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Industrial Employment (Standing Orders) Act, M.P. (26 of 1961), Section 2 - Applicability of Act - **If an industry is of the view that because of making of relevant Rules, application of the Act of 1961 is to be excluded in its establishment, it is required to approach the appropriate Govt. to issue notification in this respect in official Gazette - Standing Orders are special laws and will prevail in service matters over the Regulations made by the employer concerned. [M.P. State Electricity Board Vs Jagannath Pillai] ...1813**

औद्योगिक नियोजन (स्थायी आदेश) अधिनियम, म.प्र. (1961 का 26), धारा 2 – अधिनियम की प्रयोज्यता – यदि कोई उद्योग यह दृष्टिकोण रखता

है कि सुसंगत नियम बनाये जाने के कारण, उसकी स्थापना में अधिनियम 1961 की प्रयोज्यता अपवर्जित की जाना है, उसे इस संबंध में शासकीय राजपत्र में अधिसूचना जारी किये जाने के लिये समुचित सरकार के पास जाना चाहिए – स्थायी आदेश विशेष विधि है और सेवा प्रकरणों में, संबंधित नियोक्ता द्वारा बनाये गये विनियमों पर अध्यारोही होंगे। (एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड वि. जगन्नाथ पिल्लई) ...1813

Industrial Employment (Standing Orders) Rules, M.P. 1963 - Rule 12 - Limitation **- Employer shall not be competent to initiate proceedings for major misconduct after one year of its commission - Respondent was appointed in the year 1983 - No police verification was done at that time - After 17 years of service it was found that the respondent had suppressed the fact of conviction in the attestation form which was filled on 06.09.2000 - Charge sheet was isued on 06.08.2002 - Initiation of proceedings hit by provisions of Rule 12(6) - Labour Court rightly set aside the punishment of dismissal and directed for reinstatement. [M.P. State Electricity Board Vs Jagannath Pillai]** ...1813

औद्योगिक नियोजन (स्थायी आदेश) नियम, म.प्र. 1963 – नियम 12 – परिसीमा – नियोक्ता घोर अवचार के लिये कार्यवाही, उसके कारित होने के एक वर्ष पश्चात आरंभ करने के लिये सक्षम नहीं होगा – प्रत्यर्थी सन् 1983 में नियुक्त किया गया था – उस समय कोई पुलिस सत्यापन नहीं किया गया था – 17 वर्षों की सेवा के पश्चात यह पाया गया कि प्रत्यर्थी ने अनुप्रमाणन प्रपत्र में दोषसिद्धि का तथ्य छिपाया था, जिसे 06.09.2000 को भरा गया था – 06.08.2002 को आरोप पत्र जारी किया गया था – कार्यवाही आरंभ करना, नियम 12(6) के उपबंधों से टकराता है – श्रम न्यायालय ने उचित रुप से, सेवच्युति की शास्ति अपास्त की और पुनर्नियुक्ति के लिये निदेशित किया। (एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड वि. जगन्नाथ पिल्लई) ...1813

Land Acquisition Act (1 of 1894), Section 3(f) - Public Purpose **- Merely land is being acquired for a Company which is said to be power project and merely because electricity is being sold and Company is granted liberty to make some profit, it cannot be said that Public Interest is not involved. [Siyalal Kachi Vs. State of M.P.]** ...1883

भूमि अर्जन अधिनियम (1894 का 1), धारा 3(एफ) – लोक प्रयोजन – मात्र इसलिए कि भूमि को कम्पनी के लिये अर्जित किया गया जो कथित रुप से विद्युत परियोजना है और मात्र इसलिए कि विद्युत विक्रय की जा रही है और कम्पनी को कुछ लाभ प्राप्त करने की छूट प्रदान की गयी है, यह नहीं कहा जा सकता कि लोक

साथ बात भी नहीं कर रहा था – अभियुक्त ने कुल्हाड़ी से गर्दन, सीना इत्यादि जैसे कोमलांगों पर कई वार किये, तब भी जब मृतक नीचे गिर गया था – चक्षुदर्शी साक्षी का साक्ष्य अभिपुष्ट, प्राकृतिक एवं सुसंगत – उक्त साक्षियों की परिसाक्ष्य पर दोषसिद्धि आधारित की जा सकती है। (रघु उर्फ रघुनाथ वि. म. प्र. राज्य) (DB)...1982

Penal Code (45 of 1860), Sections 302 & 304-I - Murder or Culpable Homicide not amounting to murder **- Incident took place near the house of deceased - It is nowhere established that the house of the appellants was situated at or near the place of occurrence - The appellants did not act in exercise of their right of private defence or it was a case of mutual free fight - However, as the genesis or the origin of occurrence remained shrouded in obscurity and neither of the parties presented the true version of occurrence - It cannot be held established that appellants assaulted deceased with the intention and premeditation to commit his murder - Conviction altered to 304-I of I.P.C. [Veeran Vs. State of M.P.]** (DB)...1989

दण्ड संहिता (1860 का 45), धाराएँ 302 व 304-I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – घटना मृतक के मकान के पास घटित हुई – यह कहीं स्थापित नहीं कि अपीलार्थीगण का मकान घटनास्थल पर या उसके आसपास था – अपीलार्थीगण ने अपने निजी प्रतिरक्षा के अधिकार के प्रयोग में कार्य नहीं किया या प्रकरण बिना रोकटोक का आपसी झगड़ा था – किन्तु, घटना का उद्भव या स्त्रोत अस्पष्ट रहा है और किसी भी पक्षकार ने घटना का सत्य वर्णन प्रस्तुत नहीं किया है – यह स्थापित होना अभिनिर्धारित नहीं किया जा सकता कि अपीलार्थीगण ने मृतक पर हमला उसकी हत्या कारित करने के आशय से एवं पूर्वचिन्तन के साथ किया था – दोषसिद्धि को भा.द.सं. की धारा 304–I में परिवर्तित किया गया। (वीरन वि. म.प्र. राज्य) (DB)...1989

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दण्ड संहिता (1860 का 45), धारा 304–I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – भा.दं.सं. की धारा 300 का अपवाद 4 लागू करने के लिये, यह दर्शाना पर्याप्त नहीं कि अचानक विवाद हुआ और कोई पूर्वचिंतन नहीं था – आगे यह भी दर्शाना चाहिए कि अपराधी ने असम्यक लाभ नहीं उठाया या क्रूर एवं

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रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 17 (1)(बी), 17 (2) – दावा याचिका, 4 वर्ष द्वारा वर्जित होने के कारण खारिज – अभिनिर्धारित – रेल दावा अधिकरण से अपेक्षित है कि वह विलम्ब के लिए माफी के आवेदन पर उदारता से विचार करे – विद्वान अधिकरण द्वारा विलम्ब के लिये माफी का आवेदन खारिज करना न्यायोचित नहीं था, विशेष रुप से मृत्यु के प्रकरण में जहां अपीलार्थी एकमात्र उत्तरजीवी है और उसने अपना पुत्र खोया है – मामला गुणदोषों पर निर्णित करने हेतु प्रतिप्रेषित। (अतर बाई (श्रीमति) वि. यूनियन ऑफ इंडिया)

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अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(v) – अपीलार्थी ने शिकायतकर्ता के विरुद्ध, लोक दृष्टिगोचर स्थान पर, सार्वजनिक हैंडपम्प पर उसे अपमानित करने के आशय के साथ जातिगत टिप्पणी की – पानी के घड़े से उसके शरीर पर पानी भी फेंका – अपीलार्थी, शिकायतकर्ता के पानी के उपभोग के अधिकार के साथ हस्तक्षेप करने का दोषी – अपील खारिज। (राकेश सिंह वि. म.प्र. राज्य)

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***Shaskiya Sevak (Adhivarshiki-Ayu) Adhiniyam, M.P. (29 of 1967), Fundamental Rules - Rule 56 - Age of superannuation of Librarian* - By enhancing the age of superannuation of liberaian from 60 to 62 years, it cannot be said that the State Govt. has equated the post of Librarian with that of Teacher - Petition also filed after 19 years of superannuation - Suffers from delay and laches - Petition dismissed. [Hare Krishan Vs. State of M.P.] ...*31**

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***Stamp Act (2 of 1899), Section 2(14) - Instrument* - In order to determine whether any duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be asserted. [Deochand Bhura (Dr.) Vs. State of M.P.] ...1870**

स्टाम्प अधिनियम, (1899 का 2), धारा 2(14) – लिखत – यह निर्धारित करने के लिए कि क्या लिखत पर कोई शुल्क प्रभार्य है, विधिक नियम यह है कि लिखत का वास्तविक एवं शुद्ध अर्थ में प्राख्यान किया जाना चाहिए। (देवचन्द भूरा (डॉ.) वि. म.प्र. राज्य) **...1870**

***Succession Act (39 of 1925), Section 2(h) - Will* - Will involves**

transfer after death of person concerned and is infact a legal expression of wish and intention of author of Will - Document which is described as Will may not be a Will at all - By Will, the author of the Will gives the right to title and ownership of her property and for this all her legal heirs have consented - After her death, petitioner will be deemed as Bhumiswami and can get his name entered into all documents - Testator had also executed a power of attorney in favour of petitioner to transfer the property and after her death said power of attorney will become unfruitful in the light of Will - Document is not a simple declaration of intention of testator to give her property on the contrary it is a device and substitute for sale of property or for transfer of immovable property - Document although titled as Vasiyatnama is not a document which can be termed as testamentary document - On the contrary, it is a document which is used as a vehicle for transfer of property - Document has to be assessed for payment of stamp duty. [Deochand Bhura (Dr.) Vs. State of M.P.] ...1870

उत्तराधिकार अधिनियम (1925 का 39), धारा 2(एच) – वसीयत – वसीयत में संबंधित व्यक्ति की मृत्यु के पश्चात अंतरण समाविष्ट हैं और वास्तव में वसीयतकर्ता की इच्छा एवं आशय की विधिक अभिव्यक्ति है – दस्तावेज जिसे वसीयत के रुप में वर्णित किया गया है, वह वसीयत नहीं भी हो सकती है – वसीयत द्वारा, वसीयतकर्ता अपनी सम्पत्ति के हक एवं स्वामित्व का अधिकार देता है और इसके लिए उसके सभी विधिक वारिसों ने सहमति दी है – उसकी मृत्यु के पश्चात, याची को भूमिस्वामी माना जायेगा और वह सभी दस्तावेजों में अपने नाम की प्रविष्टियां करवा सकता है – वसीयतकर्ता ने सम्पत्ति अंतरण के लिए याची के पक्ष में मुख्तारनामा भी निष्पादित किया है और उसकी मृत्यु पश्चात उक्त मुख्तारनामा वसीयत के आलोक में निष्फल हो जायेगा – दस्तावेज वसीयतकर्ता द्वारा अपनी सम्पत्ति देने के आशय की साधारण घोषणा नहीं, इसके विपरीत यह सम्पत्ति के विक्रय या अचल सम्पत्ति के अंतरण हेतु साधन एवं प्रतिस्थति है – यद्यपि दस्तावेज का शीर्षक वसीयतनामा है, वह ऐसा दस्तावेज नहीं है जिसे वसीयती दस्तावेज कहा जा सके – इसके विपरीत, यह ऐसा दस्तावेज है जिसका उपयोग सम्पत्ति के अंतरण हेतु वाहन के रुप में किया गया – स्टाम्प शुल्क के भुगतान हेतु दस्तावेज का निर्धारण किया जाना चाहिए। (देवचन्द भूरा (डॉ.) वि. म.प्र. राज्य)

...1870

Words & Phrases - Phrase "vis major" and phrase "force majeure" - Meaning of **- An event which is out of control of the human being and prevent one or other party from performing their contractual obligation or thereof would amount to "force majeure" - Act of the**

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कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 4 – प्रतिकर – दावाकर्ता का प्रकरण कि उसे थ्रेशर पर काम करने के लिए रु. 150/– प्रतिदिन मिलता था, इसका खंडन प्रत्यर्थीगण क्र. 2 व 3 द्वारा साक्षी कठघरे में प्रवेश करके नहीं किया गया – दावाकर्ता का साक्ष्य स्वीकार किये जाने योग्य। (नेशनल इंश्योरेंस कं. लि. वि. लालाराम) **...1962**

Workmen's Compensation Act (8 of 1923), Section 30 - Interest **- Compensation amount deposited within 30 days from the date of award - Interest was granted on compensation from the date of award till realization - Only a small amount would have accrued - It is hypertechnical to say that such small amount was not deposited therefore, the appeal is required to be thrown - Appeal cannot be dismissed. [National Insurance Co. Ltd. Vs. Lalaram]** **...1962**

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Short Note

****(31)***

Before Mr. Justice Sanjay Yadav

W.P. No. 474/2013 (S) (Jabalpur) decided on 15 February, 2013

HARE KRISHAN ...Petitioner

Vs.

STATE OF M.P. ...Respondent

***Shaskiya Sevak (Adhivarshiki-Ayu) Adhiniyam, M.P. (29 of 1967), Fundamental Rules - Rule 56 - Age of superannuation of Librarian* - By enhancing the age of superannuation of librarian from 60 to 62 years, it cannot be said that the State Govt. has equated the post of Librarian with that of Teacher - Petition also filed after 19 years of superannuation - Suffers from delay and laches - Petition dismissed.**

शासकीय सेवक (अधिवार्षिकी आयु) अधिनियम, म.प्र., 1967, मूलभूत नियम – नियम 56 – ग्रन्थपाल की अधिवर्षिता आयु – ग्रन्थपाल की अधिवर्षिता आयु 60 से बढ़ाकर 62 करके, यह नहीं कहा जा सकता कि राज्य सरकार ने ग्रन्थपाल के पद को शिक्षक के साथ समिकृत किया है – याचिका भी अधिवार्षिकी के 19 वर्ष पश्चात प्रस्तुत – विलम्ब और उपेक्षा से ग्रसित – याचिका खारिज।

Cases referred :

1992 MPST 719, AIR 1997 SC 3433, ILR (2011) MP 53.

S.K. Pathak, for the petitioner.

Short Note (DB)

****(32)***

Before Mr. Justice A.K. Shrivastava & Mr. Justice B.D. Rathi

W.A. No. 599/2012 (Gwalior) decided on 19 June, 2013

K.S. OILS LTD. MORENA (M/S) ...Appellant

Vs.

MADHYA PRADESH KSCHETRA VIDUT VITRAN COMP. LTD. & ors. ... Respondents

***Electricity Supply Code 2004 (M.P.), Clause 5.3 - Dedicated feeder - Dedicated feeder by the licensee to company* - Only right which would be conferred in the company would be to get the uninterrupted electricity supply round the clock to run the unit - It would not mean that the licensee is stopped to give connections from the said feeder to the other consumers.**

विद्युत (प्रदाय) संहिता 2004 (म.प्र.), खंड 5.3 – अनावृत्त फीडर – अनुज्ञप्तिधारी द्वारा कम्पनी को अनावृत्त फीडर – कम्पनी को केवल इकाई चलाने के लिये चौबिस घंटे

अविरत विद्युत आपूर्ति प्राप्त करने का अधिकार प्रदत्त होगा – इसका अर्थ यह नहीं होगा कि, उक्त फीडर से अन्य उपभोक्ताओं को कनेक्शन देने के लिये अनुज्ञप्तिधारी पर रोक है।

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

Mahesh Goyal, for the appellant.
Vivek Jain, for the respondents No. 1 to 3.

Short Note
****(33)***
Before Mr. Justice Sujoy Paul
W.P. No. 3187/2012 (Gwalior) decided on 19 July, 2013

SANTOSH TIWARI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

***Service Law - Departmental Enquiry - Charge sheet* - Petitioner passed the orders in various cases wherein he exercised his quasi judicial power in the capacity of Tehsildar - Allegations are made against the petitioner that he has given benefit to ineligible persons and not followed the procedure prescribed in the M.P. Land Revenue Code - Held - Allegations of dereliction of duty, not acting in consonance with the prescribed procedure, negligence and ulterior motive are already made against the petitioner - It cannot be said that charge sheet does not constitute misconduct - No interference can be made at this stage - The petitioner is free to defend himself in the enquiry in accordance with law - Petition dismissed.**

सेवा विधि – विभागीय जांच – आरोप पत्र – याची ने विभिन्न प्रकरणों में आदेश पारित किये, जिसमें उसने तहसीलदार की हैसियत से अपनी अर्द्ध न्यायिक शक्ति का प्रयोग किया – याची के विरुद्ध अभिकथन कि उसने अयोग्य व्यक्तियों को लाभ दिया है और म.प्र. भू–राजस्व संहिता में विहित प्रक्रिया का पालन नहीं किया – अभिनिर्धारित – याची के विरुद्ध कर्तव्य की उपेक्षा, विहित प्रक्रिया के अनुरुप कार्यवाही नहीं करने, उपेक्षा एवं गूढ़ प्रयोजन के आरोप पहले ही लगाये गये हैं – यह नहीं कहा जा सकता कि आरोप पत्र में अवचार गठित नहीं होता – इस प्रक्रम पर कोई मध्यक्षेप नहीं किया जा सकता – जांच में याची स्वयं की विधिनुसार प्रतिरक्षा करने के लिए स्वतंत्र है – याचिका खारिज।

Cases referred :

(1992) 3 SCC 124, (1993) 2 SCC 49, (2006) 12 SCC 28, (1993) 2 SCC 56.
D.K. Katare, for the petitioner.
A.S. Rathore, P.L. for the respondents/State.

I.L.R. [2013] M.P., 1793
WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Maheshwari
W.A. No. 65/2012 (Indore) decided on 21 March, 2013

GANESH RAM GAYARI ...Appellant
Vs.
BAGDIRAM & ors. ...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 122 & Panchayat Nirvachan Niyam, M.P. 1995, Rule 80 - Recount of Votes - **To make out a case seeking direction for recount, the facts must be pleaded and it should be supported by material particulars - Until and unless prima facie satisfaction of the Court is recorded, secrecy of the ballot papers ought to be maintained - Merely on vague allegations recount can not be directed. (Para 25)**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 122 व पंचायत निर्वाचन नियम, म.प्र. 1995, नियम 80 – मतों की पुनर्गणना – पुनर्गणना हेतु निदेश चाहने का प्रकरण बनाने के लिए, तथ्यों का अभिवाक् किये जाने चाहिए और वह तात्विक विशिष्टियों द्वारा समर्थित होने चाहिए – जब तक कि न्यायालय की प्रथम दृष्ट्या संतुष्टि अभिलिखित नहीं की जाती, मतपत्रों की गोपनीयता बनाये रखना चाहिए – मात्र अस्पष्ट अभिकथनों पर पुनर्गणना के लिए निदेशित नहीं किया जा सकता।

Cases referred :

AIR 1989 SC 640, AIR 1993 SC 367, 2008(2) MPLJ 591, 2010(2) JLJ 29, 2008 (2) MPHT 466, 2011 (1) MPLJ 659, AIR 2003 SC 2271, (2006) 6 SCC 255, (2007) 3 SCC 617, AIR 1964 SC 1249, 1969(2) SCC 433, AIR 1975 SC 2117, AIR 1975 SC 283, (1980) 2 SCC 537, 1980 Supp. SCC 53, 1995 Supp (2) SCC 101, AIR 2004 SC 2036, (2004) 6 SCC 341, (1874-80) ALL ER Rep Ext 1684 (CA), (1936) 1 ALL ER 287 (CA).

A.K. Sethi with *L.R. Bhatnagar*, for the appellant.
Abhishek Tungawat, for the respondent No.1.
Mini Ravindran, Dy. G.A. for the respondents No. 17 to 21.

ORDER

The Order of the court was delivered by :
J.K. MAHESHWARI, J: Challenging the order dated 29.09.2011, passed by

the learned Single Judge in W.P.No.14591/2010 upholding the order dated 21.12.2010 passed by the Sub Divisional Officer (Election Tribunal), Sitamau, district Mandsaur declaring the election of the Sarpanch of Gram Panchayat, Sakhtali as invalid after recount, and to declare the respondent no.1, as Sarpanch this appeal has been preferred under Section 2(1) of the M.P.Ucch Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005.

2. The facts giving rise to the filing of the present writ appeal are that appellant and respondent no.1 alongwith 11 other candidates have contested the election of Sarpanch, Gram Panchayat Sakhtali, Sitamau, district Mandsaur, wherein the appellant was declared elected by issuance of notification on 3.2.2010, as per Rule 83 of M.P.Panchayat Nirvachan Niyam, 1995 (hereinafter referred to as, Nirvachan Niyam). It is stated that total 1364 votes were casted, out of which set of 1241 votes were valid and 123 votes were rejected as not valid. The appellant received 244 votes and respondent no.1 received 242 votes. After becoming unsuccessful, respondent no.1 has filed an election petition under Section 122 of the M.P.Panchayat Raj and Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as Adhiniyam, 1993) which was decided on 5.4.2010 directing recount of the votes. The said order was challenged by filing a W.P.No.3788/2010 which was allowed on 16.04.2010 and while remitting the matter back to the Election Tribunal, it was directed that after framing of the issues and recording the evidence the election petition be decided on merit. Thereafter, the Election Tribunal vide order dated 21.12.2010 decided the same and directed for recount of votes and subsequently on 22.10.2010 recounting took place, wherein respondent no.1 has been declared elected as Sarpanch of Gram Panchyat, Sakhtali, as he has received two more votes than the appellant. The said order was challenged before the writ Court, interalia contending that the material facts and particulars have not been pleaded before the Election Tribunal. However, the findings to direct for recount is not in conformity to the principle of law laid down by various judgments. Learned Single Judge while passing the order impugned, has referred the earlier order of remand passed by this Court on 16.04.2010 and thereafter quoting some paras of the order dated 21.12.2010 passed by the Election Tribunal, recorded the finding that in the facts of the case, recounting as directed by Election Tribunal, is just and proper. However, interference was declined. Being aggrieved by the said order, this appeal has been preferred.

3. Shri A.K.Sethi, learned senior counsel appearing on behalf of the appellant referring to Rule 21 of the M.P. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995

(hereinafter be referred as Corrupt Practices Rules) contended that the grounds to assail the election has been specified in Rule 21 (d) (i) to (iv). In the pleadings of the election petition, the ground of improper acceptance of nomination and corrupt practices were also pleaded, but both of the grounds were not found prove by Election Tribunal in absence of the material and cogent evidence to establish the same. In the present case, the Court has directed for recounting, to which material facts and the particulars have neither been pleaded nor produced therefore, the direction issued for recount by the Election Tribunal, upheld by the learned Single Judge is not in conformity to law. Learned senior counsel has placed reliance on the judgments of *P.K.K.Shamsudeen Vs. A.M.Mappillai Mohindeen* AIR 1989 SC 640, *Satyanarain Dudhani Vs. Uday Kumar Singh* AIR 1993 SC 367 and the division Bench judgments of this Court in the case of *Birjha Bai Vs. State of M.P.* 2008 (2) MPLJ 591, *Vidhyawati Lilhare Vs. SDO-cum-Prescribed Officer, Lanji Balaghat* 2010(2) JLJ 29 and a Single Bench judgment in the case of *Kamlesh Bai Vs. Upper Commissioner Bhopal and Hoshangabad Division* 2008 (2) MPHT 466 *Neki Bai Vs. Mithlesh* 2011 (1) MPLJ 659. In view of the aforesaid it is submitted that the direction issued for recount by the Election Tribunal as well as by learned Single Judge was without considering the pleadings and without having any material particulars to record prima facie satisfaction. It is further submitted that the grounds for recounting has not been pleaded and proved therefore also the order impugned passed by the learned Single Judge may be ordered to be set aside.

4. Per contra Shri Abhishek Tugnawat, learned counsel appearing on behalf of the respondent referring the pleadings in para 6 and 7 of the election petition has straneously argued in support of the findings recorded by the Election Tribunal as well as the learned Single Judge and contended that looking to the conduct of the election officers and their statements it reveals that they have flouted the provisions of the law, therefore, the recount has rightly been directed by the Election Tribunal and upheld by the learned Single Judge. Reliance has been placed on the judgments of the Apex Court in the Case of *T.A.Ahammed Kabeer Vs. A.A.Azeez* AIR 2003 SC 2271, *Sadhu Singh Vs. Darshan Singh* (2006) 6 SCC 255 and *Virender Nath Gautam Vs. Satpal Singh* (2007) 3 SCC 617. In view of the foregoing it is urged that upholding the order passed by the Election Tribunal and learned Single Judge, writ appeal filed by the appellant may be dismissed.

5. Heard learned counsel for the parties at length and also perused the

record of the writ Court and the documents so filed by the parties carefully. However, looking to the facts of the present case, it is required to be seen that as per the material facts and the particulars brought before the Election Tribunal and also before learned Single Judge, whether satisfaction has rightly recorded directing for recount of votes, bringing necessary ingredients in the petition filed by him. It is to be seen that the relevant fact to prove prima facie case as required to plead supported by the documents is made out by respondent no.1. But before examining the contentions of the parties first of all, the position set out to direct recount by various judgments of Hon'ble the Apex Court as well as of this Court may be looked into, and on such basis, it is to be further seen that whether the order passed by the Election Tribunal and by learned Single Judge is in departure of maintaining the secrecy of the ballot papers.

6. In the said context, first of all in the judgment of *Ram Sevak Yadav Vs. Hussain Kamil Kidwai* AIR 1964 SC 1249, the Hon'ble Apex Court has set out the circumstances when an order of inspection of ballot papers can be directed. Wherein it has been held that the order of inspection cannot be directed as a matter of course merely on the insistence upon by one of the party. The secrecy of the ballot papers is sacrosanct which ought to be maintained while passing the order of recount. The Court must look into and satisfy that the petition for setting aside the election contains an adequate statement of material facts on which the appellant relies in support of his case. It is to be further seen that on the basis of material so produced, the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties, inspection of the ballot papers is necessary. It has been observed that on the basis of vague pleas made in the petition, not supported by material or to fish out evidence to support such pleas, the order of recount should not be passed.

7. In the case of *Jitendra Bahadur Singh Vs. Shri Kirshna Behari* 1969 (2) SCC 433, it is held that challenge on the ground of irregularity in scrutinizing and counting of votes can be permitted when the petition for setting aside the election contains the adequate statement of the material facts, and the Tribunal must prima facie satisfy on it. It has further been held that when judicial order is based on reasons, those reasons must be disclosed in the order itself. However, the order if any passed, ignoring the secrecy of the ballot papers without having material facts is not permissible under the law.

8. Thereafter, in the case of *Bhabhi Vs. Sheo Govind and others* AIR

1975 SC 2117, the Apex Court has laid down six conditions those are (i) it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations (ii) before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts; (iii) the Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount ; (iv) the court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties:(v) the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void; and (vi) on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials. In the case of *Beliram Bhalaik Vs. Jai Behari Lal Khachi* AIR 1975 SC 283 it is held that mere submitting an application stating that the candidate is not satisfied with the counting without specifying any irregularity and illegality, the order of recount should not be directed.

9. In the case of the *R.Narayanan Vs. S.Semmalai* reported in (1980) 2 SCC 537, it was held that merely on the basis of the possibility of error in counting, cannot be a ground to direct recounting. Simultaneously it has further held that small margin of victory is not a sufficient ground for Court to direct recounting. Then, in the case of *S.Raghubir Singh Gill Vs. S. Gurucharan Singh Tohra* 1980 Supp SCC 53, the Hon'ble the Apex Court has held as under:-

> "A petition for recount after inspection of some ballot papers must contain an adequate statement of material facts on which the petitioner relies in support of his case. The Tribunal must be prima facie satisfied that in order to decide the dispute and to do complete justice between the parties an inspection of the ballot papers is necessary. Only on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount and not for the purpose of fishing out materials."

10. In the case of *P.K.K.Shamsudeen Vs. K.A.M.Mappillai Mohindeen*

AIR 1989 SC 640, it was held that justification for an order for examination of ballot papers and recounting of the votes is not to be derived from Hind-sight and by the result of recount of votes. On the contrary justification for an order to recount for votes should be passed as per the material placed by an election officer, on the threshold before an order for recount of votes is actually made. The reason of the said salutary rule is that the preservation of the secrecy of ballot papers is a sacrosanct principle which cannot be lightly or hastily broken unless there is a prima facie genuine need for it. The right of a defeated candidate to assail the validity of the election result seeking recounting of votes has to be subject to basic principles that the secrecy of the ballot is sacrosanct and mandatory. However, unless the affected party is able to allege and substantiate any acceptable measure by means of evidence that a prima facie case of a higher degree of probability existed, recount of votes may be ordered by the Election Tribunal or by the Court.

11. In the case of *Satyanarayan* (Supra) it was held that on submitting a cryptic application claiming recount without specifying the details for it or showing irregularity or illegality would not be proper to direct for recount on the basis of the bare allegations in the petition. The pleadings and evidence brought before the Election Tribunal do not justify grounds for recount allowing inspection and secrecy of the ballot papers ought to be maintained and it cannot be permitted to be tinkered with lightly.

12. In the case of *M.R. Gopalkrishnan Vs. Thachady Prabhakaran* 1995 Supp (2) SCC 101, the Hon'ble Apex Court has held that if on the basis of allegations that counting has been conducted illegally and improperly not in congenial atmosphere, it is held that such allegations are vague without specifying any particular irregularity in counting. No complaint oral or in writing to the Returning Officer or any official concerned during the course of counting was substituted merely stating the fact that invalid votes in favour of the returned candidate and rejection of valid votes in favour of the election appellant has materially affected the result of election as alleged without raising any objection, merely on such vague allegations, recount cannot be directed. In paras 20 and 21 it has held as under:-

> "20. We now come to the third ground advanced by the learned counsel for the appellant that invalid votes were counted in favour of the returned candidate respondent No. 1 and that out of the total rejected votes of 1375, quite a large number of

valid votes in favour of the appellant were rejected, which materially affected the result of the election. Learned counsel for the respondent submitted that the appellant has not set forth the concise statement of material fact with regard to the allegation of counting invalid votes in favour of the respondent No. 1 nor has given any particulars of such invalid votes which are alleged to have been counted in favour of respondent No. 1 He also submitted that similarly there are no particulars with regard to the rejection of valid votes in favour of the appellant nor number of such votes in order to support the allegation that such rejection of valid votes in favour of the appellant materially affected the result of the election. In our opinion there is no substance in these submissions made by the learned counsel for the appellant. In fact the appellant has neither pleaded the details and the number of such invalid votes which were counted in favour of respondent No. 1 nor has given the particulars of the number of such valid votes in favour of die, appellant which were wrongfully rejected during the course of counting. This apart, the Returning Officer, Supervisors and other officials were also present in the counting hall throughout the process of counting and the observers also visited the counting hall, but neither the appellant nor any of his counting agents pointed out or objected either orally or in writing that invalid votes were counted in favour of the respondent No. 1 or valid votes in favour of the appellant were rejected. The evidence of the Returning Officer, PW 16 clearly goes to show that no such complaint was made by any one during the course of counting. In these facts and circumstances it is difficult to accept the allegations made by the appellant which seem to be only an after thought and without any evidence or material to support the same.

21. Learned counsel for the appellant, however, submitted that having regard to the size of counting hall which was packed and uncongenial atmosphere prevailing therein as stated earlier it was not possible for the petitioner/appellant or his agents to watch, over-see and check the ballot papers so that they could take note of the particulars of ballot papers which were not

correctly placed in the respective bundles of the candidates in whose favour the votes were cast or the particulars of those votes which were rejected as invalid though the same were otherwise valid and, therefore, it was not possible for the, petitioner/appellant to make a mention or plead any more facts and particulars beyond those already stated in paras 4 and 7 of the petition. After giving our anxious consideration to the submissions made above, we are unable to persuade ourselves to accept the same. In the earlier part of this judgment, we have already discussed the evidence and material on record and found that there is absolutely no basis to show that there prevailed any kind of confusion or irregularity in the counting which could have disabled the appellant or his agents from watching the process of counting. As said above no such grievance was ever advanced by the appellant or his agents at the time of counting either orally or in written to the Returning Officer or to the observers or to any member of the counting staff deputed for the purpose. The applications for recount were made only after the counting was over and the result was declared and that too with vague allegations. This submission has no merit and the same is accordingly rejected."

13. In the case of *Chandrika Prasad Yadav Vs. State of Bihar* AIR 2004 SC 2036, by three Judges Bench of Hon'ble the Apex Court, it was held that if the recounting order is not supported by cogent and valid reasons, it is liable to be set aside. The Court in paras 25 and 26 has held as under:-

"25. Rule 79 as noticed hereinbefore enables a candidate to file an appropriate application for recounting of votes. Rule 79 unlike rules framed by other States does not say that such an application would not be maintainable after declarations of the votes polled by the parties or prior thereto. Such an application, therefore, can be filed at any point of time. The very fact that Sub-rule (3) of Rule 79 provides for amendment of the result relating to the votes polled by the respective candidates and as, such amended result is required to be announced in the prescribed form under Sub-rule (2) of Rule 79, the same itself is a pointer to the fact that even after announcement of result for recounting an application would be

maintainable. It may be true that only because such an application had not been filed before the returning officer by itself may not preclude the Election Tribunal to go into the question of requirement of issuing a direction for recounting but there cannot be any doubt whatsoever that Rule 79 serves a salutary purpose. Counting of ballot papers in terms of the rules takes place in presence of the candidate or his counting agent. When an agent or a counting agent or the candidate himself notices improper acceptance or rejection of the ballot papers, he may bring the same to the notice of the prescribed authority. As noticed hereinbefore, in a given case, an application for recounting either before announcement of the result or thereafter, would be maintainable. Once an application is filed by an agent or a counting agent or the candidate himself pointing out the irregularities committed by the officers appointed for the counting the ballot papers, immediate redressal of grievances would be possible. As indicated hereinbefore, while filing such an application the basis for making a request for recounting of votes is required to be disclosed. The returning officer is statutorily enjoined with a duty to entertain such an application, make an inquiry and pass an appropriate order in terms of Sub-rule (2) of Rule 79 either accepting in whole or in part such requests or rejecting the same wherefor he is required to assign sufficient or cogent reasons. In the event, such an application is allowed either in whole or in part, he is statutorily empowered to amend the results also.

26. Ordinarily, thus, it is expected that the statutory remedies provided for shall be availed of. If such an opportunity is availed of by the Election Petitioner; he has to state the reasons therefor. If no sufficient explanation is furnished by the Election Petitioner as to why such statutory remedy was not availed of, the Election Tribunal my consider the same as one of the factors for accepting or rejecting the prayer for recounting. An order of the prescribed authority passed in such application would render great assistance to the Election Tribunal in arriving at a decision as to whether a prima facie case for issuance of direction for recounting has been made out."

14. In the case of *M.Chinnasamy Vs. K.C.Palanisamy* reported in

(2004) 6 SCC 341, the three judges Bench of the Apex Court held that the material facts and material particulars must be pleaded. Evidence at variance with pleadings is neither admissible nor permissible. Prima facie case that at such magnitude as to materially affect the election, must be pleaded. Onus to prove the said allegations is on the returned candidate. Merely making such allegations because of the margin of the votes between the returned candidate and the elected candidate is narrow, recount cannot be directed. It has further been held that where irregularities in counting of votes were alleged in the election petition, but in detail the names of polling stations, counting centers, tables round of counting of votes in relation to which alleged irregularities have taken place without disclosing the material facts, the appellant has not proved prima facie case of scrutiny of ballot papers. However, rejection has rightly been directed. In the case of *Vidyawati Lilhare* (Supra) and *Birjha Bai* (Supra) the Court has held similar preposition of law as thus:-

> "42. With respect we are not in a position to endorse the views taken therein in its entirety. Unfortunately, the decision of a larger Bench of this Court in *Jagjit Singh* (supra) had not been noticed therein. Apart from the clear legal position as laid down in several decisions, as noticed hereinbefore, there cannot be any doubt or dispute that only because a recounting has been directed, it would be held to be sacrosanct to the effect that although in a given case the court may find such evidence to be at variance with the pleadings, the same must be taken into consideration. It is now well-settled principle of law that evidence adduced beyond the pleadings would not be admissible nor any evidence can be permitted to be adduced which is at variance with the pleadings. The court at a later stage of the trial as also the appellate court having regard to the rule of pleadings would be entitled to reject the evidence wherefor there does not exist any pleading.
>
> 43. Furthermore, the High Court has not arrived at a positive finding as to how a prima facie case has been made out for issuing a direction for recounting. It is well-settled that prima facie case must be made out for scrutiny and recounting of ballot papers where it is of the opinion that the errors are of such magnitude as to materially affect the election. [See *M.R. Gopalakrishan vs. Thachady Prabhakaran* - 1995 Supp.(2) SCC 101].

44. The requirement of laying foundation in the pleadings must also be considered having regard to the fact that the onus to prove the allegations was on the election petitioner. The degree of proof for issuing a direction of recounting of votes must be of a very high standard and is required to be discharged. [See *Mahender Pratap vs. Krishan Pal and Others* - (2003) 1 SCC 390]."

15. The similar preposition of law has been laid down by this Court in the cases of *Birjha Bai Vs. State of M.P.* 2008 (2) MPLJ 591, *Vidhyawati Lilhare Vs. SDO-cum-Prescribed Officer, Lanji Balaghat* 2010(2) JLJ 29 and *Kamlesh Bai Vs. Upper Commissioner Bhopal and Hoshangabad Division* 2008 (2) MPHT 466.

16. Learned counsel for the respondent has placed reliance on a judgment of *Sadu Singh* (Supra) wherein it was held that on the basis of the material facts and pleadings irregularities in counting of votes for prima facie case must be established, roving and fishing enquiry cannot be directed by an order of recount and the secrecy of the ballot papers should be maintained. Relying upon the case of *Virender Nath Gautam* (Supra), it is contended, that there is a distinction in the material facts as well as material particulars. However, the Court after considering the pleadings and on considering of the material particulars available on record rightly recorded a finding which do not warrant any interference. Relying upon the observations of Hon'ble the Apex Court in the case of *T.A.Ahammed Kabeer* (Supra) in para 26 reads as under:-

"26. The task before an Election Judge is ticklish. It is often urged and also held that the success of a winning candidate should not be lightly set aside and the secrecy of ballot must be zealously guarded. On account of a rigid following of these principles the election courts are inclined to lean in favour of the returned candidates and place the onus of proof on the person challenging the result of election, insisting on strict compliance with the rules of pleadings and excluding such evidence from consideration as is in divergence with the pleadings. However, what has so developed as a rule of practice should not be unduly stretched; for the purity of the election process needs to be preserved unpolluted so as to achieve the predominant goal of democracy that only be should

represent the constituency who has been chosen by the majority of the electors. This is the purpose and object of the election law."

17. In view of the aforesaid, it is submitted that on account of rigidly following the principles, the election courts are inclined to lean in favour of the returned candidates placing the onus of proof on the person challenging the result of election, but it is the duty of the Court to see that the period of election process needs to be ascertained unpolluted so as to achieve the predominant goal of democracy that only he should represent the constituency who has been chosen by the majority of the electors and this is the purpose and object of the election law. It is further said that the order of recount has rightly been passed and pursuance to the said order, after recounting, appellant has been declared elected by two votes, therefore at this stage, interference is not warranted.

18. Thus, it is to be seen that what is the meaning of material facts and how it is distinguishable from material particulars. To find out the said meaning, first of all the meaning of the word material is relevant. Thereafter the meaning of material facts and material particulars may be understand.

If we see the dictionary meaning of the word "material" it means 'fundamental', 'vital', 'basic', 'cardinal', 'central', 'crucial', 'decisive', 'essential', 'pivotal', indispensable', 'elementary' or 'primary'. The material facts can be said to be those facts upon which a party relies and his claim rests upon.

19. In the leading case of *Phillips v. Phillips,* reported in (1874-80) ALL ER Rep Ext 1684 (CA), Cotton, L.J. Stated:

"What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial."

Relying upon the aforesaid judgment in the case of *Bruce vs. Odhams Press Ltd.*, reported in (1936) 1 All ER 287 (CA), Scott L.J. observed as under:-

"The cardinal provision in Rule 4 is that the statement of claim must state the material facts. The word 'material' means

necessary for the purpose of formulating a complete cause of action; and if any one 'material' statement is omitted, the statement of claim is bad; it is 'demurrable' in the old phraseology, and in the new is liable to be 'struck out' under R.S.C. Order 25 Rule 4 (see *Phillips v. Phillips*); or 'a further and better statement of claim' may be ordered under Rule 7."

20. In view of the foregoing, it is apparent that the material facts in each of the case remains different. However, those material facts must be set out in the pleadings which may be proved on the basis of the material particulars brought on record during trial. The pleadings are necessary to plead, otherwise, the defendant may be embarrassed stating that if the facts have been brought in their notice, then they may be in a position to meet those averments by filing a reply and particulars in defence. However, Scott LJ has rightly explained that the claim must be stated in the material facts indicating the complete cause of action. By omission of the statement of material facts the claim so made is bad. The aforesaid judgments have been accepted in India. In the judgment of *Virender Nath Gautam* (Supra), the Hon'ble Apex Court in paras 34 and 35 observed as under:-

"34. A distinction between 'material facts' and 'particulars', however, must not be overlooked. 'Material facts' are primary or basic facts which must be pleaded by the plaintiff or by the defendant in support of the case set up by him either to prove his cause of action or defence. 'Particulars', on the other hand, are details in support of material facts pleaded by the party. They amplify, refine and embellish material facts by giving distinctive touch to the basic contours of a picture already drawn so as to make it full, more clear and more informative. 'Particulars' thus ensure conduct of fair trial and would not take the opposite party by surprise.

35. All 'material facts' must be pleaded by the party in support of the case set up by him. Since the object and purpose is to enable the opposite party to know the case he has to meet with, in the absence of pleading, a party cannot be allowed to lead evidence. Failure to state even a single material fact, hence, will entail dismissal of the suit or petition. Particulars, on the other hand, are the details of the case which

is in the nature of evidence a party would be leading at the time of trial."

21. In view of the foregoing preposition of law, it is clear that the material facts are the contents which ought to be pleaded in the election petition, while material particulars is the material in support thereto explaining those facts in detail. Thus, it is clear that material facts ought to be pleaded in the pleadings and it may be supported by material particulars thereby the other side may have a right to put his defence rebutting those facts by pleading and by producing the particulars in support of his defence. Therefore the material facts are known to be facta probanda and material particulars are known as facta probantia. However, to make out a case seeking direction for recount, the facts must be pleaded and it should be supported by material particulars, there upon the Court should record satisfaction for directing recount .

22. In the context of the legal position discussed above the facts of the present case is required to examined. In this regard, if the pleadings of the election petition is seen, thereby as per para 6 of the election petition, it is pleaded that on the basis of the datas received from three polling centers, respondent no.1 was declared as elected candidate. While he was busy in preparing for rally of his victory, at that time, appellant by joining hands with the Returning Officers, polling booth no.124 and 126, got cancelled the vote received by respondent no.1, and some of the votes of the appellant which were cancelled has been counted as valid votes to him. However, by two votes, the appellant before this Court was declared elected. In para 7 of the election petition, it is pleaded that when respondent no.1 has reached on relevant polling stations and submitted the application for recount, then it was told that he may go to Sitamau, where the recounting may be ordered, however, denied for recounting. In para 9 it is stated that on the said two polling booth, the respondent no.1 has not received the votes as indicated in Form No.17.

23. The Election Tribunal while passing the order impugned has observed that as per the statements of the Returning Officer of polling booth no.124 and 125, it was admitted that respondent no.1-Bagdiram has submitted the application for recount, where upon the recount was done. However, the denial of respondent no.1 from recount is incorrect. The Returning Officer of the polling booth no.125 has stated that the application for recounting has been taken with him to home and not specified in the diary of the Returning officer. The Returning Officer of the polling booth no.124 has stated that the application

for recount may be in the envelope of ballot papers, but in their return they have stated that none of the person have submitted the application for recounting. The Returning Officer were unaware regarding the provisions of Order 6 Rule 17 of CPC. It has further been observed that Tehsildar has reached to village Sakhtali, where there was a possibility of breach of peace and law and order, where it was heard that recounting is going on, but nothing is submitted on record. In view of the foregoing it appears that in the polling booth no.124 and 126 there was a mismanagement thereby Tehsildar had reached on the spot. The conduct of the Returning Officer indicates that they have not acted as per law and their statements are contradictory to their reply therefore, recount was directed.

24. In view of the findings as well as the pleadings set forth in the election petition, it is clear that the description of the irregularities in counting of the votes has not been specified. While describing the illegality and irregularity of polling booths nos.124 and 126, the pleadings is only of two booth, but no irregularity of polling booth no.125 has been pleaded. After recount, two votes were found in excess in polling booth no.125, thereby the respondent no.1 was declared elected. Thus, it is clear that the irregularities of polling booth no.125 has not been stated in the election petition. It has not been stated that while counting the ballot papers, what type of irregularities were seen by the election petitioner or his agent and on which polling booth. Thus description thereof is missing in pleadings, and in absence of bringing the material facts in pleadings of election petition and without explaining it by material particulars recount has been ordered. Merely making an allegation of counting of the invalid votes of the appellant and not counting the valid votes of the returned candidate and vis-a-vis allegation is not sufficient to direct the recount. Thus, findings recorded on the basis of the conduct of the Returning Officer is not sufficient to set aside the election of the appellant or to direct for recount. In this regard, the guidance can safely be taken from the judgments of *M.Chinnasamy* (Supra), *Chandrika Prasad Yadav* (Supra), and *M.Gopalakrishnan* (Supra) as discussed above. Whereby it is clear that if the election petitioner has not set forth sufficient statement of material facts on record with regard to allegations of counting of invalid votes, nor has given any particulars of such invalid votes which has been alleged to be counted, recount cannot be directed. No material particulars with regard to rejection of valid votes nor the number of such votes in support of the allegations have been brought on record. In absence thereto the Election Tribunal is having no

occasion to set at knought the election of the appellant declaring it invalid, and to direct the recount of votes.

25. In the light of the judgment of the Apex Court in the case of *P.K.K.Shamsudeen* (Supra) it is clear that the result of recount would not be sufficient to justify the order. In view of the foregoing discussion it is apparent that in absence of the pleadings of the material facts supported by material particulars, learned Election Tribunal committed error to direct the recount which is not in conformity to the law laid down by the Apex Court and also by this Court. The learned Single Judge while passing the order impugned has relied upon the findings recorded by the Election Tribunal without considering the fact that the pleadings and the evidence brought on record are sufficient to prima facie satisfy the Court directing recount or not. In this regard, it can be safely observed that until and unless prima facie satisfaction of the Court is recorded, secrecy of the ballot papers are sacrosanct, and it ought to be maintained. The learned Single Judge has also not considered the aforesaid proposition of law, therefore, the order passed by the learned Single Judge affirming the order of the Election Tribunal stands set aside. In consequence thereto the Election petition filed by respondent no.1 stands dismissed.

26. Accordingly, the appeal filed by the appellant stands allowed, dismissing the Election petition filed by respondent no.1, by setting aside the order of the Election Tribunal as well as the learned Single Judge. In the facts and circumstances of the case, parties are directed to bear their own costs.

C.C.as per rules.

Appeal allowed.

I.L.R. [2013] M.P., 1808
WRIT APPEAL
Before Mr. Krishn Kumar Lahoti, Acting Chief Justice and Mr. Justice M.A. Siddiqui
W.A. No. 107/2013 (Jabalpur) decided on 26 April, 2013

LATA MISHRA (MS.) ...Appellant
Vs.
DISTRICT ELECTION OFFICER, REWA & anr. ...Respondents

*A. **Municipal Corporation Act, M.P. (23 of 1956), Section 441 (3) - Election Petition** -* **Petitioner did not deposit requisite amount of Rs. 250/- alongwith election petition but deposited Rs. 100/- after**

the expiry of the period of filing of election petition - Held - Provisions u/s. 441 (3) are specific and mandatory in nature - It is a settled law that amount of security can not be reduced and delay in the deposit can not be condoned - No fault is found in the order passed by the learned single Judge in dismissing the petition - Appeal dismissed.

(Para 2 & 8)

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 441 (3) – निर्वाचन याचिका – प्रार्थी ने सुरक्षा निधि रूपये 250/– निर्वाचन याचिका के साथ जमा नही की किन्तु निर्वाचन याचिका प्रस्तुत करने की अवधि के पश्चात् रूपये 100/– जमा किये – अभिनिर्धारित – धारा 441 (3) के अन्तर्गत उपबन्ध विनिर्दिष्ट और आज्ञापक स्वरूप के हैं – यह सुस्थापित विधि है कि सुरक्षा निधि को कम नहीं किया जा सकता और विलम्ब से जमा करने को माफ नहीं किया जा सकता – विद्वान एकल न्यायमूर्ति द्वारा याचिका खारिज करते हुए पारित किये गये आदेश में कोई त्रुटि नहीं पाई गई – अपील खारिज।

B. Municipal Corporation Act, M.P. (23 of 1956), Section 441-F, Constitution, Article 226 - Appropriate Remedy - Revision - **Section 441-F provides for revision before the High Court against the decision of election Tribunal within period of 30 days of such decision - Held - Filing of petition under Article 226 of the Constitution was misconceived.** **(Para 15)**

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 441–एफ, संविधान, अनुच्छेद 226 – समुचित उपचार – पुनरीक्षण – धारा 441–एफ, निर्वाचन अधिकरण के निर्णय के विरूद्ध उक्त निर्णय के 30 दिनों की अवधि के भीतर उच्च न्यायालय के समक्ष पुनरीक्षण उपबंधित करता है – अभिनिर्धारित – संविधान के अनुच्छेद 226 के अर्न्तगत याचिका प्रस्तुत करना भ्रांत धारणा थी।

S.P. Mishra, for the appellant.

Kumaresh Pathak, Dy.A.G., for the respondents.

ORDER

The Order of the court was delivered by :

K.K. Lahoti, Ag, C. J.: This appeal is directed against an order dated 9.1.2013 passed in W.P.No.159/2013 by the writ Court, by which writ petition preferred by the appellant against an order dated 21.11.2012 Annexure P-11 of the District Judge, Rewa, by which the election petition filed by the petitioner bearing No.2/2010 was dismissed because of non compliance of section 441(3) of the M.P.Municipal Corporation Act, 1956.

2. The default on the part of petitioner was that the petitioner had not deposited requisite amount alongwith Election petition which was Rs.250/-, but had deposited Rs.100/- after the expiry of period of filing of election petition, that is 30 days from the date from which the election was notified in the Gazette.

3. The learned Election Tribunal had found that the election petition was not maintainable because of non-compliance of sub-clause (2) of sub-section (3) of section 441 of the M.P.Municipal Corporation Act, 1956 (hereinafter referred to as 'Act' for short).

4. The learned Single Judge considered the statutory provisions and found that the requisite amount was not deposited alongwith the election petition and an amount of Rs.100/- was deposited after the expiry of period of limitation, while the requisite amount was Rs.250/-, which was not deposited by the petitioner and considering the provisions as contained under sub-section (3) of section 441 of the Act, dismissed the writ petition. This order is under challenge in this appeal.

5. Learned counsel for appellant submitted that the aforesaid objection ought to have been taken by the respondents at the initial stage and that too by filing an application in this regard and without filing such an application, the election Tribunal had erred in allowing such objection. Reliance is placed to a Division Bench judgment of this Court in *Vidya Charan Shukla Vs. G.P.Tiwari and others* (AIR 1963 MP 356). Another judgment which is relied on by the appellant is *Ravi Thakur Vs. Shivshankar Patel and others* (AIR 1997 MP 136), in which the learned Single Judge of this Court held that if the security amount was not deposited along with the petition, but was deposited within the time period as provided for filing of election petition, it was a sufficient compliance of the provision and on this ground the election petition could not have been dismissed.

6. To appreciate the aforesaid contention, we have perused the record.

7. Section 441(3) of the Act is relevant, which we reproduce thus :-

"441. *Election petitions* -

(1) .....

(2) .....

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

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

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

8. The aforesaid provision specifically provides that any petition presented under sub-section (2) shall not be admitted unless it is presented within a period of thirty days from the date on which the result of such election was notified in the Gazette and it is accompanied by the Government Treasury receipt showing a deposit of Rs.250/-. The aforesaid provision is very specific, which is mandatory in nature and casts a duty on the Court not to admit any election petition until and unless it is accompanied by a receipt of Government Treasury and the deposit shall be of Rs.250/-. Infact it was the duty on the part of the Court to see whether such amount was deposited in the Government Treasury and the receipt was accompanied along with the election petition.

9. In the aforesaid circumstances, if the objection was not raised by the other side and the matter was proceeded further or the election petitioner was allowed time to deposit the amount, the objection was raised at a subsequent stage, the election Tribunal had taken cognizance of it and considered the legal position and dismissed the election petition, no fault is found. When the duty is cast on the Court and it is mandatory requirement, the Court ought to have looked into this fact at the initial stage or at a subsequent stage. When such mandatory provision was not complied with, then it was well within the jurisdiction of the Tribunal to consider this objection even at a later stage.

10. In *Vidya Charan Shukla* (supra) the question was in respect of the consideration of the preliminary objection without filing written statement and the Division Bench while considering this aspect held that the preliminary objection ought to have been filed in the written statement and in that circumstances the aforesaid decision was rendered. The objections were in respect of the non-joinder of necessary party and non-deposit of security amount. But in the present case as stated hereinabove, the Tribunal had considered the mandatory provision as contained under section 441(3) of the

Act and found that the aforesaid deposit was mandatory, in absence of such deposit the election petition itself was not maintainable and dismissed even at a later stage, in which no fault is found. It is settled law that amount of security cannot be reduced or delay in deposit cannot be condoned. See *Charan Lal Sahu Vs.Nandkishore Bhatt* [(1973) 2 SCC 530]

11. In so far as the judgment rendered in *Ravi Thakur* (supra) is concerned, in that case, the question was entirely different. The security amount was not deposited alongwith the election petition, but was deposited within the time period as provided for filing of election petition and in that circumstances the learned Single Judge of this Court, considering the legal position, held that the aforesaid deposit can be treated within time and cannot be as fatal to dismiss the election petition.

12. The factual position in the present case is entirely different. In the present case the amount was not deposited within the time period, as provided under the statute and it was deposited beyond the period of limitation, that too only Rs.100/- while the requisite amount was Rs.250/-.

13. In view of aforesaid discussion, we find that the learned Single Judge has rightly dismissed the writ petition, in which we do not find any fault.

14. At this stage, it would be proper to mention that the remedy which was available to the petitioner against the dismissal of election petition was under section 441-F of the Act by filing a revision and invoking the jurisdiction of High Court by filing a writ petition under Article 227 of the Constitution of India itself was mis-conceived. Section 441-F provides thus :-

> **"441-F. Finality of decisions** (1) No appeal shall lie against the decision of the Court on petition.
>
> (2) Any person aggrieved by the decision of the Court on the petition may within thirty days from the date of such decision apply to the High Court for revision on any of the following grounds -
>
> (a) that the decision is contrary to law;
>
> (b) that the Court has exercised jurisdiction not vested in it by law or has failed to exercise jurisdiction vested in it by law,

but subject to such orders as the High Court may pass thereon, such decision shall be final."

15. The aforesaid provision specifically provides that any person aggrieved by the decision of the Court on the petition may within a period of thirty days of such decision may apply to the High Court by filing revision. The aforesaid provision specifically provides filing of revision against the decision of election Tribunal. In view of aforesaid, petitioner ought to have filed revision against such an order and filing of such petition under Article 226 of the Constitution of India was misconceived.

16. In view of aforesaid, no fault is found in the order passed by the learned Single Judge. Accordingly, this appeal is dismissed, with no order as to costs.

Appeal dismissed.

I.L.R. [2013] M.P., 1813
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 4011/2008 (Jabalpur) decided on 13 September, 2012

M.P. STATE ELECTRICITY BOARD & ors. ...Petitioners
Vs.
JAGANNATH PILLAI ...Respondent

A. ***Industrial Employment (Standing Orders) Act, M.P. (26 of 1961), Section 2 - Applicability of Act*** **- If an industry is of the view that because of making of relevant Rules, application of the Act of 1961 is to be excluded in its establishment, it is required to approach the appropriate Govt. to issue notification in this respect in official Gazette - Standing Orders are special laws and will prevail in service matters over the Regulations made by the employer concerned.**

(Para 8)

क. औद्योगिक नियोजन (स्थायी आदेश) अधिनियम, म.प्र. (1961 का 26), धारा 2 – अधिनियम की प्रयोज्यता – यदि कोई उद्योग यह दृष्टिकोण रखता है कि सुसंगत नियम बनाये जाने के कारण, उसकी स्थापना में अधिनियम 1961 की प्रयोज्यता अपवर्जित की जाना है, उसे इस संबंध में शासकीय राजपत्र में अधिसूचना जारी किये जाने के लिये समुचित सरकार के पास जाना चाहिए – स्थायी आदेश विशेष विधि है और सेवा प्रकरणों में, संबंधित नियोक्ता द्वारा बनाये गये विनियमों पर अध्यारोही होंगे।

B. Industrial Employment (Standing Orders) Rules, M.P. 1963 - Rule 12 - Limitation **- Employer shall not be competent to initiate proceedings for major misconduct after one year of its commission - Respondent was appointed in the year 1983 - No police verification was done at that time - After 17 years of service it was found that the respondent had suppressed the fact of conviction in the attestation form which was filled on 06.09.2000 - Charge sheet was isued on 06.08.2002 - Initiation of proceedings hit by provisions of Rule 12(6) - Labour Court rightly set aside the punishment of dismissal and directed for reinstatement. (Para 10)**

ख. औद्योगिक नियोजन (स्थायी आदेश) नियम, म.प्र. 1963 – नियम 12 – परिसीमा – नियोक्ता घोर अवचार के लिये कार्यवाही, उसके कारित होने के एक वर्ष पश्चात आरंभ करने के लिये सक्षम नहीं होगा – प्रत्यर्थी सन् 1983 में नियुक्त किया गया था – उस समय कोई पुलिस सत्यापन नहीं किया गया था – 17 वर्षों की सेवा के पश्चात यह पाया गया कि प्रत्यर्थी ने अनुप्रमाणन प्रपत्र में दोषसिद्धि का तथ्य छिपाया था, जिसे 06.09.2000 को भरा गया था – 06.08.2002 को आरोप पत्र जारी किया गया था – कार्यवाही आरंभ करना, नियम 12(6) के उपबंधों से टकराता है – श्रम न्यायालय ने उचित रुप से, सेवच्युति की शास्ति अपास्त की और पुनर्नियुक्ति के लिये निदेशित किया।

Cases referred :

AIR 1979 SC 65, 1980 MPLJ 8, 1999 (1) MPLJ 466, W.P. No. 210/1999 decided on 08.03.1999.

Anoop Nair, for the petitioners.
K.N. Pethia, for the respondent.

ORDER

K.K. Trivedi, J: This order will also govern the disposal of W.P. No. 7064/2009 as both the petitions have been filed against the same award. The facts for the purposes of this order are taken from W.P. No. 4011/2008.

2. This petition under Article 227 of the Constitution of India has been filed calling in question the order dated 28.01.2008 passed by the Presiding Officer, Industrial Court, Jabalpur in the appeal filed against the award of the Labour Court, Jabalpur dated 06.10.2007. Brief facts giving rise to filing of this petition are that the respondent was engaged as Security Guard in the establishment of the petitioners. The order of appointment was issued on

06.04.1983. The respondent was medically examined and was found fit, therefore, he was allowed the joining. The services of the respondent were found satisfactory, therefore, vide order dated 27.08.1996, he was granted senior pay scale as a Security Guard w.e.f. 01.04.1994, on completion of 9 years of service. The respondent was confirmed by an order dated 29.10.1997 w.e.f. 01.04.1997. After some time the service book of the respondent was verified and it was found that there was no character verification done at the relevant time. The respondent was asked to give the form of attestation in the year 2000. The said form duly filled in by respondent was sent for verification. Some sort of verification was done and a report was given on 05.03.2001. It was found that the offence was registered against the respondent way back in the year 1983 for certain offences under Sections 452, 323, 427,34, 302, 324, 148 and 149 of Indian Penal Code. A challan was filed against him. After the trial, the Sessions Judge found the respondent guilty of offence under Section 452 of IPC only and punished him with an imposition of fine of Rs.200/-. The said decision was given on 21.12.1990. This particular information was not mentioned by the respondent in his attestation form at the relevant column.

3. After receipt of the report from the competent authority of the police department a charge sheet was issued on 06.08.2002 and thereafter enquiry was conducted. The report was given and accepting the enquiry report, the order was passed on 03.01.2003, giving a show cause notice to the respondent, and ultimately the respondent was terminated from service on 23.06.2003. The respondent approached the Labour Court by making an application under Section 31 (3) read with Sections 61 and 64 (S) of the M.P. Industrial Relation Act, 1960. It was contended that the respondent had put in about 17 years of service throughout before the verification of his antecedents and his services were found most satisfactory. The respondent has not committed any such misconduct on account of which he could be removed from the post. It was contended that the enquiry was not to be initiated against the respondent as the same was barred by limitation as prescribed under Section 12 (6) (a) of the Standard Standing Orders. It is contended that in fact the charge sheet itself could not have been issued and as such the same was bad in law.

4. The petitioners have contested the said case by filing the written statement and they placed on record the gazette notification by which the Rules made by the State Government were made applicable to the employees of the establishment of the petitioners. It was contended that since the Rules

were there, the Standard Standing orders were not applicable and as such the enquiry was not to be quashed. However, such a plea of the petitioners was not accepted. The award was passed directing reinstatement of respondent without back wages. The appeals were preferred before the Appellate Authority i.e. the Industrial Court, by the petitioners against the award and the respondent also challenged the award against refusal of back wages but since the appeal of petitioners has been dismissed by the order impugned, this writ petition is required to be filed. The Industrial Court allowed the appeal of respondent in part and granted 25% of back wages therefore, connecting writ petition is filed by the respondent.

5. In response to the notice of the writ petition, the respondent has filed a return and has categorically contended that the Labour Court as well as the Appellate Court both have considered the law laid down by the Courts and it has been held that such a stand taken by the petitioners is not correct. Placing reliance in one of the case decided by this Court wherein, it has been held that unless a notification is issued, the M.P. Industrial Employment Standing Orders Act, 1961 (hereinafter referred to as 'Act'), would be applicable and in absence of such a notification, it cannot be said that the applicability of the said Act was excluded, it is contended that in settled position of law since the enquiry itself was hit by the limitation as prescribed, no order of punishment could have been issued and services of the respondent were not to be terminated in the manner they have been. It is contended that only 25% of the back wages is awarded to the respondent by the Appellate Court whereas in fact the respondent should have been granted the full back wages. The writ petition has been filed against the order of the Appellate Court in this respect. It is contended that in view of these facts and the well settled position of law, the respondent would be entitled to 100% back wages. It is further contended that this position of law is made clear by the several decisions of this Court one of which has been placed on record as Annexure R-1 by the respondent i.e. order passed in W.P. No. 213/1999 on 08.03.1999 in which also the same Electricity Board was the petitioner. It is thus contended that the writ petition filed by the petitioners is liable to be dismissed and the petition of the respondent is liable to be allowed with costs.

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

7. First of all it is to be seen whether the Act of 1961 is applicable or not and whether merely because a notification of making application of certain

service Rules has been issued by the petitioners could it be said that the provisions of the Act aforesaid are satisfied and the application of the Act of 1961 is excluded, in the service establishment of the petitioners. Section 2 of the Act of 1961 reads thus :

> " 2. Application of the Act--(1) This Act shall apply to :
>
> (a) every undertaking wherein the number of employees on any day during the twelve months preceding or on the day this Act comes into force or on any day thereafter was or is more than twenty; and
>
> (b) such other class or classes of undertaking as the State Government may, from time to time, by notification, specify in this behalf."
>
> [Provided that it shall not apply to an undertaking carried on by or under the authority of the Central Government or railway administration or a mine or an oil field.]
>
> (2) Nothing in this Act shall apply to the employees in an undertaking to whom the Fundamental and Supplementary Rules, Civil Services (Classification, Control and Appeal) Rules, Civil Services (Temporary Service) Rules, Revised Leave Rules, Civil Services Regulations or any other rules or regulations that may be notified in this behalf by the State Government in the Official Gazette apply.

8. A bare reading of the provisions will make it clear that if a industry is of the view that because of making of the relevant Rules, application of the Act of 1961 is to be excluded in its establishment, it is required to approach the appropriate Government to issue the notification in this respect in the official gazette. This particular aspect was considered long back by the Apex Court in the case of *U.P.S.E. Board and another Vs. Hari Shankar Jain and others* [AIR 1979 SC 65. The Full Bench of this Court in the case of *M.P. State Road Transport Corporation Vs. Heeralal Ochhelal and others* [1980 MPLJ 8] has again considered these aspects very categorically. It has been held that the Standing Orders are the special laws and will prevail in the service matters over the regulations made by the employer concerned, unless a specific notification is issued in this respect excluding the application of the Act of 1961. The law laid down by the Apex Court in the case of *U.P.S.E.*

Board and another Vs. Hari Shankar Jain and others (supra) was again considered and made applicable by the Full Bench of this Court. The specific findings given by the Full Bench of this Court in para 10 of the report are reproduced thus:

> "10. The Road Transport Corporations Act, 1950 under which the petitioner Corporation is established is an Act to provide for incorporation and regulation of Road Transport Corporation. Section 45 (2)(c) of the Act authorises the Corporation to make regulations to provide for the conditions of appointment and service and the scales of pay of officers and servants of the Corporation. This Act in so far it provides for establishment of Road Transport Corporations is a special Act. But the power conferred under Section 45 (2) (c) on the Corporation to make regulations laying down conditions of service is a general provision which is often found in statutes creating statutory Corporations. A general provision of this nature is not intended to affect a law designed to lay down conditions of employment for a special class of employees such as industrial workers governed by the Industrial Employment (Standing Orders) Act, 1946, which is an Act to require employers in industrial establishments formally to define conditions of employment under them, or the corresponding Madhya Pradesh Act i.e. the Madhya Pradesh Industrial Employment (Standing Orders) Act, 1961. The Standing Orders Acts are special laws dealing with conditions of employment of industrial workers and so on principles of construction their provisions prevail over the general provision contained in section 45 (2)(c) of the Road Transport Corporation Act. The regulations made, therefore, cannot have any effect on matters contained in the Schedule to the Standing Orders Acts on which Standing Orders can be made under those Acts for industrial workers. The regulations can, however, be operative even in respect of Industrial workers on matters not included in the schedule to the Standing Orders Acts. The only method by which the regulations can be applied to matters contained in the schedule to the Standing Orders Acts is either to notify them under Section 13-B of the Central Standing

Orders Act or section 2 (2) of the Madhya Pradesh Act, as the case may be, or to have them certified as standing orders in accordance with the procedure laid down in Supreme Court in *U.P.S.E. Board V. Hari Shanker.* The question in that case was to how, far the regulations made under the Electricity Supply Act, 1948 would apply to industrial employees. It was held by the Supreme Court that the Central Standing Orders Act "is a special law in regard to matters enumerated in the Schedule and the regulations made by the Electricity Board with respect to any of those matters are of no effect unless such regulations are notified by the Government under section 13-B or certified by the certifying officer under section 5". In that case a regulation made by the Electricity Board in 1970 relating to age of superannuation was notified under section 13-B. The Standing Orders did not provide for any age of retirement. Age of superannuation was, however, added as a matter in the Schedule in 1959. The regulation, therefore, was on a matter which was mentioned in the Schedule yet it was given effect to as it was notified under section 13-B. It was held that the words "any other rules or regulations" as used in that section were not to be read ejusdem generis with the expressions "Fundamental and Supplementary Rules" etc., so as to confine them to Government establishments where the employees have the status of Government servants. The regulations made by the Electricity Board were therefore held to be covered by the words "any other rules or regulations" in section 13-B. it was further held that the words "nothing in this Act shall apply to an industrial establishment" as used in the said section are not to be interpreted too literally and that the only reasonable construction is that a Rule or regulation notified by the Government excludes the applicability of the Act to the extent that rule or regulation covers the field. Now, the Central Standing Orders Act is replaced in our State by the Madhya Pradesh Standing Orders Act. The scheme of both the Acts is the same. Section 13-B of the Central Act is the same as section 2(2) of the Madhya Pradesh Act. The ruling of the Supreme Court in *Harishanker's* case, therefore, fully applies in deciding the question whether on a particular

matter regulations made under the Road Transport Corporations Act apply or the Standard Standing Orders apply. As earlier pointed out by us the general power of making regulations as a matter of construction is not intended to prevail over the matters mentioned in the schedule to the Standing Orders Act which in respect of industrial workers are to be regulated by Standing Orders. The regulations will, however, have application even to industrial workers in respect of matters not covered by the schedule Further regulations can also be effective on matters in the schedule and can apply to industrial workers on these matters when they are notified under section 2 (2) by the Government or certified as Standing Orders under the Act. It has to be noticed that the requirement of notification under section 2 (2), on a proper understanding of that provision, is only in respect of matters mentioned in the schedule which are to be regulated by Standard Standing Orders".

9. Again the similar situation has arisen and the Full Bench of this Court in the case of *Superintending Engineer, Public Works Department, Circle Gwalior and another Vs. Dev Prakash Shrivas Gwalior and others* [1999 (1) MPLJ 466] has considered these aspects and has categorically held that unless the appropriate Government issued a notification in the official gazette, it cannot be said that the application of the Act is excluded. In absence of such a notification even if the regulations are made by the employer, only the standing order as prescribed in the Act will prevail. This particular aspect was already considered by this Court in W.P. No. 210/1999 (*Secretary, M.P. Electricity Board, Jabalpur and others Vs. Raja Bhaiya Thakur*) which came to be decided on 08.03.1999. Thus, the petitioners were well aware of the fact that their regulations will not prevail and they will have to take action only in accordance to the provisions of the Act.

10. The Rules have been made in exercise of powers conferred under the Act by the State Government, styled as M.P. Industrial Employment (Standing Orders) Rules, 1963 (hereinafter referred to as 'Rules'). The Standing Orders have been framed under the said Rules. Rule 12 of the aforesaid Rules prescribed the disciplinary action for misconduct. A specific bar is created under Sub Rule 6 of Rule 12 of the Rules aforesaid in definite words, wherein it is provided that an employer shall not be competent to initiate proceedings against an employee for major misconduct after one year of its commission

and for a minor misconduct after six months of its commission. The respondent was appointed admittedly by order dated 06.04.1983. He gave the joining, which was accepted. The police verification could have been got done at the relevant time, but was not done. After putting in 17 years of service, for the first time the respondent was called upon to submit an attestation form, which was submitted by him on 06.09.2000. In the said form some sort of mistake was committed in not mentioning the imposition of fine which was done by the Court of law in the year 1990. A charge sheet was issued to the respondent on 06.08.2002 and, therefore, the initiation of the proceedings of major punishment against the respondent was only on 06.08.2002. This being so, the Act of petitioners of initiating the proceedings against the respondent was hit by the provisions of Rule 12 (6) of the Rules referred to hereinabove. If this was rightly considered by the Labour Court and only on this count the Labour Court has set aside the termination of the respondent and has directed his reinstatement, no illegality was committed by the Labour Court. The order of the Labour Court was required to be affirmed and, therefore, it was rightly affirmed by the Industrial Appellate Court by the order impugned.

11. Now the only question remains whether the respondent was rightly granted back wages @ 25 % of salary for the period of termination or not ? Though the past conduct of the respondent was very good and after induction in the service there was nothing against him, but his conduct of with holding of such information has created trouble for him. Had he been fair enough and had he declared that he was imposed a fine of Rs.200/- only by the Court of law way back in the year 1990, even after his induction in the service, the petitioners-employer would not have taken such stand against him and would not have terminated his services. But for with holding of such information, ultimately it was held by the petitioners that the respondent was not to be retained in the service any longer. From the record of the service of the respondent, it is clear that he had put in satisfactory service with the petitioners on account of which he was granted the senior pay scale. Thus, the Industrial Appellate Court has rightly taken a decision that the respondent should be granted some solace of 25% of back wages. In such circumstances in the considered opinion of this Court, the order of the Industrial Court is not to be interfered. In view of this, both the writ petitions are to be dismissed. However, it is made clear that since the continuity of the services of the respondent is already ordered as the back wages is allowed to the extent of 25%, the period of termination of the respondent is to be treated as duty period for all purposes,

including grant of benefit of placement in the higher pay scale, in case he is found fit for the same.

12. Consequently, the W.P. No. 4011/2008 is dismissed as a whole and the W.P. No. 7064/2009 is disposed of in terms of the directions indicated hereinabove. There shall be no order as to costs.

Order accordingly.

I.L.R. [2013] M.P., 1822
WRIT PETITION
Before Mr. Justice J.K. Maheshwari
W.P. No. 4094/2005 (Indore) decided on 17 September, 2012

PAN STEELS PVT. LTD. ...Petitioner
Vs.
M.P. STATE ELECTRICITY BOARD & ors. ...Respondents

A. Constitution - Article 226 & 227 - Alternative Remedy - **For invoking jurisdiction under Articles 226 & 227, the alternate remedy is not absolute bar. (Para 7)**

क. संविधान – अनुच्छेद 226 व 227 – वैकल्पिक उपचार – अनुच्छेद 226 व 227 के अंतर्गत अधिकारिता का अवलंब लेने के लिए वैकल्पिक उपचार, पूर्ण वर्जित नहीं है।

B. Words & Phrases - Phrase "vis major" and phrase "force majeure" - Meaning of - **An event which is out of control of the human being and prevent one or other party from performing their contractual obligation or thereof would amount to "force majeure" - Act of the God, which cannot be prevented by the existence of prudence, diligence and care of human being would call as "vis major". (Paras 13 to 18)**

ख. शब्द और वाक्यांश – वाक्यांश "दैवकृत" (vis major) और वाक्यांश "अपरिहार्य घटना" (force majeure) – का अर्थ – ऐसी घटना जो मनुष्य के नियंत्रण से बाहर है और जो एक या अन्य पक्षकार को अपने संविदात्मक दायित्वों का पालन करने से रोकते हैं या जिसका परिणाम "अपरिहार्य घटना" **(force majeure)** की कोटि में आता है – दैवी घटना, जिसे मनुष्य के विवेक, तत्परता एवं सतर्कता से रोका नहीं जा सकता, उसे "दैवकृत" *(vis major)* कहेंगे।

Cases referred :

JT 2005 (1) SC 370, (2004) 1 SCC 195, AIR 1961 SC 1285, (1976)

2 SCC 877, AIR 1986 SC 391.

Amit S. Agrawal, for the petitioner.
S.S. Chouhan, for the respondents.

ORDER

J.K. MAHESHWARI, J: Invoking the jurisdiction under Articles 226/ 227 of the Constitution of india, to assail the order dated 29.12.2001 Annexure-P- 16, notice of demand dated 15.10.2004 Annexure P-21 and the consequential orders dated 8.11.2004 and 17.11 .2004 directing. recovery of Rs.2,70,668/- after adjustment of the security amount of Rs.8,12,105/- Annexures-P-22, P-23 and P-24, this petition has been filed seeking following reliefs:-

(a) quash the order Annexure-P-16;

(b) quash the demands made by Annexures P..21, P-22, P-23 and P-24 and;

(c) command the respondent to reduce the contract demand from the 1100 K.V.A. to 60 K.V.A. and accordingly work out the T.M.C. charges without any Surcharge and re-calculate the dues and

(d) may further be pleased to direct the respondent to adjust the dues as may be worked out against the cash deposit of Rs.2050467/-and if any balance is found to be due to the petitioner refund the same;

(e) the cost of petition may kindly be awarded to the petitioner."

2. It is averred in the petition that petitioner-Company is duly incorporated under the provisions of the Companies Act, 1950 and Mr. S.M. Jain has been authorised on behalf of the company by resolution Annexure-P-1-A to file this petition. Petitioner being HT consumer of M.P. State Electricity Board (for short hereinafter be referred as "Board") entered into an agreement dated 31.3.1985 Annexure-P-2 and supplementary agreement Annexure-P-3 of the contract demand of 976 K.V.A. Later enhanced by 124 KVA, having the total contract demand of 1100 KVA for running the industrial unit.

3. On 25.6.2001 the transformer installed to run the unit was blown,

however, intimation was given to the Board by petitioner on the same date at 4.00 A M. making the request to reduce the contract demand from 1100 KVA to 60 KVA so that the tariff minimum charges (TMC) may be worked out for reduced supply. On 26.6.2001 respondent-Board sought some information from petitioner with respect to cause of breakdown. type of breakdown and its details to enable the Board to take necessary action. In reply petitioner intimated to the Board that the transformer which was blown checked by a A-Class Electrical Contractor and sent for repairs to M/s. Transformer & Rectifier India Ltd., Ahmedabad, along with the vouchers of freight challan, crane charges, transportation charges etc. On 27.6.2001 a reminder was sent to the Board for reducing the contract demand w.e.f. 25.6.2001 and record day-to-day meter reading and factory may be monitored daily. The said transformer has been received after repair on 19.9.2001 and the charges Rs.3,71,000/- was paid to which all connected documents have again been submitted to Board. Even thereafter without reducing the supply, the Board has issued the bills for a period from 25.6.2001 till 17.7.2001 for an amount of Rs.5,43,726/- and up-to the period of 20.8.2001 for an amount of Rs.4,65,320/- and up-to 18.9.2001 for Rs.7,80,910/- total amount comes to Rs.17,89,956/-. Petitioner has deposited Rs.1,09,096/- on 6.8.2001, Rs,1,55,107/- on 7.9.2001 and Rs.1,00,000/- on 18.10.2001, total comes to Rs.2,64,202/-. Thereafter a representation was submitted to reduce the contract demand and bills for the said period, but remained undecided. Being aggrieved of the inaction petitioner filed the writ petition bearing number 2275/ 2001 which was disposed of vide order dated 21St June, 2004. it was directed that the cause of failure of transformer is a relevant factor which needs to be examined by technical experts in presence of nominee of the petitioner and the dispute be settled as per such report. The Court has not examined the tenability, legality and correctness of the demand on merit and directed that after appointment of the committee of the experts parties i.e. petitioner and Board may submit their documents and the evidence and. a reasoned report be submitted. Thereafter tenability of the demand raised by the Board may be examined in terms of the agreement. It was also observed that the report of the committee shall be binding on both the parties, till then no coercive step be taken in furtherance to the impugned demand. Thereafter a Letters Patent Appeal bearing number 287/2004 was filed and during pendency of it Rs.20 lacs were deposited by petitioner, however, interim protection was directed to not take coercive action of recovery. The said LPA was dismissed as not maintainable in view of the decision of Hon'ble the Apex Court in the case of

Jamshed N. Guzdar v. State of Maharashtra reported in JT 2005 (1) SC 370. Thus as per the directions of the learned Single Judge, the committee was constituted who submitted its report as per Annexure-P-20. In the report two members of committee have opined that cause of failure of transformer was not due to any external effects, but it is a 'normal failure'. It has further been observed that as per demand raised by the Board, in terms of the agreement the consumer has to pay tariff minimum charges for the infrastructure developed in arranging the power supply to the consumer. The nominee member has agreed with the cause "normal failure" and opined that failure of transformer is neither due to fault of petitioner nor respondent, or any other's fault, and the reason of failure is technical snag developed internally due to the effect of repeated transient occurred. It has been further opined that occurrence of transient is unavoidable cause in any electrical system, while on the issue of demand observed that Clause 23 (a) needs legal examination due to reason mentioned in my detail note enclosed, without commenting on the demand. In furtherance to the aforesaid report, a demand of Rs.10.84 lacs was raised on 15.10.2004 and directed to deposit within two weeks. Thereafter deducting the security deposit Rs.8,12,105/-, the remaining amount of Rs.2,70,688/- has been ordered to be deposited. However, assailing the action and the recoveries, this petition has been filed.

4. Respondent-Board by filing the reply has not disputed that petitioner is a HT consumer and the existence of the agreements. It is said that Clause 23 (a) of the H.T. agreement not attracted in the facts and circumstances in relation to the closure of the unit on account of their own admitted inability to arrange alternative service or spare transformer by their own showing. It has further been said that the blown-up of transformer resulting into close down of the factory do not fall within the ambit of the "other unavoidable cause" or "natural calamity" which includes the word 'breakdown'. In fact it is a breakdown in the machinery of the consumer, however, the petitioner would not be entitled to claim any relief in the facts of the present case. It is further said that after commencement of Vidyut Sudhar Adhiniyam, 2001 as per Section 9 (a) petitioner is having an efficacious alternative remedy to invoke the jurisdiction to determine all the matters by the M.P. Electricity Regulatory Commission (for brevity, in short 'Regulatory Commission'), however, in the light of the judgment of the Apex Court in the case of *BSES Ltd. v. Tata Power Co. Ltd. and others,* (2004) 1 SCC 195 this Court cannot entertain petition for the reliefs so prayed, therefore, the petition may be dismissed.

5. Shri Amit S. Agrawal, leaned counsel appearing on behalf of the petitioner referring the document AnnexureP/16 has contended that as per the opinion of the Board failure of the equipment, machineries, transformers etc., are not covered under "force majeure", however denied the relief in terms of clause-23(a) of the H.T. Agreement. It is further submitted that as per the Expert Report it is clear that it is a case of normal failure. It is contended that the force majeure and normal failure of the transformer would fall within the purview of the terms as specified in the agreement "unavoidable cause" or "natural calamity" which includes "breakdown". In support of his contention reliance has been placed on a judgment of the Hon'ble Apex Court in the case of *M/s. Dhanrajamal Gobindram v M/s. Shamji Kalidas and Co. reported* in AIR 1961 SC 1285 and in the reference of the judgment of Hon'ble the Apex Court in the case of *Northern India Iron and Steel Co. v. State of Haryana* reported in (1976) 2 SCC 877. It is submitted by him that while interpreting the meaning of "force majeure" Hon'ble the Apex Court observed that the breakdown of machinery which though normally not included in vis major are included in force majeure. On the issue of maintainability of petition, it is urged that the said Act came into force on 3rd July 2001 while the demand has been raised for the cause arose on 25th June, 2001. In the first round of litigation aforesaid issue has not been raised by the respondent, however, the direction was issued by the Court to constitute a committee of the experts to find out the cause how the transformer has been blown, therefore, the objection of maintainability cannot be permitted to be raised in view of principle of "constructive res judicata". The said contention is buttressed relying upon the judgment of Apex Court in the case of *Forward Construction Co. and others v. Prabhat Mandal (Regd.), Andheri and others* reported in AIR 1986 SC 391. In view of the foregoing it is urged that the petition filed by the petitioner may be allowed.

6. *Per contra,* Shri Chouhan, learned counsel representing the resnondent-Board referring the provisions of Section 9 (a) of the Act contends that for the relief prayed "the Regulatory Commission", is having exclusive jurisdiction, however, the Court should refused to entertain the petition. In support of the contention, reliance has been placed on a judgment in the case of *BSES Ltd. v. Tata Power Co. Ltd. and others,* (2004) 1 SCC 195. On merit it is contended that the report submitted by the committee of the experts is binding as per the judgment of this Court in the earlier round of litigation and by the report it is clear that failure of the transformer is not due to external

effects, but it is a normal failure. The normal failure cannot be counted within the purview of "other unavoidable cause" or "natural calamity which is called as breakdown", therefore, the demand has rightly been raised by the Board against the petitioner. Referring Clause 11.1 of the M.P. Electricity Supply Code, 2004 it is urged that the licensee shall not be liable to claim for any loss, in the circumstances as specified in Clause 23 (a) of the Agreement, therefore, also petitioner is not entitled to claim any benefit. In view of the foregoing it is urged that petition may be dismissed.

7. After having heard learned counsel for the parties, firstly the objection regarding maintainability of the petition is required to be dealt with. In this context it is suffice to observe that the Act came into force on 3rd July, 2001 while the cause of action arose on 25.6.2001 prior to commencement of the Act. In the first round of litigation in W.P. NO.2275/2001 respondents have not raised this objection, wherein direction to hold an enquiry by the experts and to act upon the said report was issued. The LPA filed was dismissed as not maintainable in view of the judgment of the Supreme Court in the case of *Jamshed N. Guzdar* (supra). Thereafter as per report of the expert committee demands were raised refusing to work out the T.M.C. on reduced supply denying the benefit of Clause 23 (a) of the agreement. Thus it is the second round of litigation challenging the demand raised by the Board, and this petition has already been admitted. However, in such circumstances, in the considered opinion of this Court, objection regarding maintainability of petition on account of having an alternative remedy raised by the respondents is merit-less. Although respondents and petitioner relying upon the judgment of the Supreme Court raised the said contention, but in the facts and circumstances indicated hereinabove for invoking the jurisdiction under Articles 226/227 the alternative remedy is not absolute bar. Thus the objection is hereby repelled.

8. Now on merit, after hearing learned counsel for the parties at length and on perusal of the record it is not in dispute that the petitioner is the HT consumer having connection of 1100 KVA in terms of the agreements Annexures-P-2 and P-3 entered into between the parties. It is also not in dispute that the transformer installed for running the Industry was blown up on 25.6.2001 to which immediate intimation was sent to Board on the same date at 4 A.M. In the earlier round in W.P. No.2275/2001 vide order dated 21st June, 2004 this Court has directed that tenability of the impugned demand is required to be examined by committee of experts whether it is due to petitioner's fault or technical snag, or at whose fault it is blown up, are the

questions required to be gone into for determination of demand. The Court in the said context observed in paragraphs 5, 6 and 7 as thus :-

> "5. Submission of learned counsel for the petitioner was that it is not necessary because the fact that transformer was out of order is not in dispute. He, therefore, contended that there is no need to investigate the cause nor is necessary to direct holding of any fact finding inquiry. I do not agree. In my view, the cause of failure of transformer is one of the relevant factors in this case. It may be that explanation offered by the petitioner may be good or may not be, but in any event it needs to be probed by a technical expert.
>
> 6. In a case of this nature, the writ court cannot be called upon to embark upon such type of inquiry. This can be done only by the Commission, or arbitrator, as the case may be. In my view, in the facts of this case, clause 37 of agreement can be pressed in service or a committee of experts appointed by the Board can be asked to settle such dispute and submit their report giving a right to petitioner to nominate one of their nominee in the committee.
>
> 7. I, therefore, while declining to examine the tenability, legality and correctness of the impugned demand in this writ, direct the board-the respondent herein to appoint the committee of experts in this field consisting of three persons of which one will be a nominee of petitioner. The committee will examine the case of the petitioner as also examine the tenability of the demand raised by the Board in terms of the agreement and then submit their reasoned report. Needless to observe the committee will allow both the parties i.e. petitioner and Board to submit their case including all documents and evidence. The committee will also, if necessary make spot inspection and examine the causes of failure of transformer as alleged by the petitioner and then submit the report, as to whether demand in question could be raised and if so, to what extent, it is justified or not? The report of committee will be binding on both the parties. Let this be done within three months from the date of this order. Till then no coercive steps to give effect to the

impugned demand against petitioner shall be taken."

9. Thereafter on filing L.P.A. No.287/2004 by petitioner interim orders dated 4.11.2004 and 17.12.2004 were passed that on depositing Rs.20 lacs Board shall not take any coercive step pursuance to Annexure-P-19. But the said appeal was dismissed as not maintainable. Thus the direction issued by learned Single Judge holds the field and as per such directions after receiving the report Annexure-P-20 from the experts of committee demand has been raised vide Annexures-P/21, P/22, P/23 and P-24. Thus to determine the issues, the report of expert committee is relevant; however conclusion of the report of the expert committee is reproduced as under :-

CONCLUSION

Conclusion of ShriA.C. Vyas and Shri R.C. Raisene (member of committee)

(i) Committee member concludes that failure of transformer is not due to any external effects but it is a normal failure..

(ii) Regarding the tenability of the demand raised by the Board in terms of the agreement it is obvious that consumer has to pay tariff minimum to the Board for the infrastructure developed in arranging the power supply to the consumer. Further there is no any such reason observed in the enquiry which could provides any sort of relief to the consumer for a normal act of failure of the transformer.

Conclusion of Shri KK. Dave (member of committee)

Issue No. 1 : I am of the opinion that failure of transformer is neither. due to fault of petitioner nor respondent, and any other's fault, as protection had operated, there was no over loading, system voltages were well within limit, maintenance was done & therefore reason of failure is technical snag develop internally due to the effect of repeated transient occurred during service period of transformer. The occurrence of transient is unavoidable cause in any electrical system. (Detail explanation given in note enclosed)

Issue No. 2: The interpretation of clause 23

(a) needs legal examination due to reason mentioned in my (Detail note enclosed), therefore, the tenability of demand can not be commented upon."

It is to be noted here that Mr. A.C. Vyas and Mr. R.C. Raisene members of the committee were nominated by the Board Mr. K.K. Dave was nominated by petitioner. Unanimously all three members were of the opinion that the transformer was of 1985 which failed in 1995. After repair it again failed on 25.6.2001. The said failure resulted into blowing of D.O. fuses at consumer premises and tripping of industrial feeder on EIF indication. There was no failure of other equipments and no natural calamity. There was no fire incident, and supply was normal all the time. The member nominated by petitioner further said that in the month of June there was beginning of monsoon which may have adverse conditions for electrical system. Thus referring "J & P transformer book", Power transformer hand book edited by "Alsthom transformer Division France", Electrical energy system "Theory-An introduction by OLLE-I-Algerd" and "Transformer by BHEL" opined that it was neither fault of the department nor fault of the consumer and also it is not a case of failure of the transformer due to external effects, but it is a case of normal failure of the transformer. However, at this stage it is to be examined that the phrase "normal failure" to which other members have opined that it is not due to fault of the petitioner or respondent, would fall within the purview of "unavoidable cause" or "natural calamity" called as "breakdown" or not as specified in clause 23 of the agreement. In this context the language of Clause 23 (a) and (b) is relevant, hence reproduced as thus

"23 (a) if at any time the Consumer is prevented from receiving or using the electrical energy supplied under this Agreement either in whole or in part through lockout, strike, riot, insurrection, command of civil and military authority, fire explosion, act of God, other unavoidable cause or natural calamity (hereinafter called the "Breakdown"), then and in any such case, the Consumer on giving notice in writing to the Board of such breakdown shall not be required to pay for a greater supply of electrical energy under this Agreement than the Consumer may require (hereinafter referred to as "the reduced supply") during such time as the said work and premises may be wholly or partially unfit for occupation or use. Provided nevertheless on the expiration of period of Agreement referred

to in clause 28 hereof this Agreement shall continue to remain in force for a further period equal in length to the period during which the "reduced supply" under this clause shall have continued and provided also that the Consumer shall pay for the said reduced supply at such rate as under the Board's tariff for the area for the time being in force the Consumer shall elect to be charged.

(b) If at any time during the continuance of this Agreement, due to the said breakdown, the Board is prevented from supplying the electrical energy herein contracted, the Board on giving notice in writing to the Consumer of such breakdown shall be under no obligation to give supply of electrical energy during such time as the Board may be prevented from giving supply by reason of the said breakdown. But in such event the Consumer shall not be liable to pay any energy not actually supplied by the Board nor shall the period of discontinuance be added to the said period of the Agreement.

Provided that the Consumer shall pay for any reduced supply which the Board may supply to the Consumer for the time being in lieu of the demand under this Agreement at such rate as under the Board's tariff for the area for the time being in force the Consumer shall elect to be charged."

Thus as per the report of experts committee it is apparent that it is not a case, whereby the consumer has prevented from receiving or using electric energy, through lock out, strike, riot, insurrection command of civil or military authority, fire explosion and the act of God. Now it is to be examined that cause "normal failure" would fall in other "unavoidable cause" or in "natural calamity" i.e. "breakdown".

10. By the letter of Board Annexure-P-16 it was intimated to petitioner that failure of equipments, machineries and transformers is not covered under 'force-majeure' conditions. However, denied the relief in terms of Clause 23 (a) of the HT Agreement. In such circumstances, meaning of the words "force majeure" and "force-majeure conditions" is required to be seen. As per Black's Law Dictionary the meaning of the word "force majeure" is as under :-

"An event or effect that can be neither anticipated nor

controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts if people (e.g. riots, strikes, and wars).

In contractual matters the meaning of "force-majeure clause" is as under :-

"A contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp.. as a result of an event or effect that the parties could not have anticipated or controlled."

As per the Law Lexicon by T.P. Mukherjee and K.K. Singh Edition 1971 phrase 'force-majeure' has been defined as under :-

"**Force majeure.** The expression "force-majeure" is not a mere French version of the Latin expression 'vis-major", and that strikes break down of machinery and such things which, though normally not included in "vis-major", are included in "force-majeure"."

The literature on the subject matter show that where reference is made to "force-majeure", the intention to save the performing party from the consequences of anything of the nature stated above or over which he has no control."

As per the Law Lexicon by P. Ramanatha Aiyar 3rd Edition Reprint 2009 expression "force-majeure" has been defined as under:

"**Force majeure.** Events outside the control of the parties and which prevents one or both of the parties from performing their contractual obligations."

A contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled.'

As per Wharton's Law Lexicon phrase "force majeure" has been defined as under :-

"**Force majure,** irresistible compulsion, coercion diplomatically recognized as irresistible, concise Oxford Dict. Compare ACT OF GOD; RESTARAINT OF PRINCES.

An event or effect that can be neither anticipated nor

controlled."

11. Hon'ble the Apex Court in the case of *M/s. Dhanrajamal Gobindram* (supra) in para 17 Observed as under :-

> "17. McCardie J. in *Lebeaupin v. Crispin,* 1920-2 KB 714 has given an account of what is meant by "force majeure", with reference to its history. The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual' makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties."

12. On going through the afore quoted and to find out the real meaning of "force majeure" the definition and meaning of the phrase "vis major" is also required to be seen. As per Black's Law Dictionary the meaning of the word "vis major" is as under:-

> "1. A greater or superior force, an irresistible or overwhelming force of nature; FORCE MAJEURE; Cf. ACT OF GOD.2. A loss resulting immediately from a natural cause without human intervention and that could not have been prevented by the exercise of prudence, diligence, and care.- Also termed *act of nature, act of providence, superior force, irresistible force; vis divina.*

The word "vis major" has been defined in the Law Lexicon by T.P. Mukherjee and K.K. Singh Edition 1971 as under :-

> **"Vis major.** What is 'vis major' is clearly stated in the cases of *Nitro Phosphate and Odham's Chemical Manure Co. v.*

London and St. Katharine Docks, Co. [(1878) 9 Ch. D.503], *Nugent v. Smith* [(1876) 1 C.P.D. 423] and *Province of Madras v. I.S. and Co., Machado* [A.I.R. 1955 Mad. 519].

In the last of these decisions their Lordships of the Madras High. Court, relying on the case *Nugent v. Smith* [(1876) 1 C.P.D. 423], have observed that the expression 'act of God' is a mere short way of expressing the proposition that a common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and conclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him."

As per the Law Lexicon by P. Ramanatha Aiyar, the said phrase is defined as under

"**Vis major.** Irresistible force; Act of God. A greater or superior force, an irresistible force. A loss that results immediately from a natural cause without the intervention of man, and could not have been prevented by the existence of prudence, diligence, and care.

A natural and inevitable necessity, and arising wholly above the control of human agencies, and which occurs independently of human action or neglect. In the civil law, this term is sometimes used as synonymous with "vis divina" or the act of God."

In addition to the aforesaid, to clearly understand the nature of 'Vis major' it has been observed as under :-

"The superior force of nature. This phrase comprehends the force of the elements, or force arising from natural causes which are irresistible, such as a violent gale of wind, an earthquake, & c."

As per Wharton's Law Lexicon phrase "vis major" has been defined as under : -

"**Vis major,** insuperable accident, irresistible force. See ACT OF GOD.

> Means 'act of God' is a mere short way of expressing the proposition that a common carrier is not liable for any accident as to which he can show that it is due to natural causes directly and exclusively, without human intervention, and that it could not have prevented by any amount of foresight and pains and care reasonably to be expected for him, *Baldeo Narain v. State of Bihar*, AIR 1959 Pat 442."

13. In view of the foregoing, it is apparent that vis major is synonym to the "act of God or vis-divina" meaning thereby the loss result immediately from the natural cause without the intervention of human being and could not have been prevented by the existence of prudence, diligence and care. It can safely be observed that any of the Act which includes violent gale of wind, an earthquake over and above by a natural and inevitable necessity, which is wholly beyond the control of human agency, human action or negligent or neglect of the human being. It can safely be observed that an act of the God, which cannot be prevented by the existence of prudence, diligence and care of human being would call as "vis major". While 'force majeure' indicates an event which is out of the control of the human being and prevent one or other party performing their contractual obligations, meaning thereby that the performance of the contractual obligations becomes impossible or impractiable due to an event or effect. It also do not include the act of God or an act of nature by virtue of inevitable necessity. Thus, phrase "vis major" indicates an act and event not within the control of human being or can be prevented by prudence, care and due diligence.

14. In the facts of the present case it is apparent that the transformer was blown which resulted the Unit non-functional time being. After issuance of the directions by this Court to find out the cause of blowing up of the transformer a committee of the experts was appointed. The said committee has given its report. The cause opined by two members of the committee as "normal failure" while third member assigning additional reasons concurred with the opinion "normal failure", but in the reasons it has been specified that it is not a fault either of the petitioner or of the Board. In such circumstances it is required to be seen that blown up of transformer by the cause "normal failure" would fall within the purview of the "force majeure conditions" or "natural calamity" which includes "Breakdown". In the said context the meaning of the word "normal failure" is required to be seen. After consultation with dictionaries and Law Lexicon it may be observed that the meaning of phrase "normal failure" is not

available, however, to understand the meaning of the said phrase, meaning of both the words "normal" and "failure" may be consulted from the dictionaries. The meaning of the word "normal" as per Black's Law Dictionary is as under:-

> "**normal, 1.** According to a regular pattern; natural<it is normal to be nervous in court>.. The terms describes not just forces that re constantly and habitually operating but also forces that operate periodically or with some degree of frequency. In this sense, its common antonyms are unusual and extraordinary. 2. According to an established rule or norm<it is not normal to deface statues>. 3. Setting a standard or norm<a normal curriculum was established in the schools>.

As per New Oxford Advanced Learner's Dictionary the meaning c f "normal" is as under:-

> "1. typical, usual or ordinary; what you would expect; ***quite/ perfectly*** (=completely) **normal** * Her temperature is normal. **It's normal** to feel tired after such a long trip. * Divorce is complicated enough ***in normal circumstances,*** but this situation is even worse. ***Under normal circumstances,** I would say 'yes'. * He should be able to **lead a** perfectly **normal life.** * ***In the normal course of events I*** wouldn't go to that part of town. * We are open during normal office hours. 2. not suffering from any mental DISORDER; People who commit such crimes aren't normal.

As per Collins COBUILD English Dictionary for Advanced Learner's the meaning of "normal" is as under:-

> "(1) Something that is ***normal*** is usual and ordinary, and is what people expect. * He has occasional injections to maintain his good health but otherwise he lives a normal life... The two countries resume normal diplomatic relations.... Some of the shops were closed but that's quite normal for a Thursday afternoon... In November, Clean's bakery produced 50 percent more bread than normal... Life in Israel will continue as normal."

As per Wharton's Law Lexicon the meaning of "normal" is as under:-

> "**Normal** [fr. *Norma,* Lat., a rule or precept], opposed to exceptional; that state wherein any body most exactly comports

in all its parts with the abstract idea thereof, and is rnot exactly fltted to perform its proper functions, is entitled normal."

Now to understand the meaning of word "failure" it is quoted as under :-

As per Black's Law Dictionary the meaning of "failure" is as under :-

"1. Deficiency; lack; want. 2. An omission of an expected action, occurrence, or performance,."

As per New Oxford Advanced Learner's Dictionary the meaning of "failure" is as under:-

"1. Lack of success in doing or achieving. The success or failure of the plan depends on you. The attempt was doomed to failure. All any efforts ended in failure, the problem of economic failure and increasing unemployment. She is still coming to terms with the failure of her marriage. 2. A person or thing that is not successful. The whole thing was a complete failure. He was a failure as a teacher. 3. An act of not doing, especially that you are expected to do; the failure of the United Nations to maintain food supplies. Failure to comply with the regulations will result in prosecution. 4. The state of not working correctly or as expected; an occasion when this happens; patients suffering from heart/kidney etc failure. A power failure plunged everything into darkness. The cause of the crash was given as engine failure. 5. A situation in which a business has to close because it is not successful. 6. A situation in which a crops do not grow correctly and do not produce food."

As per Collins COBUILD English Dictionary for Advanced Learner's the meaning of "failure" is as under :-

"1. **Failure** is a lack of success in doing or achieving something, especially in relation to a particular activity. 2. If something is a **failure,** it is not a success. 3. If you say that someone is a **failure,** you mean that they have not succeeded in a particular activity, or that they are unsuccessful at everything they do. 4. Your **failure** to do a particular thing is the fact that you do not do it, even though you were expected to do it. 5. If there is a **failure** of something, for example a machine or part of the body, it goes

> wrong and stops working or developing properly. 6. If there is a **failure of** a business or bank, it is no longer able to continue operating. 7. If you say that someone has a **failure of** a particular quality or ability, you mean that they do not have enough of it."

As per Wharton's Law Lexicon the meaning of "failure" is as under :-

> "Failure and default are synonymous terms, 'Failure' in the dictionary sense, means 'a falling short', a deficiency' or 'lack'. Default means omission of that which a man ought to do."

15. Bare reading of the aforesaid it is clear that the meaning of the word "normal failure" in common parlance is that in ordinary and usual course due to default, lack, deficiency and by short fall the system has affected due to omission of man. However, for "normal failure" there must be a short fall or deficiency or lack or default by means of omission which can be crept out by due diligence of a man, must be there. In the context of the facts of the present case due to "normal failure" of the transformer the power supply was ceased to the factory vis-a-vis cessation of power supply which resulted into closure of industrial unit. As per Annexure-P-16 the Board opined that failure of equipment, machinery and transformer is not covered under "force majeure". As per the discussion made hereinabove, it is apparent that an event which is out of control of the human being and prevent one or other party from performing their contractual obligation or its performance becomes impossible or impracticable due to an event or effect thereof would amount to "force majeure". In the said context as per report of the experts the transformer was ceased in its function due to "normal failure" thereby the contractual obligation would not have been performed by the petitioner for a period i.e. from 25.6.2001 to 19.9.2001. In this context the report of the Expert Committee may be looked into, whereby the common consensus of all those members was that no natural calamity at the time of blown up of the transformer, no fire incident reported, normal condition reported, while as per the report of the third member, in addition, pointed out that the reason of failure of the transformer due to anybody fault or due to technical snag is required to be examined referring "GNP Transformer Book", "Power Transformer Hand Book", "Electrical Energy System" "Theory of Transformer by BHEL". It has been observed that the said issue can be examined on the following points :-

"(i) Design

(ii) Overload

(iii) Non operation of protection

(iv) Maintenance

(v) Prolonged over voltage

(vi) Atmospheric discharge (Lightening)

(vii) Switching in and switching out transient.

(viii) External short circuit."

Thereafter it was observed that point number (i) relates to manufacture, point numbers (ii) (iii), (iv) relates to petitioner side, point No. (v) relates to respondent and Point No. (vi) to (viii) are beyond the control of the parties. Point No.(vi) atmospheric discharge and Point (vii) Switching in and switching out transient and Point No. (viii) External short circuit. On these three issues opinion has been given as under:-

"Atmosphere disturbance, switching in switching out and external short circuit :-

These aspects are related to transient in electrical system. These repetitive transient conditions are unavoidable. Accumulated effect of these conditions during service period may reduce mechanical strength of insulation, may cause loosening of clamps, reducing the clearance of live parts from earth and damage the equipment accidentally.

In support of my above statement I would like to submit few paragraphs from the aforesaid reference which are related to transient indicating detrimental effect on insulation, existence of vibration and stresses in normal operation, reduction of mechanical strength, failure inspire of adequate design, difficulty in measurement of atmospheric discharge etc. are enclosed as annexure K1.

Regarding atmospheric discharge I would like to state that since lightening arrestor was provided failure due to this is rare possibility however cannot be routed out cent percent.

On the basis of above discussion and references made, I am of the opinion that above transient condition had caused either of reduction of mechanical strength of insulation,

loosening or clamping, reduction in clearances of live parts with the earth and there by causing internal short circuit. The insurance surveyor had also given probable cause as under "winding of transformer had been damaged due to some accidental internal short circuiting in side the winding of transformer which is damage to HT & LT coils."

16. Thus as per the discussion made hereinabove and the report of the experts it is apparent that two members have not assigned any reason for the cause "normal failure" while one member in contradistinction assigned various reasons as indicated hereinabove. Bare reading thereof it is apparent that the cause of "failure" of transformer is neither due to the petitioner nor of the respondents nor any other faults. No overloading found, system voltages were well within limit, maintenance was done, however the reason of failure is technical snag developed internally due to the effect of repeated transient occurred during service period of transformer. The occurrence of transient is unavoidable cause in any electrical system. In the said report cause of "failure" of supply due to short fall, deficiency, lack, default by means of omission which can be rectified or crept due to indulgence of the human being is not specified. Thus, in absence of the basic ingredient of the meaning "normal failure" in the report, the incident would fall within the purview of the "force majeure". Therefore, accepting the report of the expert committee and looking to the meaning of the words "force majeure" and "normal failure", in the considered opinion of this Court, the blown up of the transformer is due to "force majeure" which is not due to deficiency or omission on the part of the human being but it is for unforeseen cause beyond the control or expectation of the man. In that view of the matter, the finding recorded by the Board in Annexure-P-16 is hereby set aside.

17. In view of foregoing discussions, in the considered opinion of this court that the transformer was not blown due to "vis major" conditions and it was blown due to "force majeure", looking to the report of the experts and as per the discussion made hereinabove. The aforesaid act would fall within the purview of the phrase "other unavoidable cause" leading to its meaning "breakdown" due to natural calamity as specified in clause 23(a) of the agreement and in such circumstances, if notice has been given by the consumer to the Board within the time so specified the Board is liable to receive the tariff minimum charges on reduced supply, for the period of the repair of the blown transformer, if the said period is not beyond to 6 months as specified in

the agreement. Hence, the documents of demand Annexures P/21, P/22, P/23 and P/24 are hereby quashed.

18. In view of the foregoing discussion it is held that petitioner and Board are bound to follow Clause 23(a) of the agreement and accordingly the reduced supply be calculated by the officers of the Board in terms of the agreement. Thus the Board shall take action for preparation of the bills as per tariff minimum charges on reduced supply ignoring the bills annexures P/21, P/22, P/23, P/24 for the period from 25.6.2001 to 19.9.2001 and the fresh bill be issued accordingly. The surcharge be calculated as per rules on revised bills. It is further made clear that after issuing reduced bill, the amount deposited by petitioner as per order of this Court, be adjusted and the remaining amount be refunded back.

19. At this stage, Shri Chouhan learned counsel representing the Board submits that as per Clause 11(1) of M.P. Electricity. Supply Code, 2004 and for the reasons so specified in the agreement, petitioner would not be entitled to claim such amount. In the considered opinion of this court, the aforesaid argument is having no force of law, because the said clause has been introduced by way of amendment in the year 2007. More so, the cause arose is prior to the commencement of the M.P. Electricity Supply Code, 2004, therefore, Clause 11(i) do not attract from retrospective date. In addition thereto bare reading of clause 11.2 makes it clear that in certain circumstances which are available in the present case and if the act of the petitioner is found within the purview of "force majeure", issuing a notice for the period so specified, benefit for reduced supply can be prayed. Therefore, the said argument of respondent is hereby repelled.

20. Accordingly, this petition succeeds and is hereby allowed, the order Annexure-P-16 is quashed; The demands made by respondents as per Annexures-P-21, P-22, P-23 and P-24 are also quashed. It is directed that the respondents shall prepare the fresh bills of tariff minimum charges on reduced supply along with surcharge for the period 25.6.2001 to 19.9.2001 in view of forgoing directions within a period of one month and after adjusting the amount so deposited by the petitioner in terms of the interim orders of this court, the remaining amount be refunded back to the petitioner within a period of three months. The entire exercise be completed by the Bord within the period of four months from the date of communication of this order. In the facts and circumstances of the case, parties are directed to bear their on costs.

Petition allowed.

I.L.R. [2013] M.P., 1842
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 2900/2005 (Jabalpur) decided on 4 December, 2012

B.S. VISHWAKARMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Senior Pay Scale **- Petitioner was working as Librarian in a college receiving Grant in Aid, from 1966 - Relaxation in qualification was granted by State Govt. in the year 1979 - Screening Committee also recommended for grant of Senior Pay Scale - Commission also recommended for grant of Selection Grade to the petitioner - Nothing brought on record as to why the claim of the petitioner has been rejected - Respondents directed to implement the recommendations of Screening Committee and Commission for grant of Senior Pay Scale and Selection Grade Pay Scale - Petition allowed. (Paras 8 to 10)**

सेवा विधि – वरिष्ठ वेतनमान – याची सन् 1966 से ग्रंथपाल के रुप में अनुदान प्राप्त कर रहे महाविद्यालय में कार्यरत था – राज्य सरकार द्वारा सन् 1979 में अर्हता में छूट प्रदान की गई – छानबीन समिति ने भी वरिष्ठ वेतनमान प्रदान किये जाने के लिए अनुशंसा की – आयोग ने भी याची को प्रवरण श्रेणी प्रदान किये जाने की सिफारिश की – अभिलेख पर ऐसा कुछ नहीं पेश किया गया कि क्यों याची का दावा अस्वीकार किया गया – वरिष्ठ वेतनमान एवं प्रवरण श्रेणी वेतनमान प्रदान करने के लिए, छानबीन समिति एवं आयोग की अनुशंसाओं का परिपालन करने के लिए प्रत्यर्थीगण को निदेशित किया गया – याचिका मंजूर।

T.S. Ruprah with *Harmeet Ruprah,* for the petitioner.
Yogesh Dhande, Dy. G.A. for the respondents/State.

ORDER

K.K. Trivedi, J: This petition has been filed under Article 226 of the Constitution of India seeking quashment of the order dated 25.10.2004 (Annexure P-26) and the directions to the respondents to make payment of arrears of salary to the petitioner after granting Senior Pay Scale to him in the pre revised pay scale of Rs.700-1100/- with effect from 19.4.1981 and to further grant the benefit of revision of pay in the pay scale of Rs.3700-5700/- w.e.f. 1.8.1987 and all the payment of arrears of salary after revision of his salary in the pay scale of Rs.12000-18000/- w.e.f. 1.1.1986. It is contended

that the petitioner was appointed as a Librarian in the College which was fully receiving the Grant-in-Aid from the State Government. Since the post of Librarian is equated with the post of Lecturer (now redesignated as Assistant Professor), the petitioner was also entitled to the grant of benefit of Senior Pay Scale and Selection Grade Pay Scale in terms of the pay scales prescribed by the M.P. Uchh Siksha Anudan Ayog (in short, 'the Commission'). It is contended that when such a claim was made screening of the case of the petitioner was done. The Committee and also the Commission both have recommended the grant of such benefit to the petitioner but by impugned order, the same was denied. Therefore the writ petition is required to be filed.

2. In response to the allegations made by the petitioner, it is contended that the relaxation in educational qualifications as claimed by the petitioner was not available to him in view of the fact that the rules were framed by the State Government governing the services of the employees and officers of the Higher Education Department. The very same rule would be applicable to the case of the petitioner. Since the petitioner was not qualified as prescribed for the post of Librarian, he would not entitled to the benefit of Senior Pay Scale. It is further contended that scheme of Pay Revision formulated by the Government of India contains the provisions of career advancement which are available only to those who have qualified the conditions mentioned in the said scheme. Since the petitioner was not fulfilling such conditions, the petitioner would not be entitled to the benefit of Senior Pay Scale. It is further contended that the similar is provision for the purposes of grant of Selection Grade Pay Scale and since the petitioner was not having the qualification for such post again he was not entitled to grant of benefit of Selection Grade Pay Scale.

3. Refuting the allegations made in the return, the petitioner has filed the documents to indicate that he has taken part in the training so imparted. He has taken part in the refresher course and since he has qualified in all, he could not have been denied the benefit of Senior and Selection Grade Pay Scale. It is put forth that relaxation was granted in the matter of educational qualification by the State Government to those who were appointed prior to 1.7.1969 and since the petitioner was one who was appointed prior to this date, the benefit was available to him. In view of the this, there was no cogent reason to refuse to accept the report of the Screening Committee and to discard the recommendation of the Commission.

4. The other respondents namely, the college and the society running the college have also filed the return but they have simply said that the responsibility is of the State Government and if the amount is made available, the same would be paid to the petitioner as per his entitlement.

5. Heard learned counsel for the parties at length and examined the record.

6. Undisputedly, the petitioner was appointed on 1.8.1966 as is evident from Annexure P-1. It is also not in dispute that the relaxation was granted by the State Government vide order dated 14.7.1979/20.8.1979 wherein it was specifically said that the Librarians who were in service on 1.7.1969 are granted the exemption from having the qualification of Post Graduation in the Library Science and one year Diploma in Library Science for the purposes of grant of UGC pay scale of Rs.300-25-600/-. Thus, even if the rules were made or amended by notification Annexure R-1 which was made applicable with effect from 1.7.1969, the petitioner was not going to be affected at all inasmuch as the rules were made though retrospective but from a particular date and the petitioner was appointed prior to the date of coming into force of the rules. Since there was no specific provision made, the relaxation though issued in reference to some other notification would remain operative till it is withdrawn. From the other document filed along with the writ petition again, it is clear that the same notification was reiterated and was re-enforced. This fact is clear from perusal of the order dated 29.7.1983. At any rate, the denial of the pay scale to the petitioner only because of making of prospective rule from the date after the appointment of the petitioner, would not affect his service condition and the petitioner would be entitled to the benefit as were granted to him under the notification dated 14.7.1979/20.8.1979. It is also clear from the perusal of the record that when the pay of the petitioner was revised, the same was referred to the higher authorities and the said authorities have duly accepted the same as correct. On 15.9.1979, the pay fixation of the petitioner in terms of the notification issued by the State Government, was done in the pay scale of Rs.300-600/- and the same was duly approved by the Commission on 1.3.1980. If the petitioner was said to be inducted in the said pay scale which was prescribed with the recommendation of the Commission, any benefit accrued under the scheme would not have been denied to him. Consequently, the petitioner was also entitled to those benefit which were available to the similarly situated employees/officers who were receiving the benefit of revised pay scale recommended by the Commission.

7. The Ministry of Human Resources Development, Department of Education of Government of India made a scheme of pay revision. The said scheme was duly approved by University Grant Commission. As is referred herein above, the pay scale were also affirmed by the UGC. The scheme prescribed career advancement. The relevant provision of the scheme are incorporated in Annexure R-2 which reads thus:

> "11. Every Lacturer will be eligible for placement in a senior scale of Rs.3000-5000 if he/she has:
>
> (a) completed 8 years of service after regular appointment or has reached a basic pay of Rs.2800/-, whichever is earlier;
>
> (b) obtained a M Phil. Or Ph.D. Degree, as the case may be, or has to his/her credit research work of equivalent standard;
>
> (c) attended two refresher courses/summer institutes each of at least four weeks duration; and
>
> (d) consistently satisfactory performances apprasial reports.
>
> 12. The requirement of participation in two refresher courses/summer institutes would be suitably relaxed till arrangements for course/institutes are made. The requirement of M.Phil/Ph.D. will not apply in the case of Lecturers who were appointed prior to the implementation of the 1973 revision.
>
> Explanation;
>
> (I) All Lecturers in the existing scale of Rs.700-1600, who have completed 8 years of service on 1.1.1986, will be eligible for placement in the scale of Rs.3000-5000 in accordance with the provisions in paras 11 and 12. the benefit of the relaxation mentioned in the explanation under para 10 will also be available to them.
>
> (ii) A regular and systematic appraisal of the performances of teachers should become operational from the academic year 1988-89. till then, the existing screening mechanisms/selection

procedure will apply for the placement in the Senior Scale. There will be no relaxation in any case from the requirement of consistently satisfactory performance appraisal for placement in the Senior Scale beyond 1989-90.

13. Every Lecturer in the Senior Scale will be eligible for placement in a Selection Grade of Rs.3700-5300 if he/she has

(a) completed 12 years of service in the senior scale or has reached a basix pay of Rs.4375/-whichever is earlier;

(b) attended two refresher courses/summeer institutes after placement in the senior scale; and

(c) consistently satisfactory performance appraisal reports.

14. Placement in the Selection Grade will be through a process of selection by a Section Committee to be set up under the Statutes of the University concerned or other similar Committees set up by the appointing authorities in accordance with the guidelines to be laid down by the U.G.C.

15. Lecturers in the existing Selection Grade of Rs.1200-1900 in Colleges will be eligible for placement at the appropriate stage in the revised Selection Grade of Rs.3700-5300 in accordance with the pay fixation formula under this scheme. "this relaxation envisaged in the case of Lecturers for placement in the Senior Scale in respect of participation in refresher courses/summer institutes as well as performance appraisal will also apply to placement in the Selection Grade."

8. Thus, scheme if minutely perused, the same reflects that those who fulfills the conditions and those who were enjoying the relaxation were entitled to be considered for grant of Senior and Selection Grade Pay scale in terms of the scheme on completion of the requisite years of service. The petitioner has categorically submitted that he has taken part in the refresher course and had completed the other requisite qualification and if the claim is considered with relaxation, the petitioner would be one who was fulfilling all the norms prescribed for grant of Senior Pay Scale and Selection Grade Pay Scale. This

being so, the claims of the petitioner were considered and the screening committee specifically recommended that the petitioner be granted the said benefit. These facts are categorically mentioned in the proceedings referred to herein above. The Committee was constituted in terms of the instructions issued by the respondents State on 17.2.1989. After considering the claim of the petitioner, the recommendation were made on 30.5.1992 (Annexure P-13) and the very same recommendation were referred by the Commission on 30.6.1992. Similarly the petitioner was again considered for grant of Selection Grade Pay Scale w.e.f. 1.8.1982 and his name was included in the list recommended by the Commission on 25.6.1992. These documents have been placed on record to indicate that proper recommendation were made.

9. As against this, the respondents have said that the claim of the petitioner was not be considered at all as he was not fulfilling the norms prescribed and thus the order was rightly issued on 25.10.2004. Nothing has been said as to why the claim of the petitioner has been rejected. The justification as done in the return is not acceptable in view of the foregoing discussion. Even after coming into force of the scheme subsequently made, which has been explained herein above, the claim of the petitioner could not have been rejected.

10. Consequently, the writ petition is allowed. The impugned order dated 25.10.2004 (Annexure P-26) is hereby quashed. The screening of the claim of the petitioner for grant of Senior Pay Scale and Selection Grade Pay Scale has already been done by the appropriate Committee and by the Commission as has been referred herein above. The respondents are therefore directed to implement the recommendations of the screening committee and the Commission for the purposes of grant of Senior Pay scale and Selection Grade Pay Scale to the petitioner, from the date the same was found admissible to the petitioner. Let the salary of the petitioner be revised and all the arrears of salary be paid to him within three months from the date of order. If the petitioner has attained the age of superannuation and any retiral dues were to be paid to him the same be also revised and all the arrears be paid to him within the aforesaid period.

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

Petition allowed.

I.L.R. [2013] M.P., 1848
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 5731/2010(S) (Jabalpur) decided on 7 January, 2013

BRIJEES DURRANI (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Public Works Department (Non-Gazetted) Service Recruitment and Condition of Service Rules (M.P.), 1972 - Rule 20, Schedule II - Relaxation **- Petitioner although matriculate was not having certificate of Higher Secondary (Technical) Examination with Drawing as one of the subject - However, the petitioner was appointed as Tracer on regular basis - Increments were paid till 1995 and thereafter mistake was detected - Matter was taken up with controlling authority for seeking exemption from passsing the requisite examination and matter was referred to State Govt. - State Govt. did not decide the matter and petitioner was allowed to retire - Held - State Govt. should have exercised its power under Rule 20 - However, State Govt. did not act with diligence instead kept the matter pending by fixing the salary on the minimum of scale which is not the pay of Tracer - Petitioner is entitled for regular pay scale of Tracer and subsequent pay revisions - Arrears be paid however, without interest - Petition allowed.** **(Para 10 to 14)**

लोक निर्माण विभाग (अराजपत्रित) सेवा भर्ती एवं सेवा की शर्तें नियम (म. प्र.), 1972 – नियम 20, अनुसूची II – छूट – यद्यपि याची मैट्रिक था, उसके पास एक विषय के रुप में ड्राईंग के साथ माध्यमिक शिक्षा (तकनीकी) परीक्षा का प्रमाण पत्र नहीं था – किन्तु, याची को नियमित आधार पर अनुरेखक (ट्रेसर) के रुप में नियुक्त किया गया था – 1995 तक वेतनवृद्धियां दी गईं और तत्पश्चात भूल पकड़ी गई – नियंत्रण प्राधिकारी के समक्ष अनिवार्य परीक्षा उत्तीर्ण करने की छूट चाहते हुए मामला पेश किया गया और राज्य सरकार को प्रकरण निर्दिष्ट किया गया – राज्य सरकार ने मामले का विनिश्चय नहीं किया और याची सेवानिवृत्त हो गया – अभिनिर्धारित – राज्य सरकार को नियम 20 के अंतर्गत अपनी शक्ति का प्रयोग करना चाहिए था – किन्तु, राज्य सरकार ने तत्परता से कार्यवाही नहीं की और इसके बजाये वेतन को न्यूनतम वेतनमान पर निश्चित करके प्रकरण लंबित रखा, जो कि अनुरेखक का वेतन नहीं है – याची, अनुरेखक के नियमित वेतनमान एवं पश्चातवर्ती वेतन पुनरीक्षणों का हकदार है – अवशेष का भुगतान किया जाए किन्तु बिना ब्याज के – याचिका मंजूर।

Cases referred :

(1990) 1 SCC 361, (2001) 3 SCC 328.

Rajeshwari Nair, for the petitioner.
Rajesh Tiwari, G.A. for the respondent/State.

ORDER

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

2. Non implementation of periodical pay revision since 1995 leading to non-settlement of pension is the grievance which is being raised vide this petition by the petitioner who retired from the service of the respondents from the post of Tracer on attaining the age of superannuation w.e.f 26.2.2010.

3. Petitioner was initially appointed as Tracer on ad hoc basis on a fixed pay of Rs.169/- per month + usual allowances as sanctioned by the Government from time to time vide office order No. 2201/E-23-4- of 74 dated 31.12.1974 issued by Superintending Engineer, Public Works Department, National Highway, Circle Bhopal.

4. That, by order No. 975/E dated 24.9.1975 services of the petitioner was regularized in Grade Rs.169-4-185-5-240-eb-6-270-10-300 along with 15 other employees. The petitioner continued to draw regular pay in the pay scale in which she was regularly appointed by order dated 24.5.1975; however, controversy arose in the year 1995 when an objection was raised by Joint Registrar (Treasury and Accounts) in respect of Revision of her pay scale on the ground that the petitioner was not possessing requisite qualification for appointment to the post of Tracer in the year 1975. It was stated that unless exemption is sought petitioner will not be entitled for revision of pay scale of the post of Tracer. Correspondence to that effect was entered into between the authorities of Public Works Department for seeking exemption from the State Government for regularizing the pay of the petitioner. It, however, did not bear any result and since the petitioner was retired on 26.2.2010 on attaining the age of superannuation, by order dated 23.2.2010, her pay was fixed at the minimum of scale of Rs.5200-20200. Thus, the petitioner has been deprived of the benefit of increment since 1995 and the revision of pay since 1996. Aggrieved and having been unsuccessful in getting any relief of her representation given to the State and its functionaries, the

petitioner has filed this petition seeking direction to the respondents to grant increments since 1995 and pay revision since 1996 on the post of Tracer.

5. Respondents in their return have denied the entitlement of the petitioner. It is urged that as per Schedule III of M.P. Public Works Department (Non Gazetted) Service Recruitment and Condition of Service Rules, 1972, the prescribed qualification for the post of Tracer was matriculation with drawing as one of the subjects or a certificate of higher secondary (technical) examination from M.P. Board or any other recognized equivalent board. It is contended that the petitioner is simply higher secondary pass and is not qualified as per the criteria laid down in Schedule III of 1972 Rules. As such she was not eligible for being appointed to the post of Tracer. It is contended that when said mistake was detected in the year 1995, objections were raised and the petitioner's increment was stopped and no revision of pay was also allowed to the petitioner. It is, however, not disputed that the matter was pursued by the department since 1996 for grant of exemption treating the case as exceptional one; however, since no final order could be passed the petitioner's pay was fixed in the minimum in Grade Rs.5200-20200 and his pension has been settled accordingly. It is urged that the petitioner, however, has declined to accept the pension as settled. It is further contended that since the petitioner was not qualified to hold the post of Tracer she is not entitled for the pay scale of said post nor the pay revision effected in the year 1996 and subsequent thereafter.

6. Question which arises for consideration is as to whether the respondents are justified in denying the petitioner the grant of increment of the post of Tracer w.e.f. 1995 and of pay revision w.e.f. 1996 and subsequent pay revisions on the count that the petitioner at the time of her initial appointment as Tracer in the year 1975 was not possessing the requisite qualification. Another issue would be as to whether the State Government is justified in not considering the case of the petitioner as exception to grant exemption from having a minimum qualification for appointment to the post of Tracer taking into consideration that the petitioner had discharged her duties as Tracer for almost 20 years from 1975 to 1995 when the mistake was detected by the respondents.

7. It is not in dispute that for appointment to the post of Tracer in Public Works Department, the requisite qualification stipulated in Schedule

III of 1972 Rules are "Certificate of having passed higher secondary school certificate examination or its equivalent with Drawing as one of the subjects from the M.P. Board of Higher Secondary Examination, or certificate from any other Board or institution recognized by the State Government in this behalf;

Or

8. The certificate of Higher Secondary (Technical) Examination from M.P. Board or any other recognized equivalent board".

9. It is also not in dispute that though the petitioner is matriculate but does not have to her credit the higher secondary school certificate with Drawing as one of the subjects or a certificate of Higher Secondary (Technical) Examination. In other words she is a plain matriculate. Be that as it may.

10. These facts were well before the departmental selection committee which recommended the appointment of the petitioner on a regular basis in time scale of pay Rs. 169-4-185-5-240-eb-6-270-10-300, culminating into an order dated 24.5.1975. Petitioner continued to discharge her duties and earned increments till 1995, i.e. for a period of 2 decades. It was in the year 1995 that the mistake was detected and the matter was taken up by the controlling authority in the year 1996 for seeking exemption from passing the requisite examination and referred to the State Government. However, no material has been commended at as would show that the State Government dwelt upon the recommendation of the controlling authority for grant of exemption treating the case of the petitioner as an exception.

11. Rule 20 of the Rules, 1972 empowers the State Government to grant relaxation. It stipulates:

> "20. Relaxation- Nothing in these Rules shall be construed to limit or abridge power of the Government to deal with the case of any person to whom these Rules apply in such manner as may appear to it to be just and equitable:
>
> Provided that the case shall not be dealt with in any manner less favourable to him than that provided in these Rules"

12. In the considered opinion of this Court the present was a fit case for the State Government to have exercised the discretion vested in it under Rule 20 of 1972 Rules. The State Government; however, has not acted in due

diligence, instead as kept the matter hanging since 1996 and the petitioner has been allowed to retire on attaining the age of superannuation w.e.f 26.2.2010 by fixing her salary on the minimum of scale of Rs.5200-20200 which is not the scale of the Tracer which the petitioner could have earned had there been a decision by the State Government.

13. In *Bhagwati Prasad v. Delhi State Mineral Development Corporation* [(1990) 1 SCC 361] it has been held by Supreme Court:

> "6. The main controversy centres round the question whether some petitioners are possessed of the requisite qualifications to hold the posts so as to entitle them to be confirmed in the respective posts held by them. The indisputable facts are that the petitioners were appointed be- tween the period 1983 and 1986 and ever since, they have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always aid the person to effectively discharge the duties and is a sure guide to assess the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications....."

14. In *Buddhi Nath Chaudhary and others v. Abahi Kumar and others* [(2001) 3 SCC 328], it has been held by the Supreme Court:

> "6. The selected candidates, who have been appointed, are now in employment as Motor Vehicle Inspectors for over a decade. Now that they have worked in such posts for a long time, necessarily they would have acquired the requisite experience. Lack of experience, if any, at the time of recruitment is made good now. Therefore, the new exercise ordered by the High Court will only lead to anomalous results. Since we are disposing of these matters

on equitable consideration, the learned counsel for the contesting respondents submitted that their cases for appointment should also be considered. It is not clear whether there is any vacancy for the post of Motor Vehicle Inspectors. If that is so, unless any one or more of the selected candidates are displaced, the cases of the contesting respondents cannot be considered. We think that such adjustment is not feasible for practical reasons. We have extended equitable considerations to such selected candidates who have worked in the post for a long period, but the contesting respondents do not come in that class. The effect of our conclusion is that appointments made long back pursuant to a selection need not be disturbed. Such a view can be derived from several decisions of this Court including the decisions in *Ram Sarup v. Stae of Haryana* [1979 (1) SCC 168]; *District Collector & Chairman, Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi* [1990 (3) SCC 655]; and *H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka High Court, Bangalore* [1991 Supp. (2) SCC 421]. Therefore, we must let the matters lie where they are."

15. Having regard to the factual aspects of the present case and the law as laid down by Supreme Court in *Bhagati Prasad v. Delhi State Mineral Development Corporation* (supra) and *Buddhi Nath Chaudhary and others v. Abahi Kumar and others* (supra), this Court is of the considered opinion that the petitioner is entitled for grant of regular pay scale of Tracer and the Revision of pay of the post of Tracer since 1996 and subsequent pay revisions. Let the same be done within a period of three months from the date of communication of this order and arrears of pay as well as pension be settled within the said period. The petitioner, however, shall not be entitled for the interest on the arrears.

Petition is allowed to the extent above. However, no costs.

C.c. as per rules.

Petition allowed.

I.L.R. [2013] M.P., 1854
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 4370/2012 (Gwalior) decided on 7 February, 2013

RAJU SHARMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Land Acquisition Act (1 of 1894), Section 4 - **The Object of this section is that the person of the concerned locality comes to know that his land is sought to be acquired - The minimum requirement while issuing the notification is to mention the minimum description of the land - So as to enable the effected person to raise the objections adequately. (Para 8 & 16)**

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 4 – इस धारा का उद्देश्य है कि संबंधित इलाके के व्यक्ति को जानकारी मिले कि उसकी भूमि का अर्जन चाहा गया है – अधिसूचना जारी करते समय भूमि का न्यूनतम विवरण उल्लिखित किया जाना न्यूनतम आवश्यकता है – जिससे कि प्रभावित व्यक्ति पर्याप्त रुप से आक्षेपों को उठा सके।

B. Land Acquisition Act (1 of 1894), Sections 4 & 5A - Effect of Non Compliance - **Defective notification and non compliance of the requirements of the Act, not only vitiates the notification but also renders all subsequent proceedings to be bad and illegal - Requirements of both the sections must be strictly fulfilled. (Paras 16 & 17)**

ख. भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 4 व 5ए – अननुपालन का प्रभाव – त्रुटिपूर्ण अधिसूचना एवं अधिनियम की अपेक्षाओं का अननुपालन न केवल अधिसूचना को दूषित करता है बल्कि सभी पश्चातवर्ती कार्यवाहियों को भी अनुचित एवं अवैध बनाता है – दोनों धाराओं की अपेक्षाओं की यथावत पूर्ति की जानी चाहिए।

Cases referred :

(1992) 2 SCC 168, (2011) 5 SCC 553, AIR 1970 Allahabad 414, AIR 1973 Punjab & Haryana 263, AIR 1975 Punjab & Haryana 125.

V.K. Bhardwaj with *Sanjay Dwivedi,* for the petitioner.
Praveen Newaskar, Dy. G.A. for the respondent/State.

ORDER

SUJOY PAUL, J: This order will govern final disposal of W.P. No. 4370/2012 and W.P. No. 5113/2012. The facts necessary for adjudication of this matter are taken from W.P. No. 4370/2012.

2. The petitioner is having agricultural land at village Manpura Tahsil and District Gwalior. The petitioner has assailed the notification issued under section 4 of the Land Acquisition Act, 1894 (for short "the Act") (Annexure P-1). The basic ground for attack is that the notification (Annexure P-1) is not in consonance with the requirement of section 4 of the Act. It does not contain minimum details of the land which is sought to be acquired by the respondents. In absence thereof, the effective and minimum opportunity to file objection, is taken away and respondents have proceeded further and at the stage of proceeding under section 9 of the said act, the petitioner came to know about it and submitted their detailed objection.

3. Shri V.K. Bharwaj, learned senior counsel submits that on bare reading of section 4 of the Act as interpreted in various judgments, it is crystal clear that the purpose and intention to issue notification is to make the persons aware that the Government intends to acquire their land. Accordingly, it is the minimum and inevitable requirement to show the description of the land with precision and accuracy in Annexure P-1, so as to enable the effected persons to submit their objection with regard to such acquisition. By drawing the attention of this Court to the notification (Annexure P-1), learned senior counsel submits that it talks about "enclosed list" whereas no list is enclosed with Annexure P-1. In other words, it is submitted that in the notification (Annexure P-1) it is stated that Government intends to acquire certain land as mentioned in the "enclosed list", however, notification does not contain any such list and therefore, the description of the land sought to be acquired is totally absent. Only name of the village is mentioned where land is proposed to be acquired and it is mentioned that the plan of the land is available in the office of Land Acquisition Officer, Gwalior, where it can be seen. Criticizing the said notification, it is argued that it does not fulfill the statutory and mandatory requirement of the Land Acquisition Act, 1894 and therefore, the valuable right of the petitioner is taken away. By taking this Court to various sections after section 4(1) till section 9, it is stated that the respondents have proceeded further without affording reasonable, adequate, effective and sufficient opportunity to the petitioner to put forth objection and at the stage of

quantifying the compensation, the petitioner came to know about it and submitted his objection. He submits that impugned proceeding suffers from serious basic infirmity and therefore, the basic notification under section 4 needs to be set aside. He relied on several judgments of the High Court and the Supreme Court in support of the aforesaid contention.

4. Per Contra, Shri Newaskar supported the order Annexure P-1 and submits that indisputably Annexure P-1 is published in two local Hindi newspapers. In the notification which was published in the newspapers aforesaid, it is made clear that the petitioner/effected person can peruse the land map in the office of Land Acquisition Officer. Once name of the village is mentioned in the notification itself, it was open for the petitioner to peruse the map and submit his objection. Accordingly, he supported the notification Annexure P-1 and submits that it is in consonance with the requirement of the section 4 of the Act. In addition, Shri Newaskar submits that the petitioner submitted his objection Annexure P-6 and only prayed for giving adequate compensation as mentioned in the last paragraph of the said objection dated 08.06.2012 (Annexure P-6). He submits that the respondents are ready to decide this objection dated 08.06.2012 from the stage it was submitted before the concerned officer.

5. Shri Bhardwaj, learned senior counsel, in turn, drew the attention of this Court on Annexure P-8, the detailed map which is mentioned in Annexure P-1 and submits that this map also does not indicate about the detail of the canal or the detail as to which land is sought to be acquired. He submits that no length or width of the land sought to be required is shown. In absence there of, even if this map is perused, it is difficult to gather as to which land is sought to be acquired and who will be the effected person. He submits that for a rustic villager, it is difficult to gather whether his land would be effected by the proposed acquisition proceedings. He emphasized that the description should be there in the notification itself so that the effected person can submit a detailed objection.

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

7. Before proceedings with the argument, it is apt to quote section 4 and section 5A of the said Act which reads as under:-

> "4. Publication of preliminary notification and powers of officers thereupon.--(1) Whenever it appears to the [appropriate

Government] that land in any locality [is needed or] is likely to be needed for any public purpose [or for a company] a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language], and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of publication of the notification.

(2) Thereupon it shall be lawful for any officer, either, generally or specifically authorised by such Government in this behalf, and for his servants and workmen,--

to enter upon and survey and take levels of any land in such locality; to dig or bore in the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereupon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle.

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling-house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

5A. Hearing of objections.--(1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public

purpose or for a company may,]within thirty days from the date of publication of the notification], object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard in person or by any person authorised by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceeding held by him, for the decision of that Government. The decision of the appropriate Government on the objections shall be final.

(3) For the purposes of this section, person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act."

The Apex Court in (1992) 2 SCC 168 (*Madhya Pradesh Housing Board Vs. Mohd. Safi and others*) in para 8 held as under:-

"8. It is settled in law that the the process of acquisition has to start with a notification issued under Section 4 of the Act, which is mandatory, and even in cases of urgency, the issuance of notification under Section 4 is a condition precedent to the exercise of any further powers under the Act. Any notification which is aimed at depriving a man of his property, issued under section 4 of the Land Acquisition Act has to be strictly construed and any serious lapse on the part of the acquiring authority would vitiate the proceedings and cannot be ignored by the courts. The object of issuing a notification under Section 4 of the Act is twofold. First, it is a public announcement by the government and a public notice by the Collector to the effect that the land, as specified therein, is needed or is likely to be needed by the government for the "public purpose" mentioned therein; and secondly, it authorises

the departmental officers or officers off the local authority, as the case may be to do all such acts as are mentioned in section 4(2) of the Act. The notification has to be published in the locality and particularly persons likely to be affected by the proposal have to be put on notice that such an activity is afoot. The notification is, thus, required to give with sufficient clarity not only the "public purpose" for which the acquisition proceedings are being commenced but also the "locality" where the land is situate with as full a description as possible of the land proposed to be acquired to enable the "interested" persons to know as to which land is being acquired and for what purpose and to take further steps under the Act by filing objections etc., since it is open to such persons to canvass the non-suitability of the land for the alleged "public purpose" also. If a notification under Section 4(1) of the Act is defective and does not comply with the requirements of the Act, it not only vitiates the notification, but also renders all subsequent proceedings connected with the acquisition, bad."

(Emphasis Supplied)

8. A bare perusal of the aforesaid paragraph makes it crystal clear that the object of section 4 is to ensure that the notification is published with sufficient accuracy so that the person of the concerned locality comes to know that his land is sought to be acquired. Accordingly, interested persons may submit their objection as per the description mentioned in the notification. Thus, the Apex Court has emphasized the need of giving detailed and full description of the land proposed to be acquired to enable the interested persons to know as to which land is being required for the purpose of the Act.

In a recent judgment in the case of *Radhy Shyam* (Dead) through *LRs. And others Vs. State of Uttar Pradesh and others* reported in (2011) 5 SCC 553, the Apex Court held as under:-

"(i) xxx xxx xxx.

(ii) The legislations which provide for compulsory acquisition of private property by the State fall in the category of expropriatory legislation and such legislation must be construed strictly.

(iii) However, compulsory taking of one's property is a serious matter. If the property belongs to economically disadvantaged segment of the society or people suffering from other handicaps, then the court is not only entitled but is duty bound to scrutinize the action/decision of the State with greater vigilance, care and circumspection keeping in view the fact that the land owner is likely to become landless and deprived of the only source of his livelihood and/or shelter."

9. A bare perusal of this judgment makes it crystal clear that the notification under section 4 has a far reaching effect and it may have adverse impact on farmers. The purpose of this section was to ensure that the person whose land and source of livelihood is sought to be taken, gets an effective opportunity.

10. The contention of Shri Newaskar is that the name of village Manpura was given which was sufficient and thereafter it was the duty of the petitioner to approach the office of concerned land acquisition officer and peruse the concerned land map to gather whether his land is acquired. If the petitioner has failed to do so, no fault can be found in the notification (Annexure P-1).

11. In the opinion of this Court the said argument falls short the statutory and mandatory requirement of section 4 of the Act. In the aforesaid judgments of the Supreme Court, it is crystal clear that the description of the land is necessary. The notification (Annexure P-1) for the ready reference is reproduced as under:-

"कार्यालय कलेक्टर ग्वालियर एवं पदेन उपसचिव म.प्र.शासन राजस्व विभाग

(मध्यप्रदेश)

//अधिसूचना//

भू–अर्जन अधिनियम की धारा 4 (1) के अंतर्गत

कमांक/44/अ–82/10–11/भू–अर्जन ग्वालियर, दिनांक 29 अक्टूबर, 2011

चूंकि राज्य शासन को यह प्रतीत होता है कि, संलग्न सूची के खाने (1) से (4) में वर्णित भूमि की अनुसूची के खाने (6) में उसके सामने दिये गये सार्वजनिक प्रयोजन के लिये आवश्यकता है अथवा आवश्यकता पड़ने की संभावना है। अतः भू–अर्जन अधिनियम 1894 (कमांक एवं सन् 1894) की धारा–4 की उपधारा (1) के उपबंधों के अनुसार इसके द्वारा सभी संबंधित व्यक्तियों को इस आशय की सूचना दी जाती है कि राज्य शासन इसके द्वारा अनुसूची के खाने (5) में उल्लेखित

अधिकारी को उक्त भूमि के संबंध में उक्त धारा की उपधारा (2) के द्वारा दी गई शक्तियों का प्रयोग करने के लिये अधिकृत करता है।

अनुसूची

जिला	तहसील	ग्राम	लगभग क्षेत्रफल	धारा (4) की उपधारा (2) के अनुसार प्राधिकृत अधिकारी	सार्वजनिक प्रयोजन का नाम
01	02	03	04	05	06
ग्वालियर	ग्वालियर	मानपुरा	2.95 है. 2.95 है.	कार्यपालन यंत्री हरसी उच्चस्तरीय नहर संभाग कमांक 2 ग्वालियर	सिंध परियोजना (द्वितीय चरण) के अंतर्गत हरसी उच्चस्तरीय नहर की अर्रोली शाखा नहर के निर्माण हेतु ग्राम मानपुरा की भूमि का अर्जन।

भूमि का नक्शा (प्लान) न्यायालय भू–अर्जन अधिकारी ग्वालियर के कार्यालय में देखा जा सकता है।

म.प्र. के राज्यपाल के नाम से तथा
आदेशानुसार

(आकाश त्रिपाठी)
कलेक्टर ग्वालियर एवं पदेन उपसचिव
म.प्र. शासन, राजस्व विभाग"

The underlined portion shows that the respondents themselves have treated it necessary to enclose the list which contains the necessary details of the land and, therefore, they have used the words "संलग्न सूची (enclosed list)" and land described "वर्णित भूमि". However, admittedly, neither the said list is enclosed with the notification nor description of the land is mentioned in the notification. On a specific query from the Bench, Shri Newaskar, fairly, submitted that the map of the land mentioned in Annexure P-1 is the document Annexure P-8. A bare perusal of Annexure P-8 shows that there is no mention as to which land is sought to be

acquired, what is the size etc. of the said land and who may be the effected person. Accordingly this map is also of no assistance to the respondents.

12. In AIR 1970 Allahabad 414 [*Bahori Lal Vs. Land Acquisition Officer and others*], the Full Bench of Allahabad High Court opined as under:-

> "24. The note in a notification under Section 4(1) of the Act cannot take the place of a sufficient description of the locality itself. The site-plan or the plan of the land may fix the identity of the land that is, on an examination of the plan it may be possible to find out what is the exact area covered by the proposed acquisition and even which are the plots or parcels of land. That, however, necessarily cannot fix the locality itself. To illustrate, consider a case at a notification under Section 4(1) in respect of, say, 5 acres of land in the city of Allahabad. The notification mentions that 5 acres of land situate in the city of Allahabad are proposed to be acquired. If the notification contains a note to the effect that the site-plan may be inspected in the office of the Collector, Allahabad, the plan, unless it mentions the particular locality, i.e., Mohallah of the city, would hardly indicate the mohallah in which the land is actually situate. If it is a scale map, then it may be that an expert Draftsman or an Engineer may ultimately after making calculations and doing various other things, locate the land and find out that it is situate in a particular mohallah. But, it seems to us, common people would not be able to find out on a perusal of the plan the mohallah in which the land proposed to be acquired is situate. They might even after perusing the map be unable to find out whether in respect of the land they are persons interested entitled to file objections under Sec. 5-A of the Act or not. Such a notification, therefore, is likely to completely defeat the only right given under Section 5-A of the Act to raise objections against acquisition of the land or of any land in the locality. Besides, why should it be held in the absence of a clear provision that the persons interested will be bound to take upon themselves an additional onerous duty of inspecting

the site-plan in the office of the Collector merely to ascertain as to whether the land notified is one in respect of which they are or are not persons interested? Such an onerous and irksome duty cannot be cast on the citizens under Section 4(1) of the Act in the absence of a clear provision in that behalf. A note to the effect that the site-plan of the land can be inspected, in a notification under Section 4(1) of the Act, cannot, therefore, be held to be of any consequence and cannot be accepted as valid substitute for sufficient description of the land and the locality, required to be given under Section 4(1) of the Act If, independently of such a note, the description of the locality in which the land is situate can be held to be sufficient in a particular case, the notification will be valid. If, however, independently of such note, the description of the land and the locality is too vague or indefinate the notification cannot be held to be valid. Mention of plot numbers may not be indispensably necessary in a notification under Section 4 of the Act. But the notification itself must contain particulars adequately revealing the locality and the land proposed to be acquired therein. Ordinarily this can be done effectively by a proper description of the locality and the mention of the plot numbers or such other material data as may be sufficiently indicative of the land and its location. If this has been done in a given case, the requirements of Section 4(1) of the Act have been fulfilled."

This judgment is followed by *Punjab and Haryana High Court in Tulsa singh vs state of Haryana and others* (AIR 1973 Punjab and Haryana 263). Paras 4 and 6 of this judgment read as under:-

"4. Another point that arises in the case is whether the purchaser from the original owner has a right to bring the writ petition. This matter is not res integra and has been finally settled by their Lordships of the Supreme Court in *Sm. Gunwant Kaur v. Municipal Committee, Bhatinda,* AIR 1970 SC 802. This case also gives support on the first point. A notification was issued in this case in the year

1959 by the State Government of Punjab under Section 4 of the Act to the effect that the land specified in the schedule was required for the construction of Mall Road leading from the railway station. Bhatinda, to the main road known as Goniana-Bhatinda road. In the schedule the land was described as Khasra number 2030 and 11 sets of persons were shown as owners of different pieces of land. The aggregate area of the land likely to be needed was shown as 15 Bighas and 5 Biswas. By an amendment of the notification, the holding of Hari Ram was shown in the aggregate as 8 Bighas and 15 Biswas. Later on the notification under Section 6 of the Act was issued. The matter was challenged by Smt. Gunwant Kaur and others before the High Court by a writ petition which was dismissed in limine. On a certificate issued by the High Court, the petitioners appealed to the Supreme Court. Inter alia it was urged that the notification was vague, that the land was not fully described in the notification, that Khasra No. 2030 was a very large plot of land consisting of several building plots which were all part of the main Khasra No. 2030 and the original owners of this field number had divided this field into several abadi plots and had sold them to different persons before the notification and that unless the portion sought to be acquired is specified, the owners could not be deemed to have intimation that their plots were to be acquired. In paragraph 7 of the report, their Lordships of the Supreme Court observed as follows :-

"The notification under Section 4 is the foundation of a proceeding for acquisition of land. In the present case the notification under Section 4 did not set out with precision the parts of Khasra No. 2030 belonging to different owners sought to be acquired. The notification merely set out the areas intended to be acquired out of Khasra No. 2030 but the location of the areas under Khasra No. 2030 could not thereby be ascertained. No plans demarcating the land to be acquired were published or made available to the owners of the land." Then in

paragraph 9 it was observed as follows :-

"Section 4 of the Land Acquisition Act does not expressly require the Collector to publish or make available the plans of the lands intended to be notified to the owners of the lands. But the acquiring authority is bound to publish sufficient information giving due notice to the owners of the lands that their properties are intended to be compulsorily acquired....."

6. In view of this clear authority of the Supreme Court, we have no hesitation in holding that the present appellant was fully entitled to challenge the validity of the notification and in view of the fact that the notification issued under Section 4 of the Act is hopelessly vague and does not give any description by which the land sought to be acquired could be identified, we accept this appeal, set aside the order of the learned Single Judge and make the rule absolute, quash the notification under Section 4 of the Act and all the proceedings taken subsequent thereto. The appellant will have his costs in this appeal as well as in the writ petition."

13. The same view is again taken in AIR 1975 Punjab Haryana 125 [*Devi Singh and others Vs. Haryana State and others*]. Para 6 of this judgment reads as under:-

"6. The land is of Khasra No. 117. In the notification published in the gazette (Annexure A to the written statement) the land was specified as "a strip of land 475 feet in length of varying widths". In the column relating to its area, the land has been shown to be of whole area situate within the limits of villages-Chitana and Karawri. Similar specification of the land was given in the public notice referred to in the report of Roznamcha (Annexure B). Khasra Number (117) of the land was not stated in the notification published in the gazette or in the public notice given in the locality. The specification of the land, as given in the notification (Annexure A), was, in my opinion, insufficient to supply information to the persons interested

with regard to its identity. The easiest way to describe it was by giving its Khasra number. But this was not done. Therefore, I feel that the notification as well as public notice lacked information and were too vague to establish the identity of the land. I am supported in this view by *Tulse Singh v. The State of Haryana,* (1973) 75 Pun LR 227 : AIR 1978 Punj 263). So, there is force in the contention that the notification as well as public notice were bad on account of having vagueness respecting the identity of the land."

A conjoint reading of these judgments coupled with the view taken by the Supreme Court in *Madhya Pradesh Housing Board* (supra), makes it clear that the description mentioned in the impugned notification is grossly insufficient and does not fulfill the requirement of section 4 of the notification.

14. The pivotal question is what is the effect of that infirmity in section 4 of the notification. The stand of the Government is that petitioner's only demand is to pay adequate compensation and, there is no need to set aside the notification impugned herein and Court may issue direction to decide the objection dated 08.06.2012. In the opinion of this Court, this argument has no substance. If Annexure P-6 is read in its entirety, it shows that the petitioner has raised the serious objection against the acquisition proceedings itself by way of preliminary objection. He made it clear that in the notification and notices etc. it is not clear as to what is the size (length and width) of the land sought to be acquired. He submits that in absence of this minimum and necessary description, he is unable to file appropriate objection. Thus, if objection is read in its entirety it will make it clear that petitioner has raised the objection against the entire acquisition proceeding and it is not confined for the purpose of enhancement of the compensation or payment of adequate compensation. Apart from this, it cannot be forgotten that the petitioner is neither legally equipped person nor a legally trained mind. In such circumstances, the Apex Court opined as under in *Radhy Shyam* (supra):-

"It is too much to expect from the rustic villagers, who are not conversant with the intricacies of law and functioning of the judicial system in our country to first obtain relevant information and records from the State authorities concerned and then

present skilfully drafted petition for enforcement of their legal and/or constitutional rights."

In the light of aforesaid view taken by the Supreme Court, the stand of the respondents/State is without any substance.

15. In the opinion of this Court, if the objection Annexure P-6 is read in its true perspective, it shows that petitioner has very well raised the objection against the notification by which the respondents have proceeded to acquire the land in question.

16. On the basis of aforesaid analysis, it is crystal clear that it is the minimum requirement while issuing the notification under section 4 to mention the minimum description of the land so as to enable the effected person to raise the objection in adequate manner. In the present case, the impugned notification Annexure P-1 does not contain the said description and therefore, I am unable to uphold the Annexure P-1. The Apex Court in *Madhya Pradesh Housing Board* (supra) held that if a notification under Section 4(1) of the Act is defective and does not comply with the requirement of the Act, it not only vitiates the notification but also renders all subsequent proceedings connected with the acquisition, bad. Thus, in my opinion, as per the judgment of the Supreme Court aforesaid, once notification under Section 4 is found to be bad, all subsequent proceedings based on it has to be declared as bad and illegal in nature.

17. In the light of aforesaid, it is crystal clear that the procedural engrafted safeguards in section 4 and other sections of the Act are to be fulfilled with accuracy and precision. These are not empty formalities, more so when this has an effect of snatching away somebody's land or source of livelihood. Accordingly, the requirement of the section 4 and section 5A is to be fulfilled strictly.

18. Consequently, the notification Annexure P-1 and subsequent proceedings based thereupon are set aside. Petitions are allowed. However, it is made clear that respondents are at liberty to proceed in these matters in accordance with law.

Petition allowed.

I.L.R. [2013] M.P., 1868
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 10166/2012 (Jabalpur) decided on 7 March, 2013

CHHOTE LAL PATWA ...Petitioner
Vs.
MANJU PATWA ...Respondent

***Accommodation Control Act, M.P. (41 of 1961), Section 13(6) - Striking off defence* - Trial Court rejected the application on the ground that tenant has denied himself to be a tenant rather he claims to be a licencee - Defence of the tenant cannot be considered while deciding the application - Trial Court committed patent error in rejecting application - Matter remitted back. (Paras 6 & 9)**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 13(6) – बचाव को हटाया जाना – विचारण न्यायालय ने इस आधार पर आवेदन अस्वीकार किया कि किरायेदार ने स्वयं किरायेदार होने का खंडन किया है, बल्कि उसका दावा है कि वह लाईसेंसधारी है – आवेदन का विनिश्चय करते समय, किरायेदार के बचाव को विचार में नहीं लिया जा सकता – विचारण न्यायालय ने आवेदन अस्वीकार कर प्रकट त्रुटि कारित की है – मामला प्रतिप्रेषित।

Case referred :

1967 MPLJ 125.

Ashok Lalwani, for the petitioner.
Pranay Verma, for the respondent.

ORDER

SANJAY YADAV, J: Heard.

2. Order dated 15.2.2012 passed by Civil Judge Class II , Pipariya, District Hoshangabad in Civil Suit No.8-A/2010 is being assailed vide Article 227 of the Constitution of India.

3. By impugned order application preferred by the petitioner under Section 13 (6) of the M.P. Accommodation Control Act, 1961 (hereinafter to be referred to as Act of 1961) seeking striking of defence of respondent/ defendant has been rejected. Suit at the instance of the petitioners' is for eviction and arrears of rent.

4. At this juncture pertinent it would be first to consider the submission put forth on behalf of respondent/defendant that the suit though filed is for eviction and arrears of rent has not been captioned being under the Act of 1961.It is urged that it cannot therefore be made out under which provisions of said Act the relief has been sought in the suit.

5. It is not disputed by either of the parties that the provision of the Act of 1961 are applicable in District Hoshangabad and at Piparia, a Tahsil of Hoshangabad. It is also not disputed that with the applicability of the Act action for eviction and for arrears of rent can only be brought under provisions of 1961 Act. Section 12 whereunder provides for grounds whereon suit for eviction can be filed. One of the ground being arrears of rent therefore, the suit for eviction and arrears of rent filed by petitioner/plaintiff pending before the Civil Judge Class II, Piparia has to be construed to be a suit under Section 12 of the Act of 1961. This deals with contention raised on behalf of respondent / defendant.

6. Now coming to the main issue which has been raised in the petition. The Trial Court rejected the application filed by the petitioner/ plaintiff on the ground, that, the respondents / defendant has denied himself to be a tenant rather he claims to be a licencee to whom the provision of the Act of 1961 are not applicable.

7. Question therefore which crops up for consideration is as to whether while considering an application under Section 13 (6) of the Act of 1961 it is open for the trial court to go into the merit of defence taken on behalf of the defendant.

8. In *Inderlal Balkiram V. Mahngi Bai Imratlal and others:* 1967 MPLJ 125, a Division Bench of this Court while dwelling upon an issue as to whether before invoking section 13 of the Act of 1961 defendant in a. suit for eviction whether there must be first a finding that the defendant is a tenant of the plaintiff, observed "3....." the word "Tenant" raised in Section 13 (1) of the Act is merely connotative of the description which the plaintiff has given of the defendant and means nothing more than "defendant" but does not imply a defendant who has been found to be a tenant by the Court". It is further held:

> 12. For the Foregoing reasons our conclusion is that the learned First Civil Judge Second Class, Jabalpur erred in deferring consideration of the plaintiff applicant's prayer under

Section 13(6) of the M.P. Accommodation Control Act, 1961. for striking out of the non-applicants' defence against eviction till after the determination of the question whether the non-applicants are tenants of the petitioner. The result is that this revision petition is allowed, the order dated 26th August 1966 of the learned Civil Judge is set aside and he is directed to dispose of in accordance with law, the plaintiff-applicant's application for striking out the defendant-opponents defence against eviction. In the circumstances of the case, we leave the parties to bear their own costs of this petition."

9. That, the impugned order passed by the trial Court when is adjudged on the touchstone of above proponement of law leave no iota of doubt that the trial court has committed a patent error in rejecting the application under Section 13 (6) of the Act of 1961 on the ground, that the tenancy has been denied by the respondents/defendants.

10. In view whereof, impugned order is set aside. The matter is remitted to the trail Court with a direction to reconsider the application under Section 13 (6) of the Act of 1961 filed by petitioners/plaintiffs and pass a suitable order in accordance with law.

Petition is allowed to the extent above.

C.c as per rules.

Petition allowed.

I.L.R. [2013] M.P., 1870
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P. No. 11986/2012 (Jabalpur) decided on 8 March, 2013

DEOCHAND BHURA (Dr.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Stamp Act (2 of 1899), Section 2(14) - Instrument - **In order to determine whether any duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be asserted. (Paras 8 & 9)**

क. स्टाम्प अधिनियम, (1899 का 2), धारा 2(14) – लिखत – यह निर्धारित करने के लिए कि क्या लिखत पर कोई शुल्क प्रभार्य है, विधिक नियम यह है कि लिखत का वास्तविक एवं शुद्ध अर्थ में प्राख्यान किया जाना चाहिए।

***B. Succession Act (39 of 1925), Section 2(h) - Will* - Will involves transfer after death of person concerned and is infact a legal expression of wish and intention of author of Will - Document which is described as Will may not be a Will at all - By Will, the author of the Will gives the right to title and ownership of her property and for this all her legal heirs have consented - After her death, petitioner will be deemed as Bhumiswami and can get his name entered into all documents - Testator had also executed a power of attorney in favour of petitioner to transfer the property and after her death said power of attorney will become unfruitful in the light of Will - Document is not a simple declaration of intention of testator to give her property on the contrary it is a device and substitute for sale of property or for transfer of immovable property - Document although titled as Vasiyatnama is not a document which can be termed as testamentary document - On the contrary, it is a document which is used as a vehicle for transfer of property - Document has to be assessed for payment of stamp duty.**

(Paras 12 to 17)

ख. उत्तराधिकार अधिनियम (1925 का 39), धारा 2(एच) – वसीयत – वसीयत में संबंधित व्यक्ति की मृत्यु के पश्चात अंतरण समाविष्ट है और वास्तव में वसीयतकर्ता की इच्छा एवं आशय की विधिक अभिव्यक्ति है – दस्तावेज जिसे वसीयत के रुप में वर्णित किया गया है, वह वसीयत नहीं भी हो सकती है – वसीयत द्वारा, वसीयतकर्ता अपनी सम्पत्ति के हक एवं स्वामित्व का अधिकार देता है और इसके लिए उसके सभी विधिक वारिसों ने सहमति दी है – उसकी मृत्यु के पश्चात, याची को भूमिस्वामी माना जायेगा और वह सभी दस्तावेजों में अपने नाम की प्रविष्टियां करवा सकता है – वसीयतकर्ता ने सम्पत्ति अंतरण के लिए याची के पक्ष में मुख्तारनामा भी निष्पादित किया है और उसकी मृत्यु पश्चात उक्त मुख्तारनामा वसीयत के आलोक में निष्फल हो जायेगा – दस्तावेज वसीयतकर्ता द्वारा अपनी सम्पत्ति देने के आशय की साधारण घोषणा नहीं, इसके विपरीत यह सम्पत्ति के विक्रय या अचल सम्पत्ति के अंतरण हेतु साधन एवं प्रतिस्थिति है – यद्यपि दस्तावेज का शीर्षक वसीयतनामा है, वह ऐसा दस्तावेज नहीं है जिसे वसीयती दस्तावेज कहा जा सके – इसके विपरीत, यह ऐसा दस्तावेज है जिसका उपयोग सम्पत्ति के अंतरण हेतु वाहन के रुप में किया गया – स्टाम्प शुल्क के भुगतान हेतु दस्तावेज का निर्धारण किया जाना चाहिए।

Cases referred :

2004(2)MPJR 269, (2003) 1 MPLJ 341, AIR 1991 SC 401, 1977(2) SCC 308, AIR 2004 Karn. 306, AIR 2001 Raj.184, (2001) 4 Karn. L.J. 12(DB), AIR 1990 SCC 2201, AIR 1948 Pat 341.

Dr. Deochand Bhura present in person.
Samdarshi Tiwari, G.A. for the respondents/State.

ORDER

RAJENDRA MENON, J: Challenge in this writ petition under Article 226 of the Constitution is made to an order dated 24.07.2012 passed by the Commissioner, Jabalpur Division exercising powers of an Appellate Authority as contemplated under Section 56 (A) of the Indian Stamp Act, 1899 as applicable in the State of Madhya Pradesh in the matter of demanding stamp duty on an instrument which was impounded by the competent authority in a proceeding that was held before it under the M.P. Land Revenue Code for mutation.

2. Facts in brief which are necessary for disposal of the writ petition goes to show that one late Usha Hajarnavis executed a Vasiyatnama (will) on 18.07.2006 (Annexure P-1) by which the property in question consisting of a plot measuring 2880 Sqft. situated in Manmohan Nagar, Jabalpur was given in favour of petitioner. After death of Smt. Usha Hajarnavis it is said that the petitioner applied for mutation and sought for entry of his name in the land/ revenues record. The Superintendent of Land Records before whom the application was filed held that the Vasiyatnama has not been duly proved and based on the same mutation cannot be ordered. He, therefore dismissed the application and returned the documents. However, thereafter a demand notice Annexure P-2 was issued by the Collector of Stamps demanding a sum of Rs.12,28,879/- as stamp duty, payable on the document. Challenging the same petitioner filed a writ petition before this Court being Writ Petition No.3132/ 2008. The said writ petition was disposed of vide Annexure P-.3 with a direction to the petitioner to file an appeal before the Commissioner. The petitioner preferred an appeal, but the Commissioner refused to entertain the appeal and returned the same vide order dated 04.11.2008 Annexure P-4. The petitioner thereafter approached the Board of Revenue and when the Board of Revenue also refused to entertain the appeal (Annexure P-5) dated 06.10.2010, the second writ petition being Writ Petition No.10925/2011 was

filed before this Court. This writ petition was disposed of vide order Annexure P-6 dated 12.08.2011 directing the Commissioner, Jabalpur Division to decide the matter. The Commissioner having decided the matter and having rejected the same vide order Annexure P-7 dated 24.07.2012, petitioner is before this Court challenging the order Annexure P-7 passed by the Commissioner and demand notice as indicated hereinabove.

3. Petitioner, who appears in person, submitted that the Collector of Stamp on the basis of unattested photocopy of Vasiyatnama has passed the impugned order. It is stated that in the absence of original documents being available all proceedings are null and void. Thereafter placing reliance on a judgment rendered by a Division Bench of this Court in the case of *Shiv Kumar Saxena Vs. Manish Chand* 2004(2) MPJR 269, the petitioner argued that the Commissioner after considering the collateral circumstances, such as payment of consideration for a plot purchased in the name of petitioner's wife one Smt. Vijay Laxmi Bhura, decided the appeal. It is stated that in view of the provisions of Section 3 of the Stamp Act consideration of collateral circumstances/evidence for demanding stamp duty on the instrument is illegal. Further relying on the judgment rendered by the Division Bench in the case of *Shiv Kumar Saxena* (supra) it is argued that the revenue cannot go into the object of the transaction and thereafter impose stamp duty by impounding certain purpose, which is not disclosed in the document. It is argued that the Vasiyatnama is not a sale-deed and, therefore, stamp duty need not be payed. That apart, it is stated that the Superintendent Land Records refused to grant mutation, there was no authority under the Collector Stamp to take action in the matter. Contending that the entire action is initiated in an illegal and arbitrary manner and demand is made contrary to law, this writ petition has been filed and written argument has been submitted.

4. Shri Samdarshi Tiwari refuted the aforesaid and argued that, if the totality of circumstances are taken note of, it would be seen that even though the document is titled as a 'Will' but in fact it is not a will. It is only an instrument evidencing transfer of property and as based on this document petitioner preferred an appeal before the SDO under Section 44 of the M.P. Land Revenue Code, challenging the order passed by the Superintendent Land Record refusing for mutation on 03.04.2007 and as the document was used in the appeal, the SDO before whom the document was presented in the appeal impounded the same by exercising his power under Section 33 and as the Collector of Stamp has proceeded in the matter after impounding of the

document under Section 40, the action is proper. Contending that the petitioner by the documents in question was infact trying to get the property transferred in his own name and as a device for not paying stamp duty and other dues in accordance with law, the document was titled as will, it is argued that the action is proper and no interference be made. Shri Samdarshi Tiwari has produced the entire record starting from the application filed by the petitioner before the Superintendent Land Record, the appeal filed by him under Section 44 and the document and written argument submitted in the appeal and action taken by the Collector of Stamp and various documents produced in the matter, in support of his contention.

5. I have heard petitioner in person and Shri Samdarshi Tiwari, learned Government Advocate for the State, at length and have also gone through the material available on record. Petitioner claims that the document in question on which stamp duty is being assessed is a will, which is not subjected to stamp duty and when the Superintendent Land Record refused to grant mutation on the basis of these documents there was no occasion for the Collector of Stamp to proceed in the matter. That apart it is his case that the will has to be read in its totality and given effect to and the collateral purpose or any other intention proposed to be fulfilled by the document cannot be a ground for claiming the stamp duty.

6. Before proceeding to consider the rival contentions one objection of the petitioner with regard to initiation of the proceedings by the Collector in an illegal manner has to be looked into. In both the petitions and in the written argument, petitioner has tried to submit that when the Superintendent Land Record refused to grant mutation and when the will was returned to the petitioner there was occasion for the Collector of Stamp to proceed in the matter and he has challenged to initiate a proceeding before the Collector of Stamp himself. It is surprising that petitioner is making such a submission whereas the original record produced by the learned Government Advocate goes to show that after the Superintendent, Land Record refused mutation, the petitioner on 03.04.2007 filed a first appeal before the SDO, Jabalpur being Revenue F.A. No.595/A-06/06-07 (Dr. Deochand Bhura Vs. Professor Charudutt Hajarnavis). The appeal was filed under Sections 44(1) of the M.P. Land Revenue Code, 1959 and challenge in this appeal was made to the order dated 03.04.2007 refusing mutation, more than 10 documents were enclosed with the memo of appeal and the first document enclosed was the order of the Superintendent, Land Record dated 03.04.2007 refusing mutation

and document No.3 was will in question. When these documents were presented, records indicate that the appellate authority namely the SDO found that the document infact is a document evidencing and making transfer of immovable property which has to be subjected to payment of stamp duty and, therefore, exercising his powers available under Section 33 (1) of the Indian Stamp Act, impounded the document and sent it to the Collector, Stamp for assessment of stamp duty. It is based on this order passed by the SDO, that is, the appellate authority that the proceedings were held before the Collector. It is, therefore, clear that the proceedings in the matter commenced when the petitioner tried to use the documents i.e. the so called Vasiyatnama in the appeal preferred by him under Section 44 (1) of the M.P. Land Revenue Code and the appellate authority namely the SDO impounded the same. In the case of *Southern Eastern Coal Fields Ltd. Vs. State of M.P.*, (2003) 1 MPLJ 341, it has been held by this Court that if three conditions as stipulated in Section 33(1) of Indian Stamp Act are fulfilled, impounding of the document under Section 33 is permissible. It is stated that the conditions are that the authority empowered to impound the document must be the authority specified therein.

7. The second condition is that the instrument in question is not stamped according to Act and lastly the instrument is produced or comes in the performance of the function of the authority. In the present case, the SDO who has impounded the document is the authority empowered to impound the document because he is an authority holding the public office before whom the document has come, while exercising his appellate jurisdiction in a proceeding under Section 44 and if he found that the document pertains to sale of the property and is not duly stamped he is authorized to deal with the matter. In view of above, the first ground raised by the petitioner to the effect that the entire initiation of proceedings is illegal cannot be accepted. As the proceeding are held by the Collector of Stamp after the document was impounded under Section 33 and proceedings were held in accordance to the requirement of Section 40 of the Indian Stamp Act. Having held so, the next question would be as to what is the document in question and to what extent the contention advanced by petitioner can be accepted.

8. Before adverting to consider all these questions of law with regard to payment of stamp duty. The law with regard to certain aspects pertain to wills as is made out from the Indian Succession Act, 1925 and with regard to payment of duty on instrument as provided in the Indian Stamp Act may be taken note of. A 'instrument' is defined in Section 2 (14) of the Indian Stamp

Act and it says that an instrument includes every document by which any right or liability is created or purports to be created or transferred etc.. After considering the definition of instrument, as is indicated hereinabove, the Supreme Court in the case of *Municipal Corporation of Delhi Vs. Pramod Kumar Gupta*, AIR 1991 SC 401, held that the document to come within the purview of instrument has to be a vehicle for transfer of the right, title and interest in the property. It is held that if transfer of right, title or interest is made out from the documents it is an instrument, but if it is a document only evidencing transfer which has already taken place at an earlier point of time then it is not an instrument within the meaning of Section 2(14). Thereafter in the case of *Madras Refineries Ltd. Vs. the Chief Controlling Revenue Authorities, Board of Revenue, Madras* 1977(2) SCC 308, the Supreme Court again considered the question with regard to stamp duty chargeable on an instrument and it held that in order to determining whether any duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be asserted.

9. The Karnataka High Court also considered some of these questions in the matter of *L & T Komatsu Ltd. Vs. Senior Sub Registrar,* AIR 2004 Karnataka 306 and held that in understanding a deed or a document, particularly a document conveying title, the document has to be read as a whole and thereafter the intention of the parties determined. It is held by Division Bench of Rajasthan High Court in the case of *State of Rajasthan Vs. Bhilwara Spinners Ltd & Ors.*, AIR 2001 Rajasthan 184, that charge of stamp duty is on instrument and not on the transaction, subject matter of the duty is on the instrument through which the property is transferred or right created and not anything else. The complete reading of the aforesaid principle of law goes to show that the document which creates right of liability or transaction in which right or liability with regard to a property are created will come within the purview of instrument and if the instrument which creates the right or liability has to be executed after payment of stamp duty, the incidence for payment of duty is attracted.

10. It would therefore be necessary at a later stage for this Court to go through the documents in question, namely the Vasiyatnama and find out as to whether it is infact a simple will as canvassed by the petitioner or is a document fulfilling the requirement of being an instrument executed for transfer of property.

11. So far as the will is concerned, under Section 2(h) of the Indian

Succession Act, 1925 a will is defined to mean a legal declaration of the intention of a testator with respect to his or her property which he desires to be carried into effect after his or her death. In the case of N. *Ramaiah Vs. Nagaraj* (2001) 4 Karn. L.J. 12 (D.B.) the Division Bench of Karnataka High Court has held that there is difference between transfer and will. The transfer is conveyance of existing property by one living person to another, on the other hand a will involves transfer after death of the person concerned and is infact a legal expression of the wish and intention of the author of the will, with regard to the property or things referred to in the will. The principle governing wordings of the will and its interpretation are laid down in Chapter 6 of the Indian Succession Act. It is settled law that in determining the real intention of the testator entire document has to be construed as a whole. No word, phrase or clause should be ignored after reading the document in its totality. The Court has to find out the intention of the testator and the will should be interpreted by giving a correct meaning in accordance to the intention of testator. It is also well settled in law that the a Court while construing the will is required to ascertain the intention of the testator which is gathered from the language of the document and from doing so the surrounding circumstances and position of the testator, his family relationship and other related factors have to be considered. These are principles of law which are made out with regard to a will, going through the judgment rendered by the Supreme Court in the case of *Veerattalingam Vs. Ramesh,* AIR 1990 SCC 2201, it is held. that in all cases it is not necessary that the document which is described as a will is so. it may not be a will at all. The document by which any property is disposed has to be evaluated which certain other circumstances as are available, these have to be taken note of and merely because the word 'will' is mentioned in the document, it will not make the document a 'testamentary one'. It has been held by the Patna High Court in the case of *Saradendu Gangopadhyaya Vs. Nalini Devi and Another,* AIR 1948 Pat 341, that the document has to be read as a whole and thereafter it is to be gathered whether it is a will at all or some other document worded as a will. It is held that the first duty of the Court is to take note of the circumstances under which the will is made by the testator. The Court is required to place itself in the chair of the testator who executed the will and find out the manner of execution and other reasons for execution of the will.

12. The aforesaid legal principle is to be applied in the facts and circumstances of present case and it is only thereafter that a decision to be

taken. That being so, it would be most appropriate stage now to take note of certain factual aspects of the matter, which has bearing in the present case. On going through the original record available it is seen that when the petitioner filed the appeal before the S.D.O. Jabalpur under Section 44(1) originally, in the memorandum of appeal he filed 10 documents. Thereafter he filed an application for amendment under Order VI Rule 17 CPC and subsequently on 14.6.2007 filed his affidavit along with a return of the respondents in the appeal, that is.. of Professor C.R. Hajarnavis. Thereafter he filed an application under Order X Rule 2 CPC and impleaded six other persons as party. He then filed various documents in the proceedings, more than 8 documents which are available from page 51 to page 67 of the original record and the written arguments along with some judgments. These documents and affidavit which were presented by the petitioner in the appeal under Section 44 gives a very interesting picture. It is seen that the total property which was available with Late Usha Hajarnavis consisted of a plot bearing No.194 situated in Manmohan Nagar Jabalpur and the total area of the said plot was 8480 sq.ft. Late Usha Hajarnavis executed a Power of Attorney in favour of petitioner authorising him to deal with the property and to sell it. The power of attorney was executed on 14.8.1994 at Jabalpur, thereafter it is seen that an agreement was executed between the parties and it was agreed that the entire plot measuring 8480 sqft. Shall be sold by Late Usha Hajarnavis to the petitioner for certain consideration. Available on record is sale-deed executed on a non-judicial stamp paper of Rs. 500/- filed by petitioner, this document is for sale of a property valued at Rs.50,000/- and the stamp duty is shown as Rs. 4,150/-. This sale deed is executed between Smt. Usha Hajarnavis and one Smt. Vijaylaxmi Bhura, wife of petitioner. In the recital of sale-deed the property to be sold is indicated as plot No.194 measuring 36X80 ft total 2880 sq.ft. It is indicated that this property is part of plot No.194 measuring 80X106 ft total 8480 sqft and it is stated that on 20.5.1993 a sum of Rs.50,000/- as sale consideration for the entire plot measuring 2880 sq.ft. has been received by Smt. Usha Hazarnavis. It is stated that for the total area of 8480 sq.ft the agreement between the parties is to sell the entire property for a consideration of Rs. 2,10,000/-. It is further indicated that by a registered sale deed executed on 5.10.1988 between Smt. Vijaylaxmi Bhura wife of present petitioner and Smt. Usha Hajarnavis, plot measuring 70X80 ft i.e. 5600 sq.ft. has already been sold. The registered sale deed is executed on 5.10.1998 and the consideration of 1,60,000/- by demand draft drawn in favour of Smt. Usha Hajarnavis has already been paid. It is, therefore, clear from this document

available on record which is an unregistered sale-deed executed on 22.4.2006 which bears thumb impression of Usha Hajarnavis and signature of Vijaylaxmi Bhura, that with regard to same property a sale-deed was drawn-up on 22.6.2007, which was signed by the parties and this sale deed was for the same property, i.e. Plot No.194, 2808 st.ft, for which a consideration of Rs.50,000/- was already received on 20.5.1993. After the sale-deed was prepared and signed on 22.4.2006 for reasons which remain unexplained and sale deed was not registered, however, after three months on 18.7.2006, the Vasiyat-Nama in question is executed. Available on record is also a notarized affidavit of Smt. Usha Hajarnavis attested and certified by a notary, bearing the photograph of Smt. Usha Hajarnavis and in this affidavit she says that she has sold the property bearing plot No.194 measuring 36X80 ft. total area 2880 sq.ft. and the sale consideration Rs.50,000/- has been received by her on 20.5.1993. She also says in para 3 of this affidavit that she has executed a Power Of Attorney in the name of Dr. Devchand Bhura (petitioner) on 4.1.1999 and he is authorized to execute the sale deed and get it registered. It is, therefore, clear from these two document that the property in question was already subjected to sale for a consideration of Rs.50,000/-. It is also seen that property bearing plot No.194 had a total area of 8480 sqft, a sale was executed between Smt. Usha Hajarnavis and petitioner's wife and by a registered sale deed transfer of the property measuring 5600 sqft was effected on payment of consideration Rs.1.60,000/- the sale deed was executed on 5.10.1999 and after its registration it was impounded by the collector of stamp on 23.10.1998, who assessed the market value of the property to be above Rs.5,49,000/- and demand additional stamp duty on this deed, and finally the matter traveled in appeal to the court of Commissioner and the order of the Commissioner is available at para 56 of the original record which goes to show that vide order dated 5.11.2005 the market value of the property measuring 5600 sq.ft. is assessed as Rs.2,68,000/- and after adding certain more amount the property is valued at Rs.3,13,800/-and the difference of stamp duty on this sale deed is directed to be recovered. It is, therefore, clear that the total area available with Smt. Usha Hajarnavis, which consisted of Plot No.194 in Manmohan Nagar Colony Jabalpur was measuring 8480 sq.ft. By a registered sale deed executed on 5.10.1998, 5600 sq.ft. was sold and registered in the name of petitioner's wife Smt. Vijaylaxmi Bhura and for the remaining area i.e. 2880 sq.ft. even though a sale deed was prepared and executed, but it was not presented for registration and instead this property measuring 2880 sqft is proposed to be transferred by the so called

Vasiyatnama. Apart from the aforesaid, the document filed by petitioner in appeal under Section 44 of M.P. Land Revenue Code goes to show that on 4.9.2006 a letter is issued to the petitioner indicating that Smt. Usha Hajarnavis has expired on 13.11.2006 and certain documents were sent to the petitioner which includes the so called Vasiyatnama. Thereafter when the proceedings were pending for mutation before the Superintendent of the Land Record Jabalpur, Annexure P-6 is a letter of confirmation given by one Professor Charudutt Hajarnavis in this letter Shri Charudatt Hajarnavis claims to be son of Smt. Usha Hajarnavis and confirms that the entire property consisting of Plot No.194 area 8480 sqft has been sold by his mother Smt. Usha Hajarnavis to the petitioner and a registered sale-deed dated 5.10.1998 for 5600 sqft is already been executed. Registration of deed of transfer for remaining area of 2800 sqft has not been done, even though the entire consideration has been paid by Dr. Deochand Bhura, but as his mother has expired before execution of the registered sale deed. It is said that she has executed a Vasiyat Nama dated 18.7.2006 for transfer of aforesaid 2800 sqft portion of Plot No.194 to Dr. Deochand Bhura. It is, therefore, clear from reading of all these documents along with the affidavit of Smt. Usha Hajarnavis that the document in question which is treated as Vasiyat Nama is not a document by which the testator Smt. Usha Hajarnavis wanted to bequeath her property to petitioner, but it is only a document evidencing transfer of property on payment of consideration, available at page 34 of the proceedings held before the Superintendent Land Record is a written statement of the petitioner himself and he also admits the factual assertion, as indicated hereinabove. It would now be appropriate to see as to what is the Vasiyatnama said to have been executed, what are its wordings and what would be intention of parties in doing so. The Vasiyatnama as available on record and is also filed by petitioner as Annexure P-1 in Hindi the same reads as under:

वसीयतनामा

मैं, श्रीमती ऊषा हजरनवीस पत्नि स्व. श्री रामचंद्र हजरनवीस उम्र लगभग 90 वर्ष, निवासी–गुलमोहर, सीमेंट रोड, शिवाजी नगर, नागपुर आज दिनांक 18 जुलाई 2006 को नागपुर में पूरे होशों–हवास में डॉ. देवचंद भूरा आत्मज स्व. रिखब दास भूरा, उम्र 71वर्ष, निवासी मनमोहन नगर, जबलपुर को इस वसीयतनामा द्वारा मनमोहन नगर, जबलपुर में स्थित अपनी सम्पत्ति, प्लाट नं. 194, का 36X80 = 2880 वर्गफुट भाग का स्वामित्व प्रदान करती हूं। इस वसीयतनामा में मेरे वारिसों की पूर्ण सहमति है। मेरे देहावसान के पश्चात इस वसीयतनामा के आधार पर डॉ. देवचंद भूरा उपरोक्त सम्पत्ति के भूमि स्वामी

के रूप में अपना नाम समस्त शासकीय एवं अर्द्धशासकीय अभिलेखों में दर्ज करवा लेंगे। पूर्व में मैंने डॉ. देवचंद भूरा के नाम एक आम मुख्त्यारनामा दिनांक 04–01–1999 द्वारा उक्त प्लाट को बेचने के समस्त अधिकार प्रदान कर दिये थे। मेरे देहावसान के पश्चात् उक्त मुख्त्यारनामा के निष्प्रभावी होने पर डॉ. देवचंद भूरा के स्वामित्व को संरक्षित करने हेतु यह वसीयतनामा जारी किया जा रहा है।

अतः गवाहों की उपस्थिति में आज दिनांक 18 जुलाई 2006 को स्थान नागपुर में पढ़कर, समझकर, पूर्ण स्वस्थ हालत में इस दस्तावेज पर अपना अगूंठा निशानी लगाई। जो सनद रहे वक्त जरूरत पर काम आवे।

स्थान–नागपुर दिनांक "

(Emphasis Supplied)

13. If the aforesaid Vasiyatnama is scrutinized it would be seen that Smt. Usha Hajarnavis says that she gives the right to title and ownership of her property situated in Manmohan Nagar Jabalpur being Plot No.194 measuring 36X80 total 2880 sqft to the petitioner and for this all her legal heirs have consented. She further says that after her death based on this Vasiyatnama Dr. Deochand Bhura will be deemed as Bhumi Swami and he can get his name entered into all Government and Semi-Government documents and she also says that she has given right to Shri Bhura through a Power of Attorney on 04.01.1999 to transfer the entire property.She says that after her death as this power of attorney will became unfruitful and redundant, she has executed this Vasiyat-Nama to protect the interest and title of Shri Deochand Bhura. If the principle governing interpretation of will, as have been detailed hereinabove, is considered with reference to the fact of the present case and the intention of the testator is analyzed in the background of facts about sale of the property, payment of consideration and surrounding circumstances that has come on record it is clear that parties have infact sold the property in question, for part of the property that was sold a registered sale deed was executed on 5.10.1998, the total consideration for the property was Rs.2,10,000/-, the entire consideration was received, but for a part for which a registered sale deed could not be executed the will was prepared. Even though sale deed was drawn up on 22.6.2006,. for this sale transaction but as it could not be registered after its execution, the will in question was drawn up. This is nothing but a device for transfer the property for which sale consideration was also received and sale deed was executed between the parties. It is, therefore, a case where the will in question is not a will, which under normal circumstances

we understood. It is not a simple declaration of the intention of the testator to give her property, on the contrary it is a device and substitute for sale of property or for transfer of immovable property, for which sale consideration was already received. The parties had infact agreed for sale and transfer of the property and as this is now done by an instrument filed as a will, the stamp duty is being imposed. The wording of the will and the intention of the testator clearly shows that it was transfer of her right, title and interest on the property after receipt of consideration, the document is not a will, but is an instrument by which transfer of the right, title and interest of an immovable property is being effected and if that be so, I see no error in the act of respondents in claiming stamp duty on the property in question. Petitioner is contending that the collateral purpose or the collateral circumstances cannot be taken note of for assessing stamp duty, this submission cannot be accepted in the peculiar facts and circumstances of the present case.

14. Petitioner by relying on the judgment of the Division Bench in the case of *Shiv Kumar Saxena* (supra) has emphasized that stamp duty is leviable on the instrument only and, therefore, no collateral evidence can be looked into, nor can the intention of the parties derived at on the basis of such collateral material considered. It is stated that the contents of the documents can only be looked into and then a decision taken.

15. It is not in dispute that this preposition has to be applied for the purpose of considering the question of levying stamp duty on an instrument. However, in this case there are certain peculiar and exceptional circumstances and, therefore, this principle has to be applied in the light of these circumstances.

16. The documents in question if read as a whole without the aid of any external material would go to show that the document is executed by Smt. Usha Hajarnavis and by the said document she is transferring her property in the name of the petitioner and says that after her death he is the 'Bhumi-Swami' and in all records his name be entered. That being so, the document read as a whole goes to show that it is the document transferring certain immovable property. For determining the nature of document, it is only this content of the document which is taking note of, the other material available on record, considered by this Court and discussed in this order are with regard to finding out the intention of the parties to see as to whether the document is a will i.e. testamentary document by which the testator is bequeathing her property to the petitioner or anything else. That being so, the collateral material

available which is referred to and considered are the material for the purpose of finding out the intention of the parties in the matter of execution of the will and not for the purpose of considering the question of levying the stamp duty on the instrument. In this case the peculiar circumstances warrants this Court to undertake this exercise.

17. Infact this Court has evaluated the material to consider the question as to whether the document is infact a will or is if something else and on enquiry it is seen that the document even though titled as a Vasiyatnama is not a document which can be termed as testamentary document, executed by a testator for dealing with her property after her death or bequeathed to the beneficiary. On the contrary it is a document which is used as a vehicle for transfer of property. The enquiry and consideration of collateral purpose is only limited to this extent. So far as imposition of stamp duty on the document is concerned, the contents of document itself shows that it transfers the bhumi-swami rights and', therefore, it is an instrument by which transfer of property is effected and, therefore, has to be assessed for payment of stamp duty. That being so, the position of law as contemplated in the case of *Shiv Kumar Saxena* (supra) is taken note of and met with in this case.

18. Accordingly, in the totality of facts and circumstances finding action of respondents to be in accordance with law, this petition is dismissed, no order as to costs.

19. Original record be returned back to Shri Samdarshi Tiwari, Government Advocate.

Petition dismissed.

I.L.R. [2013] M.P., 1883
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P. No. 20241/2011(Jabalpur) decided on 10 May, 2013

SIYALAL KACHI & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Land Acquisition Act (1 of 1894), Sections 5-A & 40 - Subjective satisfaction for grant of consent*** **- Subjective satisfaction for grant of consent by the Govt. is to be undertaken by conducting the**

enquiry as contemplated u/s 40 which gives an option either to hold enquiry as required u/s 5-A or as required under provisions of Section 40 - If an enquiry is conducted u/s 40, then enquiry u/s 5-A can be given go-by. (Para 17)

क. भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 5ए व 40 – सहमति प्रदान किये जाने के लिए वैयक्तिक संतुष्टि – सरकार द्वारा सहमति प्रदान किये जाने हेतु वैयक्तिक संतुष्टि का उपक्रम, धारा 40 के अंतर्गत अनुध्यात जांच संचालित करके लिया जाना चाहिए जो या तो धारा 5ए के अंतर्गत अपेक्षित जांच या धारा 40 के उपबंधों के अंतर्गत अपेक्षित जांच करने का विकल्प प्रदान करता है – यदि धारा 40 के अंतर्गत जांच संचालित की जाती है तब, धारा 5ए के अंतर्गत जांच हटायी जा सकती है।

***B. Land Acquisition Act (1 of 1894), Section 3(f) - Public Purpose* - Merely land is being acquired for a Company which is said to be power project and merely because electricity is being sold and Company is granted liberty to make some profit, it cannot be said that Public Interest is not involved. (Para 21)**

ख. भूमि अर्जन अधिनियम (1894 का 1), धारा 3(एफ) – लोक प्रयोजन – मात्र इसलिए कि भूमि को कम्पनी के लिये अर्जित किया गया जो कथित रुप से विद्युत परियोजना है और मात्र इसलिए कि विद्युत विक्रय की जा रही है और कम्पनी को कुछ लाभ प्राप्त करने की छूट प्रदान की गयी है, यह नहीं कहा जा सकता कि लोक हित अंतर्ग्रस्त नहीं है।

***C. Land Acquisition Act (1 of 1894), Part VII* - For the purpose of acquisition of land for a Company, requirement of Part VII has to be followed and in exercise of powers conferred u/s 55, Statutory Rules for acquisition of land for Companies are formulated - Record shows that a detailed enquiry was made - It cannot be said that the report of Collector was mechanical. (Paras 23 & 24)**

ग. भूमि अर्जन अधिनियम (1894 का 1), भाग VII – कम्पनी हेतु भूमि का अर्जन करने के प्रयोजन हेतु, भाग VII की अपेक्षाओं का पालन किया जाना चाहिए और धारा 55 के अंतर्गत प्रदत्त शक्तियों के प्रयोग में, कम्पनी हेतु भूमि अर्जन के कानूनी नियम विरचित किये गये हैं – अभिलेख दर्शाता है कि विस्तृत जांच की गई थी – यह नहीं कहा जा सकता है कि कलेक्टर की रिपोर्ट यांत्रिकी है।

***D. Land Acquisition Act (1 of 1894), Section 5-A* - Personal hearing - No pleadings with regard to non grant of personal hearing to land owners - However, the Company has specifically taken a stand that**

efforts were made to purchase the land by private negotiations - In none of representations or objections there is anything to show that such an objection was ever raised - Return of the State also discloses that the negotiations were made but failed - Petition dismissed. (Para 28)

घ. भूमि अर्जन अधिनियम (1894 का 1), धारा 5ए – व्यक्तिगत सुनवाई – भूमि स्वामियों को व्यक्तिगत सुनवाई प्रदान नहीं किये जाने के संबंध में कोई अभिवचन नहीं – किन्तु कम्पनी ने विनिर्दिष्ट रुप से अपनी स्थिति प्रकट की है कि व्यक्तिगत संधिवार्ता द्वारा भूमि क्रय करने के प्रयास किये गये थे – किसी प्रत्यावेदन या आक्षेप में यह दर्शाने के लिये कुछ नहीं कि उक्त आक्षेप को कभी भी उठाया गया था – राज्य का लिखित कथन भी प्रकट करता है कि संधिवार्ता की गई परंतु असफल रही – याचिका खारिज।

Cases referred :

AIR 1975 SC 629, 2012 STPL 588 SC, W.P. No. 781/2011 decided on 04.09.2012, (1997)1 SCC 134, (2008) 4 SCC 695, (2002) 2 SCC 48, (1997) 2 SCC 627, (2009) 3 SCC 571, AIR 1962 SC 764, ILR 1932 Collector Page 605, (1998) 4 SCC 387, 2010(2) MPLJ 236.

Vivek Rusia, for the petitioners.

R.D. Jain, A.G. with *Rajesh Tiwari*, G.A. for the respondents No. 1, 2 & 3.

Naman Nagrath with *Himanshu Mishra*, for the respondent No.4.

ORDER

Rajendra Menon, J: Petioners, who are land-owners and are residents of Village Bujbuja and Dokaria situated in Gram Post Dokaria, District Vijayraghavgarh, District Katni, have filed this writ petition challenging the acquisition of land being undertaken by respondent No.4, for the purpose of setting up a 660x3 Mega Watt Thermal Power Station in the District of Katni. Particulars of the land held by the petitioners and other details are mentioned in the body of the petition and, therefore, it is not reproduced in this order.

Challenge is made to the acquisition initiated and the memorandum of understanding entered into between the State Government and respondent No.4 Company in the matter of acquisition. According to the petitioners, in Gram Bujbuja, land measuring 237.22 Hectares is being acquired; whereas in Village Dokariya land measuring 24.04 Hectares is being acquired.

Petitioners claim to be permanent residents of the area in question and it is stated that initially a memorandum of understanding was entered into between the State Government and respondent No.4 Company on 24.11.2009, for setting up of a Thermal Power Plant in District Betul, but subsequently vide Annexure P/1, a second memorandum of understanding was executed on 24.11.2009, whereby the Thermal Power Plant was being established in the District of Katni. It is further stated that for the purpose of establishment of the Power Plant in District Katni, total 593.64 Hectares of land is being acquired, out of which 107.02 Hectares is Government Land and 486.62 Hectares is private land, belonging to the petitioners and various other persons, situated in the villages as indicated hereinabove. It is pointed out that an application - Annexure P/2 was submitted by the representative of the Company in question to the Collector, Katni on 4.10.2010, alongwith the list of private land and government land annexed as Annexure P/3, to the said application. On the same being done, the Collector forwarded the matter to the Tehsildar, Vijayraghavgarh, who vide letter dated 11.10.2010 directed the Revenue Inspector to submit a report on the nine points as are indicated in the letter - Annexure P/4. The Collector accordingly registered a Revenue Case bearing No.01/A-19/2010-11, on 5.10.2010 and the proceeding for acquisition was initiated. It is stated that the Collector received the report and thereafter the Additional Collector on 19.11.2010 vide Annexure P/6, directed the Deputy Director of Agriculture to also submit his report. Accordingly, a report - Annexure P/7 has been submitted on 27.11.2010, and another report was submitted by the Tehsildar, Vijayraghavgarh on 4.11.2010, vide Annexure P/8. Thereafter, the matter was proceeded with and the Deputy Director, Agriculture also submitted his report, which was forwarded to the Collector vide Annexure P/10, on 14.12.2010. Based on all these material, the Collector prepared his final report - Annexure P/11 on 19.1.2011, which was forwarded to the State Government and on the basis of the report of the Collector, the matter was placed before the Land Acquisition Committee on 22.2.2011, which granted its approval to the acquisition proceedings and the revenue authorities vide Notification dated 11.3.2011 - Annexure P/12, gave permission as required under law and thereafter the agreement was executed between the State Government and the Company on 8.7.2011, vide Annexure P/13. It is pointed out that report was also called for from the Forest Department and on 28.3.2011, the Forest Department communicated to the authorities that the land in question is not within the forest or core area, but it is about 2 Kms away from buffer zone of Bandhavgarh National Park. Thereafter, the Tehsildar,

Vijayraghavgarh is said to have issued advertisement inviting objections with regard to the allotment of government land and certain objections with regard to this allotment was submitted by the villagers and the Gram Sabha. Interalia contending that without taking note of these objections and in an arbitrary manner the impugned action is taken and a final Notification under section 9(1) of the Act has been issued on 18.7.2011 vide Annexure P/25. This writ petition has been filed challenging the acquisition proceedings.

2- Shri Vivek Rusia, learned counsel for the petitioner, took me through the memorandum of agreement entered into initially between the State Government and the Company in question; the letter - Annexure P/2 written by the Company to the Collector, Katni seeking allocation of land, by pointing out that efforts to purchase the land from the land owners have not yielded fruitful result; thereafter he referred to the report submitted by the Company; action taken by the Revenue Authorities and the SDO; and, the final report prepared by the Collector and emphasized that merely on the basis of the report submitted by the Company, without conducting any proper inquiry, without application of mind, in a very casual manner the verbatim report submitted by the Company is considered by the Revenue Authorities and finally by the Collector and in a mechanical manner the permission is granted. Accordingly contending that no proper inquiry in the matter is conducted as required under section 5-A of the Act or under section 40 of the Land Acquisition Act, Shri Rusia submits that the action taken in the manner in a mechanical way by the Collector is unsustainable. Learned counsel for the petitioner thereafter took me through the provisions of Section 4, Section 5-A; and, section 6 of the Land Acquisition Act, and submitted that without conducting any inquiry and without deciding the objection of the aggrieved persons under section 5-A directly the Notification is issued under section 6, without following the procedure contemplated under section 5-A. By taking me through various documents, it was tried to be emphasized by Shri Rusia, vehemently that the entire statutory procedure contemplated under section 5-A has been given a go-by and the action is taken without complying with the requirement of section 5-A. That apart, it is stated that no public purpose is involved in the matter of acquisition. Referring to the definition of 'public purpose' as contained in section 3(f) and the agreement in question, wherein liberty is granted to the Company to sell the electricity and only 5% of the power generated is to be used for government purpose, learned counsel argued that the requirement of law has not been complied with.

3- That apart, it is pointed out by Shri Vivek Rusia that respondents in the return have stated that action is taken under Chapter VII of the Land Acquisition Act, but the procedure contemplated under Chapter VII has not been followed. Accordingly, it is his case that the entire action taken in the matter is not proper, without application of mind and without taking note of the requirement of law, particularly the requirement of section 5-A, therefore, the entire action taken is unsustainable.

4- Placing reliance on the following two judgments of the Supreme Court: *The State of Gujarat and another Vs. Patel Chaturbhai Narsinbhai and others,* AIR 1975 SC 629; and, *Surinder Singh Brar and others Vs. Union of India and others*, 2012 STPL 588 SC, it is argued by Shri Vivek Rusia that complying with the requirement of section 5-A is a mandatory requirement and if the provisions of section 5-A have not been complied with, the entire action stands vitiated. Thereafter, referring to an unreported judgment of the Chhattisgarh High Court in W.P. No. 781/2011 (*Rakesh Kumar Vs. State of Chhattisgarh*) decided on 4.9.2012, Shri Rusia tried to indicate that violation of section 5-A is fatal to the entire acquisition proceedings and in the absence of proper inquiry being conducted and 'public purpose' being established, the entire action stands vitiated.

5- Accordingly, in sum and substance, the objection raised by Shri Vivek Rusia reads as follows:

(a) That, no 'public purpose' is involved in the matter of acquisition;

(b) The procedure under section 5-A of the Land Acquisition Act has not been followed;

(c) The Collector and the Revenue Authorities have not conducted a proper inquiry, in a mechanical manner the report of the Company is accepted and action taken without proper inquiry; and,

(d) Finally, it was said that the requirement of the procedure contemplated under Chapter VII has not been followed.

6- Shri Naman Nagrath, learned Senior Advocate appearing for respondent Company, refuted the aforesaid contentions put forth by Shri Vivek Rusia and at the very outset emphasized that the main thrust of the arguments

advanced by Shri Rusia was to the effect that the provisions of section 5-A has not been followed. Learned Senior Advocate inviting my attention to the provisions of Chapter VII of the Land Acquisition Act; and, the requirement contemplated under section 39 thereof, argued that when acquisition of land is undertaken for a Company then the procedure contemplated under Chapter VII has to be followed, and if the provision of Section 39 is taken note of, it would be clear that for acquisition of land by a Company, the provision of section 5-A is not made applicable, if an inquiry under section 40(1)(a) or (aa) is conducted. Reading section 39 and 40 together, Shri Naman Nagrath, learned Senior Advocate, tried to emphasize that when the acquisition is being undertaken for a Company, the requirement of law is to conduct inquiry and submission of report by the Collector either by following the procedure contemplated under section 5-A or an inquiry to be held in accordance to the stipulations contained in Section 40(1)(a), (aa), (b) as is indicated in the statute. Accordingly, he submits at the very outset that the main thrust of arguments of Shri Vivek Rusia to the effect that provision of Section 5-A is not correct, because in this case the inquiry as contemplated under sub-sections (1)(a), (aa) and (b) of section 40 has been complied with and by referring to the requirement of the statutory rule namely the Land Acquisition (Companies) Rules, 1963, learned Senior Advocate argued that in this case the State Government has already constituted the Land Acquisition Committee as required under Rule 3 i.e... vide Notification dated 24.1.1996, filed by the petitioner as Annexure P/6. The requirement of the conditions stipulated in Rule 4 have been taken note of and the entire inquiry is conducted in accordance to the said requirement of the Rules and thereafter the action is taken.

7- By taking me through the Report of the Collector; the Report of the SDO; and the reasons given by the Collector for according approval, Shri Naman Nagrath, learned Senior Advocate, argued that the action taken is after following the mandate of section 40 of the Land Acquisition Act read with the statutory provisions contemplated in the Rules of 1963, and by mere vague allegations it cannot be said that the inquiry is not properly conducted. Learned Senior Advocate referred to the report - Annexure P/8, submitted by the Committee; the report - Annexure P/9, submitted by the SDO; the report - Annexure P/10 of the Agriculture Department; and, the final proposal sent by the Collector in his report - Annexure P/11, and argued that a detailed inquiry meeting all the statutory requirement as contemplated under the Land Acquisition Act and the Rules of 1963 have been followed and Learned Senior

Advocate demonstrated by referring to pages 93, 94 and 95 of the Report of the Tehsildar; and, pages 101, 102 and 103 of the Report of the Collector to demonstrate as to how application of mind has been done and a decision taken. Accordingly, learned Senior Advocate argued that in this case after following the due procedure action has been taken and, therefore, the petitioner cannot have any grievance in the matter.

8- Shri Naman Nagrath, learned Senior Advocate, thereafter submitted that when acquisition of land is for a Company and when the requirement of Chapter VII is being followed and when inquiry is conducted in accordance to the requirement of Section 40, compliance with the requirement of section 5-A is not called for. Referring to the judgment in the case of *Surinder Singh Brar* (supra) relied upon by Shri Vivek Rusia, learned Senior Advocate argued that in these cases the applicability of Chapter VII was not taken note of and as the acquisition was under the General provisions contemplated under Part II, where compliance of Section 5-A was necessary, therefore, these judgments will not apply in the facts and circumstances of the present case. Similarly, learned Senior Advocate points out that in the case of Smt. Ritu Kedia (supra), rendered by the Chhattisgarh High Court, the facts and circumstances are entirely different and will not apply to this case. It was also submitted that in the said case the matter is sub judice before the Division Bench in a pending writ appeal..

9- Referring to an unreported judgment of the Supreme Court in the matter of acquisition of land for establishment of solar power or power stations and a judgment in the case of *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others,* 1997(1) SCC 134, Shri Naman Nagrath, learned Senior Advocate, argued that when land is acquired for projects pertaining to infra-structural development like establishment of power stations, interference should not be made until and unless statutory breach is established. Learned Senior Advocate emphasized that in this case except for making certain vague allegations with regard to non-compliance with regard to statutory provisions, no material or evidence is filed to show actual breach of rules or regulations statutory in nature and, therefore, it is emphasized by learned Senior Advocate that the petition be dismissed.

10- Finally, referring to the agreement in question and the criticism made by Shri Vivek Rusia with regard to liberty granted to the Company to sell the electricity generated by only giving 5% or 7% of the production to the State Government, learned Senior Advocate argued that nowhere in the country

nor in the State of MP, electricity is supplied free to the public. Even the Government Electricity Transmission and Generating Companies are selling electricity on a tariff fixed statutorily by the Electricity Regulatory Committee and in this case also the memorandum of agreement contemplates sale of electricity in accordance to the tariff fixed by the statutory regulatory committee. It is argued that electricity is a commodity which is scarce, there is shortage of power, Madhya Pradesh is facing acute power shortage because of which Farmers and agriculturists are suffering and, therefore, if land is being acquired for establishment of a power project, which helps in electricity generation, the same is a 'public purpose' and the contention that 'public purpose' is not served because electricity is being sold cannot be accepted because the law itself contemplates sale of electricity in a statutorily regulated manner.

11- That apart, Shri Naman Nagrath, learned Senior Advocate, refers to the fact that in this case award has already been passed, the writ petition was filed after the award was passed and learned Senior Advocate argued that the petitioners have deliberately filed this petition only to stall the acquisition proceedings on unjustified grounds, for their vested self-interest.

12- Shri R.D. Jain, learned Advocate General, also emphasized and argued on similar lines and submitted that once the award is passed, filing of the writ petition challenging the acquisition after the award was passed is not correct. It was submitted by him that the award in question with regard to acquisition proceedings were passed on 6.9.2012 and 9.9.2012, most of the persons accepted the award and this writ petition was filed after two months of the passing of the award, therefore, it is stated that challenge to the acquisition proceedings after passing of the award is unsustainable. In support of the aforesaid contention, attention of this Court is invited to the law laid down in the cases of *Swaika Properties (P) Limited and another Vs. State of Rajasthan and others*, 2008(4) SCC 695; *Municipal Council, Ahmednagar Vs. Shah Hyder Baig*, 2002 (2) SCC 48; and, *C. Padma Vs. Deputy Secretary to the Government of Tamil Nadu*, 1997 (2) SCC 627. Accordingly, learned Advocate General also prays for dismissal of this writ petition.

13- In reply to the arguments advanced by learned counsel for the respondents, Shri Vivek Rusia advanced two more contentions. His first contention was that in the matter of taking steps for purchase of land from the land owners by private negotiation, no opportunity of hearing has been granted

to the petitioners as required under Rule 4(1) of the Land Acquisition Companies Rules, 1963. It is stated that petitioners were never heard with regard to the purchase of land by private negotiation, which is the requirement of Rule 4, and as this statutory provision is violated, the action stands vitiated. Reliance in this regard is placed on the judgment rendered in the case of *Chaturbhai* (supra). Thereafter, it was argued by Shri Vivek Rusia, learned counsel, that Part VII of the Land Acquisition Act, the purpose of acquisition is to obtain the land for erection of dwelling houses for workmen employed by the company or for building or work for a company and the acquisition for establishment of a power plant does not fall within the purview of the purpose stipulated in Section 40(1)(a)(aa). Accordingly, it is argued by him that the entire proceedings stand vitiated.

14- In reply to the aforesaid submissions made by learned counsel for the petitioner Shri R.D. Jain, learned Advocate General, and Shri Naman Nagrath, learned Senior Advocate, submitted their explanation and rebuttal arguments and argued that in the petition no objection with regard to hearing on the question of purchase by negotiation is raised. Referring to paragraph 6(c) of the writ petition, learned counsel for the respondents submit that the only ground raised is that the requirement of Rule 4 has not been complied with and that respondent No.4 did not make efforts for purchase of the land by direct negotiation. It was never the case of the petitioners at any point of time that they were never heard in this regard. It is stated that this is a question of fact warranting inquiry and in the absence of pleadings or evidence in this regard at this stage of final hearing, such a question cannot be gone into. As far as the question of 'public purpose' or the purpose of acquisition under section 40(1)(a)(aa) is concerned, learned Advocate General and learned Senior Advocate invited my attention to section 165 of the Electricity Act, 2003 and the amendment to section 40 made by virtue of this provision, to say that the meaning of the term 'work' as contemplated under section 40 and section 41 of the Land Acquisition Act is deemed to include any work in connection with electricity to be supplied or work connected with generation and supply of electricity. That apart, inviting my attention to the judgment rendered by the Supreme Court in the case of *Fomento Resorts and Hotels Limited and another Vs. Minguel Martins and others,* (2009) 3 SCC 571, and the law laid down in paragraph 26 onwards; so also the principle laid down in the case of *R.L. Arora Vs. State of UP,* AIR 1962 SC 764; and, various other judgments referred to in paragraphs 28 and 29, in the case of

Fomento Resorts (supra), it is submitted that this contention of the petitioners cannot be accepted.

15- Having heard learned counsel for the parties and on a perusal of the records it is clear that the land in question is being acquired for the purpose of setting up of 660 x 3 MW Thermal Power Station and the entire proceedings for acquisition of the land is undertaken under Chapter VII of the Land Acquisition Act. During the course of hearing of this writ petition, the main thrust of arguments advanced by Shri Vivek Rusia was with regard to Point No.(b) i.e... non-compliance with the mandatory requirement of Section 5-A. As this point was given due emphasis and stress at the time of hearing, it is thought appropriate to consider this question at the very outset.

16- If the Scheme of Land Acquisition Act is taken note of, it would be seen that Part VII of the Land Acquisition Act contemplates a detailed procedure to be followed for acquisition of land for the companies. The Land Acquisition Act provides for the sequence which is to be followed and the proceedings to be undertaken in the matter of acquisition of land. At the very outset, a Notification under section 4 has to be made for which the procedure for conducting preliminary investigation commences. After a Notification is issued under section 4(a), the Government has to take a decision as to whether it is a case of emergency and, therefore, a special procedure contemplated is to be followed or not and thereafter action is to be taken in accordance to the requirement of Section 39 and thereafter under sections 40 and 41, in case of acquisition by the Company.

17- A perusal of section 39 would clearly show that before proceeding with the acquisition proceedings and before embarking upon taking-action under section 6 to section-37, both inclusive, certain inquiry has to be conducted, consent of the Government is to be obtained and proceeding under section 40 of the Act has to be undertaken and then an agreement entered into. If the provisions of section 40 are taken note of, it would be seen that this section lays down that consent shall not be given by the Government unless it is satisfied either on a report submitted by the Collector after inquiry under section 5-A or by an inquiry held as provided under matters covered under section 40, clauses (a), (aa), (b) etc, and it further contemplates that the inquiry shall be held by such officer and at such time as the Government may appoint. It is, therefore, clear from this provision that the appropriate government is given an option to conduct the inquiry either by following the

requirement of Section 5-A or Part VII i.e.... section 40 (1) (a), (aa), (b) etc and then take a decision for giving consent. That being so, the subjective satisfaction to be arrived at by the government with regard to grant of consent or not is to be undertaken by conducting the inquiry as contemplated under section 40 and this clearly gives an option either to hold the inquiry as required under section 5-A, or as required under the provisions of section 40(1)(a), (aa), (b) etc. It is also clear from a complete reading of this Chapter that the provisions of section 6 to 37 cannot be applied unless consent is given by the State Government and thereafter an agreement in accordance to the requirement of section 41 is executed. From the aforesaid legal provision, it is clear that if action is proposed to be taken in accordance to the requirement of Chapter VII, it is not necessary always that the inquiry should be conducted under section 5-A. Section 5-A can be given a go-by, if the inquiry is conducted as per the requirement of the second option available under section 40. This aspect of the matter has been considered by the Privy Council way back in the year 1932, in the case of Ezra Vs. Secretary of State, ILR 1932 Collector Page 605, and the Hon'ble Privy Council in the said case has made the following observations:

> "Now, upon the face of this enactment, there is no provision requiring or implying the presence or the knowledge of the owner of the land. The theory of the section would seem to be that the Government through its officer is to direct its attention to public interests, and it is significant that neither promoter on the one hand, nor possible objector on the other, is mentioned in the section. This does not imply that the officer is to disregard the existence of adverse rights, and the Government is given control of the enquiry, for this is all that is meant by its being empowered to appoint time and place; and all this derives the more significance from the fact that the Act, both in this stage and in the subsequent enquiry into value, takes the initiate out of the hands of the company and puts it in the hands of the Government. That the nature of first enquiry is in no sense litigious, and that the owners of the land are purposely ignored as parties, is strongly shown by the anxious provisions made as regards the second enquiry, for which (see 9) 'public notice' is to be given calling for claims for compensation and requiring all persons interested in the land to appear at a time and place

specified. Hence their Lordships disallowed the owner's objections, holding that, in view of the true nature of the section, no exception could be taken to the adequacy of the proceedings at the first enquiry."

18- If the aforesaid provisions are taken note of, it would be clear that the inquiry under the second part of Section 40 is undertaken by the Government and the Government takes care of 'public interest' involved in the matter and when acquisition is being done for a Company, the procedure contemplated under section 5-A is given a go-by. In view of the above, the first ground raised by Shri Vivek Rusia with regard to non-compliance of the provisions of section 5-A is found to be wholly unsustainable and cannot be accepted and in that view of the matter, the judgments relied upon by Shri Vivek Rusia also will not be applicable.

19- The next question canvassed is that no 'public interest' is being served. It was only stated that land is acquired by a Company, which is said to be a power project and memorandum of understanding gives no right to sell electricity. Merely because electricity is being sold and Company is granted liberty to make some profit, Shri Rusia argued that there is no 'public interest' involved.

20- Determination of 'public interest' for the purpose of acquisition has to be considered in the light of the fact as to whether general interest of the community at large is being taken note of and the purpose of acquisition is such that the public at large would be benefitted?

21- In the present case, it is common knowledge that there is acute shortage of electricity in the State of Madhya Pradesh and in remote villages, for 8 to 10 hours everyday, power supply is not made. The State Government is making an endeavour for establishing power project with participation of private enterprises and it is in furtherance to this policy of the State Government that the project in question is being established. Electricity generation and distribution is governed by statutory provisions as are contained in the Electricity Act of 2003 and sale of electricity is also statutorily controlled and the tariff is fixed by the statutory authority so created namely the Electricity Regulatory Commission. Supply of electricity after its generation to the general public is not done free of cost, but it is done on recovery of certain dues i.e... the electricity tariff, and the tariff is fixed in accordance to the statutory provisions. In the agreement also, the provision contemplated is that the

electricity duty shall be charged by the Company in accordance to the tariff fixed by the Electricity Regulatory Committee. That being so, when the law itself contemplates fixing of tariff in a particular manner and charging of the same by the generating or transmitting Company, in accordance to the tariff fixed, merely because in the memo of agreement a provision in accordance to the statutory scheme is incorporated that does not mean that the 'public service' is not existing in the matter. It is a case where if the report of the Collector - Annexure P/11 is taken note of, it would be seen that he has adverted to consider the question of existence of 'public purpose' and has recorded a finding that the purpose of generation of electricity, establishment of the power project is in the interest of public and has given certain reasons for the same. Except for contending that no 'public purpose' would be served, no material or evidence is put forth or brought to the notice of this Court to show that 'public purpose' is not involved in the matter. Accordingly, I am not inclined to hold that in the matter of acquisition of the land in question, no 'public purpose' is involved. That apart, when the land is being acquired for a Company and when the requirement of Chapter VII is being fully complied with, no interference is called for.

22- The next question canvassed was that the requirement of Chapter VII has not been complied with and the report submitted by the Collector and the Revenue Authorities is without application of mind. Both these questions are being taken up together for consideration.

23- For the purpose of acquisition of land for a Company, as already indicated hereinabove, the requirement of Chapter VII has to be followed and in exercise of the powers conferred under section 55 of the Land Acquisition Act, statutory rules for acquisition of land for Companies under Part VII is formulated. This Rule lays down a detailed procedure to be followed and if the procedure contemplated in these rules are taken note of, it would be seen that a Land Acquisition Committee is constituted under Rule 3, consisting of Members as contemplated under sub-rule (2) of Rule 3 and thereafter the material and information required for recording suggestion of the appropriate Government for acquisition is contemplated under Chapter IV and the seven criterion are laid down, with regard to which information is required to be collected. The criterion laid down are: efforts made by the Company to acquire land from the local area by negotiation etc; suitability of the land; proposed land should not be excess to the position of the Company to utilize the land expeditiously; and, the land should not be good agricultural land. Sub-rule (2)

of Rule 4 contemplates that the Collector shall give the Company a reasonable opportunity of making representation and certain inquiry has to be conducted in the manner contemplated. If the procedure followed in the present case is evaluated in the back drop of the aforesaid rules, it would be seen that the Company in its communication made vide Annexure P/2 on 4.10.2010 gave the specifications and details of the land required; it also indicated that the Company tried to purchase the land, but as most of the land situated in the village belongs to Adivasi persons, purchase of the land from these persons without permission of the statutory authority like the Collector is not permissible and it is also stated that most of the land is uncultivated barren land and is not irrigated. Based on the details submitted by the Company, the Collector called for reports from the Revenue Department and the Tehsildar - Annexures P/4, P/5 and P/6 would go to show that the reports submitted were with regard to various statutory requirement and information that are contained in Rule 4(1) and Rule 4(2), of the Rules of 1963, and before proceeding in the matter, the opinion of the Land Acquisition Committee appointed under section 3 was also taken and based on the entire material, the Collector prepared his report - Annexure P/11 and forwarded it to the State Government. If the report of the SDO and the Agricultural Officer, submitted to the Collector and the findings recorded by the Collector in his final opinion forwarded to the State Government as contained in Annexures P/10 and P/11 are taken note of, it would be seen that the Collector has adverted to consider various question and in a detailed manner the requirement of Rule 4 has been complied with.

24- Shri Naman Nagrath, learned Senior Advocate, has demonstrated before this Court as to how and in what manner the action is taken. Except for contending that the report is prepared mechanically and in verbatim submissions made by the Company is accepted, Shri Vivek Rusia is unable to point out to this Court as to how and in what manner illegality has been committed. If the requirement of Rule 4 is taken note of, the requirement itself contemplates submission of the representation by the Company with regard to various aspects of the matter and inquiry into these aspects of the matter by the Collector. Once on going through the documents it is clear that the requirement of the rule has been complied with, and when nothing is brought to the notice of this Court on the basis of which non-compliance of the statutory provisions can be made out, merely on the basis of vague and unspecified allegations, it is not necessary for this Court to go and conduct any further inquiry in this aspect of the matter. Even though Shri Naman Nagrath, learned

Senior Advocate, during the course of hearing by taking me through the various points in the report of the SDO, the Collector and the Agriculture Department tried to emphasize that the Collector has taken note of various aspects of the matter and has given his own opinion, which shows application of mind. In the absence of anything being shown to this Court that what has been stated by Shri Naman Nagrath is not correct, I am not inclined to go into these details, except to say that the report does show application of mind and they are in conformity with the requirement of the statutory rules as indicated hereinabove.

25- It may be taken note of that when arguments were advanced at length at the initial stage, Shri Vivek Rusia had raised only three main contentions. They were - that the requirement of section 5-A has not been complied with; there is no 'public purpose'; and, the Collector has acted in a mechanical manner. All these questions have been considered as indicated hereinabove and this Court has already arrived at a conclusion that the same does not warrant any consideration. That apart, in the judgments relied upon by Shri Naman Nagrath, learned Senior Advocate, particularly in the cases of *Ramniklal N. Bhutta and another* (supra); *Larsen & Toubro Limited Vs. State of Gujarat and others*, (1998) 4 SCC 387; and, *Laxmi Narayan Mishra Vs. State of MP and others*, 2010 (2) MPLJ 236, the requirement of law for the purpose of acquisition for a company and the requirement of inquiry to be conducted under Rule 4 of the Land Acquisition Rules, have been elaborately dealt with and the law crystallized in this regard clearly shows that it is not necessary for the Collector to personally examine all the details himself. The Collector can call for report from his subordinate officers and can take action on being subjectively satisfied with regard to the requirement being fulfilled. In this regard, the observations made by the Supreme Court in paragraph 10, in the case of *Larsen & Toubro* (supra), may be taken note of. The judgments indicate that if substantive compliance of the requirement of law has been established, interference into such matters should not be made. That being the legal position and in the light of the findings as are recorded hereinabove, prima facie the grounds initially canvassed by Shri Vivek Rusia in the matter are found to be unsustainable.

26- However, as two more additional grounds were raised by Shri Vivek Rusia after submissions were made by the respondents, the same are to be looked into.

27- Placing heavy reliance on the judgment rendered by the Supreme Court

in the case of *Chaturbhai* (supra), it was argued by learned counsel for the petitioners that opportunity of personal hearing to the petitioners with regard to the efforts made by the Company for purchase of land at a reasonable price by mutual/private negotiation has not been done and, therefore, the entire action is vitiated.

28- In the entire writ petition, neither in the factual assertions or the grounds raised, there is any whisper by the petitioners with regard to personal hearing on this count. The question as to whether a personal hearing in this regard was granted or not is a question of fact and normally without there being a pleading in this regard, proper inquiry into the matter would not be possible. However, if the documents produced by the respondents and the records are perused, it would be seen that it was the specific case of the company that efforts were made for purchase of the property by direct negotiation with the land owners, but it did not materialize and it was also indicated that out of the total area of 486.620 Hectares, more than 12% of the land belongs to tribals and Adivasis, and under the law of transfer of property applicable in the State of Madhya Pradesh purchase of land from these persons directly without permission of the Collector or Revenue Officers is not permissible. Reports available in this regard, from page 73 onwards, indicate that the Company in its reply and throughout the representation made to the Collector, have come out with a case that they made efforts for acquisition of the land through personal negotiation, but the same failed. Now, at the time of hearing of this writ petition, petitioners say that they were not heard, but in none of the representations or objections submitted by the petitioners is there anything to show that such an objection was ever raised. That being so, it has to be assumed by this Court that in the reports submitted to the Collector and various other authorities, the assertion made to the effect that the Company took steps for purchase of land through personal negotiation and the same failed is a correct fact and there is no reason for disbelieving the same. Contention of the petitioners that they were not heard on this question is a statement made without any basis and without any material to substantiate the same. In this regard, the State has also filed a detailed reply and paragraphs 16 and 19 of the same also goes to show that negotiations were made and the same failed. In the report - Annexure R/5 dated 27.11.2010 and various other documents, indications in this regard are available and, therefore, I am of the considered view that now the petitioners cannot raise these grounds and the law laid down in the case of *Chaturbhai* (supra) would not apply in the peculiar facts and circumstances

of the present case.

29- In this regard, the observations made by the Supreme Court in the case of *Larsen & Toubro* (supra) may be taken note of, in which the aforesaid principle laid down is squarely applicable in the present case also with regard to violation of the requirement of Rule 4, as canvassed by Shri Vivek Rusia, learned counsel appearing for the petitioners.

30- Similarly, a Division Bench of this Court in the case of *Laxmi Narayan Mishra* (supra) has also taken note of the requirement of Rule 4. If the principle laid down in the said judgment are taken note of, I find no error in the procedure followed in the present case with regard to the inquiry conducted under section 40 read with Rule 4.

31- As far as the second ground with regard to the provisions of section 40(1)(a), (aa) and (b) being not applicable for the purpose of present acquisition is concerned, I find the aforesaid contention to be wholly misconceived. This question has already been considered by the Supreme Court in the case of *Fomento Resorts* (supra) and after considering the law laid down by the Supreme Court in various cases, including *R.L. Arora* (supra), in paragraphs 26, 27, 28 and 29, the matter has been dealt with and similar contentions rejected:

> "26. In this case, we are not concerned with Clause (a) of Section 40(1) because the land in survey Nos.803 (new No.246/2) and 8042 (new No. 245/2) was not acquired for erection of dwelling houses for workmen employed by appellant No.1 or for provision of amenities directly connected therewith. The dispute between the parties centers round the remaining two clauses of Section 40(1). According to the appellants, the acquisition was under Clause (aa), whereas writ-petitioners (private respondents herein) pleaded that the acquisition was under Clause (b). A careful reading of the two clauses shows that while Clause (aa) envisages acquisition for the construction of some building or work for a company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, Clause (b) refers to acquisition for construction of some work which is likely to prove useful to the public. The difference in the language of the two clauses clearly brings out this distinction. In the second part of Clause (aa), the legislature has used the expression 'in any industry or work which is for a public purpose'. This means that

the particular acquisition can be treated to have been made under that clause if it is for construction of some building or work for a company which is engaged or is likely to engage itself in any industry or work which may not necessarily be useful to the public in general. As against this, usefulness of the construction of some work to the general public is sine qua non for acquisition under Clause (b).

27. The expression "public purpose" used in Clause (aa) was interpreted in *R.L. Arora vs. State of Uttar Pradesh & others* [(1964] 6 SCR 784] (herein after referred to "second *R.L. Arora's case"*) which was instituted by the land owner for striking down the amendment made in 1961 for validating the acquisition, which was quashed in the first R.L. Arora's case. It was argued on behalf of the petitioner that even if the amendment was not treated ultra vires the provisions of the Constitution, the disputed acquisition is liable to be annulled because the condition prescribed in Clause (aa) of Section 40(1) was not fulfilled, inasmuch as the acquisition was not for a public purpose. It was submitted that unless there was any direct connection or close nexus between the articles produced by the company and general good of the public, the impugned acquisition cannot be treated as covered by Clause (aa). The majority of the Constitution Bench rejected this argument and held :[*R.L. Arora (2) Case, AIR pp. 1236-38, para 9*].

"9. In approaching the question of construction of this clause, it cannot be forgotten that the amendment was made in consequence of the decision of this Court in *R.L. Arora* (1) case and the intention of Parliament was to fill the lacuna, which, according to that decision, existed in the Act in the matter of acquisitions for a company; .... Further, a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute. .... Therefore, we have to see whether the provision in clause (aa) bears another construction also in the setting in which it appears and in the circumstances in which it

was put on the statute book and also in view of the language used in the clause. The circumstances in which the amendment came to be made have already been mentioned by us and the intention of Parliament clearly was to fill up the lacuna in the Act which became evident on the decision of this Court in *R.L. Arora case* (1).... It was only for such a company that land was to be acquired compulsorily and the acquisition was for the construction of some building or work for such a company i.e. a company engaged or about to be engaged in some industry or work which is for a public purpose. In this setting it seems to us reasonable to hold that the intention of Parliament could only have been that land should be acquired for such building or work for a company as would subserve the public purpose of the company; it could not have been intended, considering the setting in which clause (aa) was introduced, that land could be acquired for a building or work which would not subserve the public purpose of the company .... Further, acquisition is for the construction of some building or work for a company and the nature of that company is that it is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose. When therefore the building or work is for such a company it seems to us that it is reasonable to hold that the nature of the building or work to be constructed takes colour from the nature of the company for which it is to be constructed. We are therefore of opinion that the literal and mechanical construction for which the petitioner contends is neither the only nor the true construction of clause (aa) and that when clause (aa) provides for acquisition of land needed for construction of some building or work it implicitly intends that the building or work which is to be constructed must be such as to *subserve the public purpose of the industry or work in which the company is engaged or is about to be engaged.* In short, the words 'building or work' used in clause (aa) take their colour from the adjectival clause which governs the company for which the building; or work is being constructed .... It is only in these cases where the company is engaged in an industry or work of that kind and where the building or work is also constructed for a purpose of that kind, which is a public purpose, that acquisition can be made under clause (aa). As we read the clause we are of opinion that

the public purpose of the company for which acquisition is to be made cannot be divorced from the purpose of the building or work and it is not open for such a company to acquire land under clause (aa) for a building or work which will not subserve the public purpose of the company".

(Emphasis supplied)

28. The same question was again considered in *State of West Bengal and another vs. Surendra Nath Bhattacharya and another* [(1980) 3 SCC 237]. In that case, acquisition was made on behalf of a company which was carrying on the business of manufacturing of sodium silicate, plaster of paris etc. The manufactured goods of the company were widely used all over India, saving large amount of foreign exchange which was earlier used for importing similar goods. The Division Bench of Calcutta High Court quashed the acquisition on the ground that it was not for a public purpose. After noticing the majority judgment in second *R.L. Arora's (2) case*, the Court held :

"10. The effect of the observations made above leads to the irresistible conclusion that the words "public purpose" are not to be interpreted in a restricted sense but takes colour from the nature of the industry itself, the articles that it manufactures and the benefit to the people that it subserves. This Court clearly indicated that the land should be acquired for building or work which would serve the public purpose of the company and not public purpose as it is generally understood. In the instant case, we have also set out the nature of the products of the company and have stressed the fact that the articles produced by the company are used for the benefit of the people and as it saves lot of foreign exchange, it is unmistakably for the general good of the country particularly from the economic point of view. In these circumstances, it cannot be said that the object of the company in extending its operations by enlarging the area of its production was not for the public purpose of the company. Taking an overall picture of the nature of the products of the company, its various activities, the general public good that it seeks to achieve and

the great benefit that the people derive, it cannot be said that the acquisition, in the present case, was not for a public purpose. According to the test laid down by this Court, it is sufficient if it is shown that the building sought to be built or the work undertaken subserves the public purpose of the company which is completely fulfilled in this case."

29. In *Pratibha Nema and others vs. State of M.P. and others* [(2003) 10 SCC 626], this Court analysed the provisions of Part II and VII of the 1894 Act, referred to the earlier judgments in *Somwanti vs. State of Punjab* [AIR 1963 SC 151], second *R.L. Arora's case, Jage Ram vs. State of Haryana* [(1971) 1 SCC 671], *Bajirao T. Kote vs. State of Maharashtra* [(1995) 2 SCC 442] and observed:-

"19. These decisions establish that a public purpose is involved in the acquisition of land for setting up an industry in the private sector as it would ultimately benefit the people. However, we would like to add that any and every industry need not necessarily promote public purpose and there could be exceptions which negate the public purpose. But, it must be borne in mind that the satisfaction of the Government as to the existence of public purpose cannot be lightly faulted and it must remain uppermost in the mind of the court.

* * * *

22. Thus the distinction between public purpose acquisition and Part VII acquisition has got blurred under the impact of judicial interpretation of relevant provisions. The main and perhaps the decisive distinction lies in the fact whether the cost of acquisition comes out of public funds wholly or partly. Here again, even a token or nominal contribution by the Government was held to be sufficient compliance with the second proviso to Section 6 as held in a catena of decisions. The net result is that by contributing even a trifling sum, the character and pattern of acquisition could be changed by the Government. In ultimate analysis, what is considered to be an acquisition for facilitating the setting up of an industry in the private sector could get imbued with the character of public purpose

> acquisition if only the Government comes forward to sanction the payment of a nominal sum towards compensation. In the present state of law, that seems to be the real position."

32- That apart, in the present case the acquisition of land is for the purpose of establishment of a Mega Power Plant is for generation and production of electricity. Section 165 of the Electricity Act, 2003 makes amendment to sections 40 and 41 of the Land Acquisition Act, 1894 and it is contemplated in the Electricity Act that the term 'work' as is used in sections 40(1) and 41 of the Land Acquisition Act, shall be deemed to include electricity to be supplied by means of the work to be constructed. If that be so, the purpose for which the land is acquired would also include the purpose of establishment of the Thermal Power Plant and acquisition of land for construction of the work for establishing the Thermal Power Plant. Accordingly, the second ground canvassed by Shri Vivek Rusia is also found to be unsustainable for the reasons as are indicated hereinabove.

33- Apart from the aforesaid, it is clear that the petitioners have filed this writ petition after the award was passed on 9.9.2011 as is evident from Annexure R/2, and petitioners 8, 13, 31, 37 and 43 have already taken the amount of compensation awarded and the return filed by the State Government, particularly paragraphs 11, 28, 29, 30 and 31, goes to show that most of the agriculturists have accepted the compensation and more than 120 Acres of land have been given in possession to the Company in question. Taking note of the totality of the circumstances and the material that has come on record, this Court does not deem it appropriate to interfere into the matter, at the instance of the petitioners.

34- In the case of *Ramniklal* (supra), the concept of land acquisition, its requirement, the 'public purpose' involved in the matter, the exercise of powers by the High Court under Article 226, and the principle to be followed by the High Court in the matter of balancing competing interest has been elaborately dealt with and finally in paragraph 10, the principle has been crystallized in the following manner:

> "10. Before parting with this case, we think it necessary to make a few observations relevant to land acquisition proceedings. Our country is now launched upon an ambitious programme of all-round economic advancement to make our economy competitive in the world market. We are anxious to

attract foreign direct investment to the maximum extent. We propose to compete with china economically. We wish to attain the pace of progress achieved by some of the Asian countries, referred to as "Asian tigers", e.g., South Korea, Taiwan and Singapore. It is, however, recognized on all hands that the infrastructure necessary for sustaining such a pace of progress is woefully lacking in our country. The means of transportation, power and communications are in dire need of substantial improvement, expansion and modernizations. These things very often call for acquisition of land and that too without any delay. It is, however, natural that in most of these cases, the persons affected challenge the acquisition proceedings in courts. These challenge the acquisition proceedings in courts. These challenges are generally in shape of writ petitions filed on High Courts. Invariably, stay of acquisition is asked for and in some cases, orders by way of stay or injunction are also made. Whatever may have been the practices in the past, a time has come where the courts should keep the larger public interest in mind while exercising their power or grant in stay/injunction. The power under Article 226 is discretionary. It will be exercised only in furtherance of interests of justice and not merely on the making out of a legal point. And in the matter of land acquisition for public purposes, the interests of justice and the public purposes, the interests of justice and the public interest coalesce. They are very often one and the same. Even in civil suit, granting of injunction or other similar orders, more particularly of an interlocutory nature, is equally discretionary. The courts have to weigh the public interest vis-à-vis the private interest while exercising the power under Article 226 - indeed any of their discretionary powers. It may even be open to the High Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interested shall also be entitled to a particular amount of damages to be awarded as a lumpsum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceedings is not the only mode of redress. To wit, it is ultimately a matter of

balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the courts while dealing with challenges to acquisition proceedings.

35- The learned Advocate General has produced the entire original records with regard to acquisition and the proceedings held and on going through the same, it is seen that all the requirements with regard to conduct of an inquiry under Rule 40 read with Rules 3 and 4 of the Land Acquisition Companies Rules have been complied with and this Court does not find any error in the matter warranting interference.

36- Accordingly, both the petitions stand dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 1907
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 8445/2011(S) (Gwalior) decided on 11 July, 2013

BHASKAR RAMCHANDRA JOSHI ... Petitioner
Vs.
STATE OF M.P. & ors. ... Respondents

A. Service Law - Gratuity or retiral dues - **Right to get the aforesaid benefits is a constitutional right - Gratuity or retiral dues can be withheld or reduced only as per provision made under Services Rules - No material on record to show that respondents have taken any action in invoking the said rules to stop or withhold gratuity or other dues - Respondents erred in withholding the amount of the petitioner regarding gratuity and computation. (Paras 11 & 12)**

क. सेवा विधि – उपदान या निवृत्ति देयक – उपरोक्त लाभ प्राप्त करने का अधिकार संवैधानिक अधिकार है – उपदान या निवृत्ति देयकों को केवल सेवा नियमों के अंतर्गत दिये गये उपबंध के अनुसार ही रोका या कम किया जा सकता है – अभिलेख पर यह दर्शाने के लिये कोई सामग्री नहीं कि प्रत्यर्थीगण द्वारा उपदान या अन्य देयकों को बंद करने या रोकने के लिये उक्त नियमों का अवलंब लेकर कोई कार्यवाही की गई – याची के उपदान एवं संगणना के संबंध में रकम रोककर प्रत्यर्थीगण ने त्रुटि की।

B. Constitution - Article 226 - Writ Petition - **Delay in filing**

- Delay cannot be a ground for non-payment of retiral dues. (Para 11)

ख. संविधान – अनुच्छेद 226 – रिट याचिका – प्रस्तुतीकरण में विलम्ब – निवृत्ति देयकों के असंदाय के लिये, विलंब आधार नहीं हो सकता।

C. Constitution - Article 226 - Writ Petition - Delay in filing
- Respondents continuously recommended the case of the petitioner for release of the amount in question which gave bona fide impression to the petitioner that his grievances will be redressal departmentally - Petitioner cannot be termed as sleeping litigant or a fence sitter - Cannot be thrown on the ground of delay and laches. (Para 11)

ग. संविधान – अनुच्छेद 226 – रिट याचिका – प्रस्तुतीकरण में विलंब – प्रत्यर्थीगण ने प्रश्नगत रकम को मुक्त किये जाने के लिये याची के प्रकरण की लगातार अनुशंसा की जिससे याची ने सद्भाविक रुप में विश्वास कर लिया कि उसकी शिकायतों का विभागीय रुप से निवारण किया जायेगा – याची को निष्क्रिय मुकदमेबाज या किनारे बैठकर सिर्फ देखने वाला नहीं कहा जा सकता – विलंब या गफलत के आधार पर बाहर नहीं किया जा सकता।

Cases referred :

AIR 1971 SC 530, AIR 1985 SC 553, AIR 1985 SC 356, AIR 1961 SC 298, AIR 1968 SC 1053, AIR 1971 SC 1409, (2012) 3 Mah. L.J. 126, (1994) 2 SCC 240.

S.G. Chitnis, for the petitioner.
Nidhi Patankar, G.A., for the respondents/State.

ORDER

Sujoy Paul, J: By invoking the jurisdiction of this Court under Article 226 of Constitution, the petitioner has prayed for the direction to the respondents to pay amount of computation and gratuity with interest from the year 2000. It is also prayed that the respondents be directed to pay the costs of the litigation.

2. The petitioner was working as Sub-Engineer in Public Works Department (PWD). In 1989-90 some relief work was done on different roads. It is the case of the petitioner that no fund was alloted for payment of work, therefore, the Executive Engineer had granted the fund for payment of work from the head "A/R to roads" in August, 1990. The work was inspected and Collector Datia and Revenue Authority showed their satisfaction.

3. The Auditor has taken objection for the payment of Rs.1,16,113/- done by other head, i.e. "A/R to Roads". Accordingly, the amount paid by the Executive Engineer is marked as miscellaneous advance to the petitioner. The amount was paid by the Executive Engineer through Revenue authority. Petitioner was nowhere in the picture in the matter of drawing or paying the said amount. The petitioner further contends that he came to know about the action taken by respondents regarding the said advance of Rs.1,16,113/- and then submitted series of representations to the respondents. In turn, the respondent No.5 / Executive Engineer recommended the matter to the Superintendent Engineer on 14.07.2008, Annexure P/2. The Superintendent Engineer authorised the Executive Engineer for adjustment of the amount by letter dated 16.10.2008 Annexure P/3. The Executive Engineer wrote another letter dated 29.12.2008 to the Collector, District Datia for allotment of fund so that the advance amount marked in the name of petitioner can be adjusted. This letter is filed by the petitioner as Annexure P/4.

4. The petitioner contends that verbal assurances were given to him for refund of the amount after allotment from Collector, but the said assurance could not be translated in reality. The petitioner preferred another representation dated 27.10.2010. The petitioner has stated that because of aforesaid improper action on the part of the respondents, the petitioner has suffered a loss of Rs. 3.00 lacs from the year 2000. The petitioner has also suffered loss of interest on the said amount. The petitioner ultimately sent legal notice on 18.10.2011 Annexure P/6 to the respondent but it could not fetch any result. Although by Annexure P/8 the Executive Engineer recommended that the miscellaneous advance against the petitioner's name be cancelled and allotment be made so that amount can be adjusted, but this letter also could not see the day of implementation. On the basis of aforesaid, it is stated that the action of respondents in not releasing the computation amount and gratuity is bad in law. Lastly, the petitioner contends that delay in payment is solely attributable to the respondents and because of delay the petitioner is entitled for the interest on delayed payment.

5. The said contention is opposed by the respondents by filing return. It is the stand of the respondents that petitioner stood retired from the post of Assistant Engineer on 31.07.2000. It is stated that there was a failure on the part of the petitioner as he did not prepare muster roll of the labourer engaged in the project and did not submit before the competent authority up to March 1990. The petitioner did not complete the formalities within time and because

of this delay the allotment of amount was lapsed and the payment was made by the department in favour of the labourer and this amount was adjusted as a miscellaneous advance in the account of petitioner and for this reason the clearance in respect of payment of gratuity and computation amount could not be made in favour of the petitioner. The petitioner belatedly approached the authority and therefore, he is not entitled for any relief.

6. In view of the aforesaid stand, the question is whether respondents are justified in withholding the said amount and whether said amount of gratuity and retiral dues can be forfeited in the manner respondents have done. Another question is whether relief can be denied on the alleged ground of delay in filing the writ petition.

7. A Perusal of letter Annexure P/2 dated 14.07.2008 shows that it was recommended that the work was measured by Sub Divisional Officer on 100% basis and therefore all the proceedings were complete. Thus, it was recommended that amount be released. The Superintendent Engineer by letter dated 16.10.2008 directed the Executive Engineer to do the needful because he is competent to do so. Thereafter, the Executive Engineer wrote a letter to Collector seeking allotment of fund for the purpose of payment. It is gathered that in none of these letters any allegation is made against the petitioner for any irregularity or negligence etc. On the contrary, recommendation was made to release the amount on the ground that the entire process was supervised by the Revenue authorities.

8. It is also not the case of the respondents that petitioner was subjected to any disciplinary proceedings or criminal case because of alleged inaction in making the payment. The most important question is whether the amount of gratuity and terminal dues can be withheld in this manner. It is apt to remember that under Article 300-A of the Constitution of India, protection has been granted to the citizen that he shall not be deprived of his property save by authority of law. The word 'Property' used in this Article has wide meaning.

9. Property in legal sense means an aggregate of rights which are guaranteed and protected by law. It extends to every species of valuable right and interest, more particularly, ownership and exclusive right to a thing, the right to dispose of the thing in every legal way, to process it, to use it and to exclude everyone else from interfering with it. The dominion

or indefinite right of use or disposition which one may lawfully exercise over particular things or subjects is called "property". The exclusive right of possessing, enjoying and disposing of thing is property in legal parameters. Therefore, the word "property" connotes everything which is subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate or status. Property, therefore, within constitutional protection denotes group of rights inhering citizen's relation to physical thing, a right to possess, use and dispose of it in accordance with law. The property is the most comprehensive of all terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have. The term "property" has a most extensive signification and according to legal definition, consists of free use, enjoyment and disposition by a person of all his acquisitions without any control of diminution, save only by the laws of the land.

10. The Apex Court on different occasions had considered the scope and ambit of property. In *Madhav Rao Scindia Vs. Union of India* AIR 1971 SC 530 opined that Prievy Purse payable to ex-rulers is property. In *Nagraj, K v. State of A.P.* AIR 1985 SC 553, Apex Court opined that right of person to his livelihood is property which is subject to rules of retirement. In *State of Kerala v. Padmanabhan* AIR 1985 SC 356 the Apex Court opined that right of pension is property under the Government service Rules, In *Madhav Rao Scindia Vs.State of M.P.,* AIR 1961 SC 298 and *State of M.P. Vs. Ranojirao,* AIR 1968 SC 1053, the Apex Court opined that property in the context of Article 300-A includes 'money', salary which has accrued pension, and cash grants annually payable by the Government ; pension due under Government Service Rules; a right to bonus and other sums due to employees under statute. This view was also taken in AIR 1971 SC 1409 (*Deokinandan Vs. State of Bihar*). Bombay High Court in the case reported in (2012) 3 Mah.L.J 126 (*Shapoor M. Mehra Vs. Allahabad Bank*) opined that retiral benefits including pension and gratuity constitute a valuable right in property. In *Deokinandan* (supra) Apex Court opined as under:

> "(i) The right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no powers to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by

sub-article (5) of Article 19. Therefore, it follows that the order denying the petitioner right to receive pension affects the fundamental right of the petitioner under Article 19(1)(f) and 31(1) of the Constitution and as such the writ petition under Article 32 is maintainable."

11. In the light of aforesaid legal position, it is crystal clear that right to get the aforesaid benefits is constitutional right. Gratuity or retiral dues can be withheld or reduced only as per provision made under M.P. Civil Services (Pension) Rules, 1976. In the present case, there is no material on record to show that respondents have taken any action in invoking the said rules to stop or withhold gratuity or other dues. This is also settled in law that delay cannot be a ground for non-payment of retiral dues. Even otherwise, the record shows that respondents continuously recommended the case of the petitioner for release of the amount in question which gave bonafide impression to the petitioner that his grievances will be readdressed departmentally. When it could not be materialized, at the end, he sent legal notice and then filed this petition. The petitioner cannot be termed as sleeping litigant or a fence sitter. He was vigilant for his rights and, therefore, cannot be thrown on the ground of delay and laches. In fact there is no delay in filing the petition.

12. On the basis of aforesaid analysis, I have no doubt that respondents have erred in withholding the amount of the petitioner regarding gratuity and computation. The delay is solely attributable to the respondents and petitioner cannot be blamed for the same. Accordingly, petition is allowed. The action of the respondents in not paying the amount in question is declared as arbitrary and illegal. The respondents are directed to release the amount within 90 days from the date of production of this order. The amount shall carry interest @ 6% p.a. on delayed payment from the date of entitlement till the date of realization as per judgment of Supreme Court reported in (1994) 2 SCC 240 (*Union of India Vs. Justice S.S. Sandhawalia (Retd.) and others*). In addition, the petitioner shall get costs because respondents have unnecessarily compelled him to file this avoidable litigation. It is calculated as Rs.5000/-, which shall be paid by the respondents to the petitioner within the same time.

13. Petition is allowed.

Petition allowed.

I.L.R. [2013] M.P., 1913
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 5027/2013 (Gwalior) decided on 5 August, 2013

ROTARY CLUB BIRLA NAGAR & ors. ... Petitioners
Vs.
ROTARY INTERNATIONAL THROUGH GENERAL SECRETARY ... Respondent

A. ***Constitution - Article 12 & 226 - 'State' or any 'other authority' - Burden of proof*** **- Held - Whenever it is submitted that a body is 'State' or its 'instrumentality' or an 'authority', the burden is on the petitioner to establish it by placing adequate material that the said body falls within the ambit of Article 12 - In absence of basic material, no definite opinion can be formed by the Court in this regard. (Para 11)**

क. संविधान – अनुच्छेद 12 व 226 – 'राज्य' या कोई 'अन्य पाधिकारी' – सबूत का भार – अभिनिर्धारित – जब कभी यह निवेदित किया जाता है कि कोई निकाय 'राज्य' या उसका 'अभिकरण' या कोई 'प्राधिकारी' है, तब पर्याप्त सामग्री प्रस्तुत करके उसे साबित करने का भार याची पर होगा कि उक्त निकाय, अनुच्छेद 12 की परिधि के भीतर आता है – मौलिक सामग्री की अनुपस्थिति में, इस संबंध में न्यायालय द्वारा कोई निश्चित मत नहीं बनाया जा सकता।

B. ***Constitution - Article 21 & 226 - Writ Petition*** **- In-house dispute of election amongst the members/office bearers of private club - Held - Writ petition is not maintainable. (Para 16)**

ख. संविधान – अनुच्छेद 21 व 226 – रिट याचिका – गैर सरकारी गोष्ठी मंडल (प्राईवेट क्लब) के पदाधिकारियों/सदस्यों के बीच आंतरिक निर्वाचन विवाद – अभिनिर्धारित – रिट याचिका पोषणीय नहीं।

Cases referred :

2009(2) MPLJ 166, (2005) 6 SCC 657, AIR 2000 SC 1603, AIR 1950 SC 27, (2005) 4 SCC 649, (2005) 5 SCC 733, (2003) 10 SCC 733, (2002) 5 SCC 111, (2010) 3 SCC 571, (2011) 13 SCC 774, (2012) 4 SCC 194.

V.K. Bharadwaj with *M.P. Mangal*, for the petitioner.
Prashant Sharma, for the respondent No.1.
None for the respondent No.2.

ORDER

SUJOY PAUL, J: By invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner Rotary Club, Birla Nagar through its President Rajkumar Tamotiya and petitioner No.2 Deependra Kumar Tamotia have prayed for the following reliefs:-

> i) That, the present petition filed by the petitioners may kindly be allowed;
>
> ii) That, the order Annexure P/1 dated 16.7.2013 issued by the respondent no.1 may kindly be directed to be quashed.
>
> iii) That, any other just, suitable and proper relief, which this Hon'ble Court deems fit, may also kindly be granted to the petitioners. Costs be also awarded in favour of the petitioners.

2. When this matter was taken up, a preliminary objection was taken by the other side contending that this writ petition is not maintainable against Annexure P-1. Thus, with the consent, the parties were heard only on the question of maintainability of the petition.

3. Shri V.K.Bharadwaj, learned senior counsel assisted by Shri M.P.Mangal submits that the respondent-Rotary International is amenable to the writ jurisdiction of this Court under Article 12 of the Constitution. It is "State" within the meaning of Article 12 and if it is not State, it must be treated as "other authority" within the meaning of Article 12 of the Constitution. To elaborate this submission, the learned senior counsel for the petitioner submits that the Rotary International, South Asia Office is registered under Section 25 of the Companies Act. The aim, object and nature of activity of the Rotary Club is for common welfare of the people. Thus, it should be treated as extended arm of the State. In addition, it is submitted that the Rotary Club is engaged in the activities of public welfare and, therefore, it can be held to be a 'State' or 'authority'.

4. Learned senior counsel submits that the welfare activities which are being undertaken by the Government are also performed by the Rotary Club and, therefore, it can be safely concluded that the Rotary Club is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India. To bolster this submission with legal authorities, reliance is placed on the judgment of this Court reported in 2009 (2) M.P.L.J. 166 (*Anirudh*

Dwivedi Vs. State Chief Commissioner, Bharat Scout and Guide and another). In addition, heavy reliance is placed on the judgment of Apex Court in (2005) 6 SCC 657 (*Binny Ltd. and another Vs. V. Sadasivan and others*). The learned senior counsel submits that Binny Ltd. was a private company and it was neither an authority nor an instrumentality of the State. It was not even performing any public function or duty nor it was bound by rules and regulations, yet the Apex Court considered the meaning of the word "Public Function" and opined that when a body seeks to achieve some collective benefit for the public and is accepted by public having authority to do so or where the body is intervening or performing any social or economic affairs in public interest, it would be performing a public function.

5. By placing reliance on AIR 2000 SC 1603 (*Tamil Nadu Electricity Board Vs. Sumathi and others*), it is contended that even in case of tortuous liability and when Article 21 of the Constitution is infringed, a writ petition under Article 226 of the Constitution is maintainable. The learned senior counsel lastly submits that the petitioner's right to live with dignity is taken away by issuance of the impugned order Annexure P-1. He submits that his fundamental right of contesting election is sought to be taken away by Annexure P-1. For this he relied on AIR 1950 SC 27 (*A.K. Gopalan Vs. State of Madras*). Shri Bharadwaj also relied on constitution Bench judgment of Supreme Court reported in (2005) 4 SCC 649 (*Zee Telefilms Ltd. and another Vs. Union of India and others*).

6. Per contra, Shri Prashant Sharma, learned counsel for respondent No.1 submits that this petition is not maintainable. The impugned order Annexure P-1 is an E-Mail issued from United States (Headquarter of Rotary International). It is issued by John. P.Hewko, General Secretary, Rotary International and the said authority has not been impleaded by giving correct address. To elaborate, it is submitted that Annexure P-1 is issued by Rotary International. U.S. and its address is One Rotary Centre, 1560, Sherman Avenue Evanston Blinals, 60261-3698, USA. He submits that neither the said authority is properly implemented as a respondent, nor any writ would lie against this private person/ body, which is situated beyond the territory of India.

7. Apart from this, it is stated that the petitioner No.1 cannot be represented by Shri Rajkumar Tamotiya in the capacity of President. By relying on para 5.1 of the petition, it is contended that as per the pleading of writ

petition itself, it is clear that the term of Rajkumar Tamotiya as elected President was only upto 30.6.2013. This petition is filed after that and, therefore, the Rotary Club cannot be represented by Shri Rajkumar Tamotiya. Secondly, it is stated that the order Annexure P-1 is issued against Shri Anil K.Sharma and Anuj K. Agrawal. The directions are issued against Dr. Deependra Kumar Tamotia in Annexure P-1. None of these persons have chosen to file this petition. The petitioner No.2, as contended, has no locus standi and cannot be treated to be a 'person aggrieved'.

8. I have bestowed my anxious consideration on the rival contentions advanced at bar by the parties and perused the record.

10. In the considered opinion of this Court, to determine whether a body falls within the definition of "State" or any "other authority" as mentioned in Article 12, it is necessary for the petitioner to file complete data and relevant documents to show the aim & object, nature of constitution of the body, element of Government control over it (if any), source of finance, nature and territory of activity etc. In absence thereof, no presumption can be drawn that a body is 'State' or 'authority'. The petitioners have not placed any documents to show the constitution of the Rotary Club, its nature, activity, aim object and aforesaid relevant factors to enable this Court to examine whether the necessary ingredients to treat it as 'State' or 'authority' are available. The reliance was placed by the learned senior counsel on a judgment of Supreme Court in (2005) 5 SCC 733 (*Noise Pollution (V), in RE Vs. Union of India and another*) wherein the Apex Court in para 168 observed that awareness can be created through service clubs such as Rotary International and Lions International and societies engaged in preventing noise pollution.....

11. In the opinion of this Court, the aforesaid observation alone, by no stretch of imagination, can bring the Rotary Club within the ambit of State/ authority as contemplated in Article 12 of the Constitution. At the cost of repetition, in my opinion, whenever it is submitted that a body is 'State' or its 'instrumentality' or an 'authority', the burden is on the petitioner to establish it by placing adequate material that the said body falls within the ambit of Article 12 of the Constitution. In absence of basic material, no definite opinion can be formed by the Court in this regard.

12. The matter may be examined from yet another angle. The stand of learned senior counsel is that in *Binni* (supra), admittedly, the industry was neither the State nor its instrumentality or authority yet interference was made.

Therefore, interference can be made in this petition also against Rotary International. In addition, it is contended that since the Rotary International is a registered Company under Section 25, it is amenable to the writ jurisdiction of this Court.

13. Generally speaking a writ petition is maintainable against:- (i) Government; (ii) An authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging a public duty or positive obligation of a public nature; and (viii) a person or a body under a liability to discharge any function under any statute to perform such statutory function, (see (2003) 10 SCC 733 (*Federal Bank Ltd. Vs. Sagar Thomas and others*). In the said case the Apex Court further opined (after considering the judgment in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust vs. V.R. Rudani*) that the private institution or a company carrying on any statutory or public duty may be amenable to the writ jurisdiction. A private body or a person is amenable to the writ jurisdiction only where it is necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. (para 33). Thus, even assuming that the writ is amenable against respondents, a writ can be issued only for aforesaid purpose. Interestingly, even in *Binni* (supra), which is heavily relied upon by the petitioners, the Apex Court opined as under:-

> "Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function.
>
> (Emphasis Supplied).

14. Even in Zee Telefilms, the argument was considered by the majority that some of the functions of BCCI have the element of public duties or State actions, yet they would not fall within the parameters laid down by the Supreme Court in *Pradeep Kumar Biswas's case* (2002) 5 SCC 111, it is further opined that assuming that there is some element of public duty involved in discharge of Board functions even then as per *Biswas* (supra) that by itself

would not suffice in bringing the body within the ambit of "other authorities" for the purpose of Article 12 of the Constitution. It is apt to quote the following portion from para 29 of the judgment:-

> "Assuming that the above mentioned functions of the Board do amount to public duties or State functions, the question for our consideration is: would this be sufficient the Board to be a State for the purpose of Article 12? While considering this aspect of the argument of the petitioner, it should be borne in mind that the State/Union has not chosen the Board to perform these duties nor has it legally authorized the Board to carry out these functions under any law or agreement. It has chosen to leave the activities of cricket to be controlled by private bodies out of such bodies' own volition (selfarrogated). In such circumstances when the actions of the Board are not actions as an authorized representative of the State, can it be said that the Board is discharging State functions? The answer should be no. In the absence of any authorization, if a private body chooses to discharge any such function which is not prohibited by law then it would be incorrect to hold that such action of the body would make it an instrumentality of the State."

15. This is trite that whereas power under Article 32 can be exercised only for enforcement of fundamental rights conferred by part III of the Constitution, the right conferred by Article 226 can be exercised for enforcement of fundamental, statutory and other legal rights also. It can be enforced "for any other purpose". Scope for 'any other purpose' is considered by Apex Court as for enforcement of any legal writ conferred by statute etc. In (2010) 3 SCC 571 (*State of West Bengal and others vs. Committee for Protection of Democratic Rights, West Bengal and others*) (para 57) and in *Federal Bank* (supra), the Apex Court opined that no writ would lie against private body except whether it has some obligation to discharge which is statutory or of public character.

16. On the basis of aforesaid analysis, it is clear that the petitioner had failed to file adequate material to establish that respondent-Rotary International is a 'State', 'authority' or 'instrumentality' under Article 12 of the Constitution.

Secondly, it is not established that by issuing Annexure P-1 the respondents have failed to perform any statutory obligation or discharge any statutory or public duty. It is apt to quote the impugned order:-

ROTARY

John P. Hewko
General Secretary, Rotary International

VIA E-MAIL (aniInaidunia@gmail.com; shri ram ayurvet9@yahoo.co.in)

16 July 2013

Dr. Anil K Sharma
H.No.3/72, New Colony
Birla Nagar, Gwalior (M.P.)
INDIA

Anuj K Agrawal
H-121/2,Adityapuram
Airport Road, Gwalior(MP)
INDIA

Re: Election Litigation in District 3053

Dear Club President Anil and Club Secretary Anuj:

At its June 2013 meeting, the Rotary International Board recognized that RC Birlanagar violated RI Bylaws by failing to follow and complete RI's election review procedures before filing a lawsuit against RI in connection with election complaint allegations.

Accordingly, pursuant to a directive of the RI Board, I am sending you this letter, which serves as notice that, unless RC Birlanagar withdrawn or dismisses its election litigation against all defendants within 15 business days. Dr. Deependra Kumar Tamotia will be disqualified from the election in question and from contesting any elected officer of RI for five years and RC Birlanagar will be deemed as failing to function and will be deemed terminated by the Board immediately upon the expiration of such 15 days period.

Documents establishing that RC Birlanagar has withdrawn or dismissed its lawsuit against all defendants may be sent to Prasanta Sahu, Manager Legal, RI South Asia Office at prasanta sahu@rotary.org.

One Rotary Center
1560 Sherman Avenue
Evanston Blinals,
60201-3698, USA.

TEL.8478663000
FAX 847328 8554
www.rotary.org.

Sincerely,
John P..Hewko

cc: P.T. Prabhakar, Director, RI
Radhe Shyam Rathi, Governor, District 3053, RI
Prasanta Sahu, Manager legal South Asia Office, RI

This is totally an in-house dispute of election amongst the members/ office bearers of private club. So far the contention of Shri Bharadwaj regarding violation of Article 21 is concerned, in my opinion, the said contention is misconceived. In *A.K.Gopalan* (supra), the Habeas Corpus petition was filed under Article 32 of the Constitution against the illegal detention of Shri Gopalan in Madras jail. The petitioner therein contended that his fundamental right and right to live with liberty and dignity is taken away which is flowing from Article 21 of the Constitution. The judgment is based on the aforesaid factual backdrop. In my opinion, the judgment of *A.K.Gopalan* (supra) cannot be stretched to apply it on an in-house election of a private body. Contesting and winning the election of a private club may be a feather in the cap of a citizen but by no stretch of imagination, such contest of election has any nexus with Article 21 of the Constitution. This contention, being merit-less, is also rejected. Even otherwise, as held in (2011) 13 SCC 774 (*Supreme Court Bar Association and others Vs. B.D.Kaushik*) and (2012) 4 SCC 194 (*Jitu Patnaik Vs. Sanatan Mohakud and others*) contesting election is neither a fundamental right nor a common law right. The impugned order has nothing to do with discharge of public function nor it is related with any public function on the part of the respondents. It has nothing to do with any statutory violation, nor has any thread relation with the alleged public duties which is allegedly performed by the Rotary Club. Thus, in this factual backdrop, I am unable to hold that the writ petition is maintainable. In addition, I find force in the argument of the other side that the petition is not filed by the persons who are adversely affected by Annexure P-1.For these reasons also this petition cannot be entertained. For the aforesaid cumulative reasons, I find no justification to entertain this petition. Writ petition is not maintainable and is hereby dismissed. No cost.

Petition dismissed.

I.L.R. [2013] M.P., 1921
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
M.A. No. 2170/2009 (Jabalpur) decided on 21 August, 2012

SHRI DEV MAHADEVJI MANDIR ...Appellant
Vs.
RAJESH KUMAR & anr. ...Respondents

***Public Trusts Act, M.P. (30 of 1951), Sections 25, 26 & 27 - Removal and appointment of Trustees - Powers of Registrar* - Registrar has no power to remove the existing trustee and appoint another by his own order and this power vests in the Civil Court only. (Para 12)**

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धाराऐं 25, 26 व 27 – न्यासियों को हटाया जाना एवं नियुक्त करना – रजिस्ट्रार की शक्तियां – रजिस्ट्रार को स्वयं के आदेश से वर्तमान न्यासी को हटाकर अन्य को नियुक्त करने की कोई शक्ति नहीं है और यह शक्ति केवल सिविल न्यायालय में निहित है।

Cases referred :

2003(2) MPLJ 448, 2003(5) MPLJ SN 41, 1971 JLJ SN 135, 1972 JLJ SN 6.

B.P. Sharma, for the appellant.
Priyank Choubey, for the respondent No.1.
Akhilesh Shukla, Dy. G.A. for the respondent No.2.

ORDER

A.K. Shrivastava, J: This is an appeal under Section 27 of the M.P. Public Trusts Act, 1951 (In short "Act 1951") has been filed by the Deity Shri Dev Mahadevji Mandir through trustee Kanchhedilal against the order dated 30.03.2009 passed by learned Additional District Judge, Rehli District Sagar in M.J.C. No.1/2008 and simultaneously also deciding M.J.C. No.2/2008.

2. In pursuance to the order dated 08.10.2007 passed by the Registrar under the Act 1951 an application under section 26 was filed by Deity Shri Dev Mahadevji Mandir through trustee Kanchhedilal. Similarly another application which was registered as MJC No.2/2008 was filed by the Deity Shri Dev Mahadevji Mandir through Managing Trustee Rajesh Kumar for the

appointment of trustee. Both the applications were clubbed and consolidated and by a common order learned Court below has disposed of both the applications and passed the following order:-

18- अतः उपरोक्त आधारों पर दोनों एम.जे.सी. में प्रस्तुत आवेदन पत्रों का निराकरण करते हुये यह आदेश दिया जाता है कि :–

(1) श्री देवज महादेवजी मंदिर ट्रस्ट क. 2/र के ट्रस्टी कन्छेदीलाल को हटाते हुये उसके स्थान पर रजिस्ट्रार पब्लिक ट्रस्ट एवं ट्रस्टी राजेश की सहमति से नवीन ट्रस्टी नियुक्त किया जाये एवं दोनों ट्रस्टियों में से कोई एक मंदिर में होने वाले दोनों समय की पूजा आराधना और समय समय पर होने वाले धार्मिक कार्यकम आदि भी सम्पन्न कराये।

(2) पूजा अर्चना करने वाले ट्रस्टी, जो भी हो, के रजिस्ट्रार पब्लिक ट्रस्ट, ट्रस्टी राजेश और नवीन ट्रस्टी की सहमति से ट्रस्ट के हितों को देखते हुये एक मानदेय तय करते हुये दिया जाये।

(3) दोनों ट्रस्टियों की सहमति से ट्रस्ट अपने सामान्य कार्यकम करता रहे, किन्तु ट्रस्टियों की आपसी सहमति नहीं होने पर, इसे रजिस्ट्रार पब्लिक ट्रस्ट अथवा उसके द्वारा अधिकृत व्यक्ति जैसे की तहसीलदार आदि से निराकृत कराया जायें

(4) ट्रस्ट की कृषि भूमि की सालाना नीलामी और ट्रस्ट की सालाना आय के 25 प्रतिशत से अधिक खर्च के बारे में रजिस्ट्रार पब्लिक ट्रस्ट अथवा उनके द्वारा अधिकृत व्यक्ति से, पूर्वानुमति ली जाये और विगत वर्ष के सालाना खर्च का आडिट/अवलोकन भी नीलामी के समय करा लिया जाये। रजिस्ट्रार पब्लिक ट्रस्ट अथवा उनकी ओर से अधिकृत व्यक्ति, भूमि की वार्षिक नीलामी की प्रस्तावित राशि से कम से कम दस प्रतिशत अधिक दिलवाये जा सकने की स्थिति में प्रस्ताव को रदद करते हुये स्वतः नीलाम कर सकेंगे अथवा ट्रस्ट को इसके बारे में प्रस्ताव भेज सकेंगे। रजिस्ट्रार पब्लिक ट्रस्ट अथवा उसके द्वारा अधिकृत व्यक्ति को आदेश/सलाह ट्रस्टियों पर बन्धनकारी होगी और ऐसा नहीं करने पर इसे ट्रस्ट के हितों के विपरीत कार्य माना जायेगा।"

3. The contention of Shri Sharma learned counsel for appellant is that the judicial function to appoint new trustees should have been discharged by the Court itself and it should not have been directed to the Registrar to discharge this function. In this context learned counsel has invited my attention to Section 27 of the Act of 1951 wherein powers of the Court have been described and also placed reliance on the decisions of this Court in *Shri Deo Janki Raman Mandir Trust, Gora Khurd vs. State of M.P. and others* 2003(2) MPLJ 448 and Trust, *Gora Khurd, District Sagar vs. State of M.P. and others*

2003(5) MPLJ SN 41. Hence, it has been prayed that by allowing this appeal the impugned order be set aside and the District Judge be directed to decide the matter by appointing new trustees.

4. On the other hand Shri Choubey, learned counsel for respondent No.1 argued in support of the impugned order and also raised a preliminary objection that this appeal is not maintainable for two reasons. Firstly by the impugned order the working trustee Kanchhedilal was directed to be removed from his office and hence he was not having any locus standi to file appeal by assailing the impugned order. Secondly, during the pendency of this appeal, said Kanchhedilal had also died and his son Alok Tiwari is not having any locus standi to continue this appeal. Thus, it has been prayed that this appeal be dismissed on the ground of maintainability as well as on merits.

5. Having heard learned counsel for the parties I am of the view that this appeal deserves to be allowed and the case is required to be sent back to learned District Judge.

6. So far as preliminary objection raised by learned counsel for respondent No.1 in regard to maintainability of appeal is concerned, suffice it to say that although Kanchhedilal has been directed to be removed from the post of working trustee by the impugned order but since the application under Section 26 was filed by Kanchhedilal for Deity Shri Dev Mahadevji Mandir through trustee and further because the impugned order has been passed against him, therefore, for the purpose of this appeal he can assail the order in the name of deity since the original application was filed by him in the name of deity. Even otherwise, now said Kanchhedilal is no more in the world. So far as the another objection that after the death of Kanchhedilal his son Alok Tiwari cannot be brought on record is concerned, suffice it to say that only for the purpose of continuing this appeal he can file necessary application so as to challenge the impugned order. At-present he is not at all a trustee and thus he is only permitted to continue this appeal. Thus, this appeal cannot be dismissed on the preliminary objections raised by learned counsel for respondent No.1 and they are hereby overruled.

7. Now coming to the merits of the case, on bare perusal of the impugned order, which I have quoted hereinabove, it is gathered that the Court below has directed the Registrar to appoint new trustee of trust namely Shri Dev Mahadevji Mandir, which according to me he cannot do for the reasons stated hereinafter.

8. Section 25 of the Act 1951 is in regard to filling of vacancies and under this section where the public trust is under the management of a Board of Trustees, the working trustee shall, as soon as a vacancy occurs in the Board, inform the Registrar of such vacancy and the time within and the manner in which he proposes to fill the same. On receipt of such information the Registrar may, if he considers if necessary, issue any directions to the working trustee regarding the filling of such vacancy not inconsistent with any instrument of trust or the mode of succession specified in the register and the working trustee shall comply with any such direction. However, if the working trustee fails to give any such information or to fill the vacancy within the time specified by him or comply with any direction issued by the Registrar, the Registrar may, by order passed in writing, till the vacancy and any person having interest in the public trust who may be aggrieved by the order of the Registrar, may apply to the Court for setting aside the order of the Registrar within the thirty days from the date of such order. But this section would not be applicable in the present case for the simple reason that no such application was ever filed by working trustee of the Management of Trustee.

9. Section 26 of Act 1951 speaks about application to Court for directions and under this provision if the Registrar on the application of any person interested in the public trust or otherwise is satisfied that (a) the original objection of the public trust has failed; (b) the trust property is not being properly managed or administered; or (c) the direction of the Court is necessary for the administration of the public trust; he may, after giving, the working trustee an opportunity of hearing, direct such trustee to apply to Court for direction within the time specified by the Registrar. Under sub-section (2) of Section 26 if the trustee so directed fails to make an application as required or if there is no trustee of the public or if for any other reason, the Registrar considers it expedient to do so, he shall himself make an application to the Court. In the present case, since there is an order dated 08.10.2007 of Registrar, Public Trust directing the parties before him to file necessary application under Section 26 to the Court, both the parties filed applications under the said provision before the Court.

10. On bare perusal of Section 27 of the Act of 1951 it is gathered that it speaks about Court's power to hear application and on its bare perusal it is luminously clear like a noon day that while exercising to decide the application under Section 26 of the Act 1951 the Court is required to hold an inquiry and thereafter the Court may pass appropriate order. Under sub-section (2) of

Section 27 while exercising power under sub-section (1), the Court shall among other powers, have power to make an order for :-

(a) removing any trustee;

(b) appointing a new trustee;

(c) declaring what portion of the trust property or of the interest there in shall be allocated to any particular object of the trust;

(d) providing a scheme of management of the trust property;

(e) directing how the funds of a public trust whose original object has failed, shall be spent, having the regard to the original intention of the auditor of the trust or the object for which the trust was created;

(f) issuing any directions as the nature of the case may require.

By putting emphasis to sub-clause (b) of the aforesaid provision, no argument is required to decide that appointment of a new trustee is to be made by the Court and not by the Registrar. Since learned Court below has totally deviated from the procedure and has passed the impugned order de hors to the aforesaid provision, on this short term, the impugned order is liable to be set aside.

11. Learned counsel for appellant has rightly placed reliance on the aforesaid two decisions of this Court *Shri Deo Janki Raman Mandir Trust, Gora Khurd and Trust, Gora Khurd, District Sagar* (supra) wherein it has been categorically held that while passing an order upon the application under Section 26 of the Act of 1951, the appointment of a trustee is to be made by the Court and this power should not be confined to the Registrar.

12. The Division Bench of this Court in *Dalludas v. Registrar of Public Trusts, Hoshangabad* 1971 JLJ SN 135 has categorically held that the Registrar has no power to remove the existing trustee and appoint another by his own order and this power vests in the Civil Court only. At the most the Registrar can refer the matter to the Civil Court. There is another decision of *Division Bench in Sheoprasad Dubey v. Registrar, Public Trusts, Sagar & others* 1972 JLJ SN 6 wherein it has been categorically held that Registrar

has no jurisdiction to appoint any committee to take charge of trust property. The powers given to the Registrar are enumerated by Clauses (a), (b) and (c) of Section 26 of the Act 1951. The intention of legislature is that whenever the Registrar considers it necessary that some arrangement should be made to manage the trust property, he should apply to the District Judge who has power to make suitable arrangement for the management of the trust property. Thus, according to me, the impugned order passed by learned Court below directing Registrar to appoint new trustees is without jurisdiction and indeed this power should have been exercised by the Court.

13. The term "Court" has also been defined in Section 2(1) of the Act of 1951, according to which it means the principal Civil Court of Original jurisdiction in the district. Thus, the appointment of new trustees should have been made only by the Court and not the Registrar.

14. For the aforesaid reasons, the impugned order cannot be allowed to remain stand and the same is hereby set aside. Learned Court below is hereby directed to appoint new trustees looking to the facts and circumstances of the case to benefit the trust and its property.

15. This appeal is allowed and disposed of. No costs.

Appeal allowed.

I.L.R. [2013] M.P., 1926
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
F.A. No. 16/2012 (Jabalpur) decided on 12 September, 2012

PUSHPA BAI KUSHWAHA (SMT.) ...Appellant
Vs.
SANTOSH KUMAR GUPTA ...Respondent

Limitation Act (36 of 1963), Section 5 - Condonation of Delay - **Application u/s 5 of the Act be considered with a pragmatic and liberal approach, however, such approach should be justice oriented - However, Courts do not enjoy the unlimited and unbridled discretionary powers and the discretion of the judicial power should be exercised within reasonable bounds known to the law - The liberal approach would not include whims or fancies, prejudices or predilections. (Para 9)**

परिसीमा अधिनियम (1963 का 36), धारा 5 — विलम्ब के लिए माफी —

अधिनियम की धारा 5 के अंतर्गत आवेदन पर व्यावहारिक एवं उदार दृष्टिकोण से विचार किया जाना चाहिए, अपितु, उक्त दृष्टिकोण (न्यायिक अनुकूलन अभिगामी) न्याय की ओर ले जाने वाला होना चाहिए – किन्तु न्यायालय, असीमित एवं अनियंत्रित शक्तियों का उपभोग नहीं करता और न्यायिक शक्ति के विवेकाधिकार का प्रयोग विधि ज्ञात युक्तियुक्त बाध्यताओं के भीतर किया जाना चाहिए – उदार दृष्टिकोण में सनक या काल्पनिकता, पूर्वाग्रह या पक्षपात/झुकाव का समावेश नहीं होगा।

Cases referred :

(2005) 3 SCC 752, (2011) 4 SCC 363, (2005) 11 SCC 197.

T.S. Ruprah with *Harpreet Singh Ruprah*, for the appellant.
Sanjay K. Agarwal, for the respondent.

ORDER

A.K. Shrivastava, J: An application I.A. 98/2012 has been filed to condone the delay in filing the appeal. A decree for specific performance of contract was passed by learned District Judge, Narsinghpur in Civil Suit No. 54-A/1999 on 21.12.2000. This appeal has been filed by defendant on 2.1.2012 and thus, the office has reported this appeal to be barred by 10 years 8 months and 26 days.

2. The contention of learned senior counsel for the appellant is that after the decree of specific performance of contract was passed against defendant/ appellant the brother of the respondent namely, Rattu alias Ratan Lal approached defendant that the matter can be settled amicably out of the Court and the defendant readily accepted the said offer. Thereafter she also paid a sum of Rs.80,000/- to plaintiff/respondent in that regard and it was settled between the parties that the decree of specific performance will not be executed. Learned senior counsel submits that all of a sudden when a notice to deliver possession was received by the appellant from the Executing Court, thereafter she has filed this first appeal along with application under Section 5 of the Limitation Act to condone the delay.

3. Learned senior counsel for the appellant submits that during this period the defendant dismantled the house in question and reconstructed it after obtaining loan from two Banks. It has also been put forth that before constructing the house notice was also published in the newspapers that defendant/appellant is taking loan and if anybody is having objection, in writing

objections be submitted to her. But, the plaintiff/respondent never objected and therefore, in these facts and circumstances, the delay of 10 years 8 months 26 days be condoned. In support of his contention learned senior counsel has placed heavy reliance upon the decision of Supreme Court in *State of Nagaland vs. Lipok Ao and others* (2005) 3 SCC 752 and has submitted that the application under Section 5 of the Indian Limitation Act should be liberally construed and a pragmatic approach should be adopted by the Court. Thus, it has been prayed that application under Section 5 of the Limitation Act be allowed.

4. On the other hand, Shri Sanjay K. Agarwal, learned counsel appearing for the respondent/plaintiff by replying the application has submitted that no sufficient ground is made out to condone the delay in filing the appeal. In reply the averments of appellant made in the application has been emphatically denied. The contention of learned counsel for the respondent is that a decree of specific performance of contract was put to execution well in time in the year 2007. Thereafter, in pursuance to the said decree the sale deed through Court has also been executed, but, no objection was raised before the Executing Court about the plea which now the appellant is setting up to condone the delay. Learned counsel further submits that when the warrant of possession was issued against the appellant, instead of setting up the said plea she took time to vacate the house in question and therefore, all these averments which all are in the air have no bearing and therefore, since the appellant has utterly failed to establish sufficient cause to condone the exorbitant delay of 10 years 8 months and 26 days, this application be dismissed. In support of his contention learned counsel has placed reliance on the decision of Supreme Court *Lanka Venkateswarlu* (dead) by *L.Rs vs. State of Andhra Pradesh and others,* (2011) 4 SCC 363.

5. Having heard learned counsel for the parties I am of the view that I.A. No. 98/2012 deserves to be dismissed.

6. Admittedly, a bi-party judgment and decree of specific performance of contract was passed by learned Trial Court. Had the decree been passed in ex parte the appellant may have some say in regard to the contention which he is now placing and making the application under Section 5 of the Indian Limitation Act. Indeed, the appellant kept silent for more than a decade and did not assail the judgment and decree of specific performance of contract by filing an appeal. Merely because the decree was not put to execution

immediately and was put to execution somewhere in February 2007 would not mean that decree has become otiose or the stand taken by the appellant in the application under Section 5 of the Limitation Act is corroborated.

7. I do not find any merit in the contention of learned senior for the appellant that the decree was not put to execution till Rattu had died and after his death only the decree was put to execution and therefore, the averments made in the application are correct. Admittedly, the decree of specific performance has been put to execution within limitation and therefore, the stand which has been taken is having no meaning. Admittedly whatever the averments which are made in the application in regard to the payment of Rs.80,000/- etc. by the appellant to respondent/plaintiff all are oral and no document in this regard is filed. No application under Section 47 CPC was filed by appellant/defendant in the learned in Executing Court in regard to the adjustment or full and final satisfaction of the decree. Thus, in absence of any document in this regard, the bald statement that too after 10 years 8 months and 26 days cannot be accepted and one can think and infer that all these averments are lame excuses and afterthought.

8. One important fact which cannot be marginalised and blinked away is that when the decree of specific performance of contract was put to execution through Court the sale deed was executed and registered, but, the appellant did not raise any objection in this regard before the Executing Court. Further she did not raise any objection even when warrant of possession was served upon her, on the contrary, she took time to vacate the suit premises. This indicates that the plea which has been taken by the appellant in the application explaining the delay in filing the appeal is afterthought.

9. Generally the application under Section 5 of the Limitation Act is considered with a pragmatic and liberal approach, however, such approach should be justice oriented. I have already held hereinabove that there is no justification to condone the delay because there is no sufficient reason assigned in the application under Section 5 of the Limitation Act to condone the delay. According to me, while deciding the said application the Courts do not enjoy the unlimited and unbridled discretionary powers and the discretion of the judicial power should be exercised within reasonable bounds known to the law. The liberal approach would not include whims or fancies; prejudices or predilections. The valuable right has been accrued in favour of plaintiff/ respondent after the decree was passed in his favour and it should not be

lightly brushed aside on the basis of the averment made in the application which has no bearing and is not having any supporting documents to corroborate the averments. Thus, I am of the view that in this backdrop the decision of Supreme Court *State of Nagaland* (supra) relied by learned senior counsel for the appellant on facts is distinguishable and is not applicable but the decision *Lanka Venkateswarlu* (supra) placed reliance by learned counsel for the respondent is squarely applicable. On this point I may also profitably place reliance upon another decision of Supreme Court *State of Rajasthan vs. Nav Bharat Construction Co.* (2005) 11 SCC 197.

10. After giving my anxious and bestowed consideration to the averments made in the application (I.A. No. 98/2012). I do not find that sufficient cause has been made out to condone the inordinate and exorbitant delay of 10 years 8 months and 26 days.

11. Eventuality, I.A. No.98/2012 is hereby dismissed and eventually this appeal is also hereby dismissed as barred by time.

Appeal dismissed.

I.L.R. [2013] M.P., 1930
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 433/2010 (Jabalpur) decided on 4 February, 2013

SHIV KUMAR SONI ...Appellant
Vs.
RITA KUSHWAHA (KU.) & anr. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Learning License* - Driver of offending vehicle was having learning license - Learner's license is also a valid license - Insurance Company could not be exonerated from its liability to pay compensation - Direction given by Tribunal to pay and recover set aside - Appeal allowed.** **(Para 7)**

मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का दायित्व – कच्चा (लर्निंग) लाईसेंस – आक्रामक वाहन के चालक के पास कच्चा लाईसेंस था – कच्चा लाईसेंस भी वैध लाईसेंस है – बीमा कम्पनी को प्रतिकर का भुगतान करने के उसके दायित्व से भार मुक्त नहीं किया जा सकता – अधिकरण द्वारा दिया गया भुगतान एवं वसूली का निदेश अपास्त – अपील मंजूर।

Cases referred :

2008 ACJ 238, 2009 ACJ 1184, 2004 ACJ Vol.(1) 1, (2004) 3 SCC 347.

P.N. Mishra, for the appellant.
Amrit Ruprah, for the respondent No. 2/Insurance Company.

ORDER

N.K.Mody, J:- Being aggrieved by the award dated 28-10-09 passed by the MACT, Satna in Claim Case No. 440/2008 whereby the claim petition was filed by the respondent no. 1 was allowed and compensation of Rs. 25,000/- was awarded on account of the injuries sustained in a motor accident and respondent no. 2 was exonerated, present appeal has been filed.

2. Short facts of the case are that the respondent no. 1 sustained injury in a motor accident which was caused on 18-06-08 by rash and negligent driving of the appellant. It was alleged that the offending vehicle which was driven by appellant was insured with respondent no. 2. It is pleaded that the claim petition be allowed and appellant and respondent no. 2 be directed to pay compensation to respondent no. 1. After holding an inquiry, a compensation of Rs. 25,000/- was awarded and respondent no. 2 was exonerated on account that the appellant was possessing learners licence and was not fulfilling the requirement of Motor Vehicles Act against which the appeal has been filed by the appellant.

3. Undisputedly, the date of occurrence is 18-06-08 and the learners licence which the appellant was possessing was valid w.e.f. 18-06-08 to 17-12-08. No evidence was adduced by the respondent no. 2 to the effect that no licensed driver was sitting on the scooter to instruct the appellant who was possessing learners licence therefore, the learned Tribunal has not accepted the liability of respondent no. 2. Learned counsel for the appellant has placed reliance on a decision in the case of *Gopal Thakur and another Vs. Urmila Mahant and others* 2008 ACJ 238, wherein the Himachal Pradesh High Court held that the Insurance Company has failed to lead evidence to the effect that any other person having valid driving licence was not sitting on the scooter and instructing the driver at the time of accident therefore, the driver who was possessing learners licence was competent and authorised to drive the scooter and Insurance Company is liable. Learned counsel has placed reliance on a decision in the matter of *Annal Automobiles Vs. AshishKumar*

Shukla and others 2009 ACJ 1184, wherein the driver possessing learners licence was driving motor cycle without displaying "L-Board" and was not accompanied by a duly licensed person thereby committing breach of rule 3 of the Central Motor Vehicles Rules, 1989 and the owner failed to lead evidence to prove that due diligence and care had been exercised while giving motor cycle. Chhatisgarh High Court held that the owner committed breach of terms and conditions of policy and Tribunal was justified in directing the Insurance Company to pay first and then recover from owner. Thus, it was prayed that the findings in respect of the respondent no. 2 be set aside.

4. Smt. Amrit Ruprah, learned counsel for respondent no. 2 submits that the law laid down in the case of *Gopal Thakur* (surpa,) is not applicable in this case because in the instant case respondent no. 2 has examined two witnesses who has specifically stated the Rules 3 of the Central Motor Vehicles Rules, 1989 were not followed. It is submitted that the learned Tribunal has not committed any error in exonerating respondent no. 2 and prayed that the appeal be dismissed.

5. Chapter-II of the Central Motor Vehicles Act, 1989 deals with the licence of drivers of motor vehicles. Rule 3 deals with the learners licence which reads as under:-

> "3. General - The provisions of sub-section (1) of section 3 shall not apply to a person while receiving instructions or gaining experience in driving with the object of presenting himself for a test of competent to drive, so long as -
>
> (a) Such person is the holder of an effective learners licence issued to him in Form 3 to drive the vehicle;
>
> (b) such person is accompanied by an instructor holding an effective driving licence to drive the vehicle and such instructor is sitting in such a position to control or stop the vehicle; and
>
> (c) there is painted, in the front and the rear of the vehicle or a plate or card affixed to the front and the rear, the letter "L" in red on a white background."

6. In the matter of *National Insurance Co. Ltd Vs. Swaran Singh and others* 2004 ACJ VoL(1) 1, this court had occasion to deal with learner's

licence and has observed as under:-

> "86. Motor Vehicle Act,1988 provides for grant of learner's licence. [See Section 4(3), section 7(2), section 10(2) and section 14] A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licenced resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exits a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provisions of section 149(2) of the Act.
>
> 87. The provisions contained in the said Act provide for grant of driving licence which is otherwise a learners's licence. Section 3(2) and 6 of the Act provides for restriction in the matter of grant of driving licence. Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules framed by the Central Government or the State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of statute. A person holding learner's licence would, thus, also come within the purview of 'duly licensed' as such a licence is also granted in terms of the provisions of the Act and the rules framed thereunder. It is now, a well settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well settled principle of law that for the interpretation of statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage."

7. Whether a learners licence is valid licence and Insurance Company is liable was again taken into consideration by the Hon'ble Apex Court in the

matter of *National Insurance Company Limited Vs. Bhagwani and others* (2004) 3 SCC 347 and the Apex Court held that the learners licence is also a valid licence.

8. Keeping in view the law as laid down by the Hon'ble Apex Court in the matter of *Swaran Singh* (supra,), this court finds that the learned Tribunal was not justified in giving the right of recovery to the respondent no. 2.

9. In this view of the matter, the appeal filed by the appellant is allowed and direction given by the learned Tribunal regarding pay and recover to respondent no. 2 stands quashed.

C.C as per rules.

Appeal allowed.

I.L.R. [2013] M.P.,1934
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
S.A. No. 142/2012 (Gwalior) decided on 20 February, 2013

BHUPENDRA SINGH ...Appellant
Vs.
SHYAM BABU AGARWAL ...Respondent

Civil Procedure Code (5 of 1908), Section 100 - Second Appeal **- The Concurrent findings of the Courts below on the question of bonafide requirement being finding of fact, could not be interfered in Second Appeal - Appeal being devoid of any merit, liable to be dismissed at the stage of motion hearing. (Para 14)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – वास्तविक आवश्यकता के प्रश्न पर निचले न्यायालयों के समवर्ती निष्कर्ष, तथ्य का निष्कर्ष होने के कारण, द्वितीय अपील में हस्तक्षेप नहीं किया जा सकता – किसी गुणदोष के अभाव में, अपील समावेदन की सुनवाई के प्रक्रम पर खारिज किये जाने योग्य।

Cases referred :

(2005) 7 SCC 317, (2009) 10 SCC 193, (2009) 10 SCC 196, (1995) 6 SCC 580, 2006(2) MPLJ 484, 2000(2) JLJ 1.

D.D. Bansal & Devendra Choubey, for the appellant.

M.B. Mangal, for the respondent.

ORDER

U.C. MAHESHWARI, J: The appellant/defendant/tenant has filed this appeal under Section 100 of CPC against the judgment and decree dated 31.1.2012 passed by VIIth Additional District Judge Gwalior, in Civil Regular Appeal No.46-A/2011, whereby, the judgment and decree dated 17.8.2011 passed by VIIth Civil Judge to the Court of Ist Civil Judge Class-II passed in Civil Original Suit No.10-A/09, has been affirmed till the extent of decree of eviction passed against the appellant under Section 12 (1) (f) of the M.P. Accommodation Control Act 1961 (In short 'the Act'), while such decree passed on the ground of Section 12 (1) (b) of the Act, has been set aside. In addition to it, the appellate Court by allowing the cross objection of the respondent filed under Order 41 Rule 22 of CPC in part decreed the suit of the respondent on the ground enumerated under Section 12 (1) (a) of the Act also and till such extent the judgment of the trial Court was modified.

2. The facts giving rise to this appeal in short are that, the respondent herein filed the suit for eviction against the appellant with respect of some shop situated at Gwalior described in the plaint on the ground of arrears of rent, parting the possession of the premises on sub-tenancy, nuisance and bonafide, genuine requirement of the respondent himself for non-residential purpose i.e. under Section 12 (1) (a), (b), (c) and (f) of the Act.

3. As per other averments of the plaint, such tenancy was at the rate of Rs.500/- per month and in this regard, some documents was written between the parties on 17.4.1986. According to which, the tenancy being monthly was begun from the 1st day of Gregorian calender month. Before filing the suit, the notice for termination of the tenancy with demand of arrears of rent was also given to the appellant on behalf of the respondent.

4. In the written statement of the appellant by admitting the tenancy in the disputed premises so also the terms and conditions of the same stated by the respondent in the plaint, in addition, it is stated that at the time of initiating the tenancy Rs.25,000/- was taken by the respondent in advance through cheque from the appellant and as per term, the same was to be refunded at the time of vacating the premises. In further averments it is denied by the appellant that he has received any notice from the respondent in respect of termination of tenancy or demand of arrears of rent. It is also stated that the

respondent is having as many as nine non-residential places/accommodation in the same house and out of them, some of the premises being vacant are available in his possession as alternative accommodation. In such premises, the alleged need of the respondent could not be deemed to be bonafide and genuine. In addition to it, it is also stated that one more alternative accommodation near Jayendraganj Chauraha Gwalior, is available with the respondent. With these averments, the prayer for dismissal of the suit was made.

5. After framing the issues and recording the evidence on appreciation of the same, the suit of the respondent was dismissed by the trial Court on the grounds enumerated under Section 12 (1) (a) and (c) of the Act while, the same was decreed on the ground of Section 12 (1) (b) and (f) of the Act. On filing the appeal by the appellant herein under Section 96 of the CPC, the same was considered and by affirming the judgment and decree of the trial Court till the extent of on the ground of Section 12 (1) (f) of the Act, the decree of Section 12 (1) (b) of the Act was set aside. In addition to it, allowing the cross objection of the respondent/plaintiff in part, the suit was also decreed on the ground of Section 12 (1) (a) of the Act and till this extent, the findings of the trial Court was set aside. Against such judgment and decree of the appellate Court the appellant has come to this Court with this appeal.

6. Appellant's counsel after taking me through the record of the trial Court as well as the impugned judgment argued that both the Courts below have not considered the existing pleadings and the available evidence of the parties on the question of availability of alternate accommodation with the respondent for his alleged need and contrary to record and existing legal position decreed the suit of the respondent under Section 12 (1) (f) of the Act. In this regard, he also said that at the appellate stage two different applications under Order 41 Rule 27 of CPC for taking the additional evidence on record and also an application under Order 6 Rule 17 of CPC to amend the written statement with respect of some other available alternative accommodation with the respondent, were also filed but the same were not considered with proper approach by the appellate Court and by dismissing the same, the above mentioned decree has been passed against the appellant. He further said that such applications were dismissed on the ground of delay as the same were filed at very belated stage and not immediately after vacating the alleged premises by the other tenants of the respondent thereby, the appellant has been deprived by the appellate Court to demonstrate his case on the ground

of availability of alternative accommodation with the respondent for the alleged need. So, firstly in this background he prayed to admit this appeal by framing the proposed substantial questions of law no.1 & 3 mentioned in para 5 of the appeal memo. In continuation he said that, the findings of the trial Court dismissing the suit of the respondents on the ground of Section 12 (1) (a) of the Act, has been wrongly dismantled by the appellate Court. In this regard he said that in accordance with the provision of Section 13 of the Act, the rent was duly deposited by the appellant in the trial Court and there was no occasion to pass such decree by the appellate Court. As such the trial Court has rightly refused the decree on such ground to the respondents. In continuation he said that, in any case, if there was any arrears of rent against the appellant, then in view of law laid down by the apex Court in the matter of *G. Reghunathan vs. K.V. Varghese* reported in (2005) 7 SCC 317, such arrears of the rent could have been adjusted from the aforesaid advance deposited sum of Rs.25,000/- and in such premises, the appellate Court could not pass the decree on the ground of any arrears of rent. With this background he also prayed to admit this appeal on the proposed substantial question of law no.6 mentioned in the aforesaid para 5 of the appeal memo. He also placed his reliance on a decision of the apex Court in the matter of *Mohd. Ismail vs. Dinkar Vinayakrao Dorlikar,* reported in (2009) 10 SCC 193 as well as in the matter of *Jai Prakash Gupta (Dead) through Lrs vs. Riyaz Amamad and another* reported in (2009) 10 SCC 196 so also some decisions of this Court and said that his aforesaid applications filed under Order 41 Rule 27 of CPC and of Order 6 Rule 17 of CPC being dismissed contrary to law the appeal be admitted by framing the substantial questions of laws on this ground also.

7. Having heard, keeping in view the argument advanced by the counsel, I have carefully gone through the record of both the Courts below along with the impugned judgment so also the aforesaid case laws cited by the appellant's counsel.

8. It is undisputed situation in the matter that there is concurrent findings of the Courts below in favour of the respondent regarding his bonafide genuine requirement of the premises in dispute for his business. Such finding were given by the Courts below after taking into consideration the pleadings and available evidence including the alleged available alternate accommodation with the respondent and there suitability. During the course of arguments appellant's counsel apprises me that in one suit filed by the respondent against the other tenant for his eviction with respect of the adjoining shop to the

disputed shop the requirement of three shops was stated while in present suit the requirement of two shops is stated. For the sake of argument if such situation is also taken into consideration even then, no adverse inference could be drawn against the respondent regarding his alleged need because the aforesaid concurrent findings have been given by the Courts below after taking all the available circumstances of the case as stated above.

9. True it is after passing the decree by the trial Court on the ground of bonafide genuine requirement, on behalf of the appellant the above mentioned three applications were filed to take some additional evidence at the appellate stage as well as for amendment in the written statement with respect of availability of some alternate accommodation with the respondent as alleged which has come in vacant possession of the respondent either during the course of trial of suit. All these applications were considered by the appellate Court while passing the impugned judgment and taking into consideration the available circumstances mentioned in such applications by holding that the alleged accommodation was got vacated by the respondent in the year 2007 when the suit was pending in the trial Court and these applications were filed at very belated stage in the year 2011 and also by mentioning some other reasons, the same were dismissed.

10. It is apparent that considering the available evidence the case was decided by the Courts below and the alleged requirement of the respondent with respect of the disputed premises has been concurrently held to be bonafide and genuine and as per settled proposition of law, such findings being finding of fact could not be interfered under Section 100 of CPC as laid down by the apex court in the matter of *Dr. Ranbir Singh vs. Asharfi Lal* reported in (1995) 6 SCC 580 which was followed by this Court in the matter of *Machala Bai vs. Nanak Ram* reported in [2006 (2) MPLJ 484 holding that the concurrent findings of the Courts below on the question of bonafide genuine requirement being finding of fact, could not be interfered under Section 100 of CPC.

11. So far as the case laws cited on behalf of the appellant to admit this appeal by framing the substantial question of law on the ground of dismissing there aforesaid three applications by the appellate Court is concerned, I do not dispute the principle laid down in the aforesaid cited case of *Mohd. Ismail* (supra) and *Jai Prakash Gupta* (supra), but in the available factual matrix and the circumstances, the same being distinguishable on facts are not helping to the appellant. Even

otherwise, the findings and the approach of the appellate Court given for dismissing the above mentioned applications could not be said to be contrary to any law or the procedure and such situation is also not giving any rise to any question of law rather then the substantial questions of law under Section 100 of CPC. So, on such count also I have not found any scope in the matter to frame any substantial questions of law on this count, therefore, the arguments of the appellant's counsel in this regard is hereby failed.

12. Coming to consider the another question raised by the appellant's counsel that after dismissing the suit of the respondent by the trial Court on the ground of Section 12 (1) (a) of the Act, the appellate Court has committed error in considering the cross objection of the respondent filed under Order 41 Rule 22 of CPC, and decreeing the suit on the ground under Section 12 (1) (a) of the Act is concerned, firstly such approach of the appellate Court being based on a decision of the apex Court in the matter of *Jamnalal and others vs. Radheshyam* reported in 2000(2) JLJ 1, is not giving rise to any substantial question of law. Keeping in view such cited case of the apex Court even on re-examining the case at hand, then it is apparent that after receiving the notice of demand of arrears of rent within two months, such dues of the rent were neither tender nor paid by the appellant to the respondent and subsequent to it even after receiving the summons of the suit within one month, such arrears was neither tender nor deposited with the Court and even subsequently at any point of time till pendency of the suit before the trial Court, no application for condoning the alleged delay in depositing such rent was filed. So in such premises, the approach of the appellate Court could not be said to be faulty.

13. Apart the aforesaid even on considering the matter in the light of the other submissions of the appellant's counsel that even on non-depositing the rent by the appellant in accordance with the provision of Section 13 (1) of the Act, in the light of said decision of *"G. Reghunathan" case* (supra) the Court was duty bound to adjust such arrears amount from the aforesaid earlier deposited sum of Rs.25,000/- and in such premises, no prayer for condoning the delay was required and also the decree of Section 12 (1) (a) of the Act could not be passed is concerned. In the case at hand, it is apparent that at the time of creating the tenancy as per agreement Rs.25,000/- was deposited by the appellant as security advance with the respondent for the time till subsisting the tenancy and the same was refundable only on vacating the premises and not prior to that. So unless the application before the Court or the consent in this regard was given by the appellant to the

respondent, such dues and arrears could not have been adjusted from the aforesaid sum of advance deposit. So, in such premises, and in the light of the case laws of *Jamnalal and others* (supra), the approach of the appellate Court in passing the decree under Section 12 (1) (a) of the Act, also could not be said to be contrary to law.

14. For the sake of argument keeping in view the aforesaid decision of the apex Court in the matter of *G Reghunathan* (supra), if the case is examined then, in the cited case at the time of affirming the decree of eviction on other available grounds, the observation was made that while considering the question of committing default in paying the arrears of rent, the same could be adjusted from the sum initially deposited by the tenant and such decree on such ground was set aside. So in any case, in the case at hand also if this appeal is admitted by framing any substantial question of law regarding sustainability of impugned decree in connection of Section 12 (1) (a) of the Act even then in view of the aforesaid discussions and findings that the impugned decree on the ground of bonafide genuine requirement enumerated under Section 12 (1) (f) of the Act could not be interfered under Section 100 of CPC., the impugned judgment and decree of eviction could not be set aside so this appeal could not be admitted only on such count. Consequently this appeal being devoid of any merit is hereby dismissed at the stage of motion hearing. There shall be no order as to the cost.

Appeal dismissed.

I.L.R. [2013] M.P., 1940
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 331/2013 (Jabalpur) decided on 22 February, 2013

ATAR BAI (SMT.) ...Appellant
Vs.
UNION OF INDIA ...Respondent

Railway Claims Tribunal Act (54 of 1987), Sections 17 (1) (b), 17 (2) **- Claim petition dismissed as barred by 4 years - Held - It is expected from the Railway Claims Tribunal to consider the application for condonation of delay liberally - Learned Tribunal was not justified in dismissing the application for condonation of delay specially in a death case where appellant is only surviver and lost her son - Matter remanded back to be decided on merits.** **(Para 6)**

रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 17 (1)(बी), 17 (2) – दावा याचिका, 4 वर्ष द्वारा वर्जित होने के कारण खारिज – अभिनिर्धारित – रेल दावा अधिकरण से अपेक्षित है कि वह विलम्ब के लिए माफी के आवेदन पर उदारता से विचार करे – विद्वान अधिकरण द्वारा विलम्ब के लिये माफी का आवेदन खारिज करना न्यायोचित नहीं था, विशेष रुप से मृत्यु के प्रकरण में जहां अपीलार्थी एकमात्र उत्तरजीवी है और उसने अपना पुत्र खोया है – मामला गुणदोषों पर निर्णित करने हेतु प्रतिप्रेषित।

Hemant Kumar Chouhan, for the appellant.
Govind Patel, for the respondent.

ORDER

N.K. Mody, J:- Heard on the application for condonation of delay of 1 day.

From perusal of the record, it is evident that the impugned order is dated 22/10/2012 of which copy was supplied to the appellant on 23/01/2012 while appeal is filed on 21/01/2013. Thus, the appeal is filed within 90 days, which is the limitation prescribed under Section 23 (3) of the Railway Claims Tribunal Act. Hence, the objection raised is turned down.

2. Being aggrieved by the order dated 22/10/2012 passed by Railway Claims Tribunal, Bhopal in case No. OA/IIu/BPL/2012/0096 whereby claim petition filed by the appellant was dismissed, present appeal has been filed.

3. Short facts of the case are that appellant who is widow filed a claim petition alleging that she lost her son in a train accident which took place on 27/02/2007. The claim petition was filed on 18/02/2012 alongwith an application for condonation of delay as limitation of filing the claim petition is of one year. The application was contested by the respondent. After holding summary inquiry learned tribunal dismissed the application, hence this appeal.

4. Learned counsel for the appellant submits that impugned order passed by learned tribunal is illegal and deserves to be set-aside. It is submitted that appellant is illiterate lady and was not knowing that the appellant is entitled for compensation, therefore, claim petition could not be filed in time. It is submitted that appeal be allowed and impugned order be set-aside.

5. Learned counsel for the respondent opposes the prayer and submits that appeal be dismissed.

6. From perusal of record, it appears that there is an inordinate delay in filing the claim petition which is approximately four years. Under the Railway Claims Tribunal Act, 1987 claim petition is being filed under Section 13 of the Act and in case the claim petition is filed for compensation on account of injuries or death the limitation is prescribed under Section 17 (1) (b) of the Act which is of one year and claim petition can be filed after expiry of one year alongwith the application for condonation of delay under Section 17 (2) of the Act for which the appellant has to show the bonafide ground for the delay. In Motor Vehicles Act, 1988 as per Section 166 (3) claim application was to be filed within six months and as per the proviso delay can be condoned on sufficient grounds which prevented the claimant to file the claim petition in the prescribed time. Provisions or Section 166 (3) of Motor Vehicles Act was borrowed from Section 110-A(3) of Motor Vehicles Act, 1939. Section 166 (3) of Motor Vehicles Act, 1988 was deleted by way of amendment w.e.f 14/11/1994, with the result in case of injuries or death in a motor accident claim petition can be filed at any point of time while it is not possible in relating to Railway Claims. However, keeping in view the aims and objects for deleting sub clause 3 of section 166 of Motor Vehicles Act whereby limitation for filing the claim petition for compensation on account of injuries or death was deleted, it is expected from the Railway Claims Tribunal to consider the application for condonation of delay liberally as by allowing the application for condonation of delay the claim petition is not allowed because the claimants have to prove their case for getting the compensation. The whole idea for deleting Section 166 (3) of Motor Vehicles Act, 1988 was that no claim petition filed by claimant for compensation on account of injuries or by the dependents on account of death should not be dismissed on the ground of delay. Same principles applies when learned Railway Claims Tribunal deals with the application for condonation of delay. In view of this, this Court finds that learned tribunal was not justified in dismissing the application for condonation of delay specially in a death case where appellant is only surviver and lost her son. Thus, appeal filed by the appellant is allowed and the impugned order passed by the learned tribunal stands set-aside and case is remanded back to the learned tribunal to decide the case on merits. Parties are directed to remain present before the learned tribunal on **09/04/2013.**

7. With the aforesaid observations, appeal stands disposed of. C.C. as per rules.

Appeal disposed of.

I.L.R. [2013] M.P., 1943
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
M.A. No. 2026/2012 (Jabalpur) decided on 14 March, 2013

BAJAJ ALLIANZ GENERAL INSURANCE CO. LTD. ...Appellant
Vs.
AHSISH PATEL & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 166 - Motor Accident - Murder **- Truck cleaner caused fatal injuries to the driver/deceased when the truck was standing in the side and the driver was sleeping therein - No circumstances to show that the death of the deceased was on account of accident arising out of use of motor vehicle - Appeal allowed however, the claimants shall be at liberty to claim the amount from the owner of the truck under the provisions of Workmen Compensation Act. (Para 10 &11)**

मोटर यान अधिनियम (1988 का 59), धारा 166 – मोटर दुर्घटना – हत्या – ट्रक क्लीनर ने वाहन चालक/मृतक को घातक चोटें कारित की, जब ट्रक बाजू में खड़ा था और उसमें वाहन चालक सो रहा था – यह दर्शाने के लिए कोई परिस्थिति नहीं कि मृतक की मृत्यु का कारण, वाहन के उपयोग से उत्पन्न दुर्घटना है – अपील मंजूर, किन्तु कर्मकार प्रतिकर अधिनियम के उपबंधों के अंतर्गत ट्रक मालिक से रकम का दावा करने के लिए दावाकर्ता स्वतंत्र होंगे।

Cases referred :

AIR 2000 SC 1930, 2013 ACJ 228, 2010(2) MPLJ 678, 2011(1) MPWN 46, 2009(1) ACCD 72 (All).

T.S. Lamba, for the appellant.
Kapil Patwardhan, for the respondents No. 1 & 2.

ORDER

M.C. GARG, J:- This appeal has been filed by the Insurance Company aggrieved by the award of the Tribunal dated 22nd March, 2012 in MACT Case No.90/2011 which was instituted by first respondent and another claimant, legal heirs of late Shri Shiv Prasad, who was driver of Truck bearing registration No.CG-04-JA-2770 and was murdered by his cleaner.

2. According to the respondents, it was a case of an accident arising out

of the motor vehicle and, therefore, they claimed compensation from the appellant and the owner of the truck. The Tribunal by impugned award dated 22nd March, 2012 allowed the claim petition in favour of the respondents by awarding a sum of Rs.1,78,000/- under section 166 of the Motor Vehicles Act. Consequently, as the truck was insured with the appellant, the liability was fastened on the Insurance Company.

3. Appellant has come before this Court by filing the present Miscellaneous Appeal alleging that, in this case, death of the deceased was a clear cut case of murder by the cleaner which was not a case where death was caused in an accident arising out of the use of motor vehicle. Reference has been made by the appellant to the judgment of Hon'ble Supreme Court delivered in the case of *Smt Rita Devi and others vs. New India Assurance Co.Ltd. and another* reported in AIR 2000 SC 1930. Relying upon the aforesaid judgment, it has been argued that in the peculiar facts of this case, the case is covered by the exception as discussed in para 10 of that judgment and, therefore, the appellant is not liable to pay any compensation to the respondents. The relevant observation is reproduced hereunder:-

> 10. The question, therefore, is can a murder be an accident in any given case? There is no doubt that 'murder' as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a 'murder' which is not an accident and a 'murder' which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominent intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

4. On the other hand, learned counsel for the respondents, relying on various judgments, submits that in the instant case, the murder of deceased Shiv Prasad has taken place during the course of his employment and during the course of the use of motor vehicle and, therefore, liability was that of the

insurer.

5. Judgments relied upon by the learned counsel for the respondents are the judgments delivered in the cases of *National Insurance Co.Ltd. vs. Sheela Rani and another* by Punjab and Haryana High Court reported in 2013 ACJ 228, the judgment of this Court delivered in the case of *New India Assurance Company Ltd. vs. Budhsen Mishra and others* reported in 2010(2) MPLJ 678 and the judgment of this Court delivered in the case of *National Insurance Co.Ltd. v. Harish Kumar and another* reported in 2011 (1) MPWN 46. Reliance has also been placed on the judgment of Allahabad High Court delivered in the case of *Divisional Manager, National Insurance Co. Ltd. vs. Smt. Shimla and others* reported in 2009(1) ACCD 72 (All).

6. I have gone through all these judgments. The facts in those judgments are entirely different. The facts in the case of *Divisional Manager vs. Smt. Shimla* (supra) were different and could not be considered similar to that of the case in hand. In that case, relevant discussion is in para 8 which reads as under:-

> 8. Initially, we were under an impression that this term cannot be used as accident at all, but an incident which leads to a murder. But from the aforesaid definitions and the judgment cited in *Rita Devi (Smt.) and others v. New India Assurance Co. Ltd.* (2000) 5 SCC 113, we are of the firm view that this type of accident may be distinct, but not different in the course of use of a motor vehicle. The Supreme Court in the aforesaid judgment has categorically specified the definition between the accidental murder and intentional murder. The accidental murder is a non-felonious act, which can be separated from the murder caused by felonious act. If it is other than felonious act, in such case, we can define the term as an accidental murder. Therefore, it can also be termed as incident in the course of use of the motor vehicle. In the relevant para of the case of *Rita Devi* (supra) it has been held by the Supreme Court as follows:
>
> "In our opinion, if the dominant intention of the act of felony is to kill any particular person then such killing is not an accident murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was

caused in furtherance of any other felonious act then such murder is an accidental murder."

7. The facts given in para 2 of this case are distinguishable than the judgment delivered in *Rita Devi's case*(supra) as well as facts of the instant case. Same is the position of other judgments cited at bar by the learned counsel for the respondents.

8. Counsel for the respondents submits that the case of *New India Assurance Company Ltd. vs. Budhsen Mishra* (supra) was similar to the case in hand, however, the contention is not acceptable in view of the facts of case which reads as under:-

> Facts giving rise to the claim for compensation and passing of award thereof, briefly are that, on 28-10-2005 at Village Baillwa Paikkon on NH-7 opposite shop of Birjwasi Singh at 7:30 p.m., on the road, Surendra Kumar (the deceased) was engaged in chit-chatting with one Dhirendra Singh when one Rajrakhan Singh came from his house and started talking with Surendra Kumar during course whereof he, i.e., Rajrakhan Singh pushed Surendra Kumar towards the Highway and at that very moment he was run over by truck bearing Registration No.UP-70U-9346, driven by respondent No.5, owned by respondent No.4. Consequent whereof, Surendra Kumar died on spot.
>
> Alleging that the death of Surendra Kumar was due to rash and negligent driving by respondent No.5, the legal representatives of the deceased filed a claim petition under section 163-A of Motor Vehicles Act, 1988 for compensation of Rs.8,61,000/-.

9. These facts clearly goes to show that it was a case of accident arising out of motor vehicle.

10. In the present case, it has come on record that the cleaner of the truck caused fatal injuries to the deceased. This fact has been discussed by the Tribunal in para 10 of the judgment. The trial Court has also relied upon the statement of Shri Ashish, the son of the deceased, who on oath has stated that on 9/11/2008 when the truck was standing in the site and his father was

sleeping therein, the truck cleaner caused fatal injuries to his father and it was on that basis he succumbed to the injuries. A report to that effect was also lodged on 9/11/08 at about 6:05 P.M. by him. There is no other evidence available on record to show that the death of the deceased was not taken place in the manner stated and it occurred by way of accident while the truck was being plied. There are no circumstances available on record to show that the death of the deceased was on account of the accident arising out of use of motor vehicle.

11. In.view of the aforesaid, the appeal filed by the appellant is allowed. The award dated 22nd March, 2012 passed by Motor Accident Claims Tribunal against the Insurance Company in MACT Case No. 90/2011 is set aside. However, the respondents shall be at liberty to claim the amount from the owner of the truck under the provisions of Workmen Compensation Act. The amount if any deposited by the appellant shall be refunded to the appellant except for the payment of no fault liability.

Appeal allowed.

I.L.R. [2013] M.P., 1947
APPELLATE CIVIL
Before Mr. Justice A.K. Sharma
S.A. No. 137/2013 (Gwalior) decided on 18 April, 2013

STATE OF M.P. ...Appellant
Vs.
RAJARAM & ors. ...Respondents

Limitation Act (36 of 1963), Section 5 - Condonation of delay - **Delay of 3773 days by the authorities of Government in filing the second appeal - Authorities are dealing in the mutation proceeding and facing the writ petition and contempt petition in the same matter - Such authorities of Govt. cannot be given the benefit of "leisurely attitude is expected from the Govt. servant" - Held - There is difference between leisurely attitude and revengeful attitude - Documents on record shows the pure revengeful attitude with an aim to save the authorities from the action in contempt proceedings - Such an action cannot be said to be bonafide or sufficient reason for condonation of delay. (Para 1 & 14)**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिए माफी – द्वितीय अपील प्रस्तुत करने में सरकार के प्राधिकारियों द्वारा 3773 दिनों का विलंब – उसी मामले में प्राधिकारीगण नामांतरण कार्यवाही कर रहे हैं और रिट याचिका तथा अवमानना याचिका का सामना कर रहे हैं – सरकार के उक्त प्राधिकारियों को "शासकीय सेवक से सुस्त मनोवृत्ति अपेक्षित है" का लाभ नहीं दिया जा सकता – अभिनिर्धारित – सुस्त मनोवृत्ति और प्रतिशोध की मनोवृत्ति में अंतर है – अभिलेख के दस्तावेज, अवमानना कार्यवाही में, कार्यवाही से प्राधिकारियों को बचाने के लक्ष्य के साथ प्रतिशोध की मनोवृत्ति दर्शाते हैं – उक्त कार्यवाही को विलम्ब के लिये माफी का सद्भाविक या पर्याप्त कारण नहीं कहा जा सकता।

Cases referred :

AIR 1996 SC 1623, AIR 1996 SC 2750, (2000) 9 SCC 94, 2013 RN 41, 1992 JLJ 458, (2008) 17 SCC 448, 2012 AIR SCW 2412.

Nidhi Patankar, G.A. for the appellant/State.
Sanjeev Jain, for the respondents.

ORDER

A.K. Sharma, J: Heard on I.A.No.1572/13 which is an application under Section 5 of Limitation Act for condonation of delay of 3773 days in filing of this second appeal.

2. The appellant has filed this appeal under Section 100 of Code of Civil Procedure, 1908 against the judgment and decree dated 20-08-2002 passed in Civil Appeal No.67-A/2002 by learned 12th Additional District Judge (Fast Track Court), Gwalior allowing the suit appeal of the respondents/plaintiffs by reversing the judgment and decree dated 15-02-1997 passed in Civil Suit No.248-A/19994 by learned Third Civil Judge Class -I, Gwalior.

3. Learned Government Advocate for the State has submitted that after passing of judgment and decree in the Appeal on 20-08-2002 the competent authority of the appellant/State approached the Office of Additional Advocate General when he came to know about the impugned judgment and decree passed by learned first appellate Court and Government Advocate has given his opinion on 05-01-2013 to prefer the second appeal. Thereafter, the OIC was appointed vide order dated 04-02-2013 and then the OIC approached the Office of Additional Advocate General, Gwalior and appeal has been drafted and preferred. It has been further stated that the delay is bona fide and caused due to some busyness of the officials in the essential duties. It has been further

submitted that looking to the subject involved in the appeal the delay in filing of appeal deserves to be condoned.

4. In order to refute the submissions of appellant's learned counsel, learned counsel for respondents submitted that in the main suit, the Sub Divisional Officer, Gwalior was OIC and OIC was well aware of the judgment and decree dated 20-08-2002 which was passed after hearing all the parties including the appellant. Appellant was also having the knowledge about the judgment and decree passed by learned first appellate Court in the year 2005 when the plaintiffs have filed an application before Naib Tahsildar, Gwalior for mutation of their name in the revenue record pursuant to the judgment and decree dated 20-08-2002. Certified copy of the judgment and decree dated 20-08-2002 was filed before Naib Tahsildar for mutation. Naib Tahsildar rejected the application for mutation vide order dated 11-07-2005 against the said order the appeal No.115/2004-05 was filed before the Sub Divisional Officer who after considering the implication arising out of said judgment and decree dated 20-08-2002 allowed the appeal vide order dated 10-02-2006 and remanded back the matter to the Tahsildar for deciding the same afresh keeping in view the observations made and directions contained in the order dated 10-02-2006. The same SDO was appointed as OIC in the first appeal.

5. Learned counsel for the respondents further submitted that no action has been taken by Tahsildar on the order dated 10-02-2006 passed by SDO therefore, the plaintiffs have filed writ petition bearing No.150/2012 before this Court which was decided vide order dated 16-01-2012 and direction was given to the revenue authorities to decide the application of mutation within a period of thirty days but no action was taken by the revenue authorities, therefore, the plaintiffs have filed the contempt petition bearing No.84/2013 before this Court in which the notices have been issued to the authorities concerned. The contempt petition is still pending before this Court. There is no bona fide delay in preferring the present appeal and no sufficient cause has been shown by the appellant to condone the delay.

6. Learned Government Advocate for the appellant/State submitted that the authorities were not having any knowledge about the judgment and decree dated 20-08-2002 and when they came to know about the judgment and decree passed by learned first appellate Court they approached the Government Advocate for opinion on 05-01-2013. The appeal has been filed immediately after following the due procedure. It is further submitted that

looking to the fact that the land involved in the matter is Charnoi land of which the plaintiffs are claiming themselves to be the Patta holders, therefore, looking to the property involved in the matter the delay occurred in filing of appeal be condoned.

7. Learned Government Advocate placed reliance on the decision of Apex Court in the matter of *State of Haryana Vs. Chandra Mani and others,* AIR 1996 SC 1623 in which it has been held that while considering the provisions of Section 5 of Limitation Act that in view of the fact that the Government is impersonal machinery and the decisions are taken at slow space certain amount of latitude is not impermissible. State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants.

8. Learned Government Advocate has further placed reliance on the decision of Apex Court in the matter of *Special Tahsildar, Land Acquisition, Kerela Vs. K.V. Ayisumma,* AIR 1996 SC 2750, in which it has been held that in an application for condonation of delay under Section 5 of Limitation Act each day's delay cannot be explained by the State Government and the fact that the transaction of the business of the Government being done leisurely by officers who had no or evince no personal interest at different levels, insistence upon explaining every days' delay by Court would be improper. Such adoption of strict standard of proof leads to grave miscarriage of public justice.

9. Further reliance has been placed by the Government Advocate on the decision of Apex Court in the matter of *State of Bihar and others Vs. Kameshwar Prasad Singh and another* (2000) 9 SCC 94 in which it has been held that while considering the provisions of Article 136 of Constitution of India that for condonation of delay in filing of appeal before Supreme Court, liberal approach is preferable. Where dismissing the appeal on technical ground of delay would instead of advancing interests of justice, result in failure of justice inasmuch as by virtue of impugned judgment of the High Court not only seniority and promotion of the parties before the Court be affected but those of several other incumbents also be affected, it has been held that the Court would be inclined to condone the delay.

10. Learned counsel for the respondents submitted that the plaintiffs have

filed the suit for declaration and injunction on the ground that they have been given Patta of the disputed land in csae No.1152(61)/62 in equal portion vide order dated 24-11-1961 by Tahsildar and thereafter they are doing the agriculture work on the land allotted to them. The State has filed an application under Order XLI Rule 27 read with Section 151 of CPC before learned lower appellate Court for bringing on record the Khasra entries of Samvat 1997 showing the disputed land as Charnoi land.

11. Learned counsel for the respondents has placed reliance on the decision of this Court in the matter of *Radhacharan Sharma Vs. State of M.P. through Collector, Dist. Morena*, 2013 RN 41 in which it has been held that in a revision by State delay of 23 years cannot be condoned on a bald statement that the matter has public interest. This judgment has been passed by following the judgment passed by the Division Bench of this Court in the matter of *Laxmi Bai and others Vs. Nagaram Khilawandas*, 1992 JLJ 458 and the judgment of Apex Court passed in the matter of *Pundlik Jalam Patil* (dead) by *Lrs. Vs . Executive Engineer, Jalgaon Medium Project and another*, (2008) 17 SCC 448 and another judgment of Apex Court which includes the latest judgment of Apex Court passed in the matter of *Maniben Devraj Sah Vs. Municipal Corporation of Brihan Mumbai*, 2012 AIR SCW 2412, relevant portion of which is reproduced below:

> *"In cases involving the State and its agencies/ instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and/or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest".*

12. Learned lower appellate Court has rejected the application filed by State Government and considered the evidence adduced by the plaintiffs according to which the plaintiffs were cultivating on the suit land for 30-35 years and further considering the fact that by whom the entry of Charoni has been made in the Khasra is not clear. The plaintiffs were cultivating the land on the basis of Patta issued to them by the competent authority.

13. Learned counsel for the respondents drew attention of this Court towards paragraph 6 of the judgment which shows the grave negligence on part of State Government in the present case. According to paragraph 6 of impugned judgment, the State has not filed the written statement before learned trial Court even after affording of 24 opportunities to the State, thereafter, their rights of filing the written statement has been closed and exparte was ordered. Before learned lower appellate Court, the State has appeared and filed an application under Order XLI Rule 27 read with Section 151 of CPC but no efforts were made to set aside the ex-parte judgment and decree passed by learned trial Court. Here also, the appeal has been filed after 3773 days then too by mentioning the fact that on 05-01-2013 after getting knowledge of impugned judgment and decree, the competent authority has approached the Office of Government Advocate.

14. It is important to note that the present case is an example of not only the grave negligence on part of Government authorities but on part of their Advocates. Learned counsel for the respondents has filed copy of the order dated 10-02-2006 passed by the SDO, Gwalior who was OIC in the case, has set aside the order, rejecting the mutation application and remanded the matter back for reconsideration. In the order it has also been mentioned that the plaintiffs have filed copy of judgment dated 20-08-2002 passed in Civil Appeal No.67-A/2002 which shows that the SDO had knowledge of order passed by learned lower appellate Court at least from 10-03-2006. After that even not only the OIC but the Government Advocate appearing in the High Court were having the knowledge of impugned judgment and decree which is clear from perusal of the order dated 16-01-2012 passed in Writ Petition No.150/2012 by which the revisional authorities were directed to decide the mutation application filed by the respondents within a period of 30 days from the date of receipt of certified copy of the order. The said order was passed after hearing both the parties which shows that not only the OIC but also the Office of Additional Advocate General, Gwalior High Court was having knowledge that the judgment and decree has been passed against the Government on 20-08-2002 and the ulterior motive behind filing of appeal seems to be contempt petition bearing No.84/13 filed against Tahsildar by the plaintiffs in the month of January, 2013 and that is why, the application shows that the Government Advocate has given opinion for filing of appeal on 05-01-2013 to save the authorities from contempt proceedings initiated against them and for which not only the authorities including OIC but the Office of

Additional Advocate General, Gwalior has come forward with the false ground that they came to know about passing of impugned judgment and decree on 05-01-2013 and for past 6 years, not only the concerning authorities were having the knowledge of passing of impugned judgment and decree but it was well within the knowledge of Government and their Advocates that the judgment and decree has been passed on 20-08-2002 against them and it seems that after filing of contempt proceedings the Second Appeal has been preferred with ulterior motive to save the authorities from contempt of order of Court, therefore, the delay in filing of appeal cannot be said to be bona fide and the authorities who have slept over the judgment and decree for more than 10 years and even for past 6 years they are dealing in official capacity with mutation proceedings and facing the writ petition and contempt petition, they cannot be given the benefit of judgment of Apex Court by considering the fact that the leisurely attitude is expected from the Government servant and there is difference between leisurely attitude and revengeful attitude, the attitude in the present case of the authorities is not leisurely but considering the documents on record it is purely revengeful and with an aim to save the authorities from the action in contempt petition against them which cannot be said to be bona fide or sufficient reason for condonation of delay.

15. In view of the aforesaid discussion and further considering the fact that there is no bona fide or sufficient reason for condonation of delay as discussed above, the application (I.A.No.1572/13) is hereby dismissed.

Consequently, the appeal is also dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 1953
APPELLATE CIVIL
Before Mr. Justice S.K. Gangele and Mr. Justice M.K. Mudgal
F.A. No. 199/2009 (Gwalior) decided on 7 August, 2013

OM NARAYAN BOHRE & ors. ...Appellants
Vs.
RAJENDRA PRASAD BOHRE & ors. ...Respondents

A. Evidence Act (1 of 1872), Section 3 - Proof - **Memorandum of acknowledgment of oral partition - Document written on plain paper - Neither pleaded in the written statement nor produced earlier during plaintiff evidence - Attesting witnesses are told to be dead - Scribe and**

Notary not produced in evidence - Held - It appears that the document has been prepared falsely and fabricatedly. (Para 16)

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – सबूत – मौखिक विभाजन की अभिस्वीकृति का ज्ञापन – दस्तावेज को सादे कागज पर लिखा गया – न तो लिखित कथन में अभिवाक् किया गया और न ही पूर्व में वादी के साक्ष्य के दौरान प्रस्तुत किया गया – अनुप्रमाणक साक्षीगण की मृत्यु हो जाना बताया गया है – लेखकर्ता एवं नोटरी को साक्ष्य में प्रस्तुत नहीं किया गया – अभिनिर्धारित – यह प्रतीत होता है कि दस्तावेज को मिथ्या एवं कूटरचित रुप से तैयार किया गया है।

***B. Possession - Co-sharers* - Possession of one co-owner is deemed to be the possession of all co-owners unless ouster is clearly pleaded and proved. (Para 21)**

ख. कब्जा – सह–अंशधारी – एक सह–स्वामी के कब्जे को सभी सह–स्वामियों का कब्जा समझा जायेगा जब तक कि बेदखली का स्पष्ट रुप से अभिवाक् कर साबित नहीं किया जाता।

Cases referred :

AIR 2008 SC 1541, (2002) 2 SCC 62.

Prashant Sharma, for the appellant.
None for the respondents.

JUDGMENT

The Judgment of the Court was delivered by : **M.K.MUDGAL, J. :-** The appellants/plaintiffs have filed the appeal under Section 96 of the Code of Civil Procedure being aggrieved by the judgment and decree dated 7.7.2009 passed by the Court of VI Additional District Judge (Fast Track) Bhind (Shri S.C.Rai) in Civil Suit No.13A of 2009 dismissing the suit for declaration of title to 1/6th share to each of the co-sharers and permanent injunction against the defendants no.1 and 2 not to deprive them of their share. In this appeal, the appellants are referred as 'plaintiffs' and respondents as 'defendants'.

(2). The admitted facts are that Ramsiya Bohre is father of plaintiff no.1 and 2 was real brother of plaintiffs no.3 and 4 Brahamanand and Vasudev Sharma and defendants no.1,3 and 4 Rajendra Bohre, Vishambhar Dayal Sharma and Surendra Kumar Sharma. They purchased a piece of land bearing Survey No.767 area 0.16 Hectare 70X20' vide registered sale deed dated

19.3.1979 Ex.P/4 from Mardan Singh. Names of the purchasers were recorded in Khasra entries. The defendant no.1 has executed a registered sale deed Ex.P/3 dated 24.8.2007 of the disputed property in favour of his wife defendant no.2 and her name is recorded in the municipal record.

(3). Facts, in brief, of the plaint are that after purchasing the disputed plot by Ramsiya, Brahamanand, Vasudev, Rajednra Prasad Bohre, Vishambhar Dayal Sharma and Suredndra Kumar Sharma, the disputed house was constructed by all the purchasers jointly. Every purchaser has 1/6th share in the disputed property. The plaintiffs are jointly living with the defendants in the disputed house. The plaintiffs have further pleaded that the defendant no.1 is real uncle of the plaintiffs no.1 and 2 but he has intentionally denied the right to the plaintiffs and has sold the disputed property to his wife vide registered sale deed dated 24.8.2007 without taking any consideration and possession has also not been delivered to her. The said sale deed does not affect the right of the plaintiffs. When this fact came to the knowledge of the plaintiffs on 25.7.2007, they lodged a report to the police, on the basis of which, a criminal case under Section 420, 467, 468 and 120B of Indian Penal Code has been registered against the defendants no.1 and 2. Hence, the suit was filed for declaration of title, cancellation of sale deed and permanent injunction.

(4). Denying the allegations made in the plaint, the defendants no.1 and 2 have submitted that after purchasing the plot, the partition was made between all the co-sharers in the year 1990 in the presence of their father and the said plot was given to the defendant no.1 and he became exclusive owner of the disputed plot. Thereafter, he constructed the house out of his own money. The defendants have further alleged that the defendant no.1 sold the disputed property to the defendant no.2 after receiving the full consideration and possession has been given to her. The plaintiffs and defendants no.3 and 4 have no title on the disputed property. Moreover, the mutation has already been carried out in favour of the defendants no.1 and 2 in the record of Municipality Bhind.

(5). The learned trial Court after framing the issues, recording evidence of both the parties and having considered the recorded evidence, dismissed the suit filed by the plaintiffs vide impugned judgment dated 7.7.2009 holding that the disputed plot was given to the defendant no.1 in the partition among the co-owners and the defendant no.1 has constructed a house on the said plot.

(6). The following questions arise for consideration in this appeal :

(i). Whether, the disputed plot purchased jointly by all the brothers was given in partition to the defendant no.1?

(ii). Whether, the defendant no.1 has constructed the house on the purchased plot with his own money?

(iii). Whether, the findings of the trial Court are based on proper reasoning?

(7). Assailing the findings recorded by the trial Court. Learned counsel for the appellant submits that the approach of the trial Court in assessing the evidence is not up to mark as the alleged mutual partition document Ex.D/8 was neither pleaded by the defendants No.1 and 2 in the written statement nor a copy of the document was produced on record along with the written statement. Inspite of this fact the Court has relied on the said document. Learned counsel further submits that for proving the Ex.D/8 except the statement of the defendant No.1 Rajendra Prasad, no other witness has been produced on behalf of the defendant in this regard. Moreover, the said document is prepared on plain paper which is not only ante dated but also a fake and forged document. Name of the scribe is not mentioned in the document and the statement of the scribe has not got been recorded by the defendant No.1. The document was notarized by the advocate but statement of the notary was not got recorded. Learned counsel further submits that the said document was prepared after the closure of the plaintiff evidence as well as the evidence of the defendant No.1 was over and deliberately the names of the deceased persons have been mentioned as witnesses on the document. Learned trial Court has not considered the evidence meticulously. The findings given by the learned trial Court are not only perverse but also arbitrary and are against the recorded evidence. Nevertheless, no statement of the persons by whom the house was constructed as per the statement of Rajendra Prasad (DW/1) have not been got recorded by the defendant. Hence, the impugned judgment of the learned trial Court deserves to be set aside and the suit be decreed in favour of the plaintiff.

(8). Before appreciating the evidence of both the parties, an application (I.A. No.16655/10) dated 28.9.10 under Order 26 Rule 10A of the Code of Civil Procedure filed by the appellants/plaintiffs whereby the appellants/plaintiffs have requested that they may be permitted to examine the signatures of Ramsiya

father of plaintiffs No. 1 and 2, plaintiffs No. 3 and 4 and defendants No. 3 and 4 on the alleged mutual partition deed Ex-D/8 with their standard signatures by the handwriting expert is to be considered. It is true that no reply of this application has been filed by the defendants No. 1 and 2. However, why the said application was not filed before the trial Court and no proper explanation in this regard has been given by the plaintiffs. Besides, the document Ex-D/8 was in the knowledge of the plaintiffs during pendency of the suit. The said prayer could have been made very well before the trial Court. It is true that an additional evidence can be produced in appeal under Order 41 Rule 27 of the Code of Civil Procedure, nonetheless, the said prayer is not accepted in a routine manner. A party that desires to produce additional evidence before the appellate Court has to satisfy that it could not get the evidence with due diligence during pendency of the suit before the trial Court. In the instant case, the appellants have not made out any case for which, the application may be allowed. Thus, I.A.No.16655 of 2010 is hereby rejected.

(9). Indisputably, the disputed plot was purchased by six brothers Ramsiya, Bramhanand, Vasudev, Rajendra, Vishamvar Dayal and Surendra Kumar jointly vide registered sale deed dated 19.3.1979 Ex-P/4, on the basis of which, each purchaser has title to 1/6th share in the purchased property. The defendant No.1 has also admitted this fact in para 9 of his statement, however he has claimed his exclusive ownership in the disputed property on the basis of oral partition as well as mutual relinquishment deed dated 25.11.90 Ex-D.8. In such a situation, burden of proof is shifted on the defendant No.1 to prove the alleged partition as he has stated in the written statement.

(10). As held in *Thiruvengada Pillai Vs. Navaneethammal and Another* AIR 2008 SC 1541, the Hon'ble Apex Court held that when the execution of an unregistered document put forth by the plaintiff was denied by the defendants, the ruling that it was for the defendants to establish that the document was forged or concocted is not a sound proposition. The first appellate Court proceeded on the basis that it is for the party who asserts something to prove that thing; and as the defendants alleged that the agreement was forged, it was for them to prove it. But the first appellate Court lost sight of the fact that the party who propounds the document will have to prove it. It was the plaintiff who had come to Court alleging that the first defendant had executed an agreement of sale in his favour. The defendant having denied it, the burden was on the plaintiff to prove that the defendant had executed the

agreement and not on the defendant to prove the negative.

(11). The learned trial Court having discussed the evidence in para 7 to 9 of the impugned judgment has found the alleged mutual partition deed proved in favour of the defendant No.1. This Court has to consider whether the findings of the trial Court are based on proper appreciation of the recorded evidence. On perusal of written statement dated 15.12.07 filed by the defendant No.1 and 2, it becomes clear that the defendants have pleaded in special plea of para 1 and 2 that the said plot was exclusively given by his father to the defendant No.1 by oral partition in the year 1990. At that time, no pleading was made regarding the mutual partition deed dated 25.11.90 Ex-D/8 nor the copy of the said document was produced on record. Not only this, the document Ex-D/8 was never tendered to the plaintiffs' witnesses during their cross-examination. This document was brought on record on 25.04.09 after closure of the plaintiffs' evidence on 10.8.08. It is pertinent to mention here that the defendant No.1 Rajendra Sharma's statement under Order 18 Rule 4 of the C.P.C was filed on 17.6.08, but on that date, the Ex-D/8 was not produced on record. The cross-examination of the said witness was completed on 24.7.08. Prior to it, the existence of said document was not revealed by the defendant No.1 who submitted it on record belatedly on 25.4.09. No proper reason has been given in this regard as to why it was not pleaded earlier and the copy of the document was not filed along with the written statement. Moreover, it was deliberately concealed during the plaintiffs' evidence when their statements were recorded. Further, it was not even brought on record at the time of defendant No.1's own statement when it was recorded. When the unregistered document Ex.D/8 put forth by the defendants no.1 and 2 was disputed by the plaintiffs, it was obligatory on the part of the defendants no.1 and 2 to prove the execution of Ex.D/8 beyond suspicion, but they did not do so.

(12). On perusal of the Ex-D/8 dated 25.11.90, it becomes clear that it has been prepared on plain paper and has not been got registered and even it is not written on stamp paper. If a document is registered, it shall be presumed that the document is executed on a particular date and time which is mentioned on the document whereas a document can easily be prepared on plain paper antedated.

(13). In para 1 and 10 of the defendant Rajendra Prasad's statement, it has come on record that his father made a family partition on 25.11.1990 and

thereby the said plot was given to him. The defendant Rajendra Prasad (DW-1) has not specifically deposed that the said partition was made with the consent of other co-sharers. In para 1 and 2 of the special pleas, it has been pleaded that the partition was made orally by his father in year 1990. No specific date of partition has been mentioned in the written statement without any further mention of the Ex.D/8. No witness except the statement of defendant No.1 has been produced to prove the oral partition. The father of the plaintiffs No. 3 and 4 and the defendants.No.1, 3 and 4 was not the owner of the plot which was jointly purchased vide Ex. P/4 by Six brothers. They had only right to make the partition of the disputed property but the defendant No.1 has neither pleaded nor proved the partition in the said manner. The learned trial court has given the findings in para 8 in the impugned judgment that the document Ex.D/8 is not a partition deed but only an acknowledgment of the earlier partition and thus, the document was not required to be registered. If this had been the fact, the defendant No.1 ought to have proved the earlier partition made among the co-sharers and that was acknowledged by the Ex.D/8. But in the instant case the defendant No.1 had utterly failed to have proved the oral partition.

(14). As regards the propriety of the Ex.D/8, it was neither pleaded in the written statement nor produced on record earlier. During the cross-examination in para 11 of the statement in this respect, the defendant No.1 has deposed that he got it recorded in the written statement. But why it has not come on record, he can not say anything about it. It appears that there was no such mutual partition in existence and that is why, it was not pleaded and produced. If the Ex.D/8 had been in existence earlier, it would have been mentioned outrightly in the pleadings as well as in the statement of the defendant No.1.

(15). As per statement of Rajendra Prasad (DW/1) mutual partition of the disputed plot was made by his father but his signature is not thereon. In these circumstances, it is inferred that the said story is entirely false and fabricated. In para 18 of the defendant no.1's statement, it has come on record that the Ex.D/8 was scribed by his cousin Satyanarayan Sharma, Advocate who is still alive. But his statement was not got recorded by the defendant No.1. No explanation has been further given as to why he was not produced for proving the Ex.D/8. Moreover, the name of the Satyanarayan Sharma has not been mentioned in the Ex.D/8 as the scribe of the document. Satyanarayan Sharma has put his signature on the back side of the Ex.D/8 for the purpose of identifying

the defendant No.1 before the Notary who was also not examined by the defendant No.1.

(16). In para 17 of the defendant No.1's statement, it has come on record that both the witnesses Moogaram and Jagdish are no more. Even the signatures of the said witnesses were not got identified by any of their family members. From the manner in which, the document Ex.D/8 was produced after recording the statement of the defendant No.1 himself, it appears that the Ex.D/8 has been prepared falsely and fabricatedly and that is why the names of the deceased Moongaram and Jagdish have been shown as witnesses so as to avoid the possibility of producing them before the Court.

(17). All the four plaintiffs' witnesses have unequivocally deposed in their statements that after purchasing the plot, all six brothers jointly constructed the house, in which, four rooms, Varandah, Tin-shed, Kitchen, stairs, latrine and bathroom were built by them. Though, no statement regarding expenditure of money spent in construction of the said house has been produced on record by the plaintiffs, but on this ground, their testimony can not be discarded, since the defendant no.1 and 2 have also not produced any statement of expenditure.

(18). In para 10 of the defendant Rajendra Kumar (DW1)'s statement, it has come on record that he had constructed the house in the year 1990 but in para 15, the witness has admitted that his appointment was made in the year 1991. From this statement, it is inferred that the defendant was unemployed in the year 1990 and he had no source of income to build the house. Though the defendant has tried to say that he earned money by labouring but this explanation appears to be false and concocted as he was just 27 years old in the year 1990 and no document has been produced showing that he actually had money in his possession for spending on construction of the house. Besides, no plan for construction in the house was got sanctioned by the defendants from Municipality Bhind and proved on records.

(19). The defendant no.1 deposing in para 10 has stated that he got the house constructed from Maison Vidyaram and labour Ramsanehi but their statements were not got recorded by the defendants. The witness Kamla Devi (DW3) has deposed in para 2 that she resides in Ward no.1, Ater Road near Ranital, but she does not know in which ward the disputed house is situated as well as she does not know how many brothers Rajendra Prasad has and the name of Rajendra Prasad's father. The witness has stated in para 3 that

she has no knowledge of whether the disputed plot was jointly constructed by Brahamanand and his brothers. The witness herself has admitted in the same para that she being illiterate only put her signature on the affidavit which was prepared by the counsel. In these circumstances, it appears that the contents of the statement have not been actually deposed by this witness and she does not have adequate knowledge about the disputed house. Similarly another witness Chhoti Bai (DW4) has deposed in para 2 and 3 in her statement. She has also admitted that the statement on affidavit was not got prepared by her. It might have been prepared by Rajendra Prasad and she cannot say clearly that the disputed house was jointly built by Rajendra Prasad and his brothers and so this leads to inference that the statement of both the witnesses did not have probative value to corroborate defendant's statement about the construction of the disputed house by the defendant Rajendra Prasad alone.

(20). The defendant has produced the statement of another witness Vishnu Dayal Sharma under Order 18 Rule 4 of the C.P.C, but the said witness was not produced in person for cross-examination. Therefore his statement cannot be relied upon.

(21). The learned trial Court in para 9 of the impugned judgment has given the findings regarding the exclusive possession and construction made by the defendant Rajendra Prasad placing reliance on the voter's list Ex-D/3, Ration card Ex-D.4, another Ration card (year 2006) Ex-D/5, house tax receipt Ex-D/6 and receipt issued by Municipality Bhind Ex-D.7 but these documents do not confer the exclusive title upon the defendant No.1. Apart from this, if it is presumed that the defendant No.1 is in possession of the disputed house, it does not create any title of the defendant No.1 as possession of one co-owner is deemed to be possession of all co-owners unless ouster is clearly pleaded and proved as held by the Hon'ble Apex Court in para 9 of *Darshan Singh and Others. Vs. Gujjar Singh by L.Rs and others* (2002) 2 SCC 62 that the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied. The said view is based on *Bashir Ahmad Vs. Parshottam* AIR 1929 Oudh 337.

(22). It is clear from the above discussion and in view of the facts stated that the defendant No.1 Rajendra Prasad was not the only owner of the disputed house. Therefore, he had no right to sell the disputed house vide Ex-P/3 to his wife defendant No.2. The said sale deed Ex-P/3 is not only a bogus document but has also been deliberately executed in favour of his wife defendant No.2 to defeat the right of co-owners-the plaintiffs and the defendants No. 3 and 4.

(23). Having taken into account all the facts and recored evidence, this Court comes to the conclusion that the findings of the learned trial Court are not only baseless but also perverse to the recorded evidence. Hence, the impugned judgment being devoid of merit and credence deserves to be set-aside. The plaintiffs/appellants are entitled to get declaration as prayed in the suit.

(24). Therefore, allowing the appeal, setting-aside the impugned judgment and decreeing the suit, the title to 1/6th share, to the plaintiffs no.1 and 2, 1/6th share to plaintiff no.3 and 1/6th share to plaintiff no.4 is declared in the disputed house constructed on Survey No.767 area 0.16 Hectare 70X20'. The plaintiffs would get disputed house partitioned for taking possession. The defendants no.1 and 2 are restrained from alienating or creating interest of the third party in the disputed property till partition is over. The preliminary decree is passed accordingly.

(25). The cost of this appeal and the suit would be borne by the defendants no.1 and 2.

The decree be drawn up accordingly.

Appeal allowed.

I.L.R. [2013] M.P., 1962
APPELLATE CIVIL
Before Mr. Justice N.K. Gupta
M.A. No. 3742/2010 (Jabalpur) decided on 13 August, 2013

NATIONAL INSURANCE CO. LTD. ...Appellant
Vs.
LALARAM & ors. ...Respondents

*A. **Workmen's Compensation Act (8 of 1923), Section 30 - Interest** -* **Compensation amount deposited within 30 days from the date of award - Interest was granted on compensation from the date of award**

till realization - Only a small amount would have accrued - It is hypertechnical to say that such small amount was not deposited therefore, the appeal is required to be thrown - Appeal cannot be dismissed. (Para 9)

क. कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 30 – ब्याज – प्रतिकर राशि अवार्ड की तिथि से 30 दिनों के भीतर जमा की गई – प्रतिकर पर अवार्ड की तिथि से वसूली तक का ब्याज प्रदान किया गया – केवल एक छोटी रकम प्रोद्भूत होती – यह कहना अति तकनीकी होगा कि उक्त मामूली रकम जमा नहीं की गई, इसलिए अपील अस्वीकार की जाना अपेक्षित है – अपील खारिज नहीं की जा सकती।

***B. Workmen's Compensation Act (8 of 1923), Sections 3 & 12 - Workman Employer Relationship* - Owner of tractor residing at Distt. Alwar whereas incident took place in Distt. Khandwa - Evidence of claimant that tractor fitted with thresher was being brought in Madhya Pradesh from time to time for last 8-9 years acceptable - Employment of claimant with respondent No. 2 and owner established. (Para 10)**

ख. कर्मकार प्रतिकर अधिनियम, (1923 का 8), धाराऐं 3 व 12 – कर्मकार नियोक्ता संबंध – ट्रेक्टर मालिक अलवर जिले का निवासी, जबकि घटना खंडवा जिले में घटित हुई – दावाकर्ता का साक्ष्य कि थ्रेशर लगा ट्रेक्टर पिछले 8–9 वर्षों से समय–समय पर मध्य प्रदेश में लाया जा रहा है, स्वीकार योग्य है – दावाकर्ता का प्रत्यर्थी क्र. 2 तथा मालिक के साथ नियोजन स्थापित।

***C. Workmen's Compensation Act (8 of 1923), Section 4 - Compensation* - Claimant's case that he was getting Rs. 150 per day for working on thresher not denied by respondents No. 2 and 3 by entering into witness box - Evidence of claimant liable to be accepted. (Para 11)**

ग. कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 4 – प्रतिकर – दावाकर्ता का प्रकरण कि उसे थ्रेशर पर काम करने के लिए रु. 150/– प्रतिदिन मिलता था, इसका खंडन प्रत्यर्थीगण क्र. 2 व 3 द्वारा साक्षी कठघरे में प्रवेश करके नहीं किया गया – दावाकर्ता का साक्ष्य स्वीकार किये जाने योग्य।

***D. Workmen's Compensation Act (8 of 1923), - Insurance Policy* - Insurance Policy not produced by Insurance Company but only cover note produced in which no terms and conditions mentioned - If the consumer is not given any intimation about the limitations of the**

Insurance Company, then it cannot be said that such limitations were agreed between the parties. (Para 13)

घ. कर्मकार प्रतिकर अधिनियम, (1923 का 8), – बीमा पालिसी – बीमा कम्पनी द्वारा बीमा पॉलिसी प्रस्तुत नहीं केवल प्रावरण पत्र प्रस्तुत, जिसमें कोई शर्तें उल्लिखित नहीं – यदि उपभोक्ता को बीमा कम्पनी के दायरे के बारे में कोई सूचना नहीं दी जाती, तब यह नहीं कहा जा सकता कि उक्त दायरों पर दोनों पक्षकारों की सहमति थी।

Cases referred :

1998(1) MPLJ 188, 1986 ACJ 396, 1990 ACJ 958, 1998 ACJ 190.

Anoop Nair, for the appellant.
Sameer Seth, for the respondent No. 1.

ORDER

N.K. GUPTA, J: The appellant Insurance Company has challenged the award dated 19.6.2010 passed by the Commissioner for Workmen's Compensation Act, Khandwa in W.C.N.F. Case No.25 of 2009 whereby the compensation of Rs.2,49,576/- is granted to the respondent no.1 and the appellant Insurance Company was also held liable for its payment along with the interest.

2. The respondent no.1 Lalaram has lodged a claim application before the Commissioner for Workmen's Compensation Act, Khandwa that he was resident of Village Gadbasai, District Alwar, Rajasthan. A tractor bearing registration no.RJ-2-RR-8688 which was fitted in the thresher and the respondent no.1 was working in that thresher for last 8-9 years at various places as per directions given by the respondent no.2. The tractor was insured in the name of the respondent no.3 and the respondent no.2 was the vehicle representative on behalf of the respondent no.3. On 7.10.2008 at about 8.00 a.m in the morning, the applicant was working in the field of one Balu Darbar according to the directions given by his employer. Suddenly the left hand of the applicant was pulled in the thresher and on his shouting the respondent no.2 switched off the thresher. The respondent no.2 took the applicant to Jain Hospital, Sanawad and ultimately the palm of the applicant was amputated. The applicant therefore, lodged an application for compensation before the learned Commissioner for Workmen's compensation at Khandwa.

3. The respondent no.2 in his reply has submitted that the tractor which was fitted by a thresher was borrowed by the driver and no labour was required to work on thresher machine. A cultivator who requires the help of that machine was required to arrange his own labours. Therefore, it is prayed that the respondent no.2 was not responsible for any claim. However, in alternate it was pleaded that the tractor was insured with the appellant for all agricultural purposes and therefore, Insurance Company was liable for that claim.

4. The appellant/Insurance Company in its reply has submitted that the applicant did not submit any document to show his employment and salary. No intimation of an accident was given by the vehicle owner and therefore, the Insurance Company was not liable for payment of any compensation. It was also pleaded that the Insurance Company would take the appropriate defence if it is found that the vehicle was insured with it. However, no specific defence in the written statement was taken thereafter by the Insurance Company.

5. The respondent no.3 after getting the notice of the application did not appear before the learned Commissioner and therefore, the matter was proceeded exparte against the respondent no.3.

6. After considering the evidence adduced by the learned counsel for the parties, the learned Commissioner passed an award granting a compensation of Rs.2,49,576/- with an interest of 12% p.a from the date of award till the realization. The appellant was held liable for payment of the compensation.

7. The learned counsel for the appellant has mainly raised three objections. Firstly no relationship of employer or employee was established before the Commissioner, Workmen's Compensation Act. Secondly the policy was issued under agricultural policy and there was no coverage under Workmen's Compensation Act. Thirdly, the salary was computed by the learned Commissioner without any basis.

8. On the other hand the learned counsel for the respondent no.1 has submitted that according to the provisions of 3rd proviso of Section 30(1) of the Workmen's Compensation Act, it was for the appellant to deposit the entire claim amount with an interest before filing the appeal. The appellant has deposited the amount of compensation but no interest is deposited and

therefore, the present appeal was not maintainable. In support of this contention reliance was placed on the order passed by the single Bench of this Court in the case of *"Tulsiram s/o Nandram Khati Vs. Daryaobai w/o Gendalal"* [1998 (1) MPLJ 188] therefore, it is submitted that the appeal may be dismissed.

9. After considering the submissions made by the learned counsel for the parties and looking to the evidence adduced before the trial Court, the questions raised by both the parties should be considered one by one in the present order. It is apparent that the appellant has deposited the amount of compensation within one month of the award. According to the condition of the award the interest was awarded at the rate of 12% p.a from the date of award to the date of realization. It is also true that no interest amount was deposited by the appellant along with the compensation. As per law laid by the single Bench of this Court in the case of *Tulsiram* (supra) the amount of the compensation was required to deposit along with the interest. In the present case since the amount was deposited within one month from the date of the award and therefore, period of one month was not completed after passing of the award, hence calculation of the interest on the award amount would be a hyper technical claim. If interest was granted on the compensation from the date of award till the realization then technically the interest was accrued for the period in which the compensation amount could not be deposited. However, it would be hyper technical to say that such small amount was not deposited by the appellant and therefore, its appeal is required to be thrown. Practically one month was not completed after passing of the award when the appellant deposited the award amount and therefore, no interest could be computed as such for depositing of the compensation amount as per the provisions of Section 30 of the Workmen's Compensation Act. Under such circumstances, if interest is not deposited along with the compensation amount then by such fault the appeal cannot be rejected.

10. The learned counsel for the appellant has raised an objection that no employment was proved between the respondent no.1 and the insured person i.e respondent no.3. In this connection the appellant Lalaram (PW1) has stated before the trial Court that he accompanied Ishwarlal to operate the thresher which was affixed on the aforesaid tractor and he was doing such a work for the last 8-9 years. It is also submitted that the insured owner of the tractor was Sheobaksh and Ishwarlal was representative of Sheobaksh. To rebut the evidence given by the applicant Lalaram neither Ishwarlal nor

Sheobaksh appeared in the witness box and therefore, statements given by Lalaram was not at all contradicted. It is apparent that soon after the incident Ishwarlal took the victim Lalaram to the hospital. It is also apparent that the tractor was owned by a person residing at District Alwar, Rajasthan and the tractor along with thresher was working at the time of incident in the District Khandwa, Madhya Pradesh. Under such circumstances, the evidence given by Lalaram appears to be acceptable that such tractor fitted with a thresher was being brought in Madhya Pradesh from time to time for last 8-9 years for the purpose of threshing of the crop by Ishwarlal and the respondent no.1 Lalaram. Under such circumstances, the employment of the respondent no.1 Lalaram is duly established by conduct of Ishwarlal as well as the insured owner Sheobaksh. The objection raised by the learned counsel for the appellant about the employment cannot be accepted.

11. So far as the salary is concerned the respondent no.1 Lalaram has stated that he was receiving a sum of Rs.150/- per day for working on thresher and therefore, the learned Commissioner has computed his salary to be Rs.4500/- per month. The respondent nos.2 and 3 did not appear in the witness box and therefore, the statement given by the respondent no.1 Lalaram should have been accepted as it is. If it is presumed that he was not getting the work of threshing on each and every day then the wages of the respondent no.1 may be computed for at least 25 days in a month because if a tractor affixed with thresher machine was brought from Rajasthan to Madhya Pradesh then the various agriculturists who have their crop in the field were required to get their work done from that machine one by one and there must be a queue of agriculturists to get their crop threshed by the respondents. The computation of compensation as provided in Section 4 of the Workmen's Compensation Act is considered then up to a certain extent wages of a particular employee does not make any difference in the computation and if the monthly wages of the respondent no.1 is calculated but salary is less than Rs.4500/- per month then it makes no difference in the computation of compensation. The learned Commissioner did not discuss as to how the compensation was computed but looking to the provisions of Section 4 and concerned schedule of the Workmen's Compensation Act there is no effect on the compensation computed by the learned Commissioner due to reduction of the wages of the respondent no.1 and therefore, the respondent no.1 proved his wages up to the extent which could be sufficient to compute his compensation as given by the learned Commissioner, Khandwa. Under such

circumstances, the objection relating to the wages of the respondent no.1 raised by the appellant does not affect the present case.

12. The main contention of the appellant is that the vehicle was not insured for the purpose of thresher. A policy was issued for use of the vehicle for agricultural purposes and affixing of thresher and its use was not mentioned in the policy and therefore, the appellant/Insurance Company was not responsible for payment of compensation under the Workmen's Compensation Act. It is apparent that the respondent no.2 and respondent no.3 were using their vehicle for thresher purposes by affixing a thresher in the tractor since long and therefore, they must have told the purpose of their use to the agent who insured the tractor. Hence it shall be presumed that the tractor was insured for not only the agricultural purposes but, also for that purpose for which it was specifically used and therefore, it was for the Insurance Company to plead and prove the policy condition as to whether the policy was issued to cover such a work of tractor or not. It is a settled rule of law that the objection raised by the applicant should have been pleaded before the trial Court. If the objection raised by the appellant is considered then it is apparent that it was no where pleaded in its written statement. The plea is raised for the first time in the appeal. In this context the order passed by the single Bench of Punjab and Haryana High Court in the case of *"Harnam Singh Vs. M/s. Raarpee Auto Aid"* [1986 ACJ 396] may be perused in which it is alleged that a plea raised before the appellate Court for the first time that the Insurance Company was not responsible for the payment of compensation because a particular risk was not covered then such a plea cannot be raised without pleadings. Under such circumstances, the plea raised by the appellant cannot be considered in the appeal in the absence of his pleadings.

13. In this connection if the evidence adduced by the appellant is perused then it would be apparent that one Vimalchand Soni (D2W1) appeared in the witness box and has stated that policy in this context was Ex.D/1 and copy of the driving license was Ex.D/2. The witness was the officer of the appellant/Insurance Company at Khandwa who neither issued the concerned Insurance policy nor he produced the entire policy. If the document Ex.D/1 is perused then it is a single paged document in which no term and condition is mentioned specifically. It is apparent that document Ex.D/1 is nothing but a cover note, not the entire policy. Now

a days it is observed that the officers of the Insurance Company after issuance of a cover note do not care to issue the complete policy to a consumer. After taking the premium, it is for the Insurance Company to show to its consumers that up to what extent the responsibility was to be borne by the Insurance Company. If the consumer is not given any intimation about the limitations of the Insurance Company then it cannot be said that such limitations were agreed between the parties. In this connection the order passed by the single Bench of this Court in the case of *"New India Assurance Col. Ltd. Vs. Ram Kumar Tamrakar"* [1990 ACJ 958] may be perused in which it is laid that in cases where Insurance Company disputes the allegation of the insured about the extent of its liability governed by the policy then a true copy of the policy should be produced. In the present case the appellant/Insurance Company did not produce the copy of the policy. On the contrary a copy of cover note was produced which did not indicate the terms and conditions of the policy, It appears that the officers of the Insurance Company were in habit to hide the terms and conditions of the policy from the consumers and now they think that the terms and conditions of the policy are so confidential that those should not be produced even before the Court. Now a days when a computer print of each document is available and in a computer print of policy so many annexures can be added today but by adding such annexures now a days it cannot be said that such terms and conditions were shown to the consumers at the time of issuance of the policy and therefore, in the light of the order passed by the single Bench of this Court in the case of *Ram Kumar Tamrakar* (supra), it was for the Insurance Company to have issued a complete policy having the terms and conditions to the insured and one hard copy of that policy should have been kept in the office of the Insurance Company and a true copy of the hard copy of that policy should have been placed before the trial Court to prove the terms and conditions of the policy.

14. The appellant did not file or prove the policy issued in favour of the insured respondent no.3 Sheobaksh. In this connection the order passed by the single Bench of Punjab and Haryana High Court in the cae of *"Malwa Bus Service (P) Ltd. Vs. Amrit Kaur"* [1998 ACJ 190] may be referred in which it was laid that the copy of the insurance policy was placed on record, but if it is neither proved by primary evidence nor was according to the condition mentioned in Section 65 of the Evidence

Act then the document is not admissible. Under such circumstances, the computer copy of cover note which was not primary evidence in the eye of law was inadmissible in the evidence because it was not the original copy of the cover note issued to the concerned insured. The learned counsel for the appellant has tried to file some annexures before this Court to show the terms and conditions of the policy but, filing of such terms and conditions in the appellate Court has no meaning. It was to be established by the Officer who issued the insurance policy that the original policy along with all terms and conditions was filed before the trial Court. Filing of the annexures at present general relating to the terms and conditions which were kept by the Insurance Company does not make any difference in the present case because it was not shown by the Insurance Company that such terms and conditions were settled between the appellant/Insurance Company and insured in the present particular case.

15. On the basis of the aforesaid discussion, the Insurance Company did not prove the specific terms and conditions of the Insurance policy relating to the tractor and thresher in the present case. The cover note which was produced as Ex.D/1 was not a primary document, It was a computer copy created after a long time of the creation of the original document and therefore, the objection raised by the Insurance company cannot be accepted that the Insurance Company did not cover the working of a thresher along with the tractor. Under such circumstances, the Insurance Company does not absolve from its liability.

16. On the basis of the aforesaid discussion the miscellaneous appeal filed by the appellant/insurance company appears to be not acceptable. No ground against the award passed by the learned Commissioner, Workmen's Compensation Act, Khandwa could be established. Under such circumstances, the miscellaneous appeal filed by the Insurance Company is hereby dismissed with costs. The appellant/insurance company shall bear the costs of its own and the costs of the respondent no.1. Memo of cost be prepared according. Advocate's fee may be computed at the rate of Rs.5000/- if certified.

17. Copy of the order be sent to the trial Court along with its record for information and compliance.

Appeal dismissed.

I.L.R. [2013] M.P., 1971
APPELLATE CRIMINAL
Before Mr. Justice J.K. Maheshwari
Cr. A. No. 1427/1995 (Jabalpur) decided on 16 July, 2010

ASHOK KUMAR & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Sections 306 & 107 - Abetment of Suicide - **To constitute offence accused must have provoked, incited or induced deceased to commit suicide - Nothing has been brought on record to prove the charge of abetment after settlement of matrimonial dispute - Merely a bald statement of cruelty and harassment is not sufficient.** **(Paras 8 to 11)**

क. दण्ड संहिता (1860 का 45), धाराऐं 306 व 107 – आत्महत्या का दुष्प्रेरण – अपराध के गठन के लिए, अभियुक्त द्वारा मृतक को आत्महत्या कारित करने के लिए प्रकोपन, उद्दीपन या उत्प्रेरण होना चाहिए – वैवाहिक विवाद के निपटारे के पश्चात दुष्प्रेरण का आरोप साबित करने के लिये अभिलेख पर कुछ नहीं लाया गया – मात्र क्रूरता एवं उत्पीड़न का कोरा कथन पर्याप्त नहीं है।

B. Evidence Act (1 of 1872), Section 113-A - Presumption - **Presumption is not mandatory - The word 'may presume' has been used - Simultaneously by using the word 'all other circumstances of the case' prior to drawing the presumption by the Court makes it clear that the conscience of the Court must dictated on the facts and circumstances otherwise abstained from drawing such presumption.** **(Para 11)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 113ए – उपधारणा – उपधारणा आज्ञापक नहीं है – शब्द 'उपधारणा निकाली जा सकती है', का प्रयोग किया गया है – इसके साथ ही न्यायालय द्वारा उपधारणा निकाले जाने से पूर्व शब्द 'प्रकरण की सभी अन्य परिस्थितियां' के प्रयोग से यह स्पष्ट होता है कि न्यायालय का विवेक तथ्यों एवं परिस्थितियों द्वारा निर्देशित होना चाहिए, अन्यथा ऐसी उपधारणा करने से बचना चाहिए।

C. Penal Code (45 of 1860), Section 498-A - Cruelty - **There must be some demand either in terms of cash or in terms of kind for which deceased was subjected to cruelty and harassment.** **(Para 13)**

ग. दण्ड संहिता (1860 का 45), धारा 498ए – क्रूरता – कोई मांग होनी चाहिए या तो नगद के रुप में या वस्तु के रुप में, जिसके लिए मृतिका के साथ क्रूरता का व्यवहार किया गया एवं प्रताड़ित किया गया था।

Cases referred :

(1994) 1 SCC 73, (2001) 9 SCC 618.

Imtiaz Husain, for the appellants.
Sheetal Dubey, G.A. for the respondent/State.

JUDGMENT

J.K. MAHESHWARI, J. :- This appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 against the judgment of conviction dated 10/10/1995 passed by 9th Additional Sessions Judge, Bhopal in Sessions Trial No.12/94, whereby the appellants have been convicted for the charges under Sections 306 and 498-A, IPC and directed to undergo five years RI and fine of Rs.1,000/- and two years RI and fine of Rs.500/- respectively, in default of payment of fine one year and three months additional rigorous imprisonment respectively and both the sentences were directed to run concurrently.

2. As per prosecution story, deceased Shobha Bai was the wife of accused-Ashok, daughter-in-law of Kala Bai and sister-in-law of Raju @ Rajesh. It is said that the marriage of deceased Shobha Bai was solemnized about five years back with accused. As alleged accused persons subjected her with cruelty, however, she had consumed Sulphas tablets and committed suicide on 21/10/1993. Initially Marg Intimation was received thereafter offence under sections 306/198-A of IPC was registered at crime No. 116/93 by Police Station, Gunga, Distt. Bhopal and the challan was filed against the accused persons. As the offence was triable by the Court of Sessions, however, committed to the said Court and the charges under Sections 306 and 498-A of IPC were framed. The accused- persons have abjuted their guilt ad put the defence of false implicaiton.

3. The prosecution has produced as many as eleven witnesses in the case. Hariprasad (PW-1) and Himmat Singh (PW-2) both have not supported the prosecution case, Vijay Singh (PW-3), ASI, who recorded the statement of Shyama Bai, Jaswant and Chen Singh. Dr. D.K. Satpathi (PW-4) proved the post- mortem report and opined that cause of death is due to consuming

poisonous substance i.e. Aluminium Phosphide. Jagsay Ram (PW-5), Naib Tahsildar, reached on the spot i.e. Hamidiya Hospital, Bhopal and under whose instruction Panchayatnama of the dead body was prepared. Mangilal (PW-6), is the Chowkidar of the village and a witness to the investigation. Bhagwan Singh (PW-7) Independent witness has also not supported the prosecution story. Chen Singh (PW-8) father, Shyama Bai (PW-9) mother and Jasmal (PW-10) is the brother of the deceased and Kamal Singh (PW-11) is the brother-in-law (husband of real sister of the deceased). In defence accused persons have examined Hari Prasad DW-1 and Lakhan Singh @ Laxmi Chand DW-2.

4. The trial Court found that the death of the deceased was due to consuming the poisonous substance i.e. Sulphas tablets as apparent from the post-mortem and viscera report and the statement of the doctor. The finding has also been recorded by the trial Court that the deceased was subjected to cruelty and harassment by the accused persons relying upon the statement of Chen Singh (PW-8), Shyama Bai (PW-9), father and mother of the deceased. It has further been observed that because deceased Shobha died within seven years from the date of her marriage in other than normal circumstances, therefore, the presumption under Section 113-A of the Indian Evidence Act, 1872 may be drawn against the appellants for abeting the offence. In view of foregoing discussion, finding of conviction against the appellants under Section 306 and 498-A, IPC has been recorded and directed them to undergo the sentences as aforementioned.

5. Shri Imtiaz Husain, learned counsel representing the appellants has contended that no legal evidence to prove the charge of abetment to commit suicide for the offence under Sections 306 and 498-A of the IPC has been brought by prosecution. It is submitted that abetment of a thing has been defined under Section 107 of IPC whereby it is apparent that whoever instigates any person to do that thing or engages himself or with others in conspiracy for doing of that thing, if the said act or illegal omission takes place in pursuance to the conspiracy to do that thing or intentionally aids, by an act or illegal omission of doing that thing would be abettor. In the present case Shobha Bai committed suicide by consuming Sulphas tablets contains Aluminum Phosphate. But, to prove the charge, it is to be established by the evidence that commission of the suicide by the deceased is by virtue of an abetment made by the accused persons. In this respect statements of Chain Singh (PW-8) (father of the deceased) and Shyama Bai (PW-9) (mother of the deceased), who are star

witnesses, have been referred and contended that ingredients to abet the act of suicide have not proved. The other independent witnesses Hari Prasad (PW-1), Himmat Singh (PW-2), Bhagwan Singh (PW-7) and Kamal Singh (PW-11) have not supported the prosecution story. In the statement of Chain Singh (PW-8), Shyama Bai (PW-9) and Jasmal (PW-10), it has come on record that Shobha Bai was married with Ashok about four years back and they were not behaving properly with the deceased. Chain Singh (PW-8) states that because the motorcyle was not given, therefore, the deceased was subjected to cruelty and harassment while Shyama Bai states that Rs. 10,000/- has not been given, therefore, she was subjected to cruelty. Jasmal (PW-10) has not stated regarding demand of dowry. It has further been stated that due to the said act of cruelty and harassment, deceased was called at their home by them. A notice was also sent for taking the proceedings of restitution of conjugal rights in a court. After some time somewhere in the year 1992 there was a compromise in between the parties and in furtherance to it deceased has again resided with in-laws for about three months during such period no allegation of cruelty and harassment is there. In view of the aforesaid, it is contended by him that no iota of legal evidence to prove abetment to commit suicide is available on record, however, the conviction of the appellants for the offence under Section 306 of IPC is wholly unwarranted and the trial Court has committed error to record such finding merely drawing the presumption of Section 113-A of Evidence Act. It is also contended by him that even the charge under Section 498-A has not been duly established on account of inconsistency in the evidence of Chain Singh (PW-8) and Shyama Bai (PW-9) for demand and they have deposed regarding cruelty, harassment for non fulfilment of the demand of dowry. Therefore, conviction of the appellants for the said charges is without due appreciation of the evidence. Consequently, the sentence as awarded is also not in accordance to law, therefore, the judgment passed by the trial court may be set aside and the appellants may be acquitted from the said charge.

6. Smt. Sheetal Dubey, learned Government Advocate appearing on behalf of the respondent/State, contends that the finding of conviction has rightly been recorded by the trial Court proving the charge under Section 306 of IPC as the deceased committed suicide due to abetment, and also of Section 498-A of IPC as per the statements of the prosecution witnesses, however, the trial Court has not committed any error to convict the appellants and to sentence them as specified herein above. It is submitted by her that as per the

statement of Chain Singh, Shyama Bai and Jasmal, it is apparent that deceased-Shobha Bai was not happy in the house of her in-laws. It is further apparent that the demand of dowry was made with her and she was subjected to cruelty and harassment, however, by consuming Sulphas tablets which contains Aluminum Phosphate deceased committed suicide. It is also submitted that if the death of a woman is within seven years from the date of marriage, however in drawing presumption under Section 113-A of the Evidence Act, the trial Court has not committed any error in proving the charge under Section 306 of IPC and also the offence under Section 498-A of IPC. In that view of the matter, it is prayed that the judgment passed by the trial Court may be upheld dismissing the appeal.

7. After having heard the rival contention of learned counsel for the parties at length and on perusal of the impugned judgment, it is apparent that the finding of cause of death on account of consuming the Sulphas tablet which contains the Aluminum Phosphate as found by the trial Court other than normal circumstances appears to be just and proper. But to prove the charge of abetment against accused persons the legal ingredients of abetment under Section 306 of IPC as per the evidence adduced by the parties is required to be seen, however, to understand ingredients Section 306 is reproduced as thus:

> *"306. Abetment of suicide.*- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Bare reading of the aforementioned on committing suicide by a person it is required to be examnied that, "who has abeted for the commission of such suicide". The abetment of a thing has been defined under Section 107 of IPC which reads as under: -

> *107. Abetment of a thing.*- A person abets the doing of a thing, who -
>
> First. - Instigates any person to do that things or
>
> Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

In a case where a woman committed suicide within seven years of marriage, then in the context as per the language specified under Section 113-A of Evidence Act presumption of abetment may be drawn. The contents of Section 113-A of the Evidence Act are relevant which is reproduced as under:-

113-A. Presumption as to abetment of suicide by a married woman.- When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.- For the purposes of this section, "cruelty" shall have the same meaning as in Section 498A of the Indian Penal Code (45 of 1860)"

8. In the said context to prove the abetment its meaning is required to be seen thereby instigating is to goad, urge, forward, provoke, incite or encourage to do 'an act'. In view of the aforesaid and looking to the explanation 1-2 it can safely be observed that for instigation though it is not necessary that actual words to do an act ought to be used or what constitutes instigation must necessarily be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. Thus, for abetment

to commit suicide in the context of the word abetment as defined under Section 107 of IPC appears that whoever abets the doing of the thing to instigate any person to do that thing or he himself engages with one or more persons in any conspiracy for doing all that thing and if an act or illegal omission takes place in pursuance to that conspiracy for that thing or otherwise intentionally aids,. by any act or illegal omission, the doing of that thing. In the said context the word, 'doing of that thing' co-relates with the word encourage to do an act required for instigation. In the context of abetment an act of a person coupled with the evidence of abetment for committing suicide ought to be proved by the prosecution and in the said context the evidence brought in the facts and circumstances of the case requires analysis while recording the finding of guilt. As per the language implied under Section 113-A after amendment in the Evidence Act, it is apparent that the said presumption is directory and not mandatory. In addition to the aforesaid, on the availability of the ingredients that a woman committed suicide; the commission of suicide is within 7 years from the date of marriage the husband or any of relative of her husband has subjected her with cruelty; however on availability of the aforesaid three ingredients the court may draw presumption regarding abetment by a married woman. It to be noted here that in Section 113-A of the Evidence Act, the legislature has enacted caution using the words "the court may presume" "having regard to all the other circumstances of the case". Thus on availability of aforesaid two conditions, the presumption may be drawn otherwise it may be rebuttable.

9. As per the judgment of Hon'ble the Apex Court in the case of *State of West Bengal Vs. Orllal Jaiswal* [(1994) 1 SCC 73] the caution is required to be observed by the Courts, the Court has made certain observations, relevant are reproduced as under: -

> **"This Court has cautioned that the court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. It it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit**

suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

10. Bare reading of the aforesaid, it is clear that while assessing the facts of the individual case on the basis of the evidence adduced in trial to record the finding that the cruelty indicated in the case had induced the victim to end her life committing suicide. It is to be weed out that if a common man would not commit suicide ordinary looking to the petulance, discord and differences in spouse in domestic life which is quite common, however the conscience of the Court should be satisfied looking to the facts and circumstances of the case to arrive at a conclusion that the commission of suicide by the woman is an act of abetment. Now it is to be seen whether the death of deceased-Shobha Bai is due to abetment by the appellants and in the facts and circumstances of the case, the presumption under Section 113-A of the Evidence Act may be drawn in this case. As per the statement of Chain Singh (PW-8) and Shyama Bai (PW-9), it appears that the marriage of the deceased was solemnized about four years back from the date of incident and the demand of motorcycle or in terms of cash was made which was not satisfied, however, due to some misunderstanding deceased started residing with her mother and father. After sometime the legal notice was served on husband for restitution of conjugal rights thereupon in 1992 settlement took place and the deceased came back to her in-laws house where she committed suicide after after 3-4 months by consuming sulphas tablets due to not fulfilling the demand of dowry. In the statement of Chain Singh (PW-8) it is said that the cycle and bike has not \ been given, therefore, she was subjected to cruelty while in the statement of Shyama Bai, due to non payment of Rs.10,000/-deceased was subjected to cruelty. In the testimony of the brother of the deceased namely Jasmal (PW-10) the evidence regarding demand of dowry is not there, therefore, on the point of demand of dowry the inconsistent statement is on record but the evidences causing such demand with cruelty and harassment by beating the deceased through husband and the brother-in-law (dewar) is in ocular. Further as per evidence by consuming sulphas tablets on 22.10.1993 deceased committed suicide, however, it is to be seen that after settlement of the dispute of the deceased as well as the accused persons any evidence of cruelty and harassment is available which incited the victim for commission of suicide or any other evidence of abetment has been brought by prosecution to prove the charge at home under Section 306 of IPC.

11. After going through the testimony of aforesaid three star witnesses nothing has been brought on record to prove the charge of abetment after settlement of matrimonial dispute. Merely a bald statement of cruelty and harassment is not sufficient to convict appellants, but the trial Court applying the presumption under Section 113-A of the Evidence Act convicted them because the deceased died within 7 years. The provision of Section 113-A of Evidence Act has read and also its object which was brought by way of amendment. To understand it, it is clear that such amendment has been brought to made a social demand to resolve difficulty of proof where helpless marriage women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four corners of the matrimonial home and hence was not available to any one outside the occupant of the house. Simultaneously, it is to be observed that the said presumption is intended to operate against the accused in criminal law. Before drawing presumption as per the material brought the foundation must exists in the circumstances as enumerated in Section 113-A of the Evidence Act. The Parliament while making amendment has taken sound note of caution that the said presumption is not mandatory, therefore, the word 'may presume' has been used. Simultaneously, by using the word 'all other circumstances of the case' prior to drawing the presumption by the Court makes it clear that the conscience of the Court must dictated on the facts and circumstances and circumstances otherwise abstained from drawing such presumption. The connotation 'all other circumstances of the case' suggest a way to arrive at a right conclusion showing relationship of cruelty and the act of commission of suicide to draw such presumption. In the facts of the present case as discussed herein above the aforesaid is totally missing. In such circumstances the guidance may be taken from the judgment of Hon'ble the Apex Court in the case of *Ramesh Kumar V. State of Chhatisgarh* ((2001) 9 SCC 618] the Court has observed as under: -

> **The picture which emerges from a cumulative reading and assessment of the material available is this: presumably because of disinclination on the part of the accused to drop the deceased at her sister's residence the deceased felt disappointed, frustrated and depressed. She was overtaken by a feeling of shortcoming which she attributed to herself. She was overcome by a forceful feeling generating within her that in the assessment of her husband she did not deserve to be his life partner. The accused may or must have told the deceased that she was free to go anywhere**

she liked. Maybe that was in a fit of anger as contrary to his wish and immediate convenience the deceased was emphatic on being dropped at her sister's residence to see her. Presumably the accused may have said some such thing -you are free to do whatever you wish and go wherever you like. The deceased being a pious Hindu wife felt that having being given in marriage by her parents to her husband, she had no other place to go excepting the house of her husband and if the husband had "freed" her she thought impulsively that the only thing which she could do was to kill herself, die peacefully and thus free herself according to her understanding of the husband's wish.

The suicide note written in the diary was corroborated by the dying declaration. The conduct of the accused trying to put off the fire and taking his wife to the hospital also improbabilises the theory of his having abetted suicide. There is no evidence and material available on record wherefrom an inference of the accused-appellant having abetted the commission of suicide by his wife may necessarily be drawn. The totality of the circumstances especially the dying declaration and the suicide notes left by the deceased herself, which fall for consideration within the expression "all the other circumstances of the case" employed in Section 113-A of the Evidence Act, do not permit the presumption thereunder being raised against the accused. The accused-appellant, therefore, deserves to be acquitted of the charge under Section 306 IPC. (Paras 22 and 23)

Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued

course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. If it transpires to the court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the court should not be satisfied for basing a finding that the accused charged of abeting the offence of suicide should be found guilty."

12. In view of the facts of the present case and the evidence brought on record and discussed herein above it is apparent that by evidence of cruelty and harassment for an act of committing suicide and to abet such offence, the legal evidence is totally missing. In absence thereof the presumption under Section 113-A, which is rebutable cannot be drawn, therefore, the trial Court in absence of any legal evidence of abetment to commit suicide has wrongly drawn the presumption convicting the appellants for the charge under Section 306 of IPC. Thus, in the considered opinion of this Court no iota of evidence of abetment of commission of the suicide to strike the conscience of the Court to draw the presumption is available, therefore, the judgment of conviction proving the charge under Section 306 of IPC is hereby set aside.

13. Now coming to the charge under Section 498-A of IPC is concerned, it is to be observed here that looking to the evidence of Chain Singh (PW-8) and Shyama Bai (PW-9), which is in ocular on the point of cruelty and harassment. Although on the point of demand of dowry, it has much inconsistency but in the facts and circumstances of the case, it can be accepted that there was some demand either in terms of cash or in terms of kind for which deceased was subjected to cruelty and harassment. In such circumstances in the opinion of this Court, charge under Section 498-A of IPC has been fully established by the aforesaid evidence and ... by the evidence of Jasmal (PW-10). Therefore, the findings as recorded to prove the charge under Section 498-A of IPC by the trial Court against the appellants are liable to be upheld.

14. Now coming to the point of sentence for the charge under Section 498-A of IPC, it is seen from the record that the appellants have remained in custody for some time and the incident is of the year 1993 since then approximately 17 years have already been passed away. During such period the appellants have faced trial and after releasing from bail consistently they are appearing before this Court on so many dates i.e. since last about 16 years. However, in the aforesaid facts, in the opinion of this Court, even on maintaining the conviction under Section 498-A of IPC, the sentence already undergone by appellants would be sufficient to mitigate the circumstances prevalent and explained in the facts of this case.

15. Accordingly, the appeal filed by the appellants is hereby allowed in part. The conviction of the appellants under Section 306 of IPC is hereby set aside while their conviction under Section 498-A of IPC is hereby maintained modifying the sentence to the extent already undergone by them. In consequence to the aforesaid, the bail bonds of the appellants shall stand discharged.

Appeal partly allowed.

I.L.R. [2013] M.P., 1982
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr.A. No. 963/2003 (Jabalpur) decided on 14 February, 2013

RAGHU ALIAS RAGHUNATH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 302 - Eye witnesses - Reliability - **There was no quarrel between deceased and accused - Deceased was not even talking to accused - Accused dealt repeated blows with axe on vital parts like neck, chest etc. even after deceased fell down - Evidence of eye witnesses corroborated natural and consistent - Conviction can be based on testimony of such witnesses. (Paras 23 & 24)**

क. दण्ड संहिता (1860 का 45), धारा 302 – चक्षुदर्शी साक्षी – विश्वसनीयता – मृतक व अभियुक्त के बीच कोई विवाद नहीं हुआ – मृतक तो अभियुक्त के साथ बात भी नहीं कर रहा था – अभियुक्त ने कुल्हाड़ी से गर्दन, सीना इत्यादि जैसे कोमलांगों पर कई वार किये, तब भी जब मृतक नीचे गिर गया था – चक्षुदर्शी साक्षी का साक्ष्य अभिपुष्ट, प्राकृतिक एवं सुसंगत – उक्त साक्षियों की परिसाक्ष्य पर दोषसिद्धि आधारित की जा सकती है।

***B. Penal Code (45 of 1860), Section 304-I - Culpable Homicide not amounting to murder* - For the application of Exception-4 of Section 300 I.P.C., it is not sufficient to show that there was a sudden quarrel and there was no premeditation - It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusal manner. (Para 23)**

ख. दण्ड संहिता (1860 का 45), धारा 304–I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – भा.दं.सं. की धारा 300 का अपवाद 4 लागू करने के लिये यह दर्शाना पर्याप्त नहीं कि अचानक विवाद हुआ और कोई पूर्वचिंतन नहीं था – आगे यह भी दर्शाना चाहिए कि अपराधी ने असम्यक लाभ नहीं उठाया या क्रूर एवं असाधारण ढंग से कार्य नहीं किया।

Case referred :

(2003) 3 SCC 528.

Durgesh Gupta, for the appellant.
Umesh Pandey, G.A. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : RAKESH SAKSENA, J. :- Appellant has filed this appeal against the judgment dated 5.4.2003, passed by Sessions Judge, Betul, in Sessions Trial No.170/2002 convicting him under Sections 302 of the Indian Penal Code and sentencing him to imprisonment for life.

2. According to prosecution, on 8.7.2002, at about 10.30 am, when Suribai, the deceased was going to her field taking food for her husband, accused Raghu came with an axe and assaulted her with it on her neck twice, as a result of which she fell down and died. Accused ran away from the spot. Her daughter Sunita went to the field and informed her father Ramji about the occurrence. Ramji went to the spot and then lodged first information report (Ex.P/2) at Police Station, Ranipur. It is said that Sunita (PW-2), Santobai (PW-3), Ramlal (PW-4), Buddhu (PW-5) and Santu (PW-6) were present at the time of occurrence. Police registered the offence under Section 302 of the Indian Penal Code and proceeded for investigation.

3. After inquest, the dead body of deceased was sent to Community Health Centre, Ghoda Dongri for postmortem examination. Dr. Mohit Tawar (PW-13) conducted postmortem examination on the same day and found six

incised wounds on the neck, head and back of the deceased.

4. Accused was arrested. Axe and shirt were seized from him and sent to Forensic Science Laboratory, Gwalior for examination.

5. After investigation, charge sheet was filed against the appellant and the case was committed for trial.

6. On charge being framed under Section 302 of the Indian Penal Code, accused abjured his guilt and pleaded false implication. According to him at the time of occurrence he was not present at the spot. He had gone for work at the house of Narayan. He also examined Dukadi (DW-1) and Basant Kumar (DW-2) in his defence.

7. Upon trial and after appreciating the evidence adduced by prosecution, learned trial judge held the appellant guilty, convicted and sentenced him as aforesaid. Being aggrieved by his conviction and sentence, he has filed this appeal.

8. Learned counsel for the appellants submitted that the evidence of alleged eyewitnesses was misappreciated by the trial court. The appellant was wrongly convicted. In the alternative, learned counsel placing reliance on the Apex Court's decision rendered in the case of *Ghapoo Yadav and others vs. State of M.P.*-(2003) 3 SCC 528 submitted that the conviction of appellant under Section 302 IPC was illegal, at the worst the appellant could have been liable under Section 304-I IPC since there was no evidence on record that appellant had any motive or premeditation for committing murder of deceased. On the other hand, learned counsel for the State submitted that there was more than enough evidence of reliable eyewitnesses to the effect that appellant committed murder of deceased. He supported and justified the conviction of appellant under Section 302 IPC.

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 appellant that the deceased died of a homicidal death. From the evidence of Dr. Mohit Tawar (PW-13), who conducted postmortem examination of the body of deceased, it is revealed that deceased suffered following injuries:

> "1. Superficial burn like black stains and charring over right breast, right upper limb, abdomen, left arm, right and left thighs medially.

2. Incised wound over cervico dorsal spine in mid line from C2 to T2 vertebra 10 cm x 3cm x 6 cm deep. Direction anteriorly and in mid line.

3. Incised wound in continuation with Injury No.1 on scapular region 8cm x 3 cm x 5 cm deep. Direction anteriorly and downwards.

4. Incised wound on right scapular region 8 cm x 3 cm. Subcutaneous tissues cut.

5. Incised wound on right occipital region transverse 5 cm x2cmx3cm.

6. Incised wound on right side of neck extending from anterior border of trapezius to anterior border of sternomastoid in upwards direction 4 cm x 2 cm x 3 cm. All muscles, carotid vessels, part of trachea and part of oesophagus cut. Vertebra fractured and spinal cord transected.

On opening of the injuries doctor found bones of the neck, spinal cord, 2nd and 3rd ribs of left side cut. The bones of skull were also cut.

In the opinion of doctor, the injuries were ante-mortem and homicidal in nature. The cause of death was shock due to excessive bleeding. The postmortem examination report (Ex.P/22) was written and signed by him."

11. From the aforesaid evidence of doctor we are satisfied that the death of deceased was homicidal in nature.

12. Now the question before us is whether it was appellant who caused the homicidal death of deceased.

13. The prosecution examined Sunita (PW-2), Santo Bai (PW-3), Ramlal (PW-4), Buddhu (PW-5) and Santu (PW-6) as eyewitnesses of the occurrence.

14. Sunita (PW-2), the daughter of deceased, though purporting herself as an eyewitness of the occurrence stated that she saw accused assaulting deceased with an axe, but, in cross-examination she admitted that she came to know about the death of her mother from Santo Bai, who called her to the spot. When she reached at the spot, she found her mother lying dead. She

was also confronted with her police statement (Ex. D-1,) wherein she did not disclose that she saw accused assaulting her mother. The trial court also disbelieved her as an eyewitness.

15. Another witness Santobai (PW-3) did not support the prosecution case as an eyewitness; she was declared hostile.

16. Ramlal (PW-4), Buddhu (PW-5) and Santu (PW-6) were also examined as eyewitnesses. They deposed that they were labourers and under a contract with Kishori, they were altering the roof tiles of his house. When they were doing their work, they saw deceased taking food towards her field and murmuring that her cock-hen were killed by somebody. At that very moment, accused came their with an axe and asked deceased to not to abuse anybody and go to her field quietly. Deceased uttered that she was not abusing anybody. When accused intimidated her saying that she should go silently else he would cut her, she challenged him, whereupon at once accused dealt 3-4 blows of axe on her neck. He also inflicted blows even after she fell down. The evidence of these witnesses is natural and consistent. They were subjected to cross-examination, but absolutely nothing could be brought out to render their presence doubtful at the spot. The evidence of aforesaid witnesses stood corroborated from the evidence of Kishori (PW-7) at whose house they were working. Though Kishori (PW-7) did not support the prosecution case as an eyewitness and was declared hostile yet he stated that he had given contract for Rs.200/- to Ramlal, Santu and Buddhu for altering roof tiles of his house and that they were working at his house in the morning at about 10.00 am. He deposed that when he heard commotion, he went at the spot and saw deceased lying dead in front of his house. There were injuries on her neck and back. He however did not ask anybody as to what happened to her.

17. Ramji (PW-1), the husband of deceased, stated that when he was at his field, at about 10.00 am his daughter came running and informed him that accused killed her mother. When he reached at the spot, he found his wife dead. There were injuries on her neck and back. He went to Police Station, Ranipur and lodged Murg Intimation Report (Ex.P/1) and first information report (Ex.P/2).

18. The evidence of aforesaid eyewitnesses also stood corroborated by the medical evidence of Dr. Mohit Tawar (PW-13), who deposed about the injuries found on the body of deceased by some sharp edged weapon.

19. Though the accused was arrested on the same day and an axe was

recovered from his possession by investigating officer Shailendra Sharma (PW-12), but no FSL report in respect of the aforesaid weapon was produced in the court.

20. Defence witnesses Dukadi (DW-1) and Basant Kumar (DW-2) tried to establish that on the day of occurrence accused was working at the field of Basant. According to Basant Kumar, all the time accused used to live at his field. On the day of ocurrence also he had milked a she buffalo. On perusal of the evidence of Basant Kumar it appears that on many occasions accused used to go to his house. In view of the cogent and consistent evidence of eyewitnesses examined by the prosecution, the evidence of defence witnesses does not appear trustworthy.

21. After scanning and analyzing the evidence of eyewitnesses viz. Ramlal (PW-4), Buddhu (PW-5) and Santu (PW-6) we are of the view that their evidence is trustworthy, and that learned trial judge committed no error in relying on their evidence and in holding that it was accused only who assaulted deceased with axe as a result of which she died.

22. Learned counsel for the appellant submitted that the deceased was a quarrelsome woman. She used to make complaints and police reports against many persons. At the time of occurrence also she indulged in useless altercation with accused. Therefore, suddenly, under an impulse, without any premeditation accused assaulted her with axe. In these circumstances, it could not be held that accused intended to commit murder of deceased, at the most he might have been held liable for committing the offence under Section 304-I of the Indian Penal Code. Learned counsel placed reliance on the ratio of decision rendered by the Supreme Court in case of *Ghapoo Yadav* (supra).

23. After careful consideration of the submissions made by the learned counsel for the appellant and after examining the law and the facts minutely, we are of the opinion that the case of appellant does not fall within the ambit of any of the Exceptions attached to Section 300 of the Indian Penal Code. There is nothing on record to indicate that deceased did anything which could have led appellant to the deprivation of self control or provoked him in such a manner to bring his case within the ambit of Exception-1 of Section 300 of the Indian Penal Code. In case of *Ghapoo Yadav* (supra) the Apex Court observed that:

"Exception-4 can be invoked if the death is caused: (a) without

premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed.

For the application of Exception-4, therefore, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage". Further, the word "fight" occurring in Exception 4 to Section 300 IPC is not defined in the Indian Penal Code. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case."

24. In the case in hand there was no quarrel between deceased and the accused. The deceased woman was going to her field taking food for her husband. She was not even talking to accused, but accused, though without premeditation, indulged in altercation with her saying that she should go quietly to her field otherwise he would cut her with axe. When she remonstrated with him that how could he cut her, he dealt repeated blows with axe to her on vital parts of her body like neck, chest etc. These injuries were sufficient to cause her death. By the blows, her skull bones, neck bone, nerve cord and ribs were cut. It has been stated by the eyewitnesses that when deceased fell down receiving one or two blows, accused continued to inflict blows on her. This shows that accused inflicted injuries to deceased even when she was in helpless condition. Previous altercation was also verbal and not physical. In these circumstances, in our opinion, it would not be possible to hold that the case of appellant was governed under the Exception-4 of Section 300 IPC. The intention of the appellant clearly seemed to be of committing murder of deceased.

25. For the reasons stated hereinabove, the conviction and sentence of appellant under Section 302 of the Indian Penal Code as awarded by the trial court, is affirmed.

29. Appeal being sans merit stands dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 1989
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr.A. No. 275/2006 (Jabalpur) decided on 26 April, 2013

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

Penal Code (45 of 1860), Sections 302 & 304-I - Murder or Culpable Homicide not amounting to murder **- Incident took place near the house of deceased - It is nowhere established that the house of the appellants was situated at or near the place of occurrence - The appellants did not act in exercise of their right of private defence or it was a case of mutual free fight - However, as the genesis or the origin of occurrence remained shrouded in obscurity and neither of the parties presented the true version of occurrence - It cannot be held established that appellants assaulted deceased with the intention and premeditation to commit his murder - Conviction altered to 304-I of I.P.C. (Paras 35 & 36)**

दण्ड संहिता (1860 का 45), धाराऐं 302 व 304-I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – घटना मृतक के मकान के पास घटित हुई – यह कहीं स्थापित नहीं कि अपीलार्थीगण का मकान घटनास्थल पर या उसके आसपास था – अपीलार्थीगण ने अपने निजी प्रतिरक्षा के अधिकार के प्रयोग में कार्य नहीं किया या प्रकरण बिना रोकटोक का आपसी झगड़ा था – किन्तु, घटना का उद्भव या स्त्रोत अस्पष्ट रहा है और किसी भी पक्षकार ने घटना का सत्य वर्णन प्रस्तुत नहीं किया है – यह स्थापित होना अभिनिर्धारित नहीं किया जा सकता कि अपीलार्थीगण ने मृतक पर हमला उसकी हत्या कारित करने के आशय से एवं पूर्वचिन्तन के साथ किया था – दोषसिद्धि को भा.द.सं. की धारा 304–I में परिवर्तित किया गया।

Cases referred :

AIR 1976 SC 2263, AIR 2006 SC 2152, AIR 2004 SC 72, AIR 1989 SC 1822.

S.C. Datt with *Siddharth Datt*, for the appellants.
Amit Pandey, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **RAKESH SAKSENA, J. :-** Appellants have filed this appeal against the judgment dated 28th January, 2006 passed by 12th Additional Sessions Judge, (Fast Track Court), Jabalpur in Sessions Trial No. 68/1999, convicting and sentencing the appellants as under:

CONVICTION	SENTENCE
Under Section 302/34 IPC	Imprisonment for life, Fine of Rs. 500/- each, in default, rigorous imprisonment for two years each.
Under Section 307/34 IPC	Rigorous imprisonment for 7 years, Fine of Rs. 500/- each, in default, rigorous imprisonment for one year each.
Under Section 324/34 IPC	Rigorous imprisonment for two years, Fine of Rs. 300/- each, in default, rigorous imprisonment for six months each.
Under Section 323/34 IPC	Rigorous imprisonment for one year, Fine of Rs. 200/- each, in default, rigorous imprisonment for three months each.

2. In short, the prosecution case is that in the noon of 12.10.1998, while Meenu and Vineet, respectively the son and nephew of Udal (deceased) were searching their lost she buffalo, there occurred a quarrel between them and appellant Rammu. When they went to their house, Meenu informed the said incident to his mother Kusum Bai. In the evening, when deceased returned home, Kusum Bai narrated the incident to him. In the evening, at about 8 P.M., when they were at their house, appellants including Rammu reached near their house, abused them and pelted stones at the house. When deceased came out of his house to remonstrate them, accused Mishrilal dealt a stick blow on his head. Madan and Mukesh assaulted him with swords. Rammu and Veeran assaulted him with sticks. When Kusum Bai (PW2), the wife of deceased shouted Jugal Kishore (PW1), Chiranjilal (PW3) and Omprakash

(PW9) came out of their house and rushed to the spot. When these persons tried to intervene, appellants assaulted them also by their weapons. Accused Anantram also reached there and uttered filthy abuses to them. Deceased fell down unconscious. Injured persons took deceased to police station Panagar, where Jugal Kishore (PW1) lodged first information report Ex. P/1. All the injured persons were sent to Govt. Hospital, Panagar for preliminary treatment. Subsequently, they were referred to Medical College, Jabalpur.

3. Investigating Officer A.S.I. H.S.Gaur (PW17), after recording first information report, recorded statements of witnesses. Since, deceased was not in condition to speak, his statement could not be recorded. PW17 went at the spot, prepared spot map Ex. P/14 and seized articles from the spot including amputated finger of Jugal Kishore vide seizure memo Ex. P/15.

4. On 15.10.1998, deceased expired. On receipt of that information, a merg report was recorded at police station Garha. Investigating Officer conducted inquest proceedings, drew memorandum Ex. P/3 and referred the dead body of deceased for postmortem examination. Dr. Suresh Nema (PW20) conducted postmortem examination and gave report Ex. P/40.

5. In the course of investigation, accused/appellants were arrested and on their information, weapons used in the offence were seized. After completion of the investigation, charge sheet was filed in the Court of Magistrate, who committed the case for trial.

6. On charges being framed, appellants abjured their guilt and pleaded false implication. According to them, complainant, deceased and other prosecution witnesses assaulted them with spear and lathi. As a result of which, they also suffered injuries. They, merely, defended themselves from the assault made by the members of the complainant party.

7. Learned trial Judge, upon trial, after appreciating the evidence, held the appellants guilty, convicted and sentenced them as mentioned above. However, finding no sufficient evidence against accused Mishrilal and Anantram, acquitted them of all the charges.

8. Aggrieved by their conviction and sentence, appellants have filed the present appeals on the grounds that the learned trial Judge erred in holding appellants guilty on the basis of evidence adduced by the prosecution. The order of conviction was incorrect, improper and illegal since learned trial Judge failed to consider that there were contradictions, omissions and improvements

in the prosecution evidence. The evidence was not properly appreciated. In respect of the same incident, a counter case was registered against the complainant party for the injuries sustained by the appellants. The injuries of appellants were not explained by the prosecution which indicated that the prosecution suppressed the material part of the prosecution story. Learned senior counsel for the appellants submitted that it was a case of exercise of right of private defence. In the alternative, he submitted that the conviction of appellants under Section 302/34 was not justified. On the other hand, learned Panel Lawyer for the State supported the impugned judgment of conviction and submitted that the learned trial Judge committed no error in holding the appellants guilty on the basis of the evidence of injured witnesses.

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 appellants that deceased died on account of injuries and that prosecution witnesses viz. Jugal Kishore (PW1), Kusum Bai (PW2), Chiranjilal (PW3) and Omprakash (PW9) suffered injuries. Jugal Kishore (PW1) stated that hearing cries of Kusum Bai, when he reached at the house of deceased, he saw appellants assaulting deceased with axe and lathis. When he and his brother Chiranjilal tried to intervene, they were also assaulted. By the blow of sword given by Mukesh his finger of left hand got amputated. He went to police station and lodged first information report Ex. P/1. He, deceased and other injured persons were sent to Panagar Hospital and also to Medical College, Jabalpur. On the third day, his uncle deceased succumbed to his injuries. Evidence of Jugal Kishore finds support from the evidence of Investigating Officer H.S.Gaur (PW17). R.S.Choubey (PW18), Sub Inspector of police Station, Garha on receiving information about the death of deceased from Medical College, Jabalpur conducted inquest proceedings and recorded memorandum Ex. P/3 and referred the dead body of deceased to C.M.O., Medical College, Jabalpur for postmortem examination.

11. Dr. K.C. Agrawal (PW6), Medical Officer of P.H.C. Panagar examined injuries of all the injured persons including deceased. He deposed that he found following injuries on the body of Udal Prasad Kewat (deceased):-

(i) Lacerated wound 3.5 cm x 1 cm x bone deep on left eye brow.

(ii) Incised wound 10 cm x 1 cm x bone deep on the right side of skull going behind the ear.

(iii) Abrasion 5 cm x 2 cm on left scapular region.

(iv) Pain in whole of the chest.

He referred patient to Medical College for detailed investigation and treatment. Injury nos. 1 and 3 were caused by some hard and blunt weapon, whereas injury no.2 was caused by sharp edged weapon. Injury report Ex. P/17 was written and signed by him.

12. Dr. P.K. Agrawal (PW21), the Surgical Expert of Medical College stated that on 12.10.1998, in the night injured Udal was brought to Medical College from Govt. Hospital Panagar. He gave history of beating at about 7 P.M.. He was semiconscious. On examining him, he found following injuries:-

(i) Lacerated wound 7 cm x ½ cm x muscle deep on his right temporal region.

(ii) Lacerated wound 2 cm x 1 cm x muscle deep on left eye brow.

(iii) Abrasion 3 cm x 2 cm on left shoulder.

(iv) Crepitus over left side of chest.

(v) Incised wound 3 cm x 0.5 cm x 0.2 cm on right side back.

On CT scan, depressed fracture on the right side of skull was detected. There was hemorrhagic contusion on the same side which had affected the balance of brain. In his opinion, the nature of injuries was grievous. A summary of MLC Ex. P/41 was prepared and signed by him.

13. After the death of deceased, Dr. Suresh Kumar Nema (PW20), Medical Jurist conducted postmortem examination of the body of deceased and found following injuries vide postmortem examination report Ex. P/40:-

(i) Stitched wound on left eye brow. Small stitched wound noticed on right tempro parietal region of scalp vertical in direction. Starting just above pinna of right ear. Length was 13 cm. Scrotum was swollen.

(ii) Abrasion on back of left shoulder 3 cm x 2 cm. Drainage tube found coming out from right parietal eminence.

On internal examination, he found piece of right parietal bone missing under the stitched wound. Brain was exposed in that portion. Sub- dural collection of blood was found on right cerebral hemisphere. Right temporal lobe was found lacerated. Left lung lower lobe was punctured. Left 3rd to 10th ribs were found fractured. Injuries were antemortem. Since it was an operated case, no opinion regarding cause of injuries could be given. Cause of death was combined effect of head injury and the puncture of lower lobe of left lung.

14. From the aforesaid evidence, in our opinion, it stood established that deceased suffered injuries for which he was examined by Dr. K.C.Agrawal (PW6) and after his death his postmortem examination was conducted by Dr. Suresh Nema (PW20). His injuries were serious/grievous in nature and his death was caused by the injuries. Thus, the learned trial Judge, in our opinion, rightly held that the death of deceased was homicidal in nature.

15. Dr. K.C.Agrawal (PW6) on 12.10.1998, examined Jugal Kishore and found following injuries on his body:-

(i) Left index finger amputated at the place of metacarpophalangeal joint.

(ii) Incised wound 1.2 cm x 1 cm on left middle finger posterior aspect.

(iii) Incised wound 2.5 cm x 0.3 cm x skin deep on right forearm.

(iv) Incised wound 5 cm x 1 cm x bone deep on left side of head near mid line on top of head.

(v) Abrasion 3 cm x 0.5 cm on left leg anterior aspect near knee joint.

Injury nos. 1, 2, 3 and 4 were due to sharp cutting object. Injury No.5 was due to hard and blunt object. For further investigation, patient was referred to Medical College, Jabalpur.

16. Dr. Alok Chandra Agrawal (PW16) of Medical College also examined injuries of Jugal Kishore and found almost similar injuries on his body vide

MLC report Ex. P/35. In his opinion, except the amputation injury of the finger, other injuries were simple in nature. From the aforesaid medical evidence, it stood proved beyond doubt that Jugal Kishore suffered five injuries out of which the amputation injury of his left hand finger was grievous.

17. According to Dr. K.C.Agrawal (PW6), on examining Kusum Bai, he found a contusion of 5 cm x 5 cm size on left side of her chin and lower lip. This injury was caused by hard and blunt object. He advised X-ray examination of the injury and referred the patient to Medical College for opinion and treatment. MLC report is Ex. P/18.

18. On the same day, Dr. K. C. Agrawal (PW6) examined injuries of Chiranjilal and vide his report Ex. P/20, he found following injuries on his body:-

(i) Incised wound 3 cm x 1 cm x bone deep on left shoulder joint.

(ii) Contusion 8 cm x 2 cm on left arm lower part.

(iii) Incised wound 5 cm x 0.3 cm x skin deep on right arm upper part.

(iv) Incised wound 0.3 cm x 0.2 cm x 0.2 cm on left side of head.

(v) Incised wound 8 cm x 1 cm x bone deep on occipital region of head.

Injury nos. 1, 3, 4 and 5 were caused by sharp cutting object and injury no.2 was caused by hard and blunt object. Patient was referred to Medical College, Jabalpur for detailed examination and treatment. In the absence of any specific medical evidence and the X-ray examination, injuries were found to be simple in nature.

19. Dr. K.C.Agrawal (PW6) on the same day examined Omprakash and vide his report Ex. P/21, he found a contusion 2 cm x 1 cm on his left leg lower part. This injury was found to be simple in nature.

20. Now, the question before this Court is whether injuries to deceased which resulted into his death and injuries of other prosecution witnesses were caused by the appellants.

21. Prosecution case rested mainly on the evidence of Jugal Kishore (PW1), Kusum Bai (PW2), Chiranjilal (PW3), Omprakash (PW9) and Vineet (PW11), who were also injured in the incident.

22. Kusum Bai (PW2) stated that on the day of occurrence when her son Meenu and nephew Vineet had gone for grazing she buffalo, appellant Rammu assaulted him. When they came back, they informed her about the said occurrence. On her asking, her son along with Chiranjilal went to police station in the evening and lodged report in that regard. Evidence of Kusum Bai in this regard finds support from the evidence of Vineet (PW11). Kusum Bai further stated that in the evening when her husband Udal came back from his work and sat for eating food, she informed him about the incident of beating by Rammu. Soon thereafter Rammu came in front of their house and started pelting stones. Other accused persons viz. Anantram, Mukesh, Madan and Veeran also pelted stones. When her husband went out and asked them as to why they were throwing stones, Mukesh dealt a blow of sword on his head, Rammu, Veeran and other accused persons assaulted him with lathis. When she went there to rescue him, Rammu dealt a lathi blow on her mouth. On her shouting Chiranjilal, Jugal Kishore and Omprakash also reached there and tried to save them, whereupon all the accused persons assaulted them also. After the occurrence was over, they carried injured Udal to police station Panagar. Udal was firstly taken to Panagar Hospital, thereafter he was shifted to Medical College, Jabalpur. After three days, Udal died.

23. Evidence of Kusuam Bai stood corroborated from the evidence of Jugal Kishore (PW1) and Chiranjilal (PW3). Jugal Kishore (PW1) stated that in the evening at about 8:30 P.M., when he was at this house, he heard cries of his aunt Kusum Bai calling for help. When he and Chiranjilal rushed and reached there, they saw accused persons assaulting their uncle with swords and lathis. When he tried to defend his uncle, accused Mukesh dealt a blow of sword to him, whereby his left hand finger got amputated and fell down. Madan also inflicted sword injury to him on his back. Veeran, Rammu and Anantram assaulted him with lathis. Chiranjilal, Kusum Bai and Omprakash also suffered injuries when they tried to intervene. After beating, when accused persons ran away, they carried Udal to police station Panagar, where he lodged first information report Ex. P/1. Udal was initially taken to Panagar hospital and thereafter was shifted to Medical College, Jabalpur, where on third day he died. He stated that his house was situated at a distance of 150 feet away from the house of Udal.

24. Chiranjilal (PW3) also reiterated the same story. According to him, he and his brother Jugal Kishore rushed to the house of Udal upon hearing cries of Kusum Bai and saw Madan and Mukesh assaulting Udal with swords and other accused persons assaulting with sticks. When he tried to intervene, Madan dealt a blow of sword on his head causing 6" long cut wound on his head. He also accompanied Udal and other persons to police station and the hospital. Evidence of Jugal Kishore stood corroborated from the evidence of A.S.I. H.S.Gaur (PW17), who stated that on 12.10.1998, Jugal Kishore lodged first information report Ex. P/1. He sent Udal and other injured persons to Panagar Hospital and thereafter to Medical College, Jabalpur. He went to the spot, prepared the spot map Ex. P/14 and also seized amputated finger of Jugal Kishore vide seizure memo Ex. P/15. Similar version was given by Omprakash (PW9), the son of deceased.

25. Learned senior counsel for the appellants submitted that the evidence of aforesaid eye witnesses was not reliable since no independent witnesses were examined by the prosecution. It is true that the case of the prosecution is based only on the evidence of relative witnesses, but where the presence of the eye witnesses is proved to be natural and their statements appear truthful disclosure of actual facts leading to the occurrence, it shall not be permissible for the Court to discard the statement of such related witnesses. There is no bar in law on examining family members or any other person as witnesses. What is expected from the Court is to keep in mind the relationship of witnesses and critically scrutinize their evidence before reaching a conclusion. In the instant case, the presence of eye witnesses is proved by the fact that they all suffered injuries in the incident at the hands of accused persons. Their injuries were proved by Dr. K.C.Agrawal (PW6) and Dr. Alok Agrawal (PW16). Witnesses suffered injuries by sharp edged weapons as well as by hard and blunt weapons.

26. Learned trial Judge, while appreciating the evidence of prosecution witnesses though found that the complainant Jugal Kishore (PW1) as well as other witnesses made exaggeration in involving accused Mishrilal and Anantram, since their names were not mentioned by Jugal Kishore in First Information Report Ex. P/1, but merely on this ground whole of the evidence of the said witnesses cannot be held to have been rendered unreliable.

27. As far as the non examination of independent eye witnesses is concerned, Jugal Kishore (PW1) and Kusum Bai (PW2) stated that some of

the persons from the neighbourhood witnessed the incident from their house, but they did not dare to come out and save them. This clearly indicated that the neighbour witnesses wished to keep themselves away from the occurrence. Merely by their non examination, in our opinion, no adverse inference can be drawn against the prosecution.

28. Learned senior counsel for the appellants vehemently argued that the evidence of eye witnesses examined by the prosecution is not reliable since they did not give the truthful and correct account of the incident and failed to explain the injuries found on the body of accused persons. He submitted that the injuries found on the body of accused persons were not merely superficial or trivial injuries, they were caused on vital parts of the body like head and that too by some sharp edged weapons. According to him, the incident had not occurred at the house of deceased, but on the way to village. He referred to the spot map Ex. P/14 prepared by the Investigating Officer and Ex. P/39 drawn by Patwari Girani Lal (PW19). He further submitted that as per prosecution case stones were pelted at the house of deceased, but no such stones were seized by the Investigating Officer. According to him, in these circumstances it was apparent that the genesis of the occurrence was suppressed and in fact deceased and prosecution witnesses had attacked Rammu, who is said to have assaulted Meenu, the son of deceased in the noon. As such, it is probable that accused/appellants might have caused injuries to deceased and prosecution witnesses in exercise of their right of private defence. He placed reliance on *Lakshmi Singh and others*-AIR 1976 SC 2263, *Umrao Vs. State of Haryana and others*-AIR 2006 SC 2152, *Kewal Singh and others Vs. State of Punjab*-AIR 2004 SC 72 and *State of U.P. Vs. Jodha Singh and others*-AIR 1989 SC 1822.

29. In case of *Lakshmi Singh* (supra), the Apex Court observed that "in a murder case, the non-explanation of injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:-

> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
>
> (2) that the witnesses who denied the presence of injuries on the person of the accused were lying on the most material point

and, therefore, their evidence was unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused, it renders the defence probable."

* * *

" The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses. There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

30. In case of *Umrao* (supra), the Apex Court observed that "it may not be necessary for the prosecution to explain the injuries on the person of the accused in all circumstances, but, it is trite that when such a plea is raised and the court opines that the version of the accused persons may be correct, the explanation of injuries on the person of accused cannot be put to a back seat or cannot simply be ignored."

31. In case of *Kewal Singh* (supra), the Apex Court laid down a preposition in respect of a case of free fight observing "when both the parties come armed and indulge in a free fight resulting injuries on both sides, since both the parties came prepared to fight, it would not be necessary to go into the question as to whether any of them exercised their right of private defence."

32. In *Jodha Singh* (supra), the Apex Court observed "when a wordy quarrel had taken place and the quarrel had led to the use of weapons by both the parties against each other, it's not a case where the accused deliberately attacked the deceased and the witness with an intention to kill them. On the other hand, it's a case which would fall under Exception 4 to Section 300 of the Indian Penal Code. .....Further the accused cannot be convicted for the offence of rioting if the attack on the victims had taken place in the course of a sudden quarrel."

33. In the light of above prepositions, when we examine the evidence of the prosecution witnesses, we find it established that in the same incident accused persons also suffered injuries. According to the statements of accused persons recorded under Section 313 of the Code of Criminal Procedure, deceased and prosecution witnesses caused injuries to them. Though, no witnesses were examined by the accused persons in their defence and no report lodged by them with police was proved in the case, but from the evidence of Station Officer of Police Station, Panagar R.S.Kalra (PW14), it is revealed that in the same occurrence some of the accused persons had suffered injuries, though he could not remember specifically as to which of them suffered injuries and to which of them he sent for Medical Examination. Dr. K. C. Agrawal (PW6) of Primary Health Centre, Panagar, however, deposed that on 12.10.1998, accused Madanlal, Rammu, Mukesh and Veeran were brought to hospital by police for treatment. He examined their injuries. He found following injuries on the body of **Madan:-**

(i) Lacerated wound 2 cm x 0.2 cm x 0.2 cm on left eye brow.

(ii) Lacerated wound 1 cm x 0.2 cm x 0.2 cm on left side of face.

(iii) Lacerated wound 3.5 cm x 1 cm x 0.5 cm on right post-axillary line near fifth lumber vertical region.

(iv) Penetrating wound 1 cm x 1 cm x 0.8 cm on back.

(v) Penetrating wound 0.3 cm x 0.3 cm x 0.2 cm on right side of back.

(vi) Incised wound 2 cm x 0.2 cm x 0.2 cm on right thumb.

Injury nos. 1, 2 and 3 were caused by hard and blunt object, whereas injury nos. 4 and 5 were caused by blunt object. Injury no.6 was caused by some sharp edged weapon. The patient was referred for X-ray examination for further treatment and opinion about the nature of injuries. His injury report is Ex. D/4.

He found following injuries on the body of **Rammulal:-**

(i) Incised wound 1.5 cm x 0.3 cm x 0.8 cm on right thigh.

(ii) Abrasion on right leg.

Injury no.1 was caused by sharp edged weapon and injury no.2 was caused by hard and blunt object. The patient was referred for X-ray examination and opinion. His injury report is Ex. D/5.

He found following injuries on the body of **Mukesh:-**

(i) Incised wound 2 cm x 1 cm x 0.5 cm on right scapular region upper part.

(ii) Diffuse swelling 5 cm x 5 cm on left foot.

(iii) Contusion 5 cm x 2 cm on left arm.

(iv) Contusion 5 cm x 3 cm on right forearm.

(v) Contusion 5 cm x 2 cm on right shoulder.

Injury no. 1 was caused by sharp edged weapon and other injuries were caused by hard and blunt object. The patient was referred for X-ray examination. His injury report is Ex. D/6.

He found following injuries on the body of **Veeran:**

(i) Contusion with lacerated wound 2 cm x 2 cm on left side of forehead. Size of laceration 0.5 cm x 0.2 cm x skin deep.

(ii) Lacerated wound 1 cm x 0.2 cm x 0.2 on bridge of the nose.

(iii) Contusion 5 cm x 2 cm on left posterior axillary line.

Injuries were caused by hard and blunt object. They were simple in nature. His injury report is Ex. D/7.

34. It is thus proved that accused persons also suffered injuries in the same incident. When explanation was sought from the prosecution witnesses, they bluntly refused to have caused any injury to accused persons. Jugal Kishore (PW1) and Kusum Bai (PW2) though admitted that a case for 'Marpeet' of accused persons was pending against them, but they did not know as to how they suffered injuries since they (witnesses) were empty handed, they did not cause any injury to accused persons. According to Kusum Bai (PW2), accused persons suffered injuries with their own weapons.

35. Defence suggested to prosecution witnesses during cross examination

was that when Rammu happened to pass from the front of the house of deceased, Jugal Kishore, Chiranjilal, Omprakash etc. attacked him. When he raised hue and cry, other accused persons reached there and defended themselves. This gives, in our opinion, some idea that injuries to deceased and prosecution witnesses were caused by the accused persons, but how the incident occurred remained shrouded in suspicion. Admittedly, Meenu and Vineet were beaten by Rammu prior to the present occurrence, which was the cause of the instant occurrence. Though, it is alleged by the prosecution witnesses that Meenu and Chiranjilal had gone to lodge report about the said occurrence, but that report was not produced in the case. Be that as it may, since accused Rammu had beaten Vineet and Meenu, the grudge must remain with the complainant party. If a report was lodged, the grudge could have been shifted on the side of accused persons. It is alleged that Rammu pelted stones at the house of deceased, but admittedly no stones were seized by the Investigating Officer. It is also significant to note that the incident occurred not exactly at or in front of the house of deceased, but at some distance from his house. From the spot map Ex. P/14, drawn by the Investigating Officer, it seems that the incident occurred in front of the house of Prabhat, which according to Omprakash (PW9) is about 75-100 meters away from the house of deceased. It has been admitted by the witnesses that it was the passage for going to village. From the evidence on record, it is, however, not established that the houses of accused persons were situated at or near the place of occurrence. It does not, therefore, seem probable that if at all Rammu was attacked by the accused persons, at once other accused persons could have reached the spot armed with weapons. Had this been the situation, Rammu would have suffered much more injuries rather only two injuries as found on his body by the doctor.

36. In the aforesaid fact situation, it is not possible for us to hold that appellants acted in the exercise of their right of private defence, or it was a case of mutual free fight. It, however, in our opinion, stood established that appellants attacked deceased and the prosecution witnesses armed with swords and sticks, whereby deceased suffered injuries which resulted into his death and that at the same time they attempted to cause death of Jugal Kishore (PW1) by causing dangerous injury on his head. The finding of the trial Court in this regard seems justified and, therefore, affirmed. Since the genesis or the origin of the occurrence remained shrouded in obscurity and neither of the parties presented the true version of the occurrence, in our opinion, it cannot

be held established that appellants assaulted deceased with the intention and premeditation to commit his murder. At the same, since the incident seemed to be a case of sudden fight/sudden quarrel, appellants, in our opinion, were liable to be held guilty for committing the offence under Section 304-I of the Indian Penal Code.

37. For the aforesaid reasons, the conviction and sentence of appellants as awarded by the trial Court under Sections 307/34, 324/34 and 323/34 of the Indian Penal is affirmed. However, their conviction under Section 302/34 of the Indian Penal Code is modified to one under Section 304-I/34 of the Indian Penal Code and they are sentenced to rigorous imprisonment for seven years. All the sentences of imprisonment shall run concurrent.

38. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2013] M.P., 2003
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice Subhash Kakade
Cr.A. No. 1480/2001(Jabalpur) decided on 7 May, 2013

REM SINGH & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 3 - Relative Witnesses **- Where presence of eye witnesses is proved to be natural and their statements appear truthful disclosure of actual facts leading to occurrence, it shall not be permissible for the Court to discard their evidence - Eye Witnesses also suffered injuries - No reason to doubt their evidence. (Para 12)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – संबंधित साक्षीगण – जब प्रत्यक्षदर्शी साक्षीगण की उपस्थिति स्वाभाविक होना साबित होती है तथा उनके कथन घटना के वास्तविक तथ्यों का सत्य प्रकटन प्रतीत होते हैं, उनके साक्ष्य को अस्वीकार करना न्यायालय के लिए अनुज्ञेय नहीं – प्रत्यक्षदर्शी साक्षियों ने भी चोटें सहन की हैं – उनके साक्ष्य पर संदेह करने का कोई कारण नहीं।

B. Penal Code (45 of 1860), Sections 149 & 302 - Murder - Unlawful Assembly **- Four accused persons pelted stones and caused injuries to two witnesses - Deceased came out of the house then accused**

No. 1 dealt a stick blow to him - Deceased fell down and thereafter appellant No.2 dealt axe blow on his head - It cannot be said that appellant No.1 intended to cause death of deceased - Common object of assembly was not to commit murder of deceased - Conviction of appellants No. 1, 3 and 4 under Section 302/149 of I.P.C. set aside instead they are convicted under Section 325/149 of I.P.C. - Conviction of appellant No.2 under Section 302 of I.P.C. affirmed.(Paras 20 to 23)

ख. दण्ड संहिता (1860 का 45), धाराऐं 149 व 302 – हत्या – विधि विरुद्ध जमाव – चार अभियुक्तों ने पथराव किया और दो साक्षियों को चोट कारित की – मृतक मकान से बाहर निकला, तब अभियुक्त क्र. 1 ने उस पर लाठी से वार किया – मृतक नीचे गिरा और फिर अपीलार्थी क्र. 2 ने उसके सिर पर कुल्हाड़ी मारी – यह नहीं कहा जा सकता कि अपीलार्थी क्र. 1 का आशय मृतक की मृत्यु कारित करना था – जमाव का सामान्य उद्देश्य मृतक की हत्या कारित करना नहीं था – अपीलार्थी क्र. 1, 3 व 4 की धारा 302/149 भा.द.सं. के अंतर्गत दोषसिद्धि अपास्त, इसके स्थान पर उन्हें धारा 325/149 भा.द.सं. के अंतर्गत दोषसिद्ध किया जाता है – अपीलार्थी क्र. 2 की धारा 302 भा.द.सं. के अंतर्गत दोषसिद्धि अभिपुष्ट।

R.K. Jaiswal, for the appellants.
Amit Pandey, P.L. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **RAKESH SAKSENA, J. :-** Since both the aforesaid appeals arise out of the common impugned judgment, this judgment shall govern the disposal of both the appeals.

2. Appellants have filed these appeals against the judgment dated 6th July, 2001 passed by First Additional Sessions Judge, Burhanpur in Sessions Trial No. 19/2000, convicting and sentencing them as under:

CONVICTION	SENTENCE
Appellant no.2 Ter Singh: Under Sections 302, 323, 147 & 148 IPC.	Imprisonment for life with fine of Rs.500/-, in default one month rigorous imprisonment, three months rigorous imprisonment with fine of Rs. 100/-, in default seven days rigorous imprisonment & three months rigorous imprisonment with fine of Rs. 100/-, in default 15 days rigorous imprisonment.

Rest of the Appellants:	
Under Section 302 read with 149 IPC	Imprisonment for life with fine of Rs. 500/- in default rigorous imprisonment for one month.
Under Sections 323, 147 & 148 IPC	R.I. for three months with fine of Rs.100/-, in default seven days rigorous imprisonment, rigorous imprisonment for three months with fine of Rs. 100/-, in default 15 days rigorous imprisonment. Sentences of imprisonment to run concurrently.

3. In short, the prosecution case is that on 8.11.1999, at about 6 P.M. in village Chainpura, hearing some noise, when complainant Dev Singh came out of his house, he saw appellants armed with axe and sticks beating his father Ram Singh. Appellant Ter Singh was armed with axe and other three were armed with sticks. When he and other people of village rushed to save Ram Singh, appellants ran away. They found Ram Singh dead. Dev Singh went to police station Nepanagar and lodged first information report Ex. P/23 at 8.45 P.M.. A case under Sections 147, 148 and 302 of the Indian Penal Code was registered against appellants. Police, after recording merg intimation reached the spot. Investigating Officer B.R. Taretiya (PW9) conducted inquest and recorded memorandum Ex. P/28. He sent the dead body for postmortem examination to Govt. Hospital, Nepanagar. In the incident, Dhoom Singh (PW5) and Bhonga (PW8) were also injured, therefore, they were also sent for medical examination. After investigation and arrest of the appellants, charge sheet was filed in the Court of Magistrate. The case was thereafter committed for trial.

4. On charge being framed, appellants abjured their guilt and pleaded false implication. Though, no specific defence was put forward, yet it was suggested to prosecution witnesses that the sons of deceased themselves caused injuries to their father and when appellants intervened they were assaulted and also falsely implicated in the case. Appellants examined Gulab (DW1) in their defence. Prosecution, to substantiate its case, examined nine witnesses in the Court. Relying on the evidence adduced by the prosecution,

learned Additional Sessions Judge held appellants guilty, convicted and sentenced them as mentioned earlier. Aggrieved by the impugned judgment of conviction and sentence, appellants have filed the present appeals.

5. Learned counsel for the appellants submitted that the conviction of appellants is illegal and unjustified. Learned trial Judge committed error in relying on the evidence of relative and interested witnesses. The evidence of eye witnesses is inconsistent and contradictory. They did not explain the injuries sustained by the appellants and suppressed the genesis of the occurrence. Witnesses deliberately involved five persons in the incident with the ulterior motive of attracting provisions of Section 149 of the Indian Penal Code. Counsel submitted that the conviction of appellants deserved to be set aside. On the other hand, learned Panel Lawyer for the State supported the impugned judgment of conviction passed by the trial Court and submitted that there was no ground to call for any interference in the said judgment.

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 that Ram Singh, the deceased died a homicidal death. It has been stated by Laxman (PW3), Dev Singh (PW4), Dhoom Singh (PW5), Dhyan Singh (PW6) and Bhonga (PW8) that appellants assaulted deceased with axe and sticks, as a result of which, he suffered injuries and died. Dev Singh lodged first information report Ex. P/23 with the police which was recorded by Sub Inspector B.R.Taretiya (PW9). PW9 conducted inquest proceedings and recorded memorandum Ex. P/25 in presence of witnesses and referred the dead body for postmortem examination to Govt. Hospital, Nepanagar. Dr. Gopal Pandey (PW2) conducted autopsy and found following injuries on the body of deceased:

External Injuries:

(i) Incised wound on right occipito parietal region of scalp just near the mid line with regular margins in spindle shape with red blood clots. Size 3" x 1/2"x bone. Exposed and cut; corresponding external injuries parallel to mid line.

(ii) Haemotama on right fronto parietal scalp of head 3" x 3.5".

(iii) Lacerated wound on right arm 1.5" x 1/2" x 1/4" with

irregular margins and red blood clots.

Internal Examination:

Occipital bone was cut which was corresponding to injury no.1. The size of cut was 1.5" x 1/2" x 1/4". Cut corresponding to external injuries. Occipito parietal lobe of brain was injured resulting in haemorrhage due to cerebral vessels.

Injury No.1 was caused by hard and sharp object. Other injuries were caused by hard and blunt weapons. All the injuries were ante mortem in nature. Injury no.1 was dangerous to life and was sufficient to cause death in the ordinary course of nature. In his opinion, the cause of death of deceased was coma resulting from brain injuries and haemorrhage. Death was homicidal in nature. Postmortem examination report Ex. P/17 was written and signed by him.

8. From the aforesaid evidence, it was established that deceased died a homicidal death.

9. Dr. Gopal Pandey (PW2) deposed that on the same day, he also examined injuries of Bhonga (PW8), son of Ram Singh and found following injuries:-

(i) Lacerated wound on occipital region 2.5 cm x 2 cm irregular margins with blood clot.

(ii) Lacerated wound on left ear lobule 1.5 cm x ¼ cm x ¼ cm with blood clot.

(iii) Bruise reddish on left shoulder posteriorly 3.5 x 3 cm.

(iv) Swelling on left knee joint laterally 4.5 cm x 3.5 cm.

Injuries were simple in nature. They were caused by hard and blunt object, duration within 24 hours. Advised for X-ray of occipital skull. Injury report is Ex. P/20.

10. On the same day, Dr. Gopal Pandey examined Dhoom Singh (PW5) and found following injuries vide his injury report Ex. P/21:-

(i) Lacerated wound with irregular margins on frontal region of head 5 cm x 2 cm x ½ cm.

(ii) Bruise reddish on right chest 4.5cm x 3.5 cm.

(iii) Swelling on left forearm 3.5 cm x 3 cm.

(iv) Abrasion on left iliac-crest 2.5 cm x ½ cm.

Injuries were simple in nature and were caused by hard and blunt object. Advised for X-ray of frontal head.

11. Now, it has to be seen whether appellants were responsible for causing injuries to deceased which resulted into his death and injuries to Dhoom Singh and Bhonga.

12. Learned counsel for the appellants submitted that the evidence of relative eye witnesses, which was discrepant and contradictory, was not reliable. It is true that the case of the prosecution is based on the evidence of relative witnesses, but where the presence of eye witnesses is proved to be natural and their statements appear truthful disclosure of actual facts leading to the occurrence, it shall not be permissible for the Court to discard the evidence of such related witnesses. There is no bar in law on examining family members or any other person as witnesses. What is expected from the Court is to keep in mind the relationship of witnesses and critically scrutinize their evidence before reaching a conclusion. In the instant case, witnesses were sons and nephew of the deceased, out of whom Dev Singh (PW5) and Bhonga (PW8) also had suffered injuries in the incident at the hands of appellants. Their injuries were proved by Dr. Gopal Pandey (PW2). In such circumstances, their presence at the spot could not be doubted. Otherwise also there appeared no reason for the said relative witnesses to be interested in sending the appellants to jail. It is true that according to suggestions put to eye witnesses by the defence, it were sons of deceased, who caused injuries to deceased, but such a plea was not put forward by the appellants in their statements recorded under Section 313 of the Code of Criminal Procedure. Even it was not stated by Gulab (DW1) examined by the appellants as a eye witness of the occurrence.

13. Dev Singh (PW4), son of deceased stated that the house of his father was situated in front of his house. On 8.11.1999, on the day of `Deepawali' at about 6 O' clock in the evening when he and his wife were in his house, appellants came there. Appellant Ter Singh had an axe and others had sticks. They picked up stones and threw on his brother Dhoom Singh. When his father came out of his house, Rem Singh dealt a stick blow to him. Thereafter,

all the appellants assaulted him. Ter Singh dealt axe blow to him on his head. His father died and appellants ran away. At the time of occurrence, Dev Singh, Dhyan Singh and Bhonga were present. He went to police station and lodged report Ex. P/23. Though, number of contradictions and omissions were pointed out by the learned counsel for the appellants in his statement, but none appeared material. Evidence of Dev Singh (PW4) finds substantial corroboration from the first information report Ex. P/23, lodged by him soon after the occurrence.

14. Laxman (PW3), Dhoom Singh (PW5), Dhyan Singh (PW6) and Bhonga (PW8) though reiterated almost similar story about the occurrence, yet there appeared a few minor discrepancies in their statements. According to Laxman (PW3), as soon as appellants reached in front of the house of deceased they started pelting stones due to which Dhoom singh and Bhonga suffered injuries. He stated that when deceased came out of his house, Rem Singh dealt a stick blow to him, as a result of which, he fell down, thereafter other accused persons, except Ter Singh, assaulted him with sticks. On the exhortation of Rem Singh, Ter Singh dealt axe blow to deceased, all of them then ran away. The fact that Rem Singh exhorted Ter Singh to cause axe injury to deceased was found missing in the police statement Ex. D/1 of Laxman.

15. Dhoom Singh (PW5) stated that his house and his father's house are separate, but are in the same vicinity. According to him, in the evening, he saw accused persons near his house, uttering that they had to see and beat Ram Singh. Ter Singh had an axe and others had sticks. They all assaulted his father. Ter Singh dealt axe blow on his head due to which he fell down. Sohan and Bhikla pelted stones at him and his brother Bhonga. Their injuries were examined by the doctor. This witness gave a different version by saying that it was not correct that at first stones were pelted, thereafter his father came out of his house, whereas in his police statement he stated that at first he sustained stone injuries, thereafter his father came out.

16. Dhyan Singh (PW6) stated, on way when he heard some persons shouting that Ram Singh has to be assaulted, he went near the house of Ram Singh and saw appellants armed with axe and sticks assaulting deceased, Dhoom Singh and Bhonga. Ter Singh dealt axe blow on the head of deceased, whereas other accused persons assaulted him with sticks. In para-7 of his cross examination, he stated that he did not see any body beating to other person except deceased. Though, he stated that he saw Ter Singh assaulting

deceased with axe, but at the same time he admitted that when he reached, he saw deceased lying down injured. He did not see who assaulted him, but he saw appellants standing there.

17. According to Bhonga (PW8), he was in the same house in which deceased resided. When he heard people shouting to see Ram Singh, he and his father came out of the house, at once appellants started beating his father. Ter Singh was armed with axe, whereas others were wielding sticks. When Ter Singh dealt axe blow on the head of his father, he fell down. He stated that appellants also pelted stones by which he and Dhoom Singh also suffered injuries. When accused persons ran away, Dev Singh went to police station to lodge report.

18. Learned counsel for the appellants submitted that the aforesaid witnesses stated that except appellant Ter Singh, others assaulted deceased with sticks, but on postmortem examination of the body of deceased only three injuries were found by Dr. Pandey (PW2). Only two injuries caused by hard and blunt object were found, besides one injury caused by sharp edged weapon on the head. Though, Laxman (PW3) and Dev Singh (PW4) stated that appellant Rem Singh dealt a stick blow to deceased, but none of the other witnesses stated so. According to Dhoom Singh (PW5), Dhyan Singh (PW6) and Bhonga (PW8), all the accused persons assaulted deceased with sticks. Learned counsel for the appellants, therefore submitted that the evidence of eye witnesses was belied by the medical evidence. Had all the appellants other than Ter Singh assaulted deceased with sticks, at least four injuries by hard and blunt object would have been found on the body of deceased. Out of five eye witnesses, only two witnesses named Rem Singh to have inflicted stick blow to deceased, but they did not say that he assaulted deceased on the head. Except the injury caused by axe, other two injuries found on the body of deceased were simple in nature. Learned counsel submitted that in these circumstances it was not possible to hold that the common object of unlawful assembly allegedly formed by accused persons was to commit murder of deceased.

19. Learned counsel for the State, on the other hand, submitted that all the accused persons armed with sticks and axe came at the spot forming unlawful assembly and attacked deceased. Eye witnesses stated that they were shouting to teach a lesson to deceased, therefore, it was rightly held by the trial Court that the common object of unlawful assembly formed by the

accused persons was to commit murder of deceased.

20. On a close and critical examination of the evidence of eye witnesses, we find that the evidence in respect of the fact that accused persons were shouting to teach a lesson to deceased is discrepant, contradictory and unreliable. Almost all the eye witnesses improved upon their earlier version in saying that all the accused persons said *"Ram Singh ko marna hai"*. Otherwise also the word *"Marna hai"* can be interpreted both ways i.e. to beat or to kill, therefore, even if this piece of evidence is accepted, it cannot be held that these words indicated the object of the assembly to kill the deceased. From the evidence of eye witnesses, it seems that accused persons when reached near the house of deceased, started pelting stones by which Dhoom singh (PW5) and Bhonga (PW8) suffered injuries and that none of the accused assaulted them by sticks or axe, except deceased. According to Laxman (PW3) and Dev Singh (PW4), when accused persons pelted stones and caused injuries to Dhoom Singh and Dhyan Singh, deceased came out and then at once Rem Singh dealt a stick blow to him, as a result of which, he fell down, thereafter Ter Singh dealt axe blow on his head. Evidence of Laxman (PW3) about exhortation by Rem Singh or other accused persons to Ter Singh for causing injury to deceased by axe is inconsistent, contradictory to the evidence of other witnesses and is unreliable.

21. Merely because Laxman (PW3) and Dev Singh (PW4) stated that Rem Singh assaulted deceased with stick due to which he fell down and thereafter, Ter Singh dealt axe blow on the head of deceased, it cannot be held that Rem Singh intended to cause death of deceased. Though, it has been stated by the witnesses that all the accused persons, who were armed with sticks assaulted deceased, yet it seems doubtful in view of the evidence of Dr. Pandey, who found only two simple injuries on the body of deceased caused by hard and blunt object. Therefore, in view of the above evidence though we find it established that appellants formed an unlawful assembly, yet we are unable to hold that the common object of assembly was to commit murder of deceased.

22. Since appellant Ter Singh dealt axe blow from the sharp edge side on the head of deceased which resulted into his death, we find that the learned trial Judge committed no error in holding him guilty under Section 302 of the Indian Penal Code. His conviction under Section 302 of the Indian Penal Code is, therefore, affirmed.

23. For the reasons stated in paragraph 21 we hold that the conviction of appellants Rem Singh, Mal Singh, Sohan and Bhikla under Section 302 read with Section 149 of the Indian Penal Code is not justified. However, since, they formed unlawful assembly armed with weapons like sticks, it has to be held that the common object of the unlawful assembly was to cause at least grievous hurt to deceased and other injured persons. Accordingly, the conviction and sentence of aforesaid appellants for the charge under Section 302/149 of the Indian Penal Code are set aside, instead they are convicted under Section 325/149 of the Indian Penal Code and sentenced to rigorous imprisonment for six months.

24. Conviction and sentence of all the appellants under Sections 323, 147 and 148 of the Indian Penal Code are affirmed.

25. In the result, Criminal Appeal No. 1480/2001 so far as it relates to appellant no.(2) Ter Singh, is dismissed. However, this appeal in respect to appellant nos. (1) Rem Singh (3) Mal Singh (4) Sohan, and Criminal Appeal No. 417/2004 of Bhikla, as indicated above, are partly allowed.

A copy of this judgment be kept in record of Criminal Appeal No. 417/2004.

Order accordingly.

I.L.R. [2013] M.P., 2012
APPELLATE CRIMINAL
Before Mr. Justice G.D. Saxena
Cr. A. No. 564/2004 (Gwalior) decided on 10 May, 2013

BALLI @ DAULAT SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Arms Act (54 of 1959), Section 25(1B)(a) - Sentence - Lesser Sentence - **Appellant has not served the minimum sentence - Not entitled for early release, even on the ground of parity, as the sentence which he has undergone is lesser to minimum sentence as prescribed by Statute. (Para 7)**

क. आयुध अधिनियम (1959 का 54), धारा 25(1बी)(ए) – दण्डादेश – हल्का दण्ड – अपीलार्थी ने न्यूनतम दण्ड नहीं भुगता है – अग्रिम मुक्ति का हकदार नहीं, समानता के आधार पर भी नहीं क्योंकि उसे भुगताया जा चुका दण्ड, कानून

द्वारा विहित न्यूनतम दण्ड से कम है।

B. ***Arms Act (54 of 1959), Section 25(1B)(a) - Seizure of Fire Arm - Evidence of Police Officers*** **- Entry regarding information received from informer in relation with presence and involvement of accused in crime was neither produced nor proved - Not proved that the pistol and cartridges were properly sealed on spot and were put in proper and safe custody - Nothing on record that the seized articles were sent to District Magistrate in a sealed condition for obtaining sanction - Weapons also not produced before the Court for exhibition and proving the recovery - Recovery of weapons not proved beyond reasonable doubt - Appeal allowed. (Paras 22 & 23)**

ख. आयुध अधिनियम (1959 का 54), धारा 25(1बी)(ए) – आग्नेयाशस्त्र की जब्ती – पुलिस अधिकारियों की साक्ष्य – अपराध में अभियुक्त की उपस्थिति एवं लिप्तता से संबधित मुखबिर से प्राप्त सूचना की प्रविष्टि को न तो प्रस्तुत किया गया और न ही साबित किया गया – यह साबित नहीं किया गया कि पिस्टल और कारतूसों को घटनास्थल पर उचित रुप से सीलबंद किया गया था और उचित एवं सुरक्षित अभिरक्षा में रखा गया था – अभिलेख पर कुछ नहीं कि जब्तशुदा वस्तुओं को सीलबंद स्थिति में जिला मजिस्ट्रेट की मंजूरी हेतु भेजा गया था – शस्त्रों को न्यायालय के भी समक्ष प्रदर्शित एवं बरामदगी साबित करने के लिए पेश नहीं किया गया – शस्त्रों की बरामदगी युक्तियुक्त संदेह से परे साबित नहीं की गई – अपील मंजूर।

Cases referred :

2012 (8) SCC 676, (2012) 4 SCC 722.

Ravi Dwivedi with *O.P. Meena*, for the appellant.
R.K. Shrivastava, P.L. for the respondent/State.

JUDGMENT

G.D. SAXENA, J. :- This appeal under Section 374(2) of the Code of Criminal Procedure 1973 has been preferred by the accused against his conviction and sentence recorded vide judgment dated 16th August 2004 in Sessions Case No. 78/2003 by the Special Judge (Under M.P. Dakoity Avam Vyapharan Prabhavit Kshetra Adiniyam 1981, hereafter referred as the Adhiniyam) Shivpuri, holding thereby him a guilty for commission of offence under Section 25(1-B) (a) of the Arms Act read with Section 11/13 of the said Adhiniyam and sentencing to suffer three years' rigorous imprisonment

with a fine of Rs. 200/- with further default punishment of one month's R.I.

(2) In brief, the prosecution version is that on 27th March 2003 P.N. Paul, Assistant Sub Inspector Police Outpost Sunari, got a secret information from informer that absconded dacoit Nanhe Singh, Makhan Singh and Balli @ Daulat Singh (present appellant) by hiding themselves near Papredu Math were making preparations to commit dacoity. He lodged the secret information in Enty no. 440 of Daily diary register (Roznamcha) of outpost and then informed through wireless massage to his superior officer K.K. Dixit the then In-charge of Police Station Karera. On reaching of police force alongwith K.K. Dixit In-charge of the Police Station Karera, they arranged a raid on the spot and caught hold of the accused involved in illegal criminal activities. The accused were arrested on the spot by arrest memos (Ex.P/10, 12 and 14) with illegal firearms and ammunitions by seizure memos vide Ex.P/9, P/11 and P/13. One 12 bore county-made pistol with two live cartridges were seized from accused Balli @ Daulat Singh. After arrest of accused and seizure of firearms on the spot, the police force alongwith ASI P.N. Paul and K.K. Dixit In-charge of the Police Station Karera returned back to Police Station Karera. They registered their returning by Entry No. 1310 in the Daily dairy register (Roznamcha). Thereafter by FIR (Ex.P/15), the crime No. 111/2003 was registered. The investigation was set in motion. The seized firearms were examined by the head Constable Armorer posted in the Reserve Line Shivpuri. Thereafter permission to prosecute the accused under Section 29 of the Arms Act was obtained from the District Magistrate Shivpuri. Chargesheet was filed in the Criminal court having jurisdiction. The trial Judge after trial, the accused Nanhe Singh, Makhan Singh and Balli @ Daulat Singh (present appellant) guilty of the said offence and sentenced them as above. The accused Nanhe Singh and Makhan Singh filed another Criminal Appeal No. 526/2004 which was decided by this court vide judgment dated 22nd September 2010. So, this present appeal only remains to be considered by this court, which is preferred by one of the accused, i.e. Balli @ Daulat Singh.

(3) Learned counsel appearing on behalf of the accused submitted that the case of the present appellant is similar to other co-accused whose appeal (526/2004) stands decided by the judgment dated 22nd September 2010. He therefore prayed that the conviction of the present accused may be maintained for the alleged offence like other co-convicts and benefited by reducing sentence to the imprisonment already undergone like other accused namely, Nanhe Singh who had already undergone two years, one month and

twenty three days. He therefore prayed that the present appeal may also be decided in terms of the same observations/directions.

(4) On perusal of the impugned judgment dated 22nd September 2010 recorded in Cri. Appeal No.526/04, it is noted that other co-accusedMakhan Singh has already served out the full sentence of imprisonment and so his appeal was dismissed as infructuous. The benefit was only extended to accused Nanhe Singh.

(5) The question for consideration before this court is whether present accused is entitled to the same benefit/relief on the ground of parity in a circumstance that a co-accused of the same criminal case with a similar role is granted benefit of undergoing jail sentence.

(6) Before proceeding about the desirability of parity in the matter like present case, it would be better to refer the decision of Hon. Apex Court in the *State of M.P. Vs. Ayyub Khan* 2012 (8) SCC 676, wherein it has been observed as follows :-

> "8. The legislature, in its wisdom, has fixed a mandatory minimum sentence for certain offences-keeping, possessing arms and ammunition is a serious offence for which sentence shall not be less than three years. The legislature, in its wisdom, felt that there should be a mandatory minimum sentence for such offences having felt the increased need to provide for more stringent punishment to curb unauthorised access to arms and ammunition, especially in a situation where we are facing with menace of terrorism and other anti-national activities. A person who is found to be in possession of country-made barrelled gun with two round bullets and 50 gm explosive without licence, must in the absence of proof to the contrary be presumed to be carrying it with the intention of using it when an opportunity arises which would be detrimental to the people at large. Possibly, taking into consideration all those aspects, including the national interest and safety of the fellow citizens, the legislature in its wisdom has prescribed *a minimum mandatory sentence*. Once the accused was found guilty for the offence committed under Section 25(1)(a) of the Arms Act, he has necessarily to undergo the minimum mandatory sentence, prescribed under the statute."

(7) On perusal of the law mentioned above, this court feels that the present appellant is not entitled for his early release, as the sentence which he has undergone is lesser to minimum sentence as prescribed by the Statute.

(8) So, on the request of the counsel appearing for appellant, the appeal is decided on merits.

(9) The contention put forth by the appellant is that that the judgment under appeal is against the law and procedure and therefore same is liable to be set aside. It is submitted that the trial Judge convicted the accused/appellant on evidence of police officers which is suffered by so many lacunas. The independent witnesses did not support the prosecution version hence they were declared hostile. The arrest memos and seizure memos of firearms from present appellant is not proved up to the hilt of conviction. The sanction to prosecute the accused by District Magistrate under Section 39 of the Arms Act is also not proved. The F.I.R. of the case in the form of entry lodged in Daily Dairy Register (Roznamcha) of Police Outpost which contains the secret information from informer regarding crime was not filed alongwith charge sheet and nor proved by the writer of the report. So called F.I.R. lodged in Police Station Karera is the report by returning officer who conducted the entire investigation proceedings on the spot, so the report is the report of crime registration at the police station. Apart from above, there are several other irregularities which *prima facie* show that the investigation is not properly done in this case. It is therefore prayed that by allowing the appeal, judgment under challenge may be set aside and the accused-appellant may be acquitted of the offence.

(10) *Per contra*, the learned Panel Lawyer appearing on behalf of the respondent/State contended that the prosecution succeeded to prove the guilt against accused/appellant by adducing evidence and there is no infirmity or illegality committed by the trial court in awarding conviction and sentence against the accused. Hence, it is prayed that by dismissing the appeal, the judgment of the trial court may be upheld.

(11) Heard the learned counsel appearing for the appellant and the learned Public Prosecutor for the respondent/State. Also perused the record of the trial court and the law applicable to the present case.

(12) The question for consideration in this appeal is whether the prosecution proved beyond doubts that the accused/appellant Balli @ Daulat Singh at the

time of commission of offence was possessing illegally the firearm (one county made twelve bore pistol with two live cartridges without license) for which he has been rightly awarded impugned conviction as well as sentence.

(13) The prosecution to prove the charge against the accused has examined as many as ten witnesses.

(14) P.N.Pal (PW-2) Assistant Sub Inspector posted inout post Sunari of Police Station Karera deposed that on 27th March 2003 he received the secret information from informer that absconded dacoit Nanhe Singh, Makhan Singh and Balli were hiding themselves near Papredu Math with an intention to commit offence. He wrote the information on Entry No. 440 in Police Daily diary register (Roznamcha) and also informed on wireless set to In-charge of the Police Station Karera. On his information, the In-charge of the Police Station Karera with police force reached on police outpost and thereafter arranged the search raid operation on given spot. In-charge Inspector of the Police Station Karera arrested the accused including accused Balli @ Daulat Singh on the spot and seized the country-made 12 bore pistol which was illegally possessed from possession of the accused. The case diary for investigation was then handed over to him. He recorded the case diary statements and also made an enquiry with arrested accused Makhan, Balli @ Daulat Singh and Nanhe Singh which was recorded vide memorandums Ex.P/2 to Ex.P/4. (He was not cross examined on behalf of accused Daulat Singh because the the Roznamcha of the concerned date was not available hence his court statement could not be completed).

(15) K.K. Dixit (PW-5) In-charge/Inspector of P.S. Karera deposed that on 26th March 2003 he alongwith police force departed for searching area under anti dacoit operation. On 27th March 2003 during search of the area, he got wireless massage from In-charge of police outpost Sunari and so he reached at police outpost. There Incharge of Police Outpost Sunari informed that absconded dacoits Nanhe Singh, Makhan Singh and Balli @ Daulat Singh were by hiding themselves near Papredu Math were making preparation to commit dacoity. He alongwith police force of police station and In-charge of police outpost Sunari surrounded the area and caught hold of accused Nanhe Singh, Makhan Singh and Balli @ Daulat Singh with unlicensed firearms and ammunitions. He arrested accused Nanhe Singh by arrest memo Ex.P/10 and seized the country made twelve bore pistol with five live cartridges by seizure memo Ex.P/9. He arrested

accused Makhan Singh by arrest memo Ex.P/12 and seized the country made twelve bore pistol with three live cartridges without valid licence by seizure memo Ex.P/11. Thereafter he seized twelve bore country made pistol with two live cartridges from accused Balli @ Daulat Singh by seizure memo Ex.P/13 and arrested him by arrest memo Ex.P/14. After arrest and seizures made above on the spot he alongwith police force and arrested accused returned back to police station Karera and lodged his and police fore returning on Entry No. 1310 in Station daily diary register (Roznamcha). He also wrote the report as F.I.R. and registered the Crime No. 111/2003 in Police Station Karera and handed over the case diary for investigation to P.N. Pal In-charge of Police Outpost Sunari for further investigation.

(16) Janki Prasad Gaur (PW-1) posted as Constable No. 425 working as Arms Maharir in District Reserve Police Line Shivpuri deposed that on 22nd April 2003 under direction from Reserve Inspector (lines) he examined the firearms sent from Police outpost Sunari which was brought by Constable No. 331 Narayan Singh in open condition and not sealed and after examination he opined that examined firearms twelve bore country made pistols were in working condition and they can successfully be used in firing. His report is Ex.P/1. Thereafter he returned back the examined firearms and ammunitions in open state to concerned Constable.

(17) Lalaram Jatav (PW-3) an Arms clerk posted in the office of the District Magistrate Shivpuri deposed that on 2nd July 2003 he received a letter No. S.P./Shiv./Reader/DCD/63/2003 dated 26th June 2003 alongwith case diary of Crime No. 111/2003 registered in Police Station Karera with firearms three country made twelve bore pistols and live cartridges for grant of permission to prosecute the accused under Section 39 of the Arms Act. The then District Magistrate Shri V.L. Kantarao after perusal of the case diary papers produced and firearms and cartridges granted joint permission under Section 39 of the Act for prosecution of all accused under provisions of the said Act vide Ex.P/5 which bears his signatures.

(18) Kaptan Singh (PW-4) Head Constable posted in Police Station Karera deposed that the counter FIR lodged in Police Station Karera was delivered by Entry No. 661 to the concerning court of Judicial Magistrate at Karera.

(19) Dhruv (PW-6) and Makhan Singh (PW-7) who are witnesses of arrest

memos of accused and seizure memos of illegal firearms seized from possession of arrested accused, though admitted their signatures on all arrest memos and seizure memos prepared on the spot, but denied the arrest of all accused and seizure of firearms from accused before them. Thus, they did not support the prosecution version. Other witnesses, namely, Prabhat Kumar Lithoria (PW-8) and Hari Singh Jatav (PW-9) who are the witnesses of memorandums (Ex.P/2 to Ex.P/4) recorded under Section 27 of the Evidence Act prepared by P.N. Pal (PW-2) did not support the prosecution version.

(20) Now, it is no doubt true that the evidence of P.N.Pal (PW-2) Assistant Sub Inspector posted in outpost Sunari of Police Station Karera and K.K. Dixit (PW-5) Incharge/ Inspector of P.S. Karera supports the prosecution case in toto as stated hereinabove. The point is whether the learned trial Judge was right in accepting their evidence who were police witnesses as credible and trustworthy so as to hold that the prosecution proved its case beyond shadow of reasonable doubt against the present appellant.

(21) In *Govindaraju Vs. State,* (2012) 4 SCC 722, at page 743 : the Hon. Apex Court observed as follows :-

> "30. It cannot be stated as a rule that a police officer can or cannot be a sole eyewitness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and duly corroborated by other witnesses or admissible evidence, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people; in that event, no credibility can be attached to the statement of such witness.
>
> 31. This Court in Girja Prasad while particularly referring to the evidence of a police officer said that it is not the law that police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of

law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. The rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of the police administration.

32. Wherever, the evidence of the police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form the basis of conviction and the absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. The courts have also expressed the view that no infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction.

(22) On perusal of the statement of witness P.N.Pal (PW-2) Assistant Sub Inspector and In-charge of Police Outpost Sunaria, it is found that his statement did not inspire confidence because the copy of Entry No. 440 dated 27th March 2003 written by him regarding the information from informer in relation with presence and involvement in crime of accused as first information of non cognizable offence was neither produced with charge-sheet nor that information written in Roznamcha was proved. But that is not enough. There are some more disquieting and disturbing features of this case which also persuade this court to think and believe that everything was not fair and proper with the investigation in this case on account of which the irresistible and inevitable conclusion is to hold that the appellant is entitled to the benefit of reasonable doubt. For an example, by evidence of this prosecution witness and KK Dixit (PW-5) of Police Station Karera who participated in investigation after proceeding with P.N. Pal for preparation of seizure memos of weapons from accused, it is

not proved that after seizure of weapons like twelve bore pistols and cartridges whether they were properly sealed on the spot and were put in proper and safe custody of the Police Station Karera. These two Police witnesses above also could not establish by their testimony that the seized weapons after receiving from Armorer were sent in sealed alongwith Case Diary to the District Magistrate for seeking permission. From the evidence of these witnesses it could not be proved that the seized weapons alongwith cartridges after sealing properly were sent to the Criminal Magistrate with charge sheet papers. Moreover, at the time of recording of the evidence of prosecution evidence, these weapons were not produced before the trial Judge for exhibition and proving the recovery of a particular weapon and cartridges from a particular accused. Therefore by statements of these police officers, namely, P.N. Pal (PW-2) and K.K. Dixit (PW-5) recovery of the weapons is not proved beyond any reasonable doubt. The glaring defects in the investigation on the part of these police officer in this case thus certainly can be said to have caused prejudice to the defence and that being so, the appellant is entitled to the benefit for doubt.

(23) From the above facts and circumstances, it is crystal clear that the investigation in this case was neither fair nor proper. It was far from the principles of fair-play, enquiry and good conscience. That being so, the legitimate conclusion is that during course of the investigation a fair amount of prejudice was caused to the defence and not following the proper procedural law, in the facts and circumstances of this case, would be fatal to the prosecution. Hence, the prosecution has not established and proved its case beyond shadow of reasonable doubt against the appellant in this particular case. The appellant is entitled to benefit of such a reasonable doubt and sunscreen acquittal.

(24) In this view of the matter, the appeal succeeds and the same is allowed. The impugned judgment and order passed by the learned trial Judge convicting and sentencing the appellant as above are quashed and set aside. The appellant is acquitted of the offences under Section 25(1-B) of the Arms Act read with Section 11/13 of the said Adhiniyam. He shall be set at liberty forthwith unless required in some other case. Fine, if paid by him, shall be refunded.

Appeal allowed.

I.L.R. [2013] M.P., 2022
APPELLATE CRIMINAL
Before Mr. Justice G.D. Saxena
Cr.A. No.576/2005 (Gwalior) decided on 10 May, 2013

RAKESH SINGH & anr. ...Appellants
Vs.
STATE OF M.P. ... Respondent

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(v) **- Appellant made castus remarks against complainant with an intent to humiliate her at public handpump within public view - Also threw water on her person from the water pot - Appellant guilty of interfering with enjoyment of complainant's right over water - Appeal dismissed. (Paras 15 to 17)**

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(v) – अपीलार्थी ने शिकायतकर्ता के विरुद्ध, लोक दृष्टिगोचर स्थान पर, सार्वजनिक हैंडपम्प पर उसे अपमानित करने के आशय के साथ जातिगत टिप्पणी की – पानी के घड़े से उसके शरीर पर पानी भी फेंका – अपीलार्थी, शिकायतकर्ता के पानी के उपभोग के अधिकार के साथ हस्तक्षेप करने का दोषी – अपील खारिज।

Case referred :

2000 Cri.L.J. 711 (MP).

A.K. Jain, for the appellants.
Prabal Solanki, P.P. for the respondent/State.

JUDGMENT

G.D. Saxena, J. :- Being aggrieved by the judgment dated 24th August 2005 rendered in Special Sessions Case No. 4/2005 by the Special Judge (SC & ST) M.P., the appellants/accused have preferred this appeal under Section 374(2) of the Code of Criminal Procedure 1973. Appellant No.2-Omprakash Singh has challenged his conviction under Sections 323 and 324/34 of I.P.C. and sentences to pay fines of Rs. 700/- and Rs. 1,000/-, respectively, with default rigorous punishments of one month and three months whereas appellant No.1-Rakesh has challenged his conviction for offence under Section 3(1)(v) of the Scheduled Castes and Schedule Tribes (Prevention of Atrocities) Act 1989, for short the SC & ST Act with rigorous punishment of

six months and fine of Rs. 500/- and further sentences to pay fines of Rs.700/- and 1,000/- for offence under Sections 323/34 and 324 of I.P.C. together with default rigorous imprisonments of one month and three months, respectively.

(2) The facts, in short, giving rise to submitting this appeal are that on 30th October 2005, in the noon, at public hand pump in Word No. 5 at Gohad Town, accused-appellant No.1- Rakesh Gurjar, who did not belong to Scheduled Caste, made *castus* remarks against the complainant, who was a member of the Schedule Caste. He intentionally insulted the complainant with intent to humiliate her at the place within public view when she was fetching the water from the hand pump. He also threw water on her person from the water pot. She made a complaint of the incident to her brother-inlaw Dwarika at her residence. When her brother-in-law went to the residence of the accused, accused Rakesh Gurjar slapped him. Not only that in the eventing at about 5 p.m., when she with her her brother-in-law Dwarika was going to make a report to the police, on the way, accused Rakesh Gurjar and his father Omprakash Gurjar restrained them and accused Rakesh inflicted an injury by means of Farsa on the body of Dwarika while accused Omprakash dealt the complainant with a lathi blow causing injuries on her body. This time again, both the accused uttered bad insulting words to them. Consequently, on the report of the complainant, the F.I.R. was lodged at Police Station Gohad. The investigation was set in motion. After investigation, the charge sheet was filed against both the accused in criminal court. On committal, the trial was commenced and after recording the evidence, the learned trial Judge convicted and sentenced the accused, hence this appeal.

(3) The contentions of the appellants are that the judgment under appeal is against the law and procedure and therefore same is liable to be set aside. It is submitted that the trial Judge while convicting the accused/appellants did not properly evaluate the evidence and documents as on record, hence, the conclusion arrived at without proper consideration of the factual and legal aspect deserves to be rejected at the threshold. It is submitted that the trial Judge placed reliance only on the related and biased prosecution witnesses and therefore true picture did not come on record. He submits that the evidence on record is not sufficient to constitute the offence under Section 3(1)(v) of the Act and the conviction against the accused rested merely on surmises and conjunctures since no offence is proved. On these grounds, it is prayed that by allowing the appeal, judgment under challenge may be set aside and the

accused-appellants may be acquitted of the alleged offence.

(4) Per contra, the learned Public Prosecutor appearing on behalf of the respondent/State contended that the prosecution succeeded to prove the guilt against the accused by adducing evidence and there is no infirmity or illegality committed by the trial court in awarding impugned conviction and sentence. Hence, it is prayed that by dismissing the appeal, the judgment of the trial court may be maintained.

(5) Heard the learned counsel appearing for the appellants and the learned Public Prosecutor appearing for the respondent/State. Also perused the record of the trial court and the law applicable to the present case.

(6) In order to prove the charges framed against the accused/appellants, the prosecution has examined as many as eight witnesses.

(7) Complainant Urmila (PW-2) deposed that she belongs to Jatav caste and the accused are Gurjar by caste. Near about five months ago, in the noon, she went to fetch the water from government public hand pump. On the spot, accused Rakesh Gurjar was present. He prevented the complainant from fetching the water. He abused her by calling Chamrawali by bad words. He also threw her water pot "Kalasia" and poured the water over her from water pot. She therefore returned home and in the evening narrated the incident to her brother-in-law. As her brother-in-law Dwarika went to the residence of accused Rakesh for complaining about his such behaviour, both accused Rakesh and his father Omprakash slapped him and also threatened that they would not allow them to fetch the water from the public hand pump.

(8) Dwarika Jatav (PW-3), brother-in-law of the complainant in support of the case deposed that on the day of incident, at about 5:00-5:30 p.m., on his returning home, the complainant informed him that accused Rakesh, while she was at the hand pump abused her by saying "Chamaria" and restrained her from taking the water from the hand pump. So, he went to the house of accused Rakesh when again the accused Rakesh abused him by saying "Chamrawale" and slapped him. He returned back to his residence and thereafter he and his sister-in-law (complainant) left for lodging the report to Police Station. While they were going on, both the accused surrounded them and then accused Rakesh inflicted by means of Farsa twice, first on his head and second blow was received on the palm. Another accused Omprakash also caused injury by lathi to the complainant.

(9) Adiram (PW-5), in his deposition well supported the statement of Urmila (PW-2) and Dwarka (PW-3) while witness Saddu @ Sahadat Khan (PW-6) turned hostile and did not support the prosecution version.

(10) Dr. A.K. Mudgal (PW-8), Medical Officer posted in the Community Health Centre Gohad deposed that on 30th October 2004, at about 7-10 p.m., he examined injured Dwarika Prasad Jatav and found one incised wound of size 4 cm. x 1/2cm. x 1/2cm. on right parietal side of skull, caused by sharp edging object within 24 hours. He opined that the injury was simple in nature. The said injury report is Ex.P/7 written and signed by him. He further deposed that on the same day he examined injured Urmila, wife of Jaswant and found one contusion with abrasion of size 5 cm. x 2cm. deep on left forearm, caused by hard and blunt object within 24 hours. This injury was also opined to be simple in nature. The injury report is Ex.P/8, written and signed by the doctor.

(11) N.D. Jatav (PW-1) was the In-charge of the Police Station Gohad who had written the FIR lodged by Urmila on which a Crime No. 292 /2004 was registered against the accused. Satyendra Singh Tomar (PW-7) SDO (P) Gohad on receipt of the case diary of Crime No. 292/2004 immediately started with investigation. He prepared the spot map (Ex.P/2) and recorded the case diary statement of eye-witnesses and other witnesses. On 17th November, 20004 he arrested the accused by arrest memos Ex.P/5 and Ex.P/6.

(12) The defence of the accused was that because of election rivalry, they are falsely implicated in the case.

(13) On perusal of the entire evidence on record, it appears that accused Rakesh caused injury by means of Farsa on the head of witness Dwarika Prasad which was found to be simple in nature and co- accused Omprakash also caused injury to the complainant Urmila by using lathi. In that view of the matter, so far as the conviction for commission of the alleged offences under sections 323 and 324 read with section 34 of I.P.C. is concerned, the evidence on record clearly establishes the offence alleged and, therefore, the conviction for the said offence is hereby upheld.

(14) Now, this court has to consider whether the act of the accused Rakesh comes within the purview of the definition so as to justify his conviction and sentence recorded under Section 3(1)(v) of the Act ?

(15) Clause (v) of Sub-section (1) of Section 3 of the Act makes following

acts to be an offence, namely.

1. Wrongful dispossession of member of a Scheduled Caste or a Scheduled Tribe from his land or premises.

2. Wrongful interference with the enjoyment of his rights over any land, premises or water.

(16) In the case of *Shobit & another Vs. State of M.P.* 2000 [Cr.L.J 711 (M.P)], this Court has discussed elaborately and observed as follows :-

> "For securing a conviction under Section 3 (1)(5), the prosecution, for first cause is required to show that the accused had wrongfully dispossessed a member of S.C. or S.T. for his land or premises. A wrongful dispossession, in opinion of this court, presupposes positive and de fecto possession. Unless a man is shown to be in actual physical possession of the property, he can not be dispossessed. I have already found that the complainant was not in de facto possession. If a person is not in possession of the property, then he cannot be dispossessed. The second clause of Section 3(1)(5) provides that if somebody interferes with the enjoyment of complainant's right over any land, premises or water, then he shall be punished. On a fair reading, the words " enjoyment of his right" must be read in juxta position with the words "any land, premises and water", the first clause refers to the personal lands while the second clause relates to any land, premises or water. In fact the second clause applies to a case where the right to enjoy any land, premises or water has been interfered with. For securing conviction under the second clause, the prosecution is required to prove that the complainant had some rights and he was enjoying the said right over any land, premises or water. The second clause would cover a contingency relating to rights of easements, right of way and fetching of the water etc. Unless it is proved by the prosecution that the complainant had a right and was enjoying the same, the prosecution would not be entitled to say that because accused did not permit the complainant to take possession of the property which he was allegedly entitled he be convicted."

(17) As already stated above, since prosecution has been able to prove that the accused-appellant No.1-Rakesh interfered with enjoyment of the

complainant's right over the water, on examining the legal and factual aspects of the case and considering the statement of the complainant and the spot-map prepared during investigation, it appears that the learned trial Judge has rightly convicted and sentenced the accused-appellant No.1-Rakesh of offence punishable under Section 3(1)(v) of the Act, the findings of the learned Special Judge by which he convicted the accused-appellant No.1-Rakesh Gurjar of the charge for the offence under Section 3(1)(v) of the SC/ST Act are liable to be and hereby confirmed. The appeal is accordingly dismissed. The appellant No.1- Rakesh is on bail. He shall surrender to his bail bonds or shall be arrested to undergo the remainder of his impugned sentence.

Appeal dismissed.

I.L.R. [2013] M.P., 2027
CIVIL REVISION
Before Mr. Justice A.K. Sharma
C.R. No. 42/2012 (Gwalior) decided on 24 April, 2013

RAJIV SAXENA ...Applicant
Vs.
SUBHA SAXENA (SMT.) ...Non-applicant

Civil Procedure Code (5 of 1908), Order 5 Rule 1 - Service of summons - Matrimonial Disputes **- Held - Personal service of the spouse is necessary - Court is duty bound to see that the notice has been sent to the spouse at the place where she is living at the time of filing of petition or to the address mentioned in the petition - Service of summons not duly made - Ex parte decree passsed due to non appearance of party - The order of trial Court of setting aside of such a decree is justified. (Para 6)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 5 नियम 1 – समंस की तामीली – वैवाहिक विवाद – अभिनिर्धारित – पति या पत्नी की व्यक्तिगत तामीली अनिवार्य है – न्यायालय यह देखने के लिए बाध्य है कि पत्नी को नोटिस उस स्थान पर भेजा जाना चाहिए जहां वह याचिका प्रस्तुत करने के समय निवासरत थी अथवा याचिका में उल्लिखित पते पर – समन की तामीली सम्यक रुप से नहीं की गई – पक्षकार की अनुपस्थिति के कारण एक पक्षीय डिक्री पारित की गई – विचारण न्यायालय द्वारा उक्त डिक्री को अपास्त करने का आदेश न्यायोचित।

Cases referred :

2008 (5) MPHT 2 (SC), 2006(1) MPLJ 175, 2004 (4) MPLJ 537,

N.K. Gupta, for the applicant.
R.K. Soni, for the non-applicant.

JUDGMENT

A.K. SHARMA, J. :- Arguments heard.

1. Petitioner has filed this revision petition under Section 115 of C.P.C. against order dated 27.02.2012 passed in M.J.C. No.8/11 by learned Additional District Judge, Datia, setting aside exparte decree by relying application filed under Order 9 Rule 13 read with Section 5 of Limitation Act by respondent Smt. Subha Saxena.

2. Exparte decree has been passed for divorce against respondent Smt. Subha Saxena on petition filed by petitioner/husband Rajiv Saxena. Notice of which has been sent to the wife at her address at village Aagodha, district Ferozabad. Further the paper publication was also made by mentioning address of Aagodha, district Ferozabad, while the plaintiff himself has mentioned in cause title of the application that the present residence of his wife is at Kotla Road, Tilak Nagar, Ferozabad, U.P. It is an admitted fact that no notice has been sent to the wife at her present address at Ferozabad.

3. Learned counsel for the petitioner has submitted that the wife and her father has given contradictory statement regarding their residence at Ferozabad but this does not affect their case. The plaintiff himself has given her present address as Kotla Road, Tilak Nagar, Ferozabad, U.P. where no summons were sent for appearance.

4. Learned counsel for the petitioner has drawn attention towards provisions of Order 9 Rule 13 of C.P.C. and submitted that an exparte decree cannot be set-aside on the ground of irregularity in service of summons. If the defendant had the notice of date of hearing and sufficient time to appear and answer the plaintiff's claim.

5. In support of his arguments, he has cited judgment of Hon'ble Apex Court passed in the matter of *Sunil Poddar and others Vs. Union Bank of India*, 2008 (5) M.P.H.T.2 (SC) and judgment of this Court passed in the matter of *Javed Khan Vs. Avtar Singh,* 2006(1) M.P.L.J.175 and another judgment of this Court passed in the matter of *Shri Sharda Prabandhak Samiti Maihar and another Vs. Indrasen Jali* , 2004 (4) M.P.L.J.537.

6. In the present case, petitioner was fully aware that his wife is living at

Ferozabad as he has mentioned her present address at Ferozabad in the petition but no notice has been sent even after the notice sent to village Aagodha is unserved to the address of wife at Ferozabad, therefore, the mischief of petitioner cannot be allowed for giving him benefit of judgments cited above. The matter relates to matrimonial dispute in which personal service of his spouse is necessary. Even Court was duty bound to see that the notice has been sent to the wife where she is living at the time of filing of the petition or to the address which has been mentioned in the petition. Therefore, learned trial Court is justified in passing the impugned order in setting aside the exparte decree. Therefore, petition is dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 2029
CRIMINAL REVISION
Before Mr. Justice Brij Kishore Dube
Cr. Rev. No. 46/2012 (Gwalior) decided on 5 April, 2013

PREM SHARMA @ SHIV PRASAD MISHRA ...Applicant
Vs.
SHIV PRAKASH MISHRA & anr. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Sections 227/228 - Framing of Charge & discharge - **It is for the trial Court to consider the material on record with the object that if it is not rebutted, then whether the accused can be convicted for a particular offence or not - If the accused is convicted for that offence the charge for that offence shall be framed.**

If there is strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, the charge can be framed - However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as conducting in a trial - At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. (Paras 8/16)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 227/228 – आरोप विरचित करना एवं आरोप मुक्त करना – विचारण न्यायालय अभिलेख की सामग्री पर इस उद्देश्य के साथ विचार करेगा कि यदि उसका खंडन नहीं किया गया है, तब क्या अभियुक्त को किसी विशिष्ट अपराध के लिये दोषसिद्ध किया जा सकता है अथवा नहीं – यदि अभियुक्त को उस अपराध के लिए दोषसिद्ध किया जाता है, उक्त अपराध के लिए आरोप विरचित करना चाहिए।

***B. Criminal Procedure Code, 1973 (2 of 1974), Sections 397 & 401 - Criminal Revision - Locus Standi* - Offence under Sections 420, 467, 468 & 471, IPC was registered on the basis of the complaint lodged by the complainant against the accused - Accused was discharged by the order of the trial Court - The complainant has locus standi or right to file the revision petition against the same. (Para 12)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397 व 401 – दाण्डिक पुनरीक्षण – सुने जाने का अधिकार – शिकायतकर्ता द्वारा अभियुक्त के विरुद्ध दर्ज की गई शिकायत के आधार पर धारा 420, 467, 468 व 471 भा.द.सं. के अंतर्गत आरोप पंजीबद्ध किया गया – विचारण न्यायालय के आदेश से अभियुक्त आरोपमुक्त किया गया – शिकायतकर्ता को इसके विरुद्ध पुनरीक्षण याचिका पेश करने का अधिकार या सुने जाने का अधिकार है।

Cases referred :

AIR 1980 SC 52, AIR 1990 SC 1962, AIR 2003 SC 3318, 2012 AIR SCW 5139.

D.S. Tomar, for the applicant.
Non-applicant No. 1 present in person.
Prabal Solanki, P.P. for the non-applicant No.2/State.

ORDER

Brij Kishore Dube, J: This Criminal Revision under Sections 397 read with 401 of the Code of Criminal Procedure, 1973 is preferred for quashing the order dated 30/12/11 passed by I Additional Sessions Judge, Gwalior in Criminal Revision No.170/09 reversing the order dated 19/01/09 passed by the Additional Chief Judicial Magistrate, Gwalior in Criminal Case No.13451/06 (State of M.P., Vs. Prem Sharma) whereby the petitioner herein/ accused has been discharged from the offence punishable under Sections 420, 467, 468 and 471 of IPC and remanded the matter back to the Additional Chief Judicial Magistrate, Gwalior for reconsideration of framing the charge

against the petitioner herein/accused.

2. The relevant facts for adjudication of this case are that the respondent No.1 herein/complainant, Shivprakash Mishra filed a written complaint on 26/09/04 at Police Station, Gole Ka Mandir, District Gwalior alleging that the petitioner herein who is Prem Sharma S/o Baldev Raj Sharma got the job on the post of Technical Assistant in the Lakshmi Bai National Institute of Physical Education, Gwalior (For short, LNIPE) on the basis of Higher Secondary School Certificate issued by the Board of Secondary Education,Madhya Pradesh, Bhopal in favour of one Shiv Prasad Mishra S/o Baladeen Mishra with the help of the officials of the LNIPE and continuously doing the job in the name of that person whereas the original Shiv Prasad Mishra S/o Baladeen Mishra is working as Conductor in the Madhya Pradesh Road Transport Corporation, Gwalior (For short, MPSRTC). The complaint was enquired into and a case was registered on 11/10/04 at Crime No.369/04 under Sections 420, 467, 468 and 471 of IPC against the petitioner herein/accused, Prem Sharma alias Shiv Prasad Mishra. After completing the investigation, a charge sheet was submitted on 16/11/06 before the Judicial Magistrate, First Class, Gwalior against the present petitioner for the offence punishable under Sections 420, 467, 468.and 471 of IPC which was registered as Criminal Case No.13451/06.

3. The learned Additional Chief Judicial Magistrate, Gwalior after considering the material placed on record found that *prima facie* no case is made out against the accused and, therefore, discharged him from the offence punishable under Sections 420, 467, 468 and 471 of IPC. Being aggrieved thereof, the respondent No.1 herein/complainant/Shivprakash Mishra preferred a revision. The Revisional Court vide the impugned order dated 30/12/11 allowed the revision and remitted the matter back to the Additional Chief Judicial Magistrate, Gwalior for reconsideration of the matter of framing charge against the accused. Challenging the aforesaid remand order, this revision petition is preferred by the petitioner herein/accused.

4. Learned counsel appearing on behalf of the petitioner herein/accused challenged the propriety and legality of the impugned order on the following grounds:

(a) That, the respondent No.1 herein/complainant has no right to prefer the revision against the order dated 19/01/09

passed by the ACJM, Gwalior in Criminal Case No. 13451/06;

(b) From the entire prosecution evidence collected during the course of investigation, no case under Sections 420, 467, 468 and 471 of IPC is made out against the petitioner herein/ accused as it has never been stated by the prosecution that the petitioner ever created any kind of forged document/marks sheet.

(c) The alleged forged marks sheet has not been seized and produced before the Court and, therefore, in the absence of the aforesaid document, no case under Sections 420, 467, 468 and 471 of IPC is made out. In this regard, learned counsel placed reliance on the judgment of this Court in the case of *Mangilal Agarwal Vs. State of Madhya Pradesh through P.S.,Kotwali, Dewas*, [Citation: 2012 Cr. L. R. (MP) 22];

(d) The respondent No.1/complainant also worked in the LNIPE and retired from service in the year 2000 but he never made any complaint earlier against the petitioner before any authority;

(e) No authorised officer on behalf of LNIPE filed any complaint against the petitioner; and

lastly, learned counsel drawn attention of this Court to the voters list, Annexure P/3 and submitted that the petitioner is Shiv Prasad S/o Baladeen Mishra as mentioned in the voters list.

5. Learned Public Prosecutor argued in support of the impugned order and submitted that the petitioner is Prem Sharma S/o Baldev Rao Sharma and got the job in LNIPE on the basis of marks sheet of one Shiv Prasad S/o Baladeen Mishra and now posing himself as Shiv Prasad S/o Baladeen Mishra. Further, the original Shiv Prasad Mishra S/o Baladeen Mishra is another person who got job in the MPSRTC on the basis of the same marks sheet of Higher Secondary School Certificate Examination issued by the Board of Secondary Education,Madhya Pradesh, Bhopal.

6. The respondent No.1 submitted that the petitioner is an established criminal who has used the marks sheet / certificate of Shiv Prasad Mishra who is an employee of the MPSRTC and resident of Jawahar Colony, Kampoo,

Gwalior. When he came to know the said fact then, he made a complaint to the officers of LNIPE but they did not take any action against the petitioner. Thereafter, original Shiv Prasad Mishra made a complaint against the petitioner herein and filed the photo copy of the marks sheet/certificate. It is further submitted that the present petitioner has also got his name included in the voters list by fraud and misrepresentation and the proceedings for cancellation of inclusion of his name in the voters list is pending before the competent authority. It is further submitted that the petitioner has not only changed his name but also changed the name of his father. His real father's name is Baldev Raj Sharma who owned a house in his name at Phalka Bazar, Gwalior wherein the present petitioner is residing. Ashok Bhardwaj who is the real brother-in-law (husband of the younger sister) of the petitioner also made a complaint against the activities of the petitioner. Further, the petitioner was a regular student of M.P.Ed., at Bhopal and at the same time, he was also a regular employee of LNIPE during the period of 2 years. In such circumstances, how a man can do regular service at Gwalior and regularly study at Bhopal. The real name of the petitioner is Prem Sharma who never passed the Higher Secondary School Certificate Examination from the Board of Secondary Education,Madhya Pradesh, Bhopal.

7. I have considered the rival contentions of the learned counsel for the parties as well as the respondent No.1 and perused the record.

8. According to the provisions of Sections 227 and 228 of Cr.P.C., it is for the Trial Court to consider the material available on record with the object that if it is not rebutted, then whether the accused can be convicted for a particular offence or not. By considering such material, if the accused is convicted for that offence, then charge for that offence shall be framed.

9. In *Supdt. & Remembrancer of Legal Affairs, West Bengal, v. Kumar Bhunja and others*, AIR 1980 SC 52, a three Judge Bench of the Supreme Court held as under:

> "18 It may be remembered that the case was at the stage of framing charges; the prosecution evidence had not yet commenced. The Magistrate had, therefore, to consider the above question on a general consideration of the materials placed before him by the investigating police officer. At this stage, as was pointed out by this Court in *State of Bihar Vs. Ramesh Singh,* AIR 1977 SC 2018, the truth, veracity and

> effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. The standard of test, proof and judgment which is to be applied finally before finding the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. **At this stage, even a very strong suspicion found upon materials before the Magistrate, which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged; may justify the framing of charge against the accused in respect of the commission of that offence."**
>
> (Emphasis supplied)

10. The Apex Court in the case of *Niranjan Singh Karam Singh Punjabi v. Jitendr Bhimraj Bijja and others*, AIR 1990 SC 1962, held as under:

> "It seems well settled that as the Ss.227-228 stage i.e.,stage of framing the charge, the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case."

11. I have carefully perused the statements of Shivprakash Mishra, the respondent No.1 and the original person, Shiv Prasad Mishra, the complaint of Ashok Bharadwaj and other material collected during the investigation. It is revealed from that the present petitioner's real name is Prem Sharma S/o Baldev Rao Sharma. The elder brother's name of Prem Sharma is Subhash Sharma who is engaged in the vocation of tyre puncture repair work. At the shop of Subhash Sharma, the real Shiv Prasad Mishra S/o Baladeen Mishra came in contact with the present petitioner. In the year 1974, the marks sheet of Higher Secondary School Examination of real Shiv Prasad Mishra which was passed by him in the year 1972 was seen and taken by Prem Sharma and thereafter, he never returned back and, therefore, real Shiv Prasad Mishra obtained duplicate marks sheet

from the Board of Secondary Education,Madhya Pradesh, Bhopal and thereafter got service in MPSRTC. After death of his father on 26/04/2004, he came to know that Prem Sharma got service in LNIPE on the basis of his marks sheet of Higher Secondary School Examination and serving there with his name and, hence, he made a complaint with the LNIPE. Shiv Prasad Mishra in his another statement recorded on 11/10/2004 stated the details for showing that the present petitioner is Prem Sharma S/o Baldev Rao Sharma and is serving in the LNIPE with the name of Shiv Prasad Mishra. The police sized the complaint of Ashok Bharadwaj who is real brother-in-law (husband of younger sister) of the present petitioner for proving the fact that the petitioner is not Shiv Prasad Mishra but Prem Sharma. During the investigation, the police sought information from MPSRTC by letter dated 05/10/04 regarding Shiv Prasad Mishra and it was clarified by the Senior Depot. Manager, MPSRTC, Gwalior that Shiv Prsadad Mishra S/o Baladeen Mishra's date of birth is 19/07/1953 and is working as Conductor in the Corporation. During the investigation, it was also found that the present petitioner is working with the name of Shiv Prasad Mishra S/o Baladeen Mishra in LNIPE and his date of birth is the same as that of original Shiv Prasad Mishra, i.e., 19/07/1953. At the stage of framing charge, the Court is not expected to go into deep and weigh the evidence as is done in trial.

12. Since the offence under sections 420, 467, 468 and 471 of IPC was registered on the basis of complaint lodged by the respondent No.1 herein/ complainant against the accused, therefore, in my considered opinion, he had a *locus standi* to file the revision petition against the order dated 19/01/09 passed by the Additional Chief Judicial Magistrate by which the accused has been discharged *(K.Pandurangam etc., Vs. S.S.R.Velusamy and another*, AIR 2003 SC 3318, referred to).

13. In the back drop of the aforesaid and on the basis of the material placed on record, the other grounds raised by the learned counsel for the petitioner have no force, firstly; the photocopy of marks sheet of Higher Secondary School Certificate Examination, 1972 on the basis of which the present petitioner got employment is on the record; secondly; the original Shiv Prasad Mishra and Ashok Bharadwaj who is real brother-in-law of the present petitioner have made complaints against the petitioner to the Vice Chancellor, LNIPE, the copies thereof are on record and lastly; the respondent No.1 has submitted photo-copies of the complaints, Annexure R/12 and

Annexure R/13 which shows that the complainant made a complaint to the Vice Chancellor of LNIPE.

14. In the case of *Mangilal Agarwal* (supra), the basic dispute pertains to the fact that the accused, Mangilal Agrawal's brother Narendra Kumar Agarwal had formed a colony at Agarwal Nagar, A.B.Road, Dewas and plot No.23 of this colony had been purchased by the complainant, Dilip Kumar Patidar by registered sale deed on 9.1.2003 and he had been handed over the possession of the same. Thereafter, Mangilal had in conspiracy and with fraudulent intention got the power of attorney (Aam Mukhtyar Nama) of Narendra Kumar Agarwal prepared in his own name and thereafter sold the same piece of plot No.23 to one Nandlal Choudhary by registered sale deed on 16.6.2004. Under these circumstances, the police registered a case under Section 420 of IPC against Mangilal and filed the charge sheet. The Trial Court has also framed the charge under Section 420 of IPC but at the fag end of trial, the Trial Court framed charge for the offence punishable under Sections 467, 468 and 471 of IPC. This Court observed that the original power of attorney which was allegedly to be fraudulent had never been produced before the Court and, therefore, in the absence of the alleged forged document, the charge under Sections 467, 468 and 471 of IPC liable to be set aside and held as under:

> "14. Then under these circumstances, I find that the learned Judge of the trial Court on emergent facts merely suspected that the second transaction of sale by the accused was fraudulent and thus, the complainant had been cheated and situation emergent rendered the power of attorney also to be fraudulent; however, even if these facts are taken into consideration and alternation/addition of charges under sections 467, 468 and 471 of the I.P.C. are attracted then under the circumstances their imposition would have been justified only if the fraudulent power of attorney was available on record to draw such and inference. All that what was available was a copy of the power of attorney, I find that it is here, that the learned Judge of the trial Court has erred when there were no documents before it or other evidence which justified the framing of these additional charges. Mere suspicion and probabilities would not be

sufficient for framing of charges. Then under these circumstances, I find that the impugned order needs to be set aside only to the extent of framing of charges under Sections 467, 468 and 471 of the I.P.C. and it is hereby set aside. It is however, made clear that the trial Court for offence under Section 420 of the I.P.C. shall go on and in case the complainant decides to file fresh proceedings with proper documents for the other offences the observations made in this judgement shall not stand in the way of the complainant."

15. In the case in hand according to the prosecution case, the petitioner is one Prem Sharma S/o Baldev Raj Sharma who had not passed the Higher Secondary School Examination in the year 1972, however, in order to show his eligibility, he fraudulently or dishonestly submitted false particulars and Higher Secondary Examination marks sheet of Shiv Prasad Mishra S/o Baladeen Mishra and signed in an assumed name without any authority and have procured employment in the name of Shiv Prasad Mishra S/o Baladeen Mishra and continuously doing the job in the name of the person.

16. In the case of *Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao,* 2012 AIR SCW 5139, the Apex Court considered its earlier authorities about the scope of Sections 227 and 228 of Cr.P.C., and held that for framing of charge, a roving enquiry in *pros and cons* of matter and weighing of evidence as is done in trial is not permissible at this stage. The charge has to be framed if Court feels that there is strong suspicion that accused has committed offence. Thus, even if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, a charge can be framed.

17. Resultantly, In the facts and circumstances of the case, the settled legal position and for the reasons given hereinabove, I do not find any infirmity and illegality in the impugned order that may call for any interference in exercise of the revisional jurisdiction under Sections 397 read with 401 of Cr. P.C., This revision petition is devoid of merit and is therefore, dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 2038
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice D.K. Paliwal
M.Cr.C. No. 9992/2012 (Gwalior) decided on 1 August, 2013

KALLU KHAN & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of criminal case - **Allegations so absurd that no reasonable man would accept the same - Prima facie have no ring of truth and appear to have been made with a view to harass the petitioners - Continuance of the criminal trial against the petitioners would be sheer abuse of process of law. (Paras 10, 12, 18 & 19)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आपराधिक प्रकरण को अभिखंडित किया जाना – अभिकथन इतने अर्थहीन कि कोई युक्तिमान मनुष्य उसे स्वीकार नहीं करेगा – प्रथम दृष्टया इनमें सत्यता की कोई गूंज नहीं और याचीगण को प्रताड़ित करने के उद्देश्य से किये जाना प्रतीत होता है – याचीगण के विरुद्ध आपराधिक विचारण को जारी रखना, विधि की प्रक्रिया का शुद्ध दुरुपयोग होगा।

B. Penal Code (45 of 1860), Section 498-A - Cruelty - **Complainant was married to Imran on 17.12.2003 - In F.I.R. lodged on 18.09.2012, it is alleged that soon after marriage she was being subjected to harassment and cruelty due to non fulfillment of their demand - No whisper by complainant that why she kept mum till lodging of F.I.R.-No complaints were ever made to even near relatives or Panchayat-Allegations of demand of dowry, harassment & beating are inherently improbable-Criminal proceeding quashed. (Paras 12 to 17)**

ख. दण्ड संहिता (1860 का 45), धारा 498ए – क्रूरता – शिकायतकर्ता का विवाह इमरान के साथ 17.12.2003 को हुआ था – 18.09.2012 को दर्ज की गई प्रथम सूचना रिपोर्ट में यह अभिकथन किया गया है कि विवाह के तुरंत बाद, उनकी मांग पूरी नहीं होने के कारण उसे प्रताड़ित किया गया एवं क्रूरता का व्यवहार किया गया – शिकायतकर्ता द्वारा कुछ नहीं कहा गया कि वह प्रथम सूचना रिपोर्ट दर्ज होने तक चुप क्यों रही – नजदीकी रिश्तेदार या पंचायत को भी कभी कोई शिकायत नहीं की गई – दहेज की मांग, प्रताड़ना एवं मारपीट के आरोप अंतर्निहित रुप से असंभाव्य है – आपराधिक कार्यवाही अभिखंडित।

Cases referred :

(2010) 7 SCC 667, 1992 Suppl.(1) SCC 335, (2005) 1 SCC 122, (2007) 12 SCC 1, (2012) 10 SCC 741.

Shishir Saxena, for the applicants.
Anil Kumar Shrivastava, P. L., for the non-applicant No.1/State.
Vilas Tikhe, for the non-applicant No.2.

ORDER

D.K. PALIWAL, J: This petition has been preferred under Section 482 of Cr. P.C. for quashing the Criminal Case No.2183/2012 pending in the Court of CJM, Guna, under Section 498-A, 506, 323 of IPC and Section 3 & 4 of the Dowry Prohibition Act.

2. The brief facts of the case are that, respondent No. 2, who is the wife of the petitioner No.3 Imran Khan, has lodged the report against the petitioners who are father-in-law, mother-in-law and husband respectively, alleging that her marriage was solemnized in accordance with Muslim rituals on 17.12.2003 with Imran Khan and after marriage Imran Khan and Kallu Khan started demanding cash of Rs.1 Lac. When the complainant stated that her father is not in a position to fulfill the demand, then respondent No.2 was harassed and beaten by the petitioners and when respondent No.2 told this fact to her parents, then her father tried to settle the dispute but petitioners continued their demand. It is further alleged that on 22.07.2012 petitioners have beaten the complainant and left her in her parental house. On 18.09.2012 at about 12:00 P.M petitioners came at parents house of the complainant and started beating the complainant and insisted to fulfill the demand of dowry. On the report, FIR at Crime No.417/2012 under Sections 498-A, 506, 323, 34 of IPC and Section 3/4 of Dowry Prohibition Act has been registered against the petitioners and after due investigation charge-sheet has been filed in the Court of CJM, Guna.

3. It is submitted by the learned counsel for the petitioners that the petitioners have falsely been implicated. There is no evidence to show that the petitioners have committed the alleged offence. It is further submitted that petitioner No.3 is residing separately with his parents since 2005 and in this regard agreement has also been executed. It is further submitted that the FIR has been lodged by the complainant and before lodging the F.I.R. complainant had filed an application

under the provisions of Protection of Women from Domestic Violence Act, 2005 and reply was filed by petitioner No.3 on 18.09.2012 and on the same day complainant has also filed an application for interim maintenance. Criminal proceedings have been initiated by the respondent with a view to harass the petitioners. *Prima facie*, there is no material against the petitioners for holding that they have committed the alleged offence.

4. The submission of the learned counsel for the respondent No.2 is that after due investigation the charge-sheet has been filed and there is ample material against the petitioners that they have committed the offence punishable under Sections 498-A, 506, 323 & 34 of IPC and Section 3/4 of Dowry Prohibition Act, hence, no interference is required.

5. From perusal of the report lodged by Kafiya Khan, it is transpired that her marriage took place with Imran Khan on 17.12.2003 and after marriage, her husband, father-in-law and mother-in-law used to demand dowry of Rs.1 Lac. She was treated with cruelty due to non-fulfillment of the said demand. It is further alleged that on 22.07.2012 she was beaten by her husband and her in-laws and they left her at her parental home. On 18.09.2012 her husband and in-laws came to her parental house and demanded dowry and beaten her.

6. The application filed by Kallu Khan to SHO, P.S. Aron, reveals that Kallu Khan has stated that he has separated his son vide agreement dated 29.07.2011, this application has been submitted on 05.08.2010. Imran Khan has submitted an application before S.P. Guna alleging that his wife is threatening him to implicate in dowry case. It appears that on 25.07.2012, respondent has filed an application under Section 12 of Protection of Women from Domestic Violence Act, 2005 against her husband, father-in-law, mother-in-law, Jeth and two sisters-in-law alleging that she is being mentally harassed because she could not deliver the child.

7. It is pertinent to mention here that in the report lodged at Police Station, Kotwali on 18.09.2012, it is mentioned that on 22.07.2012, her mother-in-law, father-in-law and husband beaten her and left her in parental house at Guna, however, report of the incident was not lodged on 22.07.2011 and no reason has been mentioned why report of the incident, which took place on 22.07.2012 was not lodged.

8. As per the allegations in the FIR lodged by the respondent/complainant on 18.09.2012, it appears that soon after her marriage, her husband and in-

laws used to demand Rs.1 Lac and when she told that her father is poor and he cannot fulfill the demand, she was beaten and harassed by her husband and in-laws.

9. There is no whisper why respondent/complainant remained mum till filing of this report dated 08.09.2012. Had really there been some truth in the allegation, atleast some complaint would have been made to the nearest relative or some Panchayat would have been called, but about 9 years have passed and nowhere any complaint has been lodged by the respondent/complainant regarding the demand of dowry and harassment by the husband-in-laws.

10. From the perusal of the report as well as the statement of respondent/ complainant and her father, mother and brother Farid Khan and Iqbal recorded under Section 161 of Cr.P.C, it appears that omnibus allegation of demand of dowry has been made but no specific month, date and time is mentioned. Though, it is not a stage for finding out the truth or otherwise of the allegation but looking to the allegation that after marriage respondent/complainant was being harassed for and in connection with the demand of dowry, the silence of respondent/complainant for about 9 years, shows that allegations is so absurd that no reasonable man would accept the same.

11. The Hon'ble Apex Court in the case of *Preeti Gupta and another Vs. State of Jharkhand and another,* reported in (2010) 7 SCC 667 have taken note of the growing tendency of filing of complaints which are not bonafide and filed with oblique motive and observed as under. :-

> ***"30. It is a matter of common knowledge that unfortunately matrimonial litigation is rapidly increasing in our country. All the Courts in our country including this Court are flooded with matrimonial cases. This clearly demonstrates discontent and unrest in the family life of a large number of people of the society.***
>
> ***"31. The Courts are receiving a large number of cases emanating from Section 498-A of the Penal Code ----- xxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx***
>
> ***32. It is a matter of common experience that most of these complaints under Section 498-A IPC are filed in the heat of the moment over trivial issues without***

proper deliberations. We come across a large number of such complaints which are not even bona fide and are filed with oblique motive. At the same time, rapid increase in the number of genuine cases of dowry harassment is also a matter of serious concern.

> ***The learned members of the Bar have enormous social responsibility and obligation to ensure that the social fibre of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under Section 498-A as a basic human problem and must make serious endeavor to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fibre, peace and tranquility of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases"***

12. In the instant case as noticed above the allegations regarding demand of dowry and harassment prima facie have no ring of truth and appear to have been made with a view to harass the petitioners.

13. Hon'ble Supreme Court in the case of *State of Harayana and Others Vs. Bhajan Lal and Others,* reported in 1992 Suppl. (1) SCC 335 laid down the principal of law initiated in series of decisions relating to exercise of inherent powers under Section 482 of Cr.P.C and formulated the guidelines observing as under:-

> ***"This Court in the backdrop of interpretation of various relevant provisions of the Cr.P.C under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the***

exercise of the extra-ordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482, Cr.P.C gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the Court or otherwise to secure the ends of justice. Thus, this Court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formula and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised:-

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a

just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specified provisions in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

14. Hon'ble Apex Court in the case of *Zandu Pharmaceutical Works Ltd. & Others Vs. Mohd. Sharaful Haque and another* (2005) 1 SCC 122 has observed as under:-

"It would be an abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceedings if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegation are accepted in toto."

15. In the case of *Inder Mohan Goswami and another Vs. State of Uttaranchal and Others,* reported in (2007) 12 SCC 1, Hon'ble Supreme Court has held as under:-

"Inherent powers under section 482 of Cr.P.C., though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified

by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

16. Recently, Hon'ble Supreme Court in the case of *Geeta Mehrotra and another Vs. State of U.P. and another,* reported in (2012) 10 SCC 741 has observed as under:-

"If the FIR as it stands does not disclose specific allegation against accused more so against the coaccused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the name accused in the FIR to undergo the trial unless of course the FIR discloses specific allegations which would persuade the Court to take cognisance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention, that if the FIR did not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law".

17. In the instant case, as discussed above, it is apparent that the allegation of demand of dowry, harassment and beating made against the petitioners appears to be inherently improbable, absurd and malicious. It appears that allegations have been levelled with a view to harass the petitioners.

18. For the reasons stated hereinabove, I am of the considered opinion that continuance of the criminal trial against the petitioners would be sheer abuse of process of law.

19. Consequently, petition is allowed and the criminal proceedings in Case No.2183/2012 pending before the CJM, Guna is hereby quashed.

With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2013] M.P., 2046
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice D.K. Paliwal
M.Cr.C. No. 4264/2011 (Gwalior) decided on 1 August, 2013

LAXMINARAYAN @ BILLA ... Applicant
Vs.
RAJKUMAR & ors. ... Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - Review - **Magistrate initially rejected the application filed u/s 156(3) and directed to examine witnesses - Subsequently, the Magistrate directed the S.H.O. to investigate the matter get the documents examined by a Handwriting Expert and thereafter to submit the report - Order amounts to review of earlier order which can not be done. (Para 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – पुनर्विलोकन – मजिस्ट्रेट ने धारा 156(3) के अंतर्गत प्रस्तुत आवेदन को पहले अस्वीकार किया और साक्षियों के परीक्षण के लिये निदेशित किया – तत्पश्चात, मजिस्ट्रेट ने थाना प्रभारी को प्रकरण में विवेचना कर दस्तावेजों का परीक्षण हस्तलेख विशेषज्ञ द्वारा करवाने और तद्‌पश्रांत रिपोर्ट प्रस्तुत करने के लिए निदेशित किया – आदेश, पूर्वतर आदेश के पुनर्विलोकन की कोटि में आता है, जो कि नहीं किया जा सकता।

B. Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - Reasons - **Magistrate cannot act as a Post office - Before passing an order he has to apply his mind and satisfy himself that allegations prima facie point to commission of offence. (Para 11)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – कारण – मजिस्ट्रेट डाक कार्यालय के रुप में कार्यवाही नहीं कर सकता – आदेश पारित करने से पहले उसे अपने मस्तिष्क का प्रयोग करना चाहिए और स्वयं की तुष्टि कर लेनी चाहिए कि अभिकथन प्रथम दृष्ट्या अपराध की ओर संकेत करते हैं।

Cases referred :-

(2008) 1 SCC (Cri) 537, 2012 Cri.L.J. 1001, 2013(II) MPJR 205, (2011) 3 SCC 412.

V.K. Saxena with *Aditya Singh*, for the applicant.
R.K. Sharma, for the non-applicant No.1.
None for the other non-applicants though served.

ORDER

D.K.PALIWAL, J: This petition has been filed under Section 482 of Cr.P.C. against the order passed by the First ASJ, Jaura, Distt. Morena, in Criminal Revision No.-/11 (Laxminarayan @ Billa Vs. Rajkumar & Ors.) whereby the revision filed against the order passed by the ACJM, Jaura, in case No.-/10 (Rajkumar Vs. Laxminarayan & Ors.) has been dismissed.

2. The brief facts giving rise to this petition are that respondent No.1 filed an application under Section 156(3) of Cr.P.C. against the petitioner and respondents No.2 to 6 stating that his grand-mother Late Smt. Kausa @ Kaushalya during her life time had executed a registered will in favour of him, his brother Sant Kumar and Neetraj on 8.6.2010. Thereafter, she died on 20.6.2010. Smt. Kausa had also executed two sale-deeds dated 18.4.1996 and 23.7.1999 in favour of Ramcharan Chaukhariya, Laxmidevi and Smt. Bhagwati by affixing her thumb impression on the sale-deeds. After the death of Smt. Kausa, the petitioner in connivance with respondents No.2 to 6 forged a will in favour of Laxminarayan, Ramlakhan and Bhanuprakash stated to be executed by Late Smt. Kausa. The learned ACJM on the application of respondent No.1 directed the complainant to produce his entire evidence in support of his complaint and fixed the case for 27.12.2010, however, later on, the learned Magistrate directed the SHO, Police Jaura to investigate the matter, get the documents examined by a handwriting expert and thereafter submit the report. The petitioner aggrieved with the said order preferred a revision but the same has been dismissed. Being aggrieved this petition has been preferred.

3. It is submitted by learned counsel for the petitioner that order passed by the learned Courts below is against the principles of law. The learned Court below has failed to appreciate the provisions of Sections 156, 200 and 202 of Cr.P.C. in its right perspective. The learned Magistrate has passed the order rejecting the prayer under Section 156(3) of Cr.P.C. of respondent No.1, but thereafter directed the police to investigate the facts mentioned in the application and report. This amounts to review of the same order which is not permissible under the criminal law. It is prayed that the order passed by the learned Magistrate on 7.12.10 be set aside.

4. The learned counsel for respondent No.1 has supported the order.

5. In view of the submissions of the learned counsel for the parties, I have perused the record.

6. Annexure A/2, which is the copy of the application filed under Section 156(3) of Cr.P.C. by respondent No.1-Rajkumar, reveals that it is alleged that his grand-mother Late Smt. Kausha @ Kaushalya had executed a will in favour of respondent No.1, his brother Sant Kumar and Neetraj on 8.6.10. Prior to it, Late Smt. Kausa had executed two sale-deeds dated 18.4.96 and 23.7.99 in favour of Ramcharan, Laxmidevi and Smt. Bhagwati by affixing her thumb impression on the sale-deeds. After the death of Smt. Kausa, Laxminarayan, Ramlakhan and Bhanuprakash with the connivance of their relatives Bhagwan Singh, Ghanshyam and Ravindra Singh got executed a sale-deed in favour of Laxminarayan @ Billa, Ramlahan and Bhanuprakash stated to be executed by Late Smt. Kausa. The complaint was filed by respondent No.1 to SHO, Jaura, and S.P., Morena, but no action has been taken, therefore, this application has been filed praying that SHO, Jaura, be directed to register the FIR and investigate the matter.

7. The learned Magistrate vide order dated 7.12.10 rejected the prayer of respondent No.1 holding that the case has been filed under Sections 467, 468, 471, 120-B of IPC and Section 467 of IPC is exclusively triable by the Court of Sessions, therefore, in view of proviso to Section 202(1) of Cr.P.C., it cannot be sent to police for investigation. It was directed that respondent No.1 shall produce his entire evidence on the next date in support of the application and the case has been fixed for recording the evidence under Sections 200 and 202 of Cr.P.C., but later on, mentioning that learned counsel for respondent No.1 has prayed that though his prayer for investigation has been turned down, however, report be called with regard to the allegations of forged will, SHO police Jaura has been directed to inquire the facts, get the documents examined by handwriting expert and file his report.

8. The submission of learned counsel for the petitioner is that after the prayer for sending the application for investigation was rejected, subsequently allowing the same would amount to review of earlier order which is not permissible.

9. As noticed earlier, the learned Magistrate had rejected the prayer for investigating the matter by SHO, police Jaura, but later on allowed the prayer for investigation by the SHO, police Jaura. It certainly amounts to review of own order because once the learned Magistrate has rejected the prayer and fixed the case for recording the evidence under Sections 200 and 202 of Cr.P.C., the learned Magistrate cannot backtrack his

order. The Hon'ble Apex Court in the case of *Sunita Jain vs. Pawan Kumar Jain and others*, (2008)1 SCC (Cri) 537 has held that no power of review has been conferred by the Criminal Procedure Code, 1973 on a criminal Court, therefore, it cannot review an order passed or judgment pronounced. In *State of Punjab v. Davinder Pal Singh,* 2012 Cri. L.J. 1001 similar view has been taken by the Hon'ble Apex Court.

10. The learned counsel for the petitioner placing reliance on the decision *Balwant Singh Tomar Vs. Tigmanshu Dhulia,* 2013(II) MPJR 205, submitted that under Section 156 of Cr.P.C. the Magistrate must satisfy himself that the allegations contained in the complaint *prima facie* show some offence. From a bare reading of the order passed by the learned Magistrate, nowhere it reflects that he has gone through the allegations made in the application. It is surprising that the learned Magistrate after rejecting the prayer for sending the application for investigation, subsequently allowed the same. The learned Magistrate did not even bother to examine the allegations made in the application. Only on the prayer of the learned counsel for respondent No.1, SHO, police Jaura has been directed to investigate the matter. It is well settled that every judicial/quasi judicial authority is required to pass a reasoned order. No reason has been given by the learned Magistrate why the prayer of learned counsel for respondent No.1 has been allowed. The learned Magistrate ought to have assigned reasons, specially when he had already disallowed the prayer for investigation. The direction of the learned Magistrate without assigning any reasons shows that he mechanically passed the order.

11. Section 156(3) of Cr.P.C. empowers the Magistrate to order for investigation. This power has been conferred on the Magistrate to check the arbitrary action of the police in matters of registration of FIR of cognizable offence. However, under Section 156(3) of Cr.P.C. the Magistrate should not mechanically pass the order directing the police to investigate the case. The Magistrate is required to satisfy himself *prima facie* that the allegations contained in the complaint point to commission of cognizable offence. For ordering investigation by police under Section 156(3) of Cr.P.C., the Magistrate cannot act merely as post office. He is bound to apply his mind before doing so. In the instant case, admittedly no complaint was filed. The petitioner chose to file only an application under Section 156(3) of Cr.P.C. before the learned Magistrate. On a bare perusal of the application, it appears that two wills are alleged to have been executed by Late Smt. Kausa; first will is said to have been executed in favour of Rajkumar, Sant Kumar and Neetraj on 8.6.10,

while the second will is alleged to have been executed in favour of Laxminarayan, Ramlakhan and Bhanuprakash. Which will is forged one, it has to be decided by the Civil Court. Unless the genuineness of a will is established, no party can agitate that a particular will is forged to initiate criminal proceeding. The Hon'ble 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 Cr.P.C., 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.

12. As noticed above, not only the learned Magistrate has reviewed its own order, which is not permissible under the criminal law, but has also passed the order mechanically directing the police to investigate the case. Hence, the order dated 7.12.10 passed by the learned ACJM, Jaura, deserves to be set aside. Consequently, the petition is allowed and the order dated 7.12.10 passed by the learned Magistrate is set aside.

Petition allowed.

I.L.R. [2013] M.P., 2050
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice D.K. Paliwal
M.Cr.C. No. 7078/2012 (Gwalior) decided on 1 August, 2013

MAHESH MATHUR (DR.) & ors. ... Applicants
Vs.
STATE OF M.P. & ors. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of complaint **- Complaint filed by respondent No.2 is just a counter blast of the proceeding started by petitioners - Omnibus allegations made not only against husband, father-in-law, and mother-in-law, but also against sister-in-law who is residing in Singapur - Allegations regarding demand of dowry and harassment *prima facie* have no ring of truth and appear to have been made with a view to harass the petitioners - The allegations appear to be inherently improbable, absurd and malicious, levelled with a view to harass the petitioners - Held - Continuance of the criminal trial against the petitioners would be sheer abuse of process of law - Petition allowed and criminal proceedings pending before the JMFC quashed.**
(Paras 9, 11, 17 to 19)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – शिकायत अभिखंडित की जाना – प्रत्यर्थी क्रं. 2 द्वारा प्रस्तुत शिकायत, याचीगण द्वारा आरंभ की गई कार्यवाही का केवल प्रत्याक्रमण है – बहुलक्षी अभिकथन न केवल पति, ससुर व सास के विरुद्ध किये गये बल्कि ननद के भी विरुद्ध किये गये, जो सिंगापुर में निवासरत है – दहेज एवं प्रताड़ना के अभिकथनों में प्रथम दृष्ट्या सत्यता की गूंज नहीं और याचीगण को परेशान करने की दृष्टि से किये जाना प्रतीत होता है – अभिकथन, अंतर्निहित रुप से असंभाव्य, अर्थहीन एवं दुर्भावपूर्ण, याचीगण को परेशान करने की दृष्टि से किये जाना प्रतीत होता है – अभिनिर्धारित – याचीगण के विरुद्ध दाण्डिक विचारण को जारी रखना, विधि की प्रक्रिया का स्पष्ट दुरुपयोग होगा – याचिका मंजूर तथा न्यायिक दण्डाधिकारी प्रथम श्रेणी के समक्ष लंबित आपराधिक कार्यवाही अभिखंडित।

Cases referred :

(2010) 7 SCC 667, 1992 Suppl.(1) SCC 335, (2005) 1 SCC 122, (2007) 12 SCC 1, (2012) 10 SCC 741.

Ankur Modi, for the applicants.
R.K. Shrivastava, P. L., for the non-applicant No.1/State.
Jitendra Sharma, for the non-applicant No.2.

ORDER

D.K.PALIWAL, J: This petition has been preferred under Section 482 of Code of Criminal Procedure for quashing the complaint case registered at case No. 6402/12 in the Court of J.M.F.C. Gwalior under Section 498-A of I.P.C.

2. Facts giving rise to the present petition are that complainant/ respondent no.-2 Smt. Manisha Mathur was married to petitioner No.1-Mahesh Mathur on 24.10.2010. After marriage the petitioners and her other in-laws used to beat and harass her in connection with demand of Rs. five lacs in dowry. It is further alleged that in the month of April 2012 when she was at Ajmer her husband, father in law, mother in law and sister in law gave beating and on 27.4.2012 forcibly turned her out from the matrimonial house and sent her to Gwalior by keeping her jewellery and clothes with them. They also told respondent No.2 to ask her parents to arrange Rs. five lacs. On 6.5.2012 husband of respondent No.2, Dr. Mahesh Mathur, father-in-law Ramswaroop Mathur, mother-in-law Smt. Sheela Mathur and sister-in-law Geeta Dayal came to Gwalior and asked her family members as to whether amount has been arranged when the father of the complainant told that he is not in a position to arrange Rs. five lacs Sheela Mathur and Geeta Dayal became annoyed and started shouting that if he was not having the amount, why

he has married his daughter. Thereafter, father of the complainant called his son-in-law Sughar Singh and daughter Namita Singh alongwith Anil Chaudhary and Dharmendra Gaud. When they were pleading that father of the complainant is unable to arrange Rs. five lacs, then Dr. Mahesh Mathur, Geeta Dayal and Ramswaroop Mathur told that when Rs. five lacs will be arranged, they may be informed on telephone and then they will take the complainant back. Till then, he will keep his daughter with him. It is further alleged that after returning from Gwalior, the petitioners filed a restraint petition in the Court of Civil Judge, Ajmer, and she has received a summon on 19.5.2012 for 25.5.2012. Thereafter, she made complaint to SHO, Mahila police Station, Padav, SHO, police Station, Janakganj, and S.P. Gwalior, but no action has been taken against the petitioners, hence, she has filed this complaint. Learned Magistrate after recording the evidence of complainant and her witnesses under Sections 200 and 202 of Cr.P.C., vide order dated 20.7.2012 has taken cognizance against the petitioners under Section 498-A of the IPC and issued bailable warrants against them. Being aggrieved by the said order, the petitioners have preferred this petition.

3. It is submitted that the private complaint lodged by complainant/ respondent No.2 does not disclose *prima-facie* commission of any offence. No details have been mentioned regarding the allegation of physical and mental torture. Learned trial Court has failed to consider the declaration deed, which was signed by petitioners No.1 and 2 at one side and respondent No.2 and her father at the other, in respect of transaction of dowry/gift at the time of marriage, in which it is clearly mentioned that dowry was neither demanded by the groom's party, nor given by the bride's party. The learned Court below has failed to consider that despite beating of the complainant by the petitioners, the complainant/ respondent No.-2 was not sent for medical examination. The learned Court below has also not considered that petitioner Nos.2 and 3 have filed restraint petition in which respondent No.2/complainant has submitted reply, but nowhere in the reply any such single incident or allegation has been mentioned for which private complaint has been filed, on the contrary she has admitted that she herself left the house of petitioners with their consent. It is prayed that by exercising inherent powers under Section 482 of Code of Criminal Procedure, the private complaint filed by the respondent No.-2/ complainant be quashed.

4. The learned counsel for respondent No.2 submitted that complaint filed by respondent No.2 *prima facie* discloses the commission of offence u/ s 498-A of I.P.C. Hence prayed for dismissal of the petition.

5. In order to appreciate the submissions of the learned counsel for the parties, I have scrutinized the record.

6. On perusal of Annexure P/2, it appears that this declaration deed has been signed at the time of marriage of petitioner No.1 and respondent No.2 by Dr. Mahesh Mathur, R.S.Mathur, S.K.Nigam and Smt. Manish. It is specifically mentioned that dowry was neither demanded by the groom's party nor given by the bride's party. The articles given to the bride and groom as personal gifts have also been mentioned in it. Annexure P/3 is the copy of the complaint filed by Smt. Sheela Mathur and Ramswaroop Mathur against respondent No.2 alleging that behaviour of respondent No.2 towards them is not proper. She was using defamatory language and also misbehaved with them. It is specifically mentioned in para 15 that respondent No.2 on her own will against the wishes of her husband left the matrimonial house alongwith her articles and is residing at Gwalior. From the perusal of reply filed by respondent No.2, the allegation of misbehaviour has been denied, however, in reply to para 15, it is stated that respondent No.2 came to Gwalior with the consent of her husband as well as father-in-law and mother-in-law. The railway reservation has also been got done by the husband of respondent No.2. Though it is stated in para 3 that complainants (petitioners No.2 and 3) used to demand dowry, but nowhere it is mentioned that how much and when the demand of dowry was made by them.

7. Annexure P/4 is the copy of petition filed by petitioner No.1 under Section 13(1)(i)(a) of the Hindu Marriage Act before the Family Court, Ajmer. It reveals that it has been filed on 16.5.2012. The complaint has been filed by the respondent to the S.P., Gwalior and SHO police Station Janakganj on 13.6.2012. In this complaint, allegation has been made that soon after marriage in-laws started demanding Rs. five lacs and used to beat her. In the month of April, 2012 her father-in-law, mother-in-law, husband and sister-in-law have beaten her on demand of dowry. On 27.4.2012 she was kicked out of the house by her husband, father-in-law and mother-in-law and forcibly sent to Gwalior by train. It is pertinent to mention that in the reply of the suit filed by Sheela Mathur and Ramswaroop Mathur (petitioners No.2 and 3), respondent has stated that she came to Gwalior with the consent of her husband and parents-in-law. Thus, the allegation made in the complaint is contradicted by the reply of respondent No.2.

8. Respondent No.2 has filed the complaint before the JMFC, Gwalior on 22.6.12. Respondent No.2 has also filed an application under Section 12 of the Protection of Women from Domestic Violence Act. As noticed earlier,

the father-in-law and mother-in-law have already filed the suit against respondent No.2 on 11.5.2012 and petitioner No.1 has filed a divorce petition on 16.5.2012. Thereafter, respondent No.2/complainant has lodged the report to the S.P., Gwalior, and later on filed the private complaint.

9. Thus, from the above, it is evident that respondent No.2 has filed the private complaint against the petitioners after she came to know that petitioners No.2 and 3 have filed a restraint application and petitioner No.1 has filed a divorce petition against her. The reply filed by respondent No.2 in response to restraint application filed by petitioners No.2 and 3 at Court at Ajmer, *prima facie* raises a question mark about the truthfulness of the allegations made by respondent No.2 in the complaint. Had the petitioners really demanded dowry and used to harass or beat respondent No.2 soon after marriage, then respondent No.2 must have made a complaint at least to her father S.K.Nigam, but no such complaint has been made by the complainant. Had the petitioners really beaten respondent No.1 in the month of April, 2012 when respondent No.2 was at Ajmer, there was no reason not to lodge the report of the incident. It seems that the complaint filed by respondent No.2 is just a counter blast of the proceeding started by petitioners No.2 and 3 and petitioner No.1. From the perusal of the complaint, it is seen that omnibus allegations have been made not only against husband, father in law, and mother in law, but also against sister in law who is residing in Singapur.

10. The Hon'ble Apex Court in the case of *Preeti Gupta and another Vs. State of Jharkhand and another*, reported in (2010) SCC 667 observed as under. :-

> "30. It is a matter of common knowledge that unfortunately matrimonial litigation is rapidly increasing in our country. All the Courts in our country including this Court are flooded with matrimonial cases. This clearly demonstrates discontent and unrest in the family life of a large number of people of the society.
>
> "31. The Courts are receiving a large number of cases emanating from Section 498-A of the Penal Code --- xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> 32. It is a matter of common experience that most of these complaints under Section 498-A IPC are filed in the heat of the moment over trivial issues without proper deliberations.

We come across a large number of such complaints which are not even bona fide and are filed with oblique motive. At the same time, rapid increase in the number of genuine cases of dowry harassment is also a matter of serious concern.

33. The learned members of the Bar have enormous social responsibility and obligation to ensure that the social fibre of family life is not ruined or demolished. They must ensure that exaggerated versions of small incidents should not be reflected in the criminal complaints. Majority of the complaints are filed either on their advice or with their concurrence. The learned members of the Bar who belong to a noble profession must maintain its noble traditions and should treat every complaint under Section 498-A as a basic human problem and must make serious endeavor to help the parties in arriving at an amicable resolution of that human problem. They must discharge their duties to the best of their abilities to ensure that social fibre, peace and tranquility of the society remains intact. The members of the Bar should also ensure that one complaint should not lead to multiple cases."

11. In the instant case, as noticed above the allegations regarding demand of dowry and harassment prima facie have no ring of truth and appear to have been made with a view to harass the petitioners.

12. Hon'ble Supreme Court in the *case of State of Harayana and Others Vs. Bhajan Lal and Others,* reported in 1992 Suppl. (1) SCC 335 laid down the principles of law enunciated in series of decisions relating to exercise of inherent powers under Section 482 of Cr.P.C and formulated the guidelines observing as under:-

"This Court in the backdrop of interpretation of various relevant provisions of the Cr.P.C under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482, Cr.P.C gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the Court or otherwise to secure

the ends of justice. Thus, this Court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formula and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised:-

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specified provisions in the Code or the concerned

Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

13. Hon'ble Apex Court in the case of *Zandu Pharmaceutical Works Ltd. & Others Vs. Mohd. Sharaful Haque and another* (2005) 1 SCC 122 has observed as under:-

"It would be an abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceedings if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegation are accepted in toto."

14. In the case of *Inder Mohan Goswami and another Vs. State of Uttaranchal and Others,* reported in (2007) 12 SCC 1, Hon'ble Supreme Court has held as under:-

"Inherent powers under section 482 of Cr.P.C., though wide have to be exercised sparingly, carefully and with great caution and only when such exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the Court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the Statute."

15. Recently, Hon'ble Supreme Court in the case of *Geeta Mehrotra*

and another Vs. State of U.P. and another, reported in (2012) 10 SCC 741 has observed as under:-

> *"If the FIR as it stands does not disclose specific allegation against accused more so against the coaccused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the name accused in the FIR to undergo the trial unless of course the FIR discloses specific allegations which would persuade the Court to take cognisance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention, that if the FIR did not disclose the commission of an offence, the court would be justified in quashing the proceedings preventing the abuse of the process of law".*

16. In the instant case as noticed hereinabove, respondent No.2 has not made any complaint regarding the alleged demand of dowry and beating in the month of April, 2012 and complaint to S.P., Gwalior and present private complaint have been filed only after petitioners No.2 and 3 have filed the restraint petition and petitioner No.1 has filed the divorce petition. Further, in the reply to the restraint application, it is stated by respondent No.2 in her reply that she came to Gwalior on her own will with the consent of her parents-in-law. Thus, *prima facie* the allegations regarding demand of dowry and harassment appear to have been made with an oblique motive.

17. In the instant case, as discussed above, it is apparent that the allegation of demand of dowry, harassment and beating made against the petitioners appears to be inherently improbable, absurd and malicious. It appears that allegations have been levelled with a view to harass the petitioners.

18. For the reasons stated hereinabove, I am of the considered opinion that continuance of the criminal trial against the petitioners would be sheer abuse of process of law.

19. Consequently, petition is allowed and the criminal proceedings in complaint case No.6402/2012 pending before the JMFC, Gwalior are hereby quashed.

Petition allowed.

I.L.R. [2013] M.P., 2059
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice D.K. Paliwal
M.Cr.C. No. 8391/2012 (Gwalior) decided on 1 August, 2013

MAHESH MATHUR (DR.) & ors. ... Applicants
Vs.
STATE OF M.P. & anr. ... Non-applicants

***Protection of Women from Domestic Violence Act (43 of 2005), Sections 12 & 27 - Cognizance* - Magistrate before issuing notice to the petitioners has to consider the contents of the application - Procedure adopted by the Magistrate issuing notice to the petitioners without considering the domestic incident report and without going through the contents of the application and without specifying as to why each of the petitioners named by the complainant was to be summoned, is contrary to the Act - Impugned order set-aside - Magistrate directed to consider domestic incident report as well as the contents of the application and pass an appropriate order. (Paras 7 to 9)**

घरेलू हिंसा से महिलाओं का संरक्षण अधिनियम (2005 का 43), धाराऐं 12 व 27 – संज्ञान – मजिस्ट्रेट द्वारा याचीगण को नोटिस जारी करने से पूर्व, आवेदन की अंतर्वस्तु को विचार में लेना चाहिए – घरेलू घटना की रिपोर्ट को विचार में लिये बिना और आवेदन की अंतर्वस्तु देखे बिना तथा यह विनिर्दिष्टित किये बिना कि शिकायतकर्ता द्वारा नामित प्रत्येक याची को क्यों समन किया जाना है, याचीगण को नोटिस जारी कर मजिस्ट्रेट द्वारा अपनायी गई प्रक्रिया, अधिनियम के विरुद्ध है – आक्षेपित आदेश अपास्त – मजिस्ट्रेट को निदेशित किया गया कि घरेलू घटना की रिपोर्ट एवं आवेदन की अंतर्वस्तु पर विचार करके समुचित आदेश पारित करे।

Ankur Mody, for the applicants.
R.K. Shrivastava, P.L., for the non-applicant No.1/State.
Jitendra Sharma, for the non-applicant No.2.

ORDER

D.K.PALIWAL, J: This petition has been filed under Section 482 of Cr.P.C. for quashing the Case No.1/2012 pending before the JMFC, Gwalior, under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (in short the Act).

2. The brief facts giving rise to this petition are that respondent No.2/

complainant has filed an application before the JMFC, Gwalior, on 25.6.2012 alleging that on 27.4.2012 her in-laws turned out her and sent her to Gwalior keeping her jewellery and clothes and told the complainant to ask her parents to arrange Rs. five lacs. On 6.5.2012 husband of respondent No.2, Dr. Mahesh Mathur, father-in-law Ramswaroop Mathur, mother-in-law Smt. Sheela Mathur and sister-in-law Geeta Dayal came to Gwalior and asked her family members as to whether amount has been arranged. Then the father of the complainant told that he is not in a position to arrange Rs. five lacs. On this, Sheela Mathur and Geeta Dayal became annoyed and started shouting that if he was not having the amount, why he has married his daughter. Thereafter, father of the complainant called his son-in-law Sughar Singh and daughter Namita Singh alongwith Anil Chaudhary and Dharmendra Gaud. When they were pleading that father of the complainant is unable to arrange Rs. five lacs, then Dr. Mahesh Mathur, Geeta Dayal and Ramswaroop Mathur told that when Rs. five lacs will be arranged, they may be informed on telephone and then they will take the complainant back. Till then, he will keep his daughter with him. On the basis of this complainant, learned JMFC, Gwalior, has taken the cognizance under Section 12 of the Act. Being aggrieved, this petition has been preferred.

3. It is submitted by learned counsel for the petitioners that complaint filed by respondent No.2/complainant does not disclose prima facie commission of any offence. The allegation of physical and mental torture has been made without mentioning the details of the incident and attributing specific acts. Learned trial Court has failed to consider the declaration deed, which was signed by petitioners No.1 and 2 at one side and respondent No.2 and her father at the other, in respect of transaction of dowry/gift at the time of marriage, in which it is clearly mentioned that dowry was neither demanded by the groom's party, nor given by the bride's party. It is further submitted that learned trial Court has straightaway issued the notice in violation of mandatory provisions of Section 12 of the Act. It is further contended that before issuing notice learned Magistrate is required to obtain the report from the Protection Officer or Service Provider. It is further submitted that learned Magistrate has also not considered the contents of the application before issuing notice to the petitioners. It is prayed by the learned counsel that complaint deserves to be quashed.

4. Learned Panel Lawyer for respondent No.1/state as well as learned counsel for respondent No.2 have supported the order issuing notice against the petitioners.

5. In view of the submissions of learned counsel for the parties, I have

perused the record.

6. In order to appreciate the submissions of learned counsel for the parties, it would be proper to refer the provisions of Section 12 of the Act which reads as under :-

> "12. Application to Magistrate.- (1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act: Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.
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> (2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:
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> Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.
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> (3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.
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> (4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.
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> (5) The Magistrate shall endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing."

7. On bare perusal of the aforesaid provision, it becomes clear that before passing an order on application, the magistrate has to take into consideration the domestic incident report received from Protection Officer or Service Provider. The impugned order reveals that learned Magistrate before issuing notice to the petitioners did not even consider the contents of the application. Section 12 of the Act clearly provides for obtaining domestic incident report. The domestic incident report proforma is given in form 1 of the schedule 2 of Domestic Violence Rules. This proforma is in detailed analytical form wherein the details of each incident of domestic violence are to be entered with date, time and place of violence and person who caused domestic violence. The object is that all allegations made in application must be specific and the Court should not exercise jurisdiction without considering domestic incident report since it is necessary for the Court to know before issuing any notice to petitioners as to who were the petitioners who caused domestic violence and what was the nature of violence and when it was committed. The proforma specifies different heads of physical violence, sexual violence, verbal and emotional abuse, economic violence, dowry related harassment and other forms of violence. The proforma also provides for filing of documents in support of the application like medico-legal certificate, list of stridhan and other documents. This domestic incident report has to be signed by the aggrieved person. The application under Section 12 is required to be made in form 2 of the Rules wherein the details of various kinds of reliefs and expenses are to be given. Section 27 of the Act provides which judicial Magistrate Court can have jurisdiction to entertain an application under Section 12 of the Act.

8. The procedure adopted by the learned Magistrate issuing notice to the petitioners without considering the domestic incident report and without going through the contents of the application and without specifying as to why each of the petitioners named by the complainant was to be summoned, is contrary to the Act.

9. In view of the above, the order dated 25.6.2012 passed by the learned Magistrate deserves to be set aside. Hence, it is set aside. The learned Magistrate is directed to consider the domestic incident report as well as the contents of the application and pass an appropriate order. With the aforesaid, petition is disposed of.

Petition disposed of