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THE HIGH COURT OF MADHYA PRADESH JABALPUR 2013

(From 01-01-2013 to 31-12-2013)

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* * *

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295	310
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300	584
320	1015
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345	1526
374	564
380	1312
390	*18
396	572
404	114
412	1842
423	2108
428	2338
439	560
453	*7
466	688
472	477
487	672
498	299
503	2977
511	486
544	421
546	2548
568	802
593	785
604	2518
609	605
612	1546
625	791
630	1088
634	813
643	696
649	2510
652	1854
662	1489
683	424
694	820
699	1294
709	2544
712	1319
718	2526
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157	1092
170	2068
185	1043
206	1357
212	1553
220	1645
226	1304
280	609
289	*24
293	2731
306	877
323	*22
328	1639
345	1027
359	827
371	1193
376	*25
379	635
390	*16
402	*15
407	1512
419	837
437	*34
442	538
445	138
447	1793
460	2277
508	80
573	1339
583	868
587	249
595	1561
646	1137
664	613
669	2850
699	2660
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"	" 94 "	"	2552
"	" 106 "	"	2579
"	" 114 "	"	1406
"	" 126 "	"	*28
"	" 135 "	"	1569
"	" 146 "	"	1521
"	" 160 "	"	2354
"	" 172 "	"	1582
"	" 184 "	"	597
"	" 207 "	"	1022
"	" 237 "	"	2360
"	" 244 "	"	367
"	" 247 "	"	2569
"	" 255 "	"	1930
"	" 258 "	"	619
"	" 277 "	"	1478
"	" 281 "	"	1934
"	" 363 "	"	984
"	" 372 "	"	1466
"	" 378 "	"	542
"	" 391 "	"	2395
"	" 410 "	"	2800
"	" 431 "	"	2720
"	" 434 (FB) "	"	1279
"	" 487 "	"	2386
"	" 490 "	"	2377
"	" 497 "	"	2589
"	" 540 "	"	1671
"	" 561 "	"	1422
"	" 619 "	"	1122
"	" 640 "	"	1072
"	" 650 "	"	*29
"	" 674 "	"	*38
"	" 688 "	"	*32
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"	" 101 "	"	1065
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"	" 135 "	"	2680
"	" 167 "	"	2183
"	" 185 "	"	1913
"	" 206 "	"	1578
"	" 403 "	"	2247
"	" 418 "	"	2366
"	" 480 "	"	2137
"	" 525 "	"	2813
"	" 533 "	"	2513
"	" 578 "	"	2917
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"	" 238 (DB) "	"	*4
"	" 258 "	"	1088
"	" 276 (DB) "	"	111
"	" 279 "	"	249
"	" 309 "	"	38
"	" 314 (DB) "	"	50
"	" 322 (DB) "	"	293
"	" 339 "	"	*14
"	" 346 "	"	584
"	" 351 (DB) "	"	477
"	" 388 "	"	410
"	" 398 "	"	724
"	" 447 "	"	70
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"	" 469 "	"	345
"	" 529 (DB) "	"	316
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"	" 59 "	"	581
"	" 65 "	"	421
"	" 93 "	"	1854
"	" 116 "	"	729
"	" 124 (FB) "	"	538
"	" 135 "	"	572
"	" 143 "	"	1015
"	" 150 "	"	130
"	" 153 "	"	1526
"	" 170 "	"	688
"	" 182 "	"	609
"	" 186 "	"	1639
"	" 201 "	"	*24
"	" 207 (DB) "	"	619
"	" 215 "	"	827
"	" 230 "	"	1934
"	" 272 "	"	979
"	" 279 "	"	1399
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	312		460
	320		597
	327		1930
	331		1022
	336 (DB)		2154
	345 (DB)		2068
	349 (DB)		2526
	378 (DB)		1294
	381		2029
	388 (DB)		2544
	393 (DB)		542
	402		1193
	408 (DB)		946
	412		*22
	434		791
	440 (DB)		299
	448		672
	484		785
	489 (DB)		552
	499		1394
	503		363
	507		133
2013 (3) MPHT 36 (DB)			1304
	48		813
	67		1137
	72		2277
	89		1569
	96		868
	116		1227
	125		605
	135 (DB)		989
	141		1357
	166		2108
	172		696
	180		114
	190		1312
	229		1214
	247		1027
	257		*21
	316 (DB)		2795
	352		738
	354		*25
	364		424
	377		1065
	394 (DB)		1553
	408		2977
	417		2518
	451		*42
	479		1770
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	85		1728
	100		*5
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	154		2720
	161		1578
	165		2360
	184 (SC)		1245
	214		2569
	233 (DB)		*29
	240		2022
	276 (FB)		1279
	295 (DB)		2589
	306		984
	314		1907
	320		1755
	339		1582
	347 (DB)		1521
	358 (DB)		2231
	366 (DB)		2377
	393		2904
	459 (DB)		762
	468		837
	495		613
	508		2038
	529 (DB)		2952
	542		1069
2013 (5) MPHT 45			2800
	100		2734
	107		*16
	118		2046
	160 (DB)		*32
	163		2012
	172		877
	184		1783
	188 (DB)		2224
	196		2579
	208 (DB)		668
	273 (DB)		2238
	280		2917
	298 (DB)		2320
	391		2183
	396		1913
	423		2680
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	491		2697

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"	55	"	2146	"	72	"	1971
"	218	"	138	"	82	"	2464
"	221	"	497	"	123	"	2072
"	233	"	877	"	182	"	2320
"	267	"	827	"	197	"	2664
"	275	"	*20	"	249	"	*18
"	280	"	837	"	256	"	2904
"	SN 5	"	1934	"	283	"	2813
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"	50	"	80	"	SN 18	"	1656
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"	81	"	1930	"	90	"	*5
"	89	"	961	"	141	"	1
"	134	"	605	"	233	"	477
"	140	"	820	"	355	"	1092
"	170	"	956	"	429	"	533
"	189	"	1574	2013 (2) JLJ	15	"	542
"	205	"	967	"	23	"	1854
"	253	"	1332	"	67	"	696
"	259	"	2254	"	75	"	1214
"	281	"	1027	"	104	"	1478
"	SN 1	"	628	"	138	"	619
"	SN 4	"	1982	"	156	"	460
"	SN 20	"	*19	"	185	"	*15
"	SN 21	"	696	"	207 (SC)	"	741
"	SN 24	"	1589	"	219	"	1027
"	SN 28	"	1569	"	275	"	1177
2013 (III) MPJR (SC)	1	"	1245	"	293	"	1561
"	19	"	946	"	339	"	1169
"	24	"	1870	"	379	"	1466
"	37	"	1883	"	440	"	827
"	97	"	2395	2013 (3) JLJ	1	"	2503
"	113	"	1304	"	7	"	2887
"	153	"	*32	"	31	"	2231
"	161	"	2366	"	44	"	2063
"	170	"	*29	"	49	"	1934
"	177	"	762	"	55	"	*29
"	184	"	1770	"	92	"	*28
"	203	"	*30	"	103	"	*19
"	217	"	*28	"	109	"	2579
"	237	"	2806	"	127	"	1279
"	243	"	2697	"	175	"	1265
"	265	"	1339	"	235	"	1793
"	284	"	2386	"	274	"	2291
"	289	"	2622	"	279	"	1656
"	292	"	1422	"	290	"	2247
"	SN 3	"	713	"	358	"	2806
"	SN 4	"	1619	"	390	"	1671
"	SN 5	"	2617				

(Note An asterisk (*) denotes Note number)

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आयुध अधिनियम (1959 का 54), धाराऐं 25 व 27 – ज्ञापन एवं जब्ती के अनुप्रमाणक साक्षियों ने अन्वेषण अधिकारी के साक्ष्य का समर्थन किया – अपीलार्थी क्र. 1 के कब्जे से कट्टा और एक जीवित कारतूस जब्त किया गया था – विधि प्रयोगशाला की रिपोर्ट में यह पाया गया कि उक्त/विरुपित सीसा के छर्रे उसी अननुज्ञप्ति वाले अग्नेयास्त्र से दागे गये थे – आयुध अधिनियम की धारा 25(1) व 27(1) के अंतर्गत उसकी दोषसिद्धि न्यायोचित और अभिपुष्ट की गई। (राजेन्द्र सिंह वि. म.प्र. राज्य) (DB)...2439

Ayurvedic Unani Tatha Prakritic Chikitsa Vyavasi Adhiniyam, M.P., 1970 (5 of 1971) **- Degree of Ayurved Ratna or Vaidya Visharad - Registration - These degrees were recongnized when the degree was obtained by petitioner and it was de-recognized later on - However, on the date when the application for registration was made, these degrees were already de-recognized and further in view of judgment passed by Apex Court that Degree and Diploma of Vaidya Visharad or Ayurved Ratna from Hindi Sahitya Sammelan Prayag, Allahabad was never recognized by the Parliamentary Act or by Central Council, therefore, they cannot be treated as eligible qualification to register any person as medical practitioner in Ayurved, the petitioner cannot be registered as medical practitioner in Ayurved. [Nizamuddin Ansari Vs. State of M.P.] ...2548**

आयुर्वैदिक यूनानी तथा प्राकृतिक चिकित्सा व्यवसायी अधिनियम, म.प्र., 1970 (5 का 1971) – आयुर्वेद रत्न या वैद्य विशारद की उपाधि – पंजीकरण – यह उपाधियां मान्यता प्राप्त थीं जब याची द्वारा उपाधि अभिप्राप्त की गई और उसकी मान्यता बाद में वापस ली गई – अपितु, जिस तिथि को पंजीकरण हेतु आवेदन किया गया था, इन उपाधियों की मान्यता पहले ही वापस ली गई थी और इसके अतिरिक्त सर्वोच्च न्यायालय द्वारा पारित किये गये निर्णय को दृष्टिगत रखते हुए कि हिन्दी साहित्य सम्मेलन प्रयाग, इलाहाबाद से वैद्य विशारद या आयुर्वेद रत्न की उपाधि या डिप्लोमा को संसद अधिनियम के द्वारा या केन्द्रीय परिषद द्वारा कभी मान्यता नहीं दी गई थी, इसलिए आयुर्वेद में चिकित्सक के रुप में किसी व्यक्ति का पंजीयन करने के लिए उसे योग्य अर्हता नहीं माना जा सकता, याची का आयुर्वेद में चिकित्सक के रुप में पंजीयन नहीं किया जा सकता। (निजामुद्दीन अंसारी वि. म.प्र. राज्य) ...2548

Caste Certificate - Examination of **- Validity of a caste certificate is to be examined by a High Power Screening Committee - No enquiry was got conducted from the High Power Screening Committee - Caste certificate issued in favor of petitioner was never**

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been suffered by land owners then remedy lies elsewhere - Doctrine of promissory estoppels and legitimate expectation cannot be made applicable - Appeal dismissed. [Mohd. Jamal Vs. Union of India]
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(SC)...2757

Constitution - Articles 15, 16 - Reservation **- Vertical reservation is only a reservation under Article 16(4) of the Constitution of India and horizontal (Special) reservation is under Article 16(1) or Article 15(3) of the Constitution of India - While reservations made on social basis are not to be changed, the horizontal reservation are compartmentwise and in such circumstances, if the Rules permit, the vacancies available in horizontal reservation are to be filled in by similar category candidates. [Aditya Tiwari Vs. State of M.P.] ...*41**

संविधान – अनुच्छेद 15,16 – आरक्षण – भारत के संविधान के अनुच्छेद 16(4) के अंतर्गत उर्ध्व आरक्षण केवल एक आरक्षण है एवं भारत के संविधान के अनुच्छेद 16(1) या अनुच्छेद 15(3) के अंतर्गत क्षैतिज (विशेष) आरक्षण –

सामाजिक आधार पर दिये गये आरक्षण को बदला नहीं जा सकता जबकि क्षैतिज आरक्षण खण्ड अनुसार है और ऐसी परिस्थिति में यदि नियम अनुज्ञा देते हैं, क्षैतिज आरक्षण में उपलब्ध रिक्तियों को उन्हें समरुप श्रेणी के अभ्यर्थियों द्वारा भरा जावे। (आदित्य तिवारी वि. म.प्र. राज्य) ...*41

Constitution - Article 16(4-B), Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P. 1994, Section 4 - Carry forward Vacancies **- Held - The conjoint reading of both the provisions clearly states that the carried forward vacancies shall not form part of the vacancies of a later recruitment year nor it shall be counted to work out the percentage of reservation. [Shekhar Singh Chauhan (Dr.) Vs. State of M.P.]...2806**

संविधान – अनुच्छेद 16 (4बी), लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण), अधिनियम, एम.पी., 1994, धारा 4 – रिक्तियों को अग्रनीत करना – अभिनिर्धारित – दोनों उपबंधों को एक साथ पढ़े जाने से स्पष्ट है कि अग्रनय रिक्तियां पश्चातवर्ती भर्ती वर्ष की रिक्तियों का भाग नहीं बनेगी और न ही उनकी गणना आरक्षण का प्रतिशत निकालने के लिए की जायेगी। (शेखर सिंह चौहान (डॉ.) वि. म.प्र. राज्य) ...2806

Constitution - Article 19(1)(g) **- Fundamental Right to practice any profession or to carry on any occupation, trade or business - Petitioner was working as Constable in Police Department - Transport Department decided to recruit constables by open selection through Professional Examination Board - Petitioner participated in selection process and was declared successful - Police Department refused to issue NOC - Held - The word occupation includes an employememt - The said right can be curtailed only as per Article 19(6) - No other condition which is not in consonace with "reasonable restrictions" can take away the fundamental right of a citizen to opt for any other profession or occupation - Order refusing NOC quashed. [Manoj Singh Tomar Vs. State of M.P.] ...2366**

संविधान – अनुच्छेद 19(1)(जी) – किसी वृत्ति, व्यवसाय, व्यापार या कारोबार चलाने का मूलभूत अधिकार – याची, आरक्षक के रुप में पुलिस विभाग में कार्यरत था – परिवहन विभाग ने व्यावसायिक परीक्षा मंडल के जरिए खुले चयन द्वारा आरक्षकों की भर्ती करने का निर्णय लिया – याची ने चयन प्रक्रिया में हिस्सा लिया और सफल घोषित किया गया – पुलिस विभाग ने अनापत्ति प्रमाण पत्र जारी करने से मना कर दिया – अभिनिर्धारित – शब्द 'व्यवसाय' में नियोजन समाविष्ट है – उक्त अधिकार को केवल अनुच्छेद 19(6) के अनुसार कम किया जा सकता है

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इस परिहार्य मुकदमे का खर्च वहन करने के लिये स्वयं को उत्तरदायी बनाया है – खर्चे के रुप में रु. 15,000/– परिमाणित किया गया। (रामकटोरी गोयल (श्रीमति) वि. म्युनिसिपल कारपोरेशन) (DB)...2513

Constitution, Article 227, Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Writ Petition **- In exercise of power under Article 227, the approach of the Courts below which is based on factual matrix and documents available on record cannot be interfered unless some material circumstances are pointed out by the parties to show that they had legal possession over the property and the same was not considered by the Courts below. [Keshari Prasad Vs. Sub-Divisional Officer] ...2344**

संविधान, अनुच्छेद 227, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – रिट याचिका – अनुच्छेद 227 के अंतर्गत शक्ति के प्रयोग में, निचले न्यायालय के दृष्टिकोण में हस्तक्षेप नहीं किया जा सकता जो तथ्यात्मक ताने बाने पर अभिलेख पर उपलब्ध दस्तावेजों पर आधारित है, जब तक कि पक्षकारों द्वारा कुछ तात्विक परिस्थतियां नहीं दर्शायी जाती कि सम्पत्ति पर उनका वैध कब्जा था और उस पर निचले न्यायालयों द्वारा विचार नहीं किया गया। (केशरी प्रसाद वि. सब–डिवीजनल ऑफीसर) ...2344

Constitution - Article 227 - Interference by High Court - Trial Court closed the right of petitioner to adduce evidence by speaking order **- Held - Order passed by Sub-ordinate Court is under its vested jurisdiction and no jurisdictional error is committed by such Court then the same could not be interfered under the revisional jurisdiction of this Court. [Lakhan Lal Vs. Durga Prasad] ...2600**

संविधान – अनुच्छेद 227 – उच्च न्यायालय द्वारा हस्तक्षेप – विचारण न्यायालय ने वादी के साक्ष्य देने का अधिकार सकारण आदेश द्वारा समाप्त किया – अभिनिर्धारित – अधीनस्थ न्यायालय द्वारा पारित आदेश इसकी निहित अधिकारिता के अंतर्गत और उक्त न्यायालय ने अधिकारिता की त्रुटि नहीं की तब पुनरीक्षण अधिकारिता के अंतर्गत इस न्यायालय द्वारा हस्तक्षेप नहीं किया जा सकता। (लखनलाल वि. दुर्गा प्रसाद) ...2600

Constitution - Article 243W, 12th Schedule - Entry 17 - Nagar Panchayat **- Nagar Panchayat is a unit of self-government which is a sovereign body having both constitutional and statutory status - Article 243Q, 243W and Entry 17 confers considerable powers on Nagar Panchayat to carry out various schemes for economic development**

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Contract - Tender - Single bid - Second respondent floated tender for two options i.e. for operation, maintenance and management of ware-housing and for setting up the manufacturing facilities - In the NIT itself, it was provided that if eligible and sufficient bids are not received for the first option, then the NIT would be considered for the second option - In the alternative, entire tenders be quashed and second respondent was obliged to invite fresh tender for the first option - Only one bid was received for the first option - Second respondent awarded the tender for the first option - Held - Award of tender to single bidder cannot be upheld - Respondent to consider floating fresh tender if at all they are interested to go ahead with award of tender for first option - In the alternative, they are free to consider the tender for the second option in terms of the NIT. [Elixir Impex Pvt. Ltd. Vs. State of M.P.] (DB)...2530

संविदा – निविदा – एकल बोली – द्वितीय प्रत्यर्थी ने दो विकल्पों के साथ निविदा निकाली अर्थात् वेयरहाऊसिंग के संचालन, अनुरक्षण एवं प्रबंध के लिये और विनिर्माण सुविधायें उपलब्ध कराने के लिए – एनआईटी में स्पष्ट है कि यदि पात्र और पर्याप्त बोली प्रथम विकल्प के लिये प्राप्त नहीं होती है, तब द्वितीय विकल्प के लिए एनआईटी को विचार में लिया जायेगा – वैकल्पिक रुप से सभी निविदायें अभिखंडित एवं द्वितीय प्रत्यर्थी से प्रथम विकल्प के लिये नयी निविदा आमंत्रित कर उपकृत किया गया था – प्रथम विकल्प के लिये केवल एक बोली प्राप्त हुई – द्वितीय प्रत्यर्थी ने प्रथम विकल्प के लिये निविदा अवार्ड की – अभिनिर्धारित – एकल बोलीकर्ता को निविदा दिये जाने का समर्थन नहीं किया जा सकता – प्रत्यर्थी नयी निविदा निकालने पर विचार करे यदि वे प्रथम विकल्प के लिये निविदा अवार्ड करने के लिये अग्रसर होने में रुचि रखते हैं – विकल्प में, वे एनआईटी की शर्तों में द्वितीय विकल्प के लिये निविदा का विचार करने हेतु स्वतंत्र है। (इलिक्सर इम्पेक्स प्रा.लि. वि. म.प्र. राज्य) (DB)...2530

Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 94 - Notice of Institution of Suit - Held - Mandatory provision - Lack of Notice - Civil Court has no authority or jurisdiction to entertain the suit. [Saphik alias Sahid Khan Vs. Nandlal Arora] (DB)...2832

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 94 – वाद संस्थित किये जाने का नोटिस – अभिनिर्धारित – आज्ञापक उपबंध है – नोटिस का अभाव – सिविल न्यायालय को वाद ग्रहण करने का प्राधिकार या अधिकारिता नहीं है। (शफीक उर्फ शाहिद खान वि. नन्दलाल अरोरा) (DB)...2832

Criminal Procedure Code, 1973 (2 of 1974), Section 125 -

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child and appropriate prosecution should not be stifled unless there are compelling circumstances to do so - An investigation should not be shut out at the threshold if the allegations have some substance - In order to quash the investigation, the Court must apply the test whether the uncontroverted allegations as made prima facie establish the offence - Court should not embark upon an inquiry whether the allegations are likely to be established by evidence or not nor the Court should judge the probability, reliability or genuineness of the allegations made therein. [Vinod Raghuvanshi Vs. Ajay Arora] (SC)...2298

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – दाण्डिक कार्यवाही को अभिखंडित किया जाना – दाण्डिक कार्यवाही अभिखंडित किये जाने के प्रकरण पर विचार करते समय, न्यायालय को मृतजात शिशू की हत्या नहीं करनी चाहिए और समुचित अभियोजन को कुचलना नहीं चाहिए जब तक कि ऐसा करने के लिए बाध्यकर परिस्थितियां न हो – जांच को आरंभ में ही बंद नहीं किया जाना चाहिए यदि अभिकथनों में कुछ सार है – जांच अभिखंडित करने के लिए न्यायालय को यह परीक्षण लागू करना चाहिए कि क्या किये गये अविवादित अभिकथन प्रथम दृष्ट्या अपराध स्थापित करते हैं अथवा नहीं – न्यायालय को यह जांच नहीं करनी चाहिए कि क्या अभिकथनों को साक्ष्य द्वारा स्थापित किये जाने की संभावना है और न ही न्यायालय को, अभिकथनों की संभाव्यता, विश्वसनीयता या सत्यता का अनुमान लगाना चाहिए। (विनोद रघुवंशी वि. अजय अरोरा) (SC)...2298

Custom - Valid custom **- To constitute a valid custom, the essential ingredients are (i) it should be ancient (ii) certain (iii) reasonable (iv) should not be opposed to morality or Public Policy (v) not forbidden by law and (vi) regular. [State of M.P. Vs. Smt. Keshar Bai] ...2664**

रुढ़ि – वैध रुढ़ि – वैध रुढ़ि के गठन हेतु, आवश्यक घटक हैं (1) वह प्राचीन होना चाहिए (2) निश्चित होना चाहिए (3) युक्तियुक्त होना चाहिए (4) नैतिकता के या लोक नीति के विरुद्ध नहीं होना चाहिए (5) विधि द्वारा निषिद्ध नहीं होना चाहिए और (6) नियमित होना चाहिए। (म.प्र. राज्य वि. श्रीमति केशरबाई) ...2664

Easement Act, (5 of 1882), Section 4 - Customary easement **- Plaintiff herself admitted that suit land is being used as path throughout from the time of her ancestors - Path is already existing for considerable long period and is ancient, reasonable, certain, regular, is not opposed to Public Policy, and is not forbidden by law - If path is being constructed by constructing a Pakka road for the convenience of public at large, it**

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याची संस्थान ने अंतिम तिथि बढ़ाने के लिये आवेदन प्रस्तुत किया, जिसे प्रत्यर्थीगण द्वारा नामंजूर किया गया – अभिनिर्धारित – केन्द्र सरकार और सीसीआईएम ने कुछ अन्य मामलों में अंतिम तिथियां बढ़ायी थीं – याची/संस्थान की कोई गलती नहीं थी – विद्यार्थी जिन्होंने पात्र अभ्यर्थियों की सूची में स्थान प्राप्त किया था, उनकी भी कोई गलती नहीं क्योंकि 30.10.2012 को याची/संस्थान को परामर्श के महाविद्यालयों की सूची में समाविष्ट नहीं किया गया था – अंतिम तिथि नहीं बढ़ाये जाने की केन्द्र सरकार और सीसीआईएम की कार्यवाही विभेदकारी – केन्द्र सरकार को, सीसीआईएम से अनुमति चाहने के पश्चात 10 दिनों के भीतर अंतिम तिथि बढ़ाये जाने के संबंध में आदेश पारित करने के लिये और 15 सीटों के लिये 2 सप्ताह के भीतर पूर्ण रुप से गुणदोषों के आधार पर पात्र अभ्यर्थियों की सूची से परामर्श कराने के लिए निदेशित किया गया – याचिका मंजूर। (शुभ दीप आयुर्वेद मेडिकल कॉलेज वि. यूनियन ऑफ इंडिया) (DB)...2552

Employees Provident Funds Act, (19 of 1952), Section 2(f) - Employee **- Employee means any person who is employed for wages in any kind of work - Petitioner had pointed out to Inspector that out of 20 persons, 4 persons are voluntarily providing their service as per their will and convenience and are not being paid any salary or emoluments - Such contention was found to be true however, Authority held that Act is applicable as 20 persons are working in the institute - In view of Section 2(f) of the Act, as four persons were not being paid salary and there was no rebuttal to petitioner's case that they were not attending the establishment on regular basis and were coming at their own will voluntarily, the findings recorded by Authority and Tribunal are perverse and bad - Petition allowed. [Jan Shiksha Prasar Samiti Barwari Vs. Assistant Provident Fund Commissioner]**

(DB)...2544

कर्मचारी भविष्य निधि अधिनियम, (1952 का 19), धारा 2(एफ) – कर्मचारी – कर्मचारी का अर्थ है कोई व्यक्ति जो किसी भी प्रकार के कार्य के लिये वेतन पर नियोजित किया गया है – याची ने निरीक्षक को यह दर्शाया है कि 20 व्यक्तियों में से 4 व्यक्ति अपनी मर्जी से और सुविधानुसार स्वेच्छापूर्ण रुप से अपनी सेवाऐं दे रहे हैं और उन्हें किसी वेतन या परिलब्धियों का भुगतान नहीं किया जा रहा है – उक्त तर्क सत्य पाया गया, किन्तु प्राधिकारी ने अभिनिर्धारित किया कि अधिनियम लागू होगा क्योंकि 20 व्यक्ति संस्थान में कार्यरत हैं – अधिनियम की धारा 2(एफ) को दृष्टिगत रखते हुए, चूंकि चार व्यक्तियों को वेतन का भुगतान नहीं किया जा रहा था और याची के प्रकरण का खंडन नहीं किया गया था कि वे नियमित आधार पर स्थापना में उपस्थित नहीं हो रहे थे और वे स्वेच्छापूर्ण अपनी रजामंदी से आ रहे थे, प्राधिकारी और अधिकरण द्वारा अभिलिखित निष्कर्ष अनुचित और दोषपूर्ण

– याचिका मंजूर। (जन शिक्षा प्रसार समिति बरवारी वि. असिस्टेन्ट प्रॉविडेन्ट फण्ड कमिश्नर) (DB)...2544

Entry Tax Act, M.P. (52 of 1976) - Charging Section - "Mediker" and "Starch" **- Mediker and Starch have not been classified under Entry Tax Act nor are covered under Schedules I & II - Charging Section has to be taken into consideration - "Mediker" is basically a medicinal product but is used as shampoo - However, its period of treatment is four weeks and shampoo is not used generally for washing hair and therefore, principle of ejusdem generis is not applicable - It is out of the purview of Schedule III and cannot be taxed since both 'Mediker' and 'Starch' are used in production of further products and not meant for sale - As article is not taxable goods under the statute then the provisions of Entry Tax Act cannot be attracted - Petition allowed [Marico Industries Ltd. Vs. State of M.P.] (DB)...2625**

प्रवेश कर अधिनियम, म.प्र. (1976 का 52) – अधिरोपण करने वाली धारा – "मेडीकर" और "स्टार्च" – मेडीकर और स्टार्च को प्रवेश कर अधिनियम के अंतर्गत वर्गीकृत नहीं किया गया है और न ही अनुसूची I व II के अंतर्गत आते हैं – अधिरोपित करने वाली धारा को विचार में लिया जाना चाहिए – "मेडीकर" मूलतः औषधि उत्पाद है परन्तु शैम्पू के रुप में उपयोग किया जाता है – अपितु, उपचार की उसकी अवधि चार सप्ताह है और शैम्पू का उपयोग सामान्यतः बाल धोने के लिये नहीं किया जाता और इसलिए सजाति का सिद्धांत लागू नहीं होता – वह अनुसूची ppp की परिधि से बाहर है और उस पर कर नहीं लगाया जा सकता, चूंकि "मेडीकर" और "स्टार्च" का उपयोग अन्य उत्पाद के उत्पादन में किया जाता है और विक्रय के लिए नहीं है – चूंकि वस्तु, कानून के अंतर्गत कर योग्य माल नहीं, तब प्रवेश कर अधिनियम के उपबंध लागू नहीं किये जा सकते – याचिका मंजूर। (मेरिको इंडस्ट्रीज लि. वि. म.प्र. राज्य) (DB)...2625

Essential Commodities Act (10 of 1955), Section 3/7 - Violation of Order **- When there is a violation of any Order, regarding any essential commodity, then the provisions of Act, 1955 would apply - It is not prima facie found that petitioner has violated any Order under Section 3 of the Act, 1955, he cannot be punished under Section 7 of the Act, 1955 - Proceedings quashed. [Narottam Singh Tomer Vs. State of M.P.] ...2498**

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 3/7 – आदेश का उल्लंघन – जब किसी आवश्यक वस्तु के संबंध में किसी आदेश का उल्लंघन होता है तब अधिनियम, 1955 के उपबंध लागू होंगे – प्रथम दृष्ट्या यह नहीं पाया जाता कि

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by the assessee before commencement of business on short term deposits with banks, even out of term loans secured from financial institutions, is an income chargeable under the head "Income from other sources" and would not go to reduce the interest payable by the assessee which would be capitalised after the commencement of commercial production. [Bharat Oman Refineries Ltd. (M/s.) Vs. Commissioner of Income Tax-I] (DB)...3024

आयकर अधिनियम (1961 का 43), धारा 143(3) – कारोबार आरंभ होने से पहले बैंक के अल्पावधि जमा पर निर्धारिती द्वारा अर्जित ब्याज, वित्त संस्थानों से प्रतिभूत सावधि ऋणों से अर्जित भी, "अन्य स्त्रोतों से आय" के मद के अंतर्गत प्रभारित किये जाने योग्य आय है और इससे निर्धारिती द्वारा देय ब्याज कम नहीं होगा जो वाणिज्यिक उत्पादन आरंभ होने के पश्चात पूंजीकृत होगा। (भारत ओमान रीफाइनरी लि. (मे.) वि. कमिश्नर ऑफ इनकम टैक्स-I) (DB)...3024

***Income Tax Act (43 of 1961), Section 253 - Appeal to Appellate Tribunal* - Commissioner of Income Tax applied net profit rate of 2.5% on the turnover of Rs. 7 Crores - Revenue as well as appellant challenged the said order by filing appeal - ITAT dismissed the appeal of Revenue on the basis of some reference being made about the net profit rate being applied by CIT, also dismissed the appeal of appellant by observing that while deciding the appeal of revenue, the stand of CIT has been upheld - Held - ITAT committed error in dismissing the Appellant's appeal merely by observing that the stand of CIT has been upheld while dismissing the appeal of revenue - Contention of appellant that net profit at 2.5% could not have been applied was required to be decided by ITAT - Order of ITAT set aside - Matter remanded back for deciding appellant's contention - Appeal allowed. [Prem Swaroop Khandelwal (Shri) Vs. The Commissioner of Income Tax] (DB)...2731**

आयकर अधिनियम (1961 का 43), धारा 253 – अपीली अधिकरण को अपील – आयकर आयुक्त ने रु. 7 करोड़ की कुल बिक्री पर 2.5 प्रतिशत शुद्ध लाभ दर लागू की – राजस्व तथा अपीलार्थी ने उक्त आदेश को अपील प्रस्तुत करके चुनौती दी – आईटीएटी ने सीआईटी द्वारा लागू की जाने वाली शुद्ध लाभ दर के बारे में कुछ संदर्भ दिये जाने के आधार पर राजस्व की अपील खारिज की, अपीलार्थी की अपील भी इस टिप्पणी के साथ खारिज की गई कि राजस्व की अपील का विनिश्चय करते समय, सीआईटी के पक्ष को अभिपुष्ट किया गया – अभिनिर्धारित – आईटीएटी ने अपीलार्थी की अपील मात्र इस टिप्पणी के साथ खारिज करने में भूल कारित की कि राजस्व की अपील खारिज करते समय सीआईटी के पक्ष की पुष्टि की

गई – अपीलार्थी का तर्क कि 2.5 प्रतिशत का शुद्ध लाभ लागू नहीं किया जा सकता था, को आईटीएटी द्वारा निर्णित किया जाना अपेक्षित था – आईटीएटी का आदेश अपास्त – अपीलार्थी के तर्क का विनिश्चय करने हेतु मामला प्रतिप्रेषित – अपील मंजूर। (प्रेम स्वरूप खण्डेलवाल (श्री) वि. द कमिश्नर ऑफ इनकम टैक्स)
(DB)...2731

***Industrial Disputes Act (14 of 1947), Section 3 - Works Committee* - Requirement of constitution of works committee depends on general or special order by appropriate Govt. - As an order has been issued by the Govt. therefore, it is obligatory on the part of the petitioner to constitute the Works Committee. [South Eastern Coal Field Ltd. Vs. Union of India]** ...2631

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 3 – कार्मिक समिति – कार्मिक समिति के गठन की आवश्यकता, समुचित सरकार के सामान्य या विशेष आदेश पर निर्भर होती है – चूंकि सरकार द्वारा आदेश जारी किये गये हैं इसलिए, कार्मिक समिति गठित करना याची के लिये बाध्यकारी है। (साउथ ईस्टर्न कोल फील्ड लि. वि. यूनियन ऑफ इंडिया) ...2631

***Industrial Disputes Act (14 of 1947), Section 36-B - Power to Exempt* - Exemption from constitution of works committee can be granted by applying the test that whether there exists adequate provision for investigation and settlement of industrial disputes in respect of workmen - Application for exemption was required to be decided considering that whether the committee mentioned by petitioner is well equipped and suitable which can investigate and settle the industrial disputes of workmen - As the application for grant of exemption has been rejected only on the ground that constitution of works committee is a statutory requirement therefore, matter is remanded back to decide the application of exemption afresh in the light of Section 36-B of the Act. [South Eastern Coal Field Ltd. Vs. Union of India]** ...2631

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 36बी – छूट देने की शक्ति – कार्मिक समिति के गठन से छूट, इस परीक्षण को लागू करके प्रदान की जा सकती है कि क्या कर्मकारों के संबंध में औद्योगिक विवादों की जाचं एवं निपटारे के लिये पर्याप्त उपबंध अस्तीत्वमान है – छूट के आवेदन का निर्धारण यह विचार में लेकर किया जाना अपेक्षित था कि क्या याची द्वारा उल्लेखित समिति परिपूर्ण एवं उपयुक्त है जो कर्मकारों के औद्योगिक विवादों की जांच एवं निपटारा कर सकती है – चूंकि छूट प्रदान किये जाने हेतु आवेदन को केवल इस आधार पर

किया, परन्तु वह पंजीकृत कम्पनी नहीं थी – अभियुक्त के रुप में कम्पनी को पक्षकार बनाये बिना आवेदकगण का अभियोजन अनुज्ञेय है – अन्यथा भी, यदि कम्पनी को अभियुक्त के रुप में जोड़ा नहीं गया तब भी आरोप पत्र को अस्वीकार नहीं किया जा सकता – कम्पनी को एक अभियुक्त के रुप में जोड़ा जा सकता है, यदि यह साबित किया जाता है कि आवेदकगण किसी विशिष्ट कम्पनी के लिये कार्य कर रहे थे जो कि एक विधिक व्यक्ति है। (शैलाभ जैन वि. म.प्र. राज्य) ...2747

Insurance Act (4 of 1938), Section 45 - Repudiation of claim by insurer **- Assured concealed the reality that she was suffering from renal disease at the time of obtaining policy - It is gathered from bed head ticket that she was a patient of chronic renal failure for the last four years - Policy can be repudiated. [Rajendra Prasad Pathak Vs. Union of India]** **...2622**

बीमा अधिनियम (1938 का 4), धारा 45 – बीमाकर्ता द्वारा दावे का निराकरण – बीमित ने वास्तविकता प्रकट की कि पॉलिसी अभिप्राप्त करते समय, वह गुर्दे की बीमारी से ग्रसित थी – बेड हेड टिकट से पता चलता है कि वह पिछले चार वर्षों से दीर्घकालिक गुर्दे नाकाम होने की मरीज थी – पॉलिसी का निराकरण किया जा सकता है। (राजेन्द्र प्रसाद पाठक वि. यूनियन ऑफ इंडिया) ...2622

Interpretation of Statute - Definition **- If a particular word is defined in that particular Act, its meaning is to be derived from the definition clause - However, if definition clause is silent on the said word, then only the dictionary meaning is to be seen. [Diamond Cements (M/s.) Vs. Union of India]** **...2417**

कानून का निर्वचन – परिभाषा – यदि किसी विशिष्ट शब्द को उस विशिष्ट अधिनियम में परिभाषित किया गया है, उसका अर्थान्वयन परिभाषा खंड से निकाला जाना चाहिए – किन्तु, यदि परिभाषा खंड, उक्त शब्द पर मौन है, केवल तब उसका अर्थ शब्दावली से देखा जाना चाहिए। (डायमंड सीमेन्ट (मे.) वि. यूनियन ऑफ इंडिया) ...2417

Interpretation of Statute - Golden Rule **- Composite perception is to be seen - A narrow interpretation which kills the intention of the legislature or makes the provision redundant cannot be accepted - Text and Context are the bases of Interpretation - If text is texture, context gives colour - Neither can be ignored. [Shammi Sharma Vs. Municipal Corporation]** **...2569**

कानून का निर्वचन – उत्तम सिद्धांत – संयुक्त बोध देखा जाना चाहिए –

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भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 4 व 6, सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 – सिविल न्यायालय की अधिकारिता – अर्जन कार्यवाही की विधिमान्यता – अर्जन कार्यवाहियां, वर्ष 1963 में आरंभ की गई थीं – वादी द्वारा भूमि वर्ष 1954 में क्रय की गई और राजस्व अभिलेख में उसके नाम पर नामांतरित की गई – किन्तु, नोटिस मूल विक्रेता को जारी किया गया, जिसकी मृत्यु वर्ष 1959 में पहले ही हो चुकी थी – नोटिस मूल विक्रेता को जारी की गई, जिसकी मृत्यु पहले ही हो चुकी थी और वादी को कोई नोटिस जारी नहीं किया गया, जिसका नाम पहले ही राजस्व अभिलेख में नामांतरित किया गया था – चूंकि नैसर्गिक न्याय के सिद्धांतों का उल्लंघन किया गया इसलिए, सिविल न्यायालय को वाद ग्रहण करने की और वादी का हक घोषित करने की एवं आवेदकगण/प्रतिवादीगण के विरुद्ध व्यादेश पारित करने की अधिकारिता है। (म.प्र. हाउसिंग बोर्ड वि. म.प्र. राज्य) ...2723

Land Revenue Code, M.P. (20 of 1959), Sections 110 & 117 - See - Evidence Act, 1872, Section 114(e) **[Yashraj Datta (dead) Through LR. Vs. Bherulal]** ...2660

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 110 व 117 – देखें – साक्ष्य अधिनियम, 1872, धारा 114(ई) (यशराज दत्ता (मृतक) द्वारा विधिक प्रतिनिधि वि. भेरूलाल) ...2660

Land Revenue Code, M.P. (20 of 1959), Section 131 - Rights of way **- Private easement is customary easement and is having wider connotation with that of rights of easement as envisaged in Easements Act, 1882. [State of M.P. Vs. Smt. Keshar Bai]** ...2664

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 131 – मार्गाधिकार – निजी सुखाचार, रुढ़िक सुखाचार है और सुखाचार के अधिकारों के संबंध में इसका व्यापक अर्थ है जैसा कि सुखाचार अधिनियम 1882 में अनुध्यात है। (म.प्र. राज्य वि. श्रीमति केशरबाई) ...2664

Land Revenue Code, M.P. (20 of 1959), Sections 165 & 170-B **- Land was sold in favour of plaintiff in the year 1957 - Vindhya Pradesh Land Revenue and Tenancy Act, 1853 was in force which did not contain any provision restraining alienation by a tribal in favour of non-tribal - Provisions of M.P. Land Revenue Code, 1959 do not apply. [Ram Niwas Vs. Jagat Bahadur Singh]** ...2689

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 165 व 170बी – वर्ष 1957 में वादी के पक्ष में भूमि का विक्रय किया गया था – विंध्यप्रदेश भू राजस्व और

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अभिधृति अधिनियम, 1883 प्रभावी था, जिसमें जनजाति व्यक्ति द्वारा किसी गैर जनजाति व्यक्ति के पक्ष में अन्य संक्रामण अवरुद्ध करने वाला कोई उपबंध समाविष्ट नहीं — म.प्र. भू राजस्व संहिता 1959 के उपबंध लागू नहीं होते। (राम निवास वि. जगत बहादुर सिंह) ...2689

Limitation Act (36 of 1963), Section 14 **- Conditions required to be satisfied.**

In order to attract the applicability of Section 14 of the Limitation Act, following conditions are required to be satisfied :-

(i) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party ;

(ii) the prior proceeding had been prosecuted with due diligence and good faith;

(iii) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(iv) the earlier proceeding and the later proceeding must relate to the same matter in issue; and

(v) both the proceedings are in a court. [Rajendra Prasad Vs. Ramlal] ...2912

परिसीमा अधिनियम (1963 का 36), धारा 14 — शर्तें जिन्हें पूरा किया जाना अपेक्षित है।

परिसीमा अधिनियम की धारा 14 की प्रयोज्यता आकर्षित करने के लिए निम्न शर्तों को पूरा किया जाना अपेक्षित है :—

(i) पूर्विक तथा पश्चातवर्ती कार्यवाहियां, दोनों सिविल कार्यवाहियां हो, जिन्हें समान पक्षकार द्वारा अभियोजित किया गया।

(ii) पूर्विक कार्यवाही को सम्यक् तत्परता एवं सद्भावनापूर्वक अभियोजित किया गया।

(iii) पूर्विक कार्यवाही की असफलता का कारण, अधिकारिता की कमी अथवा इसी स्वरुप का अन्य कारण।

(iv) पूर्वतर कार्यवाही और पश्चातवर्ती कार्यवाही का संबंध समान विवाद्य विषय से होना चाहिए। और

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मोटर यान अधिनियम (1988 का 59), धारा 163(ए) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23, नियम(1)(3) – कुछ तकनीकी बातों को विचार में लेते हुए प्रथम दावा याचिका को वापस लिया गया, किन्तु नई दावा याचिका प्रस्तुत करने का स्वातंत्र्य अभिप्राप्त किये बिना – अभिनिर्धारित – मोटर यान अधिनियम एक हितकारी विधान है जो अपीलार्थीगण/दावाकर्ताओं के हित के लिये बनाया गया है – नियम एवं प्रक्रिया, न्याय हेतुक के अग्रसरण के लिये है और न कि अति तकनीकी बातों पर उसे विफल बनाने के लिये – सि.प्र.सं. के आदेश 23 नियम(1)(3) के उपबंधों को विचार में लेते हुए विद्वान अधिकरण द्वारा दावा खारिज किया जाना न्यायोचित नहीं – अपील मंजूर। (बैजंती (श्रीमति) वि. लक्ष्मी प्रसाद कनोजिया)
...2934

Motor Vehicles Act (59 of 1988), Sections 166 & 173 **- Claimant lady aged 35 years and earning Rs. 5,000/- per month by doing household labour work, received injury by Bus while walking on the road - Her left leg was amputated below knee and she became permanently disabled - Compensation of Rs. 4,11,600/- awarded for future loss of earning by the Tribunal is just but for pain and suffering in case of amputation and other heads the amount awarded is inadequate - Claimant is awarded Rs. 50,000/- for pain and suffering in addition to the compensation awarded by the Tribunal and Rs. 50,000/ - awarded for artificial limb. [Kanta Bai (Smt.) Vs. Balu Singh]**
...2652

मोटर यान अधिनियम (1988 का 59), धाराऐं 166 व 173 – दावाकर्ता महिला जो 35 वर्ष आयु की है और घरेलू श्रमिक कार्य करके प्रति माह रु. 5,000/– अर्जित कर रही है, को सड़क पर चलते समय बस से चोट लगी – उसका बांया पैर, घुटने के नीचे से विच्छेदित किया गया और वह स्थायी रुप से निःशक्त हो गई – अधिकरण द्वारा रु. 4,11,600/– का प्रतिकर, भविष्य के अर्जन की हानि हेतु न्यायोचित है, परन्तु विच्छेदन तथा अन्य शीर्षक के मामले में पीड़ा और यातना हेतु अवार्ड की गई रकम पर्याप्त नहीं है – दावाकर्ता को अधिकरण द्वारा अवार्ड किये गये प्रतिकर के अतिरिक्त, पीड़ा और यातना के लिये रु. 50,000/– अवार्ड किये गये तथा कृत्रिम अंग हेतु रु. 50,000/– अवार्ड किये गये। (कांता बाई (श्रीमति) वि. बालू सिंह)
...2652

Motor Vehicles Act (59 of 1988), Section 173 - Compensation **- Deceased was an agriculturist and evidence available on record shows that annual income from agriculture was Rs. 2 lacs - Even after deducting expenses productivity of the deceased should be deemed to 25% of 2 lacs which comes to Rs. 50,000 p.a. - Total dependency of**

claimants after deducting 1/4th regarding expenses of deceased, comes to Rs. 37,500 - Multiplier of 14 would apply as the age of the deceased was in between 40 to 45 years - Compensation enhanced to Rs. 5,45,000/-. [Suman Singh (Smt.) Vs. Prithvipal Singh] ...*44

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – मृतक, एक कृषक था और अभिलेख पर उपलब्ध साक्ष्य दर्शाता है कि कृषि से वार्षिक आय रू. 2 लाख थी – यदि खर्चे घटाये भी जाए तब भी मृतक की उत्पादकता 2 लाख का 25 प्रतिशत मानी जानी चाहिए जो रू. 50,000 प्रतिवर्ष बनती है – मृतक के खर्चों से संबंधित 1/4 घटाने के पश्चात दावाकर्ताओं की कुल आश्रितता रू. 37,500 बनती है – 14 का गुणक लागू होगा क्योंकि मृतक की आयु 40 से 45 वर्ष के बीच थी – प्रतिकर बढ़ाकर रू. 5,45,000/-- किया गया। (सुमन सिंह (श्रीमति) वि. पृथ्वीपाल सिंह) ...*44

***Motor Vehicles Act (59 of 1988), Section 173 - Compensation - Enhancement* - Deceased was having the agricultural land - He was also engaged in taking the land on Adhbatai from different persons - Earning of deceased was shown apart from his own land and also from the land taken on Adhbatai - After death their own land has been given on Adhbatai - Loss of earning accepted Rs. 5,000/- p.m. award enhanced by Rs. 2,32,000/-. [Mamta Bai Patidar (Smt.) Vs. Ismail Khan] ...2850**

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – बढ़ाया जाना – मृतक के पास कृषि भूमि थी – वह भिन्न व्यक्तियों से अधबटाई पर भूमि लेने में भी लगा हुआ था – मृतक की कमाई, अपने स्वयं की भूमि के अलावा अधबटाई पर ली गई भूमि से भी होना दर्शाया गया – मृत्यु पश्चात उनकी स्वयं की भूमि अधबटाइ पर दी गई – अर्जन की हानि रु. 5,000/– प्रति माह स्वीकार की गई, अवार्ड रु. 2,32,000/– से बढ़ाया गया। (ममता बाई पाटीदार (श्रीमति) वि. इस्माइल खान) ...2850

***Motor Vehicles Act (59 of 1988), Section 173 - Compensation* - Enhancement of - Tribunal ought to have ordered some amount on account of future prospect - Award enhanced. [Anjli Bhatiya (Smt.) Vs. Rajkumar] ...2645**

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – बढ़ाया जाना – अधिकरण को भविष्य की संभाव्यता के कारण कुछ रकम आदेशित करनी चाहिए थी – अवार्ड बढ़ाया गया। (अंजली भाटिया (श्रीमति) वि. राजकुमार) ...2645

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मोटर यान अधिनियम (1988 का 59), धारा 173 – मृतक की उम्र 38 वर्ष थी जिसका स्थापित कारोबार था – भावी प्रत्याशा 30 प्रतिशत की सीमा तक विचार में ली गयी – तीन आश्रित व्यक्ति – 1/3 व्यक्तिगत खर्चे के अंतर्गत घटाया गया – 15 का गुणक स्वीकार किया गया – रु. 16,20,000/– का अवार्ड बढ़ाकर, ब्याज के साथ रु. 22,77,147/– किया गया। (सुनीता (श्रीमति) वि. श्रीमति सुमित्रा) ...2845

Motor Vehicles Act (59 of 1988), Section 173 - Enhancement of award - **Appellant's right hand has been amputated from the shoulder - As per Schedule I, Part-II of Workmen's Compensation Act, the loss of earning capacity is 80% and not as 42% as assessed by learned Tribunal - Award amount enhanced from 2,29,880/- to the tune of Rs. 5,80,880/-. [Jam Singh Vs. Bharat]** ...2639

मोटर यान अधिनियम (1988 का 59), धारा 173 – अवार्ड की वृद्धि – अपीलार्थी का दाहिना हांथ कंधे से काट दिया गया था – कर्मकार प्रतिकर अधिनियम की अनुसूची I भाग II के अनुसार, उपार्जन सामर्थ्य की हानि 80 प्रतिशत और न कि 42 प्रतिशत जैसा कि विद्वान अधिकरण द्वारा निर्धारित किया गया – अवार्ड की गई रकम, 2,29,880/– से बढ़ाकर 5,80,880/– की गई। (जाम सिंह वि. भारत) ...2639

Motoryan Karadhan Adhiniyam, M.P. (25 of 1991), Section 16(3) & Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457 - **Appellant's Bus seized by the Officer-in-charge, Traffic, for offence u/s 16(3) of the Adhiniyam as well as for offences under Motor Vehicles Act and the Rules - Said Officer was not notified by the State Government under its notification dated 09.01.1992 to seize vehicles for any violation of the Adhiniyam and as such was not competent to seize the vehicle for offence u/s 16(3) of the Adhiniyam but was competent to seize it for offences under Motor Vehicles Act - Seizure of the Bus u/s 16(3) of the Adhiniyam was bad in law and is quashed - Bus will be treated as seized only under the Motor Vehicles Act - Appellant can make an application for its custody before the appropriate**

मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 16(3) व दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 451 व 457 – मोटर यान अधिनियम एवं नियमों के अंतर्गत अपराधों के लिये तथा अधिनियम की धारा 16(3) के अंतर्गत अपराध के लिये ऑफीसर इंचार्ज, यातायात के द्वारा अपीलार्थी की बस जप्त की गई – उक्त अधिकारी राज्य सरकार की अधिसूचना दिनांक 09.01.1992 के अंतर्गत अधिनियम का कोई उल्लंघन करने पर वाहन जप्त करने हेतु अधिसूचित नहीं था और इस कारण वह अधिनियम की धारा 16(3) के अंतर्गत अपराध के लिये वाहन जप्त करने हेतु सक्षम नहीं था, किन्तु मोटर यान अधिनियम के अंतर्गत अपराधों में इसे जप्त करने में सक्षम था – अधिनियम की धारा 16(3) के अंतर्गत बस की जप्ती विधि की दृष्टि में दोषपूर्ण और अभिखंडित – बस को केवल मोटर यान अधिनियम के अंतर्गत जप्त माना जावे – सुपर्दगी हेतु अपीलार्थी समुचित न्यायालय के समक्ष आवेदन प्रस्तुत कर सकता है। (पदमेश गौतम वि. म.प्र. राज्य) (DB)...2510

***Municipal Corporation Act, M.P. (23 of 1956), Section 29/30* - Whether conjoint reading of both the Sections permits the corporation to delay the meeting beyond 15 days on the ground of preparation of agenda - Held - The Authorities are bound to call the meeting - Further held, there is nothing in Section 30 which puts a cap on number or the subject of requisition meeting. [Shammi Sharma Vs. Municipal Corporation]** ...2569

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***Municipalities Act, M.P. (37 of 1961), Section 319 - Two Months notice* - 2 months notice required to be given to Municipal Council u/s 319(1) of the Act - Held - Has to be given in respect of anything done**

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बाधित करता है जो उसे लोक व्यवस्था बनाये रखने के लिए प्रतिकूल बनाता है – यह विशिष्ट अव्यवस्था के विस्फोट से उन्मुक्त आतंक के प्रवाह का विस्तार, परिमाण एवं तीव्रता है जो यह अंतर करने में सहायता करता है कि वह कृत्य संबंधित 'विधि और व्यवस्था' या 'लोक व्यवस्था' को प्रभावित करता है – याचिका खारिज। (तनजील खान वि. म.प्र. राज्य) (DB)...2377

National Security Act (65 of 1980), Sections 3(2), 8 & 14(1)(a), Constitution - Article 21 & 22(5) **- Petitioner stated that he submitted representations to the State Govt. and to the Central Govt. - Central Govt. rejected the representation - But, the State Govt. did not decide the representation - Held - Writ petition was filed on 05.10.2012 - On 24.01.2013, an order dated 04.12.2012 regarding rejection of representation by the State Govt. was filed - Decision on the representation was taken belatedly - Same is contrary to the constitutional and statutory obligation conferred upon the State Govt. - Unexplained delayed decision loses both its purpose and meaning - It would fatally affect the order of detention - Hence, detention order quashed - Writ petition allowed. [Golu @ Anand Vs. State of M.P.]** (DB)...2795

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराऐं 3(2), 8 व 14(1)(ए), संविधान – अनुच्छेद 21 व 22(5) – याची का कथन है कि उसने राज्य सरकार और केन्द्र सरकार को प्रत्यावेदन प्रस्तुत किये – केन्द्र सरकार ने प्रत्यावेदन अस्वीकार किया – किन्तु राज्य सरकार ने प्रत्यावेदन का विनिश्चय नहीं किया – अभिनिर्धारित – 05.10.2012 को रिट याचिका प्रस्तुत की गई – 24.01.2013 को, राज्य सरकार द्वारा प्रत्यावेदन की अस्वीकृति के संबंध में आदेश दि. 04.12.2012 प्रस्तुत किया गया – प्रत्यावेदन पर निर्णय विलंब से लिया गया – यह राज्य सरकार को प्रदत्त संवैधानिक एवं कानूनी उत्तरदायित्व के विरुद्ध – अस्पष्ट विलंबित निर्णय अपना प्रयोजन और अर्थ दोनों खो देता है – वह निरोध के आदेश को घातक रुप से प्रभावित करता है – अतः, निरोध आदेश अभिखंडित – रिट याचिका मंजूर। (गोलू उर्फ आनंद वि. म.प्र. राज्य) (DB)...2795

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 3 - Presentation of Election Petition - Authorization **- Authorization to file an election petition has to be specific and not by mere endorsement in Vakalatnama - It is not an authorization as is required under Rule 3(1) - No evidence to show that election petitioner was present at the time of presentation of election petition as he did not put his signature**

और उसे अकृत एवं शून्य घोषित किया जाना नहीं चाहा है, बल्कि निर्वाचित प्रत्याशी के पक्ष में डाले गये अभिकथित मतों को अवैध घोषित किया जाना चाहा है और निर्वाचन याची के पक्ष में नया परिणाम की घोषणा चाही है – चूंकि निर्वाचन को अकृत एवं शून्य घोषित किये जाने का कोई अनुतोष नहीं चाहा गया, विनिर्दिष्ट अधिकारी ने परिणाम को अकृत एवं शून्य घोषित करके, निर्वाचन याची द्वारा चाहे गये अनुतोष से अधिक किया। (उमाशंकर चौबे वि. मदन) ...2603

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 21 - Corrupt Practice **- To establish allegation of corrupt practice, it is incumbent upon election petitioner to lead cogent evidence - Election Petitioner did not examine those persons who were said to have participated in casting votes at two places, but examine some persons who were not named in election petition of having casted votes in favour of Returned candidate - Some evidence does not lead to a conclusion that returned candidate had taken recourse to unfair means and corrupt practice. [Uma Shankar Chobey Vs. Madan]** ...2603

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता), नियम, म.प्र. 1995, नियम 21 – भ्रष्ट आचरण – भ्रष्ट आचरण का अभिकथन स्थापित करने के लिए, निर्वाचन याची को प्रबल साक्ष्य पेश करना जरुरी है – निर्वाचन याची ने उन व्यक्तियों का परीक्षण नहीं किया, जिनके लिये कहा गया है कि उन्होंने दो स्थानों पर मतदान करने में हिस्सा लिया था, परन्तु कुछ ऐसे व्यक्तियों का परीक्षण किया, जिनके नाम निर्वाचन याचिका में, निर्वाचित प्रत्याशी के पक्ष में मतदान करने वाले दर्शाते हुए नहीं दिये गये थे – कुछ साक्ष्य इस निष्कर्ष पर नहीं पहुंचाता कि निर्वाचित प्रत्याशी ने अनुचित साधन एवं भ्रष्ट आचारण का सहारा लिया। (उमाशंकर चौबे वि. मदन) ...2603

Panchayat Nirvachan Niyam, M.P. 1995 - Corrupt Practices **- Rules are in pari materia to the provisions of Representation of People Act - Allegation if established have a serious consequence - Hence, required to be proved to the hilt like criminal cases i.e. proof beyond reasonable doubt - Mere bald statements cannot be treated as a conclusive proof of committing corrupt practices. [Geeta Bai (Smt.) Vs. The Sub Divisional Officer]** ...2579

पंचायत निर्वाचन नियम, म.प्र. 1995 – भ्रष्ट आचरण – नियम, लोक प्रतिनिधित्व अधिनियम के उपबंधों के समविषय (pari materia) में है – अभिकथन यदि स्थापित होता है, तब परिणाम गंभीर होगा – अतः पूर्णतः साबित किया जाना अपेक्षित है जैसा कि आपराधिक प्रकरणों में अर्थात युक्तियुक्त संदेह से परे – मात्र

कमलेश उर्फ घंटी) (DB)...3004

Penal Code (45 of 1860), Section 302 - Murder - **Appellant called the deceased at his house for lunch and assaulted the deceased, his wife and child causing death of all the three persons - Appellant thereafter escaped on his motorcycle after extending threats to eye witnesses - Defence that deceased had illicit relations with the wife of appellant and had tried to commit rape in the presence of his wife and child not probable - Evidence of Eye Witnesses is corroborated by medical evidence - Appellant rightly convicted under Section 302. [Gudda @ Dwarikendra Vs. State of M.P.]** (SC)...2309

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी ने मृतक को अपने घर खाने पर बुलाया और मृतक, उसकी पत्नी और बच्चे पर हमला किया, जिससे सभी तीनों व्यक्तियों की मृत्यु कारित हुई – अपीलार्थी, उसके बाद प्रत्यक्षदर्शी साक्षियों को धमकाने के पश्चात अपनी मोटर साईकिल पर फरार हो गया – यह बचाव कि मृतक के अपीलार्थी की पत्नी से अवैध संबंध थे और उसने अपनी पत्नी और बच्चे की उपस्थिति में बलात्कार कारित करने का प्रयास किया था, संभाव्य नहीं – प्रत्यक्षदर्शी साक्षियों के साक्ष्य की पुष्टि चिकित्सीय साक्ष्य से होती है – अपीलार्थी को उचित रुप से धारा 302 के अंतर्गत दोषसिद्ध किया गया। (गुड्डा उर्फ द्वारिकेन्द्र वि. म.प्र. राज्य) (SC)...2309

Penal Code (45 of 1860), Section 302 - Murder - Death Sentence - Rarest of Rare Case - **Awarding of death sentence is an exception - Genesis of crime and manner of occurrence inside the house of appellant remains clouded - Factum of crime being pre-ordained and motive of appellant in brutally assaulting the deceased after inviting him at his house for lunch stems from his suspicion on his wife's fidelity but no motive or pre-orchestration could be culled out for the other two deceased persons - In a civilized society a tooth for a tooth and an eye for an eye ought not to be the criterion to clothe a case with rarest of rare case - Case do not fall within the category of rarest of rare case - Death sentence commuted into life sentence. [Gudda @ Dwarikendra Vs. State of M.P.]** (SC)...2309

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृत्युदण्ड – विरल से विरलतम प्रकरण – मृत्युदण्ड प्रदान करना अपवादक है – अपीलार्थी के घर के भीतर अपराध प्रारंभ होना और घटना का स्वरुप स्पष्ट नहीं – अपराध का कृत्य पूर्व निर्धारित था और मृतक को अपने घर पर खाने पर बुलाने के पश्चात मृतक पर निर्मम हमला करने का अपीलार्थी का हेतुक, अपनी पत्नी की वफादारी पर उसके

संदेह से उत्पन्न हुआ, किन्तु अन्य दो मृतक व्यक्तियों के लिए किसी हेतुक या पूर्व रचना को निकाला जा सकता – विरल से विरलतम प्रकरण दर्शाने के लिए, सभ्य समाज में दांत के बदले दांत और आंख के बदले आंख का मापदंड नहीं होना चाहिए – प्रकरण, विरल से विरलतम प्रकरण की श्रेणी में नहीं आता – मृत्युदण्ड को आजीवन कारावास में परिवर्तित किया गया। (गुड्डा उर्फ द्वारिकेन्द्र वि. म.प्र. राज्य) (SC)...2309

Penal Code (45 of 1860), Section 302 - Murder **- Injuries found on the deceased were caused by Gupti (sharp edged weapon) - Evidence of eye witnesses is corroborated by the medical evidence - No reason to discredit the prosecution case - Appeal dismissed. [Santosh Vs. State of M.P.]** (DB)...2693

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृतक पर पाई गई क्षतियां गुप्ती (धारदार हथियार) से कारित की गई – चक्षुदर्शी साक्षी के साक्ष्य की पुष्टि चिकित्सकीय साक्ष्य से होती है – अभियोजन प्रकरण पर अविश्वास का कोई कारण नहीं – अपील खारिज। (संतोष वि. म.प्र. राज्य) (DB)...2693

Penal Code (45 of 1860), Section 302 - Murder **- Injuries were inflicted by Katta on vital part - Were sufficient to cause death - Evidence of eye-witnesses is cogent, consistent and they remained firm in cross examination - Their evidence is also corroborated by medical evidence - Katta was recovered on the intimation of appellant No. 1 - Conviction of appellant No. 1 is proper. [Rajendra Singh Vs. State of M.P.]** (DB)...2439

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मार्मिक अंग पर कट्टे से चोटें पहुंचाई गयीं – मृत्यु कारित करने के लिये पर्याप्त थी – प्रत्यक्षदर्शी साक्षियों का साक्ष्य प्रबल सुसंगत है और वे प्रतिपरीक्षण में दृढ बने रहे – उनके साक्ष्य की पुष्टि चिकित्सीय साक्ष्य द्वारा भी होती है – अपीलार्थी क्र. 1 की निशानदेही पर कट्टा बरामद – अपीलार्थी क्र. 1 की दोषसिद्धि उचित। (राजेन्द्र सिंह वि. म.प्र. राज्य) (DB)...2439

Penal Code (45 of 1860), Section 302, 149 or 304 Part-I - Murder or culpable homicide not amounting to murder **- Deceased and his companions alighted from bus and went to betel shop - Altercation took place between deceased and accused No. 4 - Accused No. 12 was assaulted on head by means of Baka - Deceased and other injured witnesses boarded the bus, however bus was stopped and deceased & other injured were assaulted - Held - Possibility that accused persons**

got provoked and without premeditation in heat of passion suddenly bent upon assaulting deceased, can not be ruled out - As such their conviction u/s 302/149 of the I.P.C. does not seem appropriate but since they caused injuries with deadly weapons on the vital parts of the body of deceased, it can certainly be held that they acted with the intention of causing death or of causing such bodily injury to deceased as was likely to cause his death making them liable to be punished u/s 304-I of I.P.C. [Sheikh Waseem Vs. State of M.P.] (DB)...2428

दण्ड संहिता (1860 का 45), धारा 302, 149 या 304 भाग–I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक व उसके साथी बस से उतरे और पान की दुकान पर गये – मृतक और अभियुक्त क्र. 4 के बीच कहा सुनी हुई – अभियुक्त क्र. 12 को सिर पर बका से हमला किया गया – मृतक व अन्य आहत साक्षीगण बस में सवार हो गये किन्तु बस को रोका गया और मृतक एवं अन्य आहत व्यक्तियों पर हमला किया गया – अभिनिर्धारित – यह संभावना कि अभियुक्तगण प्रकोपित हो गये और बिना पूर्व चिंतन के, भावना वेग में मृतक पर अचानक हमला करने के लिए अग्रसर हुए, को नकारा नहीं जा सकता – ऐसे में भा. द.सं. की धारा 302/149 के अंतर्गत उनकी दोषसिद्धि उचित प्रतीत नहीं होती, परंतु चूंकि उन्होंने घातक हथियारों से मृतक के कोमलांगो पर चोटें कारित की है, यह निश्चित रुप से धारणा की जा सकती है कि उन्होंने मृतक की मृत्यु कारित करने के आशय के साथ या ऐसी शारीरिक चोट कारित करने के आशय से कार्य किया जिससे उसकी मृत्यु कारित होने की संभावना थी, जो कि उन्हें भा.द.सं. की धारा 304–ए के अंतर्गत दंडित किये जाने हेतु उत्तरदायी बनाता है। (शेख वसीम वि. म. प्र. राज्य) (DB)...2428

Penal Code (45 of 1860), Section 302 or 304 - Murder or culpable homicide not amounting to murder - Homicidal death - When the incident occurred in a sudden quarrel without premeditation and accused gave a single blow and did not act in cruel or unusual manner - Held - Case of accused would attract exception 4 to Section 300 of the I.P.C. and that trial Court committed error in holding appellant guilty u/s 302 of the I.P.C. - Since the appellant used a deadly weapon and caused injury on the vital part of the body of deceased, i.e. head which resulted into his death, appellant by his act clearly made himself liable to be punished u/s 304-I of the I.P.C. [Rajesh @ Jadu Vs. State of M.P.] (DB)...2450

दण्ड संहिता (1860 का 45), धारा 302 या 304 – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मानव वध स्वरुप की मृत्यु – जब घटना

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बिना पूर्व चिंतन के अचानक झगड़े से घटित हुई और अभियुक्त ने एकमात्र वार किया और क्रूरतापूर्ण या असामान्य ढंग से कृत्य नहीं किया – अभिनिर्धारित – अभियुक्त का प्रकरण, भा.द.सं. की धारा 300 के अपवाद 4 को आकृष्ट करेगा और विचारण न्यायालय ने अपीलार्थी को भा.द.सं. की धारा 302 के अंतर्गत दोषी ठहराकर भूल कारित की है – चूंकि अपीलार्थी ने घातक हथियार का प्रयोग किया और मृतक के कोमलांग अर्थात सिर पर चोट कारित की, जिसके परिणामस्वरुप उसकी मृत्यु हुयी है, अपीलार्थी ने अपने कृत्य द्वारा स्पष्ट रुप से स्वयं को भा.द. सं. की धारा 304–ए के अंतर्गत दंडित किये जाने के लिये उत्तरदायी बनाया है। (राजेश उर्फ जादू वि. म.प्र. राज्य) **(DB)...2450**

Penal Code (45 of 1860), Sections 302, 304-I **- Murder or culpable homicide not amounting to murder - Held - Injury inflicted to deceased on vital part without any cause or provocation with intention to murder - Were also sufficient to cause death - Intention of the accused is clear - Case does not fall under exception of 4 of Section 300 of I.P.C. [Rajendra Singh Vs. State of M.P.]** **(DB)...2439**

दण्ड संहिता (1860 का 45), धाराऐं 302, 304–I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अभिनिर्धारित – मृतक को बिना किसी कारण या उद्दीपन के, हत्या के आशय के साथ मार्मिक अंग पर चोटें पहुंचाई गई – मृत्यु कारित करने के लिए भी पर्याप्त थी – अभियुक्त का आशय स्पष्ट है – प्रकरण, भा.द.सं. की धारा 300 के अपवाद 4 के अंतर्गत नहीं आता। (राजेन्द्र सिंह वि. म.प्र. राज्य) **(DB)...2439**

Penal Code (45 of 1860) Section 304-B - Dowry Death **- Law discussed. [Vishwajeet Vs. State of M.P.]** **...2702**

दण्ड संहिता (1860 का 45), धारा 304बी – दहेज मृत्यु – विधि विवेचित। (विश्वजीत वि. म.प्र. राज्य) **...2702**

Penal Code (45 of 1860), Section 304B - Dowry Death - Soon before death **- There must be proximate link between the acts of cruelty along with the demand of dowry and death of victim. [Vishwajeet Vs. State of M.P.]** **...2702**

दण्ड संहिता (1860 का 45),धारा 304बी – दहेज मृत्यु – मृत्यु से तुरंत पहले – दहेज की मांग के साथ क्रूरतापूर्ण व्यवहार और पीड़िता की मृत्यु के बीच निकटतम संबंध होना चाहिए। (विश्वजीत वि. म.प्र. राज्य) **...2702**

Penal Code (45 of 1860) Section 304-B - Valid Marriage **- Deceased was already married and appellant brought her after giving**

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accused and even then they did not inform the prosecutrix about the actual position - Charge under Section 120-B /34 of I.P.C. can be framed against the parents of the accused - Revisions allowed. [Surekha Singh Vs. State of M.P.] ...3000

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियुक्त ने अभियोक्त्री के साथ विवाह किया और विवाह के पश्चात वह अपने पैतृक मकान में ही रही तथा अभियुक्त उसे मिलने आता था और उससे शारीरिक संबंध बनाता था – तत्पश्चात, अभियोक्त्री को एक महिला द्वारा बताया गया कि वह अभियुक्त की ब्याहता पत्नी है जिसकी दो संतानें भी हैं और विवाह विच्छेद नहीं हुआ है – अभिनिर्धारित – अभियोक्त्री ने इस धारणा के अधीन कि वह उसकी ब्याहता पत्नी है, उसे सहवास की अनुमति दी – अभियुक्त ने प्रथम दृष्ट्या भा.द.सं. की धारा 376 के अंतर्गत अपराध कारित किया है – षडयंत्र में अभियुक्त के माता–पिता भी शामिल क्योंकि वे अभियुक्त के साथ रह रहे थे और तब भी उन्होंने अभियोक्त्री को वास्तविक स्थिति से अवगत नहीं कराया – अभियुक्त के माता–पिता के विरुद्ध भा. द.सं. की धारा 120बी/34 का आरोप विरचित किया जा सकता है – पुनरीक्षण मंजूर। (सुरेखा सिंह वि. म.प्र. राज्य) **...3000**

***Penal Code (45 of 1860), Section 376(i) - Rape - Appeal Against conviction* - Prosecutrix is deaf and dumb, therefore, she was not examined - F.I.R. is delayed by 28 hours for which no explanation has been given - Doctor opined that no definite opinion can be given regarding rape - Medical evidence is also not supporting the prosecution case - Child eye witness who is 11 years old not appearing to be witness of sterling quality - Her testimony is without corroboration of satisfactory evidence - In the absence of any slightest degree of actual penetration, the conviction u/s 376(i) is illegal and unsustainable - Appeal allowed. [Karu Suryawanshi Vs. State of M.P.] ...2966**

दण्ड संहिता (1860 का 45), धारा 376(i) – बलात्कार – दोषसिद्धि के विरुद्ध अपील – अभियोक्त्री मूक बधिर है इसलिए उसका परीक्षण नहीं किया गया – प्रथम सूचना रिपोर्ट में 28 घंटे के विलम्ब के लिये कोई स्पष्टीकरण नहीं दिया गया – चिकित्सक का मत कि बलात्कार के संबंध में कोई निश्चित मत नहीं दिया जा सकता – चिकित्सीय साक्ष्य भी, अभियोजन प्रकरण का समर्थन नहीं करता – चक्षूदर्शी बालक साक्षी जो 11 वर्ष आयु का है, वह भी उत्तम विशेषता का प्रतीत नहीं होता है – उसकी परिसाक्ष्य किसी संतोषप्रद साक्ष्य से पुष्टि के बिना है – वास्तविक प्रवेशन की किसी अत्यल्प मात्रा की भी अनुपस्थिति में, धारा 376(i) के अंतर्गत दोषसिद्धि अवैध एवं अपोषणीय है – अपील मंजूर। (कारू सूर्यवंशी वि. म.प्र राज्य) **...2966**

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subsequently, the partnership deed dated 05.03.2002 was replaced by forged deed dated 06.03.2003 - Addl. Excise Commissioner and Dy. Commissioner of Excise gave a finding that partnership deed was replaced and appellant being head of District Excise Office is indirectly responsible - C.J.M. after considering the evidence and the departmental reports registered the case - Held - For taking cognizance or issuing process in a complaint case, the court must have merely a prima facie satisfaction that there is some material on record to proceed - Order issuing process not liable to be interfered with - Appeal dismissed. [Vinod Raghuvanshi Vs. Ajay Arora] (SC)...2298

दण्ड संहिता (1860 का 45), धाराऐं 420 व 120–बी – *छल* – इस अभिकथन के साथ शिकायत दर्ज की गई कि भागीदारी विलेख दिनांकित 05.03.2002 के आधार पर आबकारी संविदा प्रदान की गई, जिसमें शिकायतकर्ता भी एक पक्षकार था और जिसने बड़ी रकम लगायी थी परन्तु तत्पश्चात, भागीदारी विलेख दि. 05.03.2002 को कूटरचित विलेख दि. 06.03.2003 द्वारा प्रतिस्थापित किया गया – अति. आबकारी आयुक्त एवं उप आयुक्त, आबकारी ने निष्कर्ष दिया कि भागीदारी विलेख प्रतिस्थापित किया गया है और जिला आबकारी कार्यालय के प्रमुख होने के नाते, अपीलार्थी अप्रत्यक्ष रुप से उत्तरदायी है – सीजेएम ने साक्ष्य एवं विभागीय प्रतिवेदनों पर विचारोपरांत प्रकरण पंजीबद्ध किया – अभिनिर्धारित – शिकायत के प्रकरण में संज्ञान लेने के लिए या प्रोसेस जारी करने के लिए, न्यायालय की मात्र प्रथम दृष्ट्या संतुष्टि होनी चाहिए कि कार्यवाही करने के लिए अभिलेख पर कुछ सामग्री मौजूद है – प्रोसेस जारी करने का आदेश हस्तक्षेप किये जाने योग्य नहीं – अपील खारिज। (विनोद रघुवंशी वि. अजय अरोरा) (SC)...2298

Penal Code (45 of 1860), Section 494 - Bigamy **- Second marriage should be proved in accordance with essential religious rites available to the parties - Complainant failed to prove the second marriage - Applicant cannot be convicted. [Santosh Vs. State of M.P.] ...2990**

दण्ड संहिता (1860 का 45), धारा 494 – द्विविवाह – द्वितीय विवाह को, पक्षकार को उपलब्ध आवश्यक धार्मिक रीतियों के अनुसरण में होना, साबित किया जाना चाहिए – शिकायतकर्ता द्वितीय विवाह साबित करने में असफल – आवेदक को दोषसिद्ध नहीं किया जा सकता। (संतोष वि. म.प्र. राज्य) ...2990

Penal Code (45 of 1860), Section 494, Criminal Procedure Code, 1973 (2 of 1974), Section 182 - Bigamy - Territorial jurisdiction **- Offence u/s 494 of I.P.C. can be tried by the Court within whose jurisdiction offence was committed or the offender last resided with**

to the accused, it is proved that there was voluntary and conscious acceptance of the money - Conviction upheld. [Tula Shanker alias Tulesh Sitoke Vs. State of M.P.] (DB)...2958

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराऐं 7,13(1)(डी) सहपठित् 13(2) – अवैध परितोषण – अपीलार्थी के कब्जे से रू. 500/– के करेंसी नोट प्राप्त किये गये – जब्तशुदा नोटों के नम्बर, पंचनामा में दिये गये नम्बरों से मिलते हैं – घोल का रंग गुलाबी हुआ, जब उंगलियां और पतलून को धोया गया – इसके खंडन में अभियुक्त द्वारा कोई मौखिक या दस्तावेजी साक्ष्य प्रस्तुत नहीं – अभिनिर्धारित – एक बार जब यह साबित हो जाता है कि अभियुक्त के कब्जे से रुपये बरामद किये गये, उपधारणा का भार जैसा कि पी.सी. अधिनियम की धारा 20 में अनुध्यात है, अभियुक्त पर आता है – जब रिश्वत के रुपये अभियुक्त को सौंपे गये, यह साबित हो जाता है कि रुपये की स्वीकृति स्वेच्छापूर्ण और भानपूर्वक थी – दोषसिद्धि कि पुष्टि की गई। (तुला शंकर उर्फ तुलेश सितोके वि. म.प्र. राज्य) **(DB)...2958**

Public Trusts Act, M.P. (30 of 1951), Section 4 - Two Applications for Registration - Maintainability **- Two applications by different parties for registration of trust in respect of same property pending before Registrar Public Trust - Second application was entertained by Registrar however, the Revisional authority held that second application is not maintainable - Held - While deciding first application, an enquiry as per the provisions of Section 5 has to be followed and objections are required to be invited - Application filed by respondent No.1 can be treated as an objection to the first application - Registrar after enquiry can decide that which of the parties are entitled for registration of public trust - Both the applications are to be decided simultaneously. [Shri Digamber Jain Neminath Jinalaya Trust Vs. Shri 1008 Choudhary Digamber Jain Mandir Trust] (DB)...2320**

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 4 – रजिस्ट्रीकरण हेतु दो आवेदन – पोषणीयता – रजिस्ट्रार लोक न्यास के समक्ष, समान सम्पत्ति के संबंध में न्यास के रजिस्ट्रीकरण हेतु भिन्न पक्षकारों द्वारा दो आवेदन पत्र लंबित – द्वितीय आवेदन को रजिस्ट्रार द्वारा ग्रहण किया गया किन्तु पुनरीक्षण प्राधिकारी ने अभिनिर्धारित किया कि द्वितीय आवेदन पोषणीय नहीं – अभिनिर्धारित – प्रथम आवेदन का विनिश्चय करते समय धारा 5 के उपबंधोनुसार जांच होनी चाहिए और आक्षेप आमंत्रित किये जाना अपेक्षित है – प्रत्यर्थी क्र. 1 द्वारा प्रस्तुत आवेदन को प्रथम आवेदन के आक्षेप के रुप में माना जा सकता है – जांच उपरांत रजिस्ट्रार

revised only after due verification of fixation of pay by Joint Director, Treasury and Accounts - Salary in the revised pay cannot be disbursed unless such an approval is granted - Excess payment cannot be recovered without there being a justified reason, holding that a Govt. officer had received the money intentionally knowing fully well that he was not entitled to such payment - Recovery of excess payment from the death cum retirement gratuity is quashed. [Sushma Pyasi (Smt.) Vs. State of M.P.] ...*40

सेवा विधि – अधिक भुगतान की वसूली – याची के पति की संपूर्ण सेवा के दौरान, विभिन्न वेतन आयोग की सिफारिशें स्वीकार की गई थीं – प्राधिकारियों द्वारा वेतन पुनरीक्षण किया गया – याची के पति की कोई गलती नहीं यदि पुनरीक्षण करने पर उसके वेतन को त्रुटिपूर्ण प्रक्रम पर पुनरीक्षित किया गया – वेतन का पुनरीक्षण केवल संयुक्त निदेशक, कोषागार एवं लेखा द्वारा वेतन निर्धारण की सम्यक् जांच के पश्चात किया जाता है – जब तक उक्त अनुमोदन प्रदान नहीं किया जाता, पुनरीक्षित वेतन का भुगतान नहीं किया जा सकता – किसी न्यायोचित कारण के बिना, अधिक भुगतान की वसूली नहीं की जा सकती यह धारणा करते हुए कि सरकारी अधिकारी ने साशय रकम प्राप्त की, पूर्ण ज्ञान के साथ कि उक्त भुगतान का वह हकदार नहीं – मृत्यु सह निवृत्ति उपदान से अधिक भुगतान की वसूली अभिखंडित। (सुषमा प्यासी (श्रीमति) वि. म.प्र. राज्य) ...*40

***Service Law - Selection Process - Veterinary Council Act (52 of 1984), Section 2(e) - Qualification* - Petitioners prosecuting their graduate studies - They applied for appointment on the post of Veterinary Asstt. Surgeon - Their applications were not accepted on the ground that they do not possess necessary educational qualification on the cut-off date - Held - Since, the petitioners did not possess the necessary qualification on the cut-off date specified in the advertisement, their applications have rightly been rejected - They have no right to participate in the selection process. [Shailesh Kumar Patel Vs. State of M.P.] ...2395**

सेवा विधि – चयन प्रक्रिया – पशु–चिकित्सा अधिनियम (1984 का 52), धारा 2(ई) – अर्हता. – याचीगण स्नातक अध्ययन कर रहे थे – उन्होंने सहा. पशु चिकित्सा शल्य चिकित्सक के पद पर नियुक्ति हेतु आवेदन किया – उनके आवेदन इस आधार पर स्वीकार नहीं किये गये कि अंतिम तिथि को उनके पास आवश्यक शैक्षणिक अर्हता नहीं थी – अभिनिर्धारित – चूंकि, याचीगण के पास विज्ञापन में विनिर्दिष्ट अंतिम तिथि को आवश्यक अर्हता नहीं थी, उनके आवेदन उचित रुप से अस्वीकार किये गये – उन्हें चयन प्रक्रिया में हिस्सा लेने का अधिकार नहीं। (शैलेष

Service Law - Termination - Caste Certificate **- Petitioner was issued caste certificate to the effect that he belongs to 'Roniyar' Caste as per the State List which was in existence in State of Jharkhand - Services of petitioner were terminated only on the ground that in the Central list of O.B.C. issued for State of Jharkhand by Central Govt. caste 'Roniyar' does not appear - By virtue of Section 85 of Bihar Reorganization Act, 2000, State list cannot be said to be invalid - Even otherwise, subsequently for the State of Jharkhand also 'Roniyar' caste was specifically added as OBC category - Merely because of such a fact that for certain period, the list was not revalidated, it cannot be said that petitioner was not belonging to a particular caste - Termination of service bad - Petition allowed. [Jitu Prasad Vs. Industrial Development Bank]**

सेवा विधि – सेवा समाप्ति – जाति प्रमाण पत्र – याची को इस आशय का जाति प्रमाण पत्र जारी किया गया कि झारखंड राज्य की वर्तमान राज्य सूची के अनुसार वह 'रोनियार' जाति का सदस्य है – याची की सेवा मात्र इस आधार पर समाप्त की गई कि केन्द्र सरकार द्वारा झारखंड राज्य के लिए जारी की गई ओ.बी. सी.की केन्द्रीय सूची में 'रोनियार' जाति समाविष्ट नहीं – बिहार पुनर्गठन अधिनियम 2000 की धारा 85 के नाते, राज्य सूची को अवैध नहीं कहा जा सकता – अन्यथा भी, झारखंड राज्य के लिये तत्पश्चात, 'रोनियार' जाति को विनिर्दिष्ट रुप से ओ. बी.सी. श्रेणी में जोड़ा गया था – मात्र इस तथ्य के कारण कि कतिपय अवधि के लिये, सूची का पुनर्वैधिकरण नहीं किया गया, यह नहीं माना जा सकता कि याची विशिष्ट जाति का सदस्य नहीं था – सेवा समाप्ति अनुचित – याचिका मंजूर। (जीतू प्रसाद वि. इंडस्ट्रियल डिवैलपमैंट बैंक)

Service Law - Termination of Service - Unauthorized absence **- The absence of petitioner for a period of 129 days was regularized by granting extraordinary leave under Regulation 180 of Police Regulations - Once, the leave was granted to the petitioner he cannot be subjected to punishment as grant of leave amounts to condonation of absence and therefore, he cannot be treated to be unauthorized absent from duty - Order of termination quashed, however, petitioner is not entitled for back wages. [Ramesh Singh Jat Vs. State of M.P.]**

सेवा विधि – सेवा समाप्ति – अनाधिकृत अनुपस्थिति – याची की 129 दिनों की अनुपस्थिति की अवधि को पुलिस विनियमन के विनियम 180 के अंतर्गत

असाधारण अवकाश मंजूर करके नियमित किया गया – एक बार, याची को अवकाश मंजूर किये जाने पर उसे दण्डित नहीं किया जा सकता क्योंकि अवकाश मंजूर करना, अनुपस्थिति माफ करने की कोटि में आता है और इसलिए उसे कर्तव्य से अनाधिकृत अनुपस्थित रहना नहीं माना जा सकता – सेवा समाप्ति का आदेश अभिखंडित, अपितु, याची पूर्व वेतन के लिये हकदार नहीं है। (रमेश सिंह जाट वि. म.प्र. राज्य) ...*38

Specific Relief Act (47 of 1963), Section 16 - Ready and willing to perform **- Plaintiff had already paid 34,500/- on different dates out of total consideration amount of Rs. 36,000/- - It cannot be said that for the remaining meager amount of Rs. 1,500/- the plaintiff was not ready and willing to perform his part of contract - Merely notice was sent by plaintiff after near about 3 years would not mean that he was not ready and wiling to perform his part of contract as he had explained in his evidence that he was constantly pursuing the defendant to execute the sale deed - Appeal partly allowed. [Suresh Chand Mod Vs. Smt. Savitri Bai]** ...2835

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – पालन करने के लिये तैयार व रजामंद – वादी ने पहले ही संपूर्ण प्रतिफल की रकम रु. 36,000/– में से रु. 34,500/– भिन्न तिथियों को अदा किये – यह नहीं कहा जा सकता कि शेष बची अन्य रकम रु. 1,500/– के लिये वादी अपने भाग की संविदा का पालन करने के लिये तैयार व रजामंद नहीं था – करीब 3 वर्ष पश्चात वादी द्वारा मात्र नोटिस भेजे जाने का अर्थ यह नहीं होगा कि वह अपने भाग की संविदा का पालन करने के लिये तैयार व रजामंद नहीं था जैसा कि उसने अपने साक्ष्य में स्पष्ट किया है कि वह लगातार प्रतिवादी को विक्रय विलेख निष्पादित करने के लिए प्रयास कर रहा था – अपील अंशतः मंजूर। (सुरेश चंद मोड वि. श्रीमति सावित्री बाई) ...2835

Specific Relief Act (47 of 1963), Section 16 **- Specific Performance of Contract or loan - Agreement to sell was executed for a consideration of Rs. 36,000/- - Rs. 5000/- were paid by way of advance - Rs. 29,500/- were paid on different dates which were endorsed by defendant by writing on the back side of the agreement - Defendant had also purchased Two N.S.C.s of Rs. 12,500/- out of Rs. 25,000/- paid by plaintiff - Possession of land was also given to the plaintiff - It cannot be said that there was no agreement to sell but it was a loan transaction. [Suresh Chand Mod Vs. Smt. Savitri Bai]** ...2835

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का

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विनिर्दिष्ट पालन या ऋण – रु. 36,000/– के प्रतिफलार्थ, विक्रय करार निष्पादित किया गया – अग्रिम के रुप में रु. 5,000/– अदा किये गये – रु. 29,500/–, भिन्न तिथियों को अदा किये गये जिसे प्रतिवादी द्वारा करार के पीछे लेख कर पृष्ठांकित किया गया था – प्रतिवादी ने वादी द्वारा अदा किये गये 25,000/– रुपयों में से रु. 12,500/– की दो एन.एस.सी. भी क्रय की – भूमि का कब्जा भी वादी को दिया गया – यह नहीं कहा जा सकता कि विक्रय का कोई करार नहीं था बल्कि वह एक ऋण संव्यवहार था। (सुरेश चंद मोड वि. श्रीमति सावित्री बाई) ...2835

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विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – संविदा का विनिर्दिष्ट पालन – वादी के पक्ष में विनिर्दिष्ट पालन की डिक्री पारित की गई उसे, विक्रय प्रतिफल की बकाया रकम का भुगतान 30.10.2004 तक प्रतिवादी को करने के लिये निदेशित किया गया और यदि उक्त रकम स्वीकार नहीं की जाती है, उसे न्यायालय में जमा किया जा सकता है – रकम को मनीआर्डर द्वारा 20.10.2004 को भेजा गया – परंतु प्रतिवादी द्वारा अस्वीकार किया गया – अभिनिर्धारित – निष्पादन न्यायालय डिक्री से परे नहीं जा सकता – बकाया रकम जमा करने की अनुमति, निष्पादन न्यायालय द्वारा प्रदान की जानी चाहिए थी – आक्षेपित आदेश अपास्त। (अनिल कुमार साहू वि. भूरा) ...2791

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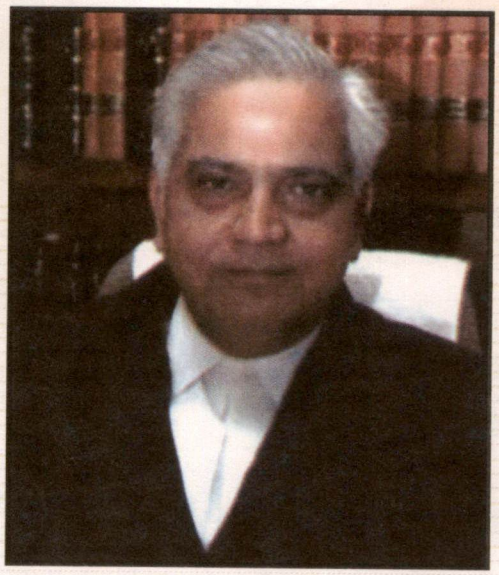
प्रतिशत सुरक्षा निधि, पांच वर्ष पूर्ण हो जाने के पश्चात मुक्त की जानी थी – याची ने कार्य पूर्ण किया – 50 प्रतिशत सुरक्षा निधि, तीन वर्ष पूर्ण होने पर मुक्त की गई – किन्तु, रखरखाव करने एवं 5 वर्ष की अवधि बीत जाने के पश्चात भी शेष 50 प्रतिशत सुरक्षा निधि मुक्त नहीं की गई, क्योंकि अन्य संविदा के अंतर्गत कुछ देयकों को मुक्त किया जाना है – अभिनिर्धारित – प्रश्नगत संविदा की सुरक्षा निधि से किसी अन्य संविदा के अंतर्गत देय रकम वसूल करने के लिये प्रत्यर्थीगण को सशक्त करने वाला कोई खंड, संविदा में नहीं – किसी अन्य संविदा के बारे में विवाद म.प्र. माध्यस्थम अधिकरण के समक्ष लंबित – प्रत्यर्थीगण को सुरक्षा निधि यथाशीघ्र मुक्त किये जाने के लिये निदेशित किया गया – रिट याचिका मंजूर। (ब्यावरा इन्फ्रास्ट्रक्चर प्रा.लि. (मे.) वि. एम.पी. ग्रामीण सड़क विकास प्राधिकार)

(DB)...2526

* * *

FAREWELL



HON'BLE MR. JUSTICE N.K. MODY

Born on December 6, 1951. Was enrolled as an Advocate on November 27, 1973. Practiced on Civil and Constitutional sides at High Court of Madhya Pradesh, Bench at Gwalior. Till elevation was working as Additional Advocate General, High Court of M.P. Gwalior Bench. Was Standing Counsel for Union Bank of India, M.P. Electricity Board and M.P. Board of Secondary Education. Sworn in as a Judge of the High Court of Madhya Pradesh on October 11, 2004 and demitted office December 5, 2013.

We wish His Lordship a healthy, happy and prosperous life.

FAREWELL OVATION TO HON'BLE MR. JUSTICE N.K. MODY GIVEN ON 05-12-2013, AT BENCH INDORE.

Hon'ble Mr. Justice S.S. Kemkar, Administrative Judge, High Court of M.P., Bench at Indore, bids farewell to the demitting Judge:-

Today we have assembled here to bid farewell to Justice N.K. Mody, who on completion of a successful inning, as a Judge of High Court of Madhya Pradesh, is leaving us.

Justice Mody was born on 6th December, 1951 in the family of a freedom fighter Late Shri M.L. Mody, who was an eminent advocate. After obtaining the Degree in Law, he was enrolled as an Advocate in the year 1973. He practiced mainly on the civil and constitutional side at Gwalior. He was Additional Advocate General, High Court of MP, Gwalior Bench. He was Senior Standing Counsel for Union of India and Standing Counsel for many Corporations, Boards and Banks. He was elevated as a Judge of the Madhya Pradesh High Court on 11th October 2004.

After performing his duties as Judge initially at Jabalpur then, he was transferred on 31st January 2005 to Indore Bench. As a Judge of High Court of Madhya Pradesh, he delivered various landmark judgments, which have been reported in law journals. While replying to his ovation, His Lordship Justice Mody had said and I quote **"During the term of tenure, my endeavour would be to encourage junior members of the Bar and to bring down the arrears of pending cases to a manageable proportion."** unquote. Today, I can certainly say that Justice Mody has done his best to encourage junior members of the Bar and to bring down arrears of pending cases.

In the end, I on my own behalf and on behalf of the Judges of this Court wish Shri Justice N.K. Mody and Mrs. Mody a very long, happy, healthy and cheerful life.

Jai Hind.

Shri Manoj Dwivedi, Addl. Advocate General, Indore, bids farewell :-

जब व्यक्ति किसी कार्य को या जिम्मेदारी को उठाने का उपक्रम करता है तो निश्चित तौर पर अपने आपसे कुछ प्रण करता है और फिर अंत तक अपनी पूर्ण ऊर्जा का सकारात्मक उपयोग कर उस प्रण को पूर्ण करने का प्रयास करता है।

मेरा यह सौभाग्य रहा है कि माननीय न्यायमूर्ति श्री मोदीजी के शपथ ग्रहण समारोह 11 अक्टूबर 2004 को भी मैं उपस्थित था एवं उक्त दिनांक को माननीय न्यायमूर्ति महोदय द्वारा अपने उद्‌बोधन में व्यक्त किया था कि वे पंच परमेश्वर के सिद्धांत को ध्यान में रखते हुए कार्य करेंगे।

आज याद आई मुझे पहली मुलाकात की बात, अजीब इत्तेफाक है।
अंजाम के दिन आयी याद, आगाज की बात।

यह वाकई सटीक बात है। आपने कहा था– "Although words are poor substitution for expression of genuine sentiments yet the assembly demands the elementry courtesy to be displaced by me."

"During the term of my tenure my endeavour would be to encourage junior members of the Bar. My endeavour would be to bring down the arrears of pending cases to manageable proportion."

आपने आगे कहा था कि ईश्वर आपको शक्ति दे कि आप अपने कर्तव्य का निर्वहन पंच परमेश्वर व न्याय के मंदिर की परम्परा अनुरूप कर सके।

आपकी सरलता का कायल हर व्यक्ति है, जो भी आपके सम्पर्क में आया आपसे प्रभावित हुए बिना नहीं रहा है। जैसा कि आपने पंच परमेश्वर परम्परा के निर्वहन को लेकर कहा वही रास्ता अपनाकर वाद को निपटाने की कोशिश की, ताकि पक्षकार को न्याय मिले। न्यायदान की आपकी अपनी शैली शायद ही हम लोग कभी भुला पाएं। आपके द्वारा कही कई बातें स्मृति पटल पर सदैव अंकित रहेगी। पक्षकार की पीड़ा का एहसास आपको सदैव रहा व समय–समय-पर आपके द्वारा उस पीड़ा का जिक्र न्यायपीठ पर से भी किया जाता रहा।

आपके द्वारा प्रकरणों के निराकरण में न्यायदान की जो कार्य–प्रणाली रही है, उसमें पुरजोर इस बात पर ध्यान दिया गया कि आम जनता की सोच एवं समझ अनुसार उन्हें न्याय प्राप्त हो और इसी सोच के साथ न्यायदान का महान कार्य किया गया।

न्याय करना आसान कार्य नहीं होता। एक जज को कानून के ज्ञान के साथ–ही–साथ यथार्थ के धरातल का ज्ञान बहुत आवश्यक होता है। माननीय न्यायमूर्ति श्री मोदीजी को इस विषय पर महारथ हासिल रही है। पूरी तन्मयता से किसी वाद को निर्णित करना, परन्तु यह भी ध्यान रखना कि आपका हृदय आपके मस्तिष्क पर हावी न हो, बड़ा दुश्कर कार्य है। कानून की परिधि में रहकर सामान्य व्यक्ति के लिए सामाजिक न्याय प्रदान करना भी समय की आवश्यकता है।

आयु आपके लिए केवल आंकड़ा रही है। क्योंकि कल शाम को 5.30 बजे भी आप उतने उत्साह से एक 354 आय.पी.सी. की एफआयआर निरस्तीकरण की याचिका की सुनवाई कर रहे थे, जितने की पहले करते रहे हैं।

आज आपके सेवानिवृत्ति के अवसर पर यह कहा जा रहा है कि आपने लगभग 71 हजार प्रकरणों का निपटारा किया गया। किसी भी न्यायमूर्ति के लिए यह महत्वपूर्ण होता है कि प्रकरणों का निपटान संख्यात्मक रूप से अधिक है या गुणात्मक रूप से। इस तथ्य की समीक्षा तो बार एसोसिएशन एवं माननीय न्यायमूर्ति एवं आने वाला समय ही कर सकता है।

जैसा कि हम सभी जानते हैं कि हमारे संविधान में तीन प्रमुख विधाएं बताई गई है। 1–न्याय पालिका 2– कार्य पालिका 3– विधायिका एवं तीनों स्तम्भों में अपना कार्य सामर्थ्य परिभाषित किया गया है। जैसा कि हम सभी जानते हैं कि विधायिका का कार्य नीति नियम का निर्धारण करना एवं न्यायपालिका की यह जिम्मेदारी है कि बनाये गये न्याय कानून का सही एवं निष्पक्ष रूप से अनुपालन किया जा सके एवं कार्य पालिका द्वारा भी न्याय निर्णयों का ठीक तरीके से क्रियान्वयन हो, इसका ध्यान रखा जाना चाहिए।

आज जब आप जीवन के एक अध्याय को समाप्त कर नये अध्याय की ओर अग्रसर हो रहे हैं तो आपको यह संतोष अवश्य होगा कि जो बातें आपके इस कार्यकाल के आगाज पर कही थी वह आज इस कार्यकाल के अंजाम तक आप निभाते रहे हैं।

माननीय न्यायमूर्ति श्री मोदीजी ज्यादा–से–ज्यादा मुकदमें निपटाने में जो उनकी ललक थी, वह उनके अंतिम कार्य दिवस तक दृष्टिगोचर होती रही। उनकी इसी इच्छा शक्ति को दृष्टिगत रखते हुए आपसे आज भी मेंशन स्लीप लेकर कई अभिभाषक उपस्थित हुए। न्यायमूर्ति श्री मोदीजी ने अपने कार्यकाल में कई महत्वपूर्ण एवं विवादास्पद प्रकरणों का त्वरित निराकरण करने में कोई संकोच नहीं किया। आपके द्वारा त्वरित प्रकरण का निराकरण करने की कार्य कुशलता को मैं व्यक्तिगत रूप से प्रणाम करता हूं।

सबसे महत्वपूर्ण तथ्य जो हम सब बिना किसी संशय के सार्वभौमिक सत्य के रूप में स्वीकार कर सकते हैं, वह यह है कि हर पक्षकार यही चाहता था कि मेरा मुकदमा मोदी साहब की कोर्ट में लगे, यह तथ्य इस बात को परिलक्षित करता है कि श्री मोदीजी इस चारदीवारी के भीतर केवल अभिभाषकों के मध्य ही नहीं, वरन् सामान्य जन में भी लोकप्रिय न्यायमूर्ति के रूप में पदस्थ रहे।

आपके द्वारा महती संख्या में मुकदमे निपटाये गये हैं। व्यक्तिगत रूप से मैं इसकी प्रशंसा करता हूं।

आज भी आप भले ही न्यायालय से सेवानिवृत्त हो रहे हैं, किन्तु आप आगे भी सामाजिक जीवन में समाज सेवा या किसी अन्य माध्यम से सक्रिय रहकर अपनी सेवाएं देते रहेंगे, यही कामना है।

अंत में कहना चाहूंगा

if you salute your duty,

you need not salute anybody.

But, if you pollute your duty,

you have to salute everybody.

We salute you Sir on finishing your term in such a nice manner.

Shri P.K. Shukla, President, High Court Bar Association, Indore, bids farewell :-

Today one of the most eminent Judge is going to retire: It is say that 'justice delayed is justice denied' and these words have been trully true during your tenure at Indore Bench. You have earned respect in the judiciary because of your compassionate behaviour and your kindheartedness for all the members of Bar. You have always encouraged the junior members of the Bar. Your judgments are practical and all the provisions of law have been duly followed and complex question of law are interpreted in the same for which they are enacted for the betterment of the public at large. Your judgments are following the principles of natural justice and there is not a single violation of it. You have always worked in the interest of litigants and public at large, this is why you are known as a Judge of high values. You have done so many things for the betterment of public at large and so many public Interest Litigations were adjudicated at your tenure for which you will be remembered for years together.

In Ethics there is a story once Lord Krishna while departuring from Mathura, said 'do not forget me' but the people said 'We will not forget you but you always keep us in our memory. We also have the same expectations from Your Lordship. At last, I on behalf of all the members of the bar request the Almighty to give you long, healthy and peaceful life.

Shri P.C. Mehta, Representative, State Bar Council of M.P., bids farewell :-

आज के यह क्षण इंदौर हाईकोर्ट बार के अभिभाषकों के लिए बहुत भावुकता, बिछोह एवं भावपूर्ण विदाई के हैं। जब हमारे बीच वर्षों से हमारे मध्य रहे--माननीय न्यायमूर्ति एन.के.मोदीजी सेवा निवृत्त हो रहे हैं। हजारों स्मृतियों के तार सहसा इन क्षणों में झंकृत हो रहे हैं। अनेक यादों की तस्वीरें मानस पटल पर उभर रही हैं। बहुत से आत्मीय संस्मरण मस्तिष्क में आ रहे हैं। किन्हें व्यक्त करूं और किन्हें न करूं इसका मैं मोह संवरण नहीं कर पा रहा हूं।

हम सब इस बात से भलीभांति परिचित हैं कि आपका जन्म मध्यप्रदेश की ऐतिहासिक एवं सांस्कृतिक नगरी ग्वालियर में हुआ और आपकी शिक्षा दीक्षा भी वहीं पर हुई। आपके पिताश्री आदरणीय मदनलालजी मोदी स्वयं ही एक प्रतिष्ठित अधिवक्ता के रूप में वही कार्यरत रहे हैं, वहीं आपके सुपुत्र श्री अंकुर मोदी भी वकालत के व्यवसाय में कार्यरत हैं। इस तरह मोदी परिवार तीन पीढ़ियों से विधि के क्षेत्र में अपना महत्वपूर्ण योगदान दे रहा है। आपने भी ग्वालियर से ही अपनी वकालत की शुरूआत की और अक्टूबर, 2004 में आप स्थाई न्यायाधीश के रूप में अपनी महनीय सेवाएं लगभग 9 वर्षों से दे रहे हैं। आपने इस अवधि में अनेक महत्वपूर्ण निर्णय दिये हैं। आपके इन निर्णयों में न्याय को विधि की किताबों से हटकर व्यवहार के धरातल पर स्थापित करने में महत्वपूर्ण योगदान दिया है। जब भी इंदौर हाईकोर्ट का इतिहास लिखा जाएगा तब आपका नाम स्वर्णिम अक्षरों में चमकता हुआ परिलक्षित होगा।

"करम प्रधान बिस्व करि राखा। जो जस करइ सो तस फलु चाखा।"

रामायण की इस पंक्ति के अनुकूल आपने न्यायमूर्ति के रूप में विधि के क्षेत्र में एक सच्चे कर्मयोगी की तरह जो महनीय सेवाएं दी हैं, उसी का प्रतिफल है कि इस सदन में उपस्थित सभी के चेहरे आपके विदाई के इस अवसर पर उदास हैं। ऐसा लगता है कि आज इंदौर हाईकोर्ट बार के चेहरे की मुस्कान गायब हो गई है। महफिल तो जमी हैं, पर नूर गायब है।

"शमा के मानिन्द जला रहा हूं ज़िन्दगी।

बुझ भले ही जाऊँ मगर सुबह तो कर ही जाऊँगा।"

आपने जीवन भर एक नये उजियारे को जन्म दिया है। अंधियारे को कोसने से अच्छा है एक दिये को जलाना। इसी तरह आपका जीवन दर्शन हमेशा सकारात्मकता से ओत–प्रोत रहा है।

"कर्मण्येवाधिकारस्ते मा फलेषु कदाचन्" गीता के इस श्लोक की तरह आपने अपने जीवन को सदैव निष्काम कर्मयोगी की तरह जिया है। आपने पैतृकता से विधि का ज्ञान प्राप्त किया है। आप जन्म से ही होनहार, प्रखर बुद्धि, मेधावी, विनम्रशील व न्यायप्रिय गुणों के स्वामी रहे हैं। यह एक बिरला संयोग है कि आपका जन्मदिन, आपकी विवाह की तिथि एवं वकालत शुरू करने का दिन एक ही रहा है। विधि के क्षेत्र में जितनी गहरी पैठ आपकी रही है, उतना ही प्रबल व गहरा पक्ष आपके दिये न्याय निर्णयों में प्रतिबिम्बित हुआ है। आपने जो भी व्यवहारित निर्णय दिये हैं, उनसे हमेशा अधिवक्ता एवं पक्षकार दोनों वर्ग ही संतुष्ट रहे हैं। आप हमेशा त्वरित न्याय के पक्षधर रहे हैं।

जब भी हम इंदौर हाईकोर्ट के इस परिसर में आएंगे तब हमें ऐसा लगेगा की न्याय के इस मंदिर में एक दिव्य, शांत, विनम्र, शील–सिन्धु, माधुर्य एवं प्रेम की साकार प्रतिमूर्ति के दर्शनों से हम वंचित हैं। वर्षों की इस आराधना का यह क्रम आज भंग होने का क्षण है। जिसे मन किसी भी तरह से स्वीकार करने को तैयार नहीं है। फिर भी इसे हमें स्वीकार तो करना ही होगा।

किसी शायर ने लिखा है–

"जहां रहेगा वहीं रोशनी लुटायेगा,

किसी चिराग का अपना मकां नहीं होता"

भूतभावन भगवान श्रीमहाकालेश्वर से आपके सपरिवार स्वस्थ, यशस्वी एवं दीर्घायु रहने की प्रार्थना वेद की इस ऋचा के साथ करते हैं–

पश्येम शरदः शतम्
जीवेम शरदः शतम्
शृणुयाम शरदः शतम्
प्रब्रवाम शरदः शतम्
अदीनाः स्याम शरदः शतम्
भूमश्च शरदः शतात्

जय हिंद

Shri Vivek Sharan, Asstt. Solicitor General of India, bids farewell:-

I deem it to be my proud privilege in offering this farewell ovation to Hon'ble Shri Justice N.K. Mody.

I quote *Patrick Devlin* what he said in his book : "The Judge":

"The social service which the judge renders to the community is the removal of a sense of injustice."

Martin Luther King further added and said:

"Injustice anywhere is a threat to justice everywhere"

"My Lord has the blessings of destiny from birth. The Almighty blessed My Lord into an illustrious family of Late Shri M. L. Mody and Late. Smt. Jaywanti Mody. My Lord's mother was a pious and religious lady who taught him basic human values, virtues and discipline. Sitting at the sacred feet of his father, My Lord, learnt basics of law and also cultivated the values through which My Lord could achieve professional success and eminence at an early age. My Lord, was the Additional Advocate General till his elevation and had a remarkable and an enviable professional profile.

Rescoe Pound said years ago that, 'the ultimate goal is to make justice for all'. Constitutional guarantee of human rights rings hollow if there is no forum available for their vindications, statutory rights become empty promises, if adjudication is too long delayed to make them meaningful or the value of a claim is consumed by the expense of asserting them. This means that delayed and expensive justice is denial of justice. There have been arrears in this High Court like any other High Court in the Country. My Lord, Justice Mody, has shown his mettle in the cradle. Sir, you are one of those who have disposed off maximum number of cases, thus preventing the arrears from mounting.

My Lord, today it is a fashion to be vocal. More vocal you are in your slogans and speeches, more wanted you are. It is a famous saying : "Judges do not speak, as do advocates to persuade. They speak through their judgements.

The judgements of My Lord, had shown the participation in the living stream of our social life, as My Lord steered the law between the endangles of rigidity and formlessness.

Today, the society is forced to re-examine its faith in the efficacy of many institutions which are cracking under the weight of external forces and the impact

of internal pressure. At this critical juncture, the justice delivery system has a very important role to play. My Lord, had tackled many such challenging tasks and made true, the expectations of common man when he thinks that judiciary shall not fail him.

Advocates who appeared before Justice Modyji, have all praises for him and would share my feelings when I say that every advocate had a feeling that whenever he will appear with a good case before My Lord, he is bound to satisfy his client as all the great qualities which a judge is required to possess, My Lord, have them in abundance.

In personal life, My Lord was generous and simple in habits. He had been a man of action and achieved concrete results in public interest. My Lord made true what he said when he took oath. He said and I Quote "You only live once but if you work it right, once is enough."

Sir, you will always enjoy a special position in the records of this court as well as in the hearts of all advocates of this Bar.

I, on my behalf, on behalf of the Union of India and on behalf of my colleagues, offer our greetings, good wishes to my lord Hon'ble Justice Shri N. K. Modyji.

Shri P.K. Saxena, Representative of Senior Advocates, bids farewell :-

My Lord Justice Mody, your Lordship has pronounced many judgments. Today is the day when the Bar has to pronounce the judgment its judgment on your tenure as a Judge and without any fear of contradiction I can very well say that you have acquitted yourself as a memorable Judge for which the Bar can justifiably feel proud of you. You had promised at the time of your elevation that you would encourage the junior members of the Bar which you have done by your courteous behaviour and attitude towards the junior members of the bar and not a single lawyer, junior or senior has ever gone out of your court feeling humiliated. Thus on this count your conduct is praiseworthy.

You have always kept the Gandhian Principles of Interpretation of Statutes in your mind. This principles tells a Judge that whenever he is facing, a problem of interpretation, then he must look to the smallest and humblest man and keep it in your mind and to decide whether this view will help the lowest man of the society

and Your Lordship have done it in immense measure which is reflected by immense judgments delivered by you on any branch of law. Whenever people approach to you, your view was that if something can be given to the litigant, he should have it and you have done and the proof of it lies in the large number of people who have gathered here and are witnessing your departure. I can assure you that Your departure is from the court and not from our hearts. Your impression is indelible in the hearts of the members of the Bar and will never be wiped out by the passage of time.

Judiciary constitutes the very strong third limb of the Constitution. Today the other two institutions of the Constitution namely Legislature and the Executive are not functioning in the spirit expected from them by the Constitution, therefore the judiciary is compelled to take upon itself the task of the Legislature as also of the executive whenever they are failing to discharge the function in public interest. It is because of this that the Supreme Court was compelled to evolve the procedure of Public Interest Litigation and have undertaken to remove the sufferings of the common and downtrodden man who cannot afford to come to court either due to ignorance, illiteracy or poverty. It is in this field Your Lordship has so actively performed that you have fulfilled the expectations of the Supreme Court in this public interest jurisdiction.

In this jurisdiction, another thing which I feel that Your Lordship despite being a non-Indorian, have made efforts to put the things for Indore in a better shape. In the P.I.L. Jurisdiction you took such interest which is normally not expected from an outsider but you tried to improve Indore which is reflected in your various judgments, one of which is the "garbage cleaning directions" and which has become a great gift to the people of Indore by Your Lordship which has made the people of Indore to feel greatly obliged. One great saying is that if a person enjoys the work he will never feel tired and you are the burning example of it as we have seen that till 1.30 P.M. you have been hearing the cases which shows that you are active throughout because you enjoyed your work of dispensing the justice more to the poor and downtrodden. I can say without fear of contradiction that you could achieve all these because of the active support given to you by Mrs. Mody. Mrs. Mody has kept you free from all other worries including the domestic one so as to leave you tension free to work in the court and dispense justice and she deserves the gratitude for your active exemplary career.

I wish that Almighty may give you the strength to work in the same active fashion throughout your life.

Farewell speech delivered by Hon'ble Mr. Justice N.K. Mody :-

आज विदाई की बेला है। और यह एक अद्भुत घड़ी है–संतोष की भी, अवसाद की भी। एक अधिवक्ता, और फिर एक न्यायाधीश के रूप में अपनी अतिव्यस्त जीवन शैली के दौरान अवकाश की चाह शायद एक चिरप्रतीक्षित अभिलाषा थी। लेकिन आज, जब अवकाश की घड़ी आई, तो महसूस हो रहा है– यही तो जीवन है। जीवन–जो कदम दर कदम, मंजिल दर मंजिल निरंतर आगे बढ़ते रहने का नाम है। और इसीलिए अवकाश ग्रहण का यह अवसर मेरे लिये एक रूपांतरण मात्र है– एक न्यायाधीश के रूप का परिवर्तन एक और नए स्वरूप में– भविष्य की नवीन जिम्मेदारियों और नव उत्तरदायत्वों का निर्वहन करने के लिए एक नई पारी की शुरूआत, तो विदा की इस घड़ी में, आइये कुछ अपनी बात कहूं– अंतर्मन के अब तक अनकहे विचार आपसे बांटूं.....

2. मेरे व्यक्तित्व के निर्माण में स्पष्ट रूप से मेरे पूज्यनीय पिता स्व. श्री मदन लाल जी मोदी की छाप है। कर्तव्यपरायणता, अनुशासन, स्वावलंबन, कठोर परिश्रम और समाज सेवा के गुण मुझे उनसे विरासत में मिले। यद्यपि मैं उनका इकलौता पुत्र था लेकिन इसका कोई मनचाहा लाभ उन्होंने मुझे कभी नहीं उठाने दिया, न ही स्नेहवश कोई विशेषाधिकार या सुविधा दी, अपितु एक हद तक वे मेरे प्रति कठोर एवं अनुशासनबद्ध ही थे। मुझ पर नियंत्रण रखते हुए भी उन्होंने मुझे अपनी कार्य शैली चयन की स्वतंत्रता दी–उनके इसी व्यवहार ने मुझे अनुशासित तो बनाया साथ ही मुझे आत्मविश्वास और सामर्थ्य से भी भर दिया। उनका मौन विश्वास उनके आशीर्वाद की तरह हमेशा मेरे साथ चला, जिसने जीवन के प्रत्येक क्षेत्र में मुझे सफलता प्रदान की।

जीवन के विकास के साथ–साथ अपने संपर्क में आने वाले व्यक्तियों, सहयोगियों, आस–पास के लोगों और वातावरण से बहुत कुछ सीखा। लोगों से घुलने मिलने के स्वभाव ने मुझे उनके सुख–दुख से सरोकार रखना सिखाया और यही सरोकार मेरे जीवन का सबसे प्रमुख ध्येय बन गया। परिवार में रचे बसे सेवा और सहायता के माहौल ने यही मेरा स्वभाव बना दिया और मेरी कामना है, ये आजीवन बना रहे।

3. एक अधिवक्ता के रूप में मेरा हमेशा विनम्र प्रयास रहा कि हर जरूरतमंद व्यक्ति और न्याय के आकांक्षी का पक्ष रखूं। एक कानून विद के रूप में मैंने शिद्दत से महसूस किया कि कई बार पीड़ित व्यक्ति को न्याय का जो हक मिलना चाहिए, वह समय अनुरूप नहीं मिल पाता। चाहते हुए भी मदद न कर पाने की विवशता अथवा असमर्थता मेरे हृदय को बेचैनी से भर देती थी । और मैं हृदय से स्वीकार करता हूं कि जीवन के किसी भी क्षेत्र में स्वयं को असमर्थ पाने से अधिक दुखदायी और कुछ भी नहीं हो सकता। यद्यपि न्यायदान के त्वरित प्रयासों को मैंने अपनी ओर से निभाने की भरसक, क्षमता के अनुरूप पूरी कोशिश की। और जहां तक बन सका अपने प्रयासों में कोई कमी नहीं आने दी है।

परमपिता परमेश्वर के प्रति आभारी हूं कि उन्होंने न्यायदान के ईश्वरीय कर्त्तव्य के संपादन के लिये मुझे चुना और संतोष है मुझे इस बात का, कि इस कृपा का मैंने अपनी सामर्थ्य से भरपूर उपयोग किया। हर रोते को हँसाना अत्यंत कठिन कार्य है, किंतु रोती आँखों से आँसू पोंछने का कार्य तो हम कर ही सकते हैं। मेरे मत में यही ईश्वर की सच्ची पूजा है, इबादत है। किसी ने सच ही कहा है–

जन्नत तो क्या है हमने खुदा को भी पा लिया
मुफ्लिस के अश्क पोंछ कर सब कुछ कमा लिया.

मेरी पूरी कोशिश रही है कि न्याय की आकांक्षा से आया प्रत्येक व्यक्ति निराश होकर न जाए। भारतीय संविधान की इस महान संस्था न्यायपालिका के प्रति आम व्यक्ति का विश्वास बना रहे, इस हेतु हमें न्याय को समाज के अंतिम छोर–गरीब से गरीब व्यक्ति तक पहुंचाना होगा। आज हमारा दुर्भाग्य है कि न्यायदान की प्रक्रिया इतनी पेचीदा हो गई है कि मुवक्किल एक बार इस अंधेरी गली में प्रवेश तो कर जाता है किंतु बाहर निकलने के लिये रोशनी की राह में भटक कर रह जाता है और "Justice delayed is justice denied" की उक्ति साकार हो जाती है। मेरी गुजारिश है कि हम सभी अपनी जिम्मेदारियों को समझें– चाहे हम जज हों या वकील। इस संसार में हम ईश्वर के प्रतिनिधि हैं– न्याय करना और न्याय मिलने में सहयोग प्रदान करना हमारा सर्वोच्च कर्तव्य होना चाहिए। और इस कर्तव्य को अगर हम पूरी ईमानदारी और निष्ठा से निभा पाए तभी हमारा जीवन सार्थक होगा।

मुझे सात्विक गर्व है कि अपने कार्यकाल में मैंने न्यायपालिका के दायित्वों का निर्वहन पूरी जिम्मेदारी से करने का प्रयास किया। लोकहित सर्वोपरि रहे–यह मैंने अपना ध्येय माना। न्यायदान त्वरित हो, कोई इस बात से दुखी न हो कि कोर्ट का समय समाप्त हो गया और सुनवाई का नंबर नहीं आया–मेरे कोर्ट से इस तरह का दुःख लेकर शायद ही कभी कोई गया हो। अपनी असुविधा, अस्वस्थता को जहाँ तक हो सका– अपने कर्तव्यपालन में मैंने बाधा नहीं बनने दिया। निस्संदेह मेरे अकेले के चाहने से यह संभव नहीं था, आप सभी के सहयोग स्वरूप यह संभव हो पाया है। यही मित्रवत् वातावरण सदैव बना रहे–यही मेरी कामना है।

(4) आज मेरी बात अधूरी रहेगी, अगर मैं अपने स्वप्नों को साकार बनाने में दो व्यक्तियों का विशेष उल्लेख न करूँ। मेरे समग्र उत्तरदायित्वों को निबाहने में ही नहीं, मेरे जीवन को आसान बनाने में जिनका विशेष महत्व/योगदान है–प्रथम–मेरी माताजी श्रीमती जयवती मोदी, जिन्होंने मेरे पिता के स्वर्गवास के पश्चात् सभी पारिवारिक और सामाजिक दायित्वों को बड़ी कुशलता से निभाया और मुझे तमाम जिम्मेदारियों से मुक्त रखा। द्वितीय– मेरी धर्मपत्नी श्रीमती शीला मोदी, जिन्होंने घर, परिवार और समाज के सभी दायित्व सफलापूर्वक निभाए। श्रीमती शीला मोदी एक धार्मिक महिला होने के साथ–साथ एक जागरूक समाजसेविका भी हैं। वे करूणा और ममता से भरा हृदय अपने सीने में रखती हैं– इसका प्रमाण है वे 50 से अधिक बालिकाएं जो नेत्रहीन होते हुए भी 'आत्मज्योति' ग्वालियर के आंगन में उन्हें स्पष्ट महसूस करती हैं, उनके नेतृत्व में उज्जवल जीवन की राह देखती हैं । मेरे जीवन में उनका विशिष्ट स्थान है और उनके पूर्ण सहयोग के बगैर यह सफर सफलतापूर्वक तय कर पाना संभव नहीं था।

साथियों, मैं अपने पिता का एक इकलौता पुत्र हूं। जीवन में भाई का एक विशिष्ट स्थान होता है। बड़े भाई की भूमिका एक पिता के समान होती है। मेरे जीवन में ऐसी दो शख्शियत है, जिन्हें इस अवसर पर याद करना मैं अपना कर्तव्य समझता हूं। इस क्रम में पहले व्यक्ति हैं–माननीय न्यायाधिपति श्री आर.सी.लाहोटी, सेवानिवृत्त मुख्य न्यायाधिपति, सर्वोच्च न्यायालय एवं श्री रमेश अग्रवाल, प्रमुख संपादक, दैनिक भास्कर पत्र समूह। आप दोनों से मुझे अग्रज जैसा स्नेह प्राप्त हुआ एवं समय–समय पर मार्गदर्शन मिला।

आज मैं जो कुछ भी हूं, ईश्वर की कृपा, माता–पिता, गुरूजन की आशीष और आप सरीखे मित्रों विशेष तौर पर ब्रदर जजेस एवं बार की शुभकामनाओं की वजह से हूं। आप सभी के सहयोग और सकारात्मकता ने मुझे अधिक से अधिक कार्य करने की प्रेरणा और स्फूर्ति दी। आप सबके साथ बिताए

हुए ये पल मेरे जीवन की स्मृतियों की अमूल्य निधि हैं।

मैंने इंदौर में जब कार्य प्रारंभ किया, उस दिन मुझे जो स्टॉफ प्राप्त हुआ था, वह आज भी मेरे साथ है। मेरे स्टॉफ का हर व्यक्ति, जो प्रत्यक्ष रूप से मुझसे जुड़ा रहा, उसने मुझे कभी स्टॉफ की कमी अहसास न होने दी और रात–दिन एकजुट होकर मेरे साथ काम किया। उच्च न्यायालय का हर कर्मचारी, अप्रत्यक्ष रूप से मुझे सहयोग करता रहा, मैं सभी का हृदय से आभारी हूं।

आज इस घड़ी में, मैं जीवन को बहुत सहज भाव से स्वीकार करता हूँ। मुझे परमपिता परमेश्वर के दिये काँटों से भी उतना ही प्यार है, जितना फूलों से। जीवन के प्रवाह में सहज प्रवाहित होते हुए मैं "बहुजन हिताय बहुजन सुखाय" की कामना करता हूं।

(5). और अब विदा चाहता हूं आप सभी के प्रति आभार ज्ञापित करते हुए और ये कहते हुए कि–

कोई याद रहे न रहे, कोई याद रहे न रहे
हम तो वक्त के पैमाने पे अपने लब के निशां छोड़ चले।

पुनः आभार, धन्यवाद.

NOTES OF CASES SECTION

Short Note

****(43)***

Before Mr. Justice J.K. Maheshwari

Cr. A. No. 636/1998 (Indore) decided on 23 January, 2013

MUKESH & anr. ...Appellants

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 306/34, 498-A /498-A/34 - **Wife committed suicide in matrimonial home - If some family dispute was in family which was resolved by sitting alongwith members of family and Society then some other evidence should have been brought on record showing instigation to commit suicide - No offence of instigation of commission of suicide has been proved by the prosecution - Appellants acquitted.**

दण्ड संहिता (1860 का 45), धाराऐं 306/34, 498–ए/498–ए/34 – पत्नी ने ससुराल में आत्महत्या कारित की – यदि परिवार में परिवारिक विवाद था जिसे परिवार और समाज के सदस्यों के साथ बैठकर सुलझाया गया था, तब आत्महत्या कारित करने के लिये उकसाया जाना दर्शाते हुए कुछ और साक्ष्य अभिलेख पर लाना चाहिए था – अभियोजन द्वारा आत्महत्या कारित करने के लिये उकसाये जाने का अपराध साबित नहीं किया गया है – अपीलार्थी दोषमुक्त।

Case referred :

2007 AIR SCW 3107.

T.N. Singh with *Hemlata Gupta*, for the appellants.
Manish Joshi, P.L. for the respondent/State.

Short Note

****(44)***

Before Mr. Justice U.C. Maheshwari

M.A. No. 1323/2003 (Jabalpur) decided on 9 April, 2013

SUMAN SINGH (SMT.) & ors. ...Appellants

Vs.

PRITHVIPAL SINGH & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 173 - Compensation - **Deceased was an agriculturist and evidence available on record shows**

that annual income from agriculture was Rs. 2 lacs - Even after deducting expenses productivity of the deceased should be deemed to 25% of 2 lacs which comes to Rs. 50,000 p.a. - Total dependency of claimants after deducting 1/4th regarding expenses of deceased, comes to Rs. 37,500 - Multiplier of 14 would apply as the age of the deceased was in between 40 to 45 years - Compensation enhanced to Rs. 5,45,000/-.

मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – मृतक, एक कृषक था और अभिलेख पर उपलब्ध साक्ष्य दर्शाता है कि कृषि से वार्षिक आय रू. 2 लाख थी – यदि खर्चे घटाये भी जाए तब भी मृतक की उत्पादकता 2 लाख का 25 प्रतिशत मानी जानी चाहिए जो रू. 50,000 प्रतिवर्ष बनती है – मृतक के खर्चों से संबंधित 1/4 घटाने के पश्चात दावाकर्ताओं की कुल आश्रितता रू. 37,500 बनती है – 14 का गुणक लागू होगा क्योंकि मृतक की आयु 40 से 45 वर्ष के बीच थी – प्रतिकर बढ़ाकर रू. 5,45,000/– किया गया।

Case referred :

(2009) ACJ 1298.

Ranvir Singh, for the appellants.

Respondent Nos. 1 & 2 unserved.

None for the respondent Nos. 2, 4 & 6, although served and represented through duly engaged counsel.

Harpreet Singh Ruprah, for the respondent No.5.

I.L.R. [2013] M.P., 2757
SUPREME COURT OF INDIA
Before Mr. Altamas Kabir, Chief Justice of India &
Mr. Justice J. Chelameswar
Civil Appeal No. 5228/2013 decided on 8 July, 2013

MOHD. JAMAL ...Appellant
Vs.
UNION OF INDIA & anr. ...Respondents

Constitution - Article 14 - Allotment of Petrol Pump Dealership - Promissory Estoppel and Legitimate Expectation **- Oil companies decided to set up Company Owned Company Operated Outlets (COCO) - Scheme formulated on 08.10.2002 provided that first COCO outlets would be offered to landlord provided he was found suitable - Petitioner applied for grant of dealership under the landlord category - He was selected for the same - However, Scheme dated 08.10.2002 was suspended and new concept of COCO outlets to be run by Maintenance and Handling Contractors was introduced - Held - Scheme dated 08.10.2002 cannot be co-related with new concept dated 06.09.2003 unless the appellants can establish that they had entered into the lease agreements with Oil Companies upon the understanding that once earlier policy is restored, the land owners would be given the option of having the COCO units converted into regular retail outlet - Land owners who had entered into lease agreement after the suspension of policy dated 08.10.2002 cannot now claim any right on the basis of earlier policy in absence of any letter of intent - If any damage has been suffered by land owners then remedy lies elsewhere - Doctrine of promissory estoppels and legitimate expectation cannot be made applicable - Appeal dismissed. (Paras 57 to 59)**

संविधान – अनुच्छेद 14 – पेट्रोल पम्प डीलरशिप का आवंटन – वचन विबंध और विधिसम्मत प्रत्याशा – तेल कम्पनी का स्वामित्व, कम्पनी द्वारा प्रचालित आउटलैट **[Company Owned Company Operated (COCO)]** स्थापित करने का निर्णय लिया – 08.10.2002 को बनायी गई योजना उपबंधित करती थी कि प्रथम **COCO** आउटलैट, भूमिस्वामी को प्रस्तावित किया जायेगा बशर्ते कि उसे योग्य पाया गया हो – याची ने भूमिस्वामी की श्रेणी के अंतर्गत डीलरशिप प्रदान किये जाने हेतु आवेदन किया – उक्त के लिये उसका चयन किया गया – किन्तु, योजना दिनांक 08.10.2002 निलंबित की गई और **COCO** आउटलैट, अनुरक्षण एवं प्रबंध

ठेकेदारों **(Maintenance and Handling Contractors)** द्वारा चलाने की नयी संकल्पना प्रस्तावित की गई – अभिनिर्धारित – योजना दि. 08.10.2002 को नयी संकल्पना दिनांक 06.09.2003 के साथ परस्पर संबंधित नहीं किया जा सकता जब तक कि अपीलार्थीगण, यह स्थापित नहीं कर सकता कि उन्होंने तेल कम्पनियों के साथ लीज अनुबंध इस समझ के साथ किया था कि एक बार पूर्ववर्ती नीति पुनः स्थापित होने पर, भूमिस्वामियों को **COCO** इकाईयां, नियमित फुटकर आउटलैट में परिवर्तित करने का विकल्प दिया जायेगा – भूमिस्वामी, जिन्होंने योजना दिनांक 08.10.2002 के निलंबन पश्चात लीज अनुबंध में प्रवेश किया है, वे इस आशय के किसी दस्तावेज की अनुपस्थिति में पूर्वतर योजना के आधार पर किसी अधिकार का अब दावा नहीं कर सकते – यदि भूमिस्वामियों को कोई क्षति हुई है तब उसका उपचार कहीं और है – वचन विबंध एवं विधिसम्मत प्रत्याशा का सिद्धांत लागू नहीं किया जा सकता – अपील खारिज।

Cases referred :

(1968) 2 SCR 366, (1979) 2 SCC 409, (1981) 1 SCC 11, (1985) 4 SCC 369, (2010) 3 SCC 274, (2011) 6 SCC 312, (1991) 1 SCC 212, (1989) 3 SCC 293, (1990) 3 SCC 752, (1979) 3 SCC 489, (1974) 4 SCC 3, (1978) 1 SCC 248, (2011)11 SCC 34, (2005) 1 SCC 625, (1995) 6 SCC 363, (1995) 1 SCC 274, (2009) 1 SCC 180.

J U D G M E N T

The Judgment of the Court was delivered by : **Altamas Kabir, CJI :-** Special Leave Petition (Civil) No. 5849 of 2008 filed by one Mohd. Jamal, has been heard along with several other matters where the same issue has been raised and the reliefs prayed for are similar.

2. Leave granted in all the matters. During the hearing of these matters, Mohd. Jamal's case was taken up as the lead matter.

3. From the facts as disclosed in the several Special Leave Petitions (now Appeals), there are three groups of matters included in these Appeals. The first group relates to the State of Karnataka, where the Union of India is the Petitioner/Appellant. The second group involves matters filed by the private parties where the jurisdiction is that of Delhi. The third group deals with the similar question in regard to the States of Gujarat and Madhya Pradesh.

4. All the private Appellants were and are aspirants for dealership in respect of retail outlets of the Indian Oil Corporation and the IBP, which merged with the Indian Oil Corporation on 2nd May, 2007. The genesis of

the claim for dealership arises out of policy guidelines, being Policy/MDPM No.319/02 dated 8th October, 2002, for selection of retail outlet dealers, published by the Indian Oil Corporation after the distribution of petroleum product had been deregulated. The said guidelines dealt with the procedure for locations outside Marketing Plans and also stipulated that for the purpose of selection, the dealership would be categorised as indicated in the guidelines and all retail outlets would be developed only on A/C Sites basis which finds place in clause 2 of the guidelines dealing with the common guidelines for all categories.

5. Appearing for the Appellant in SLP(C)No.5842/2008 (now appeal), Mr. Pradip Ghosh, learned Senior Advocate, submitted that after nationalisation of Oil Companies in 1976, the sale and distribution of petroleum and petroleum products were under the control of the Central Government and regulated by the provisions of the Essential Commodities Act, 1955. On and from 1978 the Central Government allowed the Public Sector Oil Companies to set up retail outlets through an Oil Selection Board, which was subsequently renamed as Dealer Selection Board. Mr. Ghosh submitted that the Central Government devised a methodology of setting up of retail outlets, by constituting the Industrial Meeting Committee which would decide distribution of outlets region-wise in respect of each petroleum company. Till 1998, the production and marketing of petroleum and petroleum products were under the control of the Ministry of Petroleum and Natural Gas and were executed through Public Sector Oil Companies. In 1998, the Central Government decided to partly deregulate the production, supply and distribution of petroleum and its products and indicated 2002 as a cut-off year to completely deregulate the production and supply of petroleum and petroleum products. The Central Government, therefore, again took steps to meet such objectives and in that connection decided to make certain changes with regard to the functioning of natural oil and gas companies under the Market Driven Pricing Regime and to workout the modalities of setting up petrol pumps on National and State Highways.

6. This led to the creation of the concept of Company Owned Company Operated outlets (COCO) as a means to enable National Oil Companies to run and operate their own outlets which were to be run as model retail outlets. Mr. Ghosh submitted that the scheme thus devised was to extend and cater to all National and State Highways and has certain salient features which need

to be spelt out in order to appreciate future developments, which form the subject matter of the various appeals being heard by us.

7. One of the more important objectives which the scheme hoped to achieve was to develop the retail outlets on relatively large plots of land measuring 5 acres or so on the Highways. Such land would be under the control of the marketing company either by way of purchase or on long-term lease basis. Such retail outlets would also have facilities and amenities to be developed by the Dealer in line with the norms laid down by the Oil Companies on a standardised purchase. Such retail outlets were to be developed outside the Marketing Plan in a transparent manner, subject to observance of ban on multiple dealership. Mr. Ghosh submitted that the said scheme was to be executed in two phases. Phase I would enable the Oil Companies to launch the scheme on pilot project basis for setting up COCO outlets which might serve as models for future outlets. The second phase would be based on the experience of the first phase and the rest of the scheme would be taken up and completed within a period of three years.

8. Mr. Ghosh submitted that apparently a decision had been taken by the oil companies to convert the COCO outlets into regular dealerships. A uniform policy was formulated for manning and controlling of Jubilee Retail Outlets and, pursuant to such policy, the Government approved the Indian Oil Corporation's (IOC) decision to run 83 outlets for which sites had been taken over and facilities installed on COCO basis under certain guidelines. Mr. Ghosh urged that it has subsequently come to light that in respect of the said 82 outlets, 77 dealers or those holding Letters of Intent, had been allotted dealership.

9. However, on 1st April, 2000, the Government of India notified its policy for operation of COCO outlets through contractors. In February, 2002, the Indian Oil Corporation purchased 33.58% of Equity Shares of IBP Ltd. Till 31st March, 2002, no oil company could by itself select its dealers or award its dealership to them. The Government appointed Dealer Selection Boards, who were entrusted with the task of selection of dealers for all oil companies. It was only from 1st April, 2002, that the Administered Price Mechanism was dismantled and the Dealer Selection Boards were dissolved. The Oil Companies were, thereafter, given a certain amount of freedom to frame their own policies, relating to the setting up of the retail outlets by selection of dealers.

10. On 8.10.2002, IBP Ltd. devised and/or formulated its policy and framed guidelines, *inter alia*, for selection of retail outlets in the deregulated scenario. In line with the change in policy formulated by the Government of India, guidelines were framed which recognised the rights of the land owners as a category of persons entitled to dealership, subject to conditions. Clause 3 of the scheme provided that the dealership of such COCO outlets would first be offered to the landlord, provided he was found suitable. In case the landlord declined to accept the dealership, it would be offered to Maintenance and Handling Contractors (M&H). In the event, the Maintenance and Handling Contractor also declined to accept the dealership, the same would be offered to the best candidate available.

11. Mr. Ghosh submitted that on 14th January, 2003, in line with the Respondent's policy guidelines for selection of retail outlet dealers in the aftermath of deregulation vide Memo Reference Policy/MDPM No.319/02 dated 8.10.2002, and a subsequent clarification of the General Manager (M), MHO dated 14.12.2002, the Appellant, Mohd. Jamal, applied for a retail outlet dealership for his land in the land owner's category. Such application was made pursuant to an advertisement issued by the oil company and the Appellant was also called upon by the oil company to obtain Dealership Agreement Form from the Divisional Office by depositing Rs.1000/-. After obtaining such Form, the Appellant submitted the same to the company. Mr. Ghosh submitted that on 15th January, 2003, the Committee on Dealer Selection found the Appellant's land suitable for developing a retail outlet, on National Highway No.28, Sadatpur PS, Muzaffarpur Road, Bihar. The company even sought prior approval for the said site from the Joint Chief Controller of Explosives, East Circle, Calcutta. Based on the recommendation made by the Dealer Selection Committee dated 15.1.2003, on 25th January, 2003, the General Manager (ER) of the Respondent No.2 Company recommended that the dealership be given to the Appellant and directed that a Letter of Intent be issued in his favour on receipt of the explosive licence. Mr. Ghosh submitted that while the Appellant's matter for grant of dealership was at the final stage, on 5th February, 2003, the Policy adopted on 8.10.2002 was suspended. It has, of course, been claimed on behalf of the Appellant that the suspension of the policy was never communicated to the land owners, including the Appellant, Mohd. Jamal.

12. It is also the Appellant's case that it was mutually agreed that till the

issuance of the Letter of Intent, as an interim arrangement, a nominee of the Appellant would be appointed as the Maintenance and Handling Contractor to run the petrol pump, provided that an affidavit in the prescribed form would be furnished by the Contractor. According to Mr. Ghosh, relying on such assurance, the Appellant offered his land on lease to the Oil Company on 14.3.2003, subject to the condition that the monthly rental of the land would be Rs.27,000/- and would commence from the date of registration of the documents. Further to the said understanding on 29th March, 2003, a contract for Maintenance and Handling was executed between the Oil Company and Mohd. Ishtiaq Alam, the brother and nominee of the Appellant, for running the said petrol pump. Before Mohd. Ishtiaq Alam was appointed as M&H Contractor, on anticipation of the Oil Company that he would be granted dealership, invested a sum of about Rs.25 lakhs to set up infrastructure. Ultimately, on 31st March, 2003, the petrol pump was commissioned and started operating.

13. Mr. Ghosh submitted that in the above circumstances, the Appellant executed a lease deed in favour of the Oil Company for a period of 15 years, with a clause for further periods of renewal.

14. Mr. Ghosh submitted that the aforesaid arrangement was understood by all the parties to be of temporary duration, as would be evident from the fact that the rent initially settled at Rs.27,000/- per month in respect of the Appellant's land at Sadatpur was reduced to Rs. 21,000/- per month after negotiation, which upon calculation comes to approximately 50 paise per square feet, which in terms of the valuation made, was abysmally low.

15. Mr. Ghosh submitted that various other decisions were taken both by the Oil Company as well as the Ministry concerned by which fresh guidelines were also framed for selection of retail outlets and SKO-LDO (Super Kerosene Oil - Light Diesel Oil) dealers. Learned counsel submitted that by a policy circular No. 05/0405 dated 30.3.2005, introduced by the Oil Company, existing land owners of the concerned Jubilee Retail Outlets and the Company Owned and Company Operated Outlets were disqualified from being appointed as dealers, although, the same was never communicated to the Appellant. Mr. Ghosh submitted that, in the meantime, the temporary arrangement which had been arrived at in the case of the Appellant, Mohd. Jamal, has been continuing on the strength of orders passed by this Court. Mr. Ghosh also urged that on 6th September, 2006, the Oil Company

formulated a new policy whereby the concept of offering dealership to land owners was abandoned to the prejudice of the land owners whose Letters of Intent for dealership were pending and where lands had also been taken on long term lease by the Oil Company at low rates of rent, on the assurance that dealership under the land owners category would be given to them. By virtue of the new policy, the Oil Company proposed to run outlets on their own and/ or through Labour Contractors, in supersession of all earlier policy guidelines.

16. Mr. Ghosh submitted that one of such land owners filed Writ Petition No. 358 of 2006 - *N.K. Bajpai Vs. Union of India and Others,* challenging the changed policy. While disposing of the Writ Petition, the learned Single Judge of the Delhi High Court, inter alia, held that Oil Companies cannot assign the running of petrol pumps on the land of the writ petitioners without their consent. Mr. Ghosh submitted that aggrieved by the said Notification dated 6.9.2006, the Appellant also filed Writ Petition No. 2392 of 2007, before the Delhi High Court for quashing of the said Notification and to restrain the respondents from terminating/cancelling the arrangement arrived at regarding the running of the retail outlet on the Appellant's land through his nominee, or in the alternative, to return the land to the Appellant if the dealership was not granted to the Appellant. Mr. Ghosh submitted that the learned Single Judge of the Delhi High Court referred the matter to a Division Bench for hearing and on 8.2.2008, the Delhi High Court disposed of a bunch of Writ Petitions, while retaining 11 such Writ Petitions, which, it felt needed further consideration since the said Writ Petitions projected an implied promise and/ or understanding having been reached between the land owners and the Oil Companies concerned having regard to the low lease rentals for the lands offered by the land owners to the companies for establishing their retail outlets. Learned counsel submitted that the Appellant's Writ Petition was among those bunch of petitions, which were dismissed by the High Court, although, the Appellant's case was the same as that of the 11 Petitioners, whose matters had been retained by the High Court for further consideration. Mr. Ghosh submitted that it is at that stage that this Court admitted the Appellant's Special Leave Petition (Civil) No. 5849 of 2008, on 31st July, 2008, and passed an order whereby the parties were directed to maintain status-quo as on that day, with liberty to the respondents to apply for variation and/or modification of the order, if so advised.

17. The main ground of challenge canvassed by Mr. Ghosh on behalf of the Appellant, Mr. Jamal, and other similarly placed Appellants, was that having

acted on the basis of a policy by which the Respondent Oil Companies had offered full dealership to land owners and having caused such land owners to alter their position to their disadvantage, the Oil Companies were now estopped from going back on their promise. Mr. Ghosh urged that the decision to discontinue the grant of dealership and to introduce the new concept of COCO outlets, to be run by the Maintenance and Handling contractors, could not be used to the disadvantage of those land owners in whose favour a decision had already been taken to issue Letters of Intent for grant of dealership. Mr. Ghosh submitted that these cases were clearly covered by the doctrine of promissory estoppel, inasmuch as, in these cases the land owners had altered their positions to their detriment in several ways. Mr. Ghosh submitted that in most cases the rates of rents at which the lands were offered to the Oil Companies were extremely low and did not reflect the market rental of such lands, which is one of the indications that a promise had been made to the land owners that they would be granted dealerships in respect of the said lands, which was in tune with the policy, which had been declared by the Oil Companies earlier.

18. Mr. Ghosh submitted that in other cases the landlords had invested large sums of money, as in the case of *Mohd. Jamal,* in preparing the land offered for operating the retail outlets of petroleum and petroleum products, ostensibly on the promise that they would be granted dealership for running the said outlets. Mr. Ghosh submitted that acting on such promise the Appellant, Mohd. Jamal, spent more than Rs.27 lakhs to prepare the site for running the retail outlet and it would not be unreasonable to accept the case made out on his behalf that such expenditure was incurred in lieu of such promise. In certain other cases, the land owners had been persuaded to enter into long term lease agreements, again at nominal rents, on the assurance that their nominees would be appointed as Maintenance and Handling Contractors of the different COCO units, pending the decision to grant full dealership in respect of such retail outlets, in keeping with the earlier policy of reducing the number of COCO units and retaining a few to be run by the Oil Companies as model outlets.

19. Mr. Ghosh submitted that in these circumstances, the Oil Companies and the Union of India are estopped by the promises made by them to grant dealerships to the land-owners on the basis of the policy existing prior to 5th February, 2003 and 6th September, 2006.

20. Mr. Ghosh submitted that one of the earliest decisions of this Court regarding the doctrine of promissory estoppel was in *Union of India Vs.*

M/s. Indo-Afghan Agencies Limited [(1968) 2 SCR 366], wherein it was held that even though the case did not fall within the scope of Section 115 of the Evidence Act, it was still open to a party who had acted on a representation made by the Government to claim that the Government should be bound to carry out the promise made by it, though not recorded in the form of a formal contract.

21. Reference was then made to the celebrated decision in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others* [(1979) 2 SCC 409], commonly known as the "M.P. Sugar Mills case", wherein a Bench of Two Judges went into a detailed enquiry regarding the doctrine of promissory estoppel and equitable estoppel and observed that the doctrine of promissory estoppel is not really based on the principle of estoppel, but is a doctrine evolved by equity in order to prevent injustice. It has also been observed that there is no reason as to why it should be given a limited application by way of defence and that it could also be the basis of a cause of action and all that was necessary for attracting the said doctrine was that the promisee should have altered his position in relying on the promise. It was emphasized that it was not necessary that the promise should suffer any detriment as well.

22. Mr. Ghosh submitted that a somewhat different view had been taken also by a Bench of Two Judges in *Jit Ram Shiv Kumar Vs. State of Haryana* [(1981) 1 SCC 11], but the differing view expressed in the said case was overruled by a Bench of Three Judges in *Union of India and Others Vs. Godfrey Philips India Limited* [(1985) 4 SCC 369], wherein the decision in the *M.P. Sugar Mills case* (supra) was pronounced as being the correct law.

23. Various other decisions have also been cited in support of the aforesaid doctrine of promissory estoppel or equitable estoppel, but it will suffice to refer to one of the latest decisions in this regard in *State of Bihar Vs. Kalyanpur Cement Limited* [(2010) 3 SCC 274], wherein it was emphasized that in order to invoke the aforesaid doctrine, it has to be established that a party had made an unequivocal promise or representation by word or conduct, to the other party, which was intended to create legal relations or affect the legal relationship to arise in the future, and that the party invoking the doctrine has altered its position relying on the promise.

24. Mr. Ghosh submitted that having held out a promise to grant a dealership to the Appellant and the other Appellants in the connected matters,

in respect of the lands offered by them for setting up retail outlets for the sale of petroleum and petroleum products and having acted thereupon just prior to the stage of grant of Letters of Intent, it was no longer available to the Oil Companies to renege on their promise, particularly when the aspirants for dealership had altered their position and had spent enormous sums of money to make the sites ready for setting up the retail outlets. As was observed in the *M.P. Sugar Mills case* (supra), it was not even necessary for the land owners to have suffered any prejudice on account of such alteration. It was sufficient that, pursuant to the promise made of grant of dealership, they had altered their position and had spent large sums of money to make the sites ready for occupation.

25. To bolster his submissions, Mr. Ghosh referred to the Single Bench decision of the Karnataka High Court dated 28th July, 2009, in Writ Petition No. 1016 of 2007, filed by one Shri Y.T. Narendra Babu and other connected Writ Petitions, wherein the facts identical to the facts in these cases were in issue. In fact, SLP(C) No. 9655 of 2010 (now Appeal) has been filed by the Indian Oil Corporation Limited against Y.T. Narendra Babu, against the appellate order of the Karnataka High Court dated 19.11.2009, in Writ Appeal No. 3248 of 2009, endorsing the judgment of the learned Single Judge in the Writ Petition. In the same set of facts, where lands had been taken on lease on the assurance that the land owners would be appointed as dealers in due course and that till then the retail outlet would be treated as a COCO unit to be run by a nominee of the land owner, the learned Single Judge was of the view that in view of the assurance given to the land owners and notwithstanding the change in policy guidelines regarding the allotment of dealership in favour of the land owners, the doctrine of promissory estoppel and of legitimate expectation would apply to the case. The learned Single Judge, therefore, allowed the Writ Petition and directed the Respondents to process the applications filed by the Petitioners or their nominees for grant of dealership on a co-terminus basis with the period of the lease of the land on which the retail outlets are established. As indicated hereinbefore, the said views were approved by the Division Bench, which did not interfere with the decision or the directions given consequent thereto by the learned Single Judge.

26. Mr. Ghosh then turned to another aspect, which had been considered in the cases heard and determined by the Gujarat High Court, namely, the issuance of Comfort Letters in several cases where the lease deed had been

executed prior to 8th October, 2012, assuring the land owners of the demised plots that they would enjoy the right of first refusal if COCO outlets set up on their lands were to be converted into dealerships. Mr. Ghosh pointed out that some of the Comfort Letters addressed to the land owners issued on behalf of the IBP Company Limited, by its Divisional Manager, have been annexed to the Special Leave Petitions (now Appeals), filed by those aggrieved by the judgment of the Division Bench of the Gujarat High Court, setting aside the orders of the learned Single Judge. Upon holding that the Comfort Letters issued to individual land owners could not be relied upon, as being a policy decision of the Company, the Division Bench came to the conclusion that the learned Single Judge was in error in giving a finding of fact in a Writ Petition under Article 226 of the Constitution, particularly when the facts were disputed and the entire evidence was yet to be disclosed. Mr. Ghosh submitted that, while allowing the Writ Appeals filed by the Oil Companies, the Division Bench of the Gujarat High Court had misconstrued the submissions made with regard to the doctrine of promissory estoppel, which would be available from the surrounding facts and circumstances, even if the same had not been explicitly spelt out.

27. In support of his submissions, Mr. Ghosh referred to the decision of this Court in *Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat* [(2011) 6 SCC 312], wherein the learned Judges, while considering the scope of the Supreme Court's jurisdiction under Article 142 of the Constitution, held that even during a final hearing the Supreme Court was not precluded from considering the controversy in its entire perspective and that the power under Article 142 was to do complete justice, unless there was an express provision of law to the contrary. Mr. Ghosh urged that this Court had always held that technical objections should not come in the way of the Supreme Court doing complete justice to the parties.

28. Mr. Ghosh submitted that in the light of the above, the Oil Companies should either be directed to act in terms of the promise made to grant dealerships or in the event of their unwillingness to do so, they may be directed to restore possession of the lands leased out to them in accordance with the doctrine of restitution.

29. Mr. Rana Mukherjee, who appeared for some of the Petitioners (now Appellants) in this batch of cases and had also assisted Mr. Pradip Ghosh, while reiterating the submissions made by Mr. Ghosh, referred to some of the

factual differences in the individual Writ Petitions and urged that, being in a dominant position, the Government cannot act arbitrarily. Having made a promise to grant dealership licences to some of the land owners, who had on the basis of such assurances demised their lands to the Oil Companies for rents which were markedly lower than the existing rents in the area and had also spent large amounts in making such sites ready, the Oil Companies could not go back on such assurances on the plea that there had been a change in the policy for grant of dealership. Mr. Rana Mukherjee submitted that the window period, which had been identified by this Court, between 8th October, 2002 and 5th February, 2013, was a period when the policy to grant dealerships was in full force and the applications received and processed during the said period would have to be treated differently from the applications made thereafter, after the change in the policy. Mr. Mukherjee, in fact, contended that in some of the cases, where applications had been made for grant of dealership pursuant to advertisements published in the Press, but in whose cases the decision to issue Letters of Intent had been kept in abeyance prior to 8th October, 2002, were also entitled to the same benefits in keeping with the doctrine of promissory equity.

30. Mr. Mukherjee, who also appeared in SLP(C) No. 5756 of 2008 (now Appeal), filed by one Khurshid Ahmed Chippa, submitted that this Court in *Kumari Shrilekha Vidyarthi Vs. State of U.P.* [(1991) 1 SCC 212], wherein the doctrine of natural justice fell for consideration, and it was held that every State action, in order to survive, must not be susceptible to the vice of arbitrariness, which forms the essence of Article 14 of the Constitution. While interpreting Article 14 of the Constitution, this Court has consistently held that non-arbitrariness is a necessary concomitant of the rule of law and is, in substance, fair play in action. In the said decision, it was further observed that whether an impugned act is arbitrary or not, is ultimately to be decided on the facts and circumstances of each case, but an obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and, if so, does it satisfy the test of reasonableness. It was further observed that every State action must be informed by reason and it follows that an act, uninformed by reasons, is arbitrary.

31. Mr. Mukherjee also referred to the decision of this Court in *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293] and *Mahabir Auto Stores Vs. Indian Oil Corporation* [(1990) 3 SCC 752], wherein similar views have consistently been expressed. Mr.

Mukherjee also prayed for the same reliefs as prayed for by Mr. Pradip Ghosh, learned Senior Advocate, on behalf of some of the Appellants.

32. Mr. Jitender Mohan Sharma, learned Advocate who appeared with Mr. Pradip Ghosh, learned Senior Advocate, in some of the Appeals, also appeared individually for some of the other Appellants, such as Tirath Ram Chauhan, Sohan Singh, etc. In facts which were similar to that of the facts in Mohd. Jamal's case and in almost all the other cases, Mr. Sharma repeated and reiterated the submissions made by Mr. Ghosh in general and reiterated Mr. Ghosh's submissions with regard to the doctrine of promissory estoppel, since the Appellants in all the cases in which Mr. Sharma appeared, had altered their position after being given an assurance that they would be given dealership in respect of the retail outlets to be established on the demised lands. In their cases interim arrangements were required to be made as the grant of dealerships were likely to take some time. Mr. Sharma also urged that the decision of the Respondents to alter their policy regarding grant of dealership, when matters had almost reached the final stage of allotment of dealership, was against all norms of fair play and was liable to be quashed.

33. Mr. Sanjay Sharawat, learned Advocate appearing for some of the Respondents, also adopted the submissions made by Mr. Ghosh and pointed out that the lease deeds executed by the land owners and the Maintenance and Handling Contracts were kept separate, since it was the intention of the Oil Companies that in terms of the policy of the Indian Oil Corporation dated 23.7.2003, despite the two contracts being separate, as and when the Policy permitted, dealership would be awarded to the land owners or their nominees. It was, however, pointed out that in all the cases it had been decided to grant Maintenance and Handling Contracts to nominees of the land owners to enable them to run the retail outlets till a final decision was taken in the matter. Mr. Sharawat submitted that the very fact that in the Policy of the Indian Oil Corporation dated 23.7.2003, the Company had specifically permitted the land owners to nominate anyone from the family or from outside the family for being appointed as the Maintenance and Handling Contractor, was sufficient indication that it was the intention of the Respondents to grant permanent dealership to the land owners once a clarification had been received in the matter.

Mr. Sharawat submitted that the problem had been created only on account of the decision of the Oil Companies to go back on their promise which brought all these cases squarely within the doctrine of promissory estoppel.

34. Much the same arguments were advanced by Mr. Rajiv Dutt, learned Senior Advocate appearing for the Writ Petitioner, Tirath Ram Chauhan, in Writ Petition (Civil) No.528 of 2008. Mr. Dutt urged that pursuant to the advertisement issued by IBP Oil Company on 12th April, 2001, the Petitioner (now Appellant) had offered his land on NH-1A Jalandhar-Pathankot, but no decision had been taken by the Respondents on such offer. On the other hand, on 8th October, 2002, the Company introduced a Policy regarding allotment of retail outlets under the land owners category. Thereafter, as in the other cases, on the Appellant's land being found suitable a lease deed was executed and the Appellant's nominee was appointed as the Maintenance and Handling Contractor to run the outlet on 16.12.2002. On 30.11.2002, the pump began operational. Operations were continued in the retail outlet by virtue of the said contract, which was extended annually.

35. While the aforesaid arrangement was continuing, on 6.9.2006, the Ministry of Petroleum and Natural Gas issued a Notification directing all the marketing companies to phase out the existing COCO retail units within a year.

36. Mr. Dutt submitted that the Writ Petitions which had been filed before the Delhi High Court for quashing the said Policy dated 6.9.2006 were dismissed by the High Court on 8.2.2008 against which the several Special Leave Petitions were filed. As far as the Writ Petitions are concerned, the present Writ Petition was filed under Article 32 of the Constitution and was entertained by this Court on 28.11.2008, when this Court issued Notice and directed the parties to maintain status-quo, which order is still subsisting. Mr. Dutt also relied on the decisions which had been cited by Mr. Pradip Ghosh and in addition he also relied on the often cited decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.* [(1979) 3 SCC 489], wherein a question had arisen regarding the right of the Petitioner to challenge the actions of the International Airports Authority of India, which was an instrumentality or agency of the Government. It was held that where the Corporation is an instrumentality or the agency of the Government, it would be subject to the same constitutional or public law limitations as the Government, which cannot act arbitrarily and enter into a relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance. Reference was also made to the decisions of this Court in the cases of *E.P. Royappa Vs. State of Tamil Nadu* [(1974) 4 SCC 3] and

Maneka Gandhi Vs. Union of India [(1978) 1 SCC 248], wherein it was held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary, but must be based on some rational and relevant principle which is non-discriminatory.

37. In some of the other cases, learned counsel appeared and pointed out that the applications for dealership had been made during the window period between 8.10.2002 and 5.2.2003, making them eligible for being considered for grant of dealership on the strength of the Policy, which was then prevalent and was subsequently stayed on 5.2.2003 and was replaced by the decision taken on 6.9.2006 to phase out the existing COCO Units.

38. Special Leave Petition (C) No.9010 of 2008 (now Appeal) arising out of Writ Appeal No.2445 of 2007, from the Delhi High Court is a case similar to that of Mohd. Jamal. Appearing on behalf of the Appellant, Satyanarayan Kumar Singh, Mr. Ravi Shankar Prasad, learned Senior Advocate, repeated the submissions made by Mr. Pradip Ghosh. Mr. Prasad submitted that although the Appellant had applied for full dealership, the COCO unit was thrust upon him and the same had to be reconverted into the Appellant's claim for full dealership.

39. Appearing for two of the Appellants in respect of Civil Appeal @SLP(C)No.20908 of 2011 (*Kamar Ahmed Yusuf Lulat & Ors. Vs. IBP Co. Ltd. & Ors.*) and Civil Appeal @SLP(C)No.22831 of 2011 (*Jaswantsinh A Rana (D) by LRs. & Ors. Vs. IBP Co. Ltd. & Ors.*), Mr. Sunil Gupta, learned Senior Advocate, also based the claim of the Appellants on the doctrine of promissory estoppel. In fact, the case of the two Appellants is the same as the case of most of the Appellants and Writ Petitioners, where the learned Single Judge had allowed the Writ Petitions while the Division Bench reversed the same on the ground that all the writ petitions had been disposed of by a common reasoning. Mr. Gupta contended that the new policy formulated on and from 10th August, 2002, was really a culmination of the earlier policy of the Oil Companies dated 31.5.2001, which provided for grant of full dealership in respect of the lands offered by new applicants. As in the case of the other claimants, the claim of the Appellant did not fructify on account of the change in policy and was kept in abeyance also, as there was a further change in the policy by which the Oil Companies decided to phase out the COCO units which were being run by Maintenance and Handling Contractors. Mr. Gupta

referred to the "comfort letters", which had been provided by the Government, assuring the land owners that the decision to run the COCO units with the help of the Maintenance and Handling Contractors, was only a temporary arrangement and as soon as it would be possible, the land owners would be given the first option for dealership in respect of the retail outlet. Mr. Gupta also relied on the decisions of this Court on the doctrine of promissory estoppel and legitimate expectation cited by Mr. Pradip Ghosh, Mr. Rana Mukherjee and the other learned counsel and urged that the directives issued by the Oil Company on 6.9.2006 were liable to be quashed.

40. Appearing for several of the claimants for dealership, Mr. Jaideep Gupta, learned Senior Advocate, submitted that the facts in all these cases were similar to the matters in which submissions had earlier been made. However, in some of the matters, Mr. Gupta urged that the decision to grant dealership had been taken before 8.10.2002 and nowhere in the Letters of Intent, is there any indication that the retail outlets were COCO Units. However, after the change in policy, the concept of COCO Units was introduced and the nominees of the land owners were appointed as Maintenance and Handling Contractors to run the said outlets. Thus, there was a tenuous connection between the execution of the lease documents and the grant of Maintenance and Handling Contracts. Mr. Gupta submitted that apparently, the separation of the lease from the Maintenance and Handling Contracts, was done with the deliberate intention that the land owners would not have any role to play with the running of the outlet till the matter relating to dealership of the retail outlet was settled.

41. Mr. Gupta also adopted the submissions made by Mr. Pradip Ghosh, learned Senior Advocate for the Appellants and urged that the decision taken by the Oil Companies not to grant dealerships in respect of the COCO Units ran counter to the fact situation which would indicate that the Oil Companies had intended to grant dealership to the land owners, which would be evident from the following summary of facts :-

(a) While in most cases, the issuance of the Letters of Intent were pending, Maintenance and Handling Contracts were given to run the retail outlets to the nominee and/ or near relation of the land owners.

(b) The rents initially asked for by the land owners for grant of lease for the lands offered for setting up the retail

outlets were substantially reduced when the lease deeds were executed.

(c) The investments made by the landlords in making the plots ready for setting up the petrol pumps.

(d) Correspondence exchanged between the parties.

(e) Existence of the policy to offer the land owners the right of first refusal for the Maintenance and Handling Contracts prior to grant of dealership.

(f) Annual grant of dealership.

42. Mr. Gupta urged that the lease deeds executed between the parties do not represent the totality of the matter, but is only a part of the transaction. Mr. Gupta submitted that the cases of the claimants were clearly covered by the doctrine of promissory estoppel and as had been urged by Mr. Ghosh and the other learned counsel, the decision of the Oil Companies arrived at on 6.9.2006 not to grant any further dealership but to operate through COCO Units, was bad and was liable to be quashed.

43. In all the other cases, the fact situations were almost identical as were the submissions advanced on their behalf. The Gujarat matters which were taken up in the said bunch were not very different from the other matters wherein also applications for grant of dealership had been made within the window period when the Policy relating to grant of dealership was subsisting and steps similar to those taken in the other matters were also taken with regard to the Special Leave Petitions filed against the change in Policy contained in the Notification dated 6.9.2006.

44. Appearing for the Indian Oil Corporation, the learned Attorney General confined his submissions to the legal issues raised during the hearing of this batch of Appeals and left it to Ms. Meenakshi Arora, learned Advocate, to deal with the factual aspect.

45. On the question of the common grounds taken on behalf of the Appellants and the Writ Petitioners that their respective cases were covered by the doctrine of promissory estoppel, the learned Attorney General submitted that such a stand was entirely misconceived. Once an Agreement is entered into, the parties are bound by the terms of the said Agreement which extinguishes any claim of promissory estoppel, which may have arisen prior

to the signing of the Agreement. Referring to the application made by the Appellant, Mohd. Jamal, on 14th March, 2003, providing the specifications of the land and indicating that the same, including the building thereupon, had been made ready and that there was no problem in giving the same to the Company for running the petrol pump in any manner it liked, the learned Attorney General submitted that the same destroyed any promise that may have been made before the aforesaid offer was made by the Appellant. The learned Attorney General pointed out that in the said letter, while offering the land and structures thereon in question to the Oil Company to establish a petrol pump and to run it in any manner it liked, certain terms and conditions had been indicated by the Appellant, including the monthly rental and the increments thereof after every 5 years, together with the period of the lease with an option of renewal. The learned Attorney General submitted that once such an offer had been made, which was supported by an affidavit affirmed and filed by the land owner's nominee for being awarded the Maintenance and Handling Contract, wherein it was undertaken that the said nominee would have no claim on the retail outlet dealership at any time and would not seek any legal help at a future date to stall smooth handing over of the site as and when desired, nothing remained of the promise, if such an offer had at all been made and the same could be construed to be an offer which attracted the doctrine of promissory estoppel or equitable estoppel.

46. The learned Attorney General submitted that the aforesaid letter was written by the Appellant at a point of time when the Policy dated 8.10.2002 had already been suspended. Further, the said letter had not only been suppressed but had even been disowned by the Appellant. Even after disowning the said letter, the Appellant has again relied on the same in order to make out a case that he had agreed to make the said offer on the assurance given by the Oil Company that he would be granted full dealership once the proceedings before the Court were cleared. The learned Attorney General pointed out that in none of the documents executed between the Appellants had any foundation been laid in support of the assertion that a compromise had been made that a dealership would be given to land owners and that the awarding of Maintenance and Handling contracts was only an interim measure. The learned Attorney General submitted that given the disputed nature of the claim, the matter cannot be gone into in a Writ Petition which was, therefore, misconceived. In this regard, the learned Attorney General referred to the decision of this Court in *A.P. Transco Vs. Sai Renewable Power (P) Ltd.* [(2011) 11 SCC 34], in

which while considering the doctrine of promissory estoppel and legitimate expectation in regard to various communications extending certain incentives to producers of electricity from non-conventional energy resources, it was held that the parties had voluntarily signed the Power Purchase Agreements by which they were governed and neither the doctrine of promissory estoppel nor legitimate expectation could, therefore, have any application in regard to the correspondence exchanged between the parties, whereby the Government had extended certain incentives to the producers of electricity from non-conventional energy resources. The learned Attorney General also referred to the decision in *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer* [(2005) 1 SCC 625]; *State of Himachal Pradesh Vs. Ganesh Wood Products* [(1995) 6 SCC 363]; *Kasinka Trading Vs. Union of India* [(1995) 1 SCC 274] and *Sethi Auto Service Station Vs. D.D.A.* [(2009) 1 SCC 180],wherein the same doctrine had been considered.

47. Supplementing the submissions made by the learned Attorney General, Ms. Meenakshi Arora, learned Advocate, submitted that the cases being heard in this batch of matters can be divided into four categories, namely:

(i) Agreements entered into between the Oil Companies and the land owners prior to 8.10.2002;

(ii) Maintenance and Handling contracts signed between 8.10.2002 and 5.2.2003;

(iii) Offers made by land owners and lease Agreements executed within the aforesaid period;

(iv) Petrol pumps commissioned upon lease being executed after the new Policy came into existence on 5.2.2003.

48. Ms. Arora submitted that prior to the Policy No. 319 dated 8.10.2002, the Oil Companies granted dealership in respect of retail outlets on the basis of applications invited for the said purpose. Several land owners had responded to the said applications and had offered their lands to the Oil Companies for setting up retail outlets on main Highways. However, the Oil Companies were also considering a scheme whereby they would be able to retain control over the various retail outlets by operating them as Company Owned and Company Operated (COCO) units, which provided for retail outlets to be owned fully by the Oil Companies, but the operation thereof was outsourced to M&H contractors, who would not have any right to dealership of the outlet.

49. Ms. Arora submitted that the cases of the applicants in the third category would have to be treated differently from applicants whose claims were based on decisions to grant dealership which had been arrived at prior to 8.10.2002. In certain cases, on the basis of the leases granted, petrol pumps had already been commissioned and were functioning, but with the help of M&H contractors. Ms. Arora submitted that once the policy to grant full dealerships was suspended and the new policy was adopted in September, 2003, barring a few cases no further dealerships were given in respect of the retail outlets and all the units were, thereafter, run as Company Owned and Company Operated units where the Company retained control of the outlets, but left the day to day management thereof to the contractors.

50. Taking the case of Mohd. Jamal, Ms. Arora submitted that, as was submitted by the learned Attorney General, the Appellant, whose application for grant of Letters of Intent was pending, entered into a separate Agreement with the Oil Company on 14.3.2003, when the earlier policy had already been discontinued and after execution of the lease, named his brother, Mohd. Ishtiaq Alam, as his nominee, to function as the M&H contractor in respect of the outlet established on his land. Ms. Arora submitted that Mohd. Ishtiaq Alam was found suitable to act as M&H contractor and a Agreement was, therefore, executed on 29.3.2003, which also included an affidavit affirmed by Mohd. Ishtiaq Alam. Pointing to the contents of the said letters, which had been referred to by the learned Attorney General, Ms. Arora submitted that the Appellant executed the lease Agreement, being fully aware of the consequences thereof, and so was the nominee who affirmed an affidavit clearly indicating that he was only managing the unit and had no claim to the dealership of the said outlet in lieu of being awarded the contract.

51. Ms. Arora urged that once Policy No.MDPM- 319/02 dated 8.10.2002, was replaced by the new Policy dated 19.9.2003, all future transactions between the Appellants/Petitioners and the Oil Companies would have to be considered in the light of the new policy, which dealt with COCO outlets only. Ms. Arora submitted that as the lease agreement between Md. Jamal and the Oil Company was executed after the policy dated 8.10.2002 was suspended, it was a clear indication that the land owner was aware of his actions in offering his land to the companies for establishing a petrol pump thereupon, without any conditions attached except for the rental and period of the lease. Even, if Ms. Arora's submission that the appointment of M&H Contractors was connected with the signing of the lease agreement is to be

accepted, even then the land owner could have no claim to the dealership in respect of the said retail outlet being operated as a COCO unit. Ms. Arora submitted that as has already been indicated hereinbefore, the concept of COCO units was that the land and the infrastructure would either be owned or taken on long-term lease by the oil company but the operation of the petrol pump would be outsourced to a M&H Contractor, who submitted an affidavit affirmed by him while applying for the M&H Contract that he neither had nor would in future have any claim to the dealership of the said retail outlet.

52. Ms. Arora submitted that the case made out by the land owners after the grant of M&H Contracts, was not *bona fide*, and, in any event, could not be related to the transactions under the earlier policies which had been replaced by fresh agreements entered into by the parties on the basis of the new policy. Ms. Arora urged that neither was the doctrine of promissory estoppel nor legitimate expectation applicable in the instant case where there was no foundation for such a claim. Ms. Arora reiterated her submissions that Policy No. MDPM-319/02 dated 8.10.2002, was related to selection of dealers and not to COCO outlets and it was denied that the Appellant had leased out the property upon any understanding that he or his nominee would be allowed to run the retail outlet. On the other hand, the land owner was not even eligible to be appointed as the M&H Contractor.

53. Ms. Arora lastly submitted that since the present batch of matters related to COCO outlets, the question of returning the demised land to the land owner did not also arise. Ms. Arora submitted that the entire exercise was nothing but an attempt on the part of the land owners, who had consciously entered into lease agreements, to try and resile from the contract once it became evident that there was no likelihood of a further change in the policy for grant of dealership in respect of the COCO units.

54. Referring to the decision of this Court in *Sethi Auto Service Station* (supra), Ms. Arora urged that the doctrine of legitimate expectation, had been considered in the said case where the Appellant's claim was based on an old policy and it was held that the Appellant merely had an expectation for being considered for resitement. It was also held that a person basing his claim on the doctrine of legitimate expectation has to establish that he had relied on the said representation and had altered his position and that denial of such expectation worked to his detriment. The Courts can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in

gross abuse of power or in violation of principles of natural justice and contrary to public interest. It was also reiterated that the concept of legitimate expectation has no role to play where said action is a matter of public policy or in the public interest, unless, of course, the action taken amounted to an abuse of power. It was further emphasized that in order to establish a claim of promissory estoppel, it must be proved that there was such a definite promise and not any vague offer which could not be enforced. In this regard, Ms. Arora also submitted that the "comfort letters" referred to by learned counsel for the Appellants, purported to have been issued by the State of Gujarat, would have no avail as a promise made in such a letter does not constitute a promise which could be enforced. Ms. Arora submitted that the Appeals and Petitions were liable to be dismissed with costs.

55. Learned Additional Solicitor General, Mr. P.P. Malhotra, appearing for the Union of India, submitted that the dispute involved in this batch of matters was between the Oil Companies and the land owners with whom agreements had been entered into by the Oil Companies. The learned ASG submitted that the Union of India has little to do with the dispute between the parties, except to the extent that it has been given a supervisory function to ensure proper distribution of petrol and petroleum products. Mr. Malhotra urged that anything which was not in public interest, but was likely to affect the public interest, cannot be retained and has to be quashed. As will be evident from the submissions made on behalf of the respective parties, the case of the Appellants and the Writ Petitioners, in most of the cases, is based on the doctrine of promissory estoppel on the basis of a promise apparently made by the Respondents to the land owners that they would be granted dealerships in liéu of the lands offered by them for setting up of the retail outlets. From the facts as disclosed, there is sufficient evidence to indicate that initially negotiations had been conducted by the Oil Companies with aspiring land owners that in lieu of the lease to be granted they would be provided with dealerships. The applications made pursuant to the advertisement published by the Oil Companies were also duly processed and were acted upon. However, it is only the suspension of the Policy dated 8.10.2002, which prevented such dealerships for being given to the various applicants.

56. Upon deregularisation of the distribution of petroleum products, the Oil Companies issued guidelines dealing with the procedure for locations outside the marketing plans. It was also stipulated that for the purpose of selection, the dealerships would be categorised as indicated in the guidelines and all

retail outlets would be developed only on A/C sites basis, which finds place in Clause (2) of the guidelines.

57. The said guidelines referred to grant of dealership which is completely different from the grant of long-term leases by the land owners to the Oil Companies upon the condition that the same could be used by the lessees in any way they liked, which included the right to sublet the demised plot. The concept of Company Owned and Company Operated outlets was sought to be introduced on 6.9.2003, in supersession of Policy No.MDPM-319/02 dated 8.10.2002 and the two cannot be co-related unless a link can be established by the Appellants that they had entered into the lease agreements with the Oil Companies upon the understanding that once the earlier policy was restored, the land owners would be given the option of having the COCO units converted into regular retail outlets.

58. In order to appreciate the difference between the two concepts, it has to be understood that the concept of a dealership in respect of a retail outlet is completely alien to the concept of a COCO unit. While the former deals with the right of the dealer to independently operate the retail outlet, in the case of a COCO unit, the entire set up of the retail outlet is owned by the Oil Companies and only the day-to-day operation thereof is outsourced to a M&H Contractor. With the discontinuance of the earlier policy of granting dealerships in respect of retail outlets and the introduction of a new policy awarding M&H Contracts in respect of the COCO outlets, in our view, the land owners who had entered into fresh lease agreements after the policy to grant dealerships had been suspended, cannot now claim any right on the basis of the earlier policy in the absence of any Letter of Intent having been issued thereunder. Had any Letter of Intent, which tantamounts to grant of dealership, been issued and then in respect of the same lands COCO units were established, the situation would have been different. Placed in such a position, the land owners cannot claim any relief in these proceedings and, if any loss or damages have been suffered by them on account of the assurance earlier given regarding grant of dealership, particularly in making the sites ready therefor, the remedy of such applicants would lie elsewhere. The policy guidelines and, in particular, Clauses 1.2 and 1.2.2 thereof are not available to the Appellants and the Petitioners in these proceedings, which are concerned mainly with COCO units which have no connection with the concept of dealership.

59. We are inclined to hold that the doctrine of promissory estoppel and

legitimate expectation, as canvassed on behalf of the Appellants and the Petitioners, cannot be made applicable to these cases where the leases have been granted by the land owners on definite terms and conditions, without any indication that the same were being entered into on a mutual understanding between the parties that these would be temporary arrangements, till the earlier policy was restored and the claim of the land owners for grant of dealership could be considered afresh. On the other hand, although, the nominees of the lessors were almost in all cases appointed as the M&H Contractors, that in itself cannot, in our view, convert any claim of the land owner for grant of a permanent dealership. As has been indicated hereinbefore, even the M&H Contractor had to submit an affidavit to the effect that he did not have and would not have any claim to the dealership of the retail outlet and that he would not also obstruct the making over possession of the retail outlet to the Oil Company, as and when called upon to do so. The decisions cited on behalf of the Appellants/Petitioners, are not, therefore, relevant for a decision in these cases. Although, the Appeals have been filed on account of the denial to the land owners of the grant of dealership in respect of the lands demised by them to the Oil Companies, the entire focus has shifted to COCO outlets on account of the fresh lease agreements entered into by the Appellants with the Oil Companies which has had the effect of obliterating the claim of the land owners made separately under earlier lease agreements. The claims of the Appellants/Petitioners in the present batch of matters have to be treated on the basis of the agreements subsequently entered into by the Oil Companies, as submitted by the learned Attorney General.

60. These Appeals and Petitions must, therefore, fail and are dismissed. C.A. No.5259 of 2013 filed by the Indian Oil Corporation, stands allowed. The four Transfer Petitions, being T.P.(C) Nos. 971-973 of 2010 and T.P.(C) No. 1260 of 2011, which were heard along with these Appeals and Petitions, are allowed. The Writ Petitions, which are transferred as a consequence thereof, are also dismissed along with other matters. Accordingly, the Transferred Cases, arising out of T.P.(C) Nos. 971-973 of 2010 and T.P.(C) No. 1260 of 2011, are disposed of. However, it will be open to the Appellants and the Petitioners to approach the proper forum in the event they have suffered any damages and loss, which they are entitled to recover in accordance with law.

61. Having regard to the peculiar facts of these cases, the parties are left to bear their individual costs.

Appeal dismissed.

I.L.R. [2013] M.P., 2781
SUPREME COURT OF INDIA
Before Mr. Justice R.M. Lodha & Mr. Justice Madan B. Lokur
Civil Appeal No. 7907/2013 decided on 6 September, 2013

DEVENDRA PATEL ...Appellant
Vs.
RAM PAL SINGH & ors. ...Respondents

***Representation of the People Act (43 of 1951), Section 82(b) - Candidate* - Candidate whose nomination paper was rejected by returning officer cannot be said to be a duly nominated candidate nor he can claim to be duly nominated as a candidate. (Paras 8 & 9)**

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 82(बी) – प्रत्याशी – प्रत्याशी जिसके नामांकन पत्र को निर्वाचन अधिकारी द्वारा निरस्त किया गया है, उसे सम्यक रुप से नामांकित प्रत्याशी नहीं कहा जा सकता और न ही वह प्रत्याशी के रुप में सम्यक रुप से नामांकित होने का दावा कर सकता है।

Cases referred :

AIR 1993 SC 20, (1969) 1 SCR 630.

JUDGMENT

The Judgment of the Court was delivered by :

R.M.LODHA, J. :- Leave granted.

2. The only argument canvassed by the learned counsel for the appellant is that Jaswant Singh whose nomination was rejected must be regarded as a 'candidate' for the purpose of Section 82(b) of the Representation of the People Act, 1951 (for short, '1951 Act') and since he has not been joined as a party respondent in the election petition although there is allegation of corrupt practice against him, the election petition is liable to be rejected.

3. The High Court has considered this question and, relying upon the decision of this Court in *Mithilesh Kumar Sinha Vs. Returning Officer for Presidential Election & Others* AIR 1993 SC 20, held that Jaswant Singh could not be regarded as a 'candidate' as defined in Section 79(b) for the purpose of Section 82(b) and overruled the objection regarding non-joinder of Jaswant Singh.

4. The admitted fact is that Jaswant Singh's nomination was rejected by the returning officer as he was found to be disqualified. Jaswant Singh challenged the order of the returning officer rejecting his nomination in a Writ Petition before the High Court, but that Writ Petition was not taken to the logical conclusion and it was dismissed.

5. The question is, whether Jaswant Singh is a 'candidate' for the purpose of Section 82(b) ? The answer to this would depend on whether he is a 'candidate' within the meaning of Section 79(b).

6. Section 79(b) reads as follows :-

"79. Definitions.- In this Part and in Part VII unless the context otherwise requires,-

(a) x x x

(b) "candidate" means a person who has been or claims to have been duly nominated as a candidate at any election;

(c) x x x

(d) x x x

(e) x x x

(f) x x x"

7. Section 82(b) reads as under :-

"82. Parties to the petition.- A petitioner shall join as respondents to his petitioner -

(a) x x x

(b) any other candidate against whom allegations of any corrupt practice are made in the petition."

8. In our opinion, in view of the admitted position that Jaswant Singh's nomination was rejected as he was disqualified, he cannot be considered to be duly nominated as a candidate at the election. Learned counsel for the appellant submits that his contention is founded on the expression "claims to have been duly nominated as a candidate at any election" in Section 79(b) of the 1951 Act. The expression "claims to have been duly nominated as a candidate" would not take within its fold a person whose nomination has been rejected as being disqualified. Such person cannot claim to be duly nominated as a candidate when he is not qualified to contest election. In view of this position, Jaswant Singh is not covered by the expression 'candidate' in either of the two categories within the meaning of Section 79(b).

9. Learned counsel for the appellant relies upon a decision of this Court in *Mohan Raj Vs. Surendra Kumar Taparia & Ors.* (1969)1SCR 630 in support of his contention. *Mohan Raj*[2] was a case where one R.D. Periwal who was duly nominated candidate but withdrew his nomination later was not joined as a party in the election petition though allegations of corrupt practice against him were made. This Court held that a candidate who is duly nominated continues to be candidate for the purpose of Section 82(b) in spite of withdrawal. There is an important difference between that case and this case. In that case, R.D. Periwal was duly nominated candidate but he withdrew later, whereas here Jaswant Singh's nomination was rejected as he was found to be disqualified. For this crucial and compelling difference, the statement of law in *Mohan Raj*[2] has no application. Where the nomination of a person is rejected by the returning officer on the ground of such person being disqualified, in our view, such person is neither a duly nominated candidate nor he can claim to be duly nominated as a candidate.

10. The High Court did not commit any error in not treating Jaswant Singh as a 'candidate' for the purpose of Section 82(b) of the 1951 Act.

11. Appeal is dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2013] M.P., 2784
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 16054/2003 (Jabalpur) decided on 27 June, 2012

A.L. THAKUR & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Pay scale - Discrimination **- State Govt. accepted the judgment passed by SAT by which it was held that the persons like petitioners are entitled to pay scale of Rs. 515-800 - It is not now open to Govt. to say that such benefit is not available to the petitioners as no appeal was filed against the order of the SAT - Not open to the Govt. to say that the matter is required to be referred to any High Power Committee or a Pay Commission or to any Expert Body for obtaining any recommendation for grant of such benefit. (Para 5)**

सेवा विधि – वेतनमान – विभेद – राज्य सरकार ने सेट (SAT) द्वारा पारित किया गया आदेश स्वीकार किया जिसमें यह अभिनिर्धारित किया गया था कि याचीगण के समान व्यक्ति रु. 515–800 का वेतनमान पाने के हकदार है – अब सरकार यह नहीं कह सकती कि याचीगण को उक्त लाभ उपलब्ध नहीं क्योंकि सेट (SAT) के आदेश के विरुद्ध कोई अपील प्रस्तुत नहीं की गई – सरकार नहीं कह सकती कि उक्त लाभ प्रदान किये जाने हेतु किसी अनुशंसा को अभिप्राप्त करने के लिए मामले को किसी उच्चाधिकार समिति या वेतन आयोग या किसी विशेषज्ञ निकाय को निर्दिष्ट किया जाना अपेक्षित है।

D.K. Dixit, for the petitioners.
Piyush Dharmadhikari, G.A. for the respondents.

ORDER

K.K. Trivedi, J.:- These two petitions were originally filed as Original Application before the M.P. Administrative Tribunal, which have come on transfer to this Court after abolition of the Tribunal and have been registered as writ petition. Since a common claim is made in both the writ petitions, common relief is claimed only on the basis of orders passed by the Tribunal in earlier petitions, which have been implemented by the State Government, these petitions were heard together and are being decided by this common order. The facts as have been mentioned in Writ Petition No.16054/2003 (O.A.No.5178/2000) are taken for the purposes of this order.

2 : The petitioners, who all were appointed as 'Timekeepers' have approached the Tribunal by way of filing joint Original Applications claiming that the revision of pay in their cases be rightly done, granting them benefit of pay scale of Rs.515-800 with effect from 1.4.1982, the benefit of pay scale of Rs.950-1530 with effect from 1.1.1986 and the benefit of pay scale of Rs.3050-4590 with effect from 1.1.1996 as was ordered by the Tribunal in various cases, treating them at par with the employees working in the aforesaid pay scale. The common claim made by the petitioners was that they were appointed as 'Timekeeper' in the establishment of the respondents, were discharging the same duties and functions as were discharged by many other employees. The nomenclature of the post of 'Timekeeper' was changed to be 'Field Assistant' by orders of the State Government. However, at the time of giving the benefit of pay scale, right pay scales were not prescribed for the persons like petitioners and, therefore, the Original Applications were filed before the M.P. Administrative Tribunal. One such Original Application being O.A.No.126/99 was filed which came up for hearing before the Tribunal and, ultimately, was decided in terms of the decision rendered by the Tribunal in various cases such as T.A.No.993/1988 decided on 6.11.1998 by Gwalior Bench. The Tribunal came to hold that since such decision of the Gwalior Bench were affirmed and the orders were issued by the State Government in respect of those persons, similar benefits as were granted in the case of *Laxmi Narayan Upadhyay Vs. State of M.P. and others,* would be applicable to the case of the petitioners also. However, in case of certain persons those who have approached the Tribunal, the benefit of revised pay scale was granted in appropriate manner, but the said benefit was not extended to the petitioners, therefore, they were required to file the Original Application. The orders so passed by the Tribunal have been placed on record as Annx.A/3 and A/4 and the consequential orders issued by the State Government are placed on record as Annx.A/5 and A/7. In the order dated 11.7.1999 Annx.A/7, the State Government very categorically directed that the orders passed by the Tribunal be complied with. However, in the cases of the present petitioners, such orders were not issued, therefore, the joint petitions were filed.

3 : In response to the notice issued by the Tribunal, the State Government has filed a return and has tried to justify its stand saying that the recommendation for grant of pay scale by the Pay Commission is accepted by the State Government and since the Commission has recommended different pay scales for the persons like petitioners, taking into consideration their job

responsibilities, the petitioners were not entitled to the relief claimed in the petition. It is tried to canvass that a different pay scale has been made available for the persons like petitioners since they were working in the work charged contingency establishment and they were not to be treated at par with those who were granted a higher pay scale. It is contended that Expert Committee like Pay Commission is required to take into account various facts such as the nature of the job, the duties assigned to each and every post, the gravity of the responsibilities put on such persons holding the post and then only to prescribe the pay scale. Since this has been done in rightful manner, merely because in some of the cases, the orders have been passed, it cannot be said that the petitioners are also entitled to the similar benefit. It is, thus, tried to canvass that the entire claim of the petitioners based on certain decisions of the Tribunal is misconceived and the petitions are liable to be dismissed.

4 : A rejoinder is filed by the petitioners meeting out the allegations made in the return and it has been pointed out that such issues have been settled long back. Even the appeal before the Apex Court were dismissed and, therefore, the orders were issued giving benefit of the orders of the Tribunal by the State Government. However, the said order was restricted only with respect to those who have approached the Tribunal as the list of those cases was mentioned in the order passed by the State Government vide Annx.A/7. It is pointed out that in case of Data Assistant, Progress Man, Store Attendant etc., the recommendations were made and it was said that they should be given a proper pay scale. In the very same memo, it was said that even the Data Assistants are discharging the duties like Timekeeper. It is pointed out that in respect of persons like petitioners, earlier the recommendations were made that they be treated as working in the executive post and be granted a benefit of promotion on the post of Sub Engineer. It was pointed out that the work of Sub Engineers and their subordinate like Timekeeper are much or less same. Further placing certain documents on record, it is contended that in fact persons like petitioners working as Timekeeper or Field Assistant were made to work under the Junior Engineer, helping him in discharge of his duties. Therefore, the petitioners were virtually discharging the technical job. This being so, it is contended that insistance of the respondents that recommendations were not made in respect of persons like petitioners giving them any higher pay scale by the Pay Commission and, therefore, they would not be entitled to the said benefit, specially when such a matter has already been adjudicated by the Tribunal and the said order is already affirmed, has

already been implemented by the State, is not justified and as such, the petitioners are entitled to the relief claimed.

5 : After hearing the learned counsel for the parties at length and perusal of the record, this Court is of the opinion that there is no scope available to the respondent State to avoid giving the benefit of the pay scale as claimed by the petitioners specially when such issue has already attained finality on adjudication by the Tribunal and on account of accepting the same by the State Government. The nomenclature of the post of the 'Timekeeper' was changed sometimes in the year 1996 prior to it, it was known as Timekeeper. Now it is being known as 'Field Assistant'. The claim of Timekeeper, Field Assistant, Data Processor etc., were considered in the case of *Laxmi Narayan* (supra) and was decided by the Tribunal by a detailed order as contained in Annx.A/4. The entire claim was considered by the Tribunal and it was categorically held in paragraph 6 that the persons like petitioners were entitled to the pay scale of RS.515-800. If such a finding was accepted by the respondent State in case of *Laxmi Narayan* (supra) and in terms of the said decision, the order was issued way back in the year 1999 by deciding, not to file any appeal against such orders, it is not open to the State now to say that such benefit is not available to the petitioners. On the other hand, it was not open to the State to say that such a finding is not acceptable by them and that the matter was required to be referred to any High Power Committee or a Pay Commission or to any Expert body for obtaining any recommendation for grant of such benefit. Once a decision is rendered taking into account several facts by the authorities of law including the Tribunal, and the said order is accepted by the State Government, it cannot be said that the said order would not be applicable in case of similarly situated persons. The respondent State has utterly failed to demonstrate that persons like petitioners in these two petitions are not identically placed to those of *Laxmi Narayan* (supra) and others. In view of this, the petitioners would also be entitled to the very same benefits which the respondents have extended to persons who have approached the Tribunal by way of filing different writ petitions as have been referred in Annx.A/7.

6 : In view of the aforesaid, these petitions are allowed. The respondents are commanded to grant the benefit of play scale of Rs.515-800 with effect from 1.4.1982, the benefit of pay scale of Rs.950-1530 with effect from 1.1.1986 and the benefit of pay scale of Rs.3050-4590 with effect from 1.1.1996 to the petitioners and to revise and refix their salary, calculate the

entire arrears of salary and to pay the said amount to the petitioners within a period of two months from the date of receipt of certified copy of the order passed today.

7 : With the aforesaid, the writ petitions stand allowed. There shall be no order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 2788
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 4833/2001(Jabalpur) decided on 27 June, 2012

RAM SINGH ALIAS SONU ...Petitioner
Vs.
WESTERN COAL FIELDS LTD. & anr. ...Respondents

***Service Law - Dismissal from service - Non-grant of defence assistance* - Petitioner obtained employment by impersonation - He admitted the same in the statement - Dismissal of service of the petitioner is justified - Refusal to grant representation through an agent does not violate the principles of natural justice. (Paras 4 & 5)**

सेवा विधि – सेवा से बर्खास्तगी – बचाव सहायता प्रदान नहीं की जाना – छद्मरुपण/प्रतिरुपण द्वारा याची ने नियोजन अभिप्राप्त किया – उसने कथन में इसे स्वीकार किया – याची की सेवा से बर्खास्तगी न्यायोचित – एजेंट के जरिए प्रतिनिधित्व प्रदान करने को अस्वीकार किये जाने से नैसर्गिक न्याय के सिद्धांतों का उल्लघंन नहीं होता।

Case referred :

(2008) 4 SCC 406.

S.P. Tripathi, for the petitioner.
Anoop Nair, for the respondents.

ORDER

K.K. Trivedi, J.:- Being aggrieved by the order dated 02.04.2001 by which the petitioner was dismissed from service, the petitioner has approached this Court by way of filing this writ petition under Article 226 of the Constitution of India.

2. It is contended that the petitioner was employed in the Western Coal Fields Ltd. (herein after referred to as 'W.C.L.' for short) under the control of respondent No.2. A charge sheet was issued to him on 2/3.11.2000 making allegations that the petitioner got himself employed by impersonating as if he was Ram Singh, son of Sukkal, whereas the real name of the petitioner is Sonu, son of Hannu. It is contended that the petitioner made an application in response to the said charge-sheet stating that he is illiterate tribal person and knows only to discharge his duties. He has not committed any fraud. The petitioner made an application for grant of defence assistance and for the said purpose one of the employees of the W.C.L. was appointed but the said person was not relieved, therefore, the petitioner was not granted full opportunity of defence. In the statement recorded, effective cross-examination could not be done and thereafter some sort of enquiry report was submitted. Opposing the enquiry report, submissions were made by the petitioner but he was not granted an opportunity of hearing in appropriate manner and ultimately the order was issued dismissing the petitioner from service, therefore, he is required to file this writ petition. It is contended that since the order impugned is per se illegal, the same is liable to be quashed. The petitioner is entitled to be reinstated in service.

3. In response to the notice of this writ petition, return has been filed by the respondents and it is categorically contended that the complaint was made by one Shankar, son of Ram Singh, that the petitioner, by impersonating himself as Ram Singh, has obtained the employment with the respondents whereas the real name of the petitioner was Sonu, son of Hannu, and he was residing at Salidhana, Panchayat Ratamati, District Betul. The statements of the petitioner were recorded in which he has categorically admitted that his real name was Sonu, son of Hannu. He was resident of Desawadi. He got the employment in the year 1975. His brother-in-law is Ram Singh, son of Sukkal, who is resident of Salidhana. His brother-in-law gave him his card of interview for getting the employment in the establishment of the respondents. In this manner, the petitioner has obtained the employment. He admitted that Ram Singh, son of Sukkal, was residing at Salidhana. After recording this statement and completing the formalities of holding the enquiry, a report was given that the petitioner by impersonation has obtained the employment with the respondents and, therefore, he was liable to be dismissed from service. After receipt of the enquiry report, the petitioner was granted full opportunity of defence by giving him a copy of the enquiry report. Though a reply was

submitted by the petitioner to the second show cause notice but nothing was placed on record to show that such a statement recorded by the Enquiry Officer was incorrect. After completing the proceedings of enquiry, the petitioner was dismissed from service with effect from 02.04.2001 by the impugned order. Thus, it is contended that nothing wrong is committed by the respondents and as such the petition is liable to be dismissed. No rejoinder whatsoever has been filed by the petitioner to meet out these allegations.

4. The only submission made by the learned Counsel appearing for the petitioner is that the petitioner was not afforded full opportunity of defence inasmuch as the defence assistant provided to the petitioner was not relieved to assist the petitioner in the departmental enquiry. The most important aspect is that the statement of the petitioner vide Annexure R-2 filed along with the return, was recorded on 23.08.2000 in presence of two witnesses. In this statement the petitioner has categorically admitted that his name was Sonu, son of Hannu. He has admitted that Ram Singh, son of Sukkal, is the elder brother of his wife Kaliya. Ram Singh, son of Sukkal, was the person who was issued the interview card by the respondents and said card was given to the petitioner by the said person for getting the employment. In this statement, he has categorically said that the statement is made without any pressure or influence. He categorically admitted his guilt that he has obtained the employment by impersonating himself as Ram Singh, son of Sukkal. The proceedings produced along with the writ petition are also examined. Nothing has been said in the statement recorded that the facts as have been mentioned by the petitioner in his statement were incorrect. On the other hand, Ram Singh, son of Sukkal, himself was examined as a witness. Sarpanch of the village was also examined as a witness in presence of the petitioner. Person before whom the statement in writing was made by the petitioner, was also examined in presence of the petitioner. Documentary evidence in this respect was produced. From the voter list also the fact was found proved and these documents were taken into consideration. The report was submitted categorically holding that the petitioner has obtained employment by impersonation. With this evidence, how could it be said that the action of dismissal of service of the petitioner was not justified.

5. Learned Counsel for the petitioner has again reiterated that the defence assistant was not relieved to assist the petitioner, who was an illiterate person. The Apex Court in case of *D.G. Railway Protection Force & others vs. K.*

Raghuram Babu, (2008) 4 SCC 406, has categorically held that in case the representation of employee through an assistant is not permitted or allowed, it cannot be said that the right of defence of the delinquent is violated. It is categorically held by the Apex Court in Paragraph 11 of the report thus :

> "11. Following the above decision it has to be held that there is no vested or absolute right in any charge-sheeted employee to representation either through a counsel or through any other person unless the statute or rules/standing orders provide for such a right. Moreover, the right to representation through someone, even if granted by the rules, can be granted as a restricted or controlled right. Refusal to grant representation through an agent does not violate the principles of natural justice."

Even otherwise even if such defence assistance would have been made available to the petitioner, the quantum of evidence available against the petitioner would not have been materially affected. In view of this, it cannot be said that the order impugned is bad in law. No interference in such an order of dismissal from service is called for in exercise of powers conferred on this Court under Article 226 of the Constitution of India.

6. For the reasons stated herein above, there is no substance in the writ petition. The same is dismissed. There shall be no order as to cost.

Petition dismissed.

I.L.R. [2013] M.P., 2791
WRIT PETITION
Before Mr. Justice A.K. Shrivastava
W.P. No. 1282/2005 (Jabalpur) decided on 2 July, 2012

ANIL KUMAR SAHU ...Petitioner
Vs.
BHOORA & anr. ...Respondents

Specific Relief Act (47 of 1963), Section 34 - Specific Performance of Contract **- Decree of specific performance was passed in favour of the plaintiff directing him to pay the balance amount of sale consideration to defendant till 30.10.2004 and in case the said amount is not accepted it may be deposited in the Court - Amount was**

sent by M.O. on 20.10.2004 - But was refused by defendant - Held - Executing Court cannot go beyond the decree - Permission to deposit the balance amount should have been granted by the executing Court - Impugned order set aside. (Para 5)

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – संविदा का विनिर्दिष्ट पालन – वादी के पक्ष में विनिर्दिष्ट पालन की डिक्री पारित की गई उसे, विक्रय प्रतिफल की बकाया रकम का भुगतान 30.10.2004 तक प्रतिवादी को करने के लिये निदेशित किया गया और यदि उक्त रकम स्वीकार नहीं की जाती है, उसे न्यायालय में जमा किया जा सकता है – रकम को मनीआर्डर द्वारा 20.10.2004 को भेजा गया – परंतु प्रतिवादी द्वारा अस्वीकार किया गया – अभिनिर्धारित – निष्पादन न्यायालय डिक्री से परे नहीं जा सकता – बकाया रकम जमा करने की अनुमति, निष्पादन न्यायालय द्वारा प्रदान की जानी चाहिए थी – आक्षेपित आदेश अपास्त।

Satish Shrivastava, for the petitioner/decree holder.
None for the respondents/judgment holder.

ORDER

A.K. SHRIVASTAVA, J.:- Feeling aggrieved by the impugned order dated 28.01.2005 (Annexure-P/4) passed by learned Executing Court holding that the plaintiff is not entitled to get the decree of specific performance of contract executed, this writ petition has been filed under Article 227 of the Constitution of India.

2. On bare perusal of the judgment and decree dated 21.09.2004 passed by learned Civil Judge, Class-1, Chhatarpur in Civil Suit No.1-A/2004 it is gathered that a decree of specific performance of contract was passed in favour of the plaintiff against respondents by directing the plaintiff that balance amount of consideration Rs.9000/- be paid to the defendants/respondents till 30.10.2004 and in case the said amount is not accepted by them, it may be deposited in the Court.

3. The contention of learned counsel for petitioner/decree holder is that within time on 20.10.2004 the said amount of Rs.9000/-was sent by money-order to defendants/respondents but the same was refused by them. Eventually, on 6.12.2004 execution application was filed and an application was also submitted to permit the plaintiff/petitioner to deposit balance amount of consideration Rs.9000/-in the Court. This application of petitioner was rejected and it was held by the Executing Court that the plaintiff is entitled for return of

earnest money alongwith interest and the decree of specific performance of contract cannot be executed. Against this order, the decree holder has filed this petition.

4. I have heard Shri Satish Shrivastava, learned counsel for petitioner and having heard him, I am of the view that this petition deserves to be allowed.

5. According to learned Executing Court since immediately after the refusal of balance amount of consideration by respondents/defendants, the plaintiff/petitioner has not deposited the said amount, therefore, the decree passed in his favour for specific performance of contract cannot be accepted. To me, the said finding is *ex facie* illegal. The Executing Court cannot go beyond the decree. On bare perusal of the judgment and decree only this much is gathered that plaintiff was required to pay the balance consideration Rs.9000/- to defendants No.1 and 2 till 30.10.2004. Nowhere in the judgment and decree, it has been mentioned that if the balance amount is not accepted by the defendants/respondents on the very next day it should be deposited in the Court. Indeed on 20.10.2004 the plaintiff sent the balance amount of consideration Rs.9000/- to defendants by money-order and same has been refused by them and therefore on 06.12.2004 an execution application has been filed by the plaintiff praying that balance amount of consideration be permitted to be deposited in the Court so that decree of specific performance of contract may be executed, I am of the view that the permission should have been granted by the Executing Court. Hence, the impugned order suffers from illegality and same is hereby set aside.

6. Resultantly, this writ petition succeeds and is hereby allowed. The impugned order passed by the Executing Court is set aside. The Executing Court shall now permit the petitioner/plaintiff to get the said amount deposited in the Court and after depositing the said amount, the decree of specific performance of contract passed in favour of plaintiff may be executed.

7. This petition is allowed with costs. Counsel fee Rs.1000/- if Precertified.

Petition allowed.

I.L.R. [2013] M.P., 2794
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 5405/2011 (Jabalpur) decided on 12 December, 2012

NIRMALA KHARE (SMT.) ...Petitioner
Vs.
SURENDRA PATHAK & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 26 Rule 9 - Appointment of Commissioner* - Dispute as to encroachment of land - Petitioner making application in trial Court to appoint Commissioner for investigation on spot - Such application should be allowed. (Para 2)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – कमिश्नर नियुक्त किया जाना – भूमि पर अतिक्रमण के बारे में विवाद – याची ने घटनास्थल पर जांच हेतु कमिश्नर नियुक्त करने के लिए विचारण न्यायालय में आवेदन किया – उक्त आवेदन को मंजूर किया जाना चाहिए।

Case referred :

(2008) 8 SCC 671.

Ashutosh Tiwari, for the petitioner.
Sanjay Pandey, for the respondent No.1.

ORDER

U.C. MAHESHWARI, J.:- Although this matter is listed today for admission but looking to the nature of the question involved in this petition, with the consent of the parties, the same is heard for final disposal.

2. The petitioner has filed this petition under Article 227 of the Constitution of India for quashment of order dated 12.1.2010 Anenx.P/1 passed by the IV Civil Judge-II, Sagar in COS No.16-A/09 whereby the petitioner's application filed under Order 26 rule 9 read with section 151 of the CPC for appointment of the Commissioner to call the Commissioner Report regarding measurement of the disputed property, has been dismissed.

3. Having heard the counsel, keeping in view their argument, I have carefully gone through the papers placed on the record along with the impugned order. As per averment of the plaint Annex.P/2 as well as the written statement Annex.P/3 there is a dispute between the parties regarding measurement of

their respective plots and such dispute, besides the evidence which would be recorded by the trial court, could not be resolved without calling the Commissioner Report after carrying out the measurement of both the plots.

4. As per the averment of the plaint, the defendant has constructed his house by encroaching some part of the plaintiffs land while as per averments of the written statement, the defendants have constructed their premises only in their plot and not by encroaching any part of the plaintiff's plot. So, in such premises, the measurement of both the plots appears to be relevant in the matter. My such approach is fully fortified by the decision of the Apex Court in the matter of *Haryana Waqf Board Vs. Shanti Swarup and others*-(2008) 8 SCC 671 in which it was held that the boundary dispute of the immovable property should be decided after demarcation of the disputed property.

5. In view of the aforesaid discussion, the impugned order Annex.P/1 rejecting the application of the petitioner Annex.P/5 being perverse and contrary to the settled proposition of the law, is not sustainable. Consequently, by allowing this petition, the same is set aside. Pursuant to it, by allowing the aforesaid application Annex.P/5, the trial court is directed to appoint the Commissioner and call the measurement/ demarcation report of the disputed plots on the record and such report be also considered by such court at the stage of appreciation of the recorded evidence in the matter.

6. Petition is allowed. Their shall be no order as to the cost.

C.C as per rules.

Petition allowed.

I.L.R. [2013] M.P., 2795
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg
W.P. No. 9689/2012 (Indore) decided on 13 February, 2013

GOLU @ ANAND ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

National Security Act (65 of 1980), Sections 3(2), 8 & 14(1)(a), Constitution - Article 21 & 22(5) **- Petitioner stated that he submitted representations to the State Govt. and to the Central Govt. - Central**

Govt. rejected the representation - But, the State Govt. did not decide the representation - Held - Writ petition was filed on 05.10.2012 - On 24.01.2013, an order dated 04.12.2012 regarding rejection of representation by the State Govt. was filed - Decision on the representation was taken belatedly - Same is contrary to the constitutional and statutory obligation conferred upon the State Govt. - Unexplained delayed decision loses both its purpose and meaning - It would fatally affect the order of detention - Hence, detention order quashed - Writ petition allowed. (Paras 5, 9 to 11)

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराऐं 3(2), 8 व 14(1)(ए), संविधान – अनुच्छेद 21 व 22(5) – याची का कथन है कि उसने राज्य सरकार और केन्द्र सरकार को प्रत्यावेदन प्रस्तुत किये – केन्द्र सरकार ने प्रत्यावेदन अस्वीकार किया – किन्तु राज्य सरकार ने प्रत्यावेदन का विनिश्चय नहीं किया – अभिनिर्धारित – 05.10.2012 को रिट याचिका प्रस्तुत की गई – 24.01.2013 को, राज्य सरकार द्वारा प्रत्यावेदन की अस्वीकृति के संबंध में आदेश दि. 04.12.2012 प्रस्तुत किया गया – प्रत्यावेदन पर निर्णय विलंब से लिया गया – यह राज्य सरकार को प्रदत्त संवैधानिक एवं कानूनी उत्तरदायित्व के विरुद्ध – अस्पष्ट विलंबित निर्णय अपना प्रयोजन और अर्थ दोनों खो देता है – वह निरोध के आदेश को घातक रुप से प्रभावित करता है – अतः, निरोध आदेश अभिखंडित – रिट याचिका मंजूर।

Cases referred :

(1995) 4 SCC 51, AIR 1996 SC 2998, (2011) 5 SCC 244.

S.L. Nagar, for the petitioner.
M. Ravindran, Dy. G.A. for the respondents.

ORDER

The Order of the court was delivered by :
SHANTANU KEMKAR, J.:- By this petition under Article 226 of the Constitution of India the petitioner has challenged the order dated 28.07.2012 (Annexure P-1) passed by District Magistrate, Indore detaining him under section 3(2) of the National Security Act, 1980 (for short, the Act) as also the order dated 21.09.2012 passed by the State Government affirming the order of the District Magistrate.

2. The challenge of the petitioner to his detention is on the ground that there is clear violation of procedural safe guards provided under the Act. He has alleged that exercising his right to make representation before the State

Government and Central Government he submitted the same to the State Government as also to the Central Government. However the representation submitted to the State Government has not been decided and as such there is violation of provision contained in section 14(1)(a) of the Act.

3. The case of the respondents in the return is that petitioner's representation was considered and decided by the Central Government and a communication to that effect has also been made to the petitioner. However in the return no statement was made as to what had happened to the representation made to the State Government. In the circumstances we asked the respondents to inform as to whether the petitioner representation has been decided by the State Government or not. The case was adjourned from time to time affording opportunity to the respondents State to make a statement to that effect. After getting number of adjournments an order dated 4.12.2012 passed by the State Government rejecting the representation was placed on record by the respondents.

4. We have heard learned counsel for the parties.

5. In order to appreciate the contentions raised by the parties few dates would be relevant. The writ petition was filed on 5.10.2012. The notice of which was received by the State Government on 9.10.2012. Return of the petition alongwith the affidavit of City Superintendent of Police was filed on 21.11.2012 in which no mention about the decision of the State Government on the representation submitted by the petitioner was made. Thereafter on 3.12.2012 the affidavit of the District Magistrate was filed in support of the return in which also no whisper about the decision on representation was made. Thereafter on 24.01.2013 an order dated 4.12.2012 in regard to rejection of representation by the State Government was filed without any application or affidavit in support of it.

6. Interestingly, instead of stating any reason to justify the delay in deciding the representation, Ms. Mini Raveendran, learned Deputy Government Advocate urged that since the Central Government had already rejected the representation there was no necessity for the State Government to have decided the same. According to her since now the State Government has decided the representation may be delayed but for such technical defect the order of detention need not to be quashed. The submissions of the learned Deputy Government Advocate cannot be accepted for the reasons stated hereunder.

7. Section 8 of the Act provides for affording the detenu the earliest opportunity of making representation against the order to the appropriate government. Section 14(1)(a) of the Act provides for revocation of detention order. It empowers both, the State and Central Governments, to revoke or modify the detention order. Article 22(5) of the Constitution provides that the authority making the order of preventive detention shall as soon as may be communicate to such person the grounds on which the order has been made and afford him the earliest opportunity of making a representation against the order. In the case of *Kamlesh Kumar Ishwardas Patel vs. Union of India and others* (1995) 4 SCC 51, the Supreme Court has held that Article 22(5) of the Constitution of India must be construed to mean that the person detained has right to make representation against the order of detention which can be made not only to the Advisory Board but also to the Detaining Authority i.e. the Authority that has made the order of detention or the order of confirmation of such detention which is competent to give immediate relief by revoking the said order as well as to any other authority which is competent under law to revoke the order of detention and thereby give relief to the person detained. In case such representation is submitted there is a corresponding duty on the authority to consider it. In *Kundanbhai Dulabhai v. District Magistrates Ahmdabad and others* [AIR 1996 SC 2998], the Supreme Court has held that right to make representation against the order of detention is not only a constitutional right, but a statutory right as well. Since the Constitution as also the Act specifically provide that the detenu shall be given the earliest opportunity of making representation against the order of detention, it is implicit that there is a corresponding duty on the authorities to whom representation is made to dispose of the representation at the earliest or else the constitutional and the statutory obligation to provide the earliest opportunity of making a representation would loose both its purpose and meaning. Considering the principle laid down in the earlier judgments, the Supreme Court further held that representation has to be disposed of at the earliest and if there has been any delay in disposal of the representation, the reasons for the delay must be indicated to the Court or else, the unexplained delay or unsatisfactory explanation in the disposal of the representation would fatally affect the order of detention and in that situation, continued detention would become bad.

8. The Supreme Court in the case of *Rekha vs. State of Tamilnadu and another* (2011) 5 SCC 244. has observed that law of detention should be strictly construed and confined to narrow limits of rare and exceptional cases, and meticulous compliance with procedural safeguards should be made

mandatory. It held that personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. These procedural safeguards are required to be zealously watched and enforced by the court and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.

9. In the present case, the petitioner's representation dated 01.10.2012 has been decided by the State Government vide order dated 04.12.2012. Copy of the said order of rejection of the representation was filed on 24.01.2013 without there being any endorsement of it being supplied to the petitioner. There is no application or affidavit on behalf of the State explaining the delay caused in deciding the representation. In the circumstances, there is unexplained delay in disposal of the representation, what to talk about unsatisfactory explanation.

10. Having regard to the aforesaid legal position both the contentions of the learned Deputy Government that since the Central Government had already rejected the representation there was no need for the State Government to have decided the same as also that during the pendency of the petition since the representation has been rejected and for the delay caused in deciding the same the detention order cannot be quashed on technicalities are contrary to legal provisions and the law laid down by the Supreme Court. Thus, we are of the view that the decision on the representation having been taken belatedly, the same is contrary to the constitutional and statutory obligation conferred upon the State Government and such unexplained delayed decision looses both its purpose and meaning and it would fatally affect the order of detention making its continuation bad. [See *Kundanbhai Dulabhai v. District Magistrates Ahmdabad and others* (supra)].

11. As a result, the impugned order of detention passed by the District Magistrate and confirmation passed by the State are liable to be and are hereby quashed.

12. The petition is allowed. The petitioner be set at liberty, if he is not required to be detained in any other case.

C.c. today.

Petition allowed.

I.L.R. [2013] M.P., 2800
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 12372/2006 (S) (Jabalpur) decided on 20 June, 2013

SHYAM MANOHAR ASTHANA ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

***Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9(4) - Deemed Suspension* - If an order of penalty is quashed or set aside by a decision of a Court of law and the disciplinary authority thereafter proposes to take further proceeding, the Government servant concerned shall be deemed to have been placed under suspension from the date of the original order of imposition of penalty and shall continue to remain under suspension until further orders.**
(Para 12)

सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 9(4) – निलंबित समझा जाना – यदि शास्ति का आदेश न्यायालय के निर्णय द्वारा अभिखंडित या अपास्त किया गया है और तत्पश्चात, अनुशासनिक प्राधिकारी अतिरिक्त कार्यवाही किये जाने के लिए प्रस्तावित करता है, संबंधित शासकीय सेवक को, शास्ति अधिरोपित करने वाले मूल आदेश की तिथि से निलंबन के अधीन रखा जाना समझा जायेगा और आगे के आदेशों तक निलंबन जारी रहेगा।

Cases referred :

2002 (4) MPLJ 343, 2003(3) MPLJ 501, 2003 (4) MPHT 254.
A.K. Pathak, for the petitioner.
S.M. Lal, G.A. for the respondents.

ORDER

R.S. JHA, J.:- The petitioner has filed this petition being aggrieved by order dated 30.05.2006 by which the respondents have imposed a punishment of compulsory retirement on the petitioner who was a Range Officer in the Forest Department, with retrospective effect from 31.01.1993.

2. The brief facts, leading to the filing of the present petition, are that the petitioner was working in the Forest Department as Range Officer. While in service, departmental proceedings were initiated against the petitioner by issuance of a charge sheet dated 20.01.1986 and he was placed under

suspension. The order of suspension was quashed by this court in W.P. No. 1444/86 decided on 04.07.1987. A Departmental Enquiry was initiated against the petitioner on the charges relating to non handing over of charge; of not properly recording and transferring a sum of Rs.18,091/- and Rs.2,164/- in the relevant record; using inappropriate language against the higher authorities and non-submission of daily diary.

After conducting a detailed enquiry a punishment of compulsory retirement was imposed upon the petitioner by order dated 12.01.1993, against which the petitioner preferred an appeal before the State Government which also suffered dismissal on 05.02.1994. The application for review filed by the petitioner was also dismissed on 18.05.1995. Being aggrieved by which the petitioner had filed O.A. No. 2320/95 before the State Administrative Tribunal, Jabalpur which was thereafter transferred to this court and was registered as W.P. No. 9831/2003 and was ultimately allowed by order dated 15.04.2004 in the following terms:-

> "6. I have carefully perused the order of punishment (A/12) passed by the Chief Conservator of Forest. A perusal of the same shows that reply has not been considered. On the other hand, it has been mentioned in the order that the reply has not been filed. Reply was sent by registered post envelop, has not been controverted in the return filed by the respondents and a wrong averment has been made in the return that the reply was taken into consideration while passing the order of punishment. Perusal of the order shows that the reply has not been as a matter of fact taken into consideration. It was not on record as it was refused to be accepted. There was no reply on the record to be considered. In the circumstances, only on the above ground without going into other submissions raised at bar, the impugned order (A/12), the appellate order (A/15) and the order (A/16) rejecting the review petition petition are liable to be quashed.
>
> 7. Order (A/15) passed in appeal suffers with yet another infirmity. Nothing has been considered. Only one word that after due consideration, the disciplinary authority C.C.F. Has issued an order of punishment. When the appeal is provided, the appellate order must indicate that how the appellate authority has applied

its mind to facts of the case in the appeal. Thus, the appellate order suffers with above serious infirmity. However, I find that initial order itself was passed on infraction of rule giving an opportunity of hearing against enquiry report, as registered envelop was refused to be accepted. Petitioner was denied an opportunity of representation/hearing. I quash the initial order itself. Respondents are free to pass fresh order in accordance with law after duly applying principle of natural justice.

8. Order A/2, A/15 and A/16 are hereby quashed. As to question of backwages, I am not inclined to grant backwages as fresh order is required to be passed in departmental enquiry. Question of backwages has to be considered in the light of the order which is to be passed in departmental enquiry. Let the fresh orders be passed, as prayed by Shri P.N. Dubey, learned Dy. A.G. appearing for the respondents, within six months after giving due opportunity to the petitioner. Parties to bear their own costs."

3. The petitioner on quashing of the order of punishment by this court submitted rejoining on his post on 14.07.2004, by Annexure P/20, but he was not taken back in service. The respondents then served a notice dated 25.06.2004 along with a copy of enquiry report upon the petitioner asking him to submit a detailed reply, pursuant to which he filed a detailed reply to the enquiry report on 02.07.2004 and was also given an opportunity of personal hearing on 11.01.2005.

4. The respondents/authorities thereafter sought an opinion from the M.P. Public Service Commission as to whether the petitioner could be punished with retrospective effect from 1993. The P.S.C. in its reply dated 03.05.2006 Annexure P/24 stated that, while legally the petitioner could not be compulsorily retired w.e.f. 1993, however, in view of the opinion to the contrary given by the General Administrative Department, approval of the proposed punishment was granted by the PSC, pursuant to which the respondents have passed the impugned order dated 20.05.2006 reimposing the punishment of compulsory retirement upon the petitioner with retrospective effect from 31.01.1993. Being aggrieved by which the present petition has been filed.

5. It is submitted by the learned counsel for the petitioner that this court in W.P. No. 9831/2003 had specifically quashed the order of punishment

whereby penalty of compulsory retirement was imposed upon the petitioner and had thereafter permitted the respondents/authorities to pass fresh orders in accordance with law after duly applying the principle of natural justice and giving an opportunity to the petitioner to submit a reply to the enquiry report.

6. It is submitted that after undertaking the exercise as directed by this court, the respondents/authorities passed the order of punishment dated 30.05.2006 but while doing so, have wrongly imposed the punishment of compulsory retirement with retrospective effect from 31.1.1993 which is contrary to law as, after quashing of the order of punishment, the petitioner was deemed to be in service and therefore could only have been punished from the date when a fresh order in that regard was passed. It is submitted that the petitioner had crossed his age of superannuation on 31st of July, 2001 and therefore, at best, he could have been considered to have been compulsorily retired from that date and not before that but the respondents/ authorities without taking into consideration of the aforesaid fact or the provisions of law have done so.

7. The learned counsel for the petitioner relying on the provisions of rule 9(4) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 has stated that the statutory provisions confer status of a deemed suspended employee upon the petitioner on quashing of the order of penalty which provision has totally been ignored by the respondents/authorities and, therefore, the impugned order deserves to be quashed.

8. The learned counsel for the petitioner has also submitted that the orders imposing punishment with retrospective effect are contrary to law, relying upon the decisions of this court rendered in the case of State of *M.P. Vs. Laxmi Chand Awadhiya and another* 2002(4) MPLJ 343, *Rajaram Singh Vs. State of MP and others* 2003(3) MPLJ 501 and *R.C. Bhargava Vs. MP Dugdh Mahasangh Sahkari Maryadit, Bhopal and others* 2003(4) MPHT 254 in support of his submissions.

9. The learned Government Advocate for the State per contra submits that the respondents/authorities had imposed a punishment of compulsory retirement w.e.f. 31.01.1993 upon the petitioner by order dated 12.01.1993. This order and the consequential appellate orders were quashed by this court in W.P. No. 9831/03 and the authorities were granted liberty to pass a fresh order. It is stated that there was no direction to reinstate the petitioner or to treat him in service and in such circumstances in compliance of the order

passed by this court on 15.04.2004, the respondents/authorities after giving due opportunity of hearing to the petitioner, passed fresh orders of punishment after taking the opinion of the PSC on 30.05.2006 reimposing the punishment of compulsory retirement w.e.f. 31.01.1993 and therefore, no fault can be found with the order passed by the respondents/authorities in the peculiar facts and circumstances of the case.

10. I have heard the learned counsel for the parties at length. The facts as stated above are undisputed.

11. The provisions of Rule 9 (4) of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 which provides for procedure for conducting departmental enquiry and imposition of penalty reads as under:-

> Rule 9(4) "Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant, is set aside or declared or rendered void in consequence of or by a decision of a court of law and the disciplinary authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the appointing authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders."

12. A perusal of the aforesaid rule makes it clear that if an order of penalty being quashed or set aside by a decision of a court of law and the disciplinary authority thereafter proposes to take further proceedings, the Government servant concerned shall be deemed to have been placed under suspension by the appointing authority from the date of the original order of imposition of penalty and shall continue to remain under suspension until further orders.

13. In view of the aforesaid statutory provisions, it is clear that on quashing of the initial order of penalty by this court, the petitioner would be deemed to be under suspension till passing of the fresh orders. It is also worth noting that this court while granting permission to the respondents/authorities to pass fresh orders did not observe that the provisions of rule 9(4) of the Rules would not come into the play or that the fresh orders passed by the respondents/authorities would

come into operation from the date of the initial order of punishment.

14. In the present case also after quashing of the order of penalty by this court the petitioner would be deemed to be under suspension in view of the statutory provisions of Rule 9(4) of the Rules and would continue to remain in service till the impugned order of punishment was passed and in such circumstances, the respondents/authorities had no power or authority to pass an order compulsorily retiring the petitioner with retrospective effect 31.01.1993 thereby nullifying the order passed by this court as well as rendering the provisions of rule 9(4) of the Rules redundant and otiose. Moreso, as after quashing of the initial order of penalty by this court, it was only on the date of passing of the impugned order dated 30.05.2006 that the respondents found the petitioner guilty of the charges and therefore he could not have been punished retrospectively with effect from 31.01.1993.

15. It has been held by a Division Bench of this court in the case of *Laxmi Chand Awadhiya* (supra) in para 14 that an order imposing retrospective punishment is contrary to the basic jurisprudence of service law by relying upon the decision of Supreme Court rendered in the case of *Jeevaratnam Vs State of Madras,* AIR 1966 SC 951. Similar view has been taken by a Division Bench of this Court in the case of *Rajaram Singh* (supra) in paragraph 7 of the same.

16. In the circumstances, I am of the considered opinion that the impugned order dated 30.05.2006 imposing punishment of compulsory retirement with retrospective effect from 31.01.1993 upon the petitioner, deserves to be and is hereby quashed and it is held that the penalty can be imposed prospectively only from the date of the order. It is also held that consequently, the petitioner would be entitled to all ensuing and consequential benefits. However, looking to the fact that the petitioner had crossed the age of superannuation on 31.07. 2001, the matter is remitted back to the respondents/authorities for passing fresh orders after taking all the aforesaid aspects into consideration.

17. Looking to the age of dispute, the aforesaid exercise be undertaken and completed by the respondents/authorities within a month from the date of furnishing a copy of the order passed today along with the petition on the concerned authority.

18. With the aforesaid, the petition filed by the petitioner stands allowed. There shall be no order as to the costs.

Petition allowed.

I.L.R. [2013] M.P., 2806
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 3850/2013 (S) (Gwalior) decided on 5 July, 2013

SHEKHAR SINGH CHAUHAN (DR.) and ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

***Constitution - Article 16(4-B), Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, M.P. (21 of 1994), Section 4 - Carry forward Vacancies* - Held - The conjoint reading of both the provisions clearly states that the carried forward vacancies shall not form part of the vacancies of a later recruitment year nor it shall be counted to work out the percentage of reservation. (Para 14)**

संविधान – अनुच्छेद 16 (4बी), लोक सेवा (अनुसूचित जातियों, अनुसूचित जनजातियों और अन्य पिछड़े वर्गों के लिये आरक्षण), अधिनियम, एम.पी., (1994 का 21), धारा 4 – रिक्तियों को अग्रनीत करना – अभिनिर्धारित – दोनों उपबंधों को एक साथ पढ़े जाने से स्पष्ट है कि अग्रनय रिक्तियां पश्चातवर्ती भर्ती वर्ष की रिक्तियों का भाग नहीं बनेगी और न ही उनकी गणना आरक्षण का प्रतिशत निकालने के लिए की जायेगी।

Cases referred :

AIR 1999 SC 2894, (2006) 8 SCC 212, 1992 Supp. (3) SCC 217, AIR 2006 SC 2339, AIR 2008 SC 1913.

Anil Sharma, for the petitioners.
R.D. Jain, A.G. for the respondents No. 1 & 2.
S.K. Jain, for the respondent No.3.

O R D E R

Sujoy Paul, J.:- By filing this petition under Article 226 of the Constitution, the petitioners have called in question the method of selection adopted by respondent No.3. The following relief is prayed for :-

> "The petitioners, therefore, most humbly pray that this Hon'ble Court may kindly be pleased to allow this petition and thereby issuing a writ/ mandamus thereby quashing the Advertisement No. 02/Selection/2012 OR respondents may kindly be directed

to the respondents to conduct the written examination for the post of Assistant Veterinary Surgeon and prepare the merit list accordingly. To pass such other further order (s) deemed fit and proper in the interest of justice. Costs may also be awarded."

2. Shri Anil Sharma, learned counsel for the petitioners submit that initial advertisement for recruitment for the post of Veterinary Assistant Surgeon was issued vide advertisement, Annexure P-1. However, subsequently this advertisement was amended by issuing a corrigendum on 31.12.2012. Learned counsel for the petitioners by drawing the attention of this Court submits that total number of the posts of Vaterinary Assistant Surgeon was declared as 525. Bifurcation of the vacancies in the said advertisement is as under:-

पद का नाम	कुल पद	रिक्तियों की वर्गवार संख्या				रिक्तियों में से वर्गवार मध्यप्रदेश की मूल निवासी महिलाओं के लिये आरक्षित पद			
		अना.	अनु. जाति	अनु. जनजाति	अ.पिव	अना.	अनु. जाति	अनु. जनजाति	अ.पि.व
पशु चिकित्सा सहायक शल्यज्ञ (Veterinary Assistant Surgeon)	525	139	110 (75 बैकलॉग)	241 (198 बैकलॉग)	35	41	33	71	11

3. The first contention of learned counsel for the petitioners is that admittedly 75 vacancies in SC and 198 vacancies in ST are admittedly backlog vacancies. Even vacancies are clubbed together with the general category vacancies and thereafter total number of vacancies are determined as 525. By placing reliance on M.P.Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994 (hereinafter called as "Adhiniyam"), learned counsel submits that section 2(h) defines "Recruitment Year". By taking this Court to section 4(3)(b) and (c) Shri Anil Sharma submits that the unfilled backlog vacancies can very well be carried forward but it cannot be filled along with the vacancies of another recruitment year and for that a special drive should have been initiated by the State Government as per mandate of section 4(3)(b) proviso. In addition, it is argued

that the respondents have erred in carrying forward and clubbing the vacancies with the vacancies of a different recruitment year and with the general category vacancies.

4. The last submission of attack on the recruitment process is based on the rules of procedure prepared by the M.P.P.S.C. By relying on rule 5 (4)(C) it is stated that where the number of applicants exceeds 500 and their number is also more than five times the number of vacancies, it is obligatory on the part of the respondents to conduct a written examination whereas they have only conducted an interview which is bad in law. By relying on AIR 1999 SC 2894 (*Dr. Preeti Srivastava and another vs. State of Madhya Pradesh and others*), Shri Anil Sharma, learned counsel for the petitioners submits that candidates have passed and acquired qualification from different Universities/ educational institutions. Accordingly, the respondents should have followed the procedure of scaling before subjecting them to the selection conducted by the respondent-PSC. In support of this submission, he relied on a judgment of the Constitution Bench of Supreme Court, reported in (2006) 8 SCC 212 (*M. Nagaraj and others vs. Union of India and others*), to submit that the carried forward vacancies cannot be clubbed together with the vacancies of a subsequent year and such an action is impermissible in the eye of law.

5. *Per Contra*, Shri R.D.Jain, learned Advocate General and Shri S.K.Jain, learned counsel for respondent No.3, supported the action and submits that there is no illegality or infirmity in the action taken by the respondents. Learned Advocate General relied on the judgment of Supreme Court in the case of *Indra Sawhney v. Union of India,* 1992 Supp (3) SCC 217. He also placed heavy reliance on certain paragraphs in the judgment of Supreme Court in the case of *M. Nagaraj* (supra). Learned counsel for the other side would submit that their action is in consonance with the Adhiniyam and no interference is warranted. Learned counsel also relied on AIR 2006 SC 2339 (*K.H.Siraj vs. High Court of Kerala*) to submit that interview is held to be the best method to assess a candidate. In addition, it is stated that there is no violation of rule 5(4)(C) relied on by the petitioners. By providing mathematical calculation of the date, Shri R.D.Jain, submitted that as per the said date, it is clear that the respondents have adopted the method of selection in the present case.

6. Lastly, it is submitted that the method of selection was prescribed in explicit words in Annexure P-1 (advertisement). The petitioners were aware

about these conditions and despite that without any protest or demur appeared in the interview. After having appeared in the interview, it is no more open for him to challenge the validity of the interview. For this, he relied on AIR 2008 SC 1913 (*Dhananjay Malik & others vs. State of Uttaranchal and others*).

7. In rejoinder submissions, Shri Anil Sharma submits that petitioners were not called in the interview and, therefore, there is no question of their appearance or waiver of the right. Shri R.D.Jain submits that they were below the cut of marks and, therefore, they were not called in the interview.

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

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

10. Before dealing with the rival contention, it is apt to quote section 2(h), which defines "recruitment year" and section 4(3)(b) and (c) as under:-

> *"2(h) "Recruitment Year" in relation to a vacancy means a period of twelve months commencing on the first of January of a year within which the process of direct recruitment against such vacancy is initiated."*
>
> *Rule 5(4)(C) relied on by the petitioners reads as under:- "5(4)(C) where the number of applicants exceeds 500 and their number is also more than five times the number of vacancies, then a written examination shall be held. As a result of the written examination, candidates to be called for interview, shall be unless otherwise decided, in the ratio of 1:3 i.e., three candidates for one vacancy plus such additional candidates who have secured marks equal to the last candidate on the basis of the ratio aforementioned.*
>
> *Provided that written examination shall not be necessary when number of vacancies to be filled is ten or less, irrespective of the number of applications that may have been received. Provided further that the commission may decide to adopt the procedure with such minor modifications in the procedure prescribed herein before as may be warranted if the exigencies of the type of posts, the educational qualifications prescribed for the post and*

the number of applications likely to be received so required.

Selection list of merit shall be based on total of marks obtained in written examination and marks obtained in interview both. Total marks of interview shall be 12.5% of the written examination. Applicant shall secure minimum marks in written examination as per decided by the commission. There are no minimum qualifying marks in the interview."

11. Interestingly, both the parties have relied on the Constitution Bench Judgment of Supreme Court in the case of *M.Nagaraj* (supra). In the said case, the broad issues which arose for determination before the Apex Court were in reference to (i) validity, (ii) interpretation, and (iii) implementation of the 77th, 81st, 82nd and 85th Constitution Amendment Acts. The Apex Court considered the earlier judgments delivered by it on the aforesaid aspects. The Supreme Court opined that Articles 16 (4-A) and 16 (4-B) are enabling provisions. The "width test" needs to be applied and the boundaries of the width of the power, namely, the ceiling limit of 50% (quantitative limitation) needs to be implemented. However, a simple reading of this judgment makes it clear that the Apex Court opined that insertion of Articles 16(4-A) and 16(4-B) are in consonance with the judgment of Supreme Court delivered in the case of *Indra Sawhney* (supra). Lastly, it is held that these amendments have nexus with Articles 17 and 46 of the Constitution.

12. The bone of contention of the petitioners is that the respondents have erred in clubbing the backlog vacancies of earlier recruitment year with that of present year which amounts to exceeding 50% "width test". Before dealing with this aspect, it is apt to quote Article 16(4-B), which was inserted by 81st amendment in the Constitution. It reads as under:-

"(4-B)Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for

determining the ceiling of fifty per cent reservation on total number of vacancies of that year."

(Emphasis Supplied)

A bare perusal of this provision itself shows that whenever certain reserved vacancies are carried forward and filled up in the next year/years, such class of vacancies shall not be counted and considered together with the vacancies of the year in which they are being filled up for determining the ceiling of 50% reservation on total number of vacancies of that year.

13. In Madhya Pradesh, Adhiniyam/enabling provision aforesaid was already in force. Section 4 (3)(b) makes it clear that the carried forward vacancies shall not be counted against the quote of vacancies reserved for concerned category of persons for the recruitment year to which it is carried forward. Sub-section (3)(c) of section 4 also makes it clear that such carried forward vacancies shall form a separate distinct group and will not be counted with the reserved vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

14. If Section 4 of the Adhiniyam is read conjointly with Article 16(4-B) of the Constitution, it makes it clear like noon-day that carried forward vacancies shall not form part of the vacancies of a later recruitment year nor it shall be counted to work out the percentage of reservation. Thus, the petitioners' contention that there is more than 50 per cent reservation is devoid of merits. To work out/calculate the percentage the petitioners have included the backlog vacancies (75 SC + 198 ST). These vacancies of backlog cannot be taken into account in view of the aforesaid provisions to determine the percentage of reservation in the subsequent recruitment year. Thus, this contention of petitioners completely fails.

15. A simple reading of proviso to Section 4(3)(b) of the Adhiniyam makes it clear that it is an enabling provision wherein it is open to the State Government to initiate a special recruitment drive to fill up the backlog vacancies. I am unable to read this provision in the manner suggested by Shri Anil Sharma. In other words, I am unable to persuade myself with the line of argument of the petitioners that the backlog vacancies can be filled up only by way of special drive and cannot be filled up normally. Neither Section 4 nor Article 16 (4-B) prohibits the State to fill up the posts in any manner i.e. by way of special

drive or otherwise. In para 96 of the judgment of *M. Nagaraj* (supra) the Apex Court opined as under:-

> *"Therefore, in effect, Article 16(4-B) grants legislative assent to the judgment in R.K.Sabharwal v. State of Punjab,* (1995) 2 SCC 745. *If it is within the power of the State to make reservation then whether it is made in one selection or deferred selections, is only a convenient method of implementation as long as it is post based, subject to replacement theory and within the limitations indicated hereinafter."*

Thus, this contention of the petitioners must also fail.

16. The contention regarding following scaling method does not require any consideration by this Court in absence of any specific prayer in this regard in the relief clause. Even otherwise, this is within the province of the selecting authority to decide the method of selection in accordance with rules. In absence of showing any violation of rule in not adopting the scaling method; no flaw can be found in the action of the respondents. The judgment in the case of *Dr. Preeti Srivastava* (supra) has no application in the facts and circumstances of the present case.

17. So far the contention regarding written examination is concerned, it is based on rule (C) filed by the respondents. A careful reading of Article 16 (4-B) of the Constitution and Section 4 of the Adhiniyam leaves no room for any doubt that the carried forward vacancies are not to be counted for the purpose of determining percentage of reservation. There is no bar for counting these vacancies for other purposes. In the considered opinion of this Court, the requirement of rule (C) aforesaid is of two fold :- (i) the number of applicants/candidature must exceed 500, and (ii) number of applicants/ candidature must be five times the number of vacancies. The said twin conditions are simultaneously required to be fulfilled for the purpose of holding written examination. At the costs of repetition, it is clear that carried forward vacancies can also be counted for the purpose of determining the number of applicants because the only prohibition in not counting the said vacancies is only for the purpose of determining the percentage of reservation. If in the aforesaid factual backdrop rule (C) is applied, it will be clear that the total number of applications/candidature received by the respondents is 1126 and

total number of posts are 525. If 525 is multiplied by 5, it comes to 2625. Thus, the number of applications are not five times the number of vacancies. Thus, the necessary conditions mentioned in the rule is not fulfilled. The respondents in explicit terms made it clear in the advertisement itself that in these situation, the candidates will be subjected to interview only. No case is made out by the petitioners for issuing a command to the respondents for conducting written examination.

18. On the basis of aforesaid analysis, the petition must fail. Petition is dismissed being meritless. Ad interim order is vacated. No costs.

Petition dismissed.

I.L.R. [2013] M.P., 2813
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 1180/2004(S) (Gwalior) decided on 19 July, 2013

SURENDRA KUMAR JAGGI ... Petitioner
Vs.
STATE OF MADHYA PRADESH & ors. ... Respondents

***Service Law - Disciplinary Proceeding - Delay* - Charge-sheet issued after 18 years against petitioner pertaining to an order while working as Tahsildar - The order passed by petitioner though was set-aside by revisional authority, but the order of revisional authority is also under challenge before the Board of Revenue - Held - In view of serious allegations, delay alone cannot be a ground to set aside the disciplinary proceedings - Petition dismissed. (Paras 2 to 8)**

सेवा विधि – अनुशासनिक कार्यवाही – विलम्ब – तहसीलदार के पद पर कार्यरत होने के समय के एक आदेश के संबंध में याची के विरुद्ध 18 वर्ष पश्चात आरोप पत्र जारी किया गया – याची द्वारा पारित आदेश, यद्यपि पुनरीक्षण प्राधिकारी द्वारा अपास्त किया गया था, परंतु पुनरीक्षण प्राधिकारी के आदेश को भी राजस्व बोर्ड के समक्ष चुनौती दी गई है – अभिनिर्धारित – गंभीर अभिकथनों को दृष्टिगत रखते हुए केवल विलम्ब अनुशासनिक कार्यवाही अपास्त करने का आधार नहीं हो सकता –याचिका खारिज।

Cases referred :

AIR 1990 SC 1308, (1995) 2 SCC 570, (1993) 2 SCC 56, (2012) 11 SCC 565, (2006) 12 SCC 28.

D.S. Raghuvanshi, for the petitioner.
Sangeeta Pachouri, Dy.G.A., for the respondents/State.

ORDER

SUJOY PAUL, J.:- The petitioner by filing this petition under Article 226 of the Constitution has challenged the charge sheet, Annexure P-1, dated 8.7.2003. It is challenged on the ground that the allegation of the charge sheet pertains to the year 1985, when the petitioner passed an order on 13.4.1985 while working as Tahsildar.

2. A charge sheet is issued after 18 years and, therefore, it is liable to be set aside on the ground of inordinate delay. In addition, it is stated that against the order passed by the petitioner dated 30.4.1985 the revisional authority in exercise of its suo motu powers passed the order dated 24.10.2000 (Annexure R-2), whereby the petitioner's order was set aside. Against this order dated 24.10.2000, the non-applicants of Case No. 111/97/98/suo motu revision, have filed second revision before the Board of Revenue, which is pending and there is an interim order prevailing and, therefore, this order Annexure R-2 cannot be pressed into service nor can be a reason for issuance of charge sheet against the petitioner. Lastly, it is stated that as per circular of the State Government, Annexure P-4, dated 3.4.1996, action against the employee can be taken by way of disciplinary action only after the decision in the revision. Shri D.S.Raghuvanshi relied on AIR 1990 SC 1308 (*State of MP vs. Bani Singh*) and (1995) 2 SCC 570 (*State of MP vs. Chamanlal Goyal*).

2. Per Contra, Smt. Sangita Pachauri, learned Deputy Government Advocate, supported the charge sheet and submits that at this stage no interference is warranted by this Court. She further submits that in the revisional order dated 24.10.2000 there is a finding by the revisional court that the petitioner has not conducted proper enquiry and made an effort to give improper benefits to the non-applicants therein. Thereafter, the charge sheet is issued on 8.7.2003. The allegations against the petitioner are very serious and include the allegation of acting with ulterior motive to give benefit to Shripad and Amarsingh. Thus, it is not a case of merely passing a wrong order but a case which contains an allegation of passing wrong order with oblique motive. Lastly, she relied on the judgment in the case of *Union of India and others Vs. K.K.Dhawan,* reported in (1993) 2 SCC 56.

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

4. The petitioner has challenged the charge sheet solely on the ground of delay. Additional ground is that against the revisional order the matter is pending before the Board of Revenue. The pivotal question is whether a charge sheet can be set aside merely on the ground of delay. In my opinion, this question is no more res integra. In catena of judgments the Apex Court held that inordinate delay is a ground on which interference can be made. For this also the employee has to show the prejudice caused to him. However, in cases where allegations are very grave, the charge sheet cannot be quashed mechanically on the ground of delay. It is apt to quote recent judgment of Supreme Court in (2012) 11 SCC 565 (*Secretary, Ministry of Defence and others vs. Prabhash Chandra Mirdha*). The Apex Court after taking stock of earlier judgments of Supreme Court opined as under:-

> *"Proceedings are not liable to be quashed on the grounds that the same had been initiated at a belated stage or could not be concluded in a reasonable period unless the delay creates prejudice to the delinquent employee. In case the charge-sheet is challenged before a court/tribunal on the ground of delay in initiation of disciplinary proceedings or delay in concluding the proceedings, the court/tribunal may quash the charge-sheet after considering the gravity of the charge and all relevant factors involved in the case weighing all the facts both for and against the delinquent employee and must reach the conclusion which is just and proper in the circumstance. Gravity of alleged misconduct is a relevant factor to be taken into consideration while quashing the proceedings."*
>
> *(Emphasis Supplied)*

A bare perusal of this judgment shows that gravity of charge is one relevant consideration and in such cases only on the ground of delay charge sheet cannot be quashed.

5. In *K.K.Dhawan* (supra), the Apex Court has laid down the principles on which charge sheet can be issued against an officer exercising quasi-judicial powers. In other words, the order passed in quasi-judicial capacity can also become a subject matter of disciplinary proceedings if the following is alleged:-

(i) Where the officer had acted in a manner as would

reflect on his reputation for integrity or good faith or devotion to duty;

(ii) if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

(iii) if he has acted in a manner which is unbecoming of a Government servant;

(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great".

(These illustrations are given by Supreme Court in *K.K.Dhawan's* case (supra).

6. If on the basis of aforesaid litmus test the present charge sheet is examined, it will be clear that it is alleged against the petitioner that he has not followed the prescribed procedure in the Land Revenue Code, the orders in vogue and thereby directly or indirectly with ulterior motive benefited the applicants of revenue matters. The allegations regarding applicant's integrity and negligence are also made in the charge sheet.

7. The Supreme Court in a later judgment reported in (2006) 12 SCC 28 (*Union of India and another Vs. Kunisetty Satyanarayana*) opined as under:-

"It is well settled that ordinarily no writ lies against a charge-sheet or show cause notice.

A writ petition lies when some right of any party is infringed. A mere show cause notice or charge-sheet does not infringe the right of anyone. It is only when a final oder imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance.

Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show cause notice or charge-sheet. Albeit, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal."

8. In the light of aforesaid legal position, I am unable to hold that charge sheet does not constitute misconduct and no disciplinary proceedings can be initiated and permitted to continue against the petitioner because the orders which became subject matter of charge sheet were passed in quasi judicial exercise of powers. When serious allegations of negligence, violating the fixed procedure and integrity are made coupled with the allegation of ulterior motive, no interference is warranted at this stage in the charge sheet. Correctness of charges cannot be gone into at this stage. As held by Supreme Court, in view of serious allegations delay alone cannot be a ground to set aside the disciplinary proceedings.

9. On the basis of aforesaid cumulative reasons, I find no reason to interfere in the charge sheet. Petition is bereft of merits and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2013] M.P., 2817
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 2677/2013 (Indore) decided on 25 July, 2013

KANCHAN BAI (SMT.) ...Petitioner
Vs.
HEMCHANDRA & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment **- Name of husband of the petitioner in the civil suit was shown to be Omprakash -However, the plaintiff filed an application for amending the name of the husband of the petitioner as Ramkishan Saini on the ground that plaintiff has subsequently come to know that petitioner is not legally wedded wife of Omprakash - Held - Status of a lady in society is paramount consideration, whether she is entitled for share in**

property being a widow or not, is secondary - Order of Trial Court allowing the application for amendment set aside - However, respondent No.1 shall be at liberty to lead evidence to prove that the petitioner is not a legally wedded wife of Omprakash. (Para 7, 8 & 9)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – संशोधन – सिविल वाद में, याची के पति का नाम ओमप्रकाश दर्शाया गया – किन्तु, वादी ने याची के पति का नाम रामकिशन सैनी के रूप में संशोधित करने हेतु आवेदन इस आधार पर प्रस्तुत किया कि वादी को बाद में पता चला कि याची, ओमप्रकाश की वैध रूप से ब्याहता पत्नी नही – अभिनिर्धारित – समाज में महिला की स्थिति सर्वोपरि विचारणीय है, उसे विधवा के नाते सम्पति में हिस्से का हक है अथवा नही, यह द्वितीयक है – संशोधन का आवेदन मंजूर करने का विचारण न्यायालय का आदेश अपास्त–किन्तु प्रत्यर्थी क्र.1 को यह साबित करने के लिये साक्ष्य प्रस्तुत करने की स्वतंत्रता होगी कि याची, ओमप्रकाश की वैध रूप से ब्याहता पत्नी नही है।

Vinay Zelawat, for the petitioner.
S.S. Garg, for the respondent No.1.

ORDER

N.K. Mody, J.:- Being aggrieved by the order dated 17/01/2013 passed by VI additional District Judge, Indore in Civil Suit No. 45-A/2009, whereby application filed by respondent No.1 under Order VI Rule 17 of CPC was allowed and respondent No.1 was permitted to make amendment in the cause title and also in the body of the plaint, present petition has been filed.

2. Short facts of the case are that respondent No.1 filed a suit for declaration, partition and possession. In the said suit name of the petitioner was shown as wife of Omprakash. This suit was filed in the year 2000. Thereafter an application for amendment was filed in the year 2012, wherein it was prayed that the respondent No.1 be permitted to amend the cause title by putting the name of Ramkishan Saini as husband of the petitioner. Amendment was also sought in the body of the plaint.

3. The contention of the respondent No.1 was that since Omprakash was married to Shailbala, who is respondent No.8, therefore, petitioner cannot be the wife of Omprakash.

4. The application was opposed, but allowed, hence this petition.

5. Learned counsel for the petitioner submits that the impugned order

is illegal, incorrect and deserves to be set aside. Learned counsel submits that the petitioner is the widow of Omprakash and is wedded wife of Omprakash. It is submitted that petitioner is the mother of the children from Omprakash, who are studying in the school. It is submitted that without holding any inquiry learned Court below was not justified in allowing the application filed by the respondent No.1. It is submitted that the petition filed by the petitioner be allowed and impugned order be set aside.

6. Shri SS Garg, learned counsel for respondent No.1 submits that it is true that initially suit was filed wherein the petitioner was shown as widow of Omprakash but lateron when the written statement was filed by respondent No.3, Ravindranath, before the learned Court below then respondent No.1 came to know that petitioner is not legally wedded wife of Omprakash. It is submitted that in the circumstances, the application was filed which was rightly allowed. It is submitted that the petition has no merit and the same be dismissed.

7. From perusal of the record, it appears that the dispute between the parties relating to rights in the properties and to be decided on the basis of evidence which shall be adduced by the parties before learned Court below. Since petitioner was shown as widow of Omprakash right from beginning of litigation, therefore, only because the respondent No.1 came to know that petitioner is not legally wedded wife of Omprakash, cannot be permitted to amend the cause title and body of the plaint as the status of a lady in the society is paramount consideration whether she is entitled for the share in the property being a widow or not, is secondary, but only because she is not legally wedded wife as per respondent No.1, amendment application cannot be allowed.

8. In view of this, the petition filed by the petitioner is allowed and the impugned order, so far as it relates to incorporate the amendment in the title of the suit, is quashed.

9. The respondent No.1 shall be at liberty to lead evidence to prove that the petitioner is not a legally wedded wife of Omprakash.

10. With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2013] M.P., 2820
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 10595/2012 (Indore) decided on 1 August, 2013

HASMUKH JAIN (GANDHI) ...Petitioner
Vs.
SMT. SUDHA ...Respondent

***Stamp Act (2 of 1899), Article 5(e)(ii) & Sections 2(23) & 35(b) - Suit for recovery of money* - Petitioner agreed to purchase the flat for a consideration of Rs. 19,50,000/- and paid a sum of Rs. 21,000/- as earnest money - Receipt of Rs. 21,000/- not disputed - Petitioner wants to use the document (agreement dated 22.11.2008) as receipt - Held - Petitioner is permitted to adduce the document Ex.P/1 (agreement dated 22.11.2008) in evidence, which shall be admissible for collateral purpose to prove the receipt of the amount. (Para 8)**

स्टाम्प अधिनियम (1899 का 2), अनुच्छेद 5(ई)(ii) व धाराऐं 2(23) व 35(बी) – रकम की वसूली हेतु वाद – याची ने रु. 19,50,000/– के प्रतिफलार्थ फ्लैट क्रय करने का करार किया और अग्रिम रकम के रुप में रु. 21,000/– की रकम अदा की – रु. 21,000/– की रसीद विवादित नहीं – याची, दस्तावेज (करार दि. 22.11.2008) को रसीद के रुप में उपयोग करना चाहता है – अभिनिर्धारित – याची को दस्तावेज प्र. पी/1 (करार दि. 22.11.2008), साक्ष्य में प्रस्तुत करने की अनुमति दी गई, जो रकम की स्वीकृति साबित करने के सांपार्श्विक प्रयोजन हेतु ग्राह्य होगा।

S.K. Gangwal, for the petitioner.
Vinay Saraf, for the respondent.

ORDER

N.K. Mody, J.:- Being aggrieved by the order dated 03/10/12 passed by IX ADJ, Indore in Civil Suit No.55-B/10 whereby application filed by the petitioner for taking the document admissible in evidence was dismissed, present petition has been filed.

2. Short facts of the case are that the petitioner filed a suit for recovery of Rs.3,85,250/- alleging that the petitioner entered into an agreement to purchase the plot in dispute vide agreement dated 22/11/08 for a consideration of Rs.19,50,000/- and paid earnest money of Rs.3,01,000/-. It was alleged that since the respondent is not executing the sale deed in favour of petitioner,

therefore, petitioner is entilled for refund of amount. It was prayed that decree be passed in favour of petitioner. The suit was contested by the respondent on various grounds including on the ground that it is only Rs.21,000/-which has been received by the respondent. It was prayed that the suit be dismissed. After framing of issues, at the stage of evidence petitioner tried to exhibit the agreement dated 22/11/08 in evidence, which was objected by the respondent. Thereafter an application was filed by the petitioner to take the document in evidence, which was dismissed, hence this petition.

3. Learned counsel for the petitioner argued at length and submits that the impugned order is illegal, incorrect and deserves to be set aside. It is submitted that the document which is filed by the petitioner is on stamp paper of Rs.100/- and since it is only a receipt, therefore, it requires stamp duty of Rs.1/-. Learned counsel placed reliance on definition of 'Receipt' laid down under Section 2(23) of Indian Stamp Act, 1899, which reads as under:-

> ***Section 2(23)-*** *Receipt includes any note, memorandum or writing : -*
>
> *(a) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or*
>
> *(b) whereby any other movable property is acknowledged to have been received in satisfaction of a debt, or*
>
> *(c) whereby any debt or demand, or any part of a debt of demand, is acknowledged to have been satisfied or discharged, or*
>
> *(d) which signifies or imports any such acknowledgment, and whether the same is or is not signed with the same of any person.*

4. Learned counsel further placed reliance on Section 35(b) of Indian Stamp Act, 1899, which reads as under:-

> ***Section 35. Instruments not duly stamped inadmissible in evidence etc.***
>
> *(b) where any person from whom a stamped receipt could*

have been demanded, has given an unstamped receipt, and such receipt, if stamped, would be admissible in evidence against him then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it.

5. Learned counsel submits that in view of the aforesaid since the document is receipt and suit is for refund of amount, therefore, learned Court below was not justified in dismissing the application filed by petitioner. It is submitted that the petition be allowed and impugned order passed by the learned Court below be set aside.

6. Learned counsel for respondent submits that since it was an agreement to purchase the property, therefore, it was required to be stamped @ 1% of the transaction. For this contention reliance is placed on Article 5(e)(ii) of Indian Stamp Act, which reads as under:-

5.	***Agreement or memorandum of an agreement:-***	
(e)	*If relating to sale of immovable property:-*	
(i)	.....	
(ii)	*When possession of the property is not given*	*One percent of the total consideration of the property setforth in the agreement or memorandum of agreement.*

7. It is submitted that the petition filed by the petitioner be dismissed.

8. From perusal of the record it is evident that the document in question is agreement to sale whereby petitioner agreed to purchase the flat for a consideration of Rs. 19,50,000/- and paid a sum of Rs.21,000/- as earnest money. The suit is for recovery of money. Receipt of Rs.21 ,000/- was by cheque is also not disputed by the respondent. Petitioner wants to use the document as receipt. In the facts and circumstances of the case, petition filed by the petitioner is allowed and impugned order is set aside and the petitioner is permitted to adduce the document Ex. P/1 in evidence, which shall be admissible for collateral purpose to prove the receipt of the amount.

9. With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2013] M.P., 2823
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 5976/2012 (Gwalior) decided on 10 September, 2013

MADHVI SHARMA (SMT.) ...Petitioner
Vs.
PUSHPENDRA SHARMA ...Respondent

A. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Proviso - Amendment of pleadings - Due diligence - **Amendment based on subsequent event - No reply to amendment application was filed - It can not be held that it is not filed with due diligence. (Para 5)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – परंतुक – अभिवचनों में संशोधन – सम्यक तत्परता – संशोधन, पश्चातवर्ती घटना पर आधारित – संशोधन आवेदन का कोई प्रति उत्तर प्रस्तुत नही किया गया – यह अभिनिर्धारित नहीं किया जा सकता कि उसे सम्यक तत्परता से प्रस्तुत नही किया गया है।

B. Evidence Act (1 of 1872), Sections 63 & 65, Family Courts Act (66 of 1984), Section 14 - Secondary evidence - Admissibility - **Held - Evidence Act is not made applicable in a mechanical manner - The discretion is vested with the Family Court to receive any evidence, any report, any relevant statement, documents, information etc., which is necessary for its assistance to deal effectually with a dispute - It is made permissible in the statute whether or not such documents are relevant or admissible in the Evidence Act. (Para 7)**

ख. साक्ष्य अधिनियम (1872 का 1), धाराऐं 63 व 65, कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 14 – द्वितीयक साक्ष्य – ग्राहयता – अभिनिर्धारित – साक्ष्य अधिनियम को यांत्रिकी ढंग से लागू नही किया जाता – किसी साक्ष्य, किसी प्रतिवेदन, किसी सुसंगत कथन, दस्तावेज, सूचना इत्यादि जो विवाद का प्रभावी रुप से निपटारा करने में उसकी सहायता के लिये आवश्यक है, उसे स्वीकार करने का विवेकाधिकार कुटुम्ब न्यायालय में निहित है – साक्ष्य अधिनियम में चाहे उक्त दस्तावेज सुसंगत या ग्राहय् है अथवा नहीं है, इसे कानून में अनुज्ञेय बनाया गया है।

Case referred :

(2010) 8 SCC 329.

H.K. Shukla, for the petitioner.
Santosh Agrawal, for the respondent.

ORDER

SUJOY PAUL, J.:- By filing this petition under Article 227 of the Constitution of India, the petitioner/wife assailed the order passed by the Family Court dated 6.8.2013 passed in Case No.33A/10 (HMA). By the said order, the Court below allowed the applications preferred under order 6 Rule 17 C.P.C. and order 7 Rule 14 C.P.C. Assailing this order, Shri H.K.Shukla, learned counsel for the petitioner, submits that the Court below has erred in allowing the application under order 7 Rule 14 C.P.C. and taking the photographs on record. By taking assistance from Section 63 and 65 of Evidence Act, it contended that secondary evidence can be permitted to be lead in a manner prescribed under Section 63 and 65 of the Act. Unless the ingredients of the said provisions of Evidence Act are satisfied, the secondary evidence cannot be taken on record.

2. The amendment application which was allowed by the impugned order is also challenged by contending that the matter was at the stage of evidence and after commencement of the trial, it was not open for the Court below to allow the amendment preferred under Order 6 Rule 17 C.P.C. Lastly, it is contended that the Court below should have allowed the application under Section 151 C.P.C. (Annexure P-6).

3. Per contra, Shri Santosh Agrawal, learned counsel for the respondent, supported the order and relied on certain provisions of the Evidence Act and the Family Court Act, 1984.

4. I have bestowed my anxious consideration on the rival contentions of the parties and perused the record.

5. I deem it proper to first deal with the amendment application, which has been allowed. A bare perusal of the amendment application shows that it is based on a subsequent event. The respondent has mentioned that on 24.6.2012 the wife again married Shri Ashwini Sharma. Thus, it cannot be disputed that the amendment is based on subsequent event. Immediately thereafter, on 5.7.2012 the amendment application was filed and therefore, I am unable to hold that it is not filed with due diligence. In that event, the proviso to Order 6 Rule 17 C.P.C. cannot provide any assistance to the

petitioner. More so, when the petitioner has not chosen to file any reply to the amendment application to dispute the averments mentioned therein.

6. Considering the aforesaid, in the opinion of this Court, the Court below was well within its authority in allowing amendment application which was necessary for lawful adjudication of the matter. Although Shri H.K.Shukla relied on Sections 63 and 65 of the Act, it is apt to quote Section 14 of the Family Court Act, 1984, which reads as under:-

> "14. Application of Indian Evidence Act, 1872.-- A Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872 (1 of 1872)." (Emphasis supplied).

7. A bare perusal of this provision makes it clear that evidence Act is not made applicable in a mechanical manner. The discretion is vested with the Family Court to receive any evidence, any report, any relevant statement, documents, information etc, which is necessary for its assistance to deal effectually with a dispute. It is made permissible in the statute whether or not such documents are relevant or admissible in the Evidence Act. Thus, the powers are vested with the Family Court to take those documents on record. Needless to mention that the Family Court is bound to function as per the enabling provisions and the statue by which it was created. Evidence Act cannot be pressed into service mechanically in proceedings of an appeal under Section 14 of the said Act. Consequently, the argument advanced in this effect must fail.

8. Lastly, the petitioner has prayed for a relief by preferring an application under Section 151 of the Act. The Court below opined that the respondent is under no obligation to produce Shri Ashwini Sharma and in the opinion of this Court, the said finding is a plausible finding.

9. The power under Article 227 of the Constitution of India cannot be exercised as an appellate authority. If the order impugned suffers from any jurisdictional error, palpable perversity or manifest procedural irregularity, interference can be made. Another view is possible, is not a ground for interference under Article 227 of the Constitution of India. The interference has to be made sparingly with a view to ensure that the Court below acts

within the bounds of the authority. Interference cannot be made in a routine manner or on a drop of hat. This view is taken by the Apex Court in *Shalini Shyam Shetty and another vs. Rajendra Shankar Patil,* reported in (2010) 8 SCC 329. I find no ingredients on which interference can be made in this petition.

Petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 2826
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 1224/2009 (Gwalior) decided on 10 September, 2013

MOHAN MANDELIA .... Petitioner
Vs.
STATE OF MADHYA PRADESH & ors. ... Respondents

A. ***Criminal Procedure Code, 1973 (2 of 1974), Section 173(8) - Further Investigation*** **- Concerned Minister issuing a communication regarding reinvestigation - Held - Said communication does not lead to the conclusion that the investigation is bad in law or suffers from any infirmity - No case is made out for issuance of direction for reinvestigation. (Para 9)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173(8) – अतिरिक्त अन्वेषण – संबंधित मंत्री ने पुनः अन्वेषण के संबंध में संसूचना जारी की – अभिनिर्धारित – उक्त संसूचना से यह निष्कर्ष नही निकलता कि अन्वेषण विधि के अंतर्गत अनुचित है अथवा किसी कमी से ग्रसित है– पुनः अन्वेषण के लिए निदेश जारी करने का प्रकरण नही बनता।

B. ***Criminal Procedure Code, 1973 (2 of 1974), Section 173(8) - Further Investigation*** **- Prosecution producing further evidence after filing of report u/s 173(2) of the Code before the Magistrate - Held - It is a statutory duty of the Investigating Officer to submit further report on the basis of further evidence produced in the Court. (Para 18)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 173(8) – अतिरिक्त अन्वेषण – संहिता की धारा 173(2) के अंतर्गत मजिस्ट्रेट के समक्ष प्रतिवेदन प्रस्तुत किये जाने के पश्चात, अभियोजन ने अतिरिक्त साक्ष्य प्रस्तुत किया – अभिनिर्धारित

– अन्वेषण अधिकारी का यह कानूनी कर्तव्य है कि वह न्यायालय में प्रस्तुत अतिरिक्त साक्ष्य के आधार पर अतिरिक्त प्रतिवेदन प्रस्तुत करे।

Cases referred :

AIR 2013 SC 2348, 2003(2) SCC 649, (2009) 10 SCC 488, (2010) 12 SCC 254, (2009) 6 SCC 346, (2013) 5 SCC 762, (2013) 6 SCC 348.

Prashant Sharma, for the petitioner.
Praveen Newaskar, Dy. G.A. for the respondents No.1 to5 &7/State.
None for the respondent No. 6.
S.K. Shrivastava, for the respondents No. 8 & 9.

ORDER

SUJOY PAUL, J.:- This petition filed under Article 226 of the Constitution contains a prayer for issuance of direction to the respondents to investigate the matter under section 173(8) of Cr.P.C.

2. A FIR is lodged against the petitioner by Sunita Sharma (page 16). It is contended that the allegation in the complaint is that the petitioner has taken a sum of Rs. 9 lakhs from Seeta Bai and Rs. 7 lakhs from the complainant Sunita Sharma. For repayment of said amount of loan, a cheque of Rs. 16 lakhs was given by the petitioner in the name of Seeta Bai. When the cheque was presented it was returned on account of petitioner's instruction "stop payment and because of insufficiency of fund". It was alleged that the cheque was found to be a coloured photocopy of the original cheque and therefore, FIR was registered. The matter was investigated by the Police and challan was filed.

3. Shri Prashant Sharma, learned counsel for the petitioner submits that the respondents are bound to follow section 173(8) of Cr.P.C. It is contended that State Minister of Home, Transport and Jail Department, Govt. of M.P. by communication dated 05.01.2009 Annexure P/3 directed the Superintendent of Police, Gwalior to reinvestigate the matter. It is further contended that the challan has already been filed under section 173 of Cr.P.C. before the Court below. During the pendency of the matter before the Court below, the opinion of State Examiner of Questioned Document. Govt. of M.P. is procure by the prosecution. By taking this Court to this opinion dated 20.04.2012, it is contended that in view of this report, it is clear that petitioner is not guilty.

4. Learned counsel for the petitioner submits that the said report /opinion has already been produced before the Court below by the prosecution. However, along with this opinion, a report as required under section 173(8) Cr.P.C, has not been filed. By relying on recent judgment of Supreme Court reported in AIR 2013 SC 2348 (*Karan Singh Vs. State of Haryana & Anr.*), it is contended that the prosecution is obliged to ensure that the innocent person does not suffer from unnecessary harassment of false implication. The prosecution is under an obligation to assist the Court to reach to the truth and is not supposed to only act against the accused. On the strength of this judgment, it is contended that once said opinion of State Examiner is filed by the prosecution itself, as mandated in section 173 (8) Cr.P.C, a report needs to be filed. Pleadings in this regard are made in para 2 of the rejoinder.

5. *Per Contra,* Shri Newaskar, Dy. Govt. Advocate submits that re-investigation or re-enquiry cannot be ordered. The petitioner cannot decide the manner and method in which investigation is to be done. No interference is warranted in investigation or in the trial. It is further contended that although opinion of State Examiner is before the trial Court, the trial Court will take into account and take decision on it in accordance with law. Present petition is premature and no interference is warranted.

6. Shri S.K. Shrivastava, learned counsel for the respondents No.8 & 9 opposed the relief claimed and submits that the present petition is not maintainable. No re-enquiry or re-investigation can be ordered by this court. It is contended that there is no infirmity which requires interference by this court. It is further contended that it is for the Court below to take into account the opinion of State Examiner at appropriate stage and this Court is not obliged to decide the manner and method in which the trial Court needs to interfere or decide the matter. Shri Shrivastava relied on certain judgments in support of his contention. No other point is pressed by the parties.

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

8. The petitioner placed heavy reliance on Annexure P/3 wherein the concerned Minister has informed him that the Superintendent of Police has been directed to re-investigate the matter. In the considered opinion of this Court, this document is of no assistance to the petitioner. The prosecution is under no obligation to mechanically act on such communications. It is the statutory obligation and duty of the police to investigate into the crime and Courts are normally not required to interfere and guide the investigating agency

as to in what manner the investigation has to proceed. The Apex Court took this view in catena of judgments including 2003 (2) SCC 649 (*M.C.Abraham Vs. State of Maharashtra* (para 14). This view is followed by Supreme Court in (2009) 10 SCC 488 (*D. Venkatasubramaniam and others Vs. M.K. Mohan Krishnamachari and another*) (para 25). In (2010) 12 SCC 254 (*Babubhai Vs. State of Gujrat and others*) the Apex Court opined that where serious irregularities in investigation had taken place, Court may direct the further investigation under section 173(8) Cr.P.C. It is made clear that ordinarily such directions are not issued, unless an extraordinary case of gross abuse of power is made out by those in charge of investigation. The Court should be quite loathe to interfere in the investigation, a field of activity reserved for the police and the executive.

9. In the light of aforesaid judgments, it is to be seen whether there is any gross violation in the investigation. The attack is on the ground that the concerned Minister has issued a communication Annexure P/3 and therefore, reinvestigation is needed. In my opinion, said communication does not lead to the conclusion that the investigation is bad in law or suffers from any infirmity. Thus, in the facts and circumstances of the case, in my opinion, no case is made out for issuance of direction for re-investigation.

10. The second limb of argument of the petitioner is regarding submission of report pursuant to expert opinion of handwriting expert. Before dealing with this aspect it is apt to quote section 173(8) of Cr.P.C. which reads as under:-

> "(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

11. This is settled in law that even after filing challan, the prosecution is not precluded to continue or conduct further investigation. Many a times it happens that after submission of Challan, further material is made available to

the prosecution which may throw more light on the incident. The said material is necessary for deciding the real nature of the incident. Thus it was settled that further investigation and supplementary report can be filed even after filing of chalan.

12. During the course of hearing of this matter, a specific question was asked by the Bench whether the report of State Examiner of Questioned Documents (Annexure X/1) is actually filed by the prosecution before the Court below? Learned counsel for the parties fairly submitted that this document is filed by the prosecution as further evidence before the Court below.

13. In the opinion of this court, a microscopic reading of section 173(8) of Cr.P.C makes it clear that where upon such investigation, the officer-in-charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate with further report or reports. Underlined portion of said provision quoted above makes it crystal clear that it is a statutory obligation on the part of the police to forward such additional evidence with further report or reports. Thus, I find substance in the argument of the learned counsel for the petitioner that mere providing or furnishing an expert report (Annexure X/1) does not fulfill the requirement of the section 173 (8) of Cr.P.C.

14. In *Karan Singh* (supra) Apex Court opined that investigation into a criminal offence must be free from any infirmity which may give rise to an apprehension in the mind of the complainant or the accused that investigation was not fair and may have carried out with some ulterior motive. It is the duty of the investigating officer to put forth the matter dispassionately before the Court. Investigating officer is not merely present to strengthen the case of the prosecution with evidence that will enable the Court to record conviction, but to bring out real unvarnished version of the truth and ethical conduct was expected from investigating agency. It is held that investigating agency are guardians of liberty of innocent citizens. Duty is cast upon investigating officer to ensure that an innocent person should not suffer from unnecessary harassment of false implication. Reliance is placed by the Supreme Court on the earlier judgment of *Babu Bhai* (supra).

15. The Apex Court in (2009) 6 SCC 346 (*Rama Chaudhary Vs. State of Bihar*) considered the Section 173 (8) of Cr.P.C. In para 15 the Apex Court opined that "it is incumbent on the part of investigating officer to forward the same to the Magistrate with further report with regard to such evidence in the form prescribed". In para 18, it is further held that investigating agency

has to forward to the Magistrate a "further" report and not a fresh report regarding the "further" evidence obtained during such investigation.

16. In (2013) 5 SCC 762 (*Vinay Tyagi Vs. Irshad Ali alias Deepak and others*) the Apex Court opined that there is no specific embargo upon the power of Magistrate to direct further investigation on presentation of a report of section 173(2) of the Code. It is held that it is the Magistrate who has to decide whether on the basis of record and documents produced, an offence is made out or not, and if made out, what course of law should be adopted. Whether the Magistrate should direct "further investigation" or not, is again a matter which will depend upon the fact of a given case. The Magistrate or the higher Court can direct "further investigation" on the facts of a given case.

17. In (2013) 6 SCC 348 (*Amit Bhai Anil Chandra Shah Vs. Central Bureau of Investigation and another*) the Apex Court opined in para 58.3 that "where during further investigation, the investigation authority collects further evidence, oral or documentary, he is oblige to forward the same with one or more further reports which is evidence from sub-section (8) of Section 173 of the Code".

18. In the light of aforesaid legal position, it is clear that the prosecution has produced further evidence after filing of report under section 173(2) of the Code before the Magistrate. This evidence is in the shape of Annexure X/1 (State Examiner of Questioned Documents). Thus, as mandated in sub-section 8 of section 173 of Code, the investigating officer is under a legal obligation to forward a further report on this evidence. In the opinion of this Court , if this part has not been complied with, it is a serious flaw in the investigation. It is a statutory duty of the investigating officer to submit further report on the basis of further evidence produced in the Court. To this extent, interference is warranted and petitioner deserves to succeed.

19. Resultantly, the prosecution / investigating officer is directed to submit its further report before the Magistrate on the basis of documentary evidence (Annexure X/1) (State Examiner of Questioned Documents) (if not already submitted). It shall be the duty of the Magistrate to look into the said report and proceed further in accordance with law from that stage. To this extent, petition is allowed. No Costs.

Petition allowed.

I.L.R. [2013] M.P., 2832
REVIEW PETITION
Before Mr. Justice U.C. Maheshwari & Mr. Justice G.D. Saxena
Rev. Petition No. 183/2013 (Gwalior) decided on 9 July, 2013

SAPHIK ALIAS SAHID KHAN & anr. ...Petitioners
Vs.
NANDLAL ARORA & ors. ...Respondents

***Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 94 - Notice of Institution of Suit* - Held - Mandatory provision - Lack of Notice - Civil Court has no authority or jurisdiction to entertain the suit.(Para 5)**

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 94 – वाद संस्थित किये जाने का नोटिस – अभिनिर्धारित – आज्ञापक उपबंध है – नोटिस का अभाव– सिविल न्यायालय को वाद ग्रहण करने का प्राधिकार या अधिकारिता नहीं है।

Cases referred :
1992(2) MPJR SN 39, AIR 1996 SC 2443.

D.K. Katare with *Arun Katare*, for the petitioners.
N.K. Gupta & Raghvendra Dixit, for the respondents No. 1 & 2.
R.K. Mishra, for the respondent No.3.

O R D E R

The Order of the court was delivered by :
U.C.MAHESHWARI, J.:- The applicants, some of the plaintiffs, have filed this review petition under Order XLVII Rule 1 of CPC for review and recalling the order dated 22/3/2013 passed by the Hon'ble Single Bench of this Court in Civil Revision No.162/2012, whereby allowing the revision of the respondent No.1 the order dated 31/10/2012 passed by the Additional Civil Judge, Class-II, Gwalior in Civil Suit No.53-A/2012 dismissing the application of the respondent No.1 filed under Order VII Rule 11 of CPC for dismissal of suit has been set aside and by allowing the said I.A. suit filed by the applicants and the respondents No.3 to 5 herein with respect of some plot for declaration and perpetual injunction has been dismissed on account of non-compliance of the provisions of Section 94 of the M.P. Cooperative Societies Act, 1960 (in short "the Act").

2. Shri Katare, learned senior advocate, after taking us through the averments of the petition as well as the papers placed on the record alongwith the impugned

order passed by the Hon'ble Single Judge argued that the impugned suit was not filed on any of the cause of action which was related to the constitution, management or the business of respondent/society and, therefore, the applicants and the other plaintiffs were not bound to comply the provisions of Section 94 of the Act and such mandatory provision was not applicable to the present matter although the suit was filed against the registered Cooperative Society-respondent No.2. In support of his contention, firstly he referred the provisions of Section 94 of the Act and also placed his reliance on a reported decision of this Court in the matter of *Rashtriya Adarsh Grih Nirman Sahakari Sanstha Maryadit & Ors. Vs. Laxmikant Bharwaj,* 1992 (2) MPJR, SN 39 and also on the decision of Apex Court in the matter of *Supreme Cooperative Group Housing Society v. M/s. H.S. Nag and Associates (P) Ltd.*, AIR 1996 SC 2443 and prayed to set aside the impugned order of the Hon'ble Single Bench by admitting and allowing this Review Petition.

3. Having heard the counsel and keeping in view his arguments, we have carefully gone through the papers placed on the record alongwith the impugned order, so also the aforesaid cited cases.

4. It is undisputed position between the parties that the impugned suit for declaration and perpetual injunction was filed by the applicants and the respondents No.3 to 5 herein in the Trial Court without serving any statutory notice under Section 94 of the Act and it is also undisputed position that in the relief clause of the plaint, some prayer is also made against the respondent No.2- registered cooperative society. It is also undisputed position between the parties that the respondent No.2-society is a registered housing society and the allegation is made against such society that it is trespassing on the land of the present applicants and respondents No.3 to 5. Keeping in view such factual matrix of the case in hand, we want to examine the matter in the light of Section 94 of the Act, which reads as under:-

> **"94. Notice necessary in suits.-** No suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or business of the society until the expiration of two months-next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

5. In the aforesaid Section it is mandatory provision that no suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or business of the society until the expiration of two months-next after notice of the aforesaid Section delivered to the Registrar or left at his office with the requisite information as per requirement as stated above. In view of the prayer clause if any prayer is made by the applicants / plaintiffs in their suit before the Trial Court against the respondent No.2-society, then the society being involved in the housing development for its members, then in any case the applicants / plaintiffs were bound to issue statutory notice as per requirement of Section 94 of the Act before filing the suit or in any case such notice should have been left at the office of Registrar of the Cooperative Society and in the lack of such notice, the Civil Court was not having authority or jurisdiction to entertain the suit and taking into consideration such aspect if the Hon'ble Single Bench has passed the order, then such order does not appear to be contrary to any law or procedure. In such premises, we have not found any apparent error on the face of record in the impugned order, which requires any interference under the provisions of review enumerated under Order XLVII Rule 1 of CPC.

6. So far the case laws cited on behalf of applicants' counsel are concerned, the case of *Rashtriya Adarsh Grih Nirman Sahakari Sanstha Maryadit & Ors.* (supra) was decided taking into consideration that the real dispute was between the two private parties and the society was joined as a party to the suit only incidently because of its being a original owner, under which the two contesting parties were claiming relief and in such premises, it was held that the notice of Section 94 of the Act was not necessary to the society to file such type of suit, but in the case at hand the prayer against the society is also made by the applicants and the other plaintiffs, so such citation being distinguishable on facts is not helping to the applicants. So far the other case law is concerned, that is related to some contract matter between the society and its contractor and such matter was covered under the definition of dispute defined under Section 64 of the Act and in such circumstances such citation is also not helping to the applicants in the present matter.

7. In view of the aforesaid, we have not found any merits in this Review Petition. Consequently, the same deserves to be and is hereby dismissed at the stage of motion hearing.

Petition dismissed.

I.L.R. [2013] M.P., 2835
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
F.A. No. 387/1996 (Jabalpur) decided on 11 October, 2012

SURESH CHANDRA MOD ...Appellant
Vs.
SMT. SAVITRI BAI & ors. ...Respondents

A. Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract or loan - **Agreement to sell was executed for a consideration of Rs. 36,000/- - Rs. 5000/- were paid by way of advance - Rs. 29,500/- were paid on different dates which were endorsed by defendant by writing on the back side of the agreement - Defendant had also purchased Two N.S.C.s of Rs. 12,500/- out of Rs. 25,000/- paid by plaintiff - Possession of land was also given to the plaintiff - It cannot be said that there was no agreement to sell but it was a loan transaction. (Paras 22 to 25)**

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन या ऋण – रु. 36,000/– के प्रतिफलार्थ, विक्रय करार निष्पादित किया गया – अग्रिम के रुप में रु. 5,000/– अदा किये गये – रु. 29,500/–, भिन्न तिथियों को अदा किये गये जिसे प्रतिवादी द्वारा करार के पीछे लेख कर पृष्ठांकित किया गया था – प्रतिवादी ने वादी द्वारा अदा किये गये 25,000/– रुपयों में से रु. 12,500/– की दो एन.एस.सी. भी क्रय की – भूमि का कब्जा भी वादी को दिया गया – यह नहीं कहा जा सकता कि विक्रय का कोई करार नहीं था बल्कि वह एक ऋण संव्यवहार था।

B. Specific Relief Act (47 of 1963), Section 16 - Ready and willing to perform - **Plaintiff had already paid 34,500/- on different dates out of total consideration amount of Rs. 36,000/- - It cannot be said that for the remaining meager amount of Rs. 1,500/- the plaintiff was not ready and willing to perform his part of contract - Merely notice was sent by plaintiff after near about 3 years would not mean that he was not ready and wiling to perform his part of contract as he had explained in his evidence that he was constantly pursuing the defendant to execute the sale deed - Appeal partly allowed. (Paras 26 & 27)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – पालन करने के लिये तैयार व रजामंद – वादी ने पहले ही संपूर्ण प्रतिफल की रकम रु.

* SLP(C) No.23841/2013, dimissed on 01/07/2013.

36,000/– में से रु. 34,500/– भिन्न तिथियों को अदा किये – यह नहीं कहा जा सकता कि शेष बची अन्य रकम रु. 1,500/– के लिये वादी अपने भाग की संविदा का पालन करने के लिये तैयार व रजामंद नहीं था – करीब 3 वर्ष पश्चात वादी द्वारा मात्र नोटिस भेजे जाने का अर्थ यह नहीं होगा कि वह अपने भाग की संविदा का पालन करने के लिये तैयार व रजामंद नहीं था जैसा कि उसने अपने साक्ष्य में स्पष्ट किया है कि वह लगातार प्रतिवादी को विक्रय विलेख निष्पादित करने के लिए प्रयास कर रहा था – अपील अंशतः मंजूर।

Cases referred :

(1996) 4 SCC 526, (2008) 12 SCC 145, (2011) 1 SCC 429, (2008) 11 SCC 45.

Ashish Shroti, for the appellant.
A.K. Jain, for the respondents No. 1 to 5.
Santosh Yadav, P.L. for the respondent No. 6/State.

JUDGMENT

A.K. SHRIVASTAVA, J. :- Feeling aggrieved by the judgment and decree dated 18th April 1996 passed by learned Second Additional Judge to the court of District Judge, Hoshangabad in Civil Suit No. 17-A/1991(Old No.88-A/1986) decreeing the suit of plaintiff for specific performance of contract, this first appeal has been filed by the defendant under Section 96 of the Code of Civil Procedure, 1908.

2. The present respondents are the L.Rs of the deceased-plaintiff who died during the pendency of this appeal and his name has been deleted from the cause title. However, hereinafter in this judgment the plaintiff would mean the deceased-plaintiff Ganesh Prasad Sharma.

3. In brief the suit of plaintiff is that he entered into an agreement of sale with the defendant-appellant in regard to the agricultural land, the description whereof has been mentioned in the plaint and which is the subject matter of the suit. In that regard, a document of agreement of sale was also executed on 5.1.1981. The defendant agreed to sell the suit land @Rs. 3000/-per acre and the total land is 12 acres. Thus, the consideration of the land in question was fixed to be Rs. 36,000/- . A sum of Rs. 5000/-was paid on the date of the execution of the document and it was agreed between the parties that the sale deed will be executed till 5.7.1981. Further it was agreed that if the defendants fails to execute the sale deed, the plaintiff shall be free to get the sale deed

executed through the Court. It is also the case of the plaintiff that since two years took place in partition in the family of the defendant, therefore, the sale deed could not be executed on 5.7.1981, although the plaintiff repeatedly requested the defendant to get the sale deed executed.

4. In para 2(b) of the plaint, the pleading of the plaintiff is that although it was agreed between the plaintiff and defendant that different lands (the description whereof has been mentioned in the document of agreement of sale) will be sold but in the family partition only Survey No.348/2 area 10.40 acres and Survey No.349 area 1.34 acres fell in the share of defendant upon which the defendant's exclusive name has been mutated in the Revenue record. Further it has been pleaded by the plaintiff that the possession of the land in question has been delivered to him on 5.1.1981 and since then he is cultivating the suit land. It has also been pleaded that after making payment of advance money Rs.5,000/- on the date of execution of document of agreement of sale i.e. 5.1.1981, the plaintiff further paid a sum of Rs.25,000/- on 8.6.1981; Rs.2000/- on 10.7.1981; Rs.2000/- on 25.6.1983 and Rs.5,000/- on 17.10.1983. Thus, upto 17.10.1983 the plaintiff paid a total sum of Rs.34,500/- towards consideration. Specifically in para 3(a) of the plaint it has been pleaded by the plaintiff that on 17.8.1983 when defendant came to the plaintiff, he (plaintiff) asked him that the defendant is obtaining the part payment of the balance amount of consideration from time to time, but, is not executing the sale deed. On this, it was told by the defendant that within two months he will get the sale deed executed, although the possession has already been delivered to the plaintiff.

5. The plaintiff further waited for two months as assured by the defendant but the defendant did not execute the sale deed. The plaintiff bona fidely again and again requested the defendant to obtain the balance amount of consideration and get the sale deed executed, but, since he was busy in his business, he was always assuring the plaintiff that the sale deed will be executed. Since the plaintiff was requesting the defendant again and again to get the sale deed executed and he (defendant) was avoiding to execute the same, a doubt has been carved out in his mind that the defendant is having some mala fide attitude, as a result of which on 10.9.1986 he sent registered post notice to the defendant asking him to get the sale deed executed. In the notice it was also stated that the plaintiff will remain present in the office of the Sub-Registrar on 15.9.1986 but despite this notice was received by the defendant on 11. 9.1986 he did not execute the sale deed. On 15.9.1986 throughout the

plaintiff was sitting in the Tahsil Court along with the balance amount of consideration as well as for purchasing the stamps and registration charges but the defendant did not turn up. Hence, the present suit has been filed praying a decree of specific performance of contract.

6. After the written-statement was filed by the defendant, the plaintiff amended his plaint and pleaded that the transaction was not of loan nor the defendant was in need of any money. It has also been pleaded that on 8.6.1981 an amount of Rs. 25,000/- which was paid by the plaintiff towards part of consideration, on the same date the defendant invested the said amount in National Savings Certificate and purchased the same for Rs. 12,500/- in his name and Rs. 2,500/- in the name of his wife for a period of six years, which has also been encashed by him on 15.6.1987. Similarly the plaintiff has further pleaded that the rest amount of consideration which has been obtained by the defendant from him he used to deposit the same in his Savings A/c of Bank of India.

7. A written-statement was filed by the defendant in which although he admitted the execution of document of agreement of sale on 5.7.1981 and further admitted that he obtained different amount on different dates from the plaintiff, but, according to him, the plaintiff is a money-lender and indeed the transaction was of loan.

8. Further the defendant has admitted that the possession of the suit land was delivered to the plaintiff but the possession of the land in question was delivered to him with an intention that whatever the profit the plaintiff will earn from the suit land, would be towards interest of the loan, which he took from the plaintiff. The factum of readiness and willingness has also been denied by the defendant.

9. By filing a counter-claim, the possession of the suit property has also been claimed by the defendant and hence, it has been prayed that the suit of plaintiff be dismissed and by decreeing the counter-claim the possession of the land in question be delivered to him.

10. The learned Trial Court framed necessary issues and after recording the evidence of the parties, decreed the suit.

11. In this manner, this appeal has been filed by the defendant before this Hon'ble court assailing the impugned judgment and decree.

12. The contention of Shri Ashish Shroti, learned counsel for the appellant is that indeed, the transaction was of loan and it was not intended between the parties that the land in question would be sold to the plaintiff. Further it has been put forth by him that the possession of the suit property which was given to the plaintiff was towards the interest upon the loan which the defendant took from the plaintiff. In this regard, my attention has been drawn to the additional plea made in the written statement. In the additional plea it has been pleaded that the loan of Rs 5,000/- was obtained by the defendant and it was agreed between the parties that the interest @1% per annum would be paid. So far as the payment of different amount on different dates by the plaintiff is concerned, learned counsel submits that according to the defendant they were separate loan transactions and had nothing to do with the agreement of sale and it was not the part of the consideration, as pleaded by the plaintiff. In this regard my attention has been drawn to para 2(k) of the written-statement. Learned counsel has also invited my attention to the testimony of the plaintiff and defendant who were examined as PW-1 and DW-1 respectively. By inviting my attention to para-4 of the testimony of the plaintiff it has been contended that in the examination-in-chief it has been stated by the plaintiff that still an amount of Rs 15,000/- is to be paid by him to the defendant. Learned counsel submits that if the sale consideration was Rs.36,000/- and when the plaintiff has already paid Rs.34,500/- why he will say in his testimony that too in examination-in-chief that still he is required to pay a balance consideration of Rs.15,000/- and therefore, it should be inferred that entire transaction was a loan and it was never intended by the parties that the suit property would be sold to the plaintiff.

13. By inviting my attention to Section 16(c) of the Specific Relief Act, 1963 (in short "the Specific Relief Act") it has been put forth by learned counsel that the plaintiff is not only required to plead that he is ready and willing to perform his part of contract but it should be proved also and in this regard my attention has been drawn to the decisions of Supreme Court in *His Hoilness Acharya Swami Ganesh Dassji vs. Sita Ram Thapar,* (1996) 4 SCC 526 and *Bai Krishna and another vs. Bhagwan Das (Dead) by L.Rs and others,* (2008) 12 SCC 145 and also on the recent decision *JP. Builders and another vs. A.Ramadas Rao and another,* (2011) 1 SCC 429.

14. By inviting my attention to para 3(c) of the plaint, it has been contended that although there is pleading of the plaintiff that on 15.9.1986 which is a date given in the notice to get the sale deed executed, the plaintiff was present

throughout in the Tahsil Court along with the balance amount of consideration, stamp duty and the registration charges etc. but the defendant did not turn up and therefore, the sale deed could not be executed. However, when the plaintiff appeared in the Court as PW-1 he has not at all proved this pleading and therefore, it cannot be said that the plaintiff was ready and willing to perform his part of the contract.

15. Learned counsel submits that the conduct of the plaintiff is also a relevant factor in a suit for specific performance of contract and if it is borne out from the material placed on record that the plaintiff was not ready and willing to purchase the suit property, the suit cannot be decreed. By putting a great stress on the terminology "willingness" it has been put forth by learned counsel that the last payment of Rs. 500/- was made on 17.10.1983 and till this date as per the case of the plaintiff a sum of Rs. 34,500/- in total was paid to the defendant but why he waited for three years and filed the suit only on 14.10.1986. This itself indicates that the plaintiff was not willing to perform his part of contract, although he may be ready to purchase the suit property.

16. Learned counsel further submits that the learned Trial Court has decreed the suit of plaintiff in regard to the suit land Survey No.348/2 area 10.40 acres and Survey No.349 area 1.34 acres, however, Survey No.349 was not the subject matter of the agreement of sale dated 5.1.1981 (Ex.P-1) since this survey number is not figured in the document of agreement of sale. Hence, it has been prayed that by allowing this appeal, the suit be dismissed.

17. On the other hand, Shri A.K. Jain, learned counsel appearing for the plaintiff/respondent No.1 argued in support of the impugned judgment and submitted that throughout the plaintiff was ready and willing to perform his part of contract and also paid a handsome amount of Rs. 34,500/- and only the meager amount of Rs. 1,500/- was required to be paid and therefore, it cannot be inferred that the plaintiff was not ready and willing to perform his part of contract. Further it has been contended by learned counsel that after the last payment of Rs. 500/- was made on 17.10.1983, although the notice was sent on 10.9.1986, but, in between the plaintiff was reminding the defendant to get the sale deed executed upon which he was throughout giving assurance that it will be executed and plaintiff need not to worry. By inviting my attention to the receipt of the balance amount of consideration on different dates by defendant which is embodied in the document of agreement of sale in the document itself, it is submitted that every time after receiving the part of

the balance amount, endorsement was made by the defendant that the remaining amount shall be received at the time of registration of the sale deed. Learned counsel has put emphasis that if there would have been the intention of the parties in regard to the loan, certainly repeatedly it would not have been written by the defendant in his own writing that the balance amount will be paid at the time of registration of the sale deed and thus, it has been put forth by him that the transaction was not of loan but the defendant agreed to sell the land in question to the plaintiff.

18. Further it has been put forth by learned counsel for the respondents/ plaintiff that the plea of loan was not found to be proved by the learned Court below and it was found to be false and therefore, the conduct of the defendant itself disentitles him from opposing the suit of specific performance of contract and in this context my attention has been drawn to the decision of Supreme Court *Silvey and others vs. Arun Varghese and another,* (2008)11 SCC 45.

19. So far as the disparity in regard to survey numbers is concerned, it has been put forth by learned counsel that although the defendant agreed to sell different survey numbers to the plaintiff which are mentioned in the document of agreement of sale (Ex.P-1) but the same was not recorded in the Revenue record exclusively in his name and when the suit land in Survey No. 348/2 and 349 was exclusively recorded in the name of the defendant, the present suit has been filed for specific performance of contract for those survey numbers. Learned counsel further submits that it has been wrongly interpreted by twisting the statement of the plaintiff that still a sum of Rs. 15,000/- is to be paid to him and it is only a typographical error in the deposition-sheet. Learned counsel submits that once the discretion has, been rightly exercised by the learned Trial Court on sound judicial principles for decreeing the suit of plaintiff for specific performance of contract, it should not be lightly brushed aside in the appeal and therefore, it has been prayed that this appeal be dismissed.

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

21. The crucial document which would decide the fate of the parties is the document of agreement of sale dated 5.1.1981 (Ex.P-1). The execution of this document is not at all in dispute, rather its execution has been admitted by the defendant. Not only this, the factum of receiving the amount Rs. 25,000/-

on 8.6.1981; Rs. 2,000/- on 10.7.1981; Rs. 2,000/- on 25.6.1983 and Rs. 500/- on 17.10.1983 has also not been disputed by the defendant in the written-statement, although his plea is that these are the different loan transactions. But, in the document of agreement of sale, survey No.349 was never agreed between the parties to be sold to the plaintiff and therefore, according to me, when the defendant never entered into an agreement of sale for this survey number, the plaintiff is not entitled for the decree of specific performance of contract and therefore, the suit of plaintiff for specific performance of contract so far as this survey No.349 area 1.34 acres is concerned, is hereby dismissed.

22. The question now hinges as to whether the transaction was of loan or not. The document in question Ex.P-1 is not at all in dispute, although in the document of agreement of sale it has been mentioned by the defendant that the different survey numbers which are mentioned in the agreement of sale fell in his share in partition but the exclusive name of defendant in the Revenue record has not been mentioned of these survey numbers. Later on, his name has been exclusively mentioned as Bhumiswami upon survey No.348/2 and also on 349 and therefore, survey No.348/2 which is the part of Survey No.348, since it was recorded in the name of defendant exclusively in the Revenue record, he was the exclusive Bhumiswami having possession of this land and this proposition has neither been disputed by any of the parties during the trial nor has it been raised by the parties during the course of argument before this Court. The relevant Khasras are also on record in this regard.

23. The defendant Sureshchandra (DW-1) in his testimony in para-14 of his cross-examination has admitted that the endorsement made on the rear side of the document of agreement of sale (Ex.P-1) was written by him in his own handwriting and he voluntarily wrote. Needless to say that on the rear side of the document of agreement of sale, the factum of receiving consideration has been admitted and further it has been specifically written by the defendant that the balance amount shall be received at the time of registration of the sale deed. If the transaction would have been that of the loan, certainly, the defendant would not have written in his own handwriting that the balance amount of consideration shall be obtained by him at the time of registration of the sale deed. Similarly, if the balance amount of consideration which was paid in part on different dates, would have been separate loan transactions as pleaded by the defendant in the written-statement, certainly in that regard the endorsement must not have been made on the rear side of the document of agreement of sale (Ex.P-1) but must have been separately written on a separate document.

If the endorsement of receiving balance amount of consideration on different dates on the rear side of the agreement of sale is taken into consideration in proper perspective and if these endorsements are read in context to the agreement of sale (Ex.P-1) it would reveal that the transaction between the parties was not that of loan but the defendant agreed to sell the land in question mentioned in the document of agreement of sale (Ex.P-1) to the plaintiff and therefore, the plea of defendant which he has taken that it was a loan transaction appears to be false and has been taken in order to save his skin from the decree of specific performance of the contract.

24. One important fact which cannot be marginalised and blinked away is that had there been intention of loan, certainly the defendant would not have invested the major portion of the consideration amount Rs. 25,000/- which was paid to him on 8.6.1981 by purchasing the National Savings Certificate respectively for a sum of Rs.12,500/- on the same date in his own name and in the name of his wife. In this regard, Ex.P-17(c) and P-18(c) are quite relevant and it is gathered that this much amount the defendant has invested in purchasing the NSC and it was encashed on 1.6.1987. The defendant in his cross-examination (para-17) has admitted this fact also.

25. The plea of defendant that the transaction was loan, cannot be accepted for another reason that the factum of delivery of possession of the suit property has been admitted by the defendant in the written-statement as well as in the evidence. However, according to the defendant, the possession of the land in question was given to the plaintiff in lieu of interest which was agreed between the parties to be paid @1% per annum. I fail to swallow this argument for the simple reason that the possession of such a huge land of 12 acres will never be given to the plaintiff for a nominal loan amount of Rs.5,000/- and interest thereon @1% per annum. Thus, I am having no scintilla of doubt in my mind that defendant never obtained a loan of Rs. 5,000/- and executed the document of agreement of sale on 5.1.1987 for the security of the loan and further the amount which has been received by him towards part of consideration on different dates was also not a separate loan transaction. The Supreme Court in the case of *Slivey* (supra) has categorically held in para-8 that if a false plea was taken by the defendant, the conduct itself disentitles him from opposing the suit of specific performance of contract.

26. However, under Section 16(c) of the Specific Relief Act the plaintiff is still required to prove his readiness and willingness. I am not at all impressed

by the submission of learned counsel for the appellant that the plaintiff was not ready and willing to perform his part of contract. It be seen that the consideration of Rs. 36,000/- was fixed by the parties and out of this amount a sum of Rs. 34,500/- was already paid by the plaintiff to the defendant on different dates and only a meager amount of Rs. 1,500/- was required to be paid to the defendant and hence, in these facts and circumstances it cannot be said that the plaintiff was not ready and willing to perform his part of contract. So far as the disparity which arose in para 4 of the testimony of the plaintiff in examination-in-chief that still he is required to pay a sum of Rs. 15,000/- is concerned, according to me, it is only a typographical error because on bare perusal of this para it is gathered that the figure of Rs. 15,000/- is wrongly typed in place of Rs. 1,500/-. Indeed, this was the balance amount to be paid by the plaintiff as per the calculation made hereinabove and therefore, it only appears to be a typographical error in the deposition sheet of the plaintiff.

27. I do not find any merit in the contention of learned counsel for the appellant that why the plaintiff waited for three years when the major portion of the consideration amount Rs. 34,500/- was paid upto 17.10.1983 and he sent notice to get the sale deed executed only on 10.9.1986. There is a specific pleading of the plaintiff in para 3(b) of the plaint and he has also proved this fact in his testimony and also put suggestion to defendant during his cross-examination and according to me, it can be inferred that the plaintiff was throughout insisting and pursuing the defendant to get the sale deed executed, but, ultimately when he found that the defendant is avoiding to get the sale deed executed, he has filed the suit for specific performance of contract. Learned counsel for the appellant has rightly submitted that time is not the essence of the contract to decree the suit of specific performance of the contract but looking to the conduct of the plaintiff for not getting the sale deed executed for three years it can be inferred that he was not willing to perform his part of the contract. To me, when the plaintiff already paid near about 95% of the sale consideration (in total Rs. 34,500/-), one cannot imagine that for a meager amount of Rs. 1,500/- he was not ready and willing to purchase the suit property. Indeed, looking to the facts and circumstances and evidence on record, I am of the view that the plaintiff was always ready and willing to perform his part of the contract and defendant was avoiding to get the sale deed executed. In this backdrop, the decisions of the Supreme Court in *His Holiness Acharya Swami Ganesh Dassji* (supra), *Bal Krishna* (supra) and *J. P. Builders* (supra) which are placed reliance by learned counsel for the

appellant are not applicable to the facts and circumstances of the case.

28. For the reasons stated herein-above, the suit of plaintiff in regard to Survey No.349 area 1.34 acres is hereby dismissed. However, rest part of the judgment and decree passed by learned Trial Court is hereby affirmed. Eventually, the counter-claim of defendant in regard to Survey No.349 area 1.34 acres also stands decreed. The plaintiff shall deliver the possession of Survey No.349 area 1.34 acres to the defendant and the defendant shall execute the sale deed in regard to Survey No.348/2 area 10.40 acres, failing which both the parties shall be free to get the decree executed.

29. Resultantly, this appeal is allowed in part to the extent indicated herein-above with no order as to costs.

Appeal partly allowed.

I.L.R. [2013] M.P., 2845
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 876/2011 (Indore) decided on 6 November, 2012

SUNITA (SMT.) & ors. ...Appellants
Vs.
SMT. SUMITRA & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Section 173* - Deceased aged 38 years was in settled business - Future prospect considered to the extent of 30% - Three dependent persons - 1/3rd deducted for personal expenses - Multiplier of 15 adopted - Award Rs. 16,20,000/- enhanced to Rs. 22,77,147/- with interest. (Paras 8 & 9)**

मोटर यान अधिनियम (1988 का 59), धारा 173 – मृतक की उम्र 38 वर्ष थी जिसका स्थापित कारोबार था – भावी प्रत्याशा 30 प्रतिशत की सीमा तक विचार में ली गयी – तीन आश्रित व्यक्ति – 1/3 व्यक्तिगत खर्चे के अंतर्गत घटाया गया – 15 का गुणक स्वीकारा किया गया – रु. 16,20,000/– का अवार्ड बढ़ाकर, ब्याज के साथ रु. 22,77,147/– किया गया।

Cases referred :

2012(II) ACC 377, 2003 ACJ 1803.

Manish Jain, for the appellant.
S.V. Dandwate, for the respondent No. 3/Insurance Company.

ORDER

N.K. Mody, J.:- This is an appeal filed by the claimants under Section 173 of the Motor Vehicles Act against an award dated 22/12/2010 passed by III Motor Accident Claims Tribunal, Indore in Claim Case No.61/10. By the impugned award, the Claims Tribunal awarded the compensation as Rs.16,35,000/- with interest to the claimants by way of compensation on account of death of one Kapil who died in a motor accident. According to claimants, the compensation awarded is on lower side and hence, need to be enhanced. It is for the enhancement in the compensation awarded by the Tribunal, the claimant has filed this appeal. So the question that arises for consideration is whether any case for enhancement in compensation awarded by the Tribunal on facts / evidence adduced is made out in the compensation awarded and if so to what extent.

2. It is not necessary to narrate the entire facts in detail, such as how the accident occurred, who was negligent in driving the offending vehicle, who is liable for paying compensation etc. It is for the reason that all these findings are recorded in favour of claimant by the Tribunal. Secondly, none of these findings though recorded in claimant's favour are under challenge at the instance of any of the respondents such as owner/driver either by way of cross appeal or cross objection. In this view of the matter, there is no justification to burden the judgment by detailing facts on all these issues.

3. As observed supra, it is a death case. Break-up of the amount awarded is as under :-

towards loss of dependency	Rs.16,20,000/-
towards loss of consortium	Rs.5,000/-
towards funeral expenses	Rs.5,000/-
towards loss of estate	Rs.5,000/-

4. Learned counsel for the appellants submits that in a motor accident which took place on 12/7/2008, one Kapil aged 38 years died. It is submitted that for the purpose of computation of loss of dependency, learned tribunal assessed the income @ Rs.1 5,000/- per month and after deducting 1/5th towards personal expenses, further deducted 30% on the rest of the income towards income-tax and assessed the income of deceased @ Rs.9,000/- per month, applied the multiplier of 15 and awarded Rs.16,35,000/-.

It is submitted that as per income tax return which is on record as Ex.

P/30, the income of deceased in the year 2007-08 was shown as Rs. 4,21,590/- per year while as per Ex. P/29, the income of deceased in the previous year i.e. 2006-07, was shown as Rs.2,87,745/-. It is submitted that income-tax officer was examined to prove the income of the deceased. It is submitted that in the facts and circumstances of the case, there was no justification on the part of learned tribunal to assess the income of deceased @ Rs.9,000/- per month. Learned counsel submits that learned tribunal was not justified in not taking into consideration the future prospects. For this contention, learned counsel placed reliance on a decision in the matter of *Santosh Devi Vs. National Insurance Company,* 2012(II) ACC 377, wherein Hon. Apex Court has held that court while making observations in *Sarla Verma's* case, had not intended to lay down an absolute rule that there will be no addition in income of person who is self employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she become victim of accident then same formula deserves to be applied for calculating amount of compensation. Further reliance is placed on a decision in then matter of *Urmila Deora Vs. M.P.State Road Transport Corporation* 2003 ACJ 1803, wherein the deceased was running factories and filing income tax returns, a Division Bench of this court held that his income cannot be assessed on the basis of income of his son on the ground that factories are still running ignoring income shown in income tax returns.

Learned counsel submits that in other heads also the amount awarded is inadequate, hence it was prayed that appeal be allowed and amount be enhanced.

5. Learned counsel for respondent/Insurance company submits that learned tribunal has taken into consideration the income as Rs.1,12,626/- which the deceased was getting from his profession. It is submitted that learned tribunal has also taken into consideration that deceased was having the income from National Saving Certificate @Rs.5,500/- and from other heads which comes to Rs.21,954/-per year. It is submitted that deceased was having the share of Fortune Features Pvt. Ltd. which has been transferred in the name of appellant Nos.1 and 2, therefore there is no loss of income on that account. On the contrary, the amount awarded is on higher side as deduction is made as 1/5th which ought to have been 1/3rd. It is submitted that appeal has no merits and the same be dismissed.

6. From perusal of record, it appears that dependents on the deceased are 3 in number and fourth one is the mother. To prove the case appellants have examined AW/1 Sanjay Khandelwal, AW/2 Rupesh Mittal, AW/3 Sanjay Bapna AW/4 C.R. Sahu, AW/5 Dr. Raju Mishra and AW/6 Smt. Sunita Jain. Nothing has been stated by the appellant No.1 that how the appellant No.4 is dependent on the deceased and when Hastimal Jain, husband of appellant No.4 died, what he was doing and what he left for appellant No.4 at the time of his death. Similarly, nothing has been stated to the effect that deceased was the eldest/only son of the appellant No.4. In the facts and circumstances of the case, there was no justification on the part of learned tribunal to treat the appellant No.4 as dependent on the deceased specially when appellant No.4 has not come forward to state on affidavit that she was dependent on the deceased. Since, it is only appellant No.1 to 3 who are the dependents on the deceased, therefore, there was no justification on the part of learned tribunal to deduct 1/5th towards personal expenses. Keeping in view the number of dependents deduction towards personal expenses ought to have been 1/3rd.

7. To prove the case apart from oral evidence, appellants have filed the documents Ex. P/1 to Ex. P/43. Ex. P/1 to Ex. P/28 are the documents relating to criminal case and the treatment of the deceased. Ex. P/29 to Ex. P/31 are income Tax returns of which details are as under

S.No.	Ex.	Financial Years	Filed on	Rupees
1.	P/29	2005-06	30/10/06	2,41,991/-
2.	P/30	2006-07	31/10/07	2,87,745/-
3.	P/31	2007-08	03/09/08	4,21 ,590/-

8. Ex. P/32 and Ex. P/33 are receipt of fee of appellant Nos. 2 & 3 according to which monthly fee was being paid @ Rs. 3,000/- p.m. of both the appellants. Ex. P/.31 is the return filed on 3/09/08 while Kapil died on 12/07/08. Therefore, it can be said that even after the death of Kapil an attempt was made to get a higher amount of compensation by submitting the return in which income of the deceased Kapil was shown double of the income of previous year. No tax is paid with the return Ex. P/31. Appellant No.1 has stated that deceased was doing the business in the name and style of M/s J.K.Enterprises and was also director of M/s Fortune Fitness Pvt. Ltd. and

was earning Rs. 42,515/- p.m. As per Ex. P/30 which is the return of the relevant year, income tax paid is Rs. 13,770/-. As per Ex. P/30 in the relevant year income of the deceased was Rs. 2,87,745/- which can be considered for the purpose of assessment of income of the deceased. Break-up of the income as shown in the return Ex. P/30 is as under:

salary from Fortune Feature Pvt. Ltd.	Rs.60,000/-
profit from M/s J.K. Enterprises	(Rs. 1,12,626/-)
	total 2,01 ,216/-
interest on NSC	Rs. 22,064/-
interest on saving Bank A/c	Rs.3,465/-
income from other sources	Rs.1 ,000/-

So far as interest on NSC and interest on saving bank account is concerned, no loss has caused to the appellants. The loss caused to the appellants are on account of salary and the profit which comes to Rs.1,72,626/-. It is only this amount which can be taken into consideration for the purpose of assessment of compensation. Since Kapil was aged 38 years and was in settled business, therefore future prospects can also be taken into consideration to the extent of 30%. After taking into consideration the future prospects on the amount of income of Rs.1 ,72,626/- and after deducting 1/3rd towards personal expenses and after applying the multiplier of 15, the appellants are entitled for the following amount :

towards loss of dependency	-	Rs. 22,44,147/-
towards funeral expenses	-	Rs. 5,000/-
towards loss of estate	-	Rs. 5000/-
towards loss of consortium	-	Rs. 5,000/-
towards loss of love & affection	-	Rs. 15,000/-
Total	-	Rs. 22,77,147/-

9. Thus, appellant Nos.1 to 3 are entitled for a sum of Rs.22,77,147/- instead of Rs.16,20,000/-. The enhanced amount of Rs.6,24,147/- shall carry interest @ 8% per annum from the date of application. The amount awarded shall be deposited by the Insurance company with the learned tribunal and the

learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant No.1 with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant No.1 from where the amount can be withdrawn as per needs. However, on an application by the appellant No.1, this condition could be modified by the learned tribunal in exceptional circumstances, if made out by appellant No.1.

This order shall be executable only upon payment of proportionate court fee on the enhanced amount which be paid within 3 months from the date of this order. Registry to prepare memo of costs. The appellant's counsel shall provide c.c. of memo of costs to the counsel for Insurance company which shall thereafter deposit the enhanced amount with costs with the Tribunal within one month from the date of receipt of memo of cost. Failure to comply with the direction, no interest would be payable on the enhanced amount from the date of order till Court fee is actually paid and memo of costs is supplied to counsel for respondent/ Insurance company.

With the aforesaid modification, the appeal stands disposed of.

Appeal disposed of.

I.L.R. [2013] M.P., 2850
APPELLATE CIVIL
Before Mr. Justice J.K. Maheshwari
M.A. No. 841/2010 (Indore) decided on 6 February, 2013

MAMTA BAI PATIDAR (SMT.) & ors. ...Appellants
Vs.
ISMAIL KHAN & ors. ... Respondents

A. Motor Vehicles Act (59 of 1988), Section 173 - Compensation - Enhancement - **Deceased was having the agricultural land - He was also engaged in taking the land on Adhbatai from different persons - Earning of deceased was shown apart from his own land and also from the land taken on Adhbatai - After death their own land has been given on Adhbatai - Loss of earning accepted Rs. 5,000/- p.m. award enhanced by Rs. 2,32,000/-. (Para 8)**

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – बढ़ाया जाना – मृतक के पास कृषि भूमि थी – वह भिन्न व्यक्तियों से अधबटाई पर भूमि लेने में भी लगा हुआ था – मृतक की कमाई, अपने स्वयं की भूमि के अलावा

अधबटाई पर ली गई भूमि से भी होना दर्शाया गया – मृत्यु पश्चात उनकी स्वयं की भूमि अधबटाई पर दी गई – अर्जन की हानि रु. 5,000/– प्रति माह स्वीकार की गई, अवार्ड रु. 2,32,000/– से बढ़ाया गया।

B. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company **- F.I.R. is not substantive piece of evidence and cannot be placed on a higher pedestal than the statement of witnessess on oath before the Court - In absence of violation of the terms and conditions of the policy and driver having valid driving licence, the Insurance Company is liable to pay the amount of compensation. (Paras 10 &12)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का उत्तरदायित्व – प्रथम सूचना रिपोर्ट, साक्ष्य का तात्विक भाग नहीं और उसे न्यायालय के समक्ष साक्षियों के शपथपूर्वक कथन से ऊपर स्थान नहीं दिया जा सकता – पॉलिसी की शर्तों के उल्लंघन की अनुपस्थिति में और वाहन चालक के पास वैध चालक अनुज्ञप्ति होने से, प्रतिकर की रकम का भुगतान करने के लिए बीमा कम्पनी दायी है।

C. Civil Procedure Code (5 of 1908), Order 9 Rule 6 - No instructions - Ex-parte **- If the advocate pleads no instruction on behalf of the party who is not present - It is the duty of the Court to issue notice to the said party - Claims Tribunal has committed error to proceed ex-parte against Insurance Company - Insurance Company deserves an opportunity of cross-examination and to adduce evidence to prove their defence. (Para 13)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 6 – कोई निर्देश नहीं – एक पक्षीय – पक्षकार जो उपस्थित नहीं, की ओर से यदि अधिवक्ता कोई निर्देश नहीं का अभिवाक् करता है – न्यायालय का कर्तव्य है कि उक्त पक्षकार को नोटिस जारी करे – दावा अधिकरण ने बीमा कम्पनी के विरुद्ध एक पक्षीय कार्यवाही करने में भूल कारित की – बीमा कम्पनी को प्रतिपरीक्षण का एक अवसर और अपना बचाव साबित करने के लिए साक्ष्य पेश करने का अवसर दिया जाना चाहिए।

Cases referred :

2010 ACJ 1340, 2010 ACJ 2422, 2007 ACJ 2824, MACD 2013(1) Raj. 35, 2007 ACJ 1928, 2009 ACJ 925, 2009 ACJ 1298, 2006 ACJ 803..

G.K. Neema, for the appellants/claimants.

Asif Warsi & Sonali Gupta, for the respondents/Owner & driver.
C.P. Singh, for the respondent/Insurance Company.

ORDER

J.K. MAHESHWARI, J.:- Both these appeals are arising out of the award dated 22nd December, 2009, passed by the II Member, Motor Accident Claims Tribunal, Shajapur, in Claim Case No.28/2009. Misc. Appeal No.841/2010 has been filed by the claimants while Misc. Appeal No.540/2010 has been filed by the owner and driver assailing the finding of exoneration of the Insurance Company though there was insurance of the offending vehicle.

2 It was the case of the claimants that the driver of the tractor No.M.P. 42-A-0799 ploughing the field of deceased Kishore. At that time deceased along with Zahid was standing on the bank of the said field. The said tractor dashed Kishore and overturned wherein Kishore was died. It is said that he was having huge agricultural land and earning from it, however, compensation to the tune of Rs.15,00,000/- was claimed by filing the claim petition under Section 166 of the Motor Vehicle Act.

3 The owner and driver by filing their written statements had denied the accident inter-alia contending that the driver was possessing the valid driving licence and the vehicle was insured with the Insurance Company, however, indemnifying the liability, if any, the Insurance Company ought to pay the amount of compensation. In the written statement of Insurance Company it was stated that the driver was not possessing the valid driving licence and there was a violation of the terms and conditions of the policy, therefore, the Insurance Company is not liable to pay the amount of compensation. It is also contended that as per the report of the Investigator as well as the FIR the deceased was sitting on a tractor along with Zahid and due to overturn of the said tractor Kishore died. In such circumstances there was a violation of the terms and conditions of the policy, therefore, the Insurance Company is not liable to pay the amount of compensation.

4 Learned Claims Tribunal believing the contents of the FIR (Ex. P-1) and disbelieving the statement of the lodger of the FIR namely Ritesh Patidar (AW-3) held that the accident has taken place when the deceased was sitting on a tractor which was overturned., however, treating it to be a violation of the terms and conditions of the policy, exonerated the Insurance Company and liability to pay compensation has been fastened against the owner and driver. The Claims Tribunal calculated the amount of compensation accepting

the earning of the deceased Rs.3,000/- per month after deducting 1/3rd towards personal expenses and applying the multiplier of 17 by adding Rs.57,000/- in conventional head making the total sum of compensation Rs.4,65,000/-.

5 Shri G.K. Neema, learned counsel representing the claimants have contended that looking to the Ex. P-17 and P-18, which are the Khasras of the agricultural land owned by deceased and Ex. P-21 and Ex. P-22 is the document of land indicating that deceased has taken these land of others for agriculture on Adhbatai and having earning of Rs.1,00,000/- per annum in addition, however, prayed that the compensation awarded accepting the earning Rs.3,000/- per month by the Tribunal is inadequate, which may be reasonably enhanced.

6 Shri Asif Warsi and Ms. Sonali Gupta, counsel representing the owner and driver contended that the FIR (Ex. P-1) lodged by Ritesh Patidar. The FIR is merely a corroborative piece of evidence and cannot be termed as a substantive evidence without its proof. The lodger of the FIR when appeared in a witness box and after affirmation of the oath narrated the story as pleaded in the claim petition. However, the statement of the claimant and lodger of FIR as deposed in the Court ought to be accepted in place of accepting the FIR. In support of such contention reliance has been placed on a judgment of this Court in the case of *Oriental Insurance Co. Ltd. Vs. Kamli and other* [2010 ACJ 1340]. Reliance has further been placed on a judgment of Himachal Pradesh High Court in the case of *Oriental Insurance Co. Ltd. V. Darshna Kalia and others* [2010 ACJ 2422] and the judgment of Madras High Court in the case of *New India Assurance Co. Ltd. Vs. G. Vijaya Kandiban and another* [2007 ACJ 2824] and also the judgment of Rajasthan High Court in the case of *United India Insurance Company Ltd. Vs. Smt. Shanta Devi & ors.* [MACD 2013 (1) (Raj.) 35. In view of the foregoing it is urged that relying upon the testimony of the lodger of the FIR in claim case, the liability may be fastened against the Insurance Company. However, it is urged that the finding of the exoneration of the Insurance Company may be set aside.

7. Shri C.P. Singh, Learned Counsel representing the Insurance Company contended that as per the judgments of Hon'ble Apex Court in the case of *Oriental Insurance Company Ltd Vs. Premlata Shukla and others* reported in 2007 ACJ 1928 and in the case of *National Insurance Co. Ltd. Vs. Rattani and others* reported in 2009 ACJ 925, the FIR would not be

admissible in evidence, but its allegation has been made the part of petition, however, the Appellate Court would be entitled to look into the same and in the facts of the said case, the Court ought to rely upon the contents of the said FIR. In such circumstances, the finding recorded by the Tribunal exonerating the Insurance Company and fastening the liability to pay compensation against the owner and driver do not warrant any interference. It is also one of his contention that when the owner and the driver by filing an appeal assailed the finding of exoneration of the Insurance Company, he is at liberty to argue in support of the finding of exoneration recorded by the Tribunal. On the point of quantum of compensation, it is submitted that the deceased was the agriculturist and the land which was owned by him is still lying with the legal representatives, however, it is only the loss of supervision, therefore, the tribunal has rightly calculated the compensation accepting the loss of supervision @ Rs. 3000/- per month after deducting 1/3 and applying the multiplier as per age. Therefore, on the point of quantum also, interference in the appeal filed by the claimant is not warranted.

8. After hearing learned counsel appearing on behalf of the parties first of all the argument seeking enhancement is required to be considered. In the present case the deceased was having the agricultural land as apparent from the Khasra entries Ex. P-17 and Ex. P-18. It further appears that he was engaged in taking the land on Adhbatai from different persons and having earning therefrom as reveals from the documents Ex. P-21 and Ex. P-22. In the oral evidence adduced by the claimants, the earning of the deceased was shown apart from his own land, and also from the land taken on Adhbatai vide documents Ex.-P/21 & Ex.-P/22. It is also stated that at present no responsible male member is in family to look after the agriculture owned by the deceased, however, their own land has been given on Adhbatai. In such circumstances, there is a loss of earning from their own land and also from the land of others. As per section 59 of the Evidence Act, when the oral evidence has been adduced, in support of the documentary evidence, it cannot be ignored until and unless rebutted by other side. In the present case, no evidence to deny the earning of deceased from Adhbatai or from own land which is now given on Adhbatai has been brought either by the owner or the driver or by the Insurance Company. In such circumstance, in the considered opinion of this Court, loss of earning to the legal heirs can safely be accepted Rs. 5000/- per month which annually comes to Rs. 60,000/-. Looking to the number of dependencies, if 1/3 is deducted towards personal expenses, then loss of

dependency per annum comes to Rs. 40,000/-. At the time of death, the deceased was 32 years of age, however, multiplier of 16 would be applicable as per the judgment of the Hon'ble Apex Court in the case of *Sarla Verma and others Vs. Delhi Transport Corporation and another* reported in 2009 ACJ 1298. Accordingly, loss of dependency comes to Rs. 6,40,000/-. The Tribunal has awarded Rs. 57,000/- in conventional heads which in the facts of this case appears to be just. However, on adding the same, total sum of compensation comes to Rs. 6,97,000/-. On deducting the amount so awarded by the Tribunal Rs.4,65,000/-, the net enhancement comes to Rs. 2,32,000/-.

9 Now the issue regarding liability requires consideration in view of the rival contention raised by the claimant, the owner, the driver and the Insurance Company. In this regard, the legal position annunciated in the judgment of *Premlata Shukla* (supra) is required to be considered first. The facts of the said case were, on having accident of Tempo Trax with the truck, the offending vehicle could not be traced out, however claim petition was filed against the owner, driver and the Insurance Company of the Tempo Trax, wherein the negligence of the driver of the Tempo Trax was pleaded by claimants and in the said context, Hon'ble Apex Court has observed that when the FIR has been relied upon for the purpose of proving the accident admitting the said documents by the claimant then the remaining contents of the FIR cannot be ignored by the Court. While in the case of *Rattani* (supra), the facts were that 30-40 persons were travelling as gratuitous passengers. Some of them sustained injury and some of them succumbed to death. However, the FIR indicates that they were travelling as passengers in a Barat, but in the claim petition, it was averred that they were representatives of the goods received in the marriage, therefore, the Court disbelieving the contents of the claim petition has relied upon the contents of FIR. In the said case, it was held that the persons were travelling as gratuitous passengers and not as representatives, however, exempted the Insurance Company from liability. It is to be noted here that in the case of *Rattani and others* (supra), Hon'ble Apex Court has observed that the FIR would not be admissible in evidence per se but as the allegation made in the FIR had been made a part of the claim petition, then there is no doubt whatsoever, the Tribunal and the Appellate Court would be looked into the same.

10 Before the Division Bench of this Court in the case of *Nanhu Singh Vs. Jaheer and others* reported in 2006 ACJ 803, it was held that when a

person lodged the FIR before the Investigating Agency had stated that injured claimant was travelling in a truck whereas he deposed before the Tribunal that the injured was standing on a road side when truck hit him. In the said fact, it was held that the version of the FIR should not be given preference over the testimony of the witness recorded before the Tribunal, after affirmation of oath. It is further observed that the testimony recorded on oath before the Court should be relied upon corresponding to the contents of FIR. In the judgment of *Kamli and others* (supra) before the Single Bench of this Court, the same question arose for consideration wherein also in FIR, it was mentioned that deceased who was travelling in tractor trolley fell down and was run over by its rear wheel. The witness who lodged the FIR deposed on oath that the deceased was going on foot; he was hit from behind by tractor trolley. However the issue arose before the learned Single Judge of this Court whether the Tribunal was justified in relying upon the deposition of the witness on oath mulcting liability on the Insurance Company. In the said context, it was held that the FIR is not substantive piece of evidence and it cannot be placed on a pedestal higher than the statement recorded on oath. The Tribunal rightly accepted the deposition of the witness of the FIR recorded in Court and held that, the Insurance Company is liable to pay compensation. The similar issue has been decided by Himachal Pradesh High Court in the case of *Darshna Kalia and others* (supra) and also by Madras High Court in the case of *G. Viyaya Kandiban and another* (supra) and also by Rajasthan High Court in the case of *Smt. Shanta Devi and others* (supra)

11 . In the case in hand, the FIR was lodged by Ritesh Patidar PW-4 inter alia stating that when the tractor was driven by respondent no. 1, deceased Kishor and Zahid were sitting on the mudguard of tractor which was overturned while ploughing the field. In the said incident, Kishor received injuries and succumbed to death. In the claim petition filed by the claimant, it was specifically pleaded that the offending vehicle tractor while ploughing their field dashed Kishor who was standing on the bank of the said field along with Zahid. Lodger of the FIR Ritesh Patidar PW-4 has supported the narration of the claimant's pleaded in claim petition stating that the tractor dashed the deceased Kishore who was standing on the bank of the field alongwith Zahid and overturned and due to injury, Kishor succumbed to death. In such circumstances, the statement of the lodger of the FIR, Ritesh recorded in Court after affirmation of the oath have more value than the contents of the FIR. It is to be further observed that the contents of the FIR has not been

proved by calling the scriber of FIR in the witness box by the Insurance Company. It can safely be observed that the contents of the FIR may be used for corroboration, contradiction and omission and it cannot be said to be substantive piece of evidence until and unless it is proved by cogent and legal evidence. In such circumstance, the facts of the present case are entirely different from the facts of the case of *Premlata Shukla* (supra) and *Rattani and others* (supra). The facts of the present case is squarely similar to the facts of the Division Bench judgment of this Court in the case of *Jaheer and others* (supra) and also of the Single Bench Judgment in the case of *Kamli and others* (supra). In this respect, I respectfully agree with the view taken by the Madras High Court in the case of *G. Vijaya Kandiban and another* (supra), Himachal Pradesh High Court in the case of *Darshna Kalia and others* (supra) and Rajasthan High Court in the case of *Smt. Shanta Devi and others* (supra).

12 It is seen from the record that the claim Tribunal while recording the finding exonerating the Insurance Company has considered the contents of the FIR Ex.-P/1 and final report Ex.-P/3 and held that those documents have been proved. In this regard, it is suffice to observe that mere exhibiting a document is not enough to held that the said document has been proved. Particularly, when the lodger of the documents has deposed before the Court contrary to the version of the FIR and supports the averments of the claim petition after affirmation of oath, then the statement of the lodger of the FIR recorded before the Court is on higher pedestal. Then, the finding recorded by the claim Tribunal of proving the FIR and exoneration of Insurance Company for the said reason, is unsustainable in law. It is to be held that the claim Tribunal has committed an error relying upon the contents of the FIR ignoring the statement of Ritesh Patidar PW-4 recorded in Court. Thus, it is to be held that as per the averments of the claim petition and looking to the statement of Ritesh Patidar PW-4 when Kishor (deceased) standing on the bank of the field along with Zahid received injuries from the offending vehicle tractor and due to its overturned, succumbed to death. In such circumstance, in absence of violation of the terms and conditions policy and driver having valid driving licence, the Insurance Company is liable to pay the amount of compensation jointly and separately with the owner and the driver.

13 On perusal of the record it is further seen that after filing the written statement by the Insurance Company and on the date of adducing the evidence i.e. 13.11.2009 the counsel representing the Insurance Company pleaded no

instructions, however, the Court proceeded ex-parte without taking recourse of issuance of the notice to the Insurance Company. On perusal of the order sheets of Tribunal, it is seen that on 30/11/2009, counsel representing respondent no. 3 was absent, and later on Mr. Ambar Barsi, Advocate appeared and pleaded no instructions. However, proceeding ex-parte, the Court has appointed a Commissioner to record the statement of the claimant's witnesses and to submit its report. The Commissioner after recording the statement has submitted the report which has taken on record and relying upon them, the Court has passed the award. In this regard, it is suffice to observe that if the advocate pleads no instruction on behalf of the parties, who is not present on the said date then it is the duty of the Court to issue notice from the Court to the said party indicating the fact that the Advocate appearing on behalf of them has pleaded no instructions, however, they may appear in person or through some other advocate. Thus the claim Tribunal has committed error to proceed ex-parte against the Insurance Company and also of not afforded an opportunity of hearing to cross-examine on the claimant's witness and to adduce the evidence and decided the claim petition. Thus, in the considered opinion of this Court, the Insurance Company deserves an opportunity of cross-examination and to adduce their evidence to prove their defence.

14 In view of foregoing discussions, Misc. Appeal no. 841/2010 filed by the claimants seeking enhancement is hereby allowed in part and the enhancement of Rs. 2,32,000/- is directed in addition to the amount already awarded by the claim Tribunal. Misc Appeal no. 540/2010 filed by the owner and the driver is also allowed. The finding of exoneration of the Insurance Company stands set aside in view of the foregoing observations, but the Insurance Company is at liberty to cross-examine the claimant's witnesses and to adduce the evidence in his defence, if needed.

15 In view of the foregoing observations, the claim petition is remitted back for the purpose of affording opportunity to prove the defence by the Insurance Company and to cross-examine on the claimant's witnesses by recalling them in witness box. Parties present in the Court shall appear before the Tribunal on 20th March, 2013. The claim Tribunal shall decide the issue of liability afresh within a period of three months from the date of appearance in view of the foregoing observations. It is further directed that the amount so deposited by the owner and the driver shall be subject to the final outcome of

the decision by the Tribunal on the issue of liability by the Tribunal. The cost imposed and litigation expenses of Insurance Company as awarded by the claim Tribunal stands set aside. The Registry of this Court shall transmit the record post haste with a view to reach on or before the date of appearance. In the facts and circumstances of the case, parties to bear their own cost.

Appeal partly allowed.

I.L.R. [2013] M.P., 2859
APPELLATE CIVIL
Before Mr. Justice J.K. Maheshwari
M.A. No. 734/2009 (Indore) decided on 10 April, 2013

BHARAT SINGH & anr. ...Appellants
Vs.
MADAN KUNWAR & ors. ... Respondents

Motor Vehicles Act (59 of 1988), Sections 2(30) & 173 - Owner -Agreement to sell - **Vehicle in question was registered in the RTO in the name of Pradeep Kumar - He can only be described as a "owner" for the purpose of Section 168 of M.V. Act - Finding to absolve him from the liability to pay compensation and to fasten such liability against the son of the appellant on the basis of agreement to sell as recorded by Claims Tribunal is not in conformity to the provisions of law, hence, set aside - Owner may satisfy the liability to pay compensation under the impugned award. (Para 29)**

मोटर यान अधिनियम (1988 का 59), धाराएँ 2(30) व 173 – स्वामी – विक्रय का करार – प्रश्नगत वाहन, प्रदीप कुमार के नाम से आर.टी.ओ. में पंजीकृत था – केवल उसे, मोटर यान अधिनियम की धारा 168 के प्रयोजन हेतु "स्वामी" के रुप में वर्णित किया जा सकता है – प्रतिकर के भुगतान के दायित्व से उसे मुक्त करने का निष्कर्ष और उक्त दायित्व को विक्रय करार के आधार पर अपीलार्थी के पुत्र पर लादना जैसा कि दावा अधिकरण द्वारा अभिलिखित किया गया है, विधि के उपबंधों के अनुरुप नहीं है, अतः, अपास्त – आक्षेपित आदेश के अंतर्गत प्रतिकर अदा करने के लिये, स्वामी दायित्व की संतुष्टि कर सकता है।

Cases referred :

1995 ACJ 533, 1993 ACJ 893, 2003 ACJ 521, 2007 ACJ 1249, 2008 ACJ 973, 2008 ACJ 2003, (2011) 2 SCC 240, AIR 2004 Raj. 267, 2011 ACJ 577, 1997 ACJ 1148, 2008 ACJ 705, 2007 ACJ 1666, (1997) 7

SCC 481, 1998 ACJ 1306, 2001 ACJ 2059, (2008) 17 SCC 634, M.A. No. 78/2013 decided on 17.01.2013.

Amit S. Agrawal, for the appellants.
Satish Jain, for the respondent No.7.
None for the other respondents, though served.

ORDER

J.K.MAHESHWARI, J.:- This appeal under Section 173 of the Motor Vehicles Act has been filed against the award dated 26/9/2008 passed by 1st Additional Member, Motor Accident Claims Tribunal Mandsaur in Claim Case No.74/2007 assailing the finding of liability to pay compensation fastened against the son of the appellants though not, the registered owner.

2. The facts, in brief are that on 30/10/2006 at about 8.00 p.m. deceased-Vikram Singh went on motorcycle with Guddu and Talveer Singh to Sitamau to purchase medicines, while coming back, Tempo bearing registration No:M.P.O7-T/2041 driven rashly and negligently by. the driver namely Kushal Singh dashed the standing motorcycle on the bank of the road. These persons sitting or the motorcycle fell down and sustained injuries out from Vikram Singh succumbed due to those injuries. Thus seeking compensation to the tune of Rs.20,40,000/- application under Section 166 of the Motor Vehicles Act was filed by the claimants.

3. The Driver Kushal Singh filed the written statement, inter-alia, contending that he was engaged as driver by the owner Pradeep Kumar and driving the offending vehicle on the date of accident. The fact regarding commission of accident, and other claim averments have also been denied by him.

4. Respondent- Pradeep Kumar filed written statement, inter-alia, contending that the vehicle in question has been sold to Bhanu Pratap Singh vide agreement dated 31/12/2005, however, for the accident, if any, took place, he is not responsible to pay the amount of compensation . It is further contended that decased himself driving the motorcycle in a drunken position, however, he himself was negligent, therefore, he is not liable to pay any amount of compensation for the neglience of the deceased himself.

5. Respondent- Bhanu Pratap Singh, by filing written statement, who is heavenly aboard during pendency, stated that he is neither the registered owner

nor in possession of the offending vehicle. In fact, the vehicle was of the ownership and possession of respondent- Pradeep Kumar, however he is responsible to the accident and also liable to pay compensation. It is also contended that the accident has taken place due to negligence of the deceased himself, therefore, claim petition may be dismissed.

6. Learned Claims Tribunal, after considering the evidence brought on record and relying upon the affidavit Ex. D/1, intimation in writing Ex. D/2 and U.P.C. Ex. D/3 and also the seizure memo held that the vehicle in question was in the possession of respondent Bhanu Pratap Singh after the purchase from respondent Pradeep Kumar, therefore, compensation calculated Rs. 2,16,000/- is payable by Bhanu Pratap Singh, and absolved the respondent Pradeep Kumar, from the liability to pay the amount of compensation.

7. Assailing the said finding, father and mother of respondent Bhanu Pratap Singh since deceased have filed this appeal, inter-alia, contending that for the purpose of Section 168 of the Motor Vehicles Act 1988. (For brevity it be referred as MV Act) and the definition of owner specified under Section 2(30), deceased-Bhanu Pratap Singh cannot be treated to be the owner, therefore, the impugned award passed by the Claims Tribunal directing to pay the amount of compensation by him is unsustainable in law. In support of such contention, reliance has been placed on the judgment of this Court in the case of *State of Madhya Pradesh and another Vs. Chatru Lal,* 1995 ACJ, 533, *Satish Sanghi Vs. Mihir Kumar Joshi and others,* 1993 ACJ 893, the Division Bench judgment of this Court in the case of *Hamid Khan Vs. Guddibai and ors,* 2003 ACJ 521, *Aditya Khare V. Jamuna Prasad Kahar and four ors*, 2085, the Division Bench judgment of Punjab and Haryana High Court in the case of *Vipin Kumar Sharma V. Jagwant Kaur and others*, 2007 ACJ 1249 and another judgment of the Single Bench of the same High Court in the case of *Niranjan Singh V. Zeena and others,* 2008 ACJ 973, and the judgment of Gauhati High Court in the case of *Lili Bora Vs. Nishi Rani Hazarika and others,* 2008 ACJ 2003 and lastly a judgment of Hon'ble the Apex Court in the case of *Pushpa alias Leela and others Vs. Shakuntala and others,* (2011) 2 SCC 240. In view of the aforesaid, it is submitted that the Claims Tribunal has committed an error in fastening the liability against the son of the appellants by passing the impugned award.

8. Per contra, Shri Satish Jain, learned counsel for respondent No.7, has strenuously urged that the Claims Tribunal, after appreciating the evidence

brought in para-14 of the impugned award, rightly recorded the finding that the son of the appellants has become the owner in view of sale agreement and the other documents filed by respondent- Pradeep Kumar. It is further submitted that the vehicle in question was in possession of respondent -Bhanu Pratap Singh, therefore, for all practical purposes and for the purpose of civil liability, son of the appellants shall be the owner, therefore, the finding recorded by the Claims Tribunal do not warrant any interference. Learned counsel referring the definition of Section 2(30) and Section 50 of the MV Act, has contended that as per the definition of the owner, it is clear that the motor vehicles which is the subject matter of a hire purchase agreement, or an agreement of lease or an agreement of hypothecation, if possession thereof is with a person under the agreement, then he is liable to pay the amount of compensation. In support of his contention, reliance has been placed on the judgment of Rajasthan High Court in the case of *Dhulchand Vs. Kanti Lal and others,* AIR 2004 Raj. 267. It is further contended by him that learned Single Judge of this Court in the case of *Madhav Singh Vs. Ratna and others,* 2011 ACJ 577 after considering the judgment of the Hon'ble Apex Court in the case of *Rajasthan State Road Transport Corporation Vs. Kailash Nath Kothari and others*, 1997 ACJ 1148 and the Apex Court judgment in the case of *National Insurance Co. Ltd. Vs. Deepa Devi*, 2008 ACJ 705, held that if a person is having possession and actual control on the offending vehicle then the finding recorded by the Claims Tribunal to fasten the liability upon him as owner cannot be said to be illegal. Reliance has also been placed on the Division Bench judgment of the Court in the case of *Brijlal Khilwani V. Sohan and others,* 2007 ACJ 1666 and contended that if a person is in the control of vehicle under an agreement and the amount has not been paid, in such circumstances, registration of the vehicle would have no relevance and the liability has rightly been fastened against a person having overall control of the vehicle. In view of forgoing, prayer is made to dismiss the appeal filed by the appellants upholding the finding recorded by the Claims Tribunal.

9. After hearing learned counsel for the parties up to considerable length, to appreciate their rival contentions in the present case, it is to be seen that definition of owner as specified in the MV Act would cover the registered owner only or it also includes the person who is in possession of the vehicle under an agreement. To appreciate the aforesaid issue, definition so specified under the Motor Vehicles Act is required to be noted which is reproduced as under:-

> "2 (30) "owner" means person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement", or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement."

10. It is relevant to mention here that under the Old Motor Vehicles Act, 1939, the definition of the owner was different than the definition as specified in the New M.V. Act. The definition of the owner under the old Act was found in Section 2(19) which is also reproduced as under:

> "2 (19) " owner" means, where the person, in possession of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle, which is the subject of a hire purchase agreement, the person in possession of the vehicle under that agreement"

11. After careful reading of the definition of owner under the old Motor Vehicles Act, it is apparent that if a person is in possession of the motor vehicle or in case of a minor guardian of such minor, and if said motor vehicle is purchased under hire-purchase agreement, then person in possession of the vehicle under that agreement has been described as owner. As per the New M.V. Act, it is clear that a person would be owner of the motor vehicle in whose name it stands registered and in case of minor, guardian of such minor, and if the motor vehicle is subjected to hire- purchase agreement, lease agreement, hypothecation agreement, than a person in possession of vehicle under such agreement. While appreciating the definition of the owner under the old MV Act, Hon'ble the Apex Court in the case of *Rajasthan State Road Transport Corporation Versus Kailash Nath Kothari and others* reported in (1997) 7 SCC 481 in para-1 / observed as under:

> "17. The definition of owner under Section 2(19) of the Act is not exhaustive. It has, therefore to be construed, in a wider sense, in the facts and circumstances of a given case. The expression *owner* must include, in a given case, the person who has the actual possession and control of the vehicle and under whose directions and commands the driver is obliged to operate the bus. To confine the meaning of "owner" to the registered owner only would in a case where the vehicle is in

the actual possession and control of the hirer not be proper for the purpose of fastening of liability in case of an accident. The liability of the owner" is vicarious for the tort committed by its employee during the course of his employment and it would be a question of fact in each case as to on whom can vicarious liability be fastened in the case of an accident. In this case, Shri Sanjay Kumar, the owner of the bus could not ply the bus on the particular route for which he had no permit and he in fact was not plying the bus on that route. The services of the driver were transferred along with complete "control" to RSRTC, under whose directions, instructions and command the driver was to ply or not to ply the ill-fated bus on the fateful day. The passengers were being carried by RSRTC on receiving fare from them. Shri Sanjay Kumar was therefore not concerned with the passengers travelling in that bus on the particular route on payment of fare to RSRTC. Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of RSRTC for operation of the bus. So far as the passengers of the ill-fated bus are concerned, their privity of contract was only with the RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of the RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of the agreement (*supra*), the RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of the RSRTC. The general proposition of law and the presumption arising therefrom that an *employer,* that is the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed by the employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the *original employer* is able to establish that when the servant was lent,

the *effective control* over him was also transferred to the hirer, the original owner can avoid his liability and the *temporary employer or the hirer,* as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of Conditions 6 and 7 (*supra*), which go to show that the *owner* had not merely transferred the services of the driver to the RSRTC but actual control and the driver was to act under the *instructions, control and command* of the conductor and other officers of the RSRTC."

This Court was also having occasion to consider the definition of the owner under the old MV Act as well as under the new MV Act. While considering the aforesaid, in the case of *Leelawati and others Vs. Ravindra Kumar and others* reported in 1998 ACJ 1306 observed as under:-

"13. Now, the next point that comes for determination is that as to whether all the three respondents (in M.A. No.335 & 1989) are jointly and severally liable or whether the D.D.C. Ltd. or the insurance company stands exonerated?

As accident occurred in the year 1983 the provisions of Motor Vehicles Act, 1939 shall be attracted. Section 2(19) defines word 'owner' as under:

"Section' 2 (19): 'owner' means, where the person in possession, of a motor vehicle is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement the person in possession of the vehicle under the agreement."

Thus, the person in possession and having control over the vehicle will be deemed to be the owner of the vehicle. We have perused the agreement, Exh. D/1, entered into between D.D.C. Ltd. and Ravindra kumar Sharma, whereby D.D.C.

> Ltd. has taken the service of the vehicle. On the basis of agreement the vehicle was within the command and control of D.D.C. Ltd. and on the date of accident it was being driven under the command and control of D.D.C. Ltd.
>
> 15. We would further like in observe that this proposition of law may not hold good after change in the definition of word 'owner' vide Motor Vehicles Act, 1988, but as the present accident occurred much prior to coming into force of the amended Act, the person in possession will be deemed to be the owner of the vehicle"

In view of the aforesaid, it is clear that as per the language of the definition, of the owner under the old MV Act and the new MV Act, the change has been brought regarding registration of the vehicle in the RTO in the name of the person, having much relevance leaving three conditions as specified therein. Otherwise as per the old Act if a person is in possession and control over the vehicle shall be called as owner differentiating from registered owner.

12. At this juncture, the arguments advanced by Shri Satish Jain, learned counsel, referring the definition of Section 2(30) indicating the comma after the word hire-purchase and thereafter agreement, the legal sanction to the word 'agreement' different than hire purchase, requires consideration. In this respect Editorial of a Bare Act of Universal Law Publishing Co. Pvt. Ltd., New Delhi has been seen, which is reproduced as under:

> "Ed.- In clause (30) (relating to "owner") after the words "hire-purchase" and before the word "agreement" there is a comma as printed in the Government publication (Acts or Parliament, 1988), whereas there should be no comma after the words "hire-purchase" and before the word "agreement" hence comma has been deleted. In this respect, see *Dhulchand V. Kanti Lal*, AIR 2004 Raj. 267".

Bare reading of said editorial it is clear that comma after the word "hire-purchase" and further the word "agreement" so put forth in Gazette of MV Act is merely a mistake, in fact, the comma should not be used after hire-purchase and it should be used after hire-purchase agreement. If the said editorial is ignored and the definition in whole as dictated in the New Motor Vehicles Act is appreciated, then also it is clear that if a person in whose name the motor vehicle stands registered

and if such person is minor, then the guardian, and in relation to a motor vehicle which is a subject matter of hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, person in possession of the vehicle under that agreement would be the owner. On microscopic reading thereof, it is apparent that the motor vehicle ought to be registered in the name of a person, in case of minor in the name of Guardian, is a condition precedent, therefor, the word "stand registered" has been used in the said definition. Thereafter on reading the other stipulations in the definition it is clear that, in case of hire-purchase, lease or hypothecation, agreement the person in possession under the agreement shall be the owner. The intention of the Legislature is not that "hire-purchase" is distinct then the word "agreement". If it was so then construction of sentence along with hire-purchase, lease and hypothecation the word agreement was not required to be suffixed. On perusal of the sentence, it is clear that any motor vehicle if subjected to hire-purchase agreement, agreement of lease, agreement of hypothecation, then person in possession of the vehicle under that agreement may be the owner. By adding the word 'agreement' along with hire-purchase, lease, hypothecation, then specifying that the person in possession of the vehicle under "that agreement" emphasises that the possession of the vehicle would be relevant as per that agreement entered between the parties. If the intention of the Legislature was to put the word 'agreement' independent it to hire-purchase, in the definition then it was not required to be emphasized after specifying different three agreements, that the person in possession of the vehicle under "that agreement." Thus, the word "that agreement" qualifies either hire-purchase agreement or agreement of lease or agreement of hypothecation any one of them. In such circumstances, in the considered opinion of this Court editorial written in the Bare Act of the Universal Law Publishing Co. Pvt. Ltd., New Delhi indicates the real interpretation of the definition, and offers the right direction to understand the meaning of word "owner" in the definition clause specified in the MV Act. In this respect, it is to be observed that if Rajasthan High Court in the case of *Dulichand* (supra) has considered the meaning of comma after hire purchase and thereafter "agreement" relying upon Government publication, then in view of forgoing discussion, this Court is respectfully disagree by the analogy so taken in the said judgment. Here it is required to be observed that meaning of the definition should be construed in the manner, and for the purpose it was specified in the Act, it cannot be read in different context to its real meaning. In addition to the aforesaid discussion, my view fortifies by 'various precedents of Hon'ble the Apex Court, this Court and other High Courts as described in succeeding paras.

13. The Hon'ble Apex Court in the case of *Dr. T.V. Jose Vs. Chacko P.M. and others,* 2001 ACJ 2059, in para '9 and 10 has observed as under:

> "9. Mr. Iyer appearing for the appellant submitted that the High Court was wrong in ignoring the oral evidence on record. He submitted that the oral evidence clearly showed that the appellant was not the owner of the car on the date of the accident. Mr. Iyer submitted that merely because the name had not been changed in the records of the R.T.O. did not mean that the ownership of the vehicle had not been transferred Mr. Iyer submitted that the real owner of the car was Roy Thomas. Mr. Ayer submitted that Roy Thomas had been made party respondent no.9 to these appeals. He pointed out that an advocate had filed appearance on behalf of Roy Thomas but had then applied for and was permitted to withdraw the appearance. He pointed out that Roy Thomas had been duly served and a public notice had also been issued. He pointed out that Roy Thomas had chosen not to appear in these appeals. He submitted that the liability if any, was of Roy Thomas.
>
> 10. We agree with Mr. Iyer that the High Court was not right in holding that the appellant continued to be the owner as the name had not been changed in the records of R.T.O. There can be transfer of title by payment of consideration and delivery of the car. The evidence on record shows that ownership of the car had been transferred. However, the appellant still continued to remain liable to third parties as his name continued in the records of R.T.O. as owner. The appellant could not escape that liability by merely joining Roy Thomas in these appeals. Roy Thomas was not a party either before the MACT of the High Court. In these appeals we cannot and will not go into the question of *inter se* liability between the appellant and Roy Thomas. It will be for the appellant to adopt appropriate proceedings against Roy Thomas if in law, he is entitled to do so.

14. The judgment of T.V. Jose has been considered in the case of *P.P. Mohammed Vs. K. Rajappan and others,* (2008) 17 SCC 634, and in para-4 has observed as under.

> 4. These appeals are filed by the appellants. The insurance

company has chosen not to file any appeal. The question before this Court is whether by reason of the fact that the vehicle has been transferred to Respondent no. 4 and thereafter to Respondent no. 5, the appellant got absolved from liability to the third person who was injured. This question has been answered by this Court in *T.V. Jose (Dr.) Vs. Chacko P.M.* wherein it is held that even though in law there would be a transfer of ownership of the vehicle, that, by itself, would not absolve the party, in whose name the vehicle stands in RTO records, from liability to a third person. We are in agreement with the view expressed therein. Merely because the vehicle was transferred does not mean that the appellant stands absolved of his liability to a third person. So long as his name continues in RTO records, he remains liable to a third person.

15. Thereafter in the case of *Pushpa alias Leela* (supra) the Apex Court after considering the definit on of the owner in the same context has discussed herein above relying upon the judgment of *T.V. Jose* (supra) and distinguishing the judgment of *Deepa Devi and others* (supra), held as under :-

"9. The question of the liability of the recorded owner of the vehicle has to be examined under different provisions of the Act. Section 2(30) of the Act defines "owner" in the following terms:

"2(30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement;" (Emphasis added)

10. Then, section 50 of the Act lays down the procedure for transfer of ownership. It is a long Section and insofar as relevant it is reproduced below

"50. Transfer of ownership.

(1) Where the ownership of any motor vehicle registered under this Chapter is transferred,-

(a) the transferor shall,-

(i) in the case of a vehicle . registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be prescribed by the Central Government to the registering authority within whose jurisdiction the transfer is to be effected and shall simultaneously send a copy of the said report to the transferee; and

(ii) xxxxxxx

(b) the transferee shall, within thirty days of the transfer, 'report the transfer to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may be, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.

(2)-(5) x x x

(6) On receipt of a report under sub-section (1), on an application under sub-section (2), the registering authority may cause the transfer of ownership to be entered in the certificate of registration.

(7) A registering authority making any such entry shall communicate the transfer of ownership to the transferor and to the original registering authority, if it is not the original registering authority."

11.. It is undeniable that notwithstanding the sale of the vehicle neither the transferor Jitender Gupta nor the transferee Salig Ram took any step for the change of the name of the owner in the certificate of registration of the vehicle. In view of this omission Jitender Gupta must be deemed to continue as the owner of the vehicle for the purposes of the Act, even though under the civil law he ceased to be its owner after its

sale on February 2, 1993.

15. Learned counsel for the insurance company submitted that even though the registered owner of the vehicle was Jitender Gupta, after the sale of the truck he had no control over it and the possession and control of the truck were in the hands of the transferee, Salig Ram. No liability can, therefore, be fastened on Jitender Gupta, the transferor of the truck. In support of this submission he relied upon a decision of this Court in *National Insurance Company Ltd. vs. Deepa Devi.*

16. The facts of the case in *Deepa Devi* ere entirely different. In that case the vehicle was requisitioned by the District Magistrate in exercise of the powers conferred upon him under the Representation of the People Act, 1951. In that circumstance, this Court observed that the owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remained under requisition, the owner did not exercise any control over it: the driver might still be the employee of the owner of the vehicle but he had to drive the vehicle according to the direction of the officer of the State, in whose charge the vehicle was given. Save and except the legal ownership, the registered owner of the vehicle had lost all control over the vehicle. The decision in *Deepa Devi* was rendered on the special facts of that case and it has no application to the facts of the case in hand."

16. On the said issue this Court in the case of *Chatru Lal* (supra), in para-8 and 9 has observed as under:

"8. Section 2(30) of the Act reads as follows:

'Owners means a person in whose name a motor vehicle stands registered, and were such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

9. On a plain reading of definition it is evident that a person in possession of the vehicle under an agreement of lease may

also be treated to be an owner of the vehicle. Once this plea of agreement of lease has been raised it is but necessary that it ought to have been entertained and the matter should have been adjudicated taking into consideration the plea so raised".

17. In the case of *Satish Sanghi* (supra) this Court in para 9 and 11 has held as under :

"9. Learned counsel for the appellant has submitted that the definition of owner given in section 2(30) of the Motor Vehicles Act refers to the independent agreement as well, as there is a comma after word 'hire-purchase' and a further comma after the word 'agreement' and this agreement can be other than the agreement of hire-purchase, lease or hypothecation. This contention of the learned counsel does not appear to be very sound. However, even if this contention is accepted, there is no document of independent agreement. There is a variance in the pleadings and prrof. The document regarding alleged agreement has been withheld from the court and, therefore, in the opinion of this court it has rightly been held that the appellant was the owner of the vehicle at the relevant period, i.e. at the time of accident.

11. As against it learned counsel for the respondents has referred to cases reported in *Shankerlal V. Shankerlal* 1988 ACJ 866 (*Rajasthan*) *United India Fire Genl. Ins. Co. Ltd. Vs. Kanchanbai,* 1981 ACJ 554 (MP) and *Geetabai* Vs. *Hussainkhan* 1985 ACJ 44 (MP) and submitted that since the appellant continued to be the registered owner and this accident was caused to a third party and, therefore, registered owner is liable to satisfy the award. I am in agreement with the proposition referred to above. In the opinion of this court, threfore, the appellant has rightly been held liable to satisfy the claim along with other NAs."

18. Thereafter in the case of *Hamid Khan* (supra) Division Bench of this Court in the context of definition of owner under New Motor Vehicles Act has observed as under;

"8. In the circumstances, it is absolutely clear that the deceased

was travelling in the jeep as fare paying passenger. That being so, terms and conditions of insurance policy prohibited the owner from doing so. Consequently, the owner of the jeep and its driver breached the policy conditions by carrying fare paying passengers in the jeep, therefore, the insurance company is absolved of the liability to pay compensation. Contention of Mr. Imtiyaz Hussain that after the transfer of vehicle in favour of Gangabai (respondent No. 6), the appellant is not liable to pay compensation, is not sustainable since. Hamid Khan is still the registered owner of the vehicle and transfer has not been effected in the name of Gangabai.

19. In the case of *Aditya Khare* (supra), Single Bench of this Court has observed as under -

"The contention cannot be countenanced. In view of the definition of "owner under Sub-section (30) of Section 2 of the Act the person in whose name a vehicle stands registered continues to be the owner of the vehicle till the name of the transferee is substituted in the record of the R.T.O. The name of the respondent was transferred on 17-12-91 i.e. long after the date of the accident.

It is true that the definition of "owner" under the Motor Vehicles Act, 1939 was different. In the earlier enactment the definition was not exhaustive, therefore, it included the person in whom the proprietary title vested. In the earlier definition the word "owner" included the registered owner as well as unregistered owner or transferee of the vehicle but after the change of the definition in the Motor Vehicles Act, 1988 the definition of "owner"is exhaustive. The judgment in *Sanjay Singh's case* (supra) relates to the definition of the "owner" under the Motor Vehicles Act, 1939. The judgment of Apex Court in *Panna Lal's case* (supra) also relates to the Motor Vehicles Act, 1939. The Judgment in *Rajasthan State Road Transport Corporation* (supra) relates to hirer in possession.

Sub-section (30) of section 2 of Motor Vehicles Act 1988 does not say that moment the price is paid and the possession of motor vehicle is delivered to the purchaser, the registered owner is absolved of his liability. What is required for the purpose of Sub-

section (30) of Section 2 of the Act is that the name of the purchaser is recorded in the registration certificate. Unless the name of the person is registered he cannot become the owner of the vehicle. Thus, on the date of the accident the respondent No. 4 did not become the owner of the offending vehicle and the appellant continued to be the owner thereof. The respondent No. 4 became the owner only on 17-12-91 when his name was transferred in the record of the R.T.O. Therefore, in view of the definition of the "owner" under Sub-section (30) of Section 2 of the Act the appellant alone was the owner of the offending motor cycle on the date of the accident. He was, therefore, responsible for the vicarious liability and respondent No. 4 is not liable as purchaser in whose name the vehicle was not transferred till the date of the accident."

20. Punjab and Haryana High Court in the case of *Vipin Kumar Sharma* (supra) after considering the definition of the word "owner" relying upon the judgment of *Dr. TV. Jose* (supra) of Apex Court, in parts 12, 13 and 14 has observed as, under

"12. A combined reading of the aforesaid provisions would show that the owner is a person in whose name the motor vehicle stands registered with the registering authority and the transfer of the vehicle takes place only when the requirements prescribed under the Act have been complied with the registering authority and who enters the same in its record.

13. Therefore, it is hold that reference to "owner" in Section 168 of the Act is to the registered owner of the vehicle.

14. The Apex Court in *Dr. TV. Jose V. Chacko P.M.*, 2001 ACJ 2059 (SC), in para 10 had held that an owner continued to remain liable to third parties as his name had not been changed in the records of the RTO. It further held that there can be transfer of title by payment of consideration and delivery of the vehicle, but an owner still continues to remain liable to third parties as long as his name continued in the records of the RTO as the owner. The Apex Court observed that the owner could adopt appropriate proceedings against the vendee if in law, he was entitled to do so.

The aforesaid view of the Division Bench has been reiterated by the Single Bench of the Punjab and Haryana High Court in the case of *Niranjan Singh* (supra).

21. In the case of *Lili Bora* (supra), Gauhati High Court has considred the same issue and after considering the definition of the owner under the old Motor Vehicles Act as well as New Motor Vehicles Act in para 14 held as under:

> "14. What further follows from the above discussion is that in the M.V. Act, 1939, emphasis for being regarded as 'owner' of a vehicle was on the control and possession of the vehicle; whereas in the M.V. Act, 1988, emphasis has shifted from 'possession' to 'registration' and accordingly, unless a vehicle is registered in the name of a person, he cannot be regarded an owner of the vehicle. This general principle is, however, subject to three specified exceptions. namely, that a person in possession of a vehicle may also be regarded as owner thereof provided that he comes into possession of the vehicle in any of, the said three specified modes of agreement namely, (i) hire-purchase agreement, (ii) agreement of lease, or (iii) agreement of, hypothecation. Thus, while under the MV. Act, 1939, even a person, who might have had stolen a vehicle and committed an accident, could have, perhaps, been regarded as the owner of the vehicle, for, he had the control and possession of the vehicle, the definition of owner, now given under M.V. Act, 1988, makes it clear that the possession of a vehicle has to be acquired through the three specified mode, as given under section 2 (30), in order to treat a person as owner of a vehicle on the basis of his possession alone. This change, in the mode of definition of 'owner', appears to have been made by the legislature in order to help the victims of road traffic accidents. A vehicle, in order to be used in a public place, needs to have compulsory insurance, in terms of section 147 of the M.V. Act, 1988, so as to safeguard the interest of a third party. Whoever may come to possess the vehicle, the registered owner of the vehicle would be regarded as the owner of the vehicle and the insurer would remain liable to pay compensation to a third party even if the, vehicle meets with an accident, when the registered owner of the vehicle did

not have the control and possession over the vehicle."

22. In view of forgoing legal position as apparent from reading the definition of word "owner" specified under the New Motor Vehicles Act, it is clear that motor vehicle in whose name it has been registered in the RTO. and if such person is minor, then it should be registered in the name of guardian, is called as 'owner' in the definition, it has further been clarified that if the said motor vehicle is a subject of hire-purchase agreement, lease agreement and hypothecation agreement; then in these three contingencies, a person who is in possession of the said vehicle under the said agreement, would be called as "owner". While under the Old Motor Vehicles Act, was defined that if a person is in possession or having control over the motor vehicle would be called as owner or also in case of hire-purchase under the said agreement. The basic distinction in between the definition of owner under the Old Act and the New Act is of the word "stands registrered" of the vehicle in the name of transferee, however, the said word has significance to make change under the new enactment which cannot be ignored.

23. Hon'ble Apex Court in the Case of *Pushpa alias Leela and others* (supra), has made it clear after going through the definition of word "owner", that a person in whose name the vehicle has been registered shall be deemed to continue as owner for the purpose of Motor vehicles Act though under the civil law he may have ceased to be the owner of the vehicle. In the said judgment, the judgment of *Deepa Devi* (supra) of the Apex Court relied upon by learned counsel representing respondent, has been distinguished. It has been held that in a case of *Deepa Devi* (supra). the District Magistrate in exercise of power under the Representations of People Act requisitioned the offending vehicle, which was being driven under the control of the said authority. However. on account of requisitioning the vehicle under the statute which is having a overriding effect in the peculiar facts, the State Government or the Officers of the State has been deemed to be owner to pay the compensation. Thus, looking to the peculiar facts of the case of *Deepa Devi* (supra), it was distinguished by Hon'ble the Apex Court, interpreting the definition of the owner. Thus in the considered opinion of this Court, the definition of owner as per new MV Act, the person in whose name the vehicle has been registered in the RTO, would be said to be the owner. In case the possession of the vehicle has been pleaded on the basis of alleged hire-purchase agreement, lease agreement or hypothecation agreement, then on its proof, the person in possession as per said agreement may also be the owner of the vehicle in question.

24. In view of forgoing discussion, the judgment of Division Bench of this Court, relied upon by the learned counsel for respondent No. 7 in the case of *Brijlal Khilwani* (supra) requires consideration. In the said case, this court has considered the definition of the owner under the Old Motor Vehicles Act as well as under the New Motor Vehicles Act and thereafter because under an agreement the possession was delivered and the instalments were required to be paid and as per the terms of the agreement after payment of such installments the vehicle was required to be registered, therefore, the transferee was accepted as owner of the vehicle, however, on facts, the said case is distinguishable. Similarly, the case of learned Singe Judge in the case of *Madhav Singh* (supra) and another judgment passed in M.A. No.78/2013 (*Pankaj Vs. Smt. Rajni and others*) decided on 17th January, 2013, is of no help in the light of the recent pronouncement of the Apex Court in the case of *Pushpa* alias *'Leela and others* (supra). Thus, the argument of Shri Satish Jain, learned counsel, relying upon the aforesaid judgment to accept the son of the appellants as owner though he was not the registered owner in RTO cannot be accepted and is hereby repelled. In view of forgoing discussion the only inescapable conclusion can be arrived that a person who is the registered owner of a motor vehicle can be termed as "owner" for the purpose of Section 168 of the Motor Vehicles Act unless other party is in position to establish that it is a case of hire purchase agreement, lease agreement and hypothecation agreement and on its proof, the person in possession of the vehicle may also be called as owner.

25. At this stage, the arguments advanced by Shri Jain, learned counsel for respondent No.7 showing distinction from the judgment of *Pushpa alias Leela and others* (supra), on the facts of present case, further requires consideration. It is his contention that as per the agreement executed by way of affidavit on 31/12/2005, motor vehicle i.e. Tempo in question was transferred in the name of Bhanu Pratap Singh. The intimation of such sale was given by the transferor to the RTO as specified under Section 50(1)(a)(i) of the Act. The documents to that effect Ex.D/1 to Ex.D/3 are available on record. To deal the said contention, the provisions of Section 50 are required to be taken note of which is reproduced as under;

> "50. Transfer of ownership.
>
> (1) Where the ownership of any motor vehicle registered under this Chapter is transferred,--

(a) the transferor shall,-

(i) in the case of a vehicle registered within the same State, within fourteen days of the transfer, report the fact of transfer, in such form with such documents and in such manner, as may be prescribed by the Central Government to the registering authorty with whose jurisdiction the transfer is to be affected and shall simultaneously send a copy of the said report to the transferee; and

(ii) in the case of a vehicle registered outside the State, within forty- five days of the transfer, forward to the registering authority referred to in sub- clause (i)-

(A) the no objection certificate obtained undo section 48; or

(B) in a case where no such certificate has been obtained,-

(i) the receipt obtained under sub-. section (2) of section 48; or

(ii) the postal acknowledgment received by the transferee if he has sent an application in this behalf by registered post acknowledgment due to the registering authority referred to in section 48,

together with a declaration that he has not received any communication from such authority refusing to grant such certificate or requiring him to comply with any direction subject to which such certificate may be granted;

(b) the transferee shall, within thirty days of the transfer, report the transfer to the registering authority within whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as the case may he, and shall forward the certificate of registration to that registering authority together with the prescribed fee and a copy of the report received by him from the transferor in order that particulars of the transfer of ownership may be entered in the certificate of registration.

(2) x x x

(a) x x x

(b) x x x

(3) If the transferor or the transferee fails to report to the registering authority the fact of transfer within the period specified in clause (a) or clause (b) of sub-section (1), as the case may be, or if the person who is required to make an application under sub- section (2) (hereafter in this section referred to as the other person) fails to make such application within the period prescribed, the registering authority may, having regard to the circumstances of the case, require the transferor or the transferee, or the other person, as the case may be, to pay, in lieu of any action that may be taken against him under section 177 such amount not exceeding one hundred rupees as may be prescribed under sub- section (5):

Provided that action under section 177 shall be taken against the transferor or the transferee or the other person, as the case may be, where he fails to pay the said amount.

(4) x x x.

(5) x x x.

(6) x x x.

(7) xx x."

26. After careful examination the aforesaid provision, it is clear that, if transfer of a registered vehicle has been made within the State, then within 14 days of such transfer in the manner prescribed by the Central Government along with such documents an intimation to the registering authority in whose jurisdiction the transfer is to be made effective is required to be given. Simultaneously, a copy of the said report is also required to be furnished to the transferee. The manner has been prescribed under the Central Motor Vehicles Rules, 1989. Rule 55 deals the said contingencies, whereby it is clear that on transfer of ownership of the motor vehicle, transferor is required to report the said fact on form No.29 to registering authority having jurisdiction. Along with said form, certificate of registration, certificate of insurance and fee as specified under Rule 81, is required to be affixed.

27. Thus, if compliance as specified under Section 50(1)(a)(i) and Rule 55 has been made by the transferor i.e. respondent No.7, then compliance as specified under Section 50 may be accepted, otherwise the case in hand is not distinguishable from the case of *Pushpa alias Leela and others* (supra). On perusal of the record of present case, document Ex. D/1 is an affidavit of Pradeep and Bhanupratap Singh, Ex.D/2 is an intimation given to RTO, Mandsaur by respondent No.7 along with copy of affidavit. Ex.D/4 is the UPC indicating name of RTO, Mandsaur and the Insurance Company. Thereby it is clear that Form No.29 as prescribed under Rule 55 of the Central Motor Vehicles Rules has net been sent. The registration certificate, insurance policy and fees have also not been attached. Intimation to the transferee has also not been given as apparent from the UPC. In such circumstances, respondent No.7 has not shown the compliance of the provisions of Section 50(1)(a)(I) of the Motor Vehicles Act, as prescribed in rules.

28. Learned counsel for respondent No.7, again at this stage, referring Section 50(1)(b) and 50(3) of Motor Vehicles Act, has contended that it is not only the duty of the transferor but it is also the duty of the transferee to intimate regarding sale of transaction to the registering authority in whose jurisdiction registration of the vehicle is there. As the transferee has also failed to produce any document to comply the said provision, however, in consequence thereof as per Section 50(3), transferee or transferor would be liable to pay the penalty only as specified under Section 177. In such circumstances, applying the principle of equity and good conscience and looking to the transaction of the sale it be presumed that the ownership was transferred and son of the appellants was the owner of offending vehicle on the date of accident. It is further his contention that non-compliance of provision of Section 50(1)(a)(i) would only lead to penal consequence and it is having nothing to do with the compliance of the provisions of the Act. After hearing him and on going through the aforesaid provisions, no doubt, it is dear that the transferor and transferee, both were required to intimate to the registering authority in a manner so prescribed. But, in the present case son of the appellants have denied his ownership disputing the agreement to sale. It is respondent No.7-Pradeep Kumar who has stated that Bhanu Pratap Singh, son of the appellants is the owner, however, burden of proof lies on him. As stated, respondent No.7 is transferor, thus, to prove the fact that the vehicle after sale was in possession of Bhanu Pratap Singh, is required to be proved by respondent No.7. As per the defence taken by respondent No.7, he has proved that as

per Section 50(1)(a)(i) the registering authority was intimated by him as per procedure prescribed. In absence of the said proof and looking to the defence taken by Bhanu Pratap Singh that he is not the owner of the vehicle and his name was not registered in. R.T.O., and it is not a case of hire-purchase hypothecation or lease agreement, thus the contention advanced by Shri Jain, is devoid of any substance, hence, repelled.

29. It is not disputed by respondent No.7 that on the date of accident, the vehicle in question was registered in the RTO in his name, however, in the fact of this case he can only be described is a "owner" for the purpose of Section 158 of the Motor Vehicles Act and to carry out the purpose of the M.V. Act. In such circumstances, the finding to absolve him from the liability to pay compensation and to fasten such liability against the son of the appellants as recorded by the Claims Tribunal is not in conformity to the provisions of law, hence set aside. In consequence thereto, it is directed that registered owner of the vehicle may satisfy the liability to pay compensation under the impugned award.

30. In view of forgoing discussions, this appeal is allowed, the finding of liability recorded against the son of the appellants by the Claims Tribunal to pay the amount of compensation stands set aside and in consequence thereto registered owner (respondent No 7) is directed to discharge the liability under the impugned award. The amount so deposited by the appellants to maintain this appeal may be refunded back on applying before the Claims Tribunal. In the facts and circumstances of the case, parties are directed to bear their own cost.

Appeal allowed.

I.L.R. [2013] M.P., 2881
APPELLATE CIVIL

Before Mr. Justice Rajendra Menon & Smt. Justice Vimla Jain

F.A. No. 385/1998 (Jabalpur) decided on 2 July, 2013

DASHRATH PRASAD YADAV ...Appellant

Vs.

SMT. PARVATI YADAV ...Respondent

A. ***Hindu Marriage Act (25 of 1955), Section 13(1)(a) - Divorce - Mental Cruelty*** **- After solemnization of marriage, the respondent treated her husband with cruelty by raising unnecessary quarrels, using filthy abuses, not preparing the food, threatening of mixing poison in food and threatening to commit suicide - Held - Ground**

of cruelty proved by the appellant. (Para 14)

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1)(ए) – विवाह विच्छेद – मानसिक क्रूरता – विवाह सम्पन्न होने के पश्चात, प्रत्यर्थी ने अपने पति के साथ अनावश्यक झगड़े खड़े करके, अभद्र गालियां उपयोग कर, खाना नहीं पकाकर, खाने में जहर मिलाने की धमकी देकर और आत्महत्या कारित करने की धमकी देकर क्रूरता का व्यवहार किया – अभिनिर्धारित – अपीलार्थी द्वारा क्रूरता का आधार साबित किया गया।

***B. Hindu Marriage Act (25 of 1955), Section 13(1) - Divorce - Desertion* - Wife leaving matrimonial house since 1991 - 22 years lapsed - Held - Matrimonial bond between the parties cannot be repaired - Appellant is entitled to decree of divorce. (Para 15)**

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) – विवाह विच्छेद – परित्याग – पत्नी ने 1991 से पति का घर छोड़ा – 22 वर्ष व्यपगत हुए – अभिनिर्धारित – पक्षकारों के बीच वैवाहिक बंधन सुधर नहीं सकता – अपीलार्थी, विवाह विच्छेद की डिक्री का हकदार।

Cases referred :

(2002) 5 SCC 706, 2006 (3) MPLJ 1.

Sachin Yadav, for the appellant.
S.K. Choubey, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **SMT. VIMLA JAIN, J. :-** The appellant, being aggrieved by the judgment and decree dated 22.7.1998 passed by 2nd Additional District Judge, Tikamgarh in Hindu Marriage Case No.30-A/1997 thereby dismissing the case of the appellant, has filed present first appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act').

2. Brief facts of the appeal are that as per Hindu rituals, marriage of appellant was solemnized with the respondent in Village Mongna, Tahsil Jatara of District Tikamgarh and GAUNA was performed in the year 1977 when appellant was a student. In the year 1983, he joined on the post of an Assistant Professor. He was transferred from Raigarh to Tikamgarh in the year 1988 and in the year 1990 when he was again transferred from Tikamgarh to Khurai, District Sagar, he remained with the respondent.

Allegation against the respondent is that she, being an illiterate and ill–mannered lady, was not allowing his younger brother to stay with the appellant for pursuing his studies. She used to beat appellant's brother and tear his clothes. She did not even care for food of appellant and his brother. She used to abuse and quarrel with the appellant and his parents. She did not allow the appellant to perform his marital obligations and used to tell appellant that he should merry with his mother, aunt (Chachi) and younger brother's wife. Out of their wedlock, one child was born who died subsequently. In the year 1991, she gave birth to female child. She alongwith her female child and jewelery left the house of appellant on 3.12.1991 and went to the house of her father. Being dissatisfied with her, appellant filed a suit under Section 13 of the Act for seeking divorce or in the alternative judicial separation against the respondent on the ground that both of them had been living separately and there was no possibility of amicable settlement between them in future.

3. The respondent/wife in her written statement pleaded that the allegations made by the appellant/husband were absurd and insulting. She also submitted that she never treated the appellant with cruelty. On the contrary appellant was ill-treating and misbehaving with her and making absurd allegations against her. Insofar as question of desertion was concerned, she contended that she was not living separately on her own accord but infact, she was forced to live separately because the appellant/husband was not ready and willing to live with her due to her illiteracy and dark complexion. Due to her delivery and ailment she was not able to prepare food. The appellant kicked her out and since then she had been living with her parents. She had not brought any jewelery but infact the appellant had retained her Stridhan with him. On number of occasions, her father and brother had requested the appellant to keep respondent with him but the appellant did not agree because of her illiteracy and dark complexion and forced her to divorce.

4. On the above pleadings, the trial Court framed issues and parties adduced their evidence.

5. The trial Court, after analysis of the evidence adduced in the case, dismissed the petition of the appellant/ husband holding that he failed to prove the grounds of divorce stated in the petition. Being aggrieved by the judgment and decree of the trial Court, the appellant has come to this Court with the prayer to allow his petition of divorce by allowing this appeal.

6. Learned counsel for the appellant submits that the finding recorded by the trial Court that the cruelty had not been established is contrary to the evidence on record which duly establishes the fact that the behaviour of the respondent with the appellant and his family members was impulsive, erratic and lunatic. He further submits that it is apparent and undisputed fact on record that the parties are residing separately since 1991 and more than 21 years lapsed. In such circumstances there is no chance to reconcile and re-establish the marital relations between them as such their marital relationship has become practically dead. According to him the Trial Court had committed an error of law and fact in dismissing the divorce petition filed by the appellant.

7. On the other hand, learned counsel for the respondent/wife supported the finding of the Court below by arguing that the appellant having failed to prove the cruelty on the part of the respondent, the trial Court has rightly refused to grant decree for divorce.

8. We have heard learned counsels for the parties and have gone through the records. We find that in order to establish the ground of cruelty the appellant examined himself as (AW.-1) his colleague Amitav Dubey (AW.-2), independent witnesses Bhagirath (AW.3), Nannu Singh (AW.4), and Tulshi (AW.-5), who is the father of appellant. Whereas respondent has examined herself as (DW.-1) and her younger brother Rajaram (DW.-2).

9. Before appreciating the evidence on record the concept of cruelty is to be clarified. The Apex Court, in the case of *Praveen Mehta Vs. Inderjit Mehta reported* in (2002) 5 SCC 706, defined cruelty as under:-

> " Cruelty for the purpose of section 13 (1) (i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts

and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehavour in isolation and then pose the question whether such behavour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subject to mental cruelty due to conduct of the other."

10. In the case of *A. Jayachandra v. Aneel Kaur* AIR SCW 163 the Hon'ble Apex Court has held that expression "cruelty" has been used in relation to human conduct or human behaviour. To constitute cruelty, conduct complained of should be grave and weighty for arriving at conclusion that petitioner spouse cannot be reasonable expected to live with other spouse.

11. In the light of above principles of law, we have to examine the evidence on record in order to determine whether case of cruelty has been established.

12. Dashrath Prasad Yadav (AW.1) appellant husband categorically stated that he was married with the respondent in the year 1977, when he was a student of 10th Class. After 1½ years, respondent used to raise unnecessary quarrel and dispute with him. She used to refuse for preparation of the food and threatened that she would mixed poison in food. She also threatened that she would commit suicide. He further stated that she did not allow him to perform his marital obligations and told him that he should merry with his own sister and mother. He further stated that respondent/wife abused and misbehaved with his parents and brother. Appellant's friend Amitav Dubey (AW-2) supported the evidence of the appellant about erratic behaviour of the respondent with the appellant. He stated that respondent humiliated and abused the appellant/husband in presence of his colleagues. Two independent witnesses namely Bhagirath (AW.-3), and Nannu Singh (AW.-4), also stated that the respondent used to raise unnecessary quarrel and dispute with the appellant and used to abuse him and his family members. Father of appellant Tulshi (AW-5) also supported the statement of appellant and stated that respondent always misbehaved and quarrel with him, his wife, his younger son and appellant. She did not perform the house hold activities and always

used to refuse for preparation of the food.

13. As against the aforesaid evidence led by the appellant, in rebuttal the respondent wife examined herself and her younger brother. It is noted that the respondent in her deposition did not deny the allegations levelled by the appellant, she only stated that appellant was not willing to live with her due to her dark complexion and illiteracy.

14. Having regard to the aforesaid evidence available on record, in our considered view the learned trial Court has committed error in holding that the appellant failed to prove cruelty on the part of the respondent and in drawing the inference against the appellant. The trial Court has erred in treating the aforesaid evidence to be not sufficient to record a finding that the respondent was cruel with the appellant. We find that there is ample evidence available on record to reach to the conclusion that after solemnization of marriage with the appellant, the respondent treated him with cruelty by raising unnecessary quarrels, using filthy abuses, not preparing the food, threatening of mixing poison in food and threatening to commit suicide. In such premises, it is held that the ground of cruelty has been proved by the appellant. Therefore, findings of the impugned judgment being contrary to record are not sustainable. Hence the said order is hereby set aside.

15. It also appears from the evidence led by the parties that they have been living separately over considerable length of time. Since the year of 1991 respondent had been residing with her parents. Since then no physical and marital relation took place between applicant and the respondent which also indicates that their marriage has broken down. It can well be assumed that the matrimonial bond between the parties cannot be repaired. In these circumstances, the statement made by the respondent/wife that she is willing to live with the appellant cannot be believed, particularly when she has admittedly been living separately from her husband for 22 years without making any endeavour to revive her matrimonial tie with the appellant. Thus, it appears that there has been irretrievable break down of their marriage.

16. The Apex Court in the case of *Naveen Kohli Vs. Neelu Kohli* reported in 2006 (3) MPLJ page 1 para 72 has observed as under :-

> "Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed

that the marriage has broken down. The Court, no doubt, should seriously make an endeavour to reconcile the parties, yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties."

17. Having regard to the aforesaid evidence and the legal position, we have reached to the inevitable conclusion that the appellant is entitled to decree of divorce. Consequently, we set aside the impugned judgment and decree dated 22.7.98 passed in Hindu Marriage Case No.30-A/1997 by 2nd Additional District Judge, Tikamgarh by dismissing the divorce petition filed by the appellant/husband.

18. In the result, the appeal is allowed and it is directed that the marriage between the parties should be dissolved according to the provisions of the Hindu Marriage Act, 1955.

19. In the facts and circumstances of the case, we direct the parties to bear their own costs.

Appeal allowed.

I.L.R. [2013] M.P., 2887
APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari & Mr. Justice G.D. Saxena
M.A. No. 762/2012 (Gwalior) decided on 5 July, 2013

SCINDIA DEVESTHAN REGISTERED CHARITABLE TRUST ...Appellant
Vs.
PRAVEEN KUMAR NIGAM & ors. ...Respondents

***A. Accommodation Control Act, M.P. (41 of 1961), Section 3(2)* - Govt. after examining income and object of trust may exempt (from all or any of the provisions of the Act) any accommodation owned by any religious or charitable purposes etc. - The question involved is "Whether in each and every case a registered religious charitable public trust is obliged to prove that its income is being utilized in religious and charitable purpose of the trust ?" - Held - That such a**

trust is not obliged to prove. **(Para 10)**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 3(2) – न्यास की आय एवं उद्देश्य का परीक्षण करने के पश्चात सरकार किसी धार्मिक या पूर्त प्रयोजन इत्यादि के स्वामित्व के किसी स्थान को (अधिनियम के सभी या किसी उपबंध से) छूट दे सकती है – अंतर्ग्रस्त प्रश्न यह है कि "प्रत्येक प्रकरण में पंजीबद्ध धार्मिक पूर्व न्यास को यह साबित करना बाध्यकारी है कि उसकी आय का उपयोग न्यास के धार्मिक एवं पूर्व प्रयोजन में किया जा रहा है? – अभिनिर्धारित – यह कि उक्त न्यास साबित करने के लिये बाध्य नहीं।

***B. Constitution - Article 141 - Binding effect of the Precedents* - Once the matter is considered by the Apex Court and the validity of the same was upheld, it must be presumed that all grounds which could validly be raised were raised and considered by the court - Decision would be binding - Every new discovery or argumentative novelty cannot undo a binding precedent - Further held, law declared by the Apex Court can only be substituted or clarified or reconsidered by the Apex Court alone and not by this court on the doctrine of per-incuriam and sub-silentio which are in the nature of exceptions to the rule of precedent in relation to the law declared under this article.**

(Paras 31 & 32)

ख. संविधान – अनुच्छेद 141 – पूर्व निर्णयों का बाध्यकारी प्रभाव – एक बार जब सर्वोच्च न्यायालय द्वारा मामले पर विचार किया गया और उसकी विधिमान्यता की पुष्टि की गई, यह उपधारणा की जानी चाहिए कि सभी आधार जिन्हें वैध रुप से उठाया जा सकता था, उन्हें उठाया गया और न्यायालय द्वारा विचार किया गया – निर्णय बाध्यकारी होगा – प्रत्येक नयी खोज या तार्किक नयापन बाध्यकारी पूर्व निर्णय को मिटा नहीं सकता – आगे अभिनिर्धारित किया गया कि सर्वोच्च न्यायालय द्वारा घोषित विधि को केवल सर्वोच्च न्यायालय द्वारा ही प्रतिस्थापित या स्पष्ट या पुनर्विचार किया जा सकता है और न कि इस न्यायालय द्वारा, अनावधानता एवं मौन रहते हुए के सिद्धांत पर जो कि इस अनुच्छेद के अंतर्गत घोषित की गई विधि के संबंध में पूर्व निर्णय के नियम के अपवादों के स्वरुप के हैं।

Cases referred :

1965 MPLJ 188, 1994 MPLJ 597, 1999(2) JLJ 379, 1997(1) MPWN 3, (1999) 6 SCC 368, 1998(1) MPWN 113, 2010 (III) MPJR 142, S.A. 274/2008 decided on 20.08.2010, 2011(1) MPLJ 468, 2010(1) MPLJ 158, 2011(1) MPACJ 156, 1999(1) MPLJ 133.

Ankur Modi, for the appellant.
Harish Dixit, for the respondents.

ORDER

The Order of the court was delivered by :
U.C. MAHESHWARI, J.:-This order shall decide the following question of law referred by them Single Judge in above-mentioned both the appeals by common order dated 22.3.2013.

> "'Whether in. each and every case a registered religious charitable public trust is obliged to prove that it's income is being utilized in religious and charitable purpose of the Trust?"

2. The facts giving rise to this reference in short and that, the aforesaid both the appeals have been filed by the appellants under order 43 Rule 1 of CPC being aggrieved by the orders dated 10.7.2012 and 23.7.2012 passed by the Xth. Additional District Judge, Gwalior and Vllth Additional District Judge Gwalior Civil Regular Appeal Nos. 16-A/12 and Civil Regular Appeal No.7-A/12 respectively whereby, by setting aside the judgment and decree of eviction passed by the trial Court in favour of the appellants, the cases by framing the additional issues on the question of Section 3(2) of the M.P. Accommodation Control Act 1961 (hereinafter in short 'the Act') have been remitted back with some direction to decide afresh.

3. The appellants being Public Trust after serving the quite notice for termination of tenancy filed the impugned suits for eviction against the respondents no.1 to 3 contending that the respondents were defaulter in paying the monthly rent and illegally encroached on some property of the appellants' trust. It is also stated that, it being religious and charitable trust by virtue of notification of the State of Madhya Pradesh dated 7.9.1989 promulgated under the provision of Section 3(2) of the Act, is exempted from the provisions of the Act.

4. In written statement of respondents/defendant had admitted the alleged tenancy the other averments relating to prayer of eviction were denied.

5. After framing the issues and holding the trial, both the suits of the appellant's trust were decreed by the trial Court. But in appeal filed by the respondents/defendants, the appellate Court, after setting aside the judgment and decree of the trial Court, by framing the additional issue on the question

whether the income of the appellant's/trust is utilized for the purpose and object of the trust, remitted back the matter to the trial Court with a direction to decide afresh after extending the opportunity of hearing to the parties on the aforesaid additional issue also. Accordingly, the appellants have come to this Court challenging the orders of the appellate Court.

6. Initially these appeal were heard on merits by the Single Branch of this Court, but while deciding the same earlier judgments of the Single Bench regarding crucial controversy of exemption from the provision of the notification dated 7.9.1989, issued by the State under the provision of sub-Section 2 of Section 3 of the Act to the appellant came before such Bench, on which the above mentioned point was referred for consideration to resolve the anomaly of conflicting decision on such point. Pursuant to that, the Hon'ble Chief Justice has referred the matter to this Bench to decide the point referred.

7. Having heard the counsel of the parties present keeping in view their arguments at length, we have carefully gone through the records of the Courts below along with their respective judgments and order.

8. Before considering the matter to answer the point referred we would like to reproduce the provision of sub-section 2 of Section 3 of the Act. The same is read as under:-

"Section 3.

(1) .....

(a) .....

(b) .....

(2) The Government may, by notification, exempted from all or any of the provisions of this Act any accommodation which is owned by any educational, religious or charitable institution or by any nursing or maternity home, the whole. of the income derived from which is utilized for that institution or, nursing home or maternity home."

9. By virtue of aforesaid provision, the State of M. P., has promulgated the notification dated 7.9.1989 and exempted some of the institution and the trusts from the provisions of the Act. The same is read as under:-

"In exercise of the powers conferred by sub-section (2) of Section 3 of the Act (No.XLI of 1961), the State Government hereby exemptes all the accommodations owned by-

(i) The Wakf, registered under the Wakf Act, 1954 (No.29 of 1950 or

(ii) The public trust registered under the Madhya Pradesh Public Trust Act 1951 (No.XXX of 1951) for an educational religious charitable purpose, from all the provisions of the Madhya Pradesh Accommodation Control Act 1961 (No.XLI of 1961)".

10. Coming to consider the point referred in the matter "whether in each and every case a registered religious and charitable public trust is obliged to prove that its income is being utilized in religious and charitable purposes of the trust is. concerned, on such question various cases have been considered and decided by the Single Bench of this Court in which some conflicting views have been taken by the different Benches. So, this Court has to answer that out of the views of such various decided cases, which view is correct.

11. So far as the validity of the provision of sub-section 2 of Section 3 of the Act is concerned, the same is not in res-integra because after enactment of such provision the same was challenged to hold the ultra virus, but on consideration the Division Bench of this Court in the matter of *Kanhaiyalal Thakurdasa vs. Gulab Bai Digambar Jain* reported in 1965 MPLJ 188 has held such provision inter-virus in following words:-

8. . . There is no substance in the challenge to the vires of Section 3 (2) on the ground of abdication by the Legislature of its legislative function or of excessive delegation. The principle is now well established that the Legislature cannot delegate its essential legislative function in any case; and that it must lay down the legislative policy and principle and must afford guidance for carrying out the said policy before it delegates its subsidiary powers in that behalf. See *fiarishankar Bagla v. State of M. P.* (1955) .1 SCH 380: (AIR 1954 SC 465) and *Vasanlal Maganbhai v. State of Bombay*, (1961) 1 SCR 341: (AIR 1961 SC 4). Now, Section 3 (2) does not give to the Government unfettered and un-canalized power to

exempt from the operation of the Act accommodation belonging to any institution. The power of exemption can be exercised only in relation to that accommodation which is owned by any educational, or religions or charitable institution, or by any nursing or maternity home, and the whole of the income of which is utilized for that institution or nursing or maternity home. Thus, the Legislature, itself laid down the policy and principle of granting exemption to institutions of certain types. The only discretion given to the Government in the matter of the exercise of power is in the selection of the institution satisfying the conditions mentioned in Section 3 (2) for the grant of exemption and in the selection of the accommodation belonging to the institution for being exempted from all or any of the provisions of the Act. The delegation of this power of selection does not involve any delegation of an essential legislative function or power. The question as to which institution fulfilling the conditions mentioned in Section 3 (2) is entitled to the benefit of that provision and which accommodation belonging to it should be granted exemption, and whether the exemption should be from all or any of the provisions of the Act are all matters of detail. It was clearly impossible for the Legislature to visualize, and contemplate the nature of each and every educational, religious or charitable institution or a nursing or maternity home and the nature of accommodation belonging to it and to make specific provisions covering all the contingencies in regard to the grant of exemption. In our opinion, Section 3 (2) enunciates with sufficient accuracy and clarity the legislative principle and policy in the matter of granting exemption and the delegation of power to the Government contained in that provision is intra vires."

12. Subsequent to it, by virtue of the aforesaid provision of Section 3(2) of the Act, the State of Madhya Pradesh issued the aforesaid notification No. F.24-(4)-83-XXXII-1 dated 7.9.1989, and exempted all the accommodations owned by the Wakf registered under the Wakf Act 1954(No.29 of 1950 or the Public Trust registered under the Madhya Pradesh Public Trust Act 1951 (No.XXX of 1951) for an educational religious charitable purposes from all the provisions of the Madhya Pradesh Accommodation Control Act 1961

(No.XLI of 1961). Such notification was also challenged before this Court to hold the same ultra-virus and unconstitutional by one *Chitamani Agrawal*, on consideration such notification was quashed by this Court in the matter of *Chintamani Agrawal Vs. State of M.P.* reported in 1994 MPLJ 597 against which, the Special Leave Petition was filed by the State. On consideration the Hon'ble Apex Court vide judgment dated 19.10.1995 in Criminal Appeal No. 9909/1995 reported in 1999 (2)JLJ 379, by setting aside the judgment of the High Court had held such notification is valid in following verdict.

> "The State of Madhya Pradesh in exercise of the powers under sub-section (2) of Section 3 of the M.P. Accommodation Control Act, 1961 (the Act) exempted all buildings owned by the Madhya Pradesh Wakf Board (Board) from the. operation of the Act. The notification dated September 7, 1989 granting exemption to the Board under the above mentioned provision of the Act was challenged before the High Court. The High Court quashed the notification on the short ground that there was no material before the State Government to reach the satisfaction that it was necessary to issue the impugned notification.
>
> 3. Learned counsel for the State of M.P. has invited our attention to the letter dated March, 26, 1976, by the then Prime Minister of India addressed to the Chief Minister of the State of M.P., suggesting for the reasons given in the said letter, to grant exemption of the provisions of the Act to other properties owned by the Wakf. Thereafter, the State of M.P. made inquiries from various other States in this respect. On receipt of the replies, the matter was considered and thereafter, the exemption notification was issued. We are satisfied that there was sufficient material before the State . Government for issuing the impugned notification, We, therefore, set aside the impugned judgment of the High Court. We seek support from the judgment of this Court in *S. Kandaswamy Chettiar v. State of T.N."*

13. Similarly the Division Bench of this Court also in the matter of *Babu vs. State of M.P.* reported in 1997 (1) MPWN Note 3 has held such notification is valid..

14. On Subsequent occasion such question was again considered by the Apex Court in the matter of *Beti Bai and others vs. Nathoram and others* reported in (1999)6 SCC 368 in which after taking into consideration the aforesaid judgment of *Chintamani's case* (supra) it was held as under:-

> "8. It may be mentioned that similar notifications issued in other States which wakf and trust properties were exempted, have already been upheld by this Court. As for example, the notification issued by the State Government of Tamil Nadu exempting wakf and trust properties, was upheld by this Court in *S. Kandaswamy Chettair vs. State of T.N.* Even this decision was not brought to the notice of the learned Judges who disposed *Mangilal case.*
>
> 9. In view of the above, the appeal has no merit and is dismissed but without any order as to costs."

15. Keeping in view the aforesaid legal position we proceed to consider the rival judgments/orders passed by the different single Bench of this Court.

16. In the matter of *Boolchand vs. Atal Ram Sindhi Dharmshala Trust*, reported in 1998 1 MPWN Note 113, the appellate Court while hearing the first regular appeal remanded the matter after framing a fresh issue, requiring the Court below to give the finding if the whole of the income of the trust is being utilized for the purpose of the trust, in order to find out if the respondent no.1 was covered by the notification issued by the State Government exempting the public trust from the operation of the Act. 1961 as per Section 3 thereof, because it was contended that there was issue framed by the Court below on this point. After passing the order of remand, the findings given by the trial Court to whom the case was remanded, should be routed through the first Appellate Court which was also required to give its findings on the point and on consideration this Court has held as under:-

> "The trial Court, after recording the evidence of the parties and hearing them, gave a finding that the whole of the income of the respondent no.1 was being utilized for fulfilling the object of the trust. The first Appellate Court too has confirmed that finding."

17. Pursuant to aforesaid cited case of *"Boolchand"* (supra), the respondents' counsel has argued before us that in each and every case the

plaintiff like appellants is bound to plead and prove that the entire income received by the Public Trust like appellants is spent and utilized for the object and activities of such trust/institution. It is apparent from the case cited that while deciding the same the case law of the apex Court in the matter of *Chintamani Agrawal* (supra) was not taken into consideration.

18. Subsequent to the aforesaid, both the judgments of the apex Court in the matter of *Chintamani Agrawal* (supra) and *Betibai and others* (supra) on arising the occasion such question, was again considered by the Single Bench of this Court in the matter of *Reg. Vidhichand Dharamshalal Trust through it's President and Truestee Omprakash. Garg vs. Shyam Singh and Ors.*, reported in 2010 (III) MPJR 142 in which taking into consideration the aforesaid notification promulgated under sub-Section 2 of Section 3 of the Act so also case law in the matter *Betibai and others* (supra) it was held as under:-

> "21, Validity of Section 3(2) of M.P. Accommodation Control Act, 1961 and the Notification dated 7.8.1989 exempting the application of the said Act has been upheld by Hon. Supreme Court of India in the case of *Betibai and others vs. Nathooram and others* [1999(2) JLJ 380]. In the case of *Betibai* (supra) it is observed that a landlord entitled to the benefit of the said exemption can straightway file a suit for eviction after serving a quite notice. Thus, it is clear that a registered Public Trust would be able to avail the benefit of exemption so long as its income is utilized for the trust itself. In a suit for eviction, if it is established that the entire income of the trust is not utilized for the trust itself, the plaintiff would no more be entitled to seek benefit of exemption. This may be proved by the defendants by producing reliable evidence in due manner. It is a trite law that a case is to be decided on the basis of the evidence recorded in it, as held by the Apex Court in the case of *Mitthulal and another vs. State of M.P.,* 1975 JLJ 432.
>
> It is equally clear that utilization of income of the trust for any purpose other than that of Trust must be with the express or implied consent of the trust or atleast within the knowledge of the trust with no objection. In such a situation, the benefit

> of exemption may be denied to the trust. Thus, it is clearly observed that if the defendant succeeds in establishing by cogent evidence that the utilization of the entire income of the trust has not been made for the purpose other than that of the trust, a suit for eviction by trust under the shelter of exemption of Section 3 of M.P. Accommodation Control Act, 1961 read with the aforesaid notification is liable to be dismissed in the absence of existence of any of the grounds enumerated under sub-Section (1) of Section 12 of the said Act."

19. On the otherhand in the matter of *Dayaram S/o Moolchandra Sindhi vs. Shri Charbhuja nath Mandir Panch Maheshwariyan Mandsaur* in Second Appeal No. 274/08 vide judgment of the Indore Bench of this Court dated 20.8.2010, taking into consideration the various case laws including the case laws of the apex Court in the matter of *Betibai and others* (supra) and of this Court in the matter of *Babu vs State* (supra) it was held as under:-

> "13. So far as the contention of the appellant that for claiming exemption from the provisions of M.P. Accommodation Control Act landlord Trust is required to prove that the whole of the income derived from which is being utilized for that institution is concerned, in view of the aforesaid notification and also in view of the aforesaid position of law, it is not necessary for this Court to examine whether the whole income of the trust is being utilized for that purpose or not. First because it is the job of the Registrar, Public Trust and not the Court and secondly for application of Section 3 (2) of the Act also it is not necessary for religious or charitable institution. Whether the income of the institution is being utilized for that institution or not, is required to be examined in the matter where exemption is being claimed by any Nursing Home or Maternity Home and not for religious or charitable institution"

20. Again such question was answered by this Court in the matter of *Shrimal and others. vs Shri Achal Gachh Kachhi Visa Oswal Jain Shwetambar Dharmik Parmarthik Nyas and others* reported in 2011 (1) MPLJ 468, in which it was held as under:-

> "9. In the present case, no specific plea was raised by the respondent trust that the income of the trust is not being utilized

for carrying on the activities of the trust. Exh.P.4 is the balance-sheet for the year 2004-05, from perusal of the balance-sheet it is evident that the respondent/trust is having different accounts from where the trust activities are being carried out. There is nothing on record on the basis of which it can be said that the income of the trust is being utilized for carrying out the trust activities. Apart from this when the. notification has been issued by the State Government whereby all the trusts have been exempted and the validity of the notification has been upheld by the Hon'ble Apex Court, therefore, it is not necessary for this Court to examine that income of the trust is being utilized for the welfare of the trust. Otherwise also for this purpose Registrar of Public Trust is the Competent Authority."

21. Again such question was considered and answered by the Single Bench of this Court in the matter of *Kewalchand vs. Aachalgachha Kachhi Bisa Oswal Jain Swetamber Dharamik Evam Parmarthik Nyas* reported in 2010(1) MPLJ 158 in which it was held as under:-

"6. Now the crucial question the in the case may be looked into that whether under Section 3(2) of the Act, the plaintiff trust was exempted from all the provisions of the Act. The State Government issued a Notification dated 7.9.1989 by which all the accommodation owned by wakf registered under Wakf Act, 1954 and the public trust registered under the M.P. Public Trust Act 1951 were exempted from all the provisions of the Act. This Notification was challenged before this Court and ultimately the matter travelled upto Apex Court in *State of M.P. and another vs. Chintamani Agrawal and others* 1999(2) JLJ 379. The Apex court held that Notification dated 7.9.1989 was valid. A Division Bench of this Court in *Baburam vs. State of M.P.,* 1997(I) MPWN 3 considered this aspect and held that such Notification exempting the public trust from all the provisions of the Act was valid."

22. In the matter of *Shri Bhagwatacharya Narayan Dharmarth trust, Balaji Mandir and others vs. Jai Prakash S/o Mithalala Shah* reported in 2011 (1) MPACJ 156, it was held as under.-

"6. From perusal of record, it is evident that the appellant/Shri Bhagwatacharya Narayan Dharmarth Trust Balaji Mandir is public trust having a Narsingh Temple at Alirajpur. The trust is registered under the provisions of Bombay Public Trust Act,. 1950. In exercise of powers conferred by Section 3(2) of M.P. Accommodation Control Act, State Government issued notification dated 07/09/89 whereby accommodations owned by public trust registered under M.P. Public Trust Act 1951 were exempted from all the provisions of M.P. Accommodation Control Act, 1961. This notification was challenged before this Court and this Court in the matter of *Chintamani Chandramohan Agrawal* reported in 1994 MPLJ 597 held that notification dated 07/09/89 granting exemption under Section 3(1) of the Act is constitutionally illegal and void being violative of Article 14 of Constitution of India. Ultimately the matter travelled up Hon'ble Apex Court in the matter of *State of M.P. vs. Chintamani Agrawal* 1999(2) JLJ 379 wherein it was held that the notification dated 07/09/89 was valid. In the matter of *Baburam Vs. State of M.P.* 1997(1) PMWN 3 Division Bench of this Court also held that notification exempting the public trust from all the provisions of M.P. Accommodation Control Act was valid. This position of laws is further affirmed by this Court in the matter of *Kewalchand Vs. Aachalgachha. Kachhi Bisa Oswal Jain Swetambar. Dharmik Evam Parmarthik Nyas,* 2010 (1)MPLJ 159, wherein this Court held that accommodation owned by public trust is exempted from all the provisions of the Act.

7.....

8.....

9.....Since the appellant is a registered charitable Trust, therefore, in view of the notification dated 07/09/89 it was not necessary for the appellant to make out a case either under Section 12 or 20 of M.P. Accommodation Control Act and the appellant was entitled to terminate the tenancy of the respondent under Section 106 of T.P. Act.

23. Keeping. in view all the aforesaid decided cases of the single bench of

this Court, in the light of the principle laid down by the apex Court in the abovementioned cases *Chintamani Agrawal* (supra) and *Betibai and others* (supra) the question referred is examined. It is undisputed position that under the provision of sub-Section 2 of Section 3 of the Act, by issuing the abovementioned notification dated 7.9.1989 by the State of M.P., all the public trust have been exempted from the provision of the Act and pursuant to that, such public trust/institutions are not under obligation to plead and prove any of the grounds of the eviction enumerated either under Section 12 or Section 20 of the Act in it's eviction suits, as such in view of the aforesaid notification of exemption, such public trust has a right to terminate the tenancy of the premises in accordance with the provision of Section 106 of the Transfer of the Property Act and file the suit of eviction directly and the Court is obliged to decide such case in accordance with the scheme of Section 106 of the Transfer of the Property Act.

24. Mere perusal of the language of sub-Section 2 of Section 3 of the Act, it is. apparent that it gives the right to the State Government to issue the notification exempting any educational religious and charitable institution or nursing or maternity home, the whole of the income derived from which it utilized for that. institution or nursing home or maternity home, from all or any of the provision of the Act. So, the requisite satisfaction in this regard, whether the income of the public trust is being utilized by it for the object of trust, is required to be examined by the State before issuing the notification and once the. notification was issued by the State and all the public trusts and other stated institutions have been exempted by the State from the provisions of the Act, then any of such public trust is not under obligation or bound to plead and prove that the income received by the trust is utilized for fulfilling the object and purpose of such trust. In such premises, the Court entertaining such Civil suit or it's appellate authority could neither direct nor expect from such plaintiff/public trust to plead and/or prove the income received by such trust is being utilized for the object and purpose of such trust.

25. For the sake of arguments, if the contention of the respondent is accepted. then each case the question about the income of Trust is bing spent or utilized by the trust in fulfilling the object and purpose of the trust, is required to be considered and adjudicated and issuance of notification by the State would have no meaning. The language of the section is very clear which provides that the State Government by notification may exempt from all or any of the provisions of this Act, any accommodation which is owned by any educational,

religious or charitable institution or by nursing or maternity home, the whose of the income derived from which it utilized for that institution or nursing home. Meaning thereby, the aforesaid satisfaction is to be recorded by the State Government and only thereafter the notification may be issued. For issuance of notification, the aforesaid requirement is *sine-qua-non*. Once the State Government has issued a notification, it can be presumed that the aforesaid notification was issued after due. satisfaction by the State Government in this regard and each case the landlord is not required to plead or prove such a factum. Otherwise, it will encourage unnecessary litigation and the entire purpose of issuance of notification would frustrate.

26. Apart the aforesaid, while considering the validity of the aforesaid notification dated 7.9.1989 by the apex Court in the above cited cases *Chintamani Agrawal* (supra) and *Betibai and other* (supra), all probable' questions were taken into consideration and the aforesaid notification was held to be valid and constitutional. When the apex Court after considering the matter has upheld the notification valid, then the propriety of law does not permit any subordinate Court or to this Court to give any further interpretation to the language or the decision of the apex Court. The law laid down by the apex Court being law of land, is binding against each of the citizen, the subordinate Courts and this Court. In such premises, either this Court or any other subordinate Court did not have any authority to give any further interpretation or to extend, the scope of the decision of the apex Court by giving any further or additional findings.

27. In such premises, on examining the case of *Boolchand's* (supra) it is apparent that such case was decided without taking into consideration the law laid down by the apex Court in the matter of *Chintamani Agrawal's case* (supra) as stated earlier. So, such law laid down by the Single Judge of this Court could not be said to be a good law.

28. Apart this, in the case of *Reg. Vidhichand Dharamshala Trust* (supra), the Single Judge by giving some further and additional interpretation to the decision of the apex Court announced in the matter of *Betibai and others* (supra), contrary to it's principle and spirit has stated that "thus it is clear that a registered public trust would be able to avail the benefit of exemption so long as it's income is utilized for the trust itself. In a suit for eviction if it is established that the entire income of the trust is not utilized for the trust itself, the plaintiff would no more be entitled to seek the benefit of exemption." The

aforesaid later part of this cited case of *Reg. Vidhichand* (supra), being contrary to the law laid down by the apex Court could not be said to be a correct view. In such premises, the law laid down by the single judge in the matter of *Boolchand* (supra) and in the matter of *Reg. Vidhichand* (supra) being not correct, is hereby overruled. .

29. In view of the aforesaid elaborate discussions the law laid down by the single Benches of this Court, in the matters of *"Dayaram S/o Moolchandra Sindhi"* (supra) of *"Shrimal and others"* (supra) of *"Kewalchand* (supra)" and of *Shri Bhagwatacharya and others* (supra), holding that subsequent to notification dated 7.9.1989 issued under sub-section 2 of Section 3 of the Act, such public trust is not under obligation to plead and prove that its entire income received is utilized for the object and purpose of such public trust/ institution, are hereby held to be correct law on the question referred.

30. Apart the aforesaid, on arising the occasion while considering the identical question to some extent a Division Bench of this Court in the matter of *Bipin Bhai Shankar Bhai Patel vs. Murti Deo Radha Madhav Paji Geda* reported in 1999 (1) MPLJ 133, has held as under:-

> "10. True, the validity of the notification was not considered in relation to the exemption to all the accommodations owned by Public Trust but when once the notification having come up for consideration before the Supreme Court of which validity has been upheld as a whole, in the opinion of this Court, its applicability on the accommodation in question owned by respondent Public trust cannot be attacked, as constitutional validity of the notification on the accommodation owned by Public Trust is not under challenge in this appeal, as is evident from the substantial question of law framed. Even assuming for the sake of arguments that the constitutional validity of the notification is under challenge by which exemption from application granted to accommodations owned by Public Trusts, it may be noticed that this court has already considered the question in case of *Baburam supra* wherein similar contention was raised, the Court upheld the validity of the notification 'in relation to accommodation owned by Public trust registered under the MPPT Act and observed thus:

"In our opinion, the contention has no merit as it is well settled when the Supreme Court considers the vires of a statutory provision or of a notification and upholds the constitutional validity of the said notification as a whole then it cannot be contended that before the Supreme Court apart of the notification was not under consideration. Finality in litigation and public policy both require that a litigant should not be permitted to challenge validity of the provisions of the Act or notification at different times on different grounds. Once notification has been considered by the Supreme Court and the validity of the same was upheld it must be presumed that all grounds which could validly be raised were raised and considered by the Court and the decision would be binding under Article 141 of the Constitution. See -*Anil Kumar Neotia and Ors. v. Union of India and Ors.*, AIR 1988 SC 1353 and *Kesho Ram and Co. and Ors. etc. v. Union of India and Ors.*, (1989)3 SCC 151."

11. Besides, view taken by this Court it may also be stated that the law laid down by the Supreme Court is binding on all notwithstanding the fact that it is against or in favour of the party and it is binding on even those who were not parties before the Court. It is also well settled that once an authority of law is laid down it is no longer open to recanvass the same on new grounds or reasons that may be put forth in its support. Every new discovery or argumentative novelty cannot undo a binding precedent. It does not lose its authority merely because it was badly argued, inadequately considered and fallaciously reasoned. It is a law what has been declared by the Supreme Court under Article 141 of the Constitution and is binding. It can only be substituted or clarified or reconsidered by the Supreme Court and not by this Court on the doctrine of per incuriam and sub-silentio which are in the nature of exceptions to the rule of precedent in relation to law declared under Article 141 of the Constitution. As the Supreme Court has declared the notification constitutionally valid now its validity cannot be challenged. To say so, besides the decisions relied in *Baburam's case* (supra), we rely only the decisions in *Shenoy*

and Co. Bangalore and Ors. v. Commercial Tax Officer, Circle II, Bangalore and Ors.,- AIR 1985 SC 621 and *D. K. Yadav v. J. M. A. Industries Ltd.*, (1993) 3 SCC 259.

12. As a result of aforesaid discussion we hold that the notification issued under Section 3(2) of the Act in question by the State Government exempting the applicability of the provisions to the accommodations owned by the public trust registered under MPPT Act, applies to the accommodation owned by the respondent public trust registered under MPPT Act of which the appellant is a tenant.

31. In the aforesaid decision of the Division Bench it was held, that "Finality in litigation and public policy both require that a litigant should not be permitted to challenge validity of the provisions of the Act or notification at different times on different grounds. Once the notification has been considered by the Supreme Court and the validity of the same was upheld it must be presumed that all grounds which could validly be raised were raised and considered by the Court and the decision would be binding under Article 141 of the Constitution". It was further held that the law laid down by the apex Court is binding on all notwithstanding the fact that it is against or in favour of the party and it is binding on even those who were not parties before the Court. It is also held that once an authority of law is laid down it is no longer open to recanvass the, same on new grounds or reasons that may be put forth in its support. Every new discovery or argumentative novelty cannot undo a binding precedent. It does not lose its authority merely because it was badly argued inadequately considered and fallaciously reasoned. It was held that the law which has been declared by the apex Court under Article 141 of the Constitution is binding. It can only be substituted or clarified or reconsidered by the Supreme Court and not by this Court on the doctrine of per incuriam and sub-silentio which are in the nature of exceptions to the rule of precedent in relation to law declared under Article 141 of the Constitution. Thus in such premises also, by giving any further interpretation to the above mentioned decisions of the Supreme Court the public trust could not be directed to prove in each case that it's received Income is being utilized for the object and purpose of the trust.

32. In view of the aforesaid discussions our answer on the question referred is: "that in each and every case a registered religious and charitable

public trust is not obliged to prove that it's income is being utilized in religious and charitable purpose of the trust". Accordingly after such answer of the question referred the Registry is directed to place this matter before the Single Bench for further hearing and adjudications of these appeals on merits.

33. Copy of this order are be placed in both the appeals separately.

Order accordingly.

I.L.R. [2013] M.P., 2904
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 65/2008 (Jabalpur) decided on 25 July, 2013

MALTI BAI (SMT.) ...Appellant
Vs.
SMT. KHILONA BAHU & ors. ...Respondents

A. Stamp Act (2 of 1899), Section 35 - **Document neither stamped nor registered - Family settlement cannot be read in evidence, as the same is an unstamped document - Even if the document is treated to be an 'instrument', 'agreement' or 'settlement', the same cannot be read in evidence for any purpose. (Para 12)**

क. स्टाम्प अधिनियम (1899 का 2), धारा 35 – दस्तावेज न तो स्टॉम्पित और न ही रजिस्ट्रीकृत – परिवारिक समझौते को साक्ष्य में नहीं पढ़ा जा सकता क्योंकि वह अस्टॉम्पित दस्तावेज है – यदि दस्तावेज को 'लिखत', 'करार', या 'समझौता' माना भी जाए, उक्त को किसी प्रयोजन हेतु साक्ष्य में नहीं पढ़ा जा सकता।

B. Civil Procedure Code (5 of 1908), Section 96 - First Appeal - **First appellate court while reversing the finding of the trial court must meet the reasonings on which the finding of the trial court is based. (Para 14)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 96 – प्रथम अपील – प्रथम अपीली न्यायालय को विचारण न्यायालय का निष्कर्ष उलटते समय, उन तर्कों का सामना करना चाहिए जिस पर विचारण न्यायालय का निष्कर्ष आधारित है।

Cases referred :

AIR 1966 SC 292, AIR 1955 SC 481, AIR 1976 SC 807, (2009) 2 SCC 532, (2004) 1 SCC 769, AIR 1966 SC 323, 1988 SC 881, AIR 1946

PC 51, (2001) 3 SCC 179, (2008) 2 SCC 728, (2009) 4 SCC 791, 1968 SC 620, AIR 2004 SC 4609.

Ashish Pathak, for the appellant.
Ravish Agrawal with *Abhishek Singh,* for the respondents.

JUDGMENT

ALOK ARADHE, J. :- This appeal by the plaintiff was admitted by a Bench of this Court on the following substantial questions of law:-

"(i) Whether the finding of learned first appellate Court holding that the family settlement has no sanctity in the eye of law since it is an unregistered document, runs contrary to the dictum of Supreme Court Tek Bahadur Bhujil v. Debi Singh Bhujil and others, AIR 1966 SC 292?

(ii) What is the impact of admission of defendant No.1-Smt.Khilona Bahu in her testimony that Ratanlal is the Karta of the family?

(iii) Whether in view of admission of defendant No.1-Smt.Khilona Bahu that Ratanlal was the Karta of the family, the judgment of learned first appellate court holding that Ratanlal was not Karta, is vitiated by ignoring the admission of defendant No.1-Smt.Khilona Bahu?

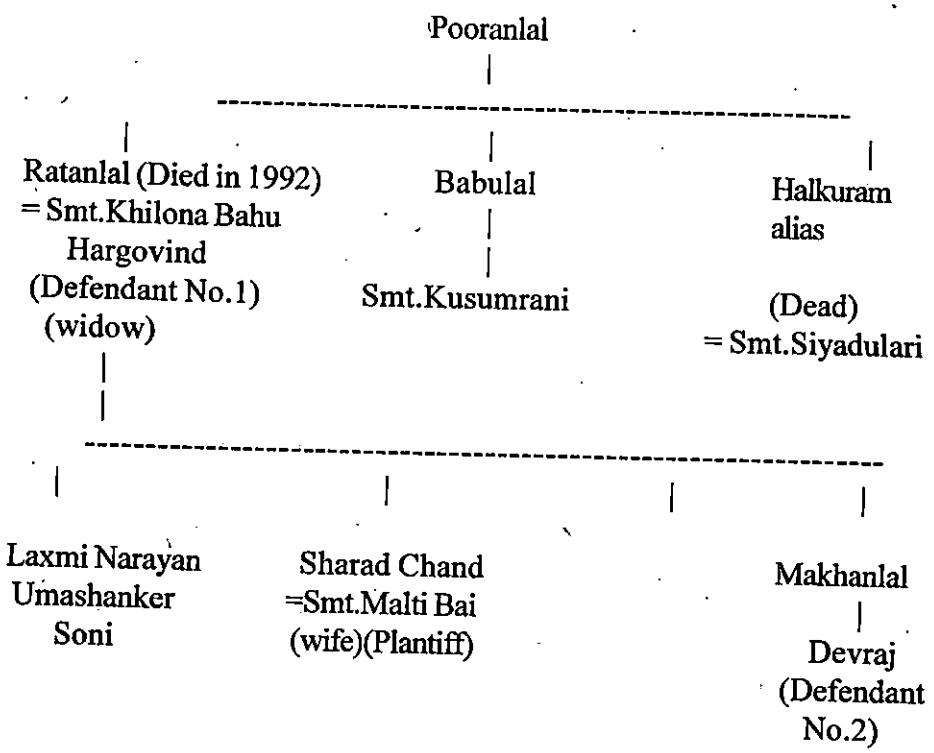
(iv) Whether Ratan being Karta of HUF was having authority to settle the suit property in the name of plaintiff?"

2. Thereafter, following additional substantial questions of law were framed

" (v) Whether the lower appellate Court committed an error of law in reversing the findings with regard to possession of the plaintiff and in consequently setting aside the decree for injunction, without meeting the reasoning of the trial Court with regard to finding of possession of the plaintiff over the suit land ?

(vi) Whether the family settlement can be read in evidence, as the same is an unstamped document ?"

3. In order to appreciate the relationship between the parties, genealogical tree as mention in the plaint is reproduced:-



4. The plaintiff filed a suit, *inter alia,* on the ground that plaintiff, defendant No.1, 2 & 4 are the members of joint family. The suit lands admeasuring 0.405 and 0.404 hectares of Khasra No.68/2 and 68/3 were purchased 'Benami' vide registered sale deed dated 20.6.1969 from the funds of joint family. However, in the revenue records the name of defendant No.1 alone was recorded. The plaintiff from her husband's income and from her 'stridhan' purchased a land in village Raheli which was situated adjacent to the land bearing khasra Nos. 69/2 and 69/4 i.e. the land belonging to joint family of which Ratanlal was the 'Karta'. The plaintiff in order to have one consolidated plot appointed Ratanlal, namely, husband of Defendant No.1, to be her attorney and authorized him to sell her land. In pursuance of aforesaid authority Ratanlal sold the land admeasuring 0.607 hectares of Khasra No.48/6 for a consideration of Rs.7000/- vide registered sale deed dated 07.4.1985 (Exhibit-P-1) to one Bhagawndas. However, the sale consideration was not paid to plaintiff.

5. Thereafter Ratanlal executed a family settlement deed dated 06.1.1986 (Exhibit-P-2) under which the plaintiff was placed in possession of land bearing Khasra No.68/2 and 68/3 admeasuring 0.405 and 0.404 hectares respectively and he further authorized the defendants No.1 and defendant No.4 to execute the sale deed in favour of the plaintiff in respect of the land bearing Khasra No.69/2 and 69/4. In pursuance of the aforesaid family settlement deed the defendants No.1 and 4 executed registered sale deeds dated 06.7.1987 (Exhibits-P-3 and P-4) for a consideration of Rs.6000/- in respect of the land comprised in Khasra Nos. 69/2 and 69/4 in favour of the plaintiff. However, in violation of the terms and conditions of the family settlement the defendant No.1 got the name of defendant No.2 mutated in the revenue records in respect of the suit lands. The defendants threatened the plaintiff with dispossession. Thereupon the plaintiff filed the suit seeking relief of declaration that she is the owner and in possession of land bearing Khasra No.68/2 and 68/3 admeasuring 0.405 and 0.404 hectares respectively by virtue of family settlement deed dated 06.1.1986. The plaintiff also sought permanent injunction restraining the defendants from interfering with her possession.

6. The defendants No.1 & 2 filed the written statement in which, *inter alia*, the claim of the plaintiff was denied and it was pleaded that the suit lands are the self acquired property of defendant No.1 which were purchased by her from her 'Stridhan' under the family settlement. It was further pleaded that under the family settlement the defendant No.1 conveyed suit land to defendant No.2. The defendants No.3 & 4 were proceeded ex parte.

7. The trial Court vide judgment and decree dated 05.12.2006, *inter alia*, held that Late Ratanlal was the 'Karta' of the family as there is no denial to his status as 'Karta' in the written statement filed on behalf of defendants No.1 & 2. It was further held that the land admeasuring 1.50 acres of Khasra No.48/6 which belonged to the plaintiff was sold by Ratanlal vide registered sale deed dated 07.4.1985 as attorney of the plaintiff and late Ratanlal had executed the family settlement deed (Exhibit-P-2) in favour of the plaintiff which has duly been proved, in pursuance of which, the defendants No.1 & 4 executed the sale deeds dated 06.7.1987 (Exhibits-P-3 & P-4) in respect of the land comprised in Khasra No.69/2 and 69/4. The trial Court further held that since execution of the family settlement (Exhibit-P-2) has not been denied by the defendants No.1 & 2, therefore, its registration was not required. The trial Court on the basis of entries made in the revenue records (Exhibit-P-13) as well as the documents (Exhibits-P-20 to P-25) held that the plaintiff is in

cultivating possession of the land in dispute. On the basis of statement of defendant No.1 and defendant witness-Umashanker the trial Court held that defendant No.1 and her witness have not been able to disclose the name of the persons and the amount of consideration for which suit lands were purchased in the name of defendant No.1 therefore from evidence of defendants it was not proved that suit lands were the self acquired property of defendant No.1. Accordingly, the trial Court decreed the suit.

8. Being aggrieved by the aforesaid decree of the trial Court, the defendants No.1, 2 & 4 filed an appeal. The lower appellate Court vide judgment and decree dated 13.10.2007, *inter alia*, held that there is no evidence on record to establish that suit lands were the joint family property. It was further held that defendants No.1 & 4 had sold the lands comprised in Khasra No.69/2 and 69/4 as owner thereof and not in the capacity as member of the joint family. It was further held that document dated 06.1.1986 (Exhibit-P-2) cannot be held to be family settlement as it contained the signature of Ratanlal and not the signatures of other members of the family and there is no evidence on record to show that sale consideration received from the sale of land of the plaintiff was utilized for the purpose of joint family. The lower appellate Court further held that plaintiff was not present at the time of execution of the family settlement (Exhibit-P-2) which contains the recital that possession was delivered. Therefore, it is not possible to infer that in pursuance of the family settlement the possession of the land in question was delivered to the plaintiff. The lower appellate court set aside the judgment and decree passed by the trial Court and dismissed the suit filed by the plaintiff.

9. Learned counsel for the appellant submitted that the document (Exhibit P-2) i.e. family settlement was executed by Ratanlal who was admittedly 'Karta' of the joint family. It is further submitted that Exhibit P-2 does not require registration and the defendant No.2 has failed to prove that property in question was purchased by her from 'Stridhan'. It is also submitted that the possession of the land in question was handed over to the appellant in pursuance of family settlement (Exhibit P2). It is urged that testimony of Siyadulari (PW-6) has not been challenged by the defendants in cross-examination. The lower appellate Court grossly erred in holding that family settlement dated 6.1.1986 can be prepared subsequently and while recording the findings, the lower appellate Court has travelled beyond the pleadings of the parties. In support of his submissions, learned counsel for the appellant has placed reliance on the decision in *Tek Bahadur Bhujil v. Debi Singh Bhujil and Others*, AIR

1966 SC 292 and *Sahu Madho Das and Others v. Mukand Ram and Another*, AIR 1955 SC 481. Lastly it is urged that the lower appellate Court grossly erred in reversing the finding that the plaintiff is in possession of the land in question without meeting the reasonings of the trial Court.

10. On the other hand, learned senior counsel for the respondent No.2 submits that plaintiffs' title flows from Exhibit P-2. However, the aforesaid document is neither stamped nor is registered. It is further submitted that from perusal of document (Exhibit P-2) i.e. alleged family settlement, it is apparent that transaction is in *praesenti* and, therefore, the same requires registration. In support of his submissions, learned senior counsel has placed reliance on the decisions in *Tek Bahadur Bhujil (supra) and Kale and Others v. Deputy Director of Consolidation and Others,* AIR 1976 SC 807. It is also submitted that since the document has not been properly stamped therefore, the same cannot be read for any purpose. In support of this submission, learned counsel has placed reliance on the decision in *Avinash Kumar Chauhan v. Vijay Krishna Mishra,* (2009) 2 SCC 532. It is also urged that if Exhibit P-2 is excluded from consideration, the entire basis of claim of the plaintiff collapses. It is further contended that the plaintiff is not in settled possession of the land in question. She is a member of joint family and is in possession of the land being member of the joint family especially in view of the fact that no plea of ouster of other family members has been taken. The plaintiff is also not in possession as a trespasser as her claim is based on family settlement. In support of his submission, learned senior counsel has placed reliance on the decision in *Rame Gowda v. M. Varadappa Naidu,* (2004) 1 SCC 769.

11. I have considered the submissions made by learned counsel for the parties and have perused the records. It is well settled in law that if a family settlement does not create or extinguish any rights in immovable property and merely recognises antecedent title of the same kind, the same does not require registration. [See: *Tek Bahadur Bhujil vs. Debi Singh Bhujil and others*, AIR 1966 SC 292, *Ram Charan Das vs. Girja Nandini Devi and others*, AIR 1966 SC 323, *Kale and Others v. Deputy Director of Consolidation and Others*, AIR 1976 SC 807 and *Roshan Singh and Others v. Zile Singh and Others,* AIR 1988 SC 881] Section 2 (24) of the Indian Stamp Act, 1899 defines the expression 'settlement' to mean any non-testamentary deposition in writing of any movable or immovable property, inter alia for the purpose of distributing property of settlor among his family or those from whom he desires to provide, or for purpose of providing for same person

dependant on him. From careful scrutiny of the definition, it is evident that if by any document a separate interest is created in favour of a person who may have a legal right against the settlor, the same would be 'settlement'. Article 5 of the Schedule I-A to the Act deals with agreement and prescribes stamp duty payable thereon.

12. Now, I may advert to document (Exhibit P-2) dated 6.1.1986. The aforesaid document is written on plain paper. It is neither stamped nor registered. It is executed by Ratanlal i.e. Karta of the family. Under the said document, possession of two acres of land comprised in khasra number 68 has been given to the plaintiff on 6.1.1986 i.e. on the day of execution of the document. The document has been styled as an agreement. In Ram Rattan v. Parama Nand, AIR 1946 PC 51 while construing the words 'for any purpose' in Section 35 of the Act, it was held that words 'for any purpose' in Section 35 of the Stamp Act should be given their natural meaning and effect and would include a collateral purpose and that an unstamped partition deed cannot be used to corroborate the oral evidence for the purpose of determining even the factum of partition as distinct from its terms. Similar view has been taken by the Supreme Court in *Avinash Kumar Chauhan v. Vijay Krishna Mishra*, (2009) 2 SCC 532. In view of the aforesaid enunciation of law, even if the document (Exhibit P-2) is treated to be an 'instrument', 'agreement' or 'settlement', the same cannot be read in evidence for any purpose and thus, the entire foundation of the claim of the plaintiff collapses. Accordingly, the 6th substantial question of law is answered in the negative and against the appellant.

13. In view of answer to 6th substantial question of law, the issue whether document (Exhibit P-2) requires registration pales into insignificance and therefore it is not necessary for the Court to examine the same. Consequently, the substantial questions of law, namely, (i) to (iv) also loose their relevance therefore, it is not necessary to answer the same.

14. The first appellate Court while reversing the finding of the trial Court must meet the reasonings on which the finding of the trial Court is based. [See: *Santosh Hazari v. Purushottam Tiwari*, (2001) 3 SCC 179, *Nopany Investments (P) Ltd. v. Santokh Singh*, (2008) 2 SCC 728 and *Nicholas v. Menezes v. Joseph M. Menezes*, (2009) 4 SCC 791] The trial Court on the basis of meticulous appreciation of evidence

on record has recorded a finding that the plaintiff is in possession of the suit land. The trial Court has taken into account the evidence of Tulsiram (defendant witness number 4) as well as Umashankar (defendant witness number 1) who have admitted in their statement that the plaintiff is in possession of the suit land. The trial Court has also relied on the entries made in the documents (Exhibits P-14 to P-20) to hold that the plaintiff is in possession of the suit land. The trial Court also placed reliance on entries made in khasra panchshala (Exhibit P-13) to hold that the plaintiff is in possession of the suit land. However, the aforesaid material evidence has not been considered by the lower appellate Court and finding with regard to possession has been reversed merely on the ground that at the time of execution of family settlement deed (Exhibit P-2) since the plaintiff was not present therefore, it cannot be inferred that the possession has been handed over to the plaintiff. At this stage, it is pertinent to mention here that the document (Exhibit D-5) dated 16.11.1963 shows that partition had taken place between Ratanlal and Babulal. The suit property was acquired vide sale deed dated 20.6.1969 (Exhibit P-9) i.e. after partition had taken place between Ratanlal and Babulal. The defendants 1 and 2 have also pleaded the factum of partition between Ratanlal and Baboolal in paragraph 3 of the written statement. Thus, neither at the time of execution of sale deed (Exhibit P-9) dated 20.6.1969 nor at the time of execution of family settlement deed dated 6.1.1986 (Exhibit P-2) Ratanlal was 'Karta' of the family. However, the fact remains that the plaintiff is in possession of the suit land. It is well settled in law that law respects possession even if there is no title to support it. [See: *Yashwant Singh v. Jagdish Singh,* AIR 1968 SC 620 and *Rame Gowda v. M. Varadappa Naidu,* AIR 2004 SC 4609] Since, the plaintiff is in possession of the suit land therefore, she cannot be dispossessed except in accordance with law. Accordingly, the fifth substantial question of law is answered.

15. Accordingly, the judgment and decree passed by the lower appellate Court is set aside. The claim of the plaintiff in respect of declaration of title is dismissed. However, the respondents are restrained from dispossessing the plaintiff from the suit land except in accordance with law.

16. In the result, the appeal is partly allowed.

Appeal partly allowed.

I.L.R. [2013] M.P., 2912
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 502/2005 (Jabalpur) decided on 5 August, 2013

RAJENDRA PRASAD & ors. ...Appellants
Vs.
RAM LAL ...Respondent

A. Limitation Act (36 of 1963), Section 14 & Articles 64, 65 - Benefit of Section 14 **- Suit initially filed by the plaintiff to restrain the defendants from interfering with the possession of the plaintiff over the suit land - Relief of possession was incorporated by way of amendment when forcible possession was taken by the defendants in respect of portion of land - Dispute between the parties with regard to mutation pending before Revenue Court - Subject matter of the proceeding pending before the Revenue Court is entirely different from the dispute which was pending adjudication in the suit - Therefore, the plaintiff is not entitled to benefit of section 14 - Suit filed for possession barred by limitation. (Paras 6 to 9)**

क. परिसीमा अधिनियम (1963 का 36), धारा 14 व अनुच्छेद 64, 65 – धारा 14 का लाभ – वादी द्वारा आरंभ में वाद, प्रतिवादियों को वाद भूमि पर वादी के कब्जे में हस्तक्षेप से रोकने के लिये प्रस्तुत किया गया – संशोधन द्वारा कब्जे का अनुतोष जोड़ा गया जब प्रतिवादियों द्वारा भूमि के हिस्से के संबंध में बलपूर्वक कब्जा लिया गया – नामांतरण के संबंध में पक्षकारों के मध्य विवाद, राजस्व न्यायालय के समक्ष लंबित–राजस्व न्यायालय के समक्ष लंबित कार्यवाही की विषयवस्तु, वाद में न्यायनिर्णयन हेतु लंबित विवाद से पूर्णतः भिन्न है– अतः वादी, धारा 14 के लाभ का हकदार नहीं–कब्जे के लिये प्रस्तुत किया गया वाद परिसीमा द्वारा वर्जित।

B. Limitation Act (36 of 1963), Section 14 **- Conditions required to be satisfied.**

In order to attract the applicability of Section 14 of the Limitation Act, following conditions are required to be satisfied :-

(i) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party ;

(ii) the prior proceeding had been prosecuted with due diligence and good faith;

(iii) **the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;**

(iv) **the earlier proceeding and the later proceeding must relate to the same matter in issue; and**

(v) **both the proceedings are in a court.**

(Para 7)

ख. *परिसीमा अधिनियम (1963 का 36), धारा 14* – शर्तें जिन्हें पूरा किया जाना अपेक्षित है।

परिसीमा अधिनियम की धारा 14 की प्रयोज्यता आकर्षित करने के लिए निम्न शर्तों को पूरा किया जाना अपेक्षित है :–

(i) पूर्विक तथा पश्चातवर्ती कार्यवाहियां, दोनों सिविल कार्यवाहियां हो, जिन्हें समान पक्षकार द्वारा अभियोजित किया गया ;

(ii) पूर्विक कार्यवाही को सम्यक तत्परता एवं सद्भावनापूर्वक अभियोजित किया गया ;

(iii) पूर्विक कार्यवाहीं की असफलता का कारण, अधिकारिता की कमी अथवा इसी स्वरुप का अन्य कारण ;

(iv) पूर्वतर कार्यवाही और पश्चातवर्ती कार्यवाही का संबंध समान विवाद्य विषय से होना चाहिए ; और

(v) दोनों कार्यवाहियां न्यायालय में हैं।

Cases referred :

1994 Supp. (1) SCC 153, AIR 2007 MP 1, AIR 1958 SC 827, AIR 1985 SC 39.

Ajay Ojha, for the appellants.
K.K. Gautam, for the respondent.

JUDGMENT

ALOK ARADHE, J. :- This appeal is by the defendants which was admitted by a Bench of this Court on the following substantial question of law:-

"Whether in view of Article 64 or 65 of the Limitation Act, the courts below have committed error in holding the

suit of the respondent for possession within limitation, especially when the plea of possession was inserted in the plaint by way of amendment on 20.3.2000 on the basis of application for amendment filed on 20.7.98?"

2. Facts leading to filing of the appeal, briefly stated, are that the plaintiff filed a suit on the ground that he purchased the suit land admeasuring 0.48 acres vide registered sale deed dated 27.7.1972 from one Ram Vishal and was placed in possession. Thereafter, in the year 1973 he constructed a house thereon. However, the defendants threatened the plaintiff with dispossession. Accordingly, on 11.8.1993 the suit seeking the relief of permanent injunction was filed by which the defendants were sought to be restrained from interfering with the possession of the plaintiff over the suit land. Thereafter, an application for amendment dated 20.7.1998 was filed which was allowed by the trial Court vide order dated 20.3.2000 by which the relief of possession was also prayed for in respect of portion of land of which forcible possession was taken by the defendants in the year 1997. The defendants filed written statement in which it was pleaded that they have purchased the suit lands from Ram Vishal in the year 1971 and are in possession of the same since then.

3. The trial Court vide judgment and decree dated 23.12.2002 held that the plaintiff is in lawful possession of the suit land. However, it was held that defendants have interfered with the possession of the plaintiff over the suit land and during the pendency of the suit have taken forcible possession of the part of the suit land in the year 1997. Accordingly, it was held that the plaintiff is entitled to a decree for possession in respect of the land of which forcible possession was taken by the defendant during pendency of suit. The trial Court also granted decree for declaration of title in favour of the plaintiff. Accordingly, the suit was decreed. The lower appellate Court vide impugned judgment and decree dated 14.2.2004, inter alia, held that since the plaintiff had not sought the relief of declaration of title, therefore, the trial Court could not have granted the relief of declaration of title. The lower appellate Court further held that the relief of possession is not time barred as the plaintiff is entitled to exclusion of time spent in the proceeding in the revenue court under section 14 of the Limitation Act. However, remaining part of the decree passed by the trial Court was affirmed.

4. Learned counsel for the appellants while inviting the attention of this Court paragraph 16 of the judgment passed by the trial Court has submitted that defendants are in possession of the land in dispute since 1974 and the suit was filed in the year 1993 initially seeking the relief of permanent injunction and thereafter the relief of possession was sought by way of amendment in the year 1998, which was barred by limitation. It is also urged that if the amendment which is barred by limitation is allowed, it would not relate bck to the institution of the suit. It is also urged that lower appellate Court erred in not appreciating that time spent in the proceeding pending before the revenue court, could not have taken into account for the purpose of extending the benefit of section 14 of Limitation Act. In support of his submission, learned counsel for the appellant has placed reliance on the decision of Supreme Court in *Jai Prakash and others vs. Satnarain and others,* 1994 Supp. (1) SCC 153 and *Kanhaiyalal Vishwambherdayal Agrawal v. Muktilal Rameshwardas Naredi,* AIR 2007 MP 1.

5. On the other hand, learned counsel for the respondent submitted that the matter stands concluded against the appellants by concurrent findings of fact. The findings recorded by the courts below are based on proper appreciation of evidence on record which do not call for any interference in exercise of power under section 100 Code of Civil Procedure.

6. I have considered the submissions made by learned counsel for the parties and have perused the record. The plaintiff admittedly filed the suit on 11.8.1993 seeking the relief of permanent injunction. Thereafter, on 20.7.1998 the relief of possession was sought to be incorporated by way of amendment which was allowed by the trial Court vide order dated 20.3.2000. The trial Court in paragraph 16 of its judgment after appreciating the evidence on record has recorded a finding that the defendants are in possession of the lands in question since 1974-75. The suit has admittedly been filed beyond the period of 12 years. It is also not in dispute that the dispute with regard to mutation remain pending before the parties to the suit before the revenue court for a period from 1974-75 till 1993. Therefore, the question which arises for consideration is whether the plaintiff is entitled to exclusion of time spent in the proceeding before the revenue Court under section 14 of the Limitation Act.

7. The object of Section 14 of the Act is to extend the protection against

bar of limitation to a person honestly doing his best to get his case tried on merits but failing through Court been unable him of such trial. In order to attract the applicability of section 14 of the Limitation Act, following conditions are required to be satisfied:-

(i) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;

(ii) the prior proceeding had been prosecuted with due diligence and good faith;

(iii) the failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(iv) the earlier proceeding and the later proceeding must relate to the same matter in issue; and

(iv) both the proceedings are in a court.

[See: *Raghunath v. Gokul,* AIR 1958 SC 827 and *Safar Khan vs. Board of Revenue,* AIR 1985 SC 39]

8. In the case of *Jai Prakash* (supra) it has been held that if the nature of proceeding pending before the revenue court is irrelevant for the purpose of suit, the litigant would not be entitled to the benefit of section 14 of the Limitation Act. In the instant case, the dispute between the parties which remain pending before the revenue court was with regard to mutation. However, the suit was initially filed for permanent injunction and thereafter the relief of possession was incorporated by way of an amendment. Thus, the subject matter of the proceeding pending before the revenue court is entirely different from the dispute which was pending adjudication in the suit and, therefore, the plaintiff is not entitled to benefit of section 14 of the Limitation Act.

9. In view of the preceding analysis, it is held that the suit filed for possession was barred by limitation. Accordingly, the substantial question of law framed by this Court is answered. The judgment and decree passed by the trial Court as well as lower appellate Court are set aside. The claim of the plaintiff is dismissed.

10. In the result, the appeal is allowed with costs.

Appeal allowed.

I.L.R. [2013] M.P., 2917
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 879/2003 (Jabalpur) decided on 3 September, 2013

I.B. MISHRA ...Appellant
Vs.
NAGAR PANCHAYAT, SOHAGPUR & ors. ...Respondents

Municipalities Act, M.P. (37 of 1961), Section 319 - Two Months notice **- 2 months notice required to be given to Municipal Council u/s 319(1) of the Act - Held - Has to be given in respect of anything done or purporting to be done under the Act - Withholding of amount on account of leave encashment of the employee cannot be said to be an act done or purporting to be done under the Act - Hence, Suit by Municipal employee instituted without giving such notice is maintainable - Suit was also brought within limitation. (Para 7)**

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 319 – दो माह का नोटिस – अधिनियम की धारा 319(1) के अंतर्गत नगरपालिका परिषद को 2 माह का नोटिस दिया जाना अपेक्षित है – अभिनिर्धारित – अधिनियम के अंतर्गत कोई कार्यवाही किये जाने या तात्पर्यित होने के संबंध में दिया जाना चाहिए – कर्मचारी के अवकाश नगदीकरण के कारण से रकम रोकना, अधिनियम के अंतर्गत कार्यवाही की जाना या तात्पर्यित होना नहीं कहा जा सकता – अतएव, नगरपालिक कर्मचारी द्वारा उक्त नोटिस दिये बिना संस्थित किया गया वाद पोषणीय है – वाद को परिसीमा अवधि के भीतर प्रस्तुत भी किया गया था।

Cases referred :

(1998) 6 SCC 514, 1982 MPWN 182.

D.K. Dixit, for the appellant.
A.K. Pandey, for the respondents.

J U D G M E N T

ALOK ARADHE, J. :- This appeal is by the plaintiff which was admitted by a Bench of this Court on the following substantial question of law:

> "Whether on the basis of material on record the suit can be said to be barred by limitation ?"

2. The facts, giving rise to filing of the appeal, briefly stated are that the

plaintiff was employed as upper division clerk in Nagar Panchayat, Sohagpur and superannuated on 31.10.1997. The Local Self Administration, Government of M.P. vide an order dated 11.3.1996 clarified that it has no objection to grant leave encashment to the employees of the local bodies. Thereafter, the Nagar Panchayat passed a resolution by which it was decided to extend the benefit of earned leave to its employees. On 27.6.1996 the plaintiff was entitled to 240 days' earned leave. The plaintiff thereupon filed an application for encashment of earned leave. However, the aforesaid application was rejected vide order dated 17.2.1997. Thereafter the plaintiff filed the suit on 9.9.1998 seeking the relief of declaration that he is entitled to receive a sum of Rs.45,200 on account of leave encashment for a period from 1.1.1997 to 30.4.1997 along with interest.

3. The defendants 3,4 and 5 denied the claim of the plaintiff. The defendant No.6 in its written statement raised an objection with regard to maintainability of the suit on the ground that no notice under Section 319 of the M.P. Municipalities Act, 1961 (hereinafter referred to as 'the Act') has been given to the defendant No.6 before institution of the suit, therefore, the suit is not maintainable.

4. The trial Court vide judgment and decree dated 16.5.2002 inter alia held that the plaintiff is entitled to a sum of Rs.42,200/- on account of leave encashment. It was further held that the suit filed by the plaintiff is maintainable in the absence of notice under Section 319 of the Act. Accordingly, the suit filed by the plaintiff was partly decreed. The lower appellate Court inter alia held that on 17.2.1997 the application preferred by the plaintiff was rejected by the defendant No.6 Municipal Council. However, the plaintiff had not filed the suit within a period of eight months therefrom but has filed the same on 9.9.1998 and therefore, the suit is barred by limitation. Accordingly, the claim of the plaintiff was dismissed.

5. Learned counsel for the appellant submitted that the lower appellate court grossly erred in reversing the well reasoned judgment and decree passed by the trial Court and in not appreciating the fact that the suit filed by the plaintiff was within limitation. On the other hand, learned counsel for the respondents submitted that the suit filed by the plaintiff was barred by limitation in view of Section 319 (2) of the Act and mere submission of repeated representations, does not give rise fresh cause of action. It is further submitted that the lower appellate Court in the facts of the case rightly held that the suit filed by the plaintiff is barred by limitation.

In support of his submissions, learned counsel for the respondents has placed reliance on the decision in *Sadanandan Bhadran v. Madhavan Sunil Kumar,* (1998) 6 SCC 514 and has also invited the attention of this Court to paragraphs 4 and 9 of the aforesaid decision.

6. I have considered the respective submissions made by learned counsel for the parties and have perused the record. The relevant extract of Section 319 of the Act reads as under:

> ***"319. Bar of suit in absence of notice-*** (1) No suit shall be instituted against any Council or any Councillor, officer or servant thereof or any person acting under the direction of any such Council, Councillor, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after a notice, in writing, stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of a Council delivered or left at its office, and, in the case of any such member, officer, servant or person as aforesaid, delivered to him or usual place of abode, and the plaint shall contain a statement that such notice has been so delivered or left.
>
> (2) Every such suit shall be dismissed unless it is instituted within eight months from the date of the accrual of the alleged cause of action."

7. Thus, from perusal of Section 319 (1) it is apparent that notice has to be given to the Municipal Council in respect of anything done or purporting to be done under the Act. If the suit is filed by the plaintiff in respect of anything done or purporting to be done under the Act then provision of Section 319 of the Act would be attracted. The action of the respondent in withholding the amount which is due to the appellant on account of leave encashment cannot be said to be an act done or purporting to be done under the provisions of the Act therefore, the provisions of Section 319 of the Act has no application in the facts of the case. Similar view has been taken by a Bench of this Court in *Indore Nagar Palika Nigam v. Ramakant,* 1982 MPWN 182 (S.N. 133). The trial Court has held that on 28.3.1998 the cause of action accrued to the plaintif and the suit was filed on 9.9.1998 i.e. well within limitation. As stated supra, since the provisions of Section 319 of the Act do not apply in the facts

of the case therefore, the suit has rightly been held to be within limitation by the trial Court.

8. For the aforementioned reasons, the substantial question of law framed by this Court is answered in the negative and in favour of the appellant. Accordingly, the judgment and decree passed by the lower appellate Court are set aside and that of the trial Court are restored.

9. In the result, the appeal is allowed with costs.

Appeal allowed

I.L.R. [2013] M.P., 2920
APPELLATE CIVIL
Before Mr. Justice Prakash Shrivastava
S.A. No. 555/2005 (Indore) decided on 4 September, 2013

TEJKARAN & anr. ...Appellants
Vs.
MEERADEVI ...Respondent

Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(b), Civil Procedure Code (5 of 1908), Section 100 - Sub-letting **- No issue was framed relating sub-letting - Trial Court decreed the eviction suit on the ground of sub-letting - First Appellate Court affirmed it - Held - No issue was framed relating to sublet u/s 12(1)(b) of the Act but since the said ground was pleaded and the parties had understood the said ground and had adduced evidence in this regard, therefore, considering the same, the courts below have committed no error in passing the decree u/s 12(1)(b) of the Act. (Para 28)**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(बी), सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – उप भाड़े पर दिया जाना – उप भाड़े पर दिये जाने के संबंध में कोई विवाद्यक विरचित नही किया गया – विचारण न्यायालय ने बेदखली के वाद को उपभाडे पर दिये जाने के आधार पर डिक्रीत किया – प्रथम अपीली न्यायालय ने उसकी पुष्टि की – अभिनिर्धारित – अधिनियम की धारा 12(1)(बी) के अंतर्गत उपभाड़े से संबंधित कोई विवाद्यक विरचित नहीं किन्तु चूंकि उक्त आधार का अभिवाक् किया गया और उक्त आधार को पक्षकारों ने समझा है और इस संबंध में साक्ष्य प्रस्तुत की है, इसलिए इसे विचार में लेते हुए निचले न्यायालयों ने अधिनियम की धारा 12(1)(बी) के अंतर्गत डिक्री पारित करने में भूल कारित नहीं की है।

Cases referred :

AIR 2011 MP 181, (1999) 1 SCC 141, 2009(2) MPHT 186, (2011) 12 SCC 695, 2009(2) MPHT 228, AIR 1981 SC 1711, (2007) 5 SCC 660, AIR 1956 SC 593, (2010) 2 SCC 689, 2008(1) MPLJ 349, (2010) 1 SCC 217, (2009) 17 SCC 796, (2005) 1 SCC 481, (2008) 14 SCC 356, 2009(2) MPLJ 156.

Sameer Athawale, for the appellants.
A.K. Sethi with *Harish Joshi*, for the respondent.

JUDGMENT

PRAKASH SHRIVASTAVA, J. :- This second appeal under Section 100 of the CPC is at the instance of defendant tenant in the eviction suit challenging the judgment of the first appellate court dated 29th March 2005 dismissing the first appeal No. 62-A/2004 and affirming the judgment of the trial court. The trial Court by judgment dated 13/9/04 in CS No. 27-A/2001 had decreed the suit for eviction filed by respondent landlord.

2/ The respondent landlord had filed the suit for eviction pleading that the suit shop was let out to the appellant No. 1 on monthly rent of Rs. 960 and it was required by the respondent for expansion of the medical profession of her husband Vijay Kumar and son Manoj Sanghai. It was further pleaded that the suit accommodation was also required for her son Manoj Sanghai for his engineering business. The eviction was also sought on the ground that the suit accommodation was sublet by appellant No. 1 to appellant No.2. Inspite of the termination of tenancy on 21/1/2000, the appellants had not vacated the suit premises, therefore, the suit for eviction was filed. The appellants had opposed the suit pleading that the respondent was not in bonafide need of the suit premises and she had alternate suitable accommodation. The other grounds raised in the suit were also denied.

3/ Trial court by judgment dated 13/9/04 had decreed the suit finding that the respondent was in bonafide need of suit premises for the medical profession of her husband and son for which the respondent had no other alternate suitable accommodation. The trial court found that appellant No. 1 had illegally sublet the suit premises to appellant No. 2. The first appellate court by judgment dated 29th March 2005 has affirmed the decree of eviction passed by the trial court on both the grounds i.e. the ground of bonafide need as well as the ground of subletting.

4/ This court by order dated 4/10/2006 had admitted the appeal on the following substantial questions of law:-

"(a) Whether the courts below were justified in holding that a ground under Sec. 12(1)(f) of the MP Accommodation Control Act for the alleged need of plaintiffs (Dr. Husband and Dr. Son) is made out?

(b) Whether plaintiff could file a suit for the bona fide need of her husband (doctor) under Sec.12(1)(f) ibid and seek eviction of the defendant-tenant when the husband is not specified in Sec. 12 (1)(f) ibid as one of the member for whom eviction can be claimed?

(c) Whether on the facts pleaded and found proved it can be inferred that the need set-up by the plaintiff is not exclusively for her son Manoj but in fact it is either a joint need of her husband and son or for her husband only?

(d) In the absence of any pleading in the plaint that plaintiff does not have any alternative and suitable accommodation of her own in city for doing the alleged profession in question and having taken note of this fact by the learned trial court in paragraph 18 of the judgment dated 13/9/2004, whether the trial court as also the first appellate court were justified in still passing a decree in favour of the plaintiff?

(e) In the absence of the pleadings regarding availability of suitable and alternative accommodation in city, whether the evidence adduced by the plaintiff to that effect could be looked into and relied upon for granting a decree under Sec. 12(1)(f) of the Act in favour of the plaintiff?

(f) Whether the lower appellate court was justified in rejecting the application made by the appellant under Order 6 Rule 17 CPC bringing to the notice of the court certain subsequent events having material bearing over the question of need and in particular construction of twelve additional rooms in the suit premises by plaintiff thereby satisfying the so called bona fide need assuming it existed at the time of filing of the suit?

(g) Whether the courts below were justified in holding that bona fide need as pleaded in the plaint is made out and if so whether such finding can be said to be legally sustainable so as to pass a decree under Sec. 12(1)(f) ibid?

(h). Whether the courts below were justified in holding that a ground under Sec. 12(1)(b) ibid is made out?

(i) For the absence of any issue framed on the ground covered under Sec.12(1)(b) ibid whether the decree under Section 12(1)(b) could be passed by the trial court and could be affirmed by the first appellate court?"

The above questions are answered as under:-

Questions No. (b) & (c).

5/ Counsel for the appellants submits that under Section 12(1)(f) of the Act only non-residential need of the landlord, her major son and unmarried daughter can be considered and the need of husband of landlord cannot be considered.

6/ As against this, counsel for the respondent has supported the decree of eviction passed under Section 12(1)(f) of the Act on the ground of bonafide need of respondent's husband and son.

7/ Under Section 12(1)(f) of M.P. Accommodation Control Act (for short the Act) eviction can be sought for the bonafide non residential need of landlord, his major son, unmarried daughter or for any person for whose benefit accommodation is held. The two courts below on the basis of appreciation of evidence on record have found that the respondent has proved the bonafide need of the suit accommodation for expansion of medical profession of her husband Vijay Kumar and his son Manoj Singhai. The Full Bench of this Court in the matter of *Badrilal Vs. Smt. Sita Bai & others*, reported in AIR 2011 MP 181 while interpreting Section 12(1)(f) has held that business need of landlord will also include the need of his member of the family who is so closely dependent on landlord that his need is practically the need of the landlord but in the present case in the case of husband's need, no such close dependency has been proved. However, the facts found proved clearly show that the son has independent need for expansion of his medical profession which is covered under Section 12(1)(f) of the Act being the need of major son of the landlord. Since undisputedly bonafide need of respondent's son is covered under Section 12(1)(f) of the Act, therefore,

even if the need of respondent's husband is excluded, than also keeping in view the language of Section 12(1)(f) of the Act and the fact that need of the major son has been proved, the decree for eviction under Section 12(1) (f) of the Act will remain intact.

Question Nos. (a) & (g).

These questions relate to bonafide need pleaded by the respondent.

8/ Learned counsel for the appellants submits that the suit for eviction was filed since the rent of the premises was not increased. He further submits that the landlord cannot seek eviction merely on the basis of the wish or desire unless the bonafide need is established. He has submitted that the respondent has failed to establish the bonafide need.

9/ As against this, the respondent has submitted that the finding relating to the bonafide need recorded by the courts below is duly supported by the evidence which does not require any interference.

10/ Having heard learned counsel for the parties and on perusal of the record, it is found that the issue relating to the bonafide need is essentially an issue of fact. The courts below on the basis of evidence led by the parties have found that the respondent has been able to prove the bonafide need of the suit premises for expansion of the medical profession of her son Dr. Manoj Singhai and also for her husband. The courts below have noted that the respondent has sufficient fund for expansion of business. The place which the respondent's husband and son are having is not adequate looking to the requirement of profession. It is found that the indoor patients are treated by them since they are established doctors and that meanwhile the population of the town has increased, therefore, they are in need of expansion of their profession and a larger and bigger places for their profession. It has been averred that they are in need of the patient ward, pathology, blood bank and x-ray machine etc. Some of the averments have even been admitted by the appellant's own witnesses. It has further been found that there are large number of patients and there is not even proper place for their sitting. Considering these material, the courts below have rightly found that the respondent has been able to establish the bonafide need of the suit premises for non-residential purpose. The concurrent finding recorded by the courts below in this regard is essentially the finding of fact which does not suffer from any error. Even if the need of the husband is excluded than also the above finding remains

uneffected in respect of the need of the son. Thus, the questions (a) & (g) are answered in favour of the respondent.

Questions No. (d) & (e).

11/ Learned counsel appearing for the appellants has submitted that in the plaint, there is no pleading about the non-availability of alternate suitable accommodation with the plaintiff, therefore, the evidence in this regard cannot be looked into and since the respondent plaintiff has failed to establish one of the necessary ingredient of Section 12(1)(f) of the Act i.e. non availability of alternate suitable accommodation hence the eviction suit cannot be decreed.

12/ As against this, the learned counsel for the respondent has submitted that not only there is pleading about the non-availability of alternate accommodation but since the parties had understood the issue and had proceeded on that basis and had led evidence about alternate accommodation, therefore, at this stage, the plea relating to absence of pleading cannot be considered.

13/ Having heard the learned counsel for the parties on questions No. (d) & (e), it is found that for getting the decree of eviction on the ground of bonafide need under Section 12(1)(f) of the Act, the landlord in addition to establishing his/her bonafide need, is also required to prove that he/ she has no other reasonable suitable non-residential accommodation of his own in the city or town concerned.

14/ In the present matter, the respondent has pleaded the bonafide need for expansion of medical profession of her son and her husband. By way of amendment, paragraph 3 of the plaint was amended and it was pleaded that respondent had prepared a map for construction on the suit accommodation and except the construction as per map for the purpose of expansion, no other alternate accommodation is available. Thus the pleading in this regard is present in the plaint, though the said pleading has been challenged as vague and inadequate and in this background trial court has made observation in para 18 of the judgment. The objection of lack of pleading about the alternate accommodation was also raised before both the courts below and it has not been accepted. The parties were aware of the requirement of Section 12(1)(f) about non-availability of the alternate accommodation and both the parties in this regard have led evidence. The two courts below have appreciated the evidence led by the parties and have found that the respondent has no other

alternate accommodation. The so called alternate accommodation available with the respondent has duly been considered by the courts below before recording the finding in this regard in respondent's favour. It is the settled position in law that if the pleadings are lacking or vague and if the parties have understood the case pleaded and have placed the requisite material, neither party is prejudiced. The Supreme court in the matter of *Ram Narain Arora Vs. Asha Rani and others* reported in (1999) 1 SCC 141 while considering the similar issue relating to the absence of pleading of other reasonable suitable accommodation in a suit for eviction on the ground of bonafide need, has held and observed as under:-

> "10. In making a claim that the suit premises is required bona fide for his own occupation as a residence for himself and other members of his family dependent on him and that he has no other reasonably suitable accommodation is a requirement of law before the Court can state whether the landlord requires the premises bona fide for his use and occupation. In doing so, the court must also find out whether the landlord or such other person for whose benefit the premises is required has no other reasonably suitable residential accommodation. It cannot be said that the requirement of the landlord is not intermixed with the question of finding out whether he has any other reasonably alternate accommodation. If he has other reasonably alternate accommodation, then necessarily it would mean that he does not require the suit premises and his requirement may not be bona fide. In such circumstances, further inquiry would be whether that premises is more suitable than the suit premises. Therefore, the questions raised before the Court would not necessarily depend upon only the pleadings. It could be a good defence that the landlord has other reasonably suitable residential accommodation and thereby defend (sic defeat) the claim of the landlord.
>
> 11. There cannot be a pedantic or dogmatic approach in the matter of analysis or of the evidence adduced thereto. It is no doubt true that if the pleadings are clearly set out, it would be easy for the court to decide the matter. But if the pleadings are lacking or vague and if both parties have understood what was the case pleaded and put forth with reference to

requirement of law and placed such material before the Court, neither party is prejudiced. If we analyze from this angle, we do not think that the High court was not justified in interfering with the order made by the Rent Controller."

This Court in the matter of *Smt. Sujata Sarkar Vs. Anil Kumar Duttani*, reported in 2009(2) MPHT 186 placing reliance upon the judgment of the Supreme court in the matter of *Ram Narain Arora* (supra) has held as under:-

"A reading of the aforesaid two judgments clearly indicates that the requirement of the provision of law is that the appellant/plaintiff must show or bring material on record to the effect that he has no other alternative suitable accommodation in the city. Neither of the aforesaid two judgments lay down the law that pleading in this respect in writing in the plaint is mandatory or that absence of such pleading would non-suit the landlord from claiming a decree of eviction under Section 12(1)(f) of the Act for bonafide non-residential requirement.

28. Even from a perusal of Section 12(1)(f) and other provisions of the Act, it is clear that there is no statutory mandate requiring that the plaintiff to maintain a suit on that ground, must compulsorily plead in the plaint that she has no alternative suitable accommodation in her possession. Even in the judgment of the Supreme court in the cases of *Hasmat Rai* (supra) and *Ram Narain Arora* (supra), the Supreme court has held that what is required is that the plaintiff must show, establish or prove that he has other alternative suitable accommodation in the city and in view of the aforesaid I am unable to aggree with the learned couinsel for the respondent/defendant that mere absence of pleading in the plaint in respect of non-availability of alternative suitable accommodation is fatal to the appellant's case specifically in the facts and circumstances of the present case, wherein the appellant/plaintiff, through the evidence of Rajnikant Sarkar (P.W.-1) and Dr. Sanjeev Sarkar (P.W.-3) who have specifically stated in their deposition that they do not possess any other alternative suitable accommodation in the city of Jabalpur, has been able to show, establish and prove the requirements of Section 12(1)(f)

of the Act, nor set up a case that the plaintiff owned or possessed any other alternative suitable accommodation in the city of Jabalpur."

15/ In view of the above judgment and keeping in view the pleading incorporated by the plaintiff by way of amendment and also considering the fact that parties had adduced the evidence in this regard and after appreciating the evidence the courts below have also recorded finding about non availability of alternate accommodation, I am of the view that the objection of the respondent challenging the decree under Section 12(1)(f) of the Act on this ground cannot be sustained.

16/ Counsel for the appellants has placed reliance upon the judgment of the Supreme court in the matter of *National Textile Corporation Limited Vs. Nareshkumar Badrikumar Jagad & others* reported in (2011) 12 SCC 695 in support of his plea that in absence of the pleading the evidence produced by the parties cannot be considered. The appellants cannot be given the benefit of said judgment since the present is not a case where there is absolutely no pleading about non-availability of alternate accommodation. Even if the plea raised by the respondent in this regard is vague, the parties have proceeded on the said plea and have adduced evidence in regard to the availability/non-availability of alternate accommodation and after appreciating the evidence, the finding has also been recorded by the courts below. Counsel for the appellants has also placed reliance upon the judgment of this Court in the matter of *Raj Kumar Jain Vs. Usha Mukhariya* (Smt.), reported in 2009(2) MPHT 228, but that was a case where neither there was any averment in the plaint nor any evidence was led to prove that the plaintiff has no other reasonable suitable non- residential accommodation of her own in the town concerned. That was a case of total absence of pleading and proof relating to other alternate suitable accommodation but present case stands on different footing.

17/ Thus keeping in view the aforesaid position in law and considering the findings recorded by the two courts below, I am of the view that the courts below have committed no error in passing the decree under Section 12(1)(f) of the Act by recording the finding in favour of respondent in respect of non availability of alternate accommodation.

Question No.(f).

18/ This question relates to the rejection of the application under Order 6

Rule 17 CPC filed by the appellants before the first appellate court in respect of the certain construction made by the respondent pending the suit.

19/ Learned counsel for the appellants submits that the lower appellate court has committed an error in rejecting the application under Order 6 Rule 17 CPC whereas on account of the subsequent event and construction of additional 12 rooms the bonafide need had come to an end.

20/ Learned counsel for the respondent opposing the said arguments has submitted that the lower appellate court has rightly rejected the said application and the alleged construction has no effect on the need proved by the respondent.

21/ Having heard learned counsel for the parties and on perusal of the record, it is found that before the lower appellate court, the appellants had filed an application under Order 6 Rule 17 CPC proposing to raise the plea that during pendency of the suit and appeal, the respondent had constructed 12 rooms which had satisfied the needs setup by the respondent in the plaint. The said application was opposed by the respondent and was rejected by the lower appellate court. The lower appellate court while rejecting the application has assigned cogent reason. The lower appellate court has noted that the respondent opposing the application under Order 6 Rule 17 CPC had filed the application for appointment of Commissioner so that the real position of construction on the spot could be brought on record but the said application for appointment of Commissioner was opposed by the appellants themselves. This indicates that the appellants were not interested to bring on record the correct position in respect of the alleged construction. The lower appellate court has also noted that the Commissioner was appointed by the trial court and he was also examined who had denied any construction behind the suit shop or in the passage. The court has also noted that 12 rooms as alleged cannot be constructed overnight. The appellants had filed the application at the final hearing stage with an intention to delay the proceedings. The reasons assigned by the court below for rejection of the application under Order 6 Rule 17 CPC are just and proper therefore, no error has been committed by the lower appellate court in rejecting the application under Order 6 Rule 17 CPC. The counsel for the appellants in this regard has placed reliance upon the judgment of the Supreme court in the matter of *Hasmat Rai and another Vs. Raghunath Prasad*, reported in AIR 1981 SC 1711 and in the matter of *Ram Kumar Barnwal Vs. Ram Lakhan* (dead), reported in (2007) 5 SCC

660 in support of the plea that in an eviction suit, the subsequent event relating to the satisfaction of the landlord's need on account of the obtaining alternate accommodation is relevant but in the present case the first appellate court has not rejected the appellant's application on the ground that subsequent event cannot be brought on record but it has been rejected finding that the application was not filed bonafidely.

22/ Keeping in view the aforesaid, the question (f) is answered in favour of the respondent by holding that the lower appellate court has not committed any error in rejecting the application under Order 6 Rule 17 CPC.

Questions No.(h) & (i).

23/ These questions relate to the grant of decree for eviction under Section 12(1)(b) of the Act on the ground of subletting the tenanted premises.

24/ Learned counsel for the appellants submits that no issue was framed by the trial court in respect of subletting therefore, no decree under Section 12 (1)(e) can be passed. He has further submitted that the suit premises was taken by appellant No. 1 for the use of appellant No. 2 and since there is no proof of parting of possession by appellant No. 1 in favour of appellant No. 2 therefore, the decree of eviction on the ground of subletting cannot be passed.

25/ As against this, learned counsel for the respondent has submitted that there is pleading about subletting and parties have led evidence and the finding has been recorded, therefore, absence of framing of issues would not be fatal. He has referred to the pleading contained in the plaint as well as the written statement in this regard.

26/ So far as non framing of issue about subletting is concerned, since both the parties were aware of the said ground taken by the plaintiff in the suit and had also adduced the evidence in this regard, therefore, non framing of issue would not be fatal. The Supreme court in the matter of *Nagubai Ammal and others Vs. B. Shama Rao and others,* reported in AIR 1956 Sc 593 has held that general rule that the evidence led by the parties on one issue should not be made the foundation for the decision of another and different issue, which was not present to the minds of the parties and on which they had no opportunity to adduce evidence, has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon and adduce evidence relating thereto. In the matter of *Sree Swayam Prakash Ashramam and Another Vs.*

G.Anandavally Amma and others, reported in (2010) 2 SCC 689, the Supreme Court has held that if despite absence of specific issue, parties had understood their case and for purpose of proving and contesting it they had adduced evidence, the absence of issue is not material. This Court in the matter of *Indira Kumari D/o Sagarmalji Jain Vs. Vishnukumar S/o Nathulalji Pawar,* reported in 2008(1) MPLJ 349 has taken the view that when the parties are aware of the case then non framing of a particular issue pales into insignificance and non framing of issue would have no impact. In the present case though no issue in respect of subletting has been framed by the trial court but the said ground was taken in the plaint and was also responded, in the written statement. The parties had also adduced evidence on that issue and thereafter the finding has been recorded by the courts below holding that the appellants had sublet the suit premises. In this case admittedly the appellant No. 1 to whom the suit premises was given on rent is not in possession of the same and the respondent has established that the appellant No. 2 is in exclusive possession of the suit premises. In view of the judgment of the Supreme court in the matter of *Celina Coelho Pereira (Ms) and others Vs. Ulhas Mahabaleshwar Kholkar and others*, reported in (2010) 1 SCC 217 once it is established that a party other than the tenant is in exclusive possession of the premises, presumption of subletting may be raised and that would amount to proof unless rebutted. The appellants have failed to rebut the same.

27/ Counsel for the appellants has placed reliance upon the judgment of the Supreme Court in the matter of *Fiza Developers and Inter-Trade Private Limited Vs. AMCI (India) Private Limited and another,* reported in (2009) 17 SCC 796 but the benefit of the said judgment cannot be given to the appellants in view of the fact that in the present case, the parties were aware of the ground of subletting and they had also adduced evidence in this regard and the finding has been recorded by the court below in this regard. Counsel for the appellants has also placed reliance upon the judgment of the Supreme Court in the matter of *Mahendra Saree Emporium (II) Vs. G.V. Srinivasa Murthy* reported in (2005) 1 SCC 481, but in the present case the appellants have not proved that they are in legal possession of the suit premises. In the said judgment also it has been held that the landlord can discharge the burden by adducing prima facie proof that the alleged sub-tenant is in exclusive possession of the premises and presumption of subletting may then be raised and would amount to proof unless rebutted. Counsel for the appellants has

placed reliance upon the judgment of the Supreme court in the matter of *Vaishakhi Ram and others Vs. Sanjeev Kumar-Bhatiani,* reported in (2008) 14 SCC 356 but in terms of the said judgment also, the respondent in the present case has proved exclusive possession of the sub-tenant.

28/ In view of the aforesaid analysis, it is held that though no issue was framed relating to sublet under Section 12(1) (b) of the Act but since the said ground was pleaded and the parties had understood the said ground and had adduced evidence in this regard, therefore, considering the same, the courts below have committed no error in passing the decree under Section 12(1)(b) of the Act.

29/ In respect of the ground of eviction under Section 12(1)(b) of the Act, both the courts below have reached to the conclusion that the suit premises has been sublet by the appellant No. 1 to appellant No. 2. The said finding is a concurrent finding of fact. The lower appellate court in this regard has taken into account the oral statement of D.W.-1 appellant himself as also Ex. P-2 which is the rent note. The admission made by appellant No. 1 in his statement before the trial Court has been considered and it has also been found that Ex.P-2 rent note does not contain the signature of appellant No. 2 Shashi Kumar, therefore, the stand of appellant No. 1 that Ex.P-2 contains signature of appellant No. 2 has been found to be false. Appellant No. 2 has been found to be in exclusive possession of the property but appellant No. 2 has not entered into the witness box to rebut the plea of subletting. Thus, it is held that the courts below were justified in holding that the ground under Section 12(1)(b) is made out.

30/ In view of the aforesaid analysis, the substantial questions 2(h) & (i) are answered against the appellants and in favour of respondent by upholding the decree of eviction under Section 12(1)(b) of the Act.

31/ Parties are also heard on IA No. 4166/11 filed by the appellants before this Court under Order 6 Rule 17 of CPC for amending para 4 of written statement and proposing to raise the plea about the vacating of another tenanted premises of the tenant Balram-Ramchandra Porwal and satisfaction of the need.

32/ This Court vide order dated 13/2/13 had directed that the said IA will be considered at the time of final hearing. Accordingly, counsel for the parties are heard on this IA.

33/ Counsel for the appellants submits that pending the appeal another

tenanted premises has been vacated by the tenant Balram-Ramchandra Porwal, therefore, alternate suitable accommodation has become available to the respondent and the suit is required to be dismissed.

34/ As against this, counsel for the respondent has pointed out that since the need is for expansion of the medical profession and hospital by the respondent's son, therefore, in respect of three tenanted premises, three suits were filed which were decreed and against which three appeals were preferred before this Court. He has further submitted that out of these three appeals, two appeals are analogously heard, whereas the third appeal was decided earlier affirming the decree of eviction and in pursuance to the said decree, Balram-Ramchandra Porwal has vacated the tenanted premises. Thus vacation of said premises by Balram-Ramchandra Porwal cannot be said to have satisfied the need of tenant.

35/ Keeping in view the facts which have been pointed out by counsel for the respondent, I find that the application has not been filed bonafidely and it has been filed only with a view to prolong the proceedings and need of the respondent is not satisfied on vacating the other premises by Balram Ramchandra Porwal. Accordingly IA No. 4166/11 is rejected.

36/ Counsel for the appellants has further prayed for framing of additional substantial questions of law submitting that the respondent plaintiff herself has not been examined therefore, the suit should have been dismissed. In this regard, it is worth noting that the suit was for the bonafide need of respondent's husband and her son and both these persons have been examined before the trial Court. The persons who have been examined before the trial Court had personal knowledge of the need. It has also been pointed out that husband of respondent was the power of attorney holder of the respondent and he has been examined before the trial court. This Court in the matter of *Sujata Sarkar Vs. Anil Kumar Duttani,* reported in 2009(2) MPLJ 156, has held that non examination of plaintiff to support her claim in respect of bonafide requirement of the accommodation for business of her son is not fatal in every case. In the present case, the evidence has been brought on record extensively through the oral and documentary evidence and no evidence has been withheld and the plaintiff could not depose before the court in person on account of her old age and ill health. In these circumstances I am of the view that the additional question which is proposed to be formulated by the counsel for the appellants before this court does not arise in the present matter.

37/ In view of the aforesaid analysis, this appeal is dismissed and the decree of eviction under Section 12(1)(b) and 12(1)(f) of the Act is affirmed.

38/ Counsel for the appellants in alternative, has prayed for time to vacate the suit premises.

39/ Learned counsel for the respondent has not objected to the said prayer but has submitted that a longer period may not be granted to the appellants to vacate the suit premises.

40/ Considering the submissions, the appellants are granted time to vacate the suit premises upto 31.3.2014 on the following conditions:-

(1) The appellants will furnish an undertaking before the trial Court within 4 weeks from today stating that they will handover the peaceful vacant possession of the suit premises to the respondent on or before 31.3.2014.

(2) The appellants will comply with the money part of the decree within 6 weeks from today.

(3) The appellants will continue to deposit the rent of the suit premises on or before 7th of each month.

(4) The appellants will not create any third party right on the suit premises in the meanwhile.

Appeal dismissed.

I.L.R. [2013] M.P., 2934
APPELLATE CIVIL
Before Mr. Justice A.K. Sharma
M.A. No. 2046/2013 (Jabalpur) decided on 20 November, 2013

BAIJANTI (SMT.) & ors. ...Appellants
Vs.
LAXMI PRASAD KANOUJIA & anr. ...Respondents

Motor Vehicles Act (59 of 1988), Section 163(a) & Civil Procedure Code (5 of 1908), Order 23, Rule (1)(3) **- First claim petition was withdrawn considering some technicalities, but without obtaining liberty to file fresh claim petition - Held - Motor Vehicle Act is beneficial piece of legislation meant for the benefit of the appellants/claimants - Rules and Procedure are meant to advance the cause of justice rather**

than scuttle the same on hyper technicalities - Learned Tribunal is not justified in rejecting the claim by considering the provisions of Order 23 Rule (1)(3) of C.P.C. - Appeal allowed. (Para 4 & 6)

मोटर यान अधिनियम (1988 का 59), धारा 163(ए) एवं सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23, नियम(1)(3) – कुछ तकनीकी बातों को विचार में लेते हुए प्रथम दावा याचिका को वापस लिया गया, किन्तु नई दावा याचिका प्रस्तुत करने का स्वातंत्र्य अभिप्राप्त किये बिना – अभिनिर्धारित – मोटर यान अधिनियम एक हितकारी विधान है जो अपीलार्थीगण/दावाकर्ताओं के हित के लिये बनाया गया है – नियम एवं प्रक्रिया, न्याय हेतुक के अग्रसरण के लिये है और न कि अति तकनीकी बातों पर उसे विफल बनाने के लिये – सि.प्र.सं. के आदेश 23 नियम(1)(3) के उपबंधों को विचार में लेते हुए विद्वान अधिकरण द्वारा दावा खारिज किया जाना न्यायोचित नहीं – अपील मंजूर।

Case referred :

Civil Rev. No. 4995/2008 (Bimla Devi & anr. Vs. Raj Bala & ors.) dated 10.03.2009.

Kapil Patwardhan, for the appellants.
Raghvendra Kumar, for the respondent No.1.
Shreyas Pandit, for the respondent No.3.

JUDGMENT

A.K. SHARMA, J. :- This appeal has been filed under Section 163 (a) of the Motor Vehicles Act against the order dated 03.05.2013 passed in Claim Case No. 91/12 by learned 3rd Additional District Judge, Motor Accident Claims Tribunal, Jabalpur (M.P.) whereby the claim case filed by the appellants/claimants has been dismissed as barred by provisions of Order 23 Rule 1 of CPC.

2. The appellants/claimants have filed earlier claim before the Tribunal under Section 163 (A) of the Motor Vehicle Act. Thereafter, considering the technicalities the claim petition was withdrawn and thereafter, claim petition under Section 166 of the Motor Vehicle Act has been filed which has been dismissed by the learned Tribunal by impugned order on the ground that no liberty to file fresh claim petition has been obtained by the claimants and second claim is barred by provisions of Order 23 Rule 1 Sub Rule 3.

3. Learned counsel for the appellants/claimants submitted that he has prayed before the Tribunal for permission to withdraw the claim with liberty to file fresh claim but the order rejecting the earlier claim does not mention about such liberty

even then the learned Tribunal is not justified in rejecting the claim as the provisions of Order 23 Rule 1 of CPC are not applicable to the Claim Cases.

4. Learned counsel for the appellants/claimants have cited judgment by Hon'ble Punjab and Haryana High Courts passed in the matter of *Bimla Devi and another Vs. Raj Bala and others* dated 10.03.2009 in Civil Revision No. 4995/08 in which it has been held that the provisions of Order 23 Rule 1 of CPC are applicable only two civil suits besides the earlier withdrawal being a conditional withdrawal. The Motor Vehicle Act is beneficial piece of legislation meant for the benefit of the appellants/claimants. It is well settled that the rules and procedure are meant to advance the cause of justice rather than scuttle the same on hyper technicalities.

5. In the present case the appellants/claimants have withdrawn the earlier claim petition by specifically mentioning that they want to withdraw the claim due to mistake of law which means that the claim may be filed again by curing the mistake. In such a case the court must be cautious enough to grant the liberty suo motu.

6. The provisions of Order 23 Rule 1 of CPC are applicable to suits only. Therefore, the learned Tribunal is not justified in rejecting the claim by considering the provisions of Order 23 Rule (1)(3) of CPC.

7. Therefore, appeal is allowed and the impugned order passed by the learned Tribunal is here by quashed and the Tribunal is directed to proceed further with the claim case as the claim filed by the appellants/claimants is maintainable under Section 166 of the Motor Vehicles Act.

Appeal allowed.

I.L.R. [2013] M.P., 2936
APPELLATE CIVIL
Before Mr. Justice A.K. Sharma
M.A. No. 3402/2013 (Jabalpur) decided on 28 November, 2013

MANIRAM SONI ...Appellant
Vs.
KANHAIYA LAL & anr. ...Respondents

***Civil Procedure Code (5 of 1908), Order 47 Rule 1 - Review Petition* - It is condition precedent that no Superior Court should have been moved for self, same relief before filing Review Petition under**

Order 47 Rule 1(a), C.P.C. - Courts directed to obtain affidavit to the effect that no appeal has been filed against the order challenged in review. (Paras 4 to 8)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – पुनर्विलोकन याचिका – पुरोभाव्य शर्त है कि सि.प्र.सं. के आदेश 47 नियम 1(ए) के अंतर्गत पुनर्विलोकन याचिका प्रस्तुत करने से पूर्व समान अनुतोष हेतु किसी वरिष्ठ न्यायालय में प्रस्तुत नहीं – न्यायालय को इस आशय का शपथपत्र अभिप्राप्त करने के लिए निदेशित किया गया कि पुनर्विलोकन में चुनौती दिये गये आदेश के विरुद्ध कोई अपील प्रस्तुत नहीं की गई है।

Cases referred :

AIR (1996) SC 742, AIR 2005 SC 1944.

Imtiyaz Hussain, for the appellant.
Hemant Namdeo, for the respondents.

JUDGMENT

A.K. SHARMA, J. :- This appeal has been filed by the appellant decree holder under Order 43 Rule 1(w) of Code of Civil Procedure, 1908 against the order dated 01.11.2013 passed in M.J.C No. 08/13 by learned 1st Additional District Judge, Hoshangabad, (MP) by which review petition filed by the defendant/ judgment debtor has been allowed, setting aside the judgment and decree dated 27.07.2007 passed in Civil Suit No. 104-A/2006 by this same Court.

2. Learned counsel for the appellant submitted that the appellant has filed First Appeal No. 732/07 before this Court against the judgment and decree dated 27.07.2007 and thereafter, he has filed the application for review petition before the trial Court.

3. Learned counsel for the appellant has drawn attention towards the provision of Order 47 Rule 1 of CPC has submitted that the application for review of judgment can be filed by a person aggrieved by judgment or order, the appeal which is allowed but from which no appeal has been preferred, therefore, after filing of appeal the review petition before the trial Court was not maintainable and this fact suppressed by the respondents/ judgment debtor before the learned trial Court.

4. Learned counsel for the appellant has cited judgment of Hon'ble Apex

Court passed in the matter of *M/s. Kabari Pvt. Ltd. Vs. Shivnath Shroff and others,* AIR (1996) SC (742) in which it has been held that for a review petition it is condition precedent no superior Court should have been moved for self, same relief before filing review petition under Order 47 Rule 1 (a) of CPC.

5. Learned counsel for the respondent on the other hand cited another judgment of Hon'ble Apex Court passed in the matter of *Rekha Mukherjee Vs. Ashish Kumar Das and others,* AIR 2005 SC (1944), in which it has been held that the appeal during the pendency of review petition is not maintainable but here the case is reverse the review petition has been filed after filing of the appeal before the High Court. Therefore, the judgment cited by learned counsel for the appellant is applicable to the present case.

6. Learned counsel for the respondent has submitted that the appeal before this Court is pending for payment of Court fees and since the review petition is allowed, the appeal will be withdrawn. The withdrawal of appeal filed before filing of the review petition has no effect, technically filing of the review petition is wrong and the respondent has committed one mistake by suppressing the fact of filing of First Appeal before the trial Court, while by withdrawing the appeal he will commit another mistake which is equal to fraud played upon the Court. By withdrawing the appeal as he has got the relief by suppression of fact from the trial Court, such a fraud played with the Court cannot be allowed. It is also surprising that the counsel who filed the First Appeal before this Court has also filed review petition before the trial Court. Therefore, it cannot be presumed that at the time of filing of review petition there was no knowledge of filing of appeal to the petitioner who has filed the review petition. Such a practice cannot be encouraged by the Court and person paying fraud with the Court cannot be allowed to take benefit of such fraud.

7. Therefore, appeal is allowed and the order passed by learned trial Court in the review petition dated 20.09.2013 is set aside. The respondent may raised those objection before this Court in First appeal.

8. Before parting with the case, considering the possibility of fraud to be played with the Court and further to prevent such possibility of playing fraud with the Courts, the Subordinate Court are directed to take affidavit from the petitioner filing application under Order 47 Rule 1 of CPC to the effect that no appeal has been filed against the order challenged in review.

9. The Principle Registrar General, is directed to circulate the copy of the order to all the Subordinate Courts after taking permission from Hon'ble the Chief Justice, and take necessary steps to make suitable provision in the concerned rules making it necessary to filed affidavit to the said fact while filing the application for review under Order 47 Rule 1 of CPC.

10. A copy of this order be also sent to the Secretary Bar Council of (M.P.), Jabalpur, for information and taking necessary steps to prevent such kind of misconduct by any learned member of the Bar.

11. A copy of this order be also kept with the record of F.A. No. 732/07 for consideration.

No order as to costs.

Appeal allowed.

I.L.R. [2013] M.P., 2939
APPELLATE CIVIL

Before Mr. Justice Ajit Singh & Mr. Justice N.K. Gupta
F.A. No. 605/2008 (Jabalpur) decided on 19 December, 2013

SHIKHA TAMRAKAAR ...Appellant
Vs.
ROHIT KUMAR TAMRAKAAR ...Respondent

A. Hindu Marriage Act (25 of 1955), Section 13(1) - Cruelty - **Evidence of witnesses with regard to payment of Rs. 1 lac to husband are not similar - Appellant also admitted that her sister-in-law is not residing with the parents of Husband but had implicated her in the F.I.R. - F.I.R. was lodged after filing of the divorce petition - Conduct of the appellant was cruel towards her in-laws - Appellant also falsely propagated that her father-in-law tried to commit rape upon her - Decree of divorce rightly granted. (Paras 6 to 20)**

क. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) – क्रूरता – पति को रू. 1 लाख अदा करने के संबंध में साक्षियों के साक्ष्य में समानता नहीं – अपीलार्थी ने यह भी स्वीकार किया कि उसकी ननद, पति के माता–पिता के साथ निवासरत नही थी परंतु उसे प्रथम सूचना रिपोर्ट में आलिप्त किया गया – प्रथम सूचना रिपोर्ट को विवाह विच्छेद याचिका प्रस्तुत करने के पश्चात दर्ज किया गया – अपने ससुरालवालों के साथ अपीलार्थी का व्यवहार क्रूरता का था – अपीलार्थी ने

मिथ्या प्रचार भी किया कि उसके ससुर ने उसके साथ बलात्कार कारित करने का प्रयास किया – विवाह विच्छेद की डिक्री उचित रुप से प्रदान की गई।

B. Hindu Marriage Act (25 of 1955), Section 13(1) - Cruelty - False F.I.R. - **Respondent did not amend the petition alleging cruelty by appellant by lodging false F.I.R. - Decree of divorce cannot be passed on the ground of lodging of false F.I.R. - However, the filing of false F.I.R. can be considered while considering the conduct of the appellant. (Para 13)**

ख. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) – क्रूरता – मिथ्या प्रथम सूचना रिपोर्ट – प्रत्यर्थी ने अपीलार्थी द्वारा मिथ्या प्रथम सूचना रिपोर्ट दर्ज करके क्रूरता का अभिकथन करते हुए याचिका संशोधित नहीं की – मिथ्या प्रथम सूचना रिपोर्ट दर्ज किये जाने के आधार पर विवाह विच्छेद की डिक्री पारित नहीं की जा सकती – किन्तु अपीलार्थी का आचरण विचार में लेते समय, मिथ्या प्रथम सूचना रिपोर्ट पेश किये जाने का विचार किया जा सकता है।

C. Hindu Marriage Act (25 of 1955)] Section 13(1) - Cruelty - Meaning of - **Law discussed. (Para 18)**

ग. हिन्दू विवाह अधिनियम (1955 का 25), धारा 13(1) – क्रूरता – का अर्थ – विधि विवेचित।

Cases referred :

2013(4) MPHT 1(SC), (2007) 4 SCC 511.

Dinesh Koshal, for the appellant.
Ashish Sinha, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **N.K. Gupta, J. :-** The appellant (wife) has preferred the present First Appeal against the judgment and decree dated 20.8.2008 passed by the Principal Judge, Family Court, Bhopal in RCC No.226-A/2007 whereby a decree of divorce was passed in favour of the respondent (husband).

2. The facts of the case in short are that the respondent/husband has moved a petition under Section 13 of the Hindu Marriage Act to get a decree of divorce in his favour on the basis of ground of cruelty and desertion for more than two years. It was pleaded that the marriage of the respondent and the appellant took place on 29.4.2004 but soon after the marriage the appellant

started misbehaving with the respondent and his parents. She wanted to live separately. In the month of August the appellant went to her parents house at Sironj on the occasion of *Raksha Bandhan.* Again when she came back she started quarreling with the respondent and his family members. She was not ready to prepare meals etc. She was consuming time by talking on phone and mobile with her family members and unknown persons and when she was prohibited to do so, her behavior was quarrelsome with the parents of the respondent. She was often giving a threat that she would get the parents of the respondent in police custody in a case of dowry cruelty. She gave threat for 2-3 times that either she would consume poison or she would commit suicide by burning. On 3.2.2005 she tried to pour kerosene upon her and to commit suicide. Under such circumstances, the respondent started living with the appellant in a separate house which was taken on rent. The appellant and her relatives publicized a wrong fact against the father of the respondent that he tried to commit rape upon the appellant. On 4.3.2005 the appellant went to Sironj with her brother and thereafter, she did not come back and deserted the respondent therefore, it was prayed that the decree of divorce may be passed.

3. In reply the appellant denied all the allegations made in the petition. On the contrary she alleged that a demand of Rs.5 lakhs and a motor cycle was made by the respondent and his parents. Since the respondent had started a business and from the income of that business it was not possible for the respondent to live with his parents and therefore, respondent himself arranged a separate residence for the respondent and appellant. The respondent also directed the appellant to fulfill the conditions of his parents. The appellant resided with the respondent up to 27.4.2007 and thereafter, she was forced to leave the house due to assault upon her by the respondent and therefore, on 27.4.2007 she went to Sironj with her minor child and thereafter, she had lodged an FIR at Mahila Police Station, Bhopal. She tried to cooperate with the respondent and his parents but, due to cruelty of the respondent and his parents she could not live with the respondent and therefore, it was prayed that the petition may be dismissed with exemplary cost of Rs.25,000/-.

4. The learned Principal Judge, Family Court after framing issues recorded the evidence adduced by the parties and after hearing the learned counsel for the parties passed a decree of divorce in favour of the respondent on the basis of the ground of "cruelty".

5. The learned counsel for the parties heard at final hearing by us.

6. In the present case, neither party proved any document in its favour. The case is dependent upon the oral evidence of the witnesses produced by the parties. It is a case of oath against oaths and therefore, it was for the trial court to assess that whose statement on oath was correct. The appellant could not rebut the allegations made by the respondent and the statements given by respondents Rohit Tamrakaar (PW1) and Ramesh Prasad (PW2) could be believed. The respondent had raised so many allegations about the behavior of the appellant but, in reply the appellant relied upon her FIR and an allegation that she was being harassed for dowry demand and thereafter, she was thrown out from the house on 26.4.2007. In that respect if the statements of Shikha (DW1) and Mukesh (DW2) are considered then they have stated that there was a demand of Rs.5 lakhs from the side of the respondent and his parents and therefore, a sum of Rs.1 lakh was paid to the respondent. However, there is a material contradiction between the statements made by Shikha and Mukesh.

7. Firstly that, Shikha has stated that a sum of Rs.1 lakh was paid by her father and brother in the house of Bhopal i.e when they were residing with the parents of the respondent whereas, Mukesh has accepted in para 1 of his statement that the sum of Rs.1 lakh was given to the respondent when he was residing in a rented house. Secondly, Shikha has stated that the payment of Rs.1 lakh was given by her father and brother whereas Mukesh, did not say that at the time of payment his father was present. On the contrary he has stated that he paid a sum of Rs.1 lakh in two installments. In para 4 he has stated that he gave a sum of Rs.1 lakh in two installments but, he could not tell the date on which such payment was made. If a sum of Rs.1 lakh was given to the respondent in two instalments then there should be similarity in the statements of Shikha and her brother Mukesh about the mode of payment and place of payment. Looking to their material contradictions, it would be apparent that the payment of Rs.1 lakh was never made to the respondent and a fake case has been prepared by the appellant in that respect.

8. Also it would be apparent that the appellant lodged an FIR against the respondent and his parents relating to cruelty on the basis of the dowry demand. Though the copy of FIR was not filed in the case and that is a separate matter therefore, that matter should not be considered in the present case in a detailed manner otherwise a prejudice may be caused in the criminal case. However,

the conduct of the appellant can be observed on the basis of that FIR. Shikha (DW1) has accepted that marriage of the sister of the respondent took place on 3.2.2006 and thereafter, she was residing at Betul. The appellant was asked as to whether on 26.4.2007 the sister of the respondent was at Bhopal or not then the appellant replied that she was residing in the rented house whereas, the sister of the respondent if she would have come from Betul to Bhopal, she must be with her parents and therefore, she could not know as to whether on 26.4.2007 she was at Bhopal or not. However, the appellant has accepted in para 6 of her evidence that in the FIR lodged against the respondent and his family members, name of his sister was included in that FIR for the incident took place on 26.4.2007 though at that time according to the appellant she was not residing with the parents of the respondents and there was no possibility of interference done by the sister of the respondent in the family matters of the appellant and therefore, it would be apparent that fake contents were shown in the FIR lodged by the appellant against the respondent.

9. As discussed above, Mukesh or his father never paid any some to the respondent relating to dowry demand and therefore, prima facie it shall be presumed that there was no dowry demand from the side of the respondent and his parents. Also if there was a dispute for the dowry demand then the appellant should have been ousted from the very beginning or she would have lodged a complaint before Police Station Mahila Thana, Bhopal prior to filing of divorce petition. But she had lodged an FIR on 27.4.2007 or thereafter whereas, the respondent had already filed the petition under Section 13 of the Hindu Marriage Act on 26.4.2007.

10. If the appellant did not leave the house of the respondent on 4.3.2005 then what was the necessity to the parties for reconciliation proceedings. Mukesh (DW2) has accepted in Para 6 of his statement that his parents and various relatives went to the house of the respondent for redressal of the problem. If the appellant was ousted from the house after filing of the divorce petition and notice of the divorce petition was served then reconciliation between the parties could be done before the trial Court and there was no need to visit the parents of the appellant along with relatives to the house of the respondent for redressal of the problem. Hence by evidence of Mukesh (DW2) it would be apparent, that the appellant pleaded a false case that she was ousted on 26.4.2007.

11. If the appellant was residing with the respondent in the year 2005

then her child must have been born at Bhopal and therefore, the papers relating to admission of the appellant in a particular hospital could be placed on record to show that delivery of the child took place at Bhopal, but no such paper is produced. If the delivery of the child had taken place at Bhopal then the respondent would have pleaded in his petition that the appellant was not permitting his parents to meet the child whereas, the respondent stated such a fact in his statement but, it was not pleaded in his petition which indicates that at the time of filing of the petition no such situation arose before the respondent and therefore, it is established that delivery of the child took place to the appellant at Sironj and not at Bhopal.

12. The respondent has pleaded that he lodged a report to the Police and a notice was issued from Pariwar Parmarsh Kendra to the appellant. She came and attended the conciliation proceeding of Pariwar Parmarsh Kendra and she did not come back with the respondent to reside with him though an assurance was given by her at Pariwar Parmarsh Kendra. If the appellant was residing with the respondent at that time then there was no need to the respondent to move an application before the Pariwar Parmarsh Kendra and to submit a reply. If the respondent had done harassment as alleged then the appellant must have intimated her difficulties before the Pariwar Parmarsh Kendra and she would have told about the harassment relating to dowry demand. The appellant could file the proceedings of the Pariwar Parmarsh Kendra to establish that she told at the Pariwar Parmarsh Kendra about dowry demand and harassment but, such documents were not produced by the appellant. Under such circumstances, *prima facie* it appears that the FIR lodged by the appellant was nothing but a counter blast after getting a notice of the divorce petition filed by the respondent or knowledge about the petition.

13. It is argued that filing of a false FIR against the husband and parents is again a ground of cruelty and in support of the contention the judgment passed by Hon'ble the Apex Court in the case of *"K. Srinivas Rao Vs. D.A. Deepa"* (2013 (4) MPHT 1 (SC)) is cited in which it is laid that if a false FIR relating to dowry demand and harassment is filed by the wife then it is also an act of cruelty against the respondent and his family members. In the present case it would be apparent that the respondent did not take such a plea in his petition. The filing of the FIR by the appellant was a subsequent event after filing of the petition and therefore, it was for the respondent to amend his petition and the instance of cruelty would have been added that the appellant lodged a false FIR for offence punishable under section 498-A of I.P.C. However,

the respondent did not modify his petition and therefore, by a subsequent conduct of the appellant a decree of divorce cannot be passed due to cruelty done by the appellant by filing an FIR. The evidence should be looked into according to the pleadings done by the parties. However, the conduct of the appellant for filing a false FIR may be considered as her conduct relating to her previous activities done before the filing of the divorce petition.

14. On the basis of the aforesaid discussion, it is duly established that the appellant left the house of the respondent on 4.3.2005 and thereafter, getting the notice of the divorce petition she had lodged a false FIR against the respondent and tried to create a new factual position that she resided with the respondent upto 26.4.2007. In the present case, it was duly proved that the appellant deserted her husband for more than two years before filing of the petition and therefore, the trial Court would have given a decree of divorce on the basis of the ground "desertion". Since the respondent did not file any cross objection or a counter appeal in the present case therefore, this Court cannot pass a decree of divorce on the basis of two years desertion done by the appellant. However, the evidence of the appellant may be accepted that the respondent deserted her without any reason which also amounts to a cruelty.

15. The learned counsel for the respondent has filed a copy of the judgment dated 31.3.2010 passed by the Second Additional Sessions Judge, Bhopal in Criminal Appeal No.476/2009 whereby the respondent was acquitted from the charge of Section 498-A of I.P.C to show that a false case was lodged by the appellant against the respondent but, as discussed above that fact cannot be considered in the present case because the respondent did not take a ground in his petition that he was falsely prosecuted by the appellant by lodging such an FIR.

16. On the basis of the aforesaid discussion, it is apparent that no demand of dowry was made either by the respondent or his parents. The appellant was not ousted on 26.4.2007 and therefore, she had no reason to leave the house of the respondent. Under such circumstances, it would be apparent that the respondent proved the fact that the appellant deserted him since 4.3.2005 without any reasonable cause. The evidence of Rohit Tamrakaar (PW1) is also accepted that the behavior of the appellant was quarrelsome with the respondent and his parents therefore, the respondent was forced to take a separate house on rent to keep the appellant. It was the height of cruelty that on 3.2.2005 she gave a threat to commit suicide, so that the

respondent should leave the house of his parents. The evidence of Rohit can be accepted on the ground that she applied before the Pariwar Parmarsh Kendra but, the appellant did not follow the compromise which took place between them at Pariwar Parmarsh Kendra.

17. Ramesh Prasad (PW2) has stated that the appellant made an allegation upon the father of the respondent that he tried to commit rape upon her whereas, no such allegation is made by the appellant even in the FIR lodged by her and therefore, it would apparent that she made a false, nasty allegation against her father-in-law amongst her relatives and relatives of the respondent which also amounts to cruelty to the respondent.

18. The word "cruelty" is not defined in the Hindu Marriage Act in a specific manner. However, it depends upon the fact of each and every case. Hon'ble the Apex Court in the case of *"Samar Ghosh Vs. Jaya Ghosh"* ((2007) 4 SCC 511) in para 101 gave so many illustrations about mental cruelty. Out of them illustrations (i), (ii), (iv), (v) and (vi) may be perused which are as under :

> "101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:
>
> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.
>
> (iii) .....
>
> (iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) ....."

19. If the illustrations given by Hon'ble the Apex Court in the case of *Samar Ghosh* (supra) are considered in the present case then it would be apparent that the appellant was quarrelsome with her husband and his parents, she was not making the meals etc. for her husband and family members, she forced her husband to reside away from his parents, for such separation she gave a threat to commit suicide, thereafter, she deserted the respondent without any reason on 4.3.2005. The respondent tried to resolve the matter but the appellant did not try to resolve the matter and continued to desert the respondent. She propagated amongst the family members and Society of Tamrakaar Samaj that the father of the respondent tried to commit rape upon her and after considering the consolidated effect of the overacts done by the appellant, it would be apparent that the appellant had done the cruelty with the respondent and his parents and therefore, if a decree of divorce is passed by the learned Principal Judge, Family Court, Bhopal against the appellant on the ground of cruelty then it is based on the cognate evidence and considering the conduct of the appellant. The appellant could not establish any ground to show that any interference can be done in the decree and judgment passed by the trial Court.

20. On the basis of the aforesaid discussion there is no reason to disturb the decree of divorce passed by the trial Court and therefore, the appeal filed by the appellant cannot be accepted. Consequently, the appeal filed by the appellant is hereby dismissed. The judgment as well as the decree passed by the trial Court is hereby confirmed. The parties shall bear their own costs.

21. The copy of the judgment along with the appellate decree shall be sent to the trial Court along with is record for information.

Appeal dismissed.

I.L.R. [2013] M.P., 2948
APPELLATE CRIMINAL
Before Mr. Justice A.K. Shrivastava
Cr. A. No. 2176/1996 (Jabalpur) decided on 1 May, 2012

RAM CHARAN ...Appellant
Vs.
STATE OF M.P. ...Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8(b) r/w 20(b)(i) - Cautious and exclusive possession **- 155 plants of cannabis (Ganja) were found planted - They were uprooted and seized - FSL examiner found presence of Ganja - Held - Since the prosecution has utterly failed to prove the cautious and exclusive possession of the appellant on the field of Survey No. 500 from which the Ganja plants were seized - The time of seizure is also quite different - Entire prosecution case becomes highly suspicious - Conviction and sentence set aside. (Paras 2 & 14)**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8(बी), सहपठित 20(बी)(i) – सचेत और अनन्य कब्जा – गांजे के 155 पौधे लगे हुए पाये गये–उन्हें उखाड़ा गया और जब्त किया गया–एफ.एस.एल. परीक्षक ने गांजे की उपस्थिति पायी–अभिनिर्धारित–चूंकि अभियोजन सर्वे क्र. 500 के खेत पर अपीलार्थी का सचेत और अनन्य कब्जा साबित करने में पूरी तरह से असफल रहा है, जहां से गांजे के पौधे जब्त किये गये थे–जब्ती का समय भी बिल्कुल अलग है–संपूर्ण अभियोजन प्रकरण अति संदेहास्पद बन जाता है–दोषसिद्धि और दण्डादेश अपास्त।

Cases referred :

2004(1) Crimes 286, 2005 SCC (Cri) 1037, 2005 SCC (Cri) 1050.

Riyaz Mohammad, for the appellant.
Yogesh Dhande, P.P. for the respondent/State.

JUDGMENT

A.K. Shrivastava, J. :- Feeling aggrieved by the judgment of conviction and order of sentence dated 30.10.1996 passed by learned Special Sessions Judge, Sehore in Special Case No.176/1995 convicting the appellant under Section 8(b) read with Section 20(b)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short "the Act") and thereby sentencing him to suffer R.I. for 5 years and fine of Rs.10,000/-; in default further R.I. for

6 months, the appellant has taken the shelter of this Court by preferring this appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

2. In brief the case of the prosecution is that one Manoj Mishra, Station House In-charge of Police Station Jawar, Tehsil Ashta, District Sehore received an information on 7.8.1995 at 2.50 A.M. that in the field Survey No.500 which is being possessed by the appellant, the plants of cannabis (ganja) are planted for which he has no licence. After reducing the said information in the Roznamcha and after performing the necessary formalities the raiding party proceeded to the spot in the late night where in the presence of the appellant in Survey No.500, 155 plants of ganja were found planted. All the plants were uprooted and samples were taken out from the bulk of plants which were uprooted. The samples were sent to the FSL Examiner, who found the presence of the ganja in it.

3. The Investigating Agency arrested the appellant and after completing the investigation a charge-sheet was submitted in the Special Court who framed the charges punishable under Section 8(b)/20 of the Act, which the appellant denied and requested for the trial.

4. In order to bring home the charges the prosecution examined as many as 15 witnesses and also placed Ex.P-1 to P-59(C) the documents on record. The defence of the appellant is of false implication and the same defence he set forth in his statement recorded under Section 313 Cr.P.C. and in defence he examined one Babulal that the photographs which have been taken indicating the cultivation of the ganja plants were not planted in Survey No.500.

5. The learned Special Judge on the basis of the evidence placed on record came to hold that the charges are proved and eventually convicted the appellant and passed the sentence which I have mentioned herein-above.

6. In this manner this appeal has been filed by the appellant assailing his judgment of conviction and order of sentence.

7. The contention of the learned counsel for the appellant is that looking to the testimony of the Patwari of the village, namely, Dhoolsingh (PW-12) it cannot be said that appellant was having exclusive possession over the area where the impugned plants of ganja were planted and were seized and if that would be the position, learned counsel submits that since the prosecution has utterly failed to prove the cautious and exclusive possession of the appellant on the land in question, his conviction is bad in law. In support of his contention,

learned counsel has placed heavy reliance on the decision of *Supreme Court, Alakh Ram vs. State of U.P.,* 2004 (1) Crimes 286. By inviting my attention to the seizure memo of the ganja plants it has been contended by learned counsel that the seizure has been made on 7.8.1995 at 5.30 hours, although the statement of the Investigating Officer as well as the photographer who took the photographs of the planted plants in the field, shows that in the late night the seizure was made and therefore, the entire case of the prosecution becomes highly suspicious.

8. On the other hand, Shri Dhande, learned Public Prosecutor argued in support of the impugned judgment and prayed that the appeal be dismissed.

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

10. In the present case, the allegation against the appellant is that he was in exclusive possession of Survey No.500 and was cultivating the plants of ganja. In order to prove the factum of possession, the prosecution has examined the Patwari of the village, namely, Dhoolsingh (PW-12). In para-12 of his examination-in-chief this witness has stated that Survey No.500 on which the plants of ganja were planted is a joint holding having several Bhumiswamis and their names are entered in the revenue record in that capacity. In examination-in-chief itself this witness has stated that he cannot say that exclusively appellant Ramcharan cultivates the Survey No.500. This witness was not declared hostile by the prosecution and therefore, according to me, the prosecution is bound by the statement given by him. In this context, I may profitably place reliance on two decisions of Supreme Court, they are *Mukhtiar Ahmed Ansari v. State* (NCT of Delhi), 2005 SCC (Cri) 1037 and *Raja Ram v. State of Rajasthan,* 2005 SCC (Cri.) 1050. Thus, the prosecution is bound by the statement given by the Patwari that he cannot say that the Survey No.500 in which the ganja plants were seized was exclusively being cultivated by the present appellant only. Apart from this, when Patwari was cross-examined he has specifically admitted in para-14 that he cannot say that which part of Survey No.500 is in the personal cultivation of which person nor there is any entry in that regard in the revenue record. In this view of the matter, from the statement of the Patwari it is not proved that the area of Survey No.500 in which the cultivation of ganja plants was there, was in exclusive possession of the appellant or being possessed by some other person.

11. The Investigating/Seizing Officer, Manoj Mishra (PW-15) in para-54

has admitted that in the spot map (Ex.P-38) he did not mention that the area in which the ganja plants are cultivated belongs to whom. Further he has admitted that in the spot map it has also not been mentioned that the lands of which cultivator are adjoining the impugned land on the Eastern, Western, Northern and Southern side. Further he has admitted that after physical verification from the Patwari he did not prepare the spot map mentioning the fact that the particular area where the plants of ganja were planted is in whose possession. In para-55 he has further admitted that he has not recorded the statement of the agriculturists whose lands are adjoining to the impugned place in order to ascertain who is in exclusive possession of the said land. Hence, from the statement of the Investigating/Seizing Officer also the cautious and exclusive possession of the appellant is not proved.

12. The learned counsel for the appellant has rightly placed reliance on the decision of Apex Court *Alakh Ram* (supra) wherein it has been held that in order to convict the accused under Section 8/20 of the Act, if there is no evidence that there was cultivation of ganja plants by the accused, he cannot be convicted. This decision is squarely applicable in the present case.

13. Apart from what I have held herein-above, on bare perusal of the seizure memo of the contraband article (ganja) (Ex.P-1) it is gathered that the ganja plants were seized on 7.8.1995 at 05.30 hours but looking to the testimony of the photographer, namely, Ramesh Chand (PW-1) who took the photographs of the land where the ganja plants were planted, it is gathered that in the late night in between 2.30 – 3.00 A.M. he went along with the raiding party to take the photographs of the contraband article (ganja) which were planted in the field. However, the Investigating Officer (Seizing Officer) Manoj Mishra (PW-15) in para-57 has admitted that in the seizure memo of the plants (Ex.P-1) it has not been mentioned that during the odd hours in the night the seizure of ganja plants was made. On the contrary, if the said seizure memo (Ex.P-1) is seen it becomes obvious that the seizure was made during the dawn hours at 5.30 A.M.

14. For the reasons stated herein-above, since the exclusive and cautious possession of the appellant on the area of the field of Survey No.500 from which the ganja plants were seized is not at all proved and further because that the time of seizure is also quite different, the entire case of the prosecution becomes highly suspicious and on the basis of the suspicion the appellant cannot be convicted.

15. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment of conviction and order of sentence is hereby set aside and the appellant is acquitted from all the charges. He is on bail, his bail bonds stand discharged. The amount of fine, if deposited, be refunded to him.

Appeal allowed.

I.L.R. [2013] M.P., 2952
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice B.D. Rathi
Cr. A. No. 2075/2006 (Jabalpur) decided on 16 July, 2013

RAKESH PATEL & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Evidence Act (1 of 1872), Section 32 - Dying declaration **- In the injury report prepared on the same day, it is mentioned that deceased was unconscious and vomiting - Doing so doctor must have taken 15 minutes - Victims brought to hospital at 10:30 - Recording of dying declaration between 11:00 to 11:15 - Therefore, it becomes extremely doubtful that deceased was in fit condition to make statement - Dying declaration neither bears the signature nor the thumb impression of deceased - No explanation by prosecution for the same - Dying declaration can hardly be sufficient as an unimpeachable document for safely basing the conviction.** **(Para 7)**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – उसी दिन तैयार किये गये क्षति प्रतिवेदन में उल्लिखित है कि मृतक अचेतनावस्था में था और उल्टियां कर रहा था – चिकित्सक को प्रतिवेदन तैयार करने में 15 मिनट लगा होगा – पीड़ित को 10.30 बजे चिकित्सालय लाया गया – मृत्युकालिक कथन 11.00 से 11.15 के बीच अभिलिखित – इसलिए, यह अत्यंत संदेहास्पद हो जाता है कि मृतक, कथन देने के लिए स्वस्थ्य स्थिति में था – मृत्युकालिक कथन पर न तो मृतक के हस्ताक्षर हैं और न ही अंगूठा निशानी – उक्त के लिए अभियोजन द्वारा कोई स्पष्टीकरण नहीं – मृत्युकालिक कथन सुरक्षित रुप से दोषसिद्धि आधारित करने हेतु अनाधिक्षेप्य दस्तावेज के रुप में वह पर्याप्त नहीं हो सकता।

Sharad Verma, for the appellants No. 1,2,4,5,6, & 7.
S.K.P. Verma, for the appellants No. 3 & 8.
Vijay Pandey, Dy. A.G. with *Yogesh Dhande, G.A.* for the respondent.

JUDGMENT

The Judgment of the Court was delivered by :

B.D. RATHI, J. :- The above named eight appellants have been convicted for an ofence under section 302/149 of the Indian Penal Code for committing the murder of Santu alias Santosh. They have also been convicted for offences under sections 307/149, 323/149, 324/149, 325/149 and 452 of the Indian Penal Code and sentenced to different terms of imprisonment with fine stipulation. Apart from this, appellant nos. 3, 4, 7 and 8 have been convicted for an offence under section 147 of the Indian Penal Code and appellant nos.1, 2, 5 and 6 have been convicted under section 148 of the Indian Penal Code. and sentenced to six months and one year rigorous imprisonment respectively. It is to be noted that in all 15 accused persons were prosecuted and the trial court has acquitted seven of them.

2. According to the prosecution case, 6/7 months prior to the date of incident appellant nos.1 and 2 had reportedly committed gang rape on the cousin of Bhumanideen (P.W.7) in which Santu alias Santosh and Ratiram (P.W.8) were important witnesses. The appellants and their family members were, therefore, exerting pressure on them to soften their stand but they declined to do so. On 13.5.2003 at about 5:00 p.m. Santu alias Santosh, Bhumanideen and Ratiram were sitting together in the house of Brajlal (P.W.6). At that time Brajlal left the house to attend the call of nature in the field. After sometime call for help from the field of Brajial was heard. Immediately thereafter the accused persons, including the appellants, armed with weapons like lathi, farsa and axe entered the house of Brajlal and caused Injuries to Santu alias Santosh, Bhumanideen, Brajial and Ratiram. The accused persons also caused injuries to Tantu Bai (P.W.15) and Amrish (P.W.16) when they intervened. All the victims were carried in a motor vehicle to the Primary Health Centre and on way Bhumanideen lodged the first information report at Police Station, Rajnagar, District Chhatarpur. In the Health Centre, Dr. Suresh Jataw (P.W.19) provided medical treatment to the victims. There Naib Tahsildar R. L. Bagari (P.W4) also recorded the dying declaration, Ex.P2, of Santu alias Santosh who later succumbed to the injuries on 14.5.2003.

3. The police, after investigation, charge sheeted 18 accused persons for committing the murder of Santu alias Santosh with a common object after forming an unlawful assembly. The police also charge sheeted them for attempting to commit the murder of Bhumanideen and causing injuries to Brajlal,

Ratiram, Tantu Bai and Amrish apart from offences under sections 452, 147 and 148 of the Indian Penal Code.

4. During the trial, the accused persons pleaded not guilty to the charges and contended that they had been falsely implicated.

5. The trial court, after appreciating the evidence and materials brought on record, disbelieved the testimony of injured witnesses Bhumanideen, Brajlal, Ratiram, Tantu Bai and Amrish as well as of the eyewitnesses namely Shyam Bai (P.W.1), Nepal Singh (P.W.10), Kalicharan (P.W.14), Rampal Singh (P.W.17) and Jitendra Singh (P.W.18). The trial court held that they are not truthful witnesses because their evidence did not corroborate with the medical evidence (injury reports). The trial court even held that the first information report was not recorded by Bhumanideen at the police station because he was unconscious. The trial court, however, relied upon the dying declaration of Santu alias Santosh and convicted the appellants because their names were found in it. The remaining seven co-accused persons were acquitted as their names did not find place in the dying declaration.

6. The State has not challenged the acquittal of seven co-accused persons by filing any appeal. And since conviction of the appellants is based solely on the dying declaration of Santu alias Santosh we, in the present appeal, have to decide whether the dying declaration inspires full confidence to uphold their conviction of committing the murder.

7. On examining the dying declaration we find that it was recorded by Naib Tahsildar R. L. Bagari on 13.5.2003 in which Santu alias Santosh has named the appellants as his assailants. We also find that its recording commenced at 11:00. p.m. in the Primary Health Centre, Rajnagar, and ended at 11:15 p.m. The dying declaration at the beginning also bears a brief (one line) certificate of Dr. Suresh Jataw that Santu alias Santosh was in a condition to give statement. But the same doctor in his detailed injury report, Ex.P59, of Santu alias Santosh prepared on the same day i.e. 13.5.2003 and at the same time 11:15 p.m. has clearly mentioned that he was unconscious and vomiting. In preparing this injury report the doctor must have taken at least 15 minutes. Not only this, the doctor in paragraph 22 of his evidence has also admitted that all the victims were brought to the hospital in a bus at 10:30 p.m. and Santu alias Santosh was in an unconscious state. Therefore, it becomes extremely doubtful that Santu alias Santosh was in a fit condition to make any statement at 11:15 p.m. There is yet another reason to disbelieve the dying

declaration. The dying declaration neither bears the signature nor the thumb impression of Santu alisas Santosh. No explanation has been given by the prosecution that Santu alias Santosh was not in a position to either sign it or give his thumb impression. The dying declaration which is impregnant with so many suspicious circumstances can hardly be sufficient as an unimpeachable document for safely basing the conviction of the appellants.

8. We are, therefore, unable to agree with the trial court that the appellants, after forming an unlawful assembly with a common object, committed the murder of Santu alias Santosh. We accordingly set aside their conviction for an offence under section 302/149 of the Indian Penal Code. We also set aside the conviction and sentences of the appellants for attempting to commit the murder of Bhumanideen and causing grievous injuries and injuries to Brajlal, Ratiram, Tantu Bai and Amrish. This is because in the dying declaration there is not even a whisper regarding these offences having been committed by them. And, as already stated above, the trial court has disbelieved the evidence of victims and eyewitnesses.

9. In the result, the appeal is allowed. The appellants be released immediately from jail if not wanted in any other case. Appellant no.6 Betu Patel is reportedly on bail. He need not surrender to custody.

Appeal allowed.

I.L.R. [2013] M.P., 2955
APPELLATE CRIMINAL
Before Mr. Justice B.D. Rathi
Cr.A. No. 351/1998 (Jabalpur) decided on 19 July, 2013

RAM LAL ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 498A - Cruelty **- Material omissions in court statement vis-a-vis police statement - There is also contradiction regarding time of maltreatment - No report was lodged - Despite the alleged cruelty complainant used to return to her matrimonial house forgetting all the alleged incident - Behaviour of the appellant was not so bad that it can be termed as physical and mental cruelty - Held - It must be established that cruelty or harassment to wife was to force her to cause grave bodily injury to herself or to**

commit suicide or the harassment was to compel her to fulfill illegal demand for dowry - Section 498-A not attracted - No case is made out. (Paras 8 &10)

दण्ड संहिता (1860 का 45), धारा 498ए – क्रूरता – न्यायालयीन कथन में पुलिस कथन से तात्विक लोप है– दुर्व्यवहार के समय के बारे में भी विरोधाभास है – कोई रिपोर्ट दर्ज नही की गई – अभिकथित क्रूरता के बावजूद, शिकायतकर्ता अपने ससुराल में अभिकथित घटना भूलकर वापस जाती थी – अपीलार्थी का आचरण इतना बुरा नही था कि जिसे शारीरिक एवं मानसिक क्रूरता कहा जा सके – अभिनिर्धारित – यह स्थापित किया जाना चाहिए कि पत्नी से क्रूरता या उत्पीड़न उसे गंभीर शारीरिक क्षति कारित करने या उसे आत्महत्या कारित करने के लिये विवश करने हेतु किया जा रहा था या उसे दहेज की अवैध मांग पूरी करने के लिये विवश करने के लिए उत्पीड़ित किया जा रहा था – धारा 498–ए आकर्षित नही होती – कोई प्रकरण नही बनता।

G.S. Baghel, for the appellant.
B.D. Singh, G.A. for the respondent.

JUDGMENT

B.D. Rathi, J. :- The appellant has been convicted under Section 498A of the IPC and sentenced to undergo R.I. for 3 years with fine stipulation, though he was acquitted of the offence under Section 306 of the Indian Penal Code (for short "IPC"). The impugned judgment dated 23/1/1998 was passed by I Additional Sessions Judge, Katni in Sessions Trial No.250/96. Appellant is husband of Godabai (since deceased). Their marriage was solemnized ten years prior to the date of incident.

2. According to the prosecution case, appellant Ramlal persistently subjected Godabai to cruelty and harassment on the ground of her dark complexion and disinclination towards work, to such an extent that she was left with no other option, except to commit suicide by consuming poisonous substance. She died on 6/3/96 at 10 p.m. in her matrimonial home at Village Gurjikala. Morgue intimation Report No.0/96 (Ex.P/5) was registered at Police Outpost Salaiya, on 7/3/96 at 8.30 p.m. Thereafter, original morgue no.7/96 (Ex.P/11) was registered at Police Station Rithi on 8/3/96 and after investigation, Crime No.46/96 (Ex.P/12) was registered for the offence punishable under Section 306 of the IPC. After completion of investigation, charge-sheet was filed and thereafter impugned judgment was passed.

3. Charges under Section 498A and 306 of the IPC were framed.

Appellant pleaded false implication and not guilty.

4. Learned counsel for the appellant argued that the impugned judgment was passed without proper appreciation of evidence on record. He submitted that even if the entire prosecution case is accepted at its face value, then too the appellant cannot be convicted.

5. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the conviction was well merited and the impugned judgment does not deserve to be interfered with.

6. Having regard to the arguments advanced by the parties, record of the trial Court was perused.

7. In the impugned judgment, on the basis of evidence of Siyaram (PW6) father of Godabai, mother Paanbai (PW9) and brother Moorat Singh (PW7), it was held by the trial Court that the appellant used to tell Godabai that "Tu Kaali hai aur kaam nahin karti hai". However, there are material omissions in his court statement vis-a-vis Police statement (Ex.D/1). Similarly Paanbai testified that appellant also used to beat Godabai on the aforesaid ground and Godabai had informed her about the maltreatment, six months prior to the date of incident, but on the contrary, Moorat Singh deposed in paragraph 5 of his evidence that Godabai had narrated about the same three years before. However, no report was ever lodged by parents of Godabai regarding the alleged cruelty meted out to Godabai at the hands of appellant.

8. Siyaram deposed in paragraph 3 that despite the alleged cruelty, Godabai used to return to her matrimonial house. He further deposed that Godabai was residing in her matrimonial home for 2½ months from the day when she breathed her last. It clearly shows that Godabai returned to her matrimonial home forgetting all the alleged incidents of cruelty and ill-treatment. On this very concept, doctrine of condonation has been developed from the provision of Section 23(1)(b) of the Hindu Marriage Act,1955. In other words, it can be deduced that the behaviour of appellant was not so bad that it can be termed as physical or mental cruelty, otherwise she would not have returned to her matrimonial home.

9. Appellant was acquitted of the charge of 306 of the IPC. As per the autopsy report (Ex.P/1), external injuries were not found on the body of Godabai. It also shows that she was not subjected to physical cruelty before

her death.

10. The term "cruelty" within the meaning of Section 498A of the IPC has been explained in the Explanation appended thereto. It consists of two clauses namely clause (a) and (b). To attract section 498A of the IPC, it must be established that cruelty or harassment to wife was to force her to cause grave bodily injury to herself or to commit suicide or the harassment was to compel her to fulfill illegal demand for dowry. It is not every type of harassment or cruelty that would attract section 498A of the IPC. Sporadic incidents of ill-treatment by husband or relatives do not attract definition of cruelty. Therefore, even if the prosecution story is accepted as it is, then too, no case would be made out against the appellant under Section 498A of the IPC. Moreover, prosecution has failed to prove the charge under Section 498A of the IPC against the appellant, beyond a reasonable doubt.

11. In the result, the appeal stands allowed. Impugned conviction and consequent sentence are hereby set aside. Bail bonds of the appellant stand discharged. Fine amount, if deposited, be refunded.

Appeal allowed.

I.L.R. [2013] M.P., 2958
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain

Cr. A. No. 508/1999 (Jabalpur) decided on 24 July, 2013

TULA SHANKER ALIAS TULESH SITOKE ...Appellant
Vs.
STATE OF M.P. ...Respondent

Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) r/w 13(2) - Illegal gratification **- Currency notes of Rs. 500/- were received from the possession of the appellant - Number of seized notes had matched with the numbers noted in panchnama - Mixture turned pink when fingers and pant were washed - No oral or documentary evidence was adduced by accused in its rebuttal - Held - Once it is proved that the money was recovered from the possession of the accused, the burden of presumption as contemplated u/s 20 of the P.C. Act shifts upon the accused - Where the bribe money was handed over to the accused, it is proved that there was voluntary and conscious acceptance of the money - Conviction upheld. (Paras 2 & 21)**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराऐं 7,13(1)(डी) सहपठित 13(2) – अवैध परितोषण – अपीलार्थी के कब्जे से रू. 500/– के करेंसी नोट प्राप्त किये गये – जब्तशुदा नोटों के नम्बर, पंचनामा में दिये गये नम्बरों से मिलते हैं – घोल का रंग गुलाबी हुआ, जब उंगलियां और पतलून को धोया गया – इसके खंडन में अभियुक्त द्वारा कोई मौखिक या दस्तावेजी साक्ष्य प्रस्तुत नहीं – अभिनिर्धारित – एक बार जब यह साबित हो जाता है कि अभियुक्त के कब्जे से रुपये बरामद किये गये, उपधारणा का भार जैसा कि पी.सी. अधिनियम की धारा 20 में अनुध्यात है, अभियुक्त पर आता है – जब रिश्वत के रुपये अभियुक्त को सौंपे गये, यह साबित हो जाता है कि रुपये की स्वीकृति स्वेच्छापूर्ण और मानपूर्वक थी – दोषसिद्धि कि पुष्टि की गई।

Cases referred :

2002 AIR SCW 16, AIR 2000 SC 3562, (2000) 9 SCC 752.

Ashish Tiwari, for the appellant.
Aditya Adhikari, Spl. P.P. for the respondent/SPE, Lokayukta.

JUDGMENT

The Judgment of the Court was delivered by : VIMLA JAIN, J. :- Appellant preferred this appeal under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment dated 17/02/1999 passed by Special Judge & First Additional Sessions Judge, Hoshangabad in Special Case No.36/1992, whereby he had been convicted and sentenced with the direction to run both the sentences concurrently as under:-

Provision	Sentence
Under Section 7 of the Prevention of Corruption Act	Rigorous Imprisonment for 2 years with fine of Rs.2500/- and in default of payment of fine, further rigorous imprisonment for two months.
Under Section 13(2) of the Prevention of Corruption Act	Rigorous Imprisonment for 2 years with fine of Rs.2500/- and in default of payment of fine, further rigorous imprisonment for two months.

2. Brief facts of the case are that complainant Antar Singh Solanki (PW.2) filed an application in Bhumi Vikash Bank for getting loan for well and motor pump. The Bank sanctioned loan of Rs.17,000/-. He received two installments each of Rs.3,000/- out of the said loan amount. To release the remaining

amount, the appellant/accused demanded Rs.500/- as illegal gratification from complainant. The complainant filed a written complaint (Ex.P/3) in the office of Special Police Establishment (SPE) Lokayukta, Bhopal on 21/06/1988. The SPE arranged trap and in pursuant to the said trap, the complainant brought Rs.200/- to pay to the appellant/accused. The phenolphthalein powder was applied and the numbers of currency notes were noted. Panchnama Ex.P/5 of the entire preliminary proceedings was prepared. The trap party reached Timbharni. The complainant and panch Mahesh Kumar met the appellant/ accused in a hotel. The appellant refused to accept Rs.200/- and demanded Rs.500/-. The complainant arranged the remaining amount of Rs.300/-. Complainant and members of trap party reached appellant's house. On instruction of police, the complainant and witnesses went in the house. After some time, appellant came. Thereafter upon signal being received from the complainant, the members of the trap party, immediately reached near the appellant where members of the trap party questioned him whether he accepted Rs.500/- from complainant Antar Singh (PW-2). The appellant was arrested along with money of Rs.500/-. The tainted currency notes were recovered from pocket of his pant. Thereafter, Constable Mohd. Rasid prepared water mixture of Sodium Carbonate. In this mixture, both panchas and members of trap party washed their hands, but its colour did not change. When the appellant/ accused washed his fingers in the same colourless mixture, it turned pink. The mixture was sealed in bottles. The pocket of appellant's pant, when washed in Sodium Carbonate colourless mixture, turned pink. It was sealed in a bottle. Right hand of complainant was also washed in Sodium Carbonate, it turned pink. It was also sealed in a bottle. The aforesaid sealed bottles were sent to Forensic Science Laboratory, Sagar. After completion of investigation and due sanction from the Deputy Registrar and authorised officer Shri D.P.Dubey, District Co-operative Land Development Bank Limited, Hoshangabad, Challan was filed against the appellant in the competent Court.

4. The appellant pleaded not guilty and complete innocence and claimed to be tried with the prayer that he had been falsely implicated in the case.

5. In order to bring home the charges against the appellant, the prosecution examined seven witnesses. The appellant did not examine any witness in support of his defence. The appellant in his statement, recorded under Section 313 of the Code of Criminal Procedure, 1973, denied his involvement in the commission of the offence. He pleaded that he had received back the loan amount of Rs.500/- which was payable by father of complainant

Antar Singh (PW-2).

6. The learned Court below, after scanning the evidence found the charges proved against the appellant under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988. Accordingly, it convicted and sentenced him as stated hereinabove.

7. This appeal has been filed by the appellant assailing the said judgment of conviction and order of sentences.

8. Learned counsel appearing for the appellant submitted that the complainant Antar Singh (PW-2) did not support the prosecution case. R.B.Sharma, DSP (PW-7) is a Police Officer. He is an interested witness on behalf of the prosecution. Therefore, his statement can not be relied upon. He further submitted that the prosecution has failed to prove beyond reasonable doubt that the appellant had made any demand and accepted bribe from the complainant as alleged by him and therefore, the presumption under Section 20 of the PC Act, 1988, has wrongly been drawn by the trial Court against the appellant and in favour of the prosecution. The Court below has committed grave error of law in holding the appellant/accused guilty for the offences under the Act. He prayed that the appeal deserves to be allowed by setting aside the finding of conviction and order of sentence. In the support of his submission, he placed reliance on a decisions of *Punjabrao vs. State of Maharashtra,* 2002 AIR SCW 16, and *State of Madhya Pradesh vs. J.B. Singh,* AIR 2000, SC 3562.

9. On the other hand, learned counsel for the SPE Lokayukta supported the findings of the Court below and contended that the findings of the Court below were recorded on a proper appreciation of the evidence and did not suffer from any infirmities, to call for interference in this appeal. He further argued that the evidence and the circumstances were sufficient to establish that the accused had accepted the amount and to give rise to a presumption under Section 20 of the Prevention of Corruption Act.

10. We have considered the arguments advanced by learned counsel for the parties and perused the record.

11. The question for decision is whether the prosecution has proved the charges beyond all the reasonable doubts.

12. Complainant Antar Singh Solanki (PW.2) stated that he was to receive

loan of Rs.17,000/- from the Bhumi Vikas Bank, Timbharni for well and motor pump. He received two installments and last installment of Rs.11,000/- was due. He further stated that the accused/appellant asked him to deposit Rs.500/-, after that remaining amount would be given to him. Appellant did not demand bribe. He did not pay Rs.500/- as a bribe to appellant. He paid him amount of Rs.500/- to credit in the account of his (complainant's) father. He also stated that he did not lodge any complaint against the appellant about illegal gratification at Bhopal. In his cross-examination, he deposed that in the application Ex.P/3 he did not mention that "मुझसे तीसरी किश्त के लिये 500/-- की रिश्वत मांगी".

13. The complainant Antar Singh (PW-2) further stated that he filed a complaint at Bhopal and admitted his signature on application Ex.P/3 on part of A to A. He also stated that he had given Rs.500/- to police at Harda Rest house. In his cross examination he admitted that the phenolphthalein powder was applied on the currency notes which were handed over to him with instruction that he would give the said notes to appellant/accused. On careful scrutiny of the statement of complainant. Antar Singh (PW-2), it appears that he had supported the prosecution to a little extent. But at the same time complainant had not supported the prosecution case on main ingredients of motive, demand and acceptance and turned hostile. In cross-examination also, he had not supported the prosecution version on demand or acceptance of the amount.

14. Shri R.B. Sharma, the then DSP, Lokayukta (PW-7), stated that on 21/06/1988, complainant Antar Singh Solanki filed a written complaint Ex.P/3 and FIR Ex.P/8 was registered. Thereafter, Crime case No.151/1988 was registered. The complainant Antar Singh brought five notes each of Rs.20/- and one note of Rs.100/- amounting to Rs.200/-. Numbers of the aforesaid notes were noted in the panchnama. Constable Rajendra Singh applied phenolphthalein powder on the aforesaid notes and kept in right pocket of pant of complainant and advised him that he would not touch the currency notes. Thereafter, trap party went to Timbharni on 22/06/1988. Complainant and panch Mahesh Kumar met the appellant/accused in a hotel wherein the appellant refused to accept Rs.200/- and demanded Rs.500/-. Then members of trap party and complainant went to village Khidkiwala and arranged the remaining amount of Rs.300/- (3 notes of Rs.100/-). The panchnama Ex.P/5 of these notes was also prepared. Thereafter, complainant and members of trap party went to appellant's house. The complainant with witnesses entered

appellant's house. The members of the trap party remained out side of the appellant's house. After some time appellant came. Thereafter, upon signal being received from the complainant, the members of the trap party immediately reached near the appellant where members of trap party questioned him that whether he had accepted Rs.500/- from complainant and he replied 'yes'. The appellant was arrested along with money of Rs.500/- Thereafter, Constable Mohd. Rasid prepared water mixture of Sodium Carbonate. In this mixture, both panchas and members of trap party washed their fingers, but its colour did not change. When the appellant/accused washed his fingers in the same colourless mixture, it turned pink. The aforesaid mixture was sealed in bottles. Seized currency notes numbers and matched its with numbers mentioned in panchnama (Ex.P/5). The pocket of appellant's pant was also washed in Sodium Carbonate and it turned pink. Such mixture was sealed in a bottle. Right hand of complainant was also washed in Sodium Carbonate and it turned pink. It was also sealed in a bottle. The aforesaid sealed bottles were sent to Forensic Science Laboratory, Sagar.

15. The trial Court mainly placed reliance on the evidence of R.B. Sharma, DSP Lokayukta(PW-7) to hold the accused guilty. The evidence of R.B.Sharma, DSP (PW-7), who is a police officer, cannot be discredited in trap case merely because he is a police officer. It appears that there is no reason for Shri R. B. Sharma, DSP (PW-7) to falsely implicate the appellant/ accused. The evidence of R.B.Sharma (PW-7), therefore does not suffer from any infirmity. On the other hand, the evidence on record and circumstances of the case clearly show that the illegal gratification was demanded and accepted by the appellant.

16. It is pointed out by the learned counsel for the appellant/accused that in this case, presumption cannot be made under Section 20 of the Act. We reproduce Section 7 and Section 20 of the Act.

> ***"7. Public servant taking gratification other than legal remuneration in respect of an official act.-*** whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or

disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of Section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

S.20, Presumption where public servant accepts gratification other than legal remuneration-(1) where, in any trial of an offence punishable under Section 7 or Section 11 or Clause (a) or clause (b) of sub-section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

17. The evidence is very clear that the currency notes with phenolphthalein powder were seized from the pocket of the accused/appellant's pant. When his pant and his fingers were washed in water mixture of Sodium Carbonate colourless mixture, it turned pink. It is also proved beyond doubt that the numbers of seized currency notes had matched with the numbers noted in panchnama Ex.P/5. Such evidence is corroborated by FIR (Ex.P/8) and statement of R.B.Sharma (P.W-7). We do not find anything in the statement of R.B.Sharma, recorded during his cross examination, to suggest that the appellant /accused had been falsely implicated at his instance. In this case; it is proved beyond any doubt that the currency notes were recovered from the possession of the appellant.

18. The Apex Court has held in the decision of *State of A.P. vs. Kmmaraju Gopala Krishna Murthy* (2000) 9 SCC 752, that:-

> "when an amount is found to have been passed to the public servant, the burden is on public servant to establish that it was not by way of illegal gratification. That burden was not discharged by the accused".

19. In the case of *Punjabrao vs. State of Maharashtra* (supra), the Apex Court has held that :-

> "It is too well settled that in a case where the accused offers an explanation for receipt of the alleged amount, the question that arises for consideration is whether that explanation can be said to have been established. It is further clear that the accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by preponderance of probability".

20. Once it is proved that the money was recovered from the possession of the appellant/accused, the burden of presumption as contemplated under Section 20 of the PC Act, 1988, shifts upon the appellant, which he could not rebut through cross examination of the prosecution witnesses or by adducing reliable and convincing evidence to prove that complainant Antar Singh paid the amount of Rs.500/- to credit in the loan account of his father. The complainant had not given any reason why did he chose to deliver currency notes of Rs.500/- with phenolphthalein powder to the appellant. The appellant/ accused did not produce any evidence oral or documentary that father of complainant took any loan which was re-payed to him by the complainant.

21. The currency notes of Rs.500/- were recovered from the possession of the appellant which were got treated with phenolphthalein powder before R.B. Sharma, DSP, Lokayukta (PW-7). The members of the trap party along with the complainant went to the house of appellant at Village Timbharni where the bribe money was handed over to the appellant by the complainant. It is proved that there was voluntary and conscious acceptance of the money.

22. Thus, the citations submitted by the appellant and the facts of this case being not similar, we are of the opinion that the said judgments are of no assistance to the appellants.

23. Having regard to the entire evidence discussed above and having carefully and closely considered the judgment of the trial Court, the view taken by the trial Court, is found to be reasonable. Therefore, we agree with

the impugned judgment of the trial Court.

24. In the result, for the above stated reasons, there is no merit in this appeal.

25 Coming to the question of sentence, it is to be noted that the minimum sentence for offence relatable to Section 7 is six months while that relatable to Section 13(1)(d) is one year. The incident in question had taken place about 24 years ago. Appellant has crossed 60 years of age. Therefore, we think it appropriate to reduce both the sentences to the minimum prescribed under the statute. In other words, both the sentences shall be six months and one year respectively and shall run concurrently.

26. The appeal is dismissed except to the extent of modification of sentences as noted above.

Appeal dismissed.

I.L.R. [2013] M.P., 2966
APPELLATE CRIMINAL
Before Mr. Justice Subhash Kakade
Cr. A. No. 451/2007 (Jabalpur) decided on 25 September, 2013

KARU SURYAWANSHI ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 376(i) - Rape - Appeal Against conviction **- Prosecutrix is deaf and dumb, therefore, she was not examined - F.I.R. is delayed by 28 hours for which no explanation has been given - Doctor opined that no definite opinion can be given regarding rape - Medical evidence is also not supporting the prosecution case - Child eye witness who is 11 years old not appearing to be witness of sterling quality - Her testimony is without corroboration of satisfactory evidence - In the absence of any slightest degree of actual penetration, the conviction u/s 376(i) is illegal and unsustainable - Appeal allowed. (Paras 34, 59 to 60)**

दण्ड संहिता (1860 का 45), धारा 376(i)– बलात्कार – दोषसिद्धि के विरुद्ध अपील – अभियोक्त्री मूक बधिर है इसलिए उसका परीक्षण नहीं किया गया – प्रथम सूचना रिपोर्ट में 28 घंटे के विलम्ब के लिये कोई स्पष्टीकरण नहीं दिया गया – चिकित्सक का मत कि बलात्कार के संबंध में कोई निश्चित मत नहीं दिया जा सकता

– चिकित्सीय साक्ष्य भी, अभियोजन प्रकरण का समर्थन नहीं करता – चक्षुदर्शी बालक साक्षी जो 11 वर्ष आयु का है, वह भी उत्तम विशेषता का प्रतीत नहीं होता है – उसकी परिसाक्ष्य किसी संतोषप्रद साक्ष्य से पुष्टि के बिना है – वास्तविक प्रवेशन की किसी अत्यल्प मात्रा की भी अनुपस्थिति में, धारा 376(i) के अंतर्गत दोषसिद्धि अवैध एवं अपोषणीय है – अपील मंजूर।

Cases referred :

AIR 1952 SC 54, AIR 1977 SC 135, 1977 CRLJ 167, 2003 CRLJ 1262 (SC), AIR 1998 SC 2726.

Nirmala Raikwar, for the appellant.
Piyush Dharmadhikari, G.A. for the respondent/State.

JUDGMENT

SUBHASH KAKADE, J. :- Appellant Karu Suryawanshi has filed this appeal under Section 37D4 of Criminal Procedure Code, 1973 being aggrieved by the judgment dated 06.02.2007 passed by the learned Special (Sessions) Judge, District Betul in Special Case No.45/2006 (State of M.P. Through P.S. AJAK Betul vs. Karu), whereby the appellant was convicted under Section 376(1) of the IPC and awarded a punishment of rigorous imprisonment of ten years and fine of Rs.10,000/-, in default of payment of fine, further to suffer three years' rigorous imprisonment.

02. (A) The case in hand has a very peculiar circumstance that prosecutrix of this case is not examined because, she is deaf and dumb. The case of prosecution as stated in the F I R in short is that on 06.01.2006 at about 10:00 AM the prosecutrix went near to the fields of Babulal to ease herself, at that point of time accused caught hold and unrobed her on fields committed rape. Because, the prosecutrix was unable to speak and communicate the signs hence, her brother Manikrao reported the matter. The source of incident mentioned in the FIR is that Chandrakala who was grazing her cattle witnessed the incident and informed Hasantibai that the accused slept over the prosecutrix after unrobed her. Hasantibai informed this matter to Gendu and grandfather of the prosecutrix. In the night at above 8 PM Dondibai, mother of the prosecutrix informed the incident to Manikrao. Gendu also informed the matter to Janpad member Raj Kumar Uike. Manikrao reported the matter on 07.01.2006 which set criminal law in motion.

(B) Investigation officer managed to sent prosecutrix District

hospital Betul where lady Doctor examined her. For age verification, she was referred to the Radiological examination. In furtherance of investigation, Officer recorded statement of Chandrakala and other witnesses, arrested appellant and after completion of investigation, a challan was submitted by Police A.J.K., Betul as the prosecutrix belongs to schedule caste in the learned trial Court.

03. The learned trial Court on the basis of evidence available on record framed charge against the appellant punishable under Section 376(1) of Indian Penal Code and Section 3(2)(5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,1989, who abjured his guilt, therefore, was put to trial.

04. (A) The prosecution in furtherance of its case examined star witness Chandrakala (PW/2), follower of prosecutrix. Other witnesses were examined Manikrao (PW/1), Hasantibai (PW/6) and Dondibai (PW/7) and other 6 witnesses who participated in investigation as per their official duties. Documents were filed Ex.P-1 to Ex.P-13.

(B) Medical Officer Shri Chandra Prakash Tiwari (CW/1). Dr. S.K. Pippal (CW/2), Dr. Keshav Singh (CW/3) also examined as court witnesses. Documents Ex.C-1 to Ex.C-4 exhibited during statements of these court witnesses.

05. During statement under Section 313 of Cr.P.C., the appellant denied all the evidence put forth against him and pleaded his innocence on the ground that he was falsely implicated with conspiracy. Defence did not examine any witness.

06. (A) The learned trial Court after detailed consideration of evidence of star witness Chandrakala (PW/2) found the appellant guilty of the offence punishable under Section 376(i) of IPC and imposed 10 years rigorous imprisonment with fine of 10,000/- and entire fine amount will be given to the prosecutrix.

(B) Though, the learned trial Court acquitted the appellant from the charges punishable under Section 3(2)(5) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, against which respondent/State does not prefer an appeal.

07. Smt. Nirmala Raikwar, learned counsel for the appellant has submitted that witnesses have not supported the prosecution case and appellant is

convicted on the ground of conjecture and surmises. She further submitted that the learned trial Court did not look into the fact that FIR is delayed without any explanation on the instance of Janpad Member Rajkumar @ Kumma. The prosecution case is also not corroborated by the medical evidence. Thus, the appeal deserves to be allowed.

08. Shri Piyush Dharmadhikari, learned Government Advocate for the State has opposed the appeal vehemently contending that the appellant has rightly been convicted believing the testimony of Chandrakala and other witnesses. The finding so recorded by the learned trial Court does not warrant any interference, thus, this appeal is liable to be dismissed.

09. Considered the rival submissions made by learned counsel for the parties at length and perused the impugned judgment and entire record carefully.

10. Before dealing with the prosecution evidence in this appeal it will be appropriate to state that the prosecutrix found deaf and dumb hence she was not examined before the learned trial Court. In this regard learned trial Court adopted positive approach and got examined Medical Officer Shri C.P. Tiwari (CW/1), Dr. S.K. Pippal (CW/2) and Dr. Keshav Singh (CW/3) as Court Witnesses but, all efforts became futile because, these experts finally opined that though the prosecutrix is not mentally retired person not insane but, she is deaf and dumb, therefore, her behavior is like a child.

11. Dr. S.K. Pippal (CW/2) examined the prosecutrix on 19.08.1996 at Gandhi Medical College, Bhopal and found that:-

(1) She is responding to loud sound only (no verbal response)

(2) She understand the instructions.

(3) She is not responding to question or Ishara

She need psychotic evaluation

She is not cooperating with test. So, hearing assessment is not possible.

Advise BERA

This investigation is not available in GMC, Bhopal.

12. The prosecution witness Shri Anugraham Alfuse (PW/3) also vide his report Ex.P-4 stated that prosecutrix is mentally handicapped she is not able to understand any voice or any gesture. Shri Gyanendra Purohit (PW/9) also stated the same facts.

13. Merely because a victim not available due to her mental health consequently could not be examined can never be a ground to acquit an accused if there is evidence otherwise available proving the criminal act of the accused concerned. Chandrakala (PW/2) is available for this purpose.

14. But, it is also another peculiar feature of the instant case that the entire story of the prosecution rests on the evidence of star witness Chandrakala (PW/2) who is minor girl of 11 years age.

Child Witness - duty of the trial Court

15. Court should not start with a presumption of untrustworthiness of the evidence of a child witness. The credibility of the evidence has to be judged on the touchstone of the intrinsic worth of the evidence.

16. A child witness is not an incompetent witness by reason of his age. Age of a child is not important factor. His degree of intelligence, maturity and knowledge matter. He must be capable of understanding questions and give rational answers thereto.

17. A child indisputably is competent to testify if he understands the questions put to him and gives rational answers thereto. In each case the court has to decide whether a particular child who has appeared in the witness box is intelligent enough to be able to understand the question and to be able to give rational answers.

18. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.

19. The Apex Court in case of *Rameshwar Singh v State of Rajasthan* AIR 1952 SC 54 held that it is desirable that Judges and Magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of witness may be seriously affected so much so, that in some cases it may be necessary to

reject the evidence altogether.

20. After asking 11 questions to Chandrakala (PW/2), the learned trial Court recorded its finding that she knows how to answer that way wisely fulfill its duty.

21. A child below 12 years of age need not be administered oath as provided under Section 4, Proviso of Oaths Act, 1969. Notwithstanding Section 5 of Oaths Act child's evidence is not inadmissible merely on the ground that no oath was administered to it.

22. Therefore, learned trial Court rightly looking to her age of 11 years did not administer the oath. The learned trial Court also instructed the learned counsel of the parties that questions asked to her be in simple language.

Evidence of Child Witness, precautions

23. The Apex Court in case of *C.P. Fernandes v Union Territory of Goa* AIR 1977 SC 135 : 1977 CrLJ 167 observed that the evidence of a child witness has to be approached with great caution. His testimony is unacceptable if it suffers from infirmities and contradiction. In case of *Bhagwan Singh v State* 2003 CrLJ 1262 (SC) the Supreme Court held that the evidence of a child witness has to be evaluated carefully because he is an easy prey to tutoring. Therefore the court with always look for adequate corroboration from other evidence.

24. A child is an easy prey of tutoring. Nevertheless his evidence cannot be rejected if he is found reliable. His evidence must be evaluated more carefully and with greater circumspection. Please see *Panchhi v State* AIR 1998 SC 2726.

25. Therefore, the court has to see first whether there is any evidence of tutoring of a child witness. Secondly, court should not convict an accused on a serious charge relying on the evidence of a child witness, unless he is materially corroborated.

26. Keeping in above precautions in mind, now I carefully scrutinized the evidence of Chandrakala (PW/2).

27. Chandrakala (PW/2) rightly explained the reason for her presence on the spot. She stated that she was following the prosecutrix as she was also going for grazing the goats.

28. About main incident she narrated that under the tree of Mahua one person after unrobing the prosecutrix slept over the prosecutrix. [Fhir Mahua Ke Jhad Ke Neeche Ak Adami (name of prosecutrix) Ke Kapade Nikal Kar Usake Upar So Gaya]. In the same fluence she also narrated after seeing her, the person run away. So this much is statement of Chandrakala (PW/2) about the sexual assault on the prosecutrix.

29. Now, question arises whether above piece of statement is "rape" under the definition of Section 375 of the IPC?

30. In interpreting the explanation to Section 375 of the IPC whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial.

31. As regards the proof of offence of "rape" under Section 376 of the IPC it is seldom, that direct evidence is available beyond the evidence of the raped woman. In the instant case the evidence of the prosecutrix is not available due to above mentioned valid reasons. But, even then it is the duty of the prosecution to prove this essential part of the proof of rape that there should have been not only an assault but actual penetration.

32. In the instant case, there had not been any evidence of penetration to the slightest degree. It is no where mentioned in the FIR (Ex.P-1) that the appellant undressed himself so there was no question of penetration. Chandrakala (PW/2) did not explain during her version that the person also unrobed himself. In other simple words, she did not explain that the person was also naked. To answer the question of learned trial Court, though it was a leading question, she did not admit that the person was naked.

33. It is difficult to presume that sleeping of one person, not naked, over one naked woman, will amount to sexual intercourse only. The situation is full of doubts. In the chain of these facts and circumstances when Smt. Nirmala Raikwar, learned counsel for the appellant argues that learned trial Court acted upon conjecture and surmises, finds substance.

34. In the absence of any slightest degree of actual penetration, the conviction under Section 376 (i) of the IPC is wholly illegal and unsustainable. On this count alone, the appellant deserves to be acquitted, but the learned trial court ignored it.

35. Now, scrutiny of remaining part of the evidence of Chandrakala (PW/2). She is not able to explain or give details regarding following material facts during her evidence:-

(i) Name of the appellant, more than once.

(ii) Caste of the appellant.

(iii) Day of the incident.

(iv) Period elapsed between date of her court evidence and date of incident.

(v) Distance of place of incident from village vicinity.

36. Ignoring above facts, it is pertinent to mention here that this fact is averted in written complaint (Ex.P-1) and her police statements that Chandrakala (PW/2) was following the prosecutrix soon before the incident. But, during her evidence she specifically denied that she was not following the prosecutrix soon before the incident. She stated contradictory fact that after half an hour she saw the person over the prosecutrix. Distance between place of incident and where she was standing she stated it was 200 feets. It is also not case of the prosecution that Chandrakala (PW/2) witnessed the incident from hillock, but, during her cross examination she repeatedly stated that she saw the incident from hillock.

37. It is pertinent to mention here that during examination-in-chief Chandrakala (PW/2) herself stated she does not know the name of the person, knows him by face only. She identified first time the appellant from witness box in the court room. In above mentioned facts and circumstances test identification was needed to fix the identification of the culprit, which is very much lacking.

37. If the entire factual scenario tested in a proper perspective manner, it would reveal that 11 years aged child witness Chandrakala (PW/2) not appearing to be witness of sterling quality on whose sole testimony conviction of the appellant can be safely based, without corroboration of well founded satisfactory evidence.

38. It is pertinent to mention here that not only Hasantibai (PW/6), aunt of the prosecutrix but, her mother Dondibai (PW/7) is also declared hostile.

39. Hasantibai (PW/6) during examination-in-chief stated that Chandrakala

informed her that appellant caught hold hands of prosecutrix. When she admitted that she does not know about the incident because Chandrakala did not told her any fact except above she was declared hostile. During leading questions she stated that she only complaint this fact to Gendubaba, grand-father of the prosecutrix that why he is not scolded appellant, who caught hold hands of the prosecutrix. She denied that she had given any statement during her police statement Ex.P-8 about sexual assault on the prosecutrix. She categorically refused the suggestion that she wants to save the appellant therefore, she is not narrating anything materially against the appellant.

40. Mother of the prosecutrix Dondibai (PW/7) also declared hostile, because during examination-in-chief she stated that nobody committed any sexual assault on her daughter and whatever is her knowledge that is based on information given by her father-in-law Gendubaba. Dondibai (PW/7) admitted that Hasantibai stated this fact to his father-in-law. Dondibai (PW/7) specifically admitted that she did not know when and what happened with her daughter.

41. Evidence of Manikrao (PW/1) is at all not admissible, because neither Chandrakala (PW/2) nor Hasantibai (PW/6) given any information directly to this witness. Whatever is knowledge of Manikrao (PW/1) is based on the information given to him by his mother Dondibai (PW/7), who is declared hostile. It is pertinent to mention here that the source of Dondibai's information was her father-in-law Gendubaba, who was an important witness, but he did not examined by the prosecution.

42. Therefore, it is clear that none of the prosecution witnesses Hasantibai (PW/6), Dondibai (PW/7) or Manikrao (PW/1) corroborating statement that of Chandrakala (PW/2).

43. The prosecutrix was medically examined by Dr. Nisha Badve (PW/4) who did not find any injury mark on the person or private part of the prosecutrix vide her MLC report (Ex.P-5). She opined that no definite opinion can be given regarding rape on the prosecutrix. Therefore, it is clear that the medical evidence is also not supporting the case of the prosecution.

44. Lady Doctor collected vaginal smear, pubic hair and undergarments of the prosecutrix and packed, sealed and handed over to the concerned lady police constable.

45. The learned trial court based the FSL report for conviction of the appellant, in para 25 of impugned judgment:-

"डा0 बड़वे ने पीड़िता का चिकित्सीय परीक्षण दिनांक 8.1.2006 को किया था। उसी दिन उसका अण्डरवियर भी जप्त किया था और ये वस्तुएं पटेल ने एफ0एस0एल0 भेजी थी तथा एफ0एस0एल0 रिपोर्ट में प्रार्थी के अण्डरवियर पर वीर्य के दाग पाये जाना और उसके गुप्तांग में वीर्य शुकाणु पाये जाना यह अवधारणा करने के लिए पर्याप्त है कि जिस समय प्रार्थी को निर्वस्त्र करके अभियुक्त प्रार्थी के ऊपर लेटा था उस समय अभियुक्त ने अपने गुप्तांग का प्रवेश पीड़िता की योनी में किया था और यह साक्ष्य बलात्कार को प्रमाणित करने के लिए इस न्यायालय के मत में पर्याप्त है।"

46. Learned trial court materially relied on the evidence of presence of semen on the undergarments of the prosecutrix. Semen stains may exist on underwear of a young woman for variety of reasons and would not necessarily connect with this presumption that she was sexually assaulted. The discovery of dried stain of semen on undergarments of the prosecutrix is circumstance far too feeble to establish that she was raped. As regards the dried stain of semen on undergarments of the prosecutrix, who is a grown up lady of more than 17 years so, no compelling interference can arise that the stain was caused during the course of the sexual assault committed by the appellant on the prosecutrix.

47. Dr. O.P. Yadav (PW/5) examined prosecutrix for determination of her age and vide report (Ex.P-6) prosecutrix found to be age of 17 years. During cross examination, Dr. O.P. Yadav (PW/5) admitted that there may be 2 years (+) (-) difference in the age which is stated by him.

48. Mere presence of sperm on private part of major prosecutrix, in above mentioned facts and circumstances, cannot be basis of conviction as accepted by the learned trial Court. The science of presence of spermatozoa has not yet developed into a positive science. There are various other factors which may negative that only presence of spermatozoa cannot be basis of conviction, i.e. faulty taking of the smear, its preservation, quality of semen, etc.

49. Presence of semen on private part of the prosecutrix does not found by Dr. Nisha Badve (PW/4). The learned trial court again acted upon conjecture and surmises, which ruined very basis of our criminal justice delivery system.

50. Incident took place on 06.01.2006 at 10:00 a.m. and written complaint (Ex.P-1) filed after more than 28 hours on 07.01.2006 at 20:30 p.m. Any plausible reason is not assigned in FIR (Ex.P-2) for this delay. Learned trial court ignored this important fact that FIR (Ex.P-2) was filed after delay and

any reason for this delay is not explained.

51. On the other hand, Standard 12th passed Manikrao (PW/1) admitted that from his village to P.S. Saikheda and from village to Multai-Saikheda road are 12 kms and 2 km away, respectively. He also admits availability of truck and jeep throughout day and night for Multai to Saikheda.

52. It was argued by the learned counsel for the appellant that it was Rajkumar @ Kumma who tutored Chandrakala (PW/2) for give evidence against the appellant. It is also submitted that unfortunately learned trial judge did not give weight to admissions of prosecution witnesses available on record.

53. It is part of written complaint (Ex.P-1), on basis of which H.C. Satya Prakash Bajpai (PW/10) written FIR (Ex.P-2), that prior to filing it Manikrao (PW/1) consulted with one Rajkumar. Shri Patel (PW/8) stated that he did not recorded statements of Rajkumar @ Kumma because he was hearsay witness and admitted that Kumma is Janpad member.

54. When Chandrakala (PW/2) examined on 23.06.2006 in the trial Court she admitted that Kumma is also came with us up to the Court.

55. In this sequence admissions of Chandrakala (PW/2) are very much important which were not taken into account by learned trial Court:-

> "कुंभा आज हमारे साथ आया है। कुंभा आज मुझे किसी वकील के पास नहीं ले गया। साक्षी से यह पूछा गया कि कुंभा ने तुम्हें कारू का नाम कब बताया इस पर साक्षी कहती है कि उसी दिन मैंने कुंभा को बताया था। साक्षी से यह पूँछा गया कि कुंभा के बताने पर कारू का नाम मालूम हुआ इस पर साक्षी पहले हॉ कहती है परंतु पुनः कहती है कि मैंने कुंभा को कारू का नाम बताया था। जिस दिन की घटना है उस दिन शाम को मैंने कुंभा को घटना नहीं बताई. मैंने हंसती को बताया था। फिर हंसती मुझे बुलाने आई थी और मुझे बुलाकर ले गई थी। मेरे पहले ही कुंभा को हंसती ने बता दिया था। मेरी भी कुंभा से उसी दिन शाम को बात हुई थी।"

56. During examination-in-chief Chandrakala (PW/2) stated that next morning Kumma came to her residence with two other persons and asked her about incident, then she narrated incident to Kumma what happened with prosecutrix. In this sequence she did not narrated name of accused Karu.

57. Manikrao (PW/1) stated that his grand father Gendubaba narrated incident to Rajkumar in the evening and next morning Rajkumar himself came to their residence.

58. During her examination after one and half month on dated 15.08.2006 Hàsantibai (PW/6) admitted that Kumma is present outside with this additional fact that he took them for the Court.

59. In light of above facts and circumstances, child witness Chandrakala (PW/2) not appearing to be witness of sterling quality to convict the appellant on her sole evidence. In this situation, corroboration sought from outside but, that is also not available. The evidence of Hansantibai (PW/6), Dondibai (PW/7) and Manikrao (PW/1) is not corroborating the statement of Chandrakala (PW/2).

60. Written complaint (Ex.P-1) is filed after delay but, delay is not explained with plausible reasons. Learned trial Court did not look into the evidence of Rajkumar @ Kumma, who is the person behind filing of the written complaint (Ex.P-1). The Medical evidence is also not supportive to the case of prosecution. Apart from it, the impugned judgment was passed by learned trial Court acting upon conjecture and surmises.

61. Therefore, appeal is allowed. Conviction and sentence awarded to appellant Karu Suryawanshi by the learned trial Court is hereby set aside and he is acquitted from the charges under Section 376 (1) of Indian Penal Code leveled against him.

62. Appellant Karu Suryawanshi be released forthwith from the custody unless required to be in custody in connection with any other case.

Appeal allowed.

I.L.R. [2013] M.P., 2977

CIVIL REVISION

Before Mr. Justice J.K. Maheshwari

Civil Rev. No. 35/2011 (Jabalpur) decided on 6 September, 2012

RISHABH KUMAR JAIN ...Applicant

Vs.

GYANCHAND JAIN & ors. ...Non-applicants

A. ***Civil Procedure Code (5 of 1908), Sections 152 & 151 - Suit for partition*** **- House numbers incorrectly mentioned in the preliminary decree and also in the final decree - Duty of the Court to rectify such mistake on having knowledge about the mistake by its**

own motion. (Para 5)

क. सिविल प्रक्रिया संहिता (1908 का 5), धाराऐं 152 व 151 – विभाजन हेतु वाद – प्रारंभिक डिक्री में और अंतिम डिक्री में भी मकान नम्बर गलत रुप से उल्लिखित – उक्त गलती के बारे में ज्ञान होने पर स्वयं से उक्त गलती सुधारना, न्यायालय का कर्तव्य है।

***B. Partition Act (4 of 1893) Section 4 - Partition of dwelling house belonging to an undivided family - Decree of partition* - 1/3rd share in the house fell to share of 'N' - Respondents No. 1 and 2 purchased the share of 'N' in the suit house and filed execution proceedings to take over the possession of the share of 'N' as per decree of partition - Application u/s 4 to purchase share of co-owner sold to stranger (respondent Nos. 1 & 2) filed by one of the co-shares having 1/3rd right in the suit property is maintainable. (Paras 8 to 10)**

ख. विभाजन अधिनियम (1893 का 4), धारा 4 – संयुक्त कुटुम्ब के निवास भवन का विभाजन – विभाजन की डिक्री – मकान का 1/3 हिस्सा 'एन' के हिस्से में आया – प्रत्यर्थी क्र. 1 व 2 ने वाद मकान में 'एन' का हिस्सा क्रय किया और विभाजन की डिक्री के अनुसार 'एन' के हिस्से का कब्जा लेने के लिए निष्पादन कार्यवाही प्रस्तुत की – वाद सम्पत्ति में 1/3 अधिकार वाले एक सह हिस्सेदार द्वारा बाहरी व्यक्ति (प्रत्यर्थी क्र. 1 व 2) को बेचा गया सह स्वामी का हिस्सा क्रय करने के लिये धारा 4 के अंतर्गत आवेदन पोषणीय है।

Cases referred :

(1996) 11 SCC 446, (2000) 8 SCC 330, AIR 2000 SC 2684, (2009) 1 SCC 510.

A.K. Jain, for the applicant.
R.P. Khare, for the non-applicants No. 1 & 2.

ORDER

J.K. MAHESHWARI, J.:- Being aggrieved by the order dated 20th December, 2010 passed by the XIX Additional District Judge, Jabalpur in M.J.C. No.16/2010 rejecting the application under Order 20 Rule 18 read with Section 151 and 152 of CPC and also the application filed under Section 4 of the Partition Act, 1893, this revision has been preferred.

2. Prior to discussion of the facts, it is necessary to indicate that the applicant was defendant No.3 in the partition suit bearing No.6-A/82 which

was filed by Smt. Sumat Rani, Ku. Sadhna and Pramod Kumar being the legal heirs of Surkhichand. The respondent No.1 and 2 in the revision are the purchasers of the share of Naval Kishore to the extent of 1/3rd right, fallen to his share. It is required to be noted that Nonelal and Phoolchandra were the real brothers and they are the owners of house No.23, 24, 25 and 26 situated in Lordganj, Jabalpur. A registered partition was entered into between them on 2.7.1948 thereby house No.23 and 24 came in the share of Phool Chand and house No.25 and 26 came in the share of Nonelal. Nonelal was having three sons, namely, Naval Kishore, Sunderlal and Surhkhichandra. Naval Kishore transferred his 1/3rd share by executing a registered sale deed dated 7.8.1979. The suit was filed by three legal heirs of Surkhichandra for partition joining Naval Kishore, Sunderlal as well as the remaining LRs of Surkhichandra which was numbered as 6-A/82 wherein a preliminary decree of partition was passed on 9.7.1985. As per the said decree it was directed that all the three brothers Naval Kishore, Sundarlal and Surkhichanda were having equal 1/3rd share in the property belonging to Nonelal i.e. house No.25 and 26 and the house No.23 and 24 fell into the share of Phoolchand be divested to his legal heirs. It was held in para 23 of the judgment that the plaintiff as well as the legal heirs of Surkhichand as well as Navalkishore and Sunderlal are having equal share of 1/3rd in house No.25 and 26 but in the operative part of the decree it was mentioned that the aforesaid three persons would get 1/3rd share in house No.24 and 25 in place of 25 and 26. After passing the preliminary decree, the court after appointment of the Commissioner and receiving the report passed the final decree on 25.11.2008. In the final decree also house Nos.24 and 25 were partitioned in between the legal heirs of Nonelal i.e. Naval Kishore, Surkhichand and Sunderlal having 1/3rd equal share therein. Thereafter purchasers i.e. respondents No.1 and 2 who have purchased 1/3rd share of Naval Kishore filed execution proceedings before the executing court seeking possession of the share of Naval Kishore which was transferred to them by registered sale deed dated 7.8.1979. During the pendency of said proceedings, the applicant has filed two applications one is under Order 20 Rule 18 read with Section 151 and 152 of CPC praying amendment in the preliminary decree for correction of house No.25 and 26, in place of house No. 24 and 25 because the aforesaid mistake is inherent and goes to the root of decree and after receiving the commissioner's report afresh final decree be corrected. Another application was filed under Section 4 of the Partition Act seeking right of pre-emption to the extent of share of Naval Kishore with

respect to house No.25 and 26. Both the applications were rejected by the order impugned, however this revision has been filed.

3. Shri Jain, learned counsel appearing for the applicant referring various paragraphs of the plaint as well as the preliminary decree passed on 9.7.1985, submitted that house No. 25 and 26 had fallen in the share of Nonelal after partition in between Nonelal and Phoolchand and house No.23 and 24 had fallen in the share of Phoolchand after a registered partition dated 2.7.1948. The trial court while passing the preliminary decree in para 9 has recorded such finding and it is held that the said two houses shall be divided in equal 1/3rd share of plaintiff and defendant No.3 and 4 and also defendant No.1 and 2 as well as legal heirs of Naval Kishore and Sunderlal. The finding to that effect has been recorded in para 17, 18 and 19. It is submitted by him that in para 23 while granting decree in place of house No.25 it has been mentioned as house No.24 and in place of house of 26 it has been mentioned as house No.25. However on passing a preliminary decree the Commissioner report has been received, but while passing the final decree on 24.11.2008 the aforesaid mistake has been continued. In such circumstances, prayed that after directing correction in the preliminary decree, it be directed that the corrected final decree be drawn after seeking a fresh report. It is further submitted that after passing a final decree the purchasers of 1/3rd share of Navalkishore have filed the execution proceedings seeking possession of the share to such extent wherein the application under Section 4 has been flied by the applicant who is the legal heir of Surkhichand seeking right of pre-emption, however the aforesaid application ought to be allowed and the trial court committed error by rejecting both the applications. In support of his contention, reliance has been placed on the judgment of Apex Court in the case of *Ghantesher Ghosh Vs. Madan Mohan Ghosh and others,* (1996) 11 SCC 446. It is submitted that the application filed by the applicants under Section 4 ought to be allowed and right of pre-emption against purchasers may be directed and the court should act accordingly. It is said that relying upon the said judgment in the case of *Gautam Paul vs. Debi Rani Paul and others* (2000) 8 SCC 330, the Apex Court has reiterated the same view, therefore allowing the revision, the order impugned may be set aside.

4. Shri Khare, learned counsel appearing on behalf of respondents No.1 and 2 has raised preliminary objection that after passing preliminary decree the application so filed by the applicant under Order 20 Rule 18 read with Section 151 and 152 of CPC is not maintainable. It is submitted by him that

merely mentioning a wrong house number in the decree would not substantially affect the right of the parties because as per the registered partition dated 2.7.1948, the property situated in the red hedges as fallen in the share of Nonelal and that has been divided equally in 1/3rd share to Naval Kishore, Sunderlal and Surkhichand. However, the report of Commissioner has been received with respect to the property indicated as 'A', F', T and 'U', therefore even specifying the wrong house number in the preliminary decree would not substantially affect the parties because the partition has taken place with respect to the property which has fallen in the share of Nonelal indicated in red hedges. In view of the foregoing, it is urged that the interference at such a belated stage on an application filed by the applicant for correction of the preliminary decree and final decree is not warranted. So far as the right to pre-emption claimed by the applicant by filing application under Section 4 of the Partition Act is concerned, it is urged that the said application is not maintainable because during the pendency of the suit the legal heir of Sunderlal defendant No.2 has filed application under Section 4 of the Partition Act wherein the litigation went up to Hon'ble the Apex Court and vide judgment dated 6th September, 2001 the application so allowed by the High Court was set aside in the light of the judgment of *Gautam Paul* (supra), however at this stage the application filed by the applicant is not tenable. It is further submitted that the applicant do not acquire any right to pre-emption at such a belated stage looking to the fact that such right is only available when the stranger has filed a suit. Reliance has been placed on a judgment of the Apex court in the case of *Babulal V. Habibnoor Khan (Dead) by L.Rs. And others*, AIR 2000 SC 2684. In view of the foregoing, prayer is made to dismiss the revision petition.

5. After hearing learned counsel for the parties and on perusal of the record, it is not in dispute that house Nos. 23, 24, 25, and 26 situated in Lordganj, Jabalpur were of the joint ownership of Nonelal and Phoolchand. It is also not in dispute that a registered partition was entered into on 2.7.1948 and house No.23 and 24 had fallen into the share of phoolchand and house Nos. 25 and 26 had fallen in the share of Nonelal. As per the said partition deed, the property which has fallen in share of Nonelal was shown in red hedges. It is also not in dispute that Navalkishore, Sunderlal and Surkhichand were three sons of Nonelal and they are having 1/3rd equal share in the property. The suit for partition was filed by three legal heirs of Surkhichand joining other legal heirs as defedant No.3 and 4 and also against Navalkishore and Sunderlal as defendant No.1 and 2. In the said suit a preliminary decree

of partition was passed vide judgment dated 9.7. 1985. While deciding the said suit in para 9, 15, 16 and 17 the trial Court observed that the plaintiff, defendant No.3 and 4 and also defendants No.1 and 2 are the legal heirs of Nonelal, however they are having equal share in the property of Nonelal which is of house No.25 and 26 as indicated in the partition deed dated 2.7.1948 but in para 23 of the said judgment while passing the decree in place of house No.25 it was mentioned as house No. 24 and in place of house No.26 it was mentioned as house No.25. Thus looking to the judgment of the trial Court in operative para the decree was passed with respect to house No. 24 and 25 in place of house No. 25 and 26. After passing the said preliminary decree the commissioner's report was received that too relates to house No. 24 and 25 though in the said report it has been mentioned that the partition of the property which is indicated in red hedges has been made and accordingly a final decree was passed on 25.11.2008 indicating house No. 24 and 25 in place of house No. 25 and 26. The trial court declined such objection merely because on a commission report the objection has not been filed and it has appeared that the partition of property has already taken place and shown in red hedges and the said mistake has been continued even up to the final decree. In the considered opinion of this court as per the finding recorded in para 9, 17 and 18 by the judgment dated 9.7.1985 where the preliminary decree was passed, it is apparent that house Nos.25 and 26 are of the share of Nonelal and the said property indicated in red hedges has been partitioned in three shares in between Navalkishore, Sunderlal and the legal heirs of Surkhichand. If by mistake the wrong house number has been mentioned in a decree then the trial court was duty bound to correct such mistake exercising the powers conferred on him under Section 152 read with Section 151 of CPC to secure the ends of justice and to prevent the abuse of process of law. It is not expected from the court to continue with such mistake taking support of the commissioner's report particularly when a decree is to be passed with respect to a specific house number and the said house number has incorrectly been mentioned in the preliminary decree and also in the final decree, in such circumstances merely having a commissioner's report indicating the property of the red hedges would not be sufficient though in the commissioner's report the house number has been wrongly shown as 24 and 25. In the considered opinion of this Court, it will create the multiplicity of the proceedings and the parties may have an option to abuse the process of law; however, on having knowledge about the mistake, it is the duty of the court to rectify such mistake even by its own motion. In this regard, reliance may be made on the decision of Apex Court in

the case of *Om Prakash Marwaha (Dead) through LRs and others vs. Jagdish Lal Marwaha (Dead) through LRs, (2009) 1* SCC 510. In such circumstances, the rejection of the application under Order 20 Rule 18 read with Section 151 and 152 of CPC by the Trial Court while passing the order impugned is wholly unsustainable in law and the argument of non-applicant is hereby repelled.

6. Now to deal the issue regarding rejection of application under Section 4 of the Partition Act, first of all the provisions contained under Section 4 is required to be reproduced which reads as follows:-

> "Partition suit by transferee of share in dwelling house.- (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.
>
> (2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the court shall follow the procedure prescribed by sub-section (2) of the last foregoing section."

7. On perusal of the aforesaid, it is apparent that no express provision has been shown at which stage the application may be filed against the stranger transferee of the share of a erstwhile co-owner of dwelling house of undivided family and such an application can be maintained after passing a preliminary decree in a case where a dwelling house belong to an undivided family has been transferred to a person who is not the member of such family and such transferee sues for property. As per the case of *Ghantesher Ghosh* (supra) the Hon'ble Apex Court has held that for the applicability of Section 4 of the Property Act, it may be at any stage of the proceedings between the parties, and the following five conditions must be satisfied which read as follows :-

> (1) A co-owner having undivided share in the family dwelling house should effect transfer of his undivided interest therein;

(2) The transferee of such undivided interest of the co-owner should be an outsider or stranger to the family;'

(3) Such transferee must sue for partition and separate possession of the undivided share transferred to him by the co-owner concerned;

(4). As against such a claim of the stranger transferee, any member of the family having undivided share in the dwelling house should put forward his claim of pre-emption by undertaking to buy out the share of such transferee; and

(5) While accepting such a claim for pre-emption by the existing co-owner of the dwelling house belonging to the undivided family, the court should make a valuation of the transferred share belonging to the stranger transferee and make the claimant co-owner pay the value of the share of the transferee so as to enable the claimant co-owner to purchase by way of pre-emption the said transferred share of the stranger transferee in the dwelling house belonging to the undivided family so that the stranger transferee can have no more claim left for partition and separate possession of his share in the dwelling house and accordingly can be effectively denied entry in any part of such family dwelling house."

8. It the said case it has further been observed that as per the Statement of Objects and Reasons indicating in the Partition Act especially section 4 makes it clear that the restriction imposed on a stranger transferee of a share of one or more of the co-owners in a dwelling house by Section 44 of the Transfer of Property Act has further been extended by Section 4 with a view to see that such transferee washes his hands off such a family dwelling house and gets satisfied with the proper valuation of his share which shall be paid to him by the pre-empting co-sharer or co-sharers, as the case may be. This right of preemption available to other co-owners under Section 4 is obviously in further fructification of the restriction on such a transferee as imposed by Section 44 of the Transfer of Property Act. Section 4 requires for its applicability that such stranger transferee must sue for partition and only in that eventuality the rights of pre-emption envisaged by Section 4 can be made available to the other contesting co-owners. The court emphasizing the word

"such transferee sues for partition" as employed in Section 4 clarified the meaning of another words "transferee filing a suit for partition" referring the meaning of the word 'sue' held that it indicates of preventive action. In the said context it has been held that the right of pre-emption if the purchaser sues for partition is available to the cosharer and co-owners applying under Section 4 as envisaged therein. The said view has been reiterated by Hon'ble the Apex Court in the case of *Gautam Paul* (supra). The said view has been reiterated by the Apex court in the case of *Babulal* (supra) so relied upon by the counsel for the respondents, in para 10 as well as in the case of *Gautam Paul* (supra). In the light of the aforesaid legal position the factual backdrop of this case is required to be analyzed.

9. In the present case, after passing a preliminary decree on 9.7.1985 and a final decree on 25.11.2008 purchasers who have purchased the property of Naval Kishore to the extent of 1/3rd share in the house Nos. 25 and 26 have applied for execution before the Executing Court on 18.1.2010. Thus it is apparent that on passing a decree of partition amongst the legal heir of Nonelal and after purchasing the share of one of the co-sharers, he has applied for the execution of the said judgment and decree of partition, it is required to be observed here that in a suit for partition the plaintiff may be treated as defendant and the defendant may be treated as the plaintiff. Navalkishore is one of the defendants and the respondents No.1 and 2 are the purchasers of the share of Navalkishore, however falls within the purview of the phrase "transferee'. After passing the decree of partition, the transferee by filing the execution proceedings prayed for the possession of the share which was purchased by them from Navalkishore and to take over the possession thereof. However, in such circumstances, the application filed by the co-sharer i.e. applicant who is the legal heir of Surkhichand having 1/3rd right in the property of Nonelal is maintainable. It can safely be observed that the transferee is stepping into the shoes of Navalkishroe and such a person want to take over the possession of the share of Navalkishore, as per decree of partition, however the right to pre-emption arise in favour of the co-sharers.

10. At this stage, the objection so raised by learned counsel Shri Khare with respect to rejection of the application of one of the co-sharer during the pendency of suit for partition, and the said proceeding ended by the judgment of Apex Court is required to be explained. In this regard it is to be observed

that the earlier application was filed by defendant No.2 Sunderlal who was the co-sharer during the pendency of the suit for partition which was rejected and the Hon'ble Apex Court in the light of the judgment of *Gautam Paul* (supra) set aside the judgment of this Court. In view of the discussions as made herein above, it is apparent that if a transferee sues in a suit for partition then the co-sharer is having a right of pre-emption meaning thereby prior to passing the preliminary decree of partition such right is not available to the co-sharer and after passing of the preliminary decree or final decree passed up to the stage of execution, such right is available to the co-sharers. In that view of the matter, it is to be held that the rejection of the application under Section 4 of the Partition Act filed by the applicant in execution proceedings started by the transferee in view of the decree of partition passed by the court below is sustainable in law and the Trial Court committed jurisdictional error while rejecting such application.

11. At this stage Shri Khare, learned counsel appearing on behalf of the respondents submits that the provisions of Section 4 of the Partition Act is having no application because it relates to the dwelling house and the present house is not a dwelling house. Per contra Shri Jain, learned counsel appearing on behalf of the applicant contends that as per the judgment and decree itself it is apparent that house nos.25 and 26 is dwelling house. In the considered opinion of this Court, the aforesaid issue is not required to be dealt with, because in exercise of the revisional jurisdiction the court has to look into the legality and propriety of the order passed by the Trial Court. Thus parties are at liberty to raise such objection, and the said issue may be decided by the trial Court.

12. Accordingly, the revision filed by the applicant is hereby allowed, and the order impugned passed by the Trial Court stands set aside. The Executing Court is directed to take action in view of the foregoing observations and in the light of the decision of Apex Court in the case of *Om Prakash Marwaha (Dead) through LRs* (supra) for correction of the preliminary decree and to consider the application under Section 4 of the Partition Act, in view of the law laid down by the Hon'ble Apex Court in the case of *Ghantesher Ghosh (supra) Gautam Paul (supra) and Babulal* (supra) and also as per the observations made therein. In the facts and circumstances of the case, parties to bear their own costs.

Revision allowed

I.L.R. [2013] M.P., 2987
CRIMINAL REVISION
Before Smt. Justice S.R. Waghmare
Cr. Rev. No. 398/2012 (Indore) decided on 11 March, 2013

DHAPUBAI (SMT.) & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Sections 306, 302 & 498A, Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 - Stage of framing of charges **- Charges framed on the basis of material and prima facie case as put up before the Court - Framing of charge u/s 302 or in the alternative 306 permissible - Relief of discharge at this stage cannot be granted. (Para 6)**

दण्ड संहिता (1860 का 45), धाराऐं 306, 302 व 498ए, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 227 व 228 – आरोप विरचित किये जाने का प्रक्रम – सामग्री और प्रथम दृष्ट्या प्रकरण, जैसा कि न्यायालय के समक्ष रखा गया, के आधार पर आरोप विरचित किये गये – धारा 302 या विकल्प में 306 के अंतर्गत आरोप विरचित किया जाना अनुज्ञेय है – इस प्रक्रम पर आरोप मुक्त किये जाने का अनुतोष प्रदान नहीं किया जा सकता।

Cases referred :

2010 CRLJ 4303, 2000(2) MPLJ 322, 2007 CRLJ 130, 1 (2007) DMC 330.

Ritesh Inani, for the applicants.
R.S. Bais, for the non-applicant/State.

ORDER

SMT.S.R.WAGHMARE, J.:- By this petition, the petitioners have challenged the order dated 29.03.2012 passed by the Additional Sessions Judge, Dewas in Sessions Trial No.102/12 framing charges under Section 306 of the IPC in the alternative for offence under Sections 302 & 498A of the IPC against the present petitioners.

02. The prosecution case in a nutshell is that the deceased Sarita @ Nagina; wife of the petitioner No.4, Sanjay caught fire and sustained grievous burn injuries and was taken to the hospital. However she succumbed to the

injuries during the treatment and the police registered the merg and after recording of statements registered the offence under Section 306 of the IPC against the present applicants.

03. Counsel for the petitioners have vehemently urged the fact that prima facie there were no ingredients for framing charges for offence punishable under Section 306 or 302, 498A of the IPC; primarily because the statement of the deceased Sarita was recorded under Section 161 of the Cr.P.C. and she did not state anything against the present petitioners. In fact, she has exonerated them and the statements of the witnesses have been due to instigation and recorded after a lapse of 25 days. Counsel vehemently urged the fact that the entire prosecution case was malafide because the father of the deceased lodged a written complaint before the SDOP, Bagli for registration of the offence, 25 days after the incident had occurred. And even if the allegations are considered there was just omnibus statements and prima facie there is no direct evidence collected by the prosecution regarding the murder of the deceased as alleged and offence u/S.302 of the IPC can not be made out in any circumstance. Counsel prayed that the impugned order framing charges be set aside.

04. Counsel for the petitioners also vehemently urged the fact that even if the documents on record are considered, the MLC by the Choithram Hospital and Research Centre clearly indicated that history as told by patient is that Sarita was cooking food and suddenly caught fire, she had poured kerosene on the wood when suddenly the fire flared up and the incident had occurred at 12:30 pm. She was brought to the Choithram Hospital on 27.02.2011 at 5:00 pm itself and Dr. Sharad Dubey has certified that the patient was having 90% burns and in this light also Counsel stated that the dying declaration has been duly verified by Naib Tehsildar and after the doctor certified that the patient was fit to give the statement. The entire dying declaration was in accordance with the provisions of law and there was no need to doubt the present petitioners unnecessarily. Moreover Counsel submitted that all the petitioners had been roped on the basis of omnibus statements and did not deserve to undergo the rigors of the long trial when there was no evidence on record. The Apex Court has time and again deprecated the practice of roping of all the family members (relied on *Preeti Gupta & another vs. State of Jharkhand & another* [2010 CRI. L. J. 4303]). He however candidly admitted that anticipatory bail had been granted to all the petitioners under the circumstances.

05. Counsel for the respondent/State has however opposed the submissions of the Counsel of the petitioners and stated that the father of the deceased has complained before the SDOP and crime was registered against the petitioners. He stated that there is no infirmity in the order framing charge. Counsel prayed dismissal of the application.

06. On considering the above submissions, the evidence on record, I find that the revision petition is not maintainable at this stage, primarily because prosecution cannot be stifled at this stage, the charges have to be framed on the basis of material and prima facie case as put up before the Court. I find that it is not a fit case for grant of relief of discharge at this stage since at the time of framing of charges prima facie the offence has to be made out. So also it would be profitable to rely on *State of M.P. vs. S.B. Johari and others*: 2000(2) MPLJ 322, whereby the Court held thus:

> "It is settled law that at the stage of framing the charge, the Court has to prima-facie consider whether there is sufficient ground for proceeding against the accused. The Court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the Court is satisfied that a prima facie case is made out for proceeding further, then a charge has to be framed."

(Also see *Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau* : 2000 (1) SCC 138; *State of Maharashtra and other vs. Somnath Thapa and others:* 1996 (4) SCC 659).

07. Similarly I find that mainly the petitioner seems to be aggrieved by the framing of charge under Section 302 as well as for offence under Section 306 of the IPC because it is the popular understanding that under Section 464 of the Cr.P.C. it is not possible for a Court to convict an accused for an offence in which no charge has been framed under the Section concerned or unless the Court is of the opinion that a failure of justice would in fact occasion. I find that the Apex Court has in the matter of *Dalbir Singh Vs. State of U.P.* [Appeal (crl.) No.479 of 1999] held that where the accused is charged under Section 302 of the IPC, he could be convicted for offence under Section 306 of the IPC. The only caution that is directed by the Apex Court is that the trial should have been a fair one and proper opportunity to defend has been

granted to the accused. This case was relied on by the Bombay High Court in the matter of *Kisan @ Pilaji Gangaram Khatale Vs. the State of Maharashtra* [2007 Cri.L.J. 130, 1 (2007) DMC 330] and their Lordships held that when an accused is charged for offence punishable under Section 498A, 302 read with Section 34 of the IPC and the charge had already been framed, then the prosecution had filed an application praying for framing of an alternative charge under Section 306 of the IPC and the Court held that to consider the

> "severity of cruelty and whether it was sufficient to drive her to commit suicide or not, could be considered only during trial if charge under Section 302 is not established. I am satisfied that no prejudice whatsoever could be caused to the petitioner by framing an alternative charge under Section 306 of the IPC. In the result, the petition fails and is dismissed as such. And in this light also no fault can be found with the trial Court for framing charge for offence under Section 302 of the IPC."

08. Consequently, the petition is dismissed as being sans merit. The record of the Trial Court has been requisitioned. Therefore, the Registry is directed to return the record forthwith and the Trial Court is directed to complete the trial as expeditiously as possible under intimation in writing to this Court preferably within a period of one year from today.

Petition dismissed.

I.L.R. [2013] M.P., 2990
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 1137/1999 (Jabalpur) decided on 18 December, 2013

SANTOSH ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. Evidence Act (1 of 1872), Sections 3 & 32 - Hearsay Evidence - **P.W. 2 stated that he was informed by complainant that her husband was cruel to her - Cannot be accepted under Section 32 of Act as complainant is still alive.** **(Para 8)**

क. साक्ष्य अधिनियम (1872 का 1), धाराऐं 3 व 32 – अनुश्रुत साक्ष्य –

अ.सा. 2 ने कथन दिया कि उसे शिकायतकर्ता से जानकारी मिली कि उसका पति उससे क्रूरता का व्यवहार करता था – अधिनियम की धारा 32 के अंतर्गत स्वीकार्य नही क्योंकि शिकायतकर्ता अभी जीवित है।

B. Penal Code (45 of 1860), Section 498-A - Cruelty - **Evidence of complainant not corroborated by her parents - Complainant also did not lodge the F.I.R. within reasonable time - Testimony of complainant cannot be accepted. (Para 11)**

ख. दण्ड संहिता (1860 का 45), धारा 498ए – क्रूरता – शिकायतकर्ता के साक्ष्य की पुष्टि उसके माता–पिता द्वारा नही की गई – शिकायतकर्ता ने युक्तियुक्त समय के भीतर प्रथम सूचना रिपोर्ट भी दर्ज नहीं की – शिकायतकर्ता की परिसाक्ष्य को स्वीकार नही किया जा सकता।

C. Penal Code (45 of 1860), Sections 494 & 498-A - Second Marriage and Cruelty - **No allegation that any offence of cruelty during the alleged performance of second marriage was committed - Both the offences cannot be tried in a common complaint. (Para 15)**

ग. दण्ड संहिता (1860 का 45), धाराऐं 494 व 498ए – द्वितीय विवाह और क्रूरता – कोई अभिकथन नहीं कि कथित द्वितीय विवाह के निष्पादन के दौरान कोई क्रूरता का अपराध कारित किया गया – दोनों अपराधों का विचारण, समान शिकायत में नहीं किया जा सकता।

D. Penal Code (45 of 1860), Section 494, Criminal Procedure Code, 1973 (2 of 1974), Section 182 - Bigamy - **Territorial jurisdiction - Offence u/s 494 of I.P.C. can be tried by the Court within whose jurisdiction offence was committed or the offender last resided with his spouse of first marriage or wife of the first marriage has taken up permanent residence after the commission of offence. (Para 17)**

घ. दण्ड संहिता (1860 का 45), धारा 494, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 182 – द्विविवाह – क्षेत्रिय अधिकारिता – भा.द.सं. की धारा 494 के अंतर्गत अपराध का विचारण उस न्यायालय द्वारा किया जा सकता है जिसके अधिकारक्षेत्र के भीतर अपराध कारित किया गया था या अपराधी अपनी प्रथम विवाह की पत्नी के साथ अंतिम बार निवासरत था या प्रथम विवाह की पत्नी ने, अपराध कारित होने के पश्चात स्थायी निवास लिया है।

E. Penal Code (45 of 1860), Section 494 - Bigamy - **Second marriage should be proved in accordance with essential religious rites available to the parties - Complainant failed to prove the second**

marriage - Applicant cannot be convicted. **(Para 23)**

ङ. दण्ड संहिता (1860 का 45), धारा 494 – द्विविवाह – द्वितीय विवाह को, पक्षकार को उपलब्ध आवश्यक धार्मिक रीतियों के अनुसरण में होना, साबित किया जाना चाहिए – शिकायतकर्ता द्वितीय विवाह साबित करने में असफल – आवेदक को दोषसिद्ध नहीं किया जा सकता।

Cases referred :

AIR 1992 SC 1831, AIR 1971 SC 1153, AIR 1979 SC 848.

Abhinav Dubey, for the applicant.
G.S. Thakur, P.L. for the State/non-applicant No.1.
None for the non-applicant No. 2, though served.

ORDER

N.K. Gupta, J.:- The applicant was convicted for the offence punishable under sections 494 and 498-A of IPC and sentenced with two years rigorous imprisonment with fine of Rs.250/- and one year's rigorous imprisonment with fine of Rs.250/- vide judgment dated 25.1.1997 passed by the learned CJM, Khandwa in criminal complaint case No.2050/1996. In criminal appeal No.9/1997, the learned First Additional Sessions Judge, Khandwa dismissed the appeal. Being aggrieved with the aforesaid judgments, the applicant has preferred the present revision.

2. The facts of the case, in short, are that, the complainant/respondent had filed a criminal complaint against the applicant and other 15 persons with the allegations that her marriage took place with the applicant 5 years prior to the filing of the complaint. She was blessed with two children but, she was ousted from the house by the applicant and his family members in pursuance to their demand of dowry and harassment. It was also pleaded that on 28.6.1991, the applicant entered into the second marriage with the help of other accused persons with one Sukai Bai, daughter of Tarachand at village Gogawan, District Khargone.

3. The applicant abjured his guilt. Premnath Sharma (D.W.1), Murarilal (D.W.2), Laxminarayan Singh (D.W.3), Shobharam (D.W.4) were examined as defence witnesses. Premnath, Murarilal, Laxminarayan Singh were examined to prove the plea of alibi for various accused persons, whereas Shobharam was examined to prove the rites relating to the marriage in the concerned caste.

4. The learned JMFC, after considering the evidence adduced by the parties, acquitted all other accused persons but, convicted and sentenced the applicant as mentioned above. The appeal filed by the applicant was dismissed in toto.

5. I have heard the learned counsel for the parties.

6. The respondent No.2 did not appear in the present revision though notice of this petition was served upon her.

7. For consideration of the present revision, the discussion should be done in two parts. One part for the offence punishable under section 494 of IPC and second part for the offence punishable under section 498-A of IPC.

8. For convenience of the discussion, offence under section 498-A of IPC could be considered initially. In that respect, Kadwa (P.W.2) has stated in omnibus manner that he was informed by the complainant that her husband was cruel to her for demand of dowry etc. but, the statement of the witness Kadwa cannot be accepted under section 32 of the Evidence Act as she still survives. His statement falls in the category of hearsay evidence, which cannot be believed. Kanti Bai (P.W.1) has stated that she was being assaulted for demand of a scooter/moped. The applicant was habitually consuming liquor and thereby assaulting her. On the contrary, Natthulal (P.W.3) has stated that the applicant went to his village to drop Kanti Bai in the house of her parents. After sometime, he came back to take Kanti Bai to his house and when she refused to go with the applicant, he assaulted the victim Kanti Bai. The complainant Kanti Bai did not say that such an incident took place in her parents house and therefore, it would be apparent that the factum of cruelty etc. shown by the witness Natthulal is nothing but, a cooked story which cannot be believed.

9. The complainant Kanti Bai has stated that the applicant was in a habit to consume liquor and to assault her, whereas the applicant was working in the office of S.P., Khandwa and he could not do such a thing otherwise he could lose his job on the complaint made by anyone. In the complaint it was not pleaded that the applicant was in a habit to consume liquor and to assault the victim Kanti Bai and therefore, such allegation appears to be an after thought which cannot be believed.

10. The victim Kanti Bai has accepted that she filed the complaint one

year and 3 months after leaving the house of the applicant. It is strange that neither mother, nor father of the complainant were examined to show that the complainant was dealt with cruelty and therefore, they went to talk with the parents of the applicant for conciliation between the victim and the applicant. After considering the evidence adduced by the complainant, she could not tell any reason as to why she did not lodge any FIR against the applicant for offence punishable under section 498-A of IPC. Also she did not take any step for conciliation etc. in those 1½ years. After considering her cross-examination, she has accepted that she left her husband, 7 years back when she was pregnant for 3 months and his son was in her womb. She has also accepted that she initiated an application for maintenance, 2 years prior to her statements, whereas her statements were recorded on 8.2.1996. She has also accepted that she was ousted from the house, 5 years prior to the proceedings of maintenance and therefore, it appears that she left the house of the applicant 2 years prior to filing of that complaint.

11. On the basis of the aforesaid discussion, it would be apparent that Natthulal did not support the allegation made by the complainant about cruelty and harassment and he told a new story. No other witness was examined to corroborate the evidence of the complainant Kanti Bai. She did not take any step to lodge an FIR against the applicant for offence punishable under section 498-A of IPC within reasonable period. Under such circumstances, the testimony of the complainant Kanti Bai cannot be accepted for the fact of cruelty or harassment done by the applicant.

12. In this connection, the learned counsel for the applicant has submitted that since the alleged second marriage took place at village Gogawan, District Khargone, the complaint for offence punishable under section 494 of IPC should have been filed before the concerned Magisterial Court, who had territorial jurisdiction over the territory of Police Station Gogawan, whereas the complaint was filed before the Magisterial Court of city Khandwa and therefore, to show that the cause of action arose at Khandwa, offence punishable under section 498-A of IPC was added in the complaint, without any basis.

13. The contention advanced by the learned counsel for the applicant is acceptable. In the cross-examination of the complainant Kanti Bai, the learned defence counsel has shown a copy of the complaint served to the applicant which was different from the complaint which was actually filed.

14. The complainant Kanti Bai had accepted that initially the complaint was prepared by Shri Mandloi, Advocate and thereafter, she engaged another counsel who changed the draft of the complaint and thereafter, the complaint was filed. Under such circumstances, where the complainant did not take any step against the applicant about his cruelty and harassment in last 2 years before filing of the complaint, her allegations cannot be accepted. Under such circumstances, the complainant could not prove that the applicant did any cruelty to her or harassed her in such a manner that a crime under section 498-A of IPC could be constituted.

15. The learned Chief Judicial Magistrate as well as the learned Additional Sessions Judge have failed to observe that it was a case of misjoinder of the charges. The offence under section 498-A of IPC cannot be considered as offence in continuation and the complainant did not allege any offence of cruelty during the alleged performance of second marriage. Therefore, cause of action for offence punishable under section 498-A of IPC arose with the complainant much prior to the filing of this complaint, whereas alleged cause of action arose for offence punishable under section 494 of IPC in a different manner. So both the offences could not be tried in a common complaint before the Chief Judicial Magistrate, Khandwa. Cause of action for offence under section 494 of IPC had arisen much after the cause of action arose for offence punishable under section 498-A of IPC at village Gogawan where alleged second marriage was performed and complaint could be filed before the Magistrate who had territorial jurisdiction over the territory of Police Station Gogawan, District Khargone.

16. On the basis of the aforesaid discussion, it would be apparent that the trial took place with misjoinder of the charges. The complainant clubbed each cause of action in filing a criminal complaint. In this connection, the judgment passed by Hon'ble the Apex Court in case of "*K.T.M.S. Mohd. and another Vs. Amanullah Quareshi*", [AIR 1992 SC 1831], in which it is laid that the misjoinder of charges is not a mere irregularity and if misjoinder was done then, accused was entitled to acquittal. Under such circumstances, the trial Court could convict the applicant either for offence punishable under section 498-A of IPC or section 494 of IPC because both the charges could not be tried simultaneously.

17. So far as the territorial jurisdiction of the Magisterial Court relating to offence under section 494 of IPC is concerned, it is true that according to

section 177 of the Cr.P.C., the Magisterial Court had the jurisdiction to try the case for offence punishable under section 494 of IPC in whose jurisdiction, second marriage was performed. However, in the year 1978 the legislature has amended the provisions of section 182 of the Cr.P.C. and it was directed that offence under section 494 of IPC can be tried by the Court within whose legal jurisdiction offence was committed or the offender last resided with his spouse of the first marriage or wife of the first marriage has taken up permanent residence after the commission of the offence. In the present case, the first wife has lastly resided at Khandwa, where the applicant was posted in the S.P. office, Khandwa and therefore, the complaint for offence under section 494 of IPC could be prosecuted before the CJM, Khandwa also.

18. If the merits of the case are considered then, the complainant Kanti Bai was not an eye witness to the alleged second marriage of the applicant. The only witness Kadwa (P.W.2) was examined who claimed that he saw the second marriage. However, there is a lot of contradiction between the evidence given by the complainant Kanti Bai and Kadwa. Initially, it was pleaded by the complainant Kanti Bai that she got the information of the second marriage of the applicant from Kadwa but, in her statement before the Court, she stated that she got the information about the proposed second marriage of the applicant and therefore, she had sent Kadwa to attend the marriage and to report her back. She has also stated that her mother and maternal aunt went to Police Station Khargone to lodge the FIR about the second marriage. She has also shown that she had lodged a complaint to S.P., Khandwa to stop that marriage. However, no copy of FIR was shown before the trial Court that any FIR was lodged at Police Station Khargone. Also, either mother or maternal aunt of the complainant is examined in support of that contention. On the contrary, the complainant Kanti Bai had accepted that in her witnesses list, names of her mother and her maternal aunt were not mentioned. If the document, Ex.P/1 is perused then, it is nothing but, a typed complaint signed by the complainant but, no endorsement is shown on the document, Ex.P/1 that it was ever given to S.P., Khandwa. Such type of complaint could be prepared at the time of filing of the complaint to establish the allegation made in the complaint. If the complainant had filed a complaint before the S.P., Khandwa on the proposed date of marriage of the applicant then, it must have been received by S.P., Khandwa in his office by his subordinate staff or by the registered post. The complainant neither submitted any postal receipt or any acknowledgement given by the office superintendent of the office of the S.P., Khandwa that such

complaint was submitted in that office and therefore, the document Ex.P/1 is nothing but, a document created before filing the complaint. For sake of arguments, if it is accepted that the complaint Ex.P/1 was filed before the S.P., Khandwa on 28.6.1991 then, there was no problem with the complainant to file a criminal complaint soon after the incident of second marriage but, the complaint was filed 6 months after the alleged incident. Under such circumstances, the evidence given by the complainant Kanti Bai and Kadwa that the complainant Kanti Bai took the steps to stop the second marriage of the applicant appears to be a falsehood.

19. In this connection, it is pertinent to note that when the complainant Kanti Bai was asked about drafting of the complaint by Shri Mandloi, Advocate that the second marriage took place as "Paat Marriage", she turned annoyed and she has accepted that she was residing with the applicant as a wife though no valid marriage took place. The annoyance of the complainant does not disturb the fact of her marriage with the applicant because it was accepted by the applicant but, her annoyance indicates that drafting of the complaint was done according to the advice of an Advocate and not on the basis of actual factual position.

20. The complainant has accepted in para 18 of her statement that in the alleged second marriage, her elder brother-in-law also visited the venue of marriage. However, neither such fact was pleaded in the complaint, nor elder brother-in-law of the complainant was examined to confirm that fact. According to the complainant, she got an information that the applicant was going to perform the second marriage but, she did not tell anything about the source of that information. The complainant has stated that she had sent Kadwa, her cousin to watch the second marriage of the complainant, whereas Kadwa (P.W.2) has stated that he attended the marriage and thereafter, he gave the information to the complainant about the second marriage. He was never sent by the complainant to watch the marriage.

21. Kadwa (P.W.2) could not tell any due reason as to why he attended the marriage. He did not say that he was invited in the marriage. On the contrary, he has accepted that when brother of Sukai Bai saw him at the venue, he directed him to leave the place and therefore, at 6 p.m. he left the venue and went to the house of her aunt-in-law and thereafter, he remained in the house of his aunt-in-law and saw the rites of marriage from the house of his aunt-in-law because marriage of the applicant was performed at an open

place. Conduct of the witness Kadwa indicates that he is a cooked witness. He did not see the marriage of the applicant with anyone at village Gogawan. If he was found at the venue of second marriage then, he could tell to father and brother of Sukai Bai that the applicant was already married. He could inform his aunt-in-law to take steps to stop the marriage because it was not a valid marriage. He did not say in his statement under section 202 of the Cr.P.C. that he was shunted from the venue and thereafter, he saw the entire ceremony from the house of her aunt-in-law. His aunt-in-law could be an eye witness for the factum of second marriage because she was also present in the house and when Kadwa could see the marriage of the applicant performed from the house of his aunt-in-law then that performance could be seen by her aunt-in-law also. When he was asked about the family members of the bride then, he could not say about the names of the brothers of the bride. He could not tell the name of the Pandit, who got the marriage performed. Under such circumstances, the testimony of the witness Kadwa cannot be accepted. It appears that since he was cousin of the complainant and therefore, he gave the evidence in favour of the complainant to prove her case. Neither he had an opportunity to attend the marriage, nor it is proved that any intimation was received to the complainant about the marriage, prior to the marriage is performed.

22. The defence witnesses have tried to prove alibi of the applicant and his family members. However, Laxminarayan Singh (D.W.3) has submitted that the applicant was present in the office on 28.6.1991 but, in the cross-examination he has accepted that on 29.6.1991, the applicant was not present in the office. If a person is required to move for his marriage in the evening then, his absence of the next day shall be counted and therefore, by the statement of the witness Laxminarayan Singh, the evidence of alibi of the applicant could not established. Though the defence evidence could not create any innocence of the applicant, however, the prosecution should stand on its own feet. The prosecution is accepted to prove its case beyond doubt and therefore, if defence evidence is not sufficient to prove the innocence of the accused then, it makes no difference to the prosecution's case.

23. On the basis of the aforesaid discussion, it would be apparent that there is a lot of contradiction between the statement of the complainant Kanti Bai and the alleged eye witness Kadwa (P.W.2). It was established that the victim Kanti Bai did not receive any information about the second marriage of the applicant and only the documents and statements of the complainant were

created while with drafting of the complaint by the Advocate. After considering the evidence given by the witness Kadwa, his testimony is not acceptable. It is not proved beyond doubt that he attended the marriage ceremony of the applicant and Sukai Bai. The learned counsel for the applicant has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of "*Smt.Priya Bala Ghosh Vs. Suresh Chandra Ghosh*", [AIR 1971 SC 1153] and "*Lingari Obulamma Vs. Venkata Reddy and others*", [AIR 1979 SC 848], in which it is laid that the second marriage should be proved in accordance with essential religious rites applicable to the parties, otherwise no conviction can be directed for offence of bigamy. In the present case, the complainant failed to prove the second marriage of the applicant and therefore, the applicant could not be convicted for the offence punishable under sections 494 of IPC.

24. On the basis of the aforesaid discussion, it would be apparent that the complainant could not prove the offence under section 498-A of IPC committed by the applicant. The trial Court has no jurisdiction to entertain the complaint of the complainant under section 494 of IPC because of territorial jurisdiction, which was with the Chief Judicial Magistrate, Khargone and therefore, the trial Court could not convict the applicant for offence punishable under section 494 of IPC. Similarly, the complainant failed to prove the factum of alleged second marriage and therefore, the applicant could not be convicted for the offence punishable under section 494 of IPC on the merits of the case. Under such circumstances, the judgment passed by the learned Chief Judicial Magistrate, Khandwa and the learned Additional Sessions Judge, Khandwa appears to be perverse, which cannot be maintained. In such a situation, the revision filed by the applicant can be accepted and therefore, it is hereby accepted. The conviction as well as the sentence directed for offence punishable under sections 494 and 498-A of IPC are hereby set aside. The applicant is acquitted from the charges of offence punishable under sections 494 and 498-A of IPC. He would be entitled to get the fine amount back, if he has deposited the same before the trial Court.

25. The presence of the applicant is no more required before this Court and therefore, it is directed that his bail bonds shall stand discharged.

26. A copy of the order be sent to both the Courts below alongwith their records for information.

Order accordingly.

I.L.R. [2013] M.P., 3000
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 309/2013 (Jabalpur) decided on 19 December, 2013

SUREKHA SINGH ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

***Penal Code (45 of 1860), Section 376 - Rape* - Accused contacted marriage with prosecutrix and after marriage she remained in her parental house and accused used to visit her and had physical relations with her - Subsequently, the prosecutrix was told by one lady that she is the married wife of accused having two children also and no divorce has taken place - Held - Prosecutrix under the impression that she is his wedded wife permitted him for intercourse - Accused has prima facie committed the offence under Section 376 of I.P.C. - Parents of accused also participated in conspiracy as they were living with the accused and even then they did not inform the prosecutrix about the actual position - Charge under Section 120-B /34 of I.P.C. can be framed against the parents of the accused - Revisions allowed. (Paras 5 & 6)**

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियुक्त ने अभियोक्त्री के साथ विवाह किया और विवाह के पश्चात वह अपने पैतृक मकान में ही रही तथा अभियुक्त उसे मिलने आता था और उससे शारीरिक संबंध बनाता था – तत्पश्चात, अभियोक्त्री को एक महिला द्वारा बताया गया कि वह अभियुक्त की ब्याहता पत्नी है जिसकी दो संतानें भी हैं और विवाह विच्छेद नहीं हुआ है – अभिनिर्धारित – अभियोक्त्री ने इस धारणा के अधीन कि वह उसकी ब्याहता पत्नी है, उसे सहवास की अनुमति दी – अभियुक्त ने प्रथम दृष्ट्या भा.द.सं. की धारा 376 के अंतर्गत अपराध कारित किया है – षडयंत्र में अभियुक्त के माता–पिता भी शामिल क्योंकि वे अभियुक्त के साथ रह रहे थे और तब भी उन्होंने अभियोक्त्री को वास्तविक स्थिति से अवगत नहीं कराया – अभियुक्त के माता–पिता के विरुद्ध भा. द.सं. की धारा 120बी/34 का आरोप विरचित किया जा सकता है–पुनरीक्षण मंजूर।

Case referred :

(2008) 8 SCC 531.

Manish Datt with *Pushpendra Dubey*, for the applicant.
S.D. Khan, P.P. for the non-applicant No.1/State.
None for the non-applicants No. 2 to 4 though served.

ORDER

N.K. GUPTA, J.:- Since all the criminal revisions are connected with the common order dated 28.1.2013 passed by the 7th Additional Sessions Judge, Bhopal, therefore, those are decided with this common order.

2. The 7th Additional Sessions Judge, Bhopal vide order dated 28.1.2013 in ST No.76/2013 discharged the respondents No.2 to 4 of Cr.R.No.309/2013 (hereinafter they would be referred as **"accused"**) from the charge of Section 376 of IPC and trial was directed under Section 228 of Cr.P.C. to the CJM Bhopal for trial of the offence under Sections 493, 420 and 120-A of IPC. Being aggrieved with the discharge of the accused persons from the charge of offence under Section 376 of IPC, the applicant of Cr.R.No.309/2013 and the State have preferred the present revisions whereas the applicants (accused) of Cr.R.No.589/2013 have preferred the revision against the impugned order that no offence under Sections 420 or 493 or 120-A of IPC is made out against them.

3. The prosecution case, in short, is that the prosecutrix had lodged an FIR that on 16.7.2012 she was introduced to the accused Satyendra Kumar Vyas and a sagai was done between them and thereafter on 7.8.2012 a marriage took place between the prosecutrix and the accused Satyendra Kumar Vyas. Thereafter she remained in her parental house and the accused Satyendra Kumar Vyas was often visiting her in that house. He had physical relations with the prosecutrix from time to time. He got an affidavit of the prosecutrix executed, which was duly notarized before the Notary R.N.Tripathi. Thereafter the prosecutrix was residing with the accused persons in the house situated at Sant Asharam Nagar, Bhopal. On 21.8.2012 one woman namely Apekchha came to the house and she intimated that she was married wife of accused Satyendra Kumar Vyas and she had two children. She was residing with her parents, however no divorce took place between Apekchha and accused Satyendra Kumar Vyas. After sometime Apekchha came back on 10.9.2012 and abused the prosecutrix and directed her to leave the house. Thereafter the prosecutrix had lodged an FIR.

4. Learned counsel for the accused did not appear in all three matters though notices of the revisions filed by the applicant Surekha and State were served upon the accused persons and they were represented in the revision petition filed by themselves, and therefore hearing was done in the absence of learned counsel for the accused persons. However, I have heard the learned

counsel for the remaining parties.

5. The main question in the case is as to whether prima facie the offence under Section 376 of IPC shall be made out or not. In this connection the learned 7th Additional Sessions Judge, Bhopal has mentioned that it is apparent that the accused Satyendra Kumar Vyas committed intercourse with the prosecutrix due to her consent, and therefore no offence under Section 376 of IPC is made out. At the most offence under Section 493 of IPC may constitute. In this connection, if the provision under Sections 375 and 376 of IPC is perused, then it would be apparent that a woman gives her consent to a man to whom she believes to be her husband and she was lawfully married with him, then the offence committed by that man may come within the purview of Section 376 of IPC. The provision of Section 375 (Fourthly) of IPC may be read as under:-

> "With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married."

On the plain reading of the aforesaid provision, it would be apparent that the accused Satyendra Kumar Vyas gave an apprehension that the prosecutrix was her wedded wife and thereafter she permitted him for the intercourse, and therefore prima facie Satyendra Kumar Vyas has committed the offence under Section 376 of IPC. In this connection the law laid down by Hon'ble the Apex Court in the case of "*Bhupinder Singh Vs. Union Territory of Chandigarh*", [(2008)8 SCC 531] may be read. Para 15 and 16 of the said judgment reads as under:

> "15. Clause "Fourthly" of Section 375 IPC reads as follows:
>
> "375. Rape - A man is said to commit "rape", who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:
>
> * * *
>
> Fourthly - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

* * *

> 16. Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause "Fourthly" of Section 375 IPC has no application, the stand is clearly without substance. Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab initio. In the event, the appellant-accused could not have lawfully married the complainant. A bare reading of clause "Fourthly" of Section 375 IPC makes this position clear."

6. In the light of the aforesaid judgment, where the prosecutrix of that case had the knowledge that her husband was already married, still Hon'ble the Apex Court found that the accused was guilty for the offence under Section 376 of IPC. In the present case, the prosecutrix did not know that the accused Satyendra Kumar Vyas was already married and therefore in the present case the prosecutrix gave her consent due to her marriage performed with the accused Satyendra and hence the crime of accused falls within the purview of Section 375 (Fourthly) of IPC and offence under Section 376 of IPC is prima facie constituted. The parents of accused Satyendra Kumar Vyas were residing with Satyendra Kumar Vyas and the prosecutrix and they did not inform about the actual position, and therefore they participated in the criminal conspiracy done by the accused Satyendra Kumar Vyas. Under such circumstances, the charge of offence under Section 376 of IPC shall also be framed against the remaining accused persons with the help of Section 120-B and Section 34 of IPC.

7. On The basis of the aforesaid discussion, it would be apparent that the learned Additional Sessions Judge has committed an error of law in discharging the accused persons from the charge of offence under Section 376 of IPC, and therefore the order passed by the 7th Additional Sessions Judge, Bhopal appears to be perverse.

8. So far as the revision filed by the accused persons is concerned, they have one more opportunity to argue the matter before the trial Court relating to charges under Sections 420, 493 and 120-A of IPC, and therefore if that matter is discussed here, then it would cause prejudice to them before the trial Court, hence the revision filed by the accused persons cannot be accepted

at this stage.

9. On the basis of the aforesaid discussion, it is a fit case in which the revisions filed by the applicant Surekha Singh and the State may be accepted. Consequently, their criminal revisions i.e. Cr.R.No.309/13 and Cr.R.No.437/13 are hereby allowed and the impugned order passed by the learned 7th Additional Sessions Judge, Bhopal is hereby set aside. The revision filed by Satyendra Kumar Vyas etc. is hereby dismissed with a direction that they shall raise all such objections before the trial Court at the time of framing of charges.

10. The learned 7th Additional Sessions Judge, Bhopal is directed to call the case file of ST No.76/2013 from the Magisterial Court and after hearing the learned counsel for the parties, a fresh order be passed for framing of charges and thereafter charges shall be framed according to law.

11. Parties are directed to appear before the 7th Additional Sessions Judge, Bhopal on 20.1.2014 so that trial may be proceeded before the 7th Additional Sessions Judge, Bhopal.

12. A copy of this order be sent to the learned 7th Additional Sessions Judge, Bhopal as well as Sessions Judge and CJM, Bhopal so that case file which must be in the Magisterial Court may be sent to the learned 7th Additional Sessions Judge, Bhopal within the stipulated period.

Revision allowed.

I.L.R. [2013] M.P., 3004
CRIMINAL REFERENCE
Before Mr. Justice Rajendra Menon & Mr. Justice Rohit Arya
Cr. Ref. No. 1/2013 (Gwalior) decided on 11 October, 2013

IN REFERENCE ...Applicant
Vs.
KAMLESH @ GHANTI ...Non-applicant

*A. **Penal Code (45 of 1860), Section 376(A)/302 - Punishment for Rape and Murder - Death Sentence** -* **Held, that appellant being in a position of trust is responsible for having acted in a manner which brings this case in the category of rarest of rare case where the sentence of death is more desirable than any other punishment - Further held that, while awarding the death sentence the court has to apply the 'rarest of**

rare' test depending upon the perception of the society i.e. a society centric view has to be taken and not a judge centric view - Death Reference answered in affirmative. (Paras 25, 38 & 39)

क. दण्ड संहिता (1860 का 45), धारा 376(ए)/302 – बलात्कार एवं हत्या के लिए दंड – मृत्यु दंड – अभिनिर्धारित कि अपीलार्थी, विश्वास कि स्थिति में होते हुए, इस प्रकार का कृत्य करने के लिए जिम्मेदार है जो इस प्रकरण को विरलतम से विरल श्रेणी में लाता है जहां किसी अन्य दंड से मृत्यु दंड अधिक वांछनीय है – आगे अभिनिर्धारित किया गया कि मृत्यु दंड देते समय न्यायालय द्वारा 'विरलतम से विरल' की कसौटी को समाज के बोध पर आश्रित करते हुए लागू किया जाना चाहिए, अर्थात समाज केन्द्रित दृष्टिकोण अपनाना चाहिए न कि न्यायाधीश केन्द्रित दृष्टिकोण – मृत्यु दंड निर्देश को सकारात्मक रूप से उत्तरित किया गया।

B. Penal Code (45 of 1860), Section 302 - Circumstantial Evidence **- Held, if circumstantial evidence is complete and conclusive in all respects and points to the guilt of the accused - Conviction is valid. (Paras 25, 38 & 39)**

ख. दण्ड संहिता (1860 का 45) धारा 302 – परिस्थितिजन्य साक्ष्य – अभिनिर्धारित, यदि परिस्थितिजन्य साक्ष्य सभी प्रकार से परिपूर्ण एवं निर्णायक है और अभियुक्त की दोषिता की ओर इंगित करता है – दोषसिद्धि विधिमान्य है।

Cases referred :

(2012) 2 SCC (Cri) 533, (2012) 4 SCC 722, (2012) 2 SCC (Cri) 179, (2012) 3 SCC 387, (1997) 10 SCC 605, (2011) 12 SCC 258, (2007) 3 SCC (Cri) 5, ILR (2011) MP 529, (2011) 3 SCC (Cri) 473, (2011) 11 SCC 724, AIR 1984 SC 1622, (2011) 12 SCC 56, (2012) 6 SCC 297, (2008) 11 SCC 113, (2010) 2 SCC 583, 2012(4) MPHT 138, (2013) 4 SCC 422, AIR 1952 SC 343, (2005) 3 SCC 114, 1989 Supp.(2) SCC 706, (1980) 2 SCC 684, (1983) 3 SCC 470, (1979) 3 SCC 366, (1994) 2 SCC 220, (1994) 3 SCC 381, (1996) 6 SCC 250, (2013) 5 SCC 546.

Vivek Khedkar, Dy. A.G. for the applicant/State.
Ravindra Dixit, for the non-applicant/Accused.

J U D G M E N T

The Judgment of the Court was delivered by : **RAJENDRA MENON, J. :-** The Sessions Judge, Datia by the impugned judgment dated 22.7.2013, in Sessions Trial No.85/2013, has sentenced the appellant to death for committing the offence of rape and murder of a 7 year old girl

and has referred the matter under section 366 of the Code of Criminal Procedure, for confirmation of the death sentence. The appellant has been convicted for offences under sections 376(A), 302, 201, 363 and 366(A) of the Indian Penal Code and has been sentenced to death; death and fine of Rs. 5,000/- five years rigorous imprisonment and fine of Rs.5,000/-. five years rigorous imprisonment and fine of Rs. 5,000/- and, seven years rigorous imprisonment and fine of Rs. 5,000/- respectively. In addition, appellant has also been convicted under section 4 of the Child Protection Act, and sentenced to imprisonment for life and fine of Rs.5000/-.

2- Challenging the same judgment of the learned Sessions Judge, appellant Kamlesh @ Ghanti has also filed an appeal under section 374 of the Code of Criminal Procedure.

3- Since the Reference and the Appeal arise out of the same judgment, both are being decided by this common judgment.

4- It is the case of the prosecution that complainant Gulzar Singh, father of the child in question, is resident of village Dongarpur. He has a kirana (grocery) shop in his house. It is alleged that on 18.4.2013, at about 7.00 in the evening, accused Kamlesh @ Ghanti came to the shop and purchased 'bindol' (packet of beedi) and gutka. The accused was staying with his cousin and her husband Ramsewak Kushwaha in the same village. He was known to the family of Gulzar Singh. The family of Gulzar Singh consisted of his wife, son aged about 14 years and his minor daughter, aged seven years. It is stated that near the house, there is a Chabootra. At about 7 PM on the day in question i.e... 18.4.2013, the child was playing on the Chahootra, her mother was sitting nearby and the father and son were in the shop when accused Kamlesh @ Ghanti came to the shop, purchased bindol and gutka. While returning he went to the child and told her that the jwar procession in connection with Navratri festival is going on in the village and if she was interested, he could take her. It is stated that the child was tempted to go with him for seeing the festive procession. The parents did not object to the same, as the child was known to the appellant and used to call him 'Mamaji' (uncle). Accordingly, it is said that the appellant picked up the child in his arms and went towards the handpump, on his way to the village where the procession was to pass by. Thereafter, it is said that father of the child PW-1 Gulzar Singh also went to see the procession. When he returned back to the house after about two hours, he was informed by his wife that the girl child has not returned after seeing the

procession. It is alleged that Gulzar Singh, father of the child, went in search of his child to the village. However, as he did not see the child or appellant Kamlesh @ Ghanti, he came back to his house after about two hours. He anticipated that the child will be dropped back by the appellant. However, they did not come in the night. Next day, early in the morning around 6.00 AM, Badri Kushwaha -resident of the village, came to the house of Gulzar Singh and informed that dead body of the child is lying in the agricultural field of Badri Kushwaha. On hearing this they rushed to the field, where they saw the dead body of the child lying, blood was oozing out of her mouth, nose and her kurti and undergarment were drenched with blood. Immediately, Gulzar Singh recognized his daughter and informed the authorities of Police Station Goraghat on phone (mobile). Immediately, thereafter, the police authorities came to the spot. the Panchnama of the dead body was prepared, all the required Formalities were completed and based on the statement of the witnesses, the appellant was arrested and put to trial.

5- The clothes worn by the appellant and the child in question were seized and sent for Forensic Examination. Plain mud and blood stained mud from the area where the child was lying was also taken for Forensic Examination. DNA test and Profiling was undertaken and at the instance of the accused, a yellow coloured Katri was also seized from a hut belonging to one Balkishan Kushwaha. The Katri was lying on a cot and it was also soaked with blood. Based on the aforesaid the accused was put to trial. In the trial, 22 witnesses were examined. They are:-

(a) PW-I Gulzar Singh - father of the child in question.

(b) PW-4 Smt. Sushma - mother of the child.

(c) PW-5 Vikram - elder brother of the child.

That apart, the other witnesses examined as are under:

(d) PW-2 Ram Kumar Katare - head Constable of PS Goraghat, to prove Dehati Nalishi Ex.P/1, and the First Information Report Ex.P/8.

(e) PW-3 Bhagwan Singh - another Head Constable of the same Police Station, to prove various documents, seizures etc.

(f) PW'-6 Badri Kushwaha - the person concerned in

whose agricultural field, dead body of the child was found.

(g) PW-7 Balkishan - from whose hut near the agricultural field of PW-6 Badri, the yellow colour Katri was seized. Balkishan is also a witness who had accompanied father of the child Gulzar Singh in the night of 18.4.2013, while searching for the child in the village.

(h) PW-8 Ishwari Kushwaha - who saw the accused carrying the child at about 8.00 PM, on 18.4.2013, towards the field of Balkishan, while he was milking his buffaloes at about 8-8.30 in the night.

(i) PW-9 Bhawani Singh - a witness to the seizure of the dead body and other documents.

(j) PW-10 Satyendra Singh - a witness to arrest of the accused, preparation of the memorandum at the instance of the accused under section 27 of the Evidence Act, and various other investigative formalities.

(k) PW-1 1 Dhawal Singh Chouhan - Incharge of the Police Station and the Investigating Officer.

(l) PW-12 Dr. Ajay Gupta - Specialist in Gajraja Medical College, Gwalior, who had conducted the post-mortem of the child.

(m) PW- 13 Madan Mohan Sharma - Naib Tehsildar, District Datia who had conducted the inquest and other formalities with regard to the body of the child.

(n) PW- 14 Manoj Kumar Shrivastava- Patwari of Villlage Dongarpur. He is also a witness to the preparation of the spot map and other various formalities in connection with investigation.

(o) PW-15 Mansharam - Constable of Police Station Goraghat, who had collected samples of viscera, vaginal slides, clothes etc after post-mortem and sent

it for testing to the Forensic Laboratory.

(p) PW-16 Kashmir Singh - also a Constable in the same Police Station - a witness to collection of samples and sending it to the Forensic Laboratory for testing.

(q) PW-17 Girdhari - a witness to the arrest of the accused appellant and seizure, on the basis of memorandum Ex.P/12.

(r) PW-18 Rameshwar Sharma - Constable of Police Station Goraghat and a witness who had taken the accused for medical examination.

(s) PW-19 Shiv Prakash Mishra -head Constable who had received the articles from PW-18, relating to the medical examination.

(t) PW-20 Dr. S.S. Batham, Medical Officer of Disrrict Hospital, Datia, who had medically examined the accused and submitted his report - Ex.P/26.

(u) PW-21 Dr. Jaibharat - Medical Officer of District - hospital Datia, who had collected sample of the accused and sent it for medical examination, including blood sample for DNA Testing.

(v) PW-22 N.S. Rawat - Deputy Superintendent of Police, also the Incharge of the entire investigation.

Apart from the aforesaid 22 witnesses, 34 documents were also exhibited, which consisted of various seizures made, medical reports and other relevant documents including the DNA Profile/Reports etc.

6- Based on the aforesaid evidence and material that came on record, the learned Sessions Judge having convicted the appellant, the appellant has filed the appeal challenging the conviction and sentence imposed by the Sessions Judge. Reference has also been made for confirmation of the death sentence, as required under section 366 of the Code of Criminal Procedure, by the learned Senior Judge.

7- Shri Ravindra Dixit, learned counsel for the appellant, argued that the entire conviction and sentence has been ordered on the basis of circumstantial

evidence that has come on record. It was submitted by him that there is no direct evidence or eye-witness to the entire incident. The circumstantial evidence according to learned counsel for the appellant is not sufficient enough to hold the appellant guilty of the offence and to convict him. It was further argued that there are various missing links in the circumstances which are fatal to the case of the prosecution. Accordingly, the first contention was that the chain of circumstances was not complete enough to warrant conviction.

8- It was then argued by learned counsel for the appellant that initially the First Information Report - Ex.P/15. at 6.30 AM on 19.4.2013, was lodged on phone (mobile) by the father of the deceased child i.e.... PW-1 Gulzar Singh, and when this information was given the name of the appellant was not indicated as the person responsible for having committed the offence. It was argued that his name was included later on, at 7.30 AM, on 19.4.2013, when the First information Report was actually written. Accordingly, a case of false implication was tried to he developed on this count.

9- Shri Ravindra Dixit, learned counsel for the appellant, further stated that the section 161 CrPC statement of various witnesses that were recorded at the time of investigation was neither exhibited nor the witnesses confronted with these statements. Accordingly, this was said to be a material flaw in the trial conducted. Thereafter, referring to the post-mortem report - Ex.P/19, learned counsel For the appellant argued that an ante-mortem head injury is found on the back side of the child's head. This injury is not explained by the prosecution and the Doctor, who had conducted the post-mortem - PW/12 Dr. Ajay Gupta, does not explain this injury. It is emphasized by learned counsel for the appellant that the chain of circumstances, therefore, remains incomplete Because of these facts. Learned counsel thereafter referred to the material seized from the body of the child and says that there is no mention of seizure about 'chunni' from the body of the child in Ex.P/10. In Ex. P/10- seizure memo, even though there is no mention of a 'chunni', but in the medical examination report reference is made to a 'chunni'. It is said that presence of this 'chunni' remains unexplained by the prosecution. This according to Shri Dixit, learned counsel for the appellant, is a fatal error in the entire case of the prosecution.

10- Learned counsel for the appellant thereafter submitted that the Doctor/ Scientist or Expert, who had conducted the DNA Test and submitted report - Ex.P/33, has not been examined and as this Expert has not been examined

and was not made available for cross-examination to the accused, therefore, the DNA Report cannot be accepted. It was stated that at the time of the incident the accused is found to have been wearing a lower and it is said that there were blood stains on this lower. However, this lower has not been sent for examination and there is no explanation with regard to the injury on the person of the accused. It is further argued that the material collected like viscera etc were sent for medical examination on 21.4.2013 after they were collected on 19th and 20th April. This delay in sending the samples for examination is not explained. Accordingly, it is stated that the entire investigation and prosecution is vitiated, the appellant has been falsely implicated and it is stated that the prosecution has failed to prove the case beyond reasonable doubt.

11. Finally, Shri Dixit - learned counsel for the appellant, argued that even if the case of the prosecution is proved, the facts and circumstances of the case does not make out the same to be a 'rarest of the rare' case and based on this, as no capital punishment could be imposed, the matter warrants reconsideration. Learned counsel had also submitted that during the course of hearing the Superintendent of Police, who had signed various documents with regard to forwarding the samples for medical examination has not been examined to explain the delay of One day in sending the samples and, therefore, there is lacuna in the case of the prosecution.

12. Learned counsel for the appellant in support of his contentions relied upon the following judgments: Govindraju @ Govinda Vs. State by Sriramapuram Police Station and Another, (2012) 2 SCC (Cri) 533:(2012) 4 SCC 722; *Sudevanand Vs. State through Central Bureau of Investigation,* (2012) 2 SCC (Cri) 179: (2012) 3 SCC 387; *Mahendra Rai Vs. Mithilesh Rai and others,* (1997) 10 SCC 605; *Sunil Rai @ Pauya and others Vs. Union 'territory, Chandigarh,* (2011) 12 SCC 258; *State of MP Vs. Nisar,* (2007) 3 SCC (Cri) 5; *Halku Vs. State of Madhya Pradesh,* ILR (2011) MP 529; Mustkeem @ *Sirajudeen Vs. State of Rajasthan,* (2011) 3 SCC (Cr1) 473: (2011) 11 SCC 724; *Sharad Birdhichand Sarda Vs. State of Maharashtra,* AIR 1984 SC 1622; *Haresh Mohandas Rajput Vs. State of Maharashtra,* (2011) 12 SCC 56; and. *jugendra Singh Vs. State of Uttar Pradesh,* (2012) 6 SCC 297.

13.- Refuting the aforesaid Shri Vivek Khedekar, learned Deputy Advocate General, emphasized that the appellant was a known person; he was residing

in the village; the child was known to him, she used to address him as 'Mamaji'; and, committing breach of trust which the child and her parents had on him, a gruesome and barbaric act has been committed by the appellant and, therefore, it is a fit case where it can be classified as a 'rarest of rare case' warranting imposition of the extreme punishment i.e.... capital sentence. Learned Deputy Advocate General explained each and every circumstance and tried to submit before us that the grounds canvassed by Shri Dixit are not so fatal to the Case of the prosecution that the story put forth by the prosecution cannot be believed. It is submitted by him that each and every circumstance necessary for conviction of the appellant is available and the hypertechnical lacuna and objections raised by the appellant's counsel does not warrant any consideration.

14. As far as examination of the Doctor who conducted the DNA Test is concerned, Shri Khedekar referred to the DNA Profile/Test Report - Ex.P/33, available at page 58 of the paper book and argued that the report will clearly show that it was submitted by a Scientitic Expert under the provisions of section 293 CrPC, and once the Expert has submitted the report it can be used as evidence and summoning the Expert for examination is not required. Accordingly, it was argued by him that in the facts and circumstances, the reference be answered by confirming the sentence and the appeal filed by the appellant be dismissed.

15- In support of his contentions, learned Deputy Advocate General relied upon the following judgments: *Bantu Vs. State of Uttar Pradesh,* (2008) 11 SCC 113; *Aftab Ahmad Ansari Vs. State of Uttaranchal*, (2010) 2 SCC 583; *Parshuram Vs. State of MP.* 2012 (4) MPHT 138 (DB); *Shankar Kisanrao Khade Vs. State of Maharashtra,* (2013) 5 SCC 546; and, *Sunil Kundu and another Vs. State of Jharkhand*, (2013) 4 SCC 422.

16- We have heard learned counsel for the parties and perused the records.

17- It is clear from the material available on record that the case of the prosecution against the appellant is based on circumstantial evidence. The law with regard to conviction solely on the basis of circumstantial evidence is well settled and the same has to be tested on the basis of the law laid down by the Supreme Court in the case of *Hanumant Govind Nargundkar Vs. State of Madhya Pradesh,* AIR 1952 SC 343; *Sharad Birdhichand Sarda Vs. State of Maharashtra,* AIR 1984 SC 1622, and *State of UP Vs. Satish,* (2005) 3 SCC 114. That being so, we propose to consider the evidence on record to see as to whether the principle laid down by the Supreme Court in

the cases referred to hereinabove are met and the circumstances established by the prosecution are sufficient enough to make it a case for conviction for the offence alleged against appellant Kamlesh @ Ghanti.

18- PW-l Gulzar Singh is father of the child in question and he has clearly stated in his evidence that on 18.4.2013, in the evening at about 7.30 PM, while he was in his house and was sitting in his shop with his son PW-5 Vikram, appellant Kamlesh @ Ghanti came to the shop and purchased bindol and gutka. On that day, Ashtami and Jwar celebrations were going on in the village and the accused made an offer to his seven year old daughter and asked her whether she was interested in coming with him for seeing the Jwar procession, which is passing through the village. It is said by this witness that the accused instigated the small child to go with him and the child was carried by him, and he took the child and went to the village for seeing the Jwar procession. This witness further says that his wife was also sitting near the Chabootra when all this happened. He further says that after sometime he also went to see the procession, came back to the house after about two hours when he was told by his wife PW-4 Smt. Sushma that the child has not come back. He, thereafter, went to the village in search of the child and PW-6 Badri Kushwaha also accompanied him, but the child was not found. He came back to his house. Next day, at about 6.00 AM in the morning, PW-6 Badri Kushwaha informed him about the child's body lying in his agricultural field, he makes a statement with regard to informing the police authority on phone (mobile) from the said agricultural field, arrival of the police party and initiation of investigating process, including the inquest, seizure etc. He has also produced the birth certificate of the child, which goes to show that she was born on 12.6.2006. The statement of this witness is supported by the statement of PW-4 Smt. Sushma, mother of the child, and their 14 year old Son PW-5 Vikram. From the statement of all these three witnesses, it is clear that the appellant was a resident of the village, he was known to the family, the child was also acquainted with him and used to call him 'Mama', and at his instance the child agreed to accompany him to see the religious procession in the village. He took the child in his arms to the place of the procession. The parents and the child believed and trusted the accused and gave him permission to take the child.

19- From the aforesaid evidence, taking away of the child by the accused and the trust which the child and the family had on the accused is established. Thereafter, from the statement of PW-6 Badri Kushwaha, the body of the

child being found in his agricultural field next day at about 6.00 AM is established, and the statement of PW-7 Balkishan goes to show that on a cot which was lying in his hut, which is very near to the agricultural field of PW-6 Badri Kushwaha, a yellow coloured Katri which was stained with blood, was also seized. PW-8 Ishwari Kushwaha is a resident of the village and he has testified that on 18.4.2013. at about 8.30 PM, he had seen the accused carrying the child in his arms/lap and going towards the field of Badri Kushwaha. Accordingly, the statement of all these witnesses does show that the accused took the child to the field of Badri Kushwaha, and, from the hut situated in the field of Balkishan, certain material i.e..... Katri has been seized and on medical examination it is found to be stained with blood of both the child and the appellant. That apart, the DNA profiling of the accused has also been conducted, which establishes the presence of various factors that implicates the appellant with the commission of the offence. The DNA Report - Ex.P/33 reads as under:

- प्रदर्श C, Vaginal Smear Slide of "Child" (R-7993) के स्त्रोत से प्राप्त महिला डी.एन.ए. प्रोफाइल एवं प्रदर्श D, Underwear of Accd. Kamlesh Stain-2(R-7994) से प्राप्त महिला डीएनए प्रोफाइल एकसमान पायी गयी।
- प्रदर्श D, Underwear of Accd. Kamlesh Stain-I (R-7994) से प्राप्त पुरूष डीएनए प्रोफाइल प्रदर्श G, Blood Sample of Kamlesh (R-7996) के स्त्रोत से प्राप्त पुरूष डीएन प्रोफाइल एकसमान पायी गयी।
- प्रदर्श A, Vaginal Swab of "Child" (R-7991) एवं प्रदर्श B, Frock and Chunni of "Child" (R-7992) एवं प्रदर्श C, Vaginal Smear Slide of "Child" (R-7993) के स्त्रोत से एकसमान महिला डीएनए प्रोफाइल प्राप्त हुई।
- प्रदर्श J, (Kathari) के स्त्रोत से प्राप्त पुरूष मिश्रित डी.एन.ए. प्रोफाइल में "Child" एवं आरोपी कमलेश के शारीरिक द्रव्य की उपस्थिति पायी गयी।
- प्रदर्श D, Underwear of Accd. Kamlesh Stain-2 (R-7994) के स्त्रोत से प्राप्त महिला डी.एन.ए. प्रोफाइल में "Child" के शारीरिक द्रव्य की उपस्थिति पायी गयी।"

(**Note::** Name of the child appearing in the report replaced with word 'Child'.)

20. That apart, the Forensic Report of the Katri also shows that it was stained with blood and the same belonged to the child and the appellant. Apart from the aforesaid, the photographs of the child lying in the field Ex.P/27 and P/28, and the medical examination of the child goes to show that she was sexually abused and more than 21 injuries were found on her person.PW-12 Dr. Ajay Gupta had conducted the post-mortem and Ex.P/19 is the post-mortem report. The report goes to show that the body was that of an average built female child about seven years, she was subjected to sexual intercourse and an ante-mortem head injury was found on her body. Death of the child was said to be due to asphyxia. Opinion with regard to death is indicated in the following manner in the post-mortem report:

> **"Opinion :-** Death was due to asphyxia as a result of smothering. Homicidal in nature. Signs of RECENT SEXUAL INTERCOURSE also present. Duration of death is within 12 to 24 hours since postmortem examination."

That apart, Professor Dr. J.N. Soni and PW-12 Dr. Ajay Gupta, who conducted the post-mortem, have reported the following 21 injuries on the person of the child, which reads as under:

(a) 08 crescenteric abrasion (finger nail like). Red colour over right angle of mandible and reymus of mandible 01 cm size each, 01 to 1.5cm apart from each other covering 8 x 7 size area.

(b) Reddish blue contusion from right reymus of mandible towards right cheek 7 x 4.5 cm size x muscle deep.

(c) 5 red abrasions over forehead varying in size from 1.5 x 1 to 1 x 1 cm size covering 6 x 5 cm size area.

(d) contusion reddish blue in colour, parallel to left reymus of mandible and adjacent cheek 8 x 3.5 cm size and muscle deep.

(e) red contusion lateral to left eyebrow 4 x 2 cm size x skin deep.

(f) contusion reddish blue over right upper lid 3 x 2 cm size.

(g) contusion reddish blue left upper eye lid 2.5 x 1 .5 cm size.

(h) diffused subconjunctinal haemorrhage present in both eyes.

(i) reddish blue contusion upper lip 4 x 3 cm size.

(j) reddish blue contusion lower lip 3.5 x 2.5cm size.

(k) diffused cickymosis present in gums of both jaw.

(l) red abrasion medial to left nipple over chest 7 x 1.5 cm size.

(m) multiple abrasion over left forearm varying in size from 2 x 1 cm to 1.5 x 0.5 cm size covering 15 x 11 cm size area. Red in colour.

(n) 4 red coloured abrasion over upper 1/3 of right arm 2 x 1, 1.5 x 1. 1 x 1, 1 x 0.5 cm size, 1 cm apart from each other.

(o) interrupted abrasion from right elbow to forearm covering 6 x 2.5 cm size area.

(p) 3 red abrasions over left lumbar area 4 x 1, 3 x I and 2.5 x I .5 cm size.

(q) contusion mid of left leg posteriorly 3 x 2 cm size x muscle deep.

(r) red abrasion below umbilicus 5 x 4 cm size.

(s) red abrasion mid line over neck transversely at the level of thyroid cartilage 6 x 3 cm size.

(t) reddish blue contusion right arm upper end laterally 3 x 1 .5 cm size x muscle deep.

(u) contusion reddish blue colour left arm midpart 2.5 x 2 cm size x muscle deep.

21- From the aforesaid narration of facts, it is clear that the entire circumstances gives a complete picture of the sequence of events that would

have happened and analysis of the oral evidence read alongwith the medical evidence and the report of the expert authorities (DNA Test) shows that all the links necessary for completing the chain of circumstances are clearly established and there is no iota of doubt that the offence was committed by the appellant. Infact the appellant has not explained various circumstances with regard to the presence of the child's blood alongwith his blood on the Katri, on his clothes and the seized materials as are indicated, in the DNA Report, which also show that the vaginal slide of the child matches with the DNA profile found on the underwear of the accused and various other findings recorded in the DNA report is sufficient enough to implicate the appellant. All these circumstances do establish that the appellant is guilty of the charges levelled against him.

22- With regard to acceptance of the circumstantial evidence and conviction based on such circumstantial evidence, the law is well settled. in the case of *Padala Veera Reddy Vs. State of AP,* 1989 Supp (2)SCC 706, it has been held by the Supreme Court that to base a conviction upon circumstantial evidence, the evidence available should satisfy the following four tests:

> "10.(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and,
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

23- Similarly. in the case of *Hanumant Govind Nargundkar* (supra), it

has been held that the circumstances from which the conclusion of guilt is to be drawn should be first established and on the basis of these established facts, a hypothesis of guilt of the accused should be derived. It is held that the circumstances found established should be conclusive in nature and they should be such so as to exclude every other hypothesis except guilt of the accused. Infact in the aforesaid case, the Supreme Court says that there must be a chain of evidence complete in all respect so as to leave no reasonable ground to conclude any fact with regard to innocence of the accused and the facts should show that within all human probability the act must have been done by the accused.

24 Similarly, in the case of *Sharad Birdhichand Sarda* (supra), dealing with the question of basing a conviction solely on circumstantial evidence, it has been held by the Supreme Court that the onus is on the prosecution to prove that the chain of circumstances is complete and there is no infirmity or lacuna in the case of the prosecution. In the aforesaid case, Supreme Court has laid down five conditions precedent, which should be fully established for basing a conviction on circumstantial evidence. The five conditions are detailed hereinunder:

> "(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
>
> (3) the circumstances should be of a conclusive nature and tendency;
>
> (4) they should exclude every possible hypothesis except the one to be proved; and,
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

25- This being the principle of law laid down by the Supreme Court for conviction based on circumstantial evidence and when we analyse the facts and circumstances of the case based on the evidence available, in the backdrop of the principle as indicated hereinabove, we have no hesitation in holding that the circumstantial evidence available is complete and conclusive in all respects and it only points to the guilt of the appellant and nothing else. Accordingly, we hold that in convicting the appellant on the basis of the said evidence, no error has been committed by the trial court.

26- As far as the objections raised by Shri Dixit at the time of hearing is concerned, we are of the considered view that they are very minor and hyper-technical in nature and they do not make the case of the prosecution so fatal so as to discard it completely. Merely because at the initial stage when the report was made on phone (mobile) at 6.30 AM to the Police Station and name of the accused was not mentioned by PW-I Gulzar Singh, it cannot be said that the appellant was falsely implicated in the light of the overwhelming circumstances which are available on record. That apart, non-examination of the Expert, who gave the DNA Report, is not required in the light of the statutory provision as is contained in Section 293 of the CrPC, which permits admission of the report without any examination of the Expert, who gave the report. The Doctor who gave the report - Ex.P/33 is Dr. Pankaj Shrivastava, Scientific Officer and Assistant Chemical Examiner, Government of Madhya Pradesh and is a statutorily notified person as is contemplated under section 293(4)(a) CrPC and, therefore, his report can be admitted without his examination.

27- The other contention raised by Shri Dixit, particularly with regard to seizure of Chunni not being explained or the delay of one day in sending the viscera, blood samples etc for medical/chemical examination cannot be termed as a mitigating circumstance for falsifying the case of the prosecution or drawing the assumption of false implication. On the contrary, the documents available on record particularly the communication made by the Superintendent of Police in Ex.P/29, the letter forwarding the material for examination, goes to show that the seizure of the material was done on 19.4.2013 and 20.4.2013, and they were all forwarded on the next date i.e... 21.4.2013, for chemical examination. That being so, we are not inclined to accept the contention of Shri Dixit to the effect that there are various lacuna in the case of the prosecution which warrants interference into the order of conviction. The lacunae pointed out are not so fatal so as to discard the entire case of the

prosecution. Accordingly, from the facts and circumstances as are indicated by us hereinabove, it is clear that the judgment of the trial court so far as it finds the appellant guilty of the offence does not suffer from any infirmity.

28- Now, the only question that survives for consideration is with regard to justification of the punishment imposed and a consideration as to whether the case in hand falls in the category of 'rarest of rare case' justifying awarding of the extreme punishment i.e... capital punishment.

29- To consider this question, it would be appropriate to take note of certain judgments of the Supreme Court, wherein question with regard to the offence in question and the punishment imposed in somewhat similar circumstance has been considered.

30- The Supreme Court in several cases has awarded capital punishment where rape and murder have been committed particularly on minor girls. In the case of *Bachan Singh Vs. State of Punjab,* (1980) 2 SCC 684, it has been held by the Supreme Court, that while considering the question of sentence to be imposed in a case of murder under section 302 IPC, the Court should have regard to other relevant circumstances relating to the crime as well as the criminal. It is held that if the Court finds that the offence is of an exceptionally depraved and heinous character on account of its design and manner and its execution; is a source of grave danger to the society at large, death sentence may be imposed.

31. in the case of *Machhi Singh Vs. State of Punjab*, (1983) 3 SCC 470, with regard to murder of an innocent child, capital punishment was imposed after classifying the case as a 'rarest of the rare case'. It was held by the Supreme Court that offence committed against an innocent child, who could not have made any provocation, has to be held to be an act which is extremely brutal, diabolically revolting and shocking the conscience of the society.

32- In the case of *Nathu Garam Vs. State of UP,* (1979) 3 SCC 366, death sentence was confirmed because of causing death of a 14 year old girl by a 28 year old man.

33- Again, in the case of *Dhananjoy Chatterjee Vs. State of West Bengal,* (1994) 2 SCC 220, in paragraphs 14 and 15, the Supreme Court has laid down the test in the following manner:

"14. In recent years, the rising crime rate - particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

(Emphasis supplied)

34- In the case of *Laxman Naik Vs. State of Orissa*, (1994) 3 SCC 381, death sentence was upheld in case of murder and rape of a seven year old girl by her own uncle.

35- Similarly, in the case of *Kamta Tiwari Vs. State of Madhya Pradesh,* (1996) 6 SCC 250, the Court considered the case pertaining to rape of a seven year old girl. In that case, it was found from the evidence available on record that the accused was very close to the family of the child, and the child used to call him uncle, as in the present case. The court noticed the closeness of the accused to the child and her family and also took note of the encouragement given by the accused to the child to go with him to a grocery shop from where the child was kidnapped and subjected to rape and later on strangulated to death. Subsequently. the body was thrown into a well. In the case of *Kamta Tiwari* (supra) where similarity with the present case is found, the Court described the offence as gruesome and barbaric and pointed out that a person like the present accused, who is in a position of trust, when he commits a crime and had committed the crime without any motivation, the vulnerability of the victim and the enormity of the crime has to be taken note of and the execution of death sentence was held to be warranted.

36- Finally, all these judgments have been considered recently by the Supreme Court in the case of *Shankar Kisanrao Khade Vs.State of Maharashtra,* (2013) 5 SCC 546, and it has been held by the Supreme Court that the aggravating and the mitigating circumstances have to be taken into account while deciding the question of imposing death penalty. In this case, the Supreme Court has laid down few examples pertaining to aggravating circumstances and has named a few which includes innocence of the victim; helplessness of the victim; trust relied upon by the victim and her family members on the accused; the crime being committed with the helpless child or a woman; and, brutality of the crime which pricks not only the judicial conscience but also the conscience of the society.

37- Some of the mitigating circumstances as have been indicated by the Supreme Court in the aforesaid judgment and the manner and circumstance with regard to commission of the offence are available in the present case also. Namely: the closeness of the accused to the family; the victim was known to the accused; the manner in which the accused misused or betrayed the trust bestowed on him by all concerned, particularly the parents and the child; the manner in which the crime is committed, as is apparent from the injuries on the person of the child and the post-mortem report, which goes to show the gruesome and brutal manner in which the child was dealt with in the darkness

of the night in an isolated place; and, thereafter thrown in the agricultural field amidst the crops of wheat that were lying there. All these circumstances are nothing but aggravating and mitigating circumstances as laid down by the Supreme Court in the case of *Shankar Kisanrao Khade* (supra) for holding that the circumstances present are such that it can be classified as a 'rarest of rare case', and we have no hesitation in so holding. Infact as held by the Supreme Court in the case of *Shankar kisanrao Khade* (supra), the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime and the execution thereof are factors which have to be kept in mind in awarding death sentence and terming it as a 'rarest of the rare case'. All these facts are present in the present case.

38- While awarding death sentence, the Court has to apply the 'rarest of rare' test depending upon the perception of the society i.e... a society centric view has to be taken and not a judge centric view. it has to be seen as to whether society will approve awarding of the death sentence to certain type of crime and if the society centric view is applied to the 'rarest of rare' test, in the present set of circumstances, we have no hesitation in holding that this is a fit case where the capital sentence can be imposed. The act of the accused is not only inhuman and barbaric, but he has committed a ruthless crime on an innocent seven year old girl and thereafter strangulated her to death.

39- Keeping in view the totality of the circumstances and the legal principles as has been detailed hereinabove, we are of the considered view that the crime in question was committed by the appellant in a pre-determined and cold-blooded manner on a small child without any provocation. The crime is cruel, diabolic and brutal in nature. The appellant being in a position of trust is responsible for having acted in a manner which brings this case in the category of 'rarest of rare case', where sentence of death is more desirable than any other punishment.

40. In the result, the reference made by the court below is answered in the affirmative, by confirming the death sentence awarded to the appellant. The conviction and the death sentence awarded to the appellant are hereby affirmed. The appeal filed by the appellant is hereby dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 3024
INCOME TAX APPEAL
Before Mr. Krishn Kumar Lahoti, Acting Chief Justice &
Mr. Justice M.A. Siddiqui
I.T.A. No. 238/2012 (Jabalpur) decided on 29 April, 2013

BHARAT OMAN REFINERIES LTD. (M/S) ...Appellant
Vs.
COMMISSIONER OF INCOME TAX-I ...Respondent

Income Tax Act (43 of 1961), Section 143(3) **- Interest earned by the assessee before commencement of business on short term deposits with banks, even out of term loans secured from financial institutions, is an income chargeable under the head "Income from other sources" and would not go to reduce the interest payable by the assessee which would be capitalised after the commencement of commercial production. (Para 6)**

आयकर अधिनियम (1961 का 43), धारा 143(3) – कारोबार आरंभ होने से पहले बैंक के अल्पावधि जमा पर निर्धारिती द्वारा अर्जित ब्याज, वित्त संस्थानों से प्रतिभूत सावधि ऋणों से अर्जित भी, "अन्य स्त्रोतों से आय" के मद के अंतर्गत प्रभारित किये जाने योग्य आय है और इससे निर्धारिती द्वारा देय ब्याज कम नहीं होगा जो वाणिज्यिक उत्पादन आरंभ होने के पश्चात पूंजीकृत होगा।

Cases referred :

(2008) 298 ITR 132 (Mad), (1997) 227 ITR 172(SC), (1968) 69 ITR 824 (MP), (2000) 243 ITR 2 (SC), (1999) 236 ITR 315 (SC), (2001) 247 ITR 268 (SC), (2005) 274 ITR 21 (Bom.).

G.N. Purohit with *Abhishek Oswal*, for the appellant.
Sanjay Lal, for the respondent.

O R D E R

The Order of the court was delivered by :
K.K. Lahoti, Ag. C. J.:- This appeal is directed against an order dated 30.7.2012 passed by the Income Tax Appellate Tribunal, Indore Bench, Indore in ITA No.2/Ind/2012 (Assessment Year 2008-09), by which an appeal preferred by the appellant was dismissed and the order passed by the CIT(A), Bhopal dated 3.10.2011 was affirmed. The ITAT and CIT have confirmed addition of Rs.31,39,70,137/- to the total income on account of the interest

earned on FDRs made out of zero coupon convertible bonds. The appellant has suggested that the appeal involves following substantial questions of law and on these substantial questions of law, this appeal may be admitted:-

(i) Whether the Tribunal is correct in law in basing its finding on erroneous finding of AO about nexus of funds invested in FDR, and holding that interest which accrued on equity funds deployed with the Bank could be taxed as income from other sources and not as a capital receipt liable to be set off against pre operative expenses?

(ii) Whether the Tribunal was correct in law in holding that the interest earned by the assessee by short term investment of zero coupon debentures funds is liable to Income Tax as income from other sources?

2. The facts necessary to consider this appeal and in respect of involvement of the aforesaid substantial questions of law are thus:-

(i) The appellant is a joint venture company constituted by Bharat Petroleum Corporation Limited (in short 'the BPCL'), a Government of India Undertaking and Oman Oil Company, incorporated on 26.2.1994 with a equal contribution of equity. It established its refinery at Agasod, Bina, District Sagar (M.P.)

(ii) That, as per approval granted by the Government of India, the share of BPCL was restricted to 50% of the equity. For raising funds from Banks and financial institutions, a debt equity ratio was fixed as 1.6:1. The initial equity capital of BPCL and Oman Oil Company Limited was 151 Crores.

(iii) That, to satisfy the debt equity ratio of 1.6:1 for raising a loan of Rs.1350.31 Crores, the company was required an additional equity due to embargo of 50% imposed by the Government of India and there being no progress in work for quite sometime, Oman Oil withdrew itself for arranging fresh capital.

(iv) As per appellant, the BPCL had introduced 900 Crores in the form of zero coupon convertible debenture to

be converted into equity shares within a span of 36 months. The total sum of Rs.900 Crores was received on 9.3.2007, out of which a sum of Rs.500 Crores was invested in short term deposits with the State Bank of Patiala and ICICI Bank. This amount was subsequently re-vested in short term deposits with the State Bank of Patiala, Jammu & Kashmir Bank and Central Bank of India. On these fixed term deposits, with various banks for short period, the company had earned an interest at Rs.31,39,70,136.99.

(v) The appellant had submitted its return of income for assessment year 2008-2009 (financial year 2007-08) on 25.8.2008. In the said return, the appellant had shown total income of Rs.43,91,84,655/- being interest earned on fixed deposits made out of borrowed funds and claimed that the sum of Rs.31,39,70,136.99 was taxable as income from business being as accretion to the capital of the appellant. The Assessing Officer, Deputy Commissioner of Income Tax-1(2), Bhopal framed the assessment order under Section 143(3) of the Income Tax Act,1961 on 30.12.2010. The Assessing Officer had not accepted the contention of the appellant regarding accretion in capital and treated the sum of Rs.31,39,70,136.99, the interest earned on non-interest bearing fund as income from other sources and found it taxable. Against the order of the Assessing Officer, the appellant herein preferred an appeal before the CIT(A), Bhopal, which was dismissed. Second appeal was also preferred before the Income Tax Appellate Tribunal but that was also dismissed. These orders have given the appellant a cause for filing this appeal.

3. The main contention of the appellant before this Court is that aforesaid amount was zero coupon money and was parked with the banks and the interest earned on the amount was not liable to income tax as income from other sources, but the interest could have been treated as income from the business and could have been assessed because it will reduce cost of construction of the industries and thereby will reduce the capital invested by the appellant. Apart from this, the amount of Rs.500 Crores was parked with the bank to satisfy the debt equity ratio as was necessary to be maintained as per condition imposed by the bank. Reliance is placed to a judgment of Madras

High Court in *Commissioner of Income Tax Vs. VGR Foundations* reported in (2008) 298 ITR 132 (Mad) and submitted that in view of the law down in Para 5 of the judgment, this appeal may be admitted for final hearing.

4. Shri Sanjay Lal, learned counsel appearing for revenue opposed the aforesaid contention and submitted that the controversy involved in this case is squarely covered by a judgment of Apex Court in *Tuticorin Alkali Chemicals & Fertilisers Ltd. Vs. CIT* (1997) 227 ITR 172(SC) and a Division Bench judgment of this Court in *M.P. State Industries Corporation Ltd. vs Commissioner of Income Tax* reported as (1968) 69 ITR 824 (MP) and submitted that this appeal does not involve any substantial question of law as suggested by the appellant.

5. Per contra, Shri Purohit, learned senior advocate submitted that there are divergent views of the Supreme Court as find place in *Commissioner of Income Tax vs Karnal Co-operative Sugar Mills Ltd.* (2000) 243 ITR 2 (SC), *Commissioner of Income Tax vs Bokaro Steel Ltd.* (1999) 236 ITR 315 (SC) and *Commissioner of Income Tax Vs. Karnataka Power Corporation* (2001) 247 ITR 268 (SC), so this appeal may be admitted on the aforesaid substantial questions of law. In reply to it, Shri Lal, learned counsel for revenue submitted that recently a Division Bench of High Court of Bombay have considered all the aforesaid judgments in *Shree Krishna Polyster Ltd. Vs. Deputy Commissioner of Income Tax* (2005) 274 ITR 21 (Bom.) and relying on the judgment in *Tuticorin Alkali Chemicals & Fertilizers* (supra) held that such interest can be treated as an income from other sources and was not a business income.

6. We have considered the rival contentions of the parties and find that in *Tuticorin Alkali Chemicals & Fertilizers* (supra), the Apex Court considering the legal position held that the interest earned by the assessee before commencement of business on short term deposits with banks, even out of term loans secured from financial institutions, is an income chargeable under the head "income from other sources" and would not go to reduce the interest payable by the assessee which would be capitalised after the commencement of commercial production. The Apex Court have held that it was an income from other sources and shall be liable to be taxed accordingly. The Division Bench of this Court considering similar controversy in *M.P. State Industries Corporation* (supra) held that the interest earned by investing the surplus share money in bank deposits, such interest is taxable as income from other sources and not as business income. The Division

Bench of Bombay High Court in *Shree Krishna Polyster Ltd* (supra) have also considered the legal position and held that the interest on short term deposits with bank by investing surplus fund acquired in public issue invested in short term bank deposits did not spring or emanate from the business activity of the assessee, hence it cannot be considered as business income and is liable as income from other sources. The Bombay High Court considered all the judgments including the judgment in *Tuticorin Alkali Chemicals & Fertilizers* (supra), Division Bench's judgment of this Court in *M.P. State Industries Corporation* (supra) and held that such income is an income from other sources and cannot be treated as an income from business and held that the said interest is liable to be taxed.

7. As the Division Bench of this Court have considered this question in *M.P. State Industries Corporation* (supra) and have decided the question, we do not find any reason to differ with the aforesaid. So we find that this appeal does not involve aforesaid substantial questions of law for our consideration and accordingly we dismiss this appeal at admission stage.

8. At this stage, Shri G.N.Purohit, learned Senior Counsel submitted that the appellant may be granted leave to file an SLP before the Apex Court, but considering the fact that the controversy is squarely covered by the judgment of the Apex Court in *Tuticorin Alkali Chemicals & Fertilizers* (supra) and *M.P. State Industries Corporation* (supra) of the Division Bench of this Court, we do not find that it is a fit case for filing an SLP before the Apex Court. The prayer made by the appellant is rejected.

Appeal dismissed.

I.L.R. [2013] M.P., 3028

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice M.C. Garg

M.Cr. C. No. 5703/2012 (Jabalpur) decided on 6 March, 2013

ASHOK MEHROTRA & anr. ...Applicants

Vs.

STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Sections 406, 418, 420, 467, 468 & 471/34 - Double Jeopardy **- Second trial on similar allegations in the first prosecution - Petitioners were acquitted in the first prosecution - Held - Present prosecution is barred on account of the principle of double jeopardy - Offences u/s 406, 418, 420, 467, 468 & 471/34, I.P.C.**

are quashed - Petition allowed. **(Para 2)**

दण्ड संहिता (1860 का 45), धाराऐं 406, 418, 420, 467, 468 व 471/34 – दोहरा संकट – प्रथम अभियोजन के अभिकथनों के समान अभिकथनों पर द्वितीय विचारण – प्रथम अभियोजन में याचीगण दोषमुक्त किये गये – अभिनिर्धारित – दोहरा संकट के सिद्धांत के कारण वर्तमान अभियोजन वर्जित है – भा.द.सं. की धाराऐं 406, 418, 420, 467, 468 व 471/34 के अंतर्गत अपराध अभिखंडित – याचिका मंजूर।

S.C. Datt with *Nishan Datt,* for the applicants.
Puneet Shroti, P.L. for the non-applicant/State.

ORDER

M.C. GARG, J.:- It is an interesting case leading to double jeopardize inasmuch the petitioners are being subjected to second trial on similar allegations for which they were acquitted in the first prosecution vide Special Case No.2/2000. In the first case allegation was that the land belonging to the Defence was sold by the petitioners illegally. In those proceedings it could not be held that the land belongs to the Defence and the petitioners and others were acquitted vide order dated 17th July, 2006 passed in Special Case No.2/2000. Relevant observation regarding ownership of the property is as under :-

> 52– इस प्रंकरण में उपरोक्त संपूर्ण चर्चा के अनुसार यह स्पष्ट है कि अभियुक्त द्वारा आपराधिक षडयंत्र कर उसके अनुसरण में कार्य किया जाना प्रमाणित नहीं है। इसी प्रकार अभियुक्त टी. पार्थसारथी, अभियुक्त पांडुरंग विट्ठल एवं अभियुक्त सुरेन्द्र कुमार नागपाल द्वारा बेईमानीपूर्वक उनके पद का दुरूपयोग किया जाना प्रमाणित नहीं है। उपलब्ध साक्ष्य से यह भी प्रमाणित नहीं है कि अभियुक्त मुकेस मेहरोत्रा एवं अभियुक्त अशोक मेहरोत्रा द्वारा अभियुक्त टी. पार्थसारथी, अभियुक्त पांडुरंग विट्ठल एवं सुरेन्द्र कुमार नागपाल को उनके पद का दुरूपयोग करने के लिए उन्हें दुष्प्रेषित किया। अभियुक्त अशोक मेहरोत्रा तथा अभियुक्त गुवेया मेहरोत्रा द्वारा भारत सरकार या केन्टोनमेन्ट जबलपुर के साथ छल कारित किया जाना भी प्रमाणित नहीं है।
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> 53– अतः अभियुक्तगण टी. पार्थरारथी, पांडुरंग विट्ठल एवं सुरेन्द्र कुमार नागपाल को भा.दं.वि. की धारा 420 सहपठित धारा 120–बी एवं धारा 13(1) (डी) सहपठित 13 (2) भ्रष्टाचार निवारण अधिनियम 1988 के अंतर्गत दंडनीय अपराध के लिये दोषी नहीं ठहराया जा सकता है। इसी प्रकार अभियुक्तगण अशोक मेहरोत्रा एवं मुकेस मेहरोत्रा को भा.दं.वि. की धारा 420 सहपठित 120–बी भा.दं.वि. एवं भ्रष्टाचार निवारण अधिनियम 1988 के धारा 13(1) (डी) सहपठित 13(2) सहपठित

धारा 109 भा.दं.वि. के अंतर्गत दंडनीय अपराध के लिए दोषी नहीं ठहराया जा सकता है अतः अभियुक्तगण को आरोप मुक्त किया जाता है।

2. Now by registration of another FIR being Crime No. 495/2011, a similar issue is being raised on behalf of the Defence Establishment, but in the different form i.e. by putting old wine and new bottle that the petitioners had no capacity to act as owners while selling the property despite admitting that they are in settled possession thereof. It is the case of the respondent that the petitioners were only the licensee whereas it is the case of the petitioners that they are purchaser of the property though their grand father and are in settled possession. In these circumstances, the present prosecution is barred on account of the principle of double jeopardize. Moreover even if the respondent has any stake in the immovable property subject-matter of the FIR, they are required to establish their title by filing civil suit for establishing that they are title holder in the property and for a declaration that the petitioners or their ancestors are not the owners of the property.

3. With this liberty as aforesaid present petition is allowed. Proceedings initiated vide Crime No.495/2011 for offences under sections 406, 418, 420, 467,468 and 471/34 IPC are quashed. The bail bonds of the petitioners, if any, stand discharged.

Petition allowed.