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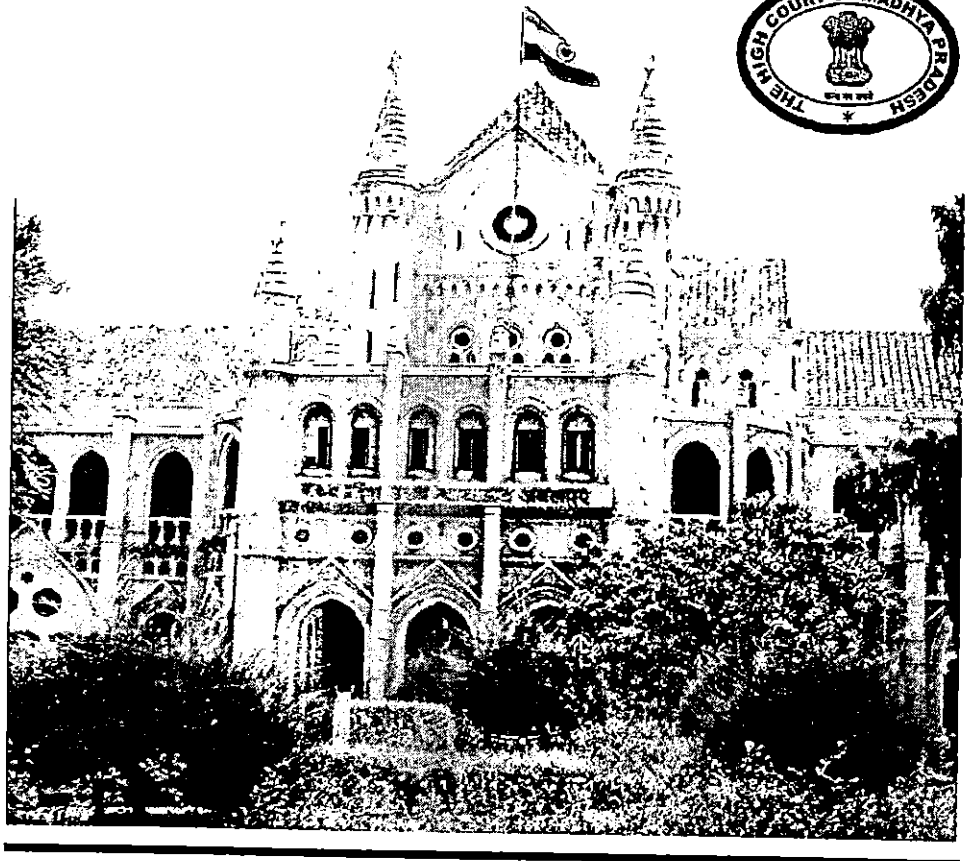
Year-5 **Vol.1**



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NOTES OF CASES SECTION

Short Note

**(8)*

Before Mr. Justice A.K. Shrivastava

Cr. A. No. 825/2001 (Indore) decided on 29 August, 2012

KALYAN SINGH ...Appellant

Vs.

STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 436 - Mischief - Sentence **- It is true that the witnesses named in F.I.R. were not examined however, there is other evidence of complainant and his wife - No cross-examination on the vital point that when the complainant came out from the house since it set to fire he saw the appellant standing there - Conviction under Section 436 upheld - However, the incident took place about 12 years back - Looking to the advance age of the appellant no purpose would be serve by sending him behind the bars - As appellant has already undergone the jail sentence of 42 days therefore, appellant is released for period already undergone, however, the amount of fine is altered to compensation and same is enhanced to Rs. 30,000/- - Appeal partly allowed.**

दण्ड संहिता (1860 का 45), धारा 436 – रिष्टि – दण्डादेश – यह सत्य है कि प्रथम सूचना रिपोर्ट में नामित साक्षीगण का परीक्षण नहीं किया गया किन्तु अन्य साक्ष्य शिकायतकर्ता एवं उसकी पत्नि का है – इस महत्वपूर्ण बिन्दू पर कोई प्रतिपरीक्षण नहीं कि घर में आग लगने के कारण जब शिकायतकर्ता घर से बाहर निकलकर आया, उसने अपीलार्थी को वहां पर खड़ा देखा – धारा 436 के अंतर्गत दोषसिद्धि अभिपुष्ट – अपितु, घटना 12 वर्ष पूर्व घटित हुई – अपीलार्थी की ढलती उम्र को देखते हुए उसे सलाखों के पीछे भेजने से कोई प्रयोजन सफल नहीं होगा – चूंकि अपीलार्थी को पहले ही 42 दिनों के कारावास से दंडित किया गया है इसलिए, अपीलार्थी को भुगताई जा चुकी अवधि के लिए मुक्त किया गया, किन्तु अर्थदण्ड की रकम को प्रतिकर में परिवर्तित कर उसे बढ़ाकर रु. 30,000/– किया गया – अपील अंशतः मंजूर।

Cases referred :

AIR (39) 1952 SC 54, AIR 1985 SC 1268, 1998 AIR SCW 819, AIR 2006 SC 201.

Vivek Singh & Rajesh Chauhan, for the appellant.
Amit Singh Sisodia, P.P. for the respondent/State.

Short Note

****(9)***

Before Mr. Justice N.K. Mody

M.A.No. 3769/2009 (Indore) decided on 29 November, 2012

LAXMI BAI & anr. ...Appellants
Vs.
NAUSHAD & ors. ...Respondents

A. ***Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company*** **- Deceased allegedly was travelling in the Truck for safety of goods - It was alleged that because of rash and negligent driving of respondent No. 1 deceased fell down and passed away - Held - During statement u/s 161, Cr.P.C. no witness stated that the deceased was travelling in the goods vehicle for safety of goods - No witness examined by the appellants and Insurance Company stated that the deceased was travelling in the goods vehicle for safety of goods - No goods was seized by police - Other co-travellers sustaining no injury and nobody explained how deceased died - Findings recorded by the Tribunal holding Insurance Company liable jointly and severely cannot be allowed to sustain.**

क. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का दायित्व – अभिकथित रुप से मृतक ट्रक में माल की सुरक्षा हेतु यात्रा कर रहा था – यह अभिकथित किया गया कि प्रत्यर्थी क्रं. 1 के उतावलेपन से और उपेक्षापूर्ण वाहन चलाने के कारण मृतक नीचे गिरा और उसकी मृत्यु हो गई – अभिनिर्धारित – द.प्र.सं. की धारा 161 के अंतर्गत कथन के दौरान किसी साक्षी का यह कथन नहीं कि मृतक माल वाहन में माल की सुरक्षा हेतु यात्रा कर रहा था – अपीलार्थीगण एवं बीमा कंपनी द्वारा परीक्षित किसी साक्षी का यह

कथन नहीं कि मृतक माल की सुरक्षा हेतु माल वाहन में यात्रा कर रहा था – पुलिस द्वारा कोई माल जब्त नहीं किया गया – अन्य सह यात्रियों को कोई चोट नहीं आई और किसी ने स्पष्ट नहीं किया कि मृतक की मृत्यु कैसे हुई – अधिकरण द्वारा अभिलिखित किये गये निष्कर्ष कि बीमा कंपनी संयुक्त रुप से व पृथक–पृथक रुप से दायी है, कायम नहीं रखे जा सकते।

B. ***Motor Vehicles Act (59 of 1988), Section 166 - Just compensation*** **- Deceased a young person met with accident in the year 2006 - Income on notional basis ought to have been Rs. 2,000/- per month and multiplier of 17 ought to have been applied - Amount of compensation enhanced from Rs. 98,500/- to Rs. 2,92,000/- with interest on enhanced amount.**

ख. मोटर यान अधिनियम (1988 का 59), धारा 166 – उचित प्रतिकर – मृतक एक नवयुवक, वर्ष 2006 मे दुर्घटना का शिकार हुआ – काल्पनिक आधार पर आय रु. 2,000/– प्रति माह होनी चाहिए थी और 17 का गुणक लागू करना चाहिए था – प्रतिकर की रकम रु. 98,500/– से बढाकर रु. 2,92,000/– की गई, बढ़ाई गई रकम पर ब्याज के साथ।

Cases referred :

2004(2) MPLJ 4, 2012 ACJ 1641, 2008 ACJ 331.

Sameer Verma, for the appellants.
Avinash Yadav, for the respondent No.2.
C.P. Singh, for the respondent No.3.

Short Note (DB)
****(10)***
Before Mr. Justice S.K. Seth & Mr. Justice M.C. Garg
Cr. A. No. 1226/1998 (Indore) decided on 7 December, 2012

SHAMBU ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Section 161, Prevention of Corruption Act (2 of 1947), Section 5(1)(d) r/w 5(2) - Offence under **- Demand as well as the acceptance of the tainted money was only with 'A-1' and not with 'A-2' - The only role assigned to 'A-2', is**

the role of receiving the money after the money was transferred to 'A-1' and then keeping in his pocket of his bush-shirt - Nothing on record to show that 'A-2' had anything to do with the audit of accounts of the Society of the complainant - Not a case that 'A-2' has been paid any money or in addition legal remuneration for the purpose of conferring any benefit to the complainant - Nothing on record that the money was shared by 'A-2' alongwith 'A-1' - Held - There is no evidence even to bring the case of the prosecution u/s 161, IPC qua appellant 'A-2'.

दण्ड संहिता (1860 का 45), धारा 161, भ्रष्टाचार निवारण अधिनियम (1947 का 2), धारा 5(1)(डी) सहपठित 5(2) – के अंतर्गत अपराध – दूषित रुपयों की मांग एवं स्वीकृति केवल 'ए–1' के साथ की गई और न कि 'ए–2' के साथ – 'ए–2' को केवल 'ए–1' को रुपये अंतरित किये जाने के पश्चात रुपये प्राप्त करने और अपनी बुशर्ट की जेब में रखने का कार्य सौंपा गया था – अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि 'ए–2' को शिकायतकर्ता की सोसायटी के खातों की संपरीक्षा से कुछ लेना–देना था – प्रकरण यह नहीं है कि शिकायतकर्ता को कोई लाभ पहुंचाने के प्रयोजन हेतु, 'ए–2' को कोई रुपये अदा किये गये या अतिरिक्त वैध पारिश्रमिक दिया गया – अभिलेख पर कुछ नहीं कि रुपयों में 'ए–2' ने 'ए–1' के साथ हिस्सा पाया – अभिनिर्धारित – अपीलार्थी 'ए–2' के संबंध में अभियोजन का प्रकरण धारा 161 द.प्र.सं. के अंतर्गत लाने के लिए भी कोई साक्ष्य नहीं है।

The judgment of the Court was delivered by : **M.C. GARG, J.**

Jai Singh with *V. Singh,* for the appellant.
A.S. Gokhale, Spl. P.P. for the respondent.

Short Note (DB)
****(11)***
Before Mr. Justice Shantanu Kemkar &
Mr. Justice Prakash Shrivastava
W.P. No. 501/2004 (Indore) decided on 21 September, 2012

SIRAJ SIDDIQUE (SHRI) ...Petitioner
Vs.
INCOME TAX OFFICER & anr. ...Respondents

A. Voluntary Disclosure of Income Scheme, 1997, Section 64 (2)(ii) & Income Tax Act (43 of 1961), Section 132 - Bar

- For attracting the provisions of Section 64(2)(ii) there should be direct search initiated u/s 132 - A bar will not be attracted in a case which is interconnected with some search proceedings but where no direct search is initiated or no search warrant is issued u/s 132 - No direct search was initiated against the petitioner - On the basis of the search conducted u/s 132 in respect of a third party the respondents are not justified in attracting the bar of Section 62(2)(ii).

क. आय का स्वेच्छया प्रकटन योजना, 1997, धारा 64(2)(ii) व आयकर अधिनियम (1961 का 43), धारा 132 – वर्जन – धारा 64(2)(ii) के उपबंध तब लागू होंगे जब धारा 132 के अंतर्गत प्रत्यक्ष तलाशी आरंभ की गई हो – ऐसे प्रकरण में वर्जन आकर्षित नहीं होगा जो किसी तलाशी कार्यवाही से अन्ततः सम्बद्ध है परंतु जिसमें प्रत्यक्ष तलाशी आरंभ नहीं की गई है या धारा 132 के अंतर्गत कोई तलाशी वारंट जारी नहीं किया गया है – याची के विरुद्ध कोई प्रत्यक्ष तलाशी आरंभ नहीं की गई – तृतीय पक्षकार के संबंध में धारा 132 के अंतर्गत संचालित की गई तलाशी के आधार पर प्रत्यर्थीगण द्वारा धारा 64(2)(ii) का वर्जन आकर्षित करना न्यायोचित नहीं है।

B. Voluntary Disclosure of Income Scheme, 1997, Sections 62(2)(ii) & 68 - Certificate issued under - **Cannot be cancelled unless the certificate was issued contrary to the Scheme itself or ignoring the bar contained in Section 62(2)(ii) or where the certificate under the VDIS itself has been obtained practicing fraud.**

ख. आय का स्वेच्छया प्रकटन योजना, 1997, धाराएं 62(2)(ii) व 68 – के अंतर्गत जारी किया गया प्रमाण पत्र – निरस्त नहीं किया जा सकता जब तक कि प्रमाण पत्र को योजना के ही विपरीत या धारा 64(2)(ii) में वर्णित वर्जन की अनदेखी करके जारी न किया गया हो अथवा जब VDIS के अंतर्गत प्रमाण पत्र ही कपट द्वारा अभिप्राप्त किया गया हो।

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

NOTES OF CASES SECTION

Cases referred :

263 ITR 119, (2007) 292 ITR 209(SC), 257 ITR 554, (2008) 13 DTR(HP) 45, 135 ITR 6789, 276 ITR 411 (Gujarat), 262 ITR 397, (2000) 241 ITR 216(MP).

G.M. Chaphekar with *P.M. Choudhary*, for the petitioner.
R.L. Jain with *Veena Mandlik*, for the respondents.

I.L.R. [2013] M.P., 273
WRIT APPEAL

Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice M.A. Siddiqui
W.A. No. 1463/2012 (Jabalpur) decided on 10 January, 2013

GENERAL SECRETARY ...Appellant
Vs.
DEPUTY GENERAL MANAGER ...Respondent

Industrial Disputes Act (14 of 1947), Section 17B - Payment of full wages **- Appellant entitled for basic grade at the rate of Rs. 68.91 alongwith other allowances, is a reasonable amount - Matter also likely to be decided expeditiously - There is no necessity of passing an order for some higher wages vis-a-vis of the last wages drawn by the appellant. (Para 17)**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 17बी – संपूर्ण वेतन का भुगतान – अपीलार्थी, अन्य भत्तों के साथ रु. 68.91 की दर से मूल ग्रेड के लिए हकदार, उचित रकम है – मामले का शीघ्र निपटारा किये जाने की भी संभावना है – अपीलार्थी द्वारा लिये गये अंतिम वेतन की तुलना में किसी उच्चतर वेतन के लिये आदेश पारित करने की आवश्यकता नहीं।

Cases referred :

(1992) 2 SCC 106, (2001) 5 SCC 169, (2007) 15 SCC 677, 2009 II LLJ 311.

Brian D'Silva with *R.C. Shrivastava* & *V. Bhide*, for the appellant.
Indira Nair, for the respondent.

ORDER

The Order of the court was delivered by,
KRISHN KUMAR LAHOTI, J.: This intra court appeal is directed under Section 2(1) of the Madhya Pradesh Uccha Nayalaya (Khand Pith Ko Appeal) Adhiniyam, 2005, assailing the order dated 14.12.10 passed in W.P.No.13240/2012 by which the learned Single Judge modified the earlier order passed in W.P.89/12 to the effect that in case the employees are not reinstated by the respondent, the wages last drawn would be paid to the employees by the employer. The amount would be paid directly to the employees as it is by way of subsistence allowance. This order is under challenge in this appeal.

2. Learned counsel for the appellant submitted that by order dated 18.9.12, the writ court while issuing show cause notice to the appellant herein directed for the compliance of Section 17-B of the Industrial Disputes Act, 1947 with a further direction that in case the employees are not reinstated, wages payable at current rate be paid to the employees but by the impugned order, this order has been modified directing the employer to make payment of last wages drawn in case the employees are not reinstated. The effect of order would be that the employees would get very megre amount of Rs.40/- per day which is insufficient for survival of the employees and their family. It is submitted that the order may be modified and reasonable amount i.e. current wages may be directed to be paid by the respondent employer.

3. Smt.Indira Nair, learned Senior Counsel appearing for the respondent opposed the aforesaid contention and submitted that as per Section 17-B of the Industrial Disputes Act, only wages last drawn by the employees at the time of retrenchment can be directed to be paid. In case employer decides not the reinstate the employee in compliance of the award passed by Labour Court. The current wages cannot be directed to be paid except certain allowance which are payable under law. It is submitted that order is in accordance with law and need not be interfered. She has placed reliance on the judgment of *Apex Court in Dena Bank Vs. Kirti Kumar* (1999)2 SCC 106 and *Dena Bank Vs. Ghanshyam* (2001) 5 SCC169 to substantiate her contention.

4. In reply to this Shri Brian D'Silva, learned counsel appearing for the appellant would submit that the powers are vested with the court to modify the relief and to make payment of a reasonable amount as has been directed by the Apex Court in *Employers Management Central Plan and design (I) Ltd. Vs. Alleged workmen* (2007) 15 SCC 677. It is submitted that Rs.40/- is very meager amount and should be enhanced to current wages payable to the employees of the respondent employer.

5. To appreciate the aforesaid fact, it would be appropriate if the factual position of the present case is stated.

6. Near about 100 workmen of respondent were allegedly retrenched on 19.8.1994. They had approached Government of India for a reference under Section 10 of Industrial Disputes Act for adjudication by the Central Government Industrial Tribunal cum Labour Court (CGIT),Jabalpur. The matter was referred by the Government of India, Ministry of Labour vide its notification

dated 23.5.1995. The reference reads as under:

> "Whether the action of the management of Western Coalfields Ltd. Nagpur (Pench Area) in terminating the services of Sh.Rajnandan and 99 others (list enclosed) w.e.f 19th August 1994 and ordering recovery of money received from them from the date of reinstatement to the date of release from Pench Area (East) is legal and justified? If not what relief the workmen if entitled to?"

7. The labour court after hearing both the parties had passed an award on 2/3/2012 directing reinstatement of all the workmen w.e.f 19.8.1994 with all backwages and other consequential benefits. It was further directed that the management shall not be entitled to recover the money received by the workman from the date of reinstatement to the date of releaving from Pench Area (East) and to allow all the workmen to join on the new place of transfer within one month from the date of receipt of the award by the Union/workmen. This award of the labour court was assailed by the respondent before the Writ Court in W.P. 13240/12.

8. On 18.9.2012 when the matter was listed for hearing on admission, Writ court directed thus:

> "In the meanwhile, the operation of the award shall remain in abeyance on compliance of the provisions of Section 17-B of the Industrial Dispute Act. In case the reinstatement is not done, the wages payable at the current rate be paid to the employees".

9. The respondent herein had moved an application for modification of the order. The learned Single Judge after hearing both the parties by an order dated 14.12.2012 modified the earlier order and directed thus:

> "In view of the foregoing discussions, the order dated 8.9.2012 is modified to the effect that in case the reinstatement is not ordered by the petitioner, the wages last drawn would be paid to the employees by the petitioner. The amount will not be deposited in the CCD of the Court, but it will be paid directly to the employees because in fact it has to be treated as subsistence allowance for survival of the employees. As far as the application for appropriate direction is concerned, the same stands disposed of. The other writ petitions are different in

nature and, therefore, are not to be tagged with this writ petition. This order is under challenge in this appeal.

10. Now to appreciate the rival contention of the parties it would be appropriate if the statutory provision as contained under Section 17-B of the Industrial Disputes Act is referred which reads thus:

> **Section 17-B** [Payment of full wages to workman pending proceedings in higher courts:- Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, fill wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:
>
> Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be.

11. The aforesaid provision specifically provides that where the Labour Court by its award directs reinstatement of any workmen and the employer prefers any proceedings against such award in the High court the employer shall be liable to pay such workman during the pendency of such proceedings in High Court, wages last drawn by him inclusive of maintenance allowance admissible to him under rule. If workman was not employed anywhere else during such period an affidavit by such workmen has to be filed to that effect in such court. In this case it is not in dispute that such an affidavit was filed by the appellants herein and there are no allegations that workmen were in employment elsewhere during the period i.e. from the date of award passed by the Labour Court and impugned order passed by the Writ Court. The respondent employer has chosen not to reinstate the employees but has chosen to make payment of last wages drawn.

12. The legal position has been considered by the Apex court in *Dena bank Vs. Kirti Kumar* (Supra) wherein the Apex Court considered the effect of Section 17-B of Industrial Disputes Act and held that the workman be paid the full amount of last wages drawn. The Apex Court held that the workman was entitled for the wages last drawn at the time of retrenchment from the date of the award till the decision by the High Court. The same law has been reiterated by the Apex Court in *Dena Bank Vs. Ghanshyam* (supra).

13. Though in *Employers Management Central Plan and Design (I) Ltd.,* the Apex Court has held that the workmen concerned can be paid current wages at the rate of wages last drawn by them with effect from a certain date. But it appears that while considering the matter the attention of the Apex court was not drawn to the earlier judgements of the Apex court in Dena Bank which are referred herein above.

14. In *Dena Bank Vs.Kirti Kumar* (supra), the Apex court in para 23 has considered the law in detail and held thus:

> "As regards the powers of the High Court and the Supreme Court under Articles 226 and 136 of the Constitution, it may be stated that Section 17-B, by conferring a right on the workman to be paid the amount of full wages last drawn by him during the pendency of the proceedings involving challenge to the award of the Labour Court, Industrial Tribunal or National Tribunal in the High Court or the Supreme Court which amount is not refundable or recoverable in the event of the award being set aside, does not in any way preclude the High Court or the Supreme Court to pass an order directing payment of a higher amount to the workman if such higher amount is considered necessary in the interest of justice. Such a direction would be dehors the provisions contained in Section 17-B and while giving the direction, the court may also give directions regarding refund or recovery of the excess amount in the event of the award being set aside. But we are unable to agree with the view of the Bombay High Court in *Elpro International* Ltd. that in exercise of the power under Articles 226 and 136 of the Constitution, an order can be passed denying the workman the benefit granted under Section 17-B. The conferment of such a right under Section 17-B cannot be regarded as a restriction on the powers of the High

> Court or the Supreme Court under Articles 226 and 136 of the Constitution".

15. The aforesaid judgment specifically provides that the High Court or Supreme Court shall not in any way preclude to pass an order directing payment of a higher amount to the workman if such higher amount is considered necessary in the interest of justice. Such a direction would be dehors the provisions contained in Section 17-B and while issuing direction the court may also direct regarding refund or recovery of the excess amount in the event of award being set aside. So it is apparent that the Apex court has given discretion to the High Court in respect of passing appropriate order, considering the fact and circumstances of the case to make payment of higher amount to the workman if it is necessary in the facts and circumstances of the case.

16. Recently in *Kaivalyadham Employees Association Vs. Kaivalyadham SMYM Samity* S.L.P. (C) No.2588/2007 dated 28.1.2009 reported in 2009 II LLJ 311 the Apex Court held thus :

> In contrast, Section 17-B provides in unambiguous terms that if an award for reinstatement of a workman is stayed at the instance of the employer, either by the High Court or the Supreme Court, the employer will be liable to pay to the workman during the pendency of the proceedings before the High Court or the Supreme. **Court full wages as last drawn by him, including any maintenance allowance admissible to him under any Rule**, if the workman had not been gainfully employed elsewhere during the said period.

17. In the present case, as per the statement of the learned counsel for the respondent, the appellant is entitled for basic grade at the rate of Rs.68.91 alongwith other allowances. A tabulation chart has been produced before us showing that for 89 days each employee would get Rs.6550.51 paise. From the perusal of the aforesaid we find that a reasonable amount has been paid to the employees by the respondent. Apart from this, the learned Single Judge has fixed the case for hearing on 12.2.2013 and it is expected that matter would be heard on the aforesaid date by the Single Bench and looking to the short point involved in this case, matter can be decided expeditiously.

18. The respondent has not paid the appellant herein the last wages drawn from the date of award till the passing of the order by the Writ court. In the

aforesaid circumstances, if the aforesaid amount is paid, the appellant herein would get a reasonable amount which would be sufficient for their subsistence.

19. In the aforesaid circumstances, we find that at present there is no necessity of passing an order for some higher wages vis- a-vis of the last wages drawn by the appellant. Apart from this the order passed by the Single Bench deserves to be clarified to the extent that appellant herein would be entitled for last wages drawn alongwith necessary allowances from the date of award till the decision by the Writ court for the compliance of Section 17-B of Industrial Disputes Act.

20. Accordingly, we dispose of this appeal with following directions:

(a) The appellant would be entitled for last wages drawn from the date of award passed by CGIT till the decision of the Writ Court in compliance of Section 17-B of the Industrial Disputes Act.

(b) The last wages drawn would include V.D.A, S.D.A and other allowances as are permissible to the appellants.

(c) The aforesaid would be paid to the appellant within a period of 30 days from today after due calculation.

(d) We request learned Single Judge to expedite the hearing of the petition.

21. With the aforesaid direction this Writ Appeal is finally disposed of with no order as to costs.

Appeal disposed of.

I.L.R. [2013] M.P., 279
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 206/2010 (Jabalpur) decided on 17 July, 2012

PRAHLAD DAS TANDIA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69 & 86(1), Panchayat (Resignation of Office Bearer) Rules, M.P. 1995, Rule 3 - Petitioner was panch in the Gram Panchayat

- He applied for the post of Panchayat Karmi pursuant to the advertisement - Cutoff date for making such application was 08.05.2006 - Petitioner tendered his resignation on 31.10.2006 - When a relative of an office bearer is not to be permitted to hold the charge of the post of Secretary, then how could a panch of very Gram Panchayat be appointed on the post of panchayat karmi - Petitioner was ineligible to take part in selection for appointment on the post of Panchayat Karmi - Resignation tendered by Petitioner was also not in the manner provided under the Rules, 1955 - Petition dismissed. (Paras 6 &7)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराऐं 69 व 86(1), पंचायत (पदाधिकारी का त्यागपत्र) नियम, म.प्र. 1995, नियम 3 – याची ग्राम पंचायत में पंच था – विज्ञापन के अनुसरण में उसने पंचायत कर्मी के पद के लिए आवेदन किया – उक्त आवेदन करने की अंतिम तिथि 08.05.2006 थी – याची ने दिनांक 31.10.2006 को त्यागपत्र प्रस्तुत किया – जब पदाधिकारी के रिश्तेदार को सचिव का पद भार धारण करने की अनुमति नहीं दी जा सकती, तब उसी ग्राम पंचायत के पंच को पंचायत कर्मी के पद पर कैसे नियुक्त किया जा सकता है– याची, पंचायत कर्मी के पद पर नियुक्ति हेतु चयन में हिस्सा लेने के लिए अनर्ह था – याची द्वारा प्रस्तुत त्यागपत्र भी नियम 1955 के अंतर्गत उपबंधित रीति से नहीं किया गया था – याचिका खारिज।

Case referred :

W.P. No. 7245/2008 decided on 27.04.2010.

V.K. Shukla, for the petitioner.
Lalit Joglekar, P.L. for the respondents No. 1 to 4.
Jitendra Tiwari, for the respondent No.7.

ORDER

K.K. Trivedi, J.: This petition is directed against the order dated 15.12.2009 passed by the Collector, Dindori, in an appeal preferred by respondent No.7, by which the appointment of the petitioner as Panchayat Karmi in Gram Panchayat, Dullopur, Block Bajag, District Dindori, has been cancelled, on the ground that the appellate authority has not properly considered the fact that rightful consideration was done by the Chief Executive Officer of Janpad Panchayat, who was directed to take action for appointment of Panchayat Karmi, because the respondent Gram Panchayat was not taking any steps in this respect. The procedure of appointment was duly followed and as such the order of appointment of the petitioner is illegally interfered

with by the appellate authority. Thus the order impugned is bad in law.

2. It is contended that vide advertisement dated 08.05.2006, the Chief Executive Officer of Janpad Panchayat, Bajag, invited applications for appointment on the post of Panchayat Karmi categorically contending that since the direction was given in exercise of powers under Section 86(1) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (herein after referred to as 'Act') for making appointment of Panchayat Karmi to the Gram Panchayat and since the Gram Panchayat has failed to comply with the directions, in exercise of powers under sub-section (2) of Section 86 of the Act, the Chief Executive Officer was required to act in this respect. The qualification, eligibility conditions etc. were mentioned in the advertisement. The application was submitted by the petitioner, which was duly considered. A merit list was prepared in which the name of the petitioner was put at S.No.1 as he has secured the highest marks in the qualifying examination. Considering the merits drawn by the Chief Executive Officer, the matter was referred to the higher authorities for approval and an order of appointment was issued in respect of the petitioner. Such an order was called in question before the Collector but instead of considering the entire procedure as laid-down, mechanically the Collector reached to the conclusion that the preference was required to be given to the reserved category candidate. Further it was wrongly considered that since the petitioner was holding the post of Panch in the very same Gram Panchayat, he could not have made an application for his selection as Panchayat Karmi, therefore, it is held that the order of appointment of petitioner was illegal. It is contended that since the petitioner had already tendered the resignation, which was subsequently accepted, the candidature of the petitioner was not to be rejected. This being so, the findings were incorrectly recorded by the Collector and as such the order impugned is bad in law and is liable to be quashed.

3. Upon notice of the writ petition, the respondents have filed return. The respondent-State has contended that the writ petition is not maintainable in view of the fact that there is a statutory remedy of revision available under the Madhya Pradesh Panchayat (Appeal & Revision) Rules, 1995, which has not been resorted to by the petitioner and as such the petition is liable to be dismissed. It is further contended that fact relating to holding of post of Panch by the petitioner in very same Gram Panchayat was found proved. Admittedly, the application was submitted by the petitioner pursuant to the advertisement well before the date of tendering the resignation. Even if resignation submitted

by the petitioner subsequently was accepted, it cannot be said that the petitioner was not holding the post of Panch on the date when he made application for selection on the post. In view of the aforesaid, the Collector has rightly interfered in the order of appointment of petitioner and has rightly set aside the same by allowing the appeal of respondent No.7. It is contended that entire petition being based on misleading and misconceived facts, is liable to be dismissed.

4. Respondent No.7 has filed a separate return and has categorically contended that apart from the facts as have been stated by the respondent-State in its return, the fact remains that the petitioner submitted his resignation only when he was appointed. Since he was holding the post of Panch at the relevant time, he could not have made the application for selection as Panchayat Karmi. Further the Gram Panchayat has already indicated that the Gram Panchayat was interested in appointment of a reserved category candidate as Panchayat Karmi for the purposes of his notification as Secretary of the Gram Panchayat because 90% population of the said Gram Panchayat was Scheduled Tribe. This being so, the petitioner, who was belonging to other backward class, was not acceptable to the Gram Panchayat. Further, it was to be seen that the petitioner was not eligible to be permitted to take part in the selection as he was holding the post of Panch, an office bearer of the very same Gram Panchayat and, therefore, was not eligible to take part in selection. The resignation from the post of Panch was submitted by the petitioner only when he was duly selected and appointed as Panchayat Karmi. Thus, in view of law laid-down by this Court in the case of *Ramphal, son of Shri Karmu Singh Maravi vs. State of M.P.* (W.P. No.7245/2008, decided on 27.04.2010), the writ petition is liable to be dismissed.

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

6. It is not in dispute that the petitioner, who was holding the post of Panch in the very same Gram Panchayat, had made an application pursuant to the advertisement dated 08.05.2006. The cutoff date for making such an application was 10.05.2006. The application was made within this time by the petitioner. Admittedly he had not tendered resignation before this date, which was submitted by him only on 31.10.2006. Specific provisions have been made under the Act for not allowing any person to join the services or to notify him as Secretary of the Gram Panchayat under Section 69 of the Act

where it is specifically said that a person shall not hold charge of Secretary of Gram Panchayat if such a person happens to be the relative of any office bearer of the concerned Gram Panchayat. If a relative of the office bearer of Gram Panchayat is not to be permitted to hold the charge of the post of Secretary of the Gram Panchayat, how could a Panch of very same Gram Panchayat be appointed on the post as Panchayat Karmi, which is meant only and only for notifying such a person as Secretary of the Gram Panchayat. The bar itself created under the Act was there against the petitioner and accordingly he was ineligible to take part in selection for appointment on the post of Panchayat Karmi. The Chief Executive Officer of Janpad Panchayat concerned while making selection has not taken note of these facts and committed an illegality in making selection of the petitioner. This was rightly examined by the Collector and he has rightly held that the petitioner was ineligible to be appointed on the post of Panchayat Karmi.

7. Apart from the fact whether on the cutoff date the petitioner was office bearer of the Gram Panchayat or not, it is to be seen on what date the petitioner has relinquished the post of Panch of the concerned Gram Panchayat. Specific Rules have been made for the purposes of tendering resignation by an office bearer of the Panchayat known as Madhya Pradesh Panchayat (Resignation by Office Bearer) Rules, 1995 (herein after referred to as 'Resignation Rules, 1995'). The resignation is to be submitted by giving a notice as prescribed under Rule 3 of the Resignation Rules, 1995. The same is to be submitted in Form-A prescribed before the Sarpanch of the concerned Gram Panchayat and the said notice is also to be sent to the Secretary or Chief Executive Officer. The notice is to be forwarded to the District Deputy Director, Panchayat & Social Welfare and the Collector as per Rule 4 of the aforesaid Rules. A special meeting of the Gram Panchayat concerned is to be called and in the said meeting the Panchayat is to ascertain from the member concerned whether he desires to withdraw his resignation or not. If the resignation is not withdrawn, the same is to be accepted by the Panchayat and the information would be sent to the concerned Collector of the District and to the District Deputy Director, Panchayat & Social Welfare. A Panch ceases to be the Panch of the Gram Panchayat from the date the resignation is accepted by the Gram Panchayat. The petitioner upon his own has mentioned that he gave the notice of resignation on 30th October, 2006 whereas his selection was finalized on 21.07.2006. Prior to this date, the resignation was not submitted. The resignation was accepted sometime after this date and

thereafter an order of appointment was issued in respect of the petitioner on 30.12.2006. This itself is enough to indicate that on the date when the application was made by the petitioner for appointment on the post of Panchayat Karmi and, on the date when his selection was finalized and recommendation for his appointment was made as Panchayat Karmi, the petitioner was holding the post of Panch of the Gram Panchayat concerned. This being so, in view of the settled position of law, the petitioner was ineligible to be appointed as Panchayat Karmi. The order was rightly passed by the Collector setting aside illegal appointment of the petitioner.

8. This Court has considered these aspects on various other occasions and has also given a definite finding in the case of *Ramphal, son* of *Shri Karmu Singh Maravi* (supra). This being so, the findings recorded by the Collector cannot be said to be illegal or unjust.

9. There is no force in this writ petition, which deserves to be and is hereby dismissed. However, there shall be no order as to cost.

Petition dismissed.

I.L.R. [2013] M.P., 284
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 18273/2011 (S) (Jabalpur) decided on 18 July, 2012

SOHAN JOSHI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law - Compassionate Ground* - Application for appointment on compassionate ground was rejected only on the ground that elder brother was in government job in other State - Deceased employee is survived by three unemployed sons and one marriageable daughter - Financial status of the family was not examined before rejecting application - Matter remitted back to reconsider the question of grant of appointment on compassionate ground ignoring the fact of employment of elder brother. (Paras 6 to 8)**

सेवा विधि – अनुकम्पा आधार – अनुकम्पा आधार पर नियुक्ति हेतु आवेदन केवल इस आधार पर अस्वीकार किया गया कि बड़ा भाई अन्य राज्य में सरकारी सेवा में है – मृतक कर्मचारी के तीन बेरोजगार पुत्र और एक विवाह योग्य पुत्री है –

आवेदन नामंजूर करने से पूर्व परिवार की आर्थिक स्थिति का परीक्षण नहीं किया गया – अनुकम्पा आधार पर नियुक्ति प्रदान करने के प्रश्न पर, बड़े भाई के नियोजन के तथ्य को नजर अंदाज करके पुनर्विचार किये जाने हेतु मामला प्रतिप्रेषित।

K.C. Ghildiyal, for the petitioner.
Piyush Dharmadhikari, G.A. for the respondent/State.

ORDER

K.K. TRIVEDI, J.: The present petition has been filed under Article 226 of the Constitution of India by the petitioner claiming a direction to the respondents to consider the claim of the petitioner afresh for grant of compassionate appointment, after quashment of the orders dated 05.08.2010 and 22.03.2011.

2. It is contended that the father of the petitioner was working as Head Constable (Driver) in the 6th Battalion S.A.F., Jabalpur, who died while in service on 28.06.2010. On account of death of the bread earner of the family, the entire family came to the stage of starvation. The application was made by the petitioner for grant of compassionate appointment but the same was rejected on the ground that the eldest brother of the petitioner is in the employment of Government of Chhattisgarh and, therefore, the petitioner is not entitled for employment on compassionate ground. Since the eldest brother of the petitioner was not maintaining the family, as he was employed in the other State, the mother of the petitioner made request for grant of compassionate appointment so that remaining family of the deceased employee could be maintained. In fact the family, which was living with the deceased employee was consisting of three sons, one daughter and the wife. It is contended in the petition that though affidavits to the effect were filed but instead of considering the same, again the representation was rejected by subsequent order dated 22.03.2011, therefore, this writ petition was required to be filed.

3. On service of the notice of the writ petition, a response has been filed by the respondents and it is contended that in terms of the policy of compassionate appointment, which was in vogue at the relevant time, the claim of the petitioner was examined. The fact remains that on the date of death, the policy of the year 2008 was in vogue. There is a specific provision made in the policy that in case any of the members of the family of deceased is in the

employment in Government departments or any Board, Mandal or any Council, the dependant of the deceased employee would not be entitled to grant of compassionate appointment. It is stated in the return that since the eldest brother of the petitioner, by name Mohan Joshi, is posted as Constable (Driver) in the State of Chhattisgarh, the petitioner was not found fit to be granted compassionate appointment and accordingly the claim made by the petitioner was rightly rejected. The representation submitted by the mother of the petitioner was also rejected in view of the aforesaid reasons. Thus, it is contended that the petitioner is not entitled to any compassionate appointment.

4. Learned Counsel for the petitioner has not filed any rejoinder rebutting the statements made in the return. He has pointed out that this fact that the eldest brother of the petitioner was in the employment of State of Chhattisgarh, was brought to the notice of the respondents by the mother of the petitioner. It is pointed out that the affidavits so sworn by the said persons were produced. Even in the application the fact was mentioned that the eldest son of the mother of the petitioner was not in a position to look after the family of the deceased Government employee as he was having a very low salary in the State of Chhattisgarh. It is further pointed out that these aspects were never considered that the eldest brother of the petitioner was not in the employment of the State of Madhya Pradesh and, therefore, the bar as imposed could not have been made applicable nor the petitioner could have been denied the compassionate appointment.

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

6. Undisputedly a policy is made by the State Government prescribing grant of compassionate appointment to the dependant of the deceased Government employee. It is said in the said policy that the dependant of the Government employee would not be entitled to grant of compassionate appointment in case any of the members of the family is in the employment of the Government or Board, Corporation or Council. However, if the said bar is taken into consideration, it would be applicable in case a family member of the deceased Government employee is in the service in the very same State and not if a member of the family is employed elsewhere in other State. This has to be examined in view of the fact that the policy of the compassionate appointment is made with an object to provide financial assistance to the family of the deceased Government employee, which always is put in great financial difficulties because of death of the bread earner of the family. Undisputedly, this fact was brought to the notice of the respondents authorities that the eldest

son of the deceased Government employee has separated much before and has obtained an employment in the State of Chhattisgarh. Therefore, merely because one of the family member was employed in another State, it was not justified to hold that sufficient financial means were available to the family members of the deceased Government employee to live on. This fact was very categorically pleaded that looking to the present financial status, it was very difficult for the family of the deceased employee to pull on. There were three unemployed sons, one major daughter of marriageable age and the widow. This particular aspect has not been examined by the respondents and merely on the prescription of such a condition in the policy of compassionate appointment, the claim of the petitioner was rejected. In fact the respondents were required to examine the claim of the petitioner objectively, taking into account the financial status of the family, the means of income and then only to take a decision. Since this has not been done, it cannot be said that the case of the petitioner was rightly considered by the respondents for grant of compassionate appointment.

7. Though the settled law is that compassionate appointment cannot be claimed as of right but the facts in the present case are quite different. Here the bread earner serving in the Special Armed Forces had died untimely. His death has caused loss of source of livelihood to the family members, who were living with him. If the policy of compassionate appointment is required to be made, it is only for this purpose and object, therefore, the case of the petitioner is required to be re-considered by the department.

8. Consequently, the writ petition is allowed. The orders impugned dated 05.08.2010 and 22.03.2011 are hereby quashed. The matter is remitted back to the respondents to re-consider the claim of the petitioner for grant of compassionate appointment ignoring the fact relating to the employment of the eldest brother of the petitioner in the State of Chhattisgarh and if the respondents come to the conclusion that financial status of the family of the petitioner is not such that they can live on, the respondents will make appropriate arrangement for grant of compassionate appointment to the petitioner. The aforesaid exercise be completed within a period of three months from the date of receipt of certified copy of the order passed today.

9. The writ petition is allowed and disposed of accordingly. There shall be no order as to cost.

Petition allowed.

I.L.R. [2013] M.P., 288
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 24518/2003 (Jabalpur) decided on 25 July, 2012

VIMAL KUMAR PANDEY ...Petitioner
Vs.
STATE OF M.P. ...Respondent

Service Law - Compulsory Retirement **- Petitioner was compulsorily retired on the basis of few adverse entries in Confidential Reports ignoring the satisfactory service record - Order of compulsory retirement cannot be affirmed merely on the basis of few stale adverse entries - As the petitioner has already attained the age of superannuation, he be treated in service till actual date of superannuation and will get 50% of salary and allowances from the date of compulsory retirement till date of superannuation.**
(Paras 9 & 10)

सेवा विधि – अनिवार्य सेवानिवृत्ति – संतोषजनक सेवा अभिलेख की अनदेखी करके, याची को गोपनीय प्रतिवेदनों में कुछ प्रतिकूल प्रविष्टियों के आधार पर अनिवार्य रुप से सेवानिवृत्त किया गया – अनिवार्य सेवानिवृत्ति का आदेश मात्र कुछ पुराने प्रतिकूल प्रविष्टियों के आधार पर अभिपुष्ट नहीं किया जा सकता – चूंकि याची ने पहले ही अधिवार्षिकी आयु प्राप्त कर ली है, उसे अधिवर्षिता की वास्तविक तिथि तक सेवारत माना जाए और उसे अनिवार्य सेवानिवृत्ति की तिथि से अधिवार्षिकी तिथि तक वेतन एवं भत्तों का 50 प्रतिशत प्राप्त होगा।

Cases referred :

2002(4) MPLJ 343, AIR 2001 SCW 862=(2001) 3 SCC 314, (2010) 10 SCC 693, ILR 2012 MP 42.

P.R. Bhave with *Bhanu Pratap Yadav,* for the petitioner.
Piyush Dharmadhikari, G.A. for the respondent/State.

ORDER

K.K. Trivedi, J.: This petition was originally filed as O.A. No.347/2000 before the M.P. State Administrative Tribunal and has been transmitted to this Court after closer of the Tribunal and is registered as writ petition.

2. The petitioner, who was working as Assistant Engineer (E/M) at the

relevant time, had visited the Tribunal by way of filing of this original application ventilating his grievance against the order dated 03.01.2000 by which it was communicated to the petitioner that in terms of the directions issued by the Division Bench of this Court, Bench at Gwalior, after re-screening the case of the petitioner it was found that the order of his compulsory retirement so issued on earlier occasion was to be affirmed on the ground that earlier order of compulsory retirement was issued against the petitioner on 01.10.1997, which order was sought to be challenged in O.A. No.855/1998. The Tribunal after considering the law laid-down by it in an original application filed by similarly situated person, came to the conclusion that since the screening committee constituted for the purpose of considering the case of the petitioner for compulsory retirement was the same and the said committee was found to be invalidly constituted by the Tribunal and it was held that on recommendation of the said committee, compulsory retirement order could not have been issued, the original application of the petitioner was allowed. The said order was not challenged anywhere in case of the petitioner but in one of the case decided at Gwalior Bench of the Tribunal, the writ petition was filed before this Court, Bench at Gwalior, by the State Government. The Division Bench of this Court considered the law laid-down by the Tribunal in the case of *Laxmi Chand Awadhiya Vs. State of M.P. & others* (O.A. No.3061/1997, decided on 20.03.1998), on the basis of which various cases were decided including the case of the present petitioner as also one B.L. Kaul and others and the Division Bench of this Court reached to the conclusion that there was no wrong committed by the Tribunal in holding that the committee was not rightly constituted. However, the Division Bench of this Court has made an observation that instead of rushing to the Court challenging the well reasoned order of the Tribunal, the State Government could have constituted a fresh screening committee, could have considered the cases of all those persons and could have retired them if they were found fit for such retirement. It is contended that in view of this decision of the Division Bench of this Court, screening of the case of the petitioner was to be done afresh and a fresh decision was required to be taken but he could not have been compulsorily retired by inserting the life in an order, which was already quashed by the Tribunal. Therefore, it is contended that the order impugned is bad in law.

3. It is further contended by the petitioner that the retrospective effect of an order of compulsory retirement was again considered by the Tribunal and in one of the cases of *Laxmi Chand Awadhiya,* again a decision was given

by the Tribunal that the order of compulsory retirement could be prospective and not retrospective. Such an order was also affirmed by the Division Bench of this Court but by that time since the Tribunal was at the verge of closer, instead of remitting back the matter to the Tribunal, this Court has examined the reports of the screening committee and has given opinion in such a case in which recommendation for compulsory retirement was given dehors the rules or law laid-down by the Apex Court and has quashed the recommendations as also the order of compulsory retirement. It is contended that since now the Tribunal is not in existence, this Court would be required to examine the recommendations of the screening committee and petitioner would also be entitled to the similar benefits as was extended in the case of *Laxmi Chand Awadhiya* (supra). It is also contended that there was no material available to compulsory retire the petitioner as his service record was satisfactory and at any rate, he could not have been graded as a deadwood, which was required to be chopped of. Thus, it is contended that the order impugned is bad in law on this count also and is liable to be quashed.

4. Refuting the allegations made by the petitioner, the respondents have contended that in terms of the policy made by the State Government, the case of the petitioner was considered. It was found that the petitioner is one, who was having unsatisfactory service record and, therefore, recommendations were made for his compulsory retirement. Such a recommendation of the committee was found faulted with by the Tribunal only because of the constitution of the screening committee on first occasion and such an order was quashed. Since the Division Bench of this Court has made the observation, re-screening was done after properly constituting the committee and the said committee has also recommended compulsory retirement of the petitioner affirming the earlier recommendation of the Committee, therefore, the order impugned has been issued. It is contended that the petitioner is not entitled to any relief and his petition is liable to be dismissed.

5. The record of the screening committee has been placed before this Court for consideration. Heard learned Counsel for the parties at length and perused the record.

6. Placing his reliance in the case of *State of M.P. vs. Laxmi Chand Awadhiya*, 2002(4) MPLJ 343, learned Senior Counsel has contended that well considered principles of service jurisprudence were taken note of by the Division Bench of this Court and in para 16 and 17 of the report specific

findings were recorded. It is contended that since the Division Bench of this Court has taken note of the principle laid-down by the Apex Court in the case of *State of Gujarat vs. Umedbhai M. Patel,* AIR 2001 SCW 862=(2001) 3 SCC 314, and certain guidelines prescribed by the Apex Court and it is held that it was necessary to consider the cases in the light of the principle laid-down by the Apex Court for examining the necessity of compulsory retirement of a Govt. servant under the Pension Rules or under the Fundamental Rules but this was not properly done. It is contended that in case of the present petitioner, baring for few ACRs, the entire service record of the petitioner was satisfactory but this was not taken note of by the committee, on the other hand, cursorily it was said that the petitioner is required to be compulsory retired for the age old entries made in his confidential reports. His recent past was not looked into, which has resulted in improper consideration of the case of the petitioner. Only this much was said that in the ACRs of the petitioner for the 15 years career, there were five average and adverse remarks. However, the recent past of the service of the petitioner was not looked into where he has earned good remarks, such as Very Good. If the said remarks would have been taken into consideration, there was no downgrading in the ACRs and, therefore, the petitioner could not have been compulsory retired.

7. Though such a fact is not disputed but learned Govt. Advocate has placed on record the entire ACR folder of the petitioner, which starts with the ACR for the year 1973. In that year nothing adverse was found. It was rather found that subsequently it was said that the petitioner was laborious, intelligent and punctual. The adverse part communicated to him was not of much importance. In the year 1974 he was graded as a good officer. In the years 1975, 1976, 1977, 1978 and 1979, he was graded as good officer, most eligible to be granted permission to cross efficiency bar. In the year 1984-1985 he was graded as good. In the year 1986 he was graded as average and in the year 1987 again he was graded as good. Only in the year 1988 he was given an adverse remark, which was communicated. In the year 1989 he was graded as average. In the year 1990 he was graded as very good. In the year 1992-1993 he was graded average. In the year 1993-94 and 1996-1997, 1997-1998 he was graded as very good and good. From this service record, how could it be said that only for one ACR of the year where he was graded as below average, that too in the year 1988 the petitioner would become a deadwood and would not be entitled to continue in service whereas in the next year the ACR of the petitioner was upgraded and in the recent past he

was graded as good and very good. From this analysis of the service record, it is clear that the committee has not rightly considered the claim of the petitioner and has wrongly recommended for his compulsory retirement.

8. Placing reliance in the case of *Pyare Mohan Lal vs. State of Jharkhand & others,* (2010) 10 SCC 693, learned Govt. Advocate had tried to emphasize that since there was one adverse entry, it was enough to hold that the petitioner was not a good officer to be continued in the employment and he could have been chopped of by his compulsory retirement. With great respect it is to be held that aforesaid decision of the Apex Court is distinguishable in the present case. Firstly, the aforesaid law laid-down by the Apex Court is in the case of Judicial Officer. Secondly, the single entry was touching the integrity of the said officer and, therefore, the Apex Court has reached to the conclusion that it was enough to compulsory retire a Judicial Officer. Such is not the case in hand. The single entry made in respect of the petitioner is not touching the integrity of the petitioner, on the other hand so far as the integrity part is concerned, there is nothing adverse in the ACR of the petitioner. The adverse part was only slackness in working and nothing else. Even in that entry it was categorically said that the integrity of the petitioner was beyond doubt. Thus, the case relied by the respondent is distinguishable and only on the basis of such a finding of the Apex Court, the order of compulsory retirement of the petitioner is not to be upheld.

9. This Court recently has examined the cases of compulsory retirement in various aspects. In the case of *G.R. Dhupar vs. State of M.P. & others,* I.L.R. 2012 M.P. 42, it has been categorically held that in the case of *Umedbhai M. Patel* (supra) the Apex Court has categorically laid-down that the overall service record is required to be considered and for one or few stale confidential reports communicated or uncommunicated, an employee/officer is not to be adjudged as a deadwood, unfit to remain in service in the public interest and is not required to be compulsorily retired. The Division Bench of this Court has also taken note of the law laid-down by the Apex Court in the case of *Umedbhai M. Patel* (supra) and had held in paragraph 19 of the report that there are eight points of consideration prescribed by the Apex Court and if satisfactory service record is ignored, only because of few stale adverse entries, the order of compulsory retirement cannot be affirmed.

10. In view of the aforesaid, this petition succeeds and is allowed. The order of compulsory retirement of the petitioner as communicated on 3rd

January, 2000 (Annexure A-1) is hereby quashed. The petitioner would have attained the age of superannuation by now. He will be treated to be in service till his actual date of superannuation and will get 50% of the salary and allowances of the post from the date of his compulsory retirement till the date of his superannuation. The petitioner will also get benefit of revision of his retiral dues and all the arrears of salary and retiral dues after refixation of pension be paid to him after due calculation within a period of four months from the date of this order.

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

Petition allowed.

I.L.R. [2013] M.P., 293
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 8886/2012 (Indore) decided on 21 September, 2012

BANSAL INFRATECH SYNERGIES INDIA LTD. ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution - Article 226 - Alternative Remedy **- High Court may exercise power in atleast three contingencies (i) Where the writ petition seeks enforcement of any of Fundamental Rules (ii) Where there is failure of principles of natural justice (iii) Where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (Para 5)**

क. संविधान – अनुच्छेद 226 – वैकल्पिक उपचार – उच्च न्यायालय कम से कम तीन आकस्मिकताओं में शक्ति का प्रयोग कर सकता है – (i) जब रिट याचिका किसी मूलभूत नियम का प्रवर्तन चाहती हो (ii) जब नैसर्गिक न्याय का सिद्धांत विफल हो गया हो (iii) जब आदेश या कार्यवाही संपूर्ण रुप से बिना अधिकारिता के की गई अथवा अधिनियम की वैधता को चुनौती दी गई हो।

B. Constitution - Article 226 - Writ of Prohibition - Termination of contract - Show Cause Notice **- Petitioner can put forward his case by submitting a reply to the impugned show cause notice and that may be considered appropriately - Contract document providing for dispute redressal system and further provision of appeal**

against the decision of the competent authority of the respondents by way of arbitration - Held - No ground to invoke writ jurisdiction so as to quash the show cause notice. (Paras 6, 7 & 8)

ख. संविधान – अनुच्छेद 226 – प्रतिषेध रिट – संविदा की समाप्ति – कारण बताओ नोटिस – याची, आक्षेपित कारण बताओ नोटिस का जवाब प्रस्तुत करके अपना पक्ष रख सकता है और उस पर समुचित विचार किया जा सकता है – संविदा दस्तावेज, विवाद निवारण प्रणाली उपबंधित करता है और माध्यस्थम के जरिए, प्रत्यर्थीगण के सक्षम प्राधिकारी के निर्णय के विरुद्ध अपील का अतिरिक्त उपबंध करता है – अभिनिर्धारित – कारण बताओ नोटिस को अभिखंडित करने के लिए रिट अधिकारिता का अवलंब लेने का कोई आधार नहीं।

Cases referred :

AIR 2003 SC 2120, 2003 AIR SCW 126, AIR 1999 SC 22, 1998 AIR SCW 3345, AIR 2006 SC 1301.

Shekhar Sharma, for the petitioner.

ORDER

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

1. This petition is filed under Article 226/227 of the Constitution of India. The petitioner has challenged the notice dated 31.08.2012 (Annexure P-18) issued by the third respondent General Manager, M.P. Rural Road Development Authority asking the petitioner to show cause as to why the contract awarded to it be not cancelled.

2. According to the petitioner its prayer for foreclosure was wrongly rejected by the respondents vide Annexure P-4 and as such the proposed termination of contract by the impugned show cause notice is illegal. It is also the case of the petitioner that there was considerable delay on the part of the respondents in obtaining the permission of the Forest Department and as such there was delay and, therefore, for no fault of the petitioner, the impugned show cause notice has been issued.

3. The petitioner contends that the writ petition against the show cause notice is maintainable and the availability of alternative remedy is no bar as the rule is of discretion and not one of compulsion. In support the petitioner has placed reliance on the judgment passed by the Supreme Court in the case of

Harbanslal Sahnia Vs. Indian Oil Corporation Ltd., (AIR 2003 SC 2120) =2003 AIR SCW 126, *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai* (AIR 1999 SC 22) = 1998 AIR SCW 3345.

4. Having heard learned counsel for the petitioner and having considered the submissions made by him, we find no ground to entertain this petition in view of the fact that the petition is only against a show cause notice and from the averments made in the pleadings and having gone through the grounds raised in the writ petition, we find that it is not the case of the petitioner that the show cause notice is without jurisdiction.

5. In the case of *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai* (supra) and *Harbanslal Sahnia Vs. Indian Oil Corporation Ltd.* (supra), the Supreme Court has held that in an appropriate case inspite of the availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in atleast three contingencies (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai* (supra) the Supreme Court has further observed that under Article 226 of the Constitution of India the High Court having regard to the facts of the case has a discretion to entertain or not to entertain the writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in atleast three contingencies.

6. In the present case, we find that none of the three contingencies as referred above are available. The petitioner can put forward his case by submitting a reply to the impugned show cause notice, we are sure that if reply is submitted by the petitioner it will be considered appropriately. In the circumstances, there appears to be no justification for issue of writ of prohibition restraining the authority from proceeding further with the impugned show cause notice. As observed it is open for the petitioner to put forward its case before the authority and pursue the authority in accordance with law. Our view finds support from the judgment of the Supreme Court in the case of *Standard Chartered Bank and ors Vs. Directorate of Enforcement and Ors* (AIR 2006 SC 1301).

7. We also find that in the contract document a clause is available providing for dispute redressal system and further provision of appeal against the decision of the competent authority of the respondents by way of arbitration by approaching to the M.P. Arbitration Tribunal constituted under Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983.

8. In view of the aforesaid, we find no ground to invoke writ jurisdiction so as to quash the show cause notice dated 31.08.2012.

9. As a result, the petition fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 296
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P.No. 8858/2012 (Jabalpur) decided on 8 October, 2012

SUBHASH CHAND JAIN ...Petitioner
Vs.
NATTHU SINGH & anr. ...Respondents

***Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment of pleadings* - Petitioner filed an application for amendment of plaint seeking prayer for possession and mesne profits on the ground that he has been dispossessed during the pendency of the suit - Trial Court ought to have allowed the amendment application - Application allowed - Petitioner directed to incorporate the amendment within 15 days - Defendant also permitted to file application for consequential amendment. (Paras 7 & 8)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – अभिवचनों में संशोधन – याची ने कब्जा एवं अंतःकालीन लाभों हेतु प्रार्थना करते हुए वादपत्र में संशोधन के लिए आवेदन इस आधार पर प्रस्तुत किया कि उसे वाद लंबित रहने के दौरान बेकब्जा किया गया है – विचारण न्यायालय को संशोधन आवेदन मंजूर करना चाहिए था – आवेदन मंजूर – याची को 15 दिनों के भीतर संशोधन समाविष्ट करने के लिए निदेशित किया गया – प्रतिवादी को भी परिणामिक संशोधन हेतु आवेदन प्रस्तुत करने की अनुमति दी गई।

Case referred :

AIR 1975 SC 1409.

J.K. Verma, for the petitioner.
Devendra Singh Bhagel, for the respondent No. 1.
Sharda Dubey, P.L. for the respondent No.2.

ORDER

U.C. MAHESHWARI, J.: The petitioner/plaintiff has filed this petition under Article 227 of Constitution of India, for quashment of order dated 20.04.12 (Annexure P-6) passed by IIIrd Civil Judge Class-II, Sagar, in Civil Original Suit No.20-A/2011, dismissing his application filed under Order 6 Rule 17 of the C.P.C., for amendment in the plaint to add the prayer of possession of the disputed land and of mesne profit, has been rejected.

(2) It is undisputed fact between the parties that initially the petitioner herein filed the impugned suit against the respondent for perpetual injunction with respect of alleged land.

(3) In pendency of the suit, on causing the damages to the crops by the respondent no.1 an amendment application to amend the plaint for damages of Rs.40,000/- was filed, but on consideration vide order dated 18.01.12 (Annexure P-5), the same was dismissed by the trial court. Subsequent to dismissal of such application, the petitioner herein filed the impugned amendment application (Annexure P-3). Contending that during pendency of the suit, he has been dispossessed by the respondent no.1 from the disputed land and on the basis of such subsequent event wants to amend the plaint for grant of decree against the respondent no.1 for possession of the disputed land as well as of the mesne profit at the rate of Rs. 10,000/- per annum.

(4) The proposed amendment was seriously opposed by the other side before the trial court. On consideration such amendment application Annexure P-3, was dismissed by the trial court, on which the petitioner has came to this court.

(5) It is settled proposition of law that the amendment proposed by either of the parties of the civil suit, on the basis of the subsequent events which had taken place during pendency of the suit then such amendment could not be refused in normal course unless the compelling circumstances are available to refuse the same. The merits of the same could be examined only after becoming the proposed amendment to be the part of pleadings.

(6) My aforesaid view is also fortified with the principle laid down by the

Apex Court in the matter of *"Pasupuleti Venkateswarlu v. Motor and General Traders"* reported AIR 1975 S. C. 1409, in which it was held as under:

> "4. We feel the submissions devoid of substance. First about the jurisdiction and propriety vis-a-vis circumstances which come into being subsequent to the commencement of the proceedings. It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fair play is violated, with a view to promote substantial justice, subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations, for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed. On both occasions the High Court, in revision, correctly took this view...."

(7) On examining the case at hand in view of the aforesaid principle then in available circumstances, in which plaintiff wants to amend his plaint for the prayer of possession of the disputed land as well as for mesne profit, on the basis of subsequent event which had come into existence in pendency of the suit. Such principle is directly applicable. Pursuant to it, it is held that trial

court ought to have allowed the amendment application but committed error in dismissing the same.

(8) In view of the aforesaid discussion, the impugned order being perverse and contrary to the settled legal proposition is not sustainable, hence by allowing this petition, the same is set aside and the petitioner application Annexure P/3, is hereby allowed and he is directed to incorporate the proposed amendment in the plaint before the trial court within 15 days from today. Consequently, the respondent no.1 is also extended the opportunity to file the appropriate application for consequential amendment in this regard before the trial court within further 15 days and the trial court is directed to consider such application and proceed further with the matter only after incorporating the aforesaid amendment as well as the consequential amendment if proposed.

(9) The petition is allowed as indicated above. In view of the aforesaid order IA. No. 8892/12, the stay application does not require any further consideration, hence the same is hereby disposed of.

Petition allowed.

I.L.R. [2013] M.P., 299
WRIT PETITION

Before Mr. Justice J.K. Maheshwari & Mr. Justice G.D. Saxena

W.P.No.6917/2012 (Habeas Corpus) (Gwalior) decided on 19 Oct., 2012

YOGESH @ YOGENDRA & ors. ...Petitioners
Vs.
STATE OF M.P. & ors. ...Respondents

*A. **Criminal Procedure Code, 1973 (2 of 1974), Section 41 - Power of Police Officer to arrest** -* **Notification No. F-16/266/License/96/B(1)(two) dated 11.06.96 issued by the Home Department deferring cognizance by the police till the enquiry directed by the Collector - Is just and reasonable - It does not override the powers of the police officers conferred under Section 41 of the Cr.P.C. on them. (Para 9)**

*क. **दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 41 – पुलिस अधिकारी की गिरफ्तार करने की शक्ति** – गृह विभाग द्वारा जारी की गई अधिसूचना कं. एफ–16/266/लाईसेंस/96/बी(1)(दो) दि.11.06.96, जो कलेक्टर द्वारा निदेशित जांच पूर्ण होने तक पुलिस द्वारा संज्ञान लिया जाना आस्थगित करती है – न्यायसंगत एवं युक्तियुक्त है – यह द.प्र.सं. की धारा 41 के अंतर्गत पुलिस*

अधिकारियों को प्रदत्त शक्तियों को अध्यारोही नहीं करती।

B. ***Constitution - Article 226 - Writ of Habeas Corpus*** **- After arrest of the forest officials they were produced before the Chief Judicial Magistrate, who sent them to the judicial custody - Their detention cannot be said to be illegal, warranting interference and to issue writ in the nature of Habeas Corpus. (Para 8)**

ख. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण याचिका – वन अधिकारियों की गिरफ्तारी पश्चात उन्हें मुख्य न्यायिक मजिस्ट्रेट के समक्ष प्रस्तुत किया गया जिसने उन्हें न्यायिक अभिरक्षा में भेजा – उनकी अभिरक्षा को अवैध नहीं कहा जा सकता, जिसमें कि हस्तक्षेप की आवश्यकता हो और बंदी प्रत्यक्षीकरण के स्वरुप की रिट जारी की जाये।

C. ***Criminal Procedure Code, 1973 (2 of 1974), Section 197(2), Forest Act (16 of 1927), Section 74 - Cognizance*** **- Provisions are having its application when the cognizance is to be taken by the Court and it has no application in the case where the cognizance is to be taken by the police. (Para 5)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 197(2), वन अधिनियम (1927 का 16), धारा 74 – संज्ञान – उपबंध तब लागू होंगे जब न्यायालय द्वारा संज्ञान लिया जाना है और वह ऐसे प्रकरण में लागू नहीं होंगे जहां पुलिस द्वारा संज्ञान लिया जाना है।

H.D. Gupta with *Suresh Agrawal & Santosh Agrawal,* for the petitioners.

MPS Raghuvanshi, Addl. A.G. for the respondents/State.

F.A. Shah, for the intervener.

ORDER

The Order of the Court was delivered by,

J.K. MAHESHWARI, J.: This petition seeking write in the nature of Habeas Corpus has been filed under Article 226 of the Constitution of India by the petitioners, inter-alia contending that the detention of petitioners by the police officers with effect from 28.8.2012 without conducting magisterial inquiry in view of the notification Annexure P/1 F-16/266/ license/ 96/ B/ (1) (two) dated 11.6.1996 issued by the Home Department is arbitrary and not permissible under the law. Therefore, a direction to release the corpus may be issued.

2. The facts, in brief are that, on 28.8.2012 at about 6.30 AM, petitioners along with Ranger Virendra Singh Tomar, Dy. Ranger Baburam Adiwasi, Hari Singh Forest Guard and Abhishek Singh decided to go on patrolling and to visit of compartment No.144 of reserve forest together with the picket of SAF personnels as directed by the Chief Conservator of Forest Gwalior circle Gwalior vide order dated 6.7.2012 to procure law and order situation. In the said picket, Prakash Chand Jhala No.77, Shakti Singh Sikarwar No.341 and Umesh Vishwarma No.810 were accompanied them. At about 7.30 AM, the petrolling party came across with several forest offenders who were 30-40 in number and some of these persons were habitual offenders, as several criminal cases have been registered against them under different sections as per list produced as Annexure P/4. Those offenders want to fetch wood illicitly in forest are of the said compartment. These persons were armed with deadly weapons and they made the attack on the patrolling party. At that time, Dy. Ranger gave command to the SAF personnels to resort to open fire in the air so that the offenders may be dispersed and run away. In the said attack made by the offenders, members of petrolling party Harishankar Sharma and two others unarmed forest guards were injured. In such circumstances, SAF personnels opened fire on the assaulting mob of offenders below the waist, wherein, two offenders namely Jaheer and Ismail received injuries on the thigh and foot region. Injured Ismail was immediately sent to Hospital for treatment where he succumbed due to bullet injuries. Whereupon, PS Sheopur registered a case at Crime No.441 of 2012 under Section 147, 148, 149 and 307 IPC, later on Section 302 IPC was added against the petitioners as well as two other forest officers. While on the report submitted by Dy. Ranger, offence was also registered at Crime No.442 of 2012 under Section 353, 186, 147, 148, 149, 427, 294, 332 and 323 IPC against the said offenders and when forest officers went to lodge the report, they were detained by the police authorities and produced before the Chief Judicial Magistrate, Sheopur. As per order passed by him petitioners were sent to judicial custody.

3. Learned counsel for the petitioners submit that in view of the notification issued by the Home Department dated 11.6.1996 Annexure P/1, it is clear that on lodging First Information Report no cognizance shall be taken by the police authorities, until and unless Inquiry directed by the Jila Dandadhikari/Collector is not completed regarding the fact that the force so used was not without any justifiable cause or in excess to the private defence. It is further urged that as per Section 74 of the Indian Forest Act, it is clear

that no suit, prosecution or other legal proceeding shall lie against any public servant for anything done in good faith or omitted to be done likewise, under this Act or the rules or orders made thereunder. In such circumstances, if the action is taken by the patrolling party for maintaining law and order, and to procure forest produce in the good faith, no further action on the First Information Report is permissible including detention of petitioners, It is also submitted that as per report, allegation has been levied against the forest officers in spite of the fact that the arm was used by the SAF picket which is apparent from the statements of SAF personnel given by them to their company commander as per Annexure P/7. In such circumstances, registration of case against the forest officers while they were on duty and to detain them is against the said notification and without completion of the inquiry thus, it is amounting to their illegal detention.

4. The respondents by filing their reply have averred that at present, the petitioners are in custody as per the order passed by the Court after registration of the case against them; therefore, writ in the nature of habeas corpus is not maintainable. It is further submitted that in the FIR lodged against the petitioners, specific allegations have been levied against them, therefore, the offence has rightly been registered and they were sent to judicial custody by the order of Chief Judicial Magistrate. It is further submitted that the petitioners have also filed bail applications bearing M.Cr.C.Nos.6956 of 2012, 6957 of 2012 and 6958 of 2012 which are pending for consideration. In such circumstances, since the petitioners have already taken recourse of law, therefore, release of petitioners in the writ of habeas corpus cannot be directed. It is further contended that as per section 41 of Cr.P.C. police officer conferred with the power to make arrest of a person even without order from the Magistrate in a case where cognizable offence has been committed. However, the powers so conferred under the Cr.P.C cannot be taken away by way of notification Annexure P/1 issued by the respondents. Therefore, detention of the petitioners cannot be treated to be illegal detention and the writ in the nature of habeas corpus may be dismissed.

5. After having heard learned counsel for the parties and considering the provisions contained in Section 74 of the M.P. Amendment of Indian Forest Act, 1927 as well as the provisions of Section 197 (2), we are of the considered opinion that the aforesaid provisions are having its application when the cognizance is to be taken by the Court and it has no application in the case where the cognizance is to be taken by the police. In such circumstances, the

petitioners cannot derive any benefit of the said provision, however, the contention of petitioner on the said point is hereby repealed.

6. Now coming to the arguments of the petitioners to get benefit of the notification dated 11.06.1996 issued by the State Government through the Home Department, the language of the said notification would be necessary to refer and to take note thereof, however, the said notification is reproduced *verbatim*:

मध्यप्रदेश शासन, गृह (पुलिस) विभाग
मंत्रालय
::आदेश::

भोपाल, दिनांक 11–6–96

क्रमांक एफ–16–266/लाय/96/बी (1)दो,:– वनों/वन उपज की सुरक्षा के लिए नियुक्त वन रक्षक तथा उससे उच्च वन अधिकारी अपने कर्त्तव्यों के निर्वहन करते समय आत्मरक्षार्थ वन विभाग द्वारा प्रदाय किये गये अग्नेय शस्त्र का उपयोग कर सकेंगे। इसके लिए उन्हें संबंधित वन मंडलाधिकारी की अनुशंसा पर शस्त्र लायसेंस स्वीकृत किया जा सकेगा।

2/ वनरक्षक/ उससे उच्च वन अधिकारी यदि अपने कर्त्तव्य निर्वहन के दौरान अग्नेय शस्त्र का उपयोग/चालन करते है, तो ऐसे मामलों में वन रक्षक या उससे उच्च वन अधिकारी के नाम दर्ज कराई गयी एफ0आई0आर में पुलिस तब तक प्रसंज्ञान में नहीं लेगी जब तक कि जिला दण्डाधिकारी द्वारा आदेशित दण्डाधिकारी जांच में यह सिद्ध नहीं हो जाता कि अग्नेय शस्त्र का उपयोग/चालन अनावश्यक, अकारण अथवा आवश्यकता से अधिक बल प्रयोग करने के लिये किया गया है।

म्र0प्र0 के राज्यपाल के नाम से
तथा आदेशानुसार
हस्ता/–
(आर0के0पाठक)
उप सचिव

पृ0 क्र0 एफ–16–266/लाय/96/बी(1)दो, भोपाल, दिनांक 11–6–96

प्रतिलिपि :
1– उप नियंत्रक, शासन केन्द्रीय मुद्रणालय म0प्र0 भोपाल की ओर राजपत्र में प्रकाशित करने तथा अधिसूचना की 50 प्रतियां भिजवाने हेतु सूचनार्थ.
2– सचिव,मध्यप्रदेश शासन वन विभाग की ओर सूचनार्थ
3– पुलिस महानिदेशक, म्र0प्र0 शासन की ओर सूचनार्थ
4– समस्त जिला दण्डाधिकारी/पुलिस अधीक्षक की ओर सूचनार्थ.

हस्ता/–
उप सचिव.

Bare reading of the aforesaid, it is apparent that the cognizance by the police on lodging the FIR against the forest officials has been restricted till holding the enquiry by the District Collector on all the issues aforementioned. The restrictions have been imposed only in a matter where the forest personnels while discharging their duties have used the firearms while protecting the forest produce in maintaining law and order.

7. The language of the notification does not take away the power of arrest as conferred while exercising the discretion by the police officer under Section 41 of Cr.P.C. The language of the aforesaid makes it clear that the arrest on lodging an FIR against the forest personnels has been deferred till the enquiry conducted by the District Collector. However, it can safely be observed that by issuing notification power under Section 41 of Cr.P.C. has not been taken away from a Police Officer. It may be observed that issuance of the said notification has not disputed by the State Government, however, it is binding on the police officers while making arrest in exercise of discretion under Section 41 of Cr.P.C. in a cognizable offence. It can further be observed that by the said notification protection has been extended to the forest officials, and while discharging official duty procuring forest produce, against them FIR has been lodged. If their act is found in discharge of the official duty and they have used the firearm under right to their private defence and such use is not in excess to their right, however, the aforesaid notification cannot be said to be unreasonable or in contravention to the provisions of the Cr.P.C.. In furtherance to the aforesaid notification on a letter written by the DFO to the Collector District Sheopur, an enquiry was directed vide order dated 04.09.2012 on the following issues:

"1. घटना होने से पूर्व वन विभाग की ओर से कौन–कौन से अधिकारी किसकी सूचना रवाना हुये थे ।

2. वन अधिकारियों के साथ गये एस.ए.एफ. बल का कम्पोजिशन क्या था ।

3. घटना स्थल पर फायरिंग के दौरान एवं इसके पूर्व दूसरे पक्ष के कितने व्यक्ति थे ।

4. घटना का कृत्य पदीय कर्त्तव्यों के निर्वहन के तहत किया गया। क्या ऐसा कार्य करना अनिवार्य था ?

5. घटना दिनांक को आग्नेय शस्त्र का उपयोग/चालन अनावश्यक अकारण अथवा आवश्यकता से अधिक बल प्रयोग करने के लिये किया गया है क्या ?

6. घटना दिनांक को कानून एवं शांति व्यवस्था भंग होने की स्थिति की पृष्ठभूमि क्या रही ?

7. घटना होने के क्या कारण रहे?

8. घटना दिनांक को वन विभाग द्वारा गोली चालन करने के तात्कालिक कारण क्या रहे ?

9. घटना में वनरक्षकों एवं अन्य वन्य कर्मियों की भूमिका तथा उनके द्वारा आग्नेय शस्त्र के उपयोग करने की परिस्थितियां एवं आवश्यकता ?

10. इस मुठभेड़ का नेतृत्व किसने किया तथा किन–किन अधिकारियों/कर्मचारियों ने इसमें भाग–लिया तथा उनका क्या–क्या योगदान रहा ।

11. भविष्य में इस प्रकार घटना पुनरावृत्ति न हो मजिस्ट्रियल जांच में निष्कर्ष के आधार पर सुझाव । "

It is not in dispute that the enquiry is in progress and it is to be examined that the allegations so alleged in the FIR against the forest officers is correct or they have acted in discharge of the official duties to maintain the public order protecting forest produce. No finding has yet arrived that the use of firearms was in excess to the right to their private defence. It has not been explained in the return that after directing magisterial enquiry following the notification which is binding on the officers of the police department, why the arrest of the forest officials has been made in haste. It is to be observed here that merely taking a bald statement in the return that due to non- arrest of forest official, the law and order situation may arise is of no help to the police officers, particularly after directing the enquiry by the Collector, District Sheopur, who also have the bounden duty to maintain law and order, thus, the aforesaid defence is based on after thoughts. It is relevant to note here that the forest officers were unarmed and the picket of SAF was armed who had fired and the said fact has been admitted by them in their statements given to the company Commander regarding use of fire arm and causing injury to the offenders. In such circumstances, it is the duty of the investigating officer to examine regarding the viability of allegations of the FIR lodged by the individuals who were offenders and against them offences are already registered and pending. However, in such a case, arrest so made by the police personnels is contrary to the aforesaid notification of the Home Department and even after directing the magisterial enquiry by the Collector, District Sheopur.

8. In view of the foregoing, the action of the police personnels is found contrary to the notification issued by the Home Department. But simultaneously, it is further seen from the record that after arrest of the forest officials they have been produced before the Chief Judicial Magistrate who by its order sent them to the judicial custody. Thus, at this stage their detention cannot be said to be illegal warranting interference and to issue writ in the nature of Habeas Corpus. It has seen that since the petitioners have already applied for grant of bail and their bail applications are pending, however, it is suffice to observe that they may pursue their bail applications applying for early hearing and the Court may pass appropriate orders thereupon.

9. In view of the foregoing it is to be held that the notification dated 11.6.1996 issued by the Home Department deferring cognizance by the police till the enquiry directed by the Collector, is just and reasonable and do not override the powers of the police officers conferred under Section 41 of the Cr.P.C. on them. But, in view of the order passed by the Chief Judicial Magistrate sending the petitioners into judicial custody and the petitioners have persuaded their remedy by filing the bail petitions which are pending, in the facts of the present case, at this stage their detention cannot be held illegal. Therefore, interference in this petition by issuing the writ in the nature of habeas corpus is not warranted. In the facts and circumstances of the case, parties are directed to bear their own costs.

Order accordingly.

I.L.R. [2013] M.P., 306
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P.No. 15766/2012 (Jabalpur) decided on 9 November, 2012

FARUKH KHA @ JAMAAL KHAN & anr. ...Petitioners
Vs.
UNION OF INDIA ...Respondent

Civil Procedure Code (5 of 1908) Order 6 Rule 17 - Amendment of claim petition **- Petitioner filed application for amending the train number - Any amendment application, to amend the pleadings as an additional approach or the different approach from the existing pleadings, should be allowed - Petition allowed. (Paras 6 & 7)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – दावा याचिका

में संशोधन – याची ने ट्रेन नम्बर में संशोधन हेतु आवेदन प्रस्तुत किया – अभिवचनों में संशोधन के लिये, अतिरिक्त प्रार्थना या विद्यमान अभिवचनों से भिन्न प्रार्थना के रुप में किसी संशोधन के आवेदन को मंजूर किया जाना चाहिए – याचिका मंजूर।

Case referred :

AIR 1967 SC 96.

M. Saffiqulla, for the petitioners.
Govind Patel, for the respondent.

ORDER

U.C. MAHESHWARI, J.: In the available scenario of the matter instead to hear this petition on admission, with the consent of the parties, the same is heard finally.

2. The petitioners/claimants have filed this petition under Article 227 of the Constitution of India for quashment of the order dated 9.8.12 passed by the Railway Claim Tribunal Bhopal in Claim Case No.0375/10 whereby their application filed under Order 6 rule 17 of the CPC for amendment of the claim petition to amend the concerning train number, has been dismissed.

3. The petitioners counsel after taking me through the impugned order and the other available papers said that the proposed amendment was only an additional/different approach from the facts which had been stated in the claim petition at the time of filing the same and, therefore, the tribunal ought to have been allowed such application. In continuation he said that their proposed amendment is in consonance with the report of the Railway department but contrary to it, the same has been dismissed by the tribunal under wrong premises and prayed for allowing such amendment application by allowing this petition.

4. Counsel of the respondent, by justifying the impugned order said that on allowing the impugned amendment application the entire nature of the claim petition shall be changed and in that circumstance the right of the respondent authorities to defend the matter shall be prejudice and prayed for dismissal of this petition.

5. Having heard, after perusing the petition as well as the impugned order, I am of the considered view that the amendment application Annex.P/2 ought to have been allowed by the tribunal because of the following reasons :-

(a) It is apparent fact that initially the claim was filed by the petitioners

regarding death of their son in the alleged untoward accident by the passenger train but at the time of initiation of the claim petition, the number of some other train was mentioned in the claim petition. Subsequently, from the papers of the respondent/ department, the petitioner came to know that such untoward accident was happened by some other train and not by the earlier mentioned train number in the claim petition, on which, on the basis of same facts that their son died in untoward train accident as an additional approach or the different approach from the same existing pleadings only to change the number of such train the impugned amendment application was filed.

6. As per settled proposition of the law whenever any amendment application is moved to amend the pleadings as an additional approach or the different approach from the existing pleadings then the same should be allowed as laid down by the Apex Court in the matter of *A.K.Gupta and Sons Ltd. Vs. Damodar ValleyCorporation* -AIR 1967 SC 96. So, in such premises, the impugned order of the tribunal is apparently perverse, illegal and also contrary to the propriety of the law.

7. Consequently, by allowing this petition, the same is set aside and petitioners application for amendment Annex.P/2 is hereby allowed. Counsel is directed to carry out the necessary correction in the claim petition within thirty days from today by placing the certified copy of this order before the tribunal and such tribunal is directed to proceed with the matter after extending the opportunity to amend the written statement/ reply to the respondent with consequential amendment.

8. Petition is allowed as indicated above.

Petition allowed.

I.L.R. [2013] M.P., 308
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 9986/2012 (Indore) decided on 21 November, 2012

PARAS ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

***Service Law - Public Interest Litigation - Writ petition in nature of Pro Bono Publico* - Challenging the wrong policies of State Government-Not a case that the candidates who could not appear in**

earlier examinations on account of alleged wrong policies of Government could not and cannot approach the court - Held - The female candidates cannot qualify as "little Indians" warranting entertaining this petition as PIL. (Paras 1 & 4)

सेवा विधि – लोक हित वाद – लोक हित के स्वरुप में रिट याचिका – राज्य सरकार की गलत नीतियों को चुनौती – यह प्रकरण नहीं कि अभ्यर्थीगण जो सरकार की कथित गलत नीति के कारण पूर्वतर परीक्षाओं में सहभागी नहीं हो सके और न्यायालय के समक्ष नहीं जा सकते – अभिनिर्धारित – महिला अभ्यर्थीगण "मामूली भारतीय"**(little Indians)** की कोटि में नहीं आ सकते, जिससे कि प्रस्तुत याचिका, लोक हित वाद के रुप में ग्रहण करने योग्य हो सके।

Cases referred :

(2005) 5 SCC 136, (1998) 7 SCC 276, (2006) 11 SCC 731, (2010) 9 SCC 655, (2011) 5 SCC 464.

Vishal Sharma, for the petitioner.

ORDER

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

2. This petition in the nature of Pro-Bono Publico is filed by the petitioner seeking directions to the respondents to extend the benefit to those female candidates of appearing in the next competitive examination conducted by the State Government and the Public Service Commission who on account of wrong policies adopted by the Public Service Commission since the year 1997 to 2011, were deprived of appearing in the various competitive examinations held for those years. A prayer for relaxation in the age of those female candidates and permission for them to appear in the ensuing examinations conducted by various Government Departments and the Public Service Commission has also been sought.

3. We have considered the submissions made by the learned counsel for the petitioner and have gone through the averments made in the writ petition.

4. We find that this petition in the nature of public interest litigation (PIL), is not maintainable, as it is not the case of the petitioner that those female candidates who could not appear in the earlier examinations on account of the alleged wrong policies of the State Government could not and cannot

approach the Court for redressal of their individual grievances as they were and are in such financial constraints so as to be incapable to afford the litigation. Those female candidates cannot qualify as "little Indians" warranting entertaining this petition as PIL.

5. The Supreme Court in the case of *Gurpal Singh vs. State of Punjab and others* [(2005) 5 SCC 136] has issued a note of caution by observing that weapon of public interest litigation should be used with great care and circumspection. It is also seen that this PIL is essentially relating to the service matter. It has been now well settled by catena of judgments by the Supreme Court that a PIL is not maintainable in service matters. In service matters only the non appointees can assail the legality of the appointment procedure, except in a case of writ of quo warranto no PIL in service matter is maintainable. (See *Duryodhan Sahu (Dr.) vs. Jitendra Kumar Mishra* (1998) 7 SCC 276, B., *Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn.*, (2006) 11 SCC 731, *Hari Bansh Lal vs. Sahodar_Prasad Mahto,* (2010) 9 SCC 655 and *Bholanath Mukherjee and others vs. Ramakrishna Mission Vivekananda Centenary College and others* (2011) 5 SCC 464)

6. In view of the aforesaid legal position, we decline interference in the matter and dismiss this petition in limine.

Petition dismissed.

I.L.R. [2013] M.P., 310
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 18475/2003 (S) (Jabalpur) decided on 23 November, 2012

R.K. PANDEY ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law - Deputation - Recovery of excess salary **- Petitioner was holding the post of Forest Botanist in Forest Department - After declaration of State Forest Research Institute, the petitioner sought permission from Forest Department for participating in selection process for any of the post in Institute - Petitioner was appointed on the post of Senior Scientist which was carrying higher pay scale - Held - Merely because petitioner sought permission to appear in selection**

process would not mean that permission was granted - Further, petitioner did not resign from his earlier post which was required to be done - Further, the petitioner had also expressed his willingness to continue in State Forest Department - At the best he could be treated as working on deputation in Institute - Recovery of excess payment cannot be said to be illegal as if a mistake is committed it can be remedied at later stage - Petition dismissed. (Paras 3, 4 & 5)

सेवा विधि – प्रतिनियुक्ति – अधिक वेतन की वसूली – याची वन विभाग में वन वनस्पतिज्ञ के पद पर था – राज्य वन अनुसंधान संस्थान की घोषणा के पश्चात, याची ने वन विभाग से, संस्थान में किसी पद हेतु चयन प्रक्रिया में सहभागी होने के लिए अनुमति चाही – याची को वरिष्ठ वैज्ञानिक के पद पर नियुक्त किया गया जिसका वेतनमान अधिक था – अभिनिर्धारित – मात्र इसलिए कि याची ने चयन प्रक्रिया में उपस्थित होने के लिए अनुमति चाही, इसका अर्थ यह नहीं होगा कि अनुमति प्रदान की गई थी – इसके अतिरिक्त याची ने अपने पूर्व पद से इस्तीफा नहीं दिया था जो देना आवश्यक था – इसके अतिरिक्त, याची ने राज्य वन विभाग में बने रहने की रजामंदी भी व्यक्त की थी – अधिक से अधिक उसे, प्रतिनियुक्ति पर संस्थान में कार्यरत रहना माना जा सकता है – अधिक संदाय की वसूली को अवैध नहीं कहा जा सकता क्योंकि यदि भूल कारित की गई हो तो उसे बाद में सुधारा जा सकता है – अपील खारिज।

Cases referred :

(2012) 8 SCC 417, 1995 Supp.(1) SCC 18.

Arun Shukla, for the petitioner.
Piyush Dharmadhikari, G.A. for the respondents.

ORDER

K.K. Trivedi, J.: This petition was originally filed as original application before the MP Administrative Tribunal at Jabalpur, which has come on transfer to this Court after closure of the Tribunal and has been registered as writ petition aforesaid.

2. The claim made by the petitioner is that he was appointed on the post of Senior Research Scientist in the State Forest Research Institute, but subsequently it was treated as if he was posted on deputation on the said post and treating that substantive post of the petitioner was that of the Forest Botanist, reducing the pay scale, a recovery has been made. The petitioner has opted for depositing the aforesaid amount in installments, but that was not being considered, therefore,

he has approached the Court for grant of relief. It is contended that earlier the petitioner was appointed in the services of the State Government in forest Department on the post of Botanist. At the relevant time, the State Forest Research institute was part and parcel of Forest Department. Subsequently, a decision was taken and the aforesaid Research Institute was made an autonomous body. The petitioner was willing to be appointed on the post of Senior Scientist for which a, recruitment process was started by the Research institute. On selection, since the order of appointment was issued in respect of petitioner on 30th of June, 1998, he gave his joining. In the order of appointment it was specifically prescribed that the petitioner was appointed on the post of Senior Scientist in the pay scale of Rs.3700-5000/-. However, after joining of the petitioner, some consideration was done and as the petitioner was willing to continue his lien in the State Govt. Department, ultimately an order was passed and it was said that the petitioner was to be treated on deputation in the Research Institute and was not to be allowed higher pay scale. He would be entitled to continue on his post of Forest Botanist. The petitioner made a representation that he may be repatriated back to his parent department, but that was not considered. Ultimately by the impugned order it was communicated that infact the petitioner has been paid salary in the higher pay scale whereas he was entitled to lower pay scale and, thus, it was necessary to recover the amount from the petitioner. On receipt of such an order, the petitioner made representation, but the same was not considered, therefore, the original application was required to be filed.

3. Contesting the claim made by the petitioner, the respondents have filed their return. Respondent no.1 has categorically contended that petitioner could not accepted appointment in the Research Institute relinquishing the post he was holding in the Forest Department if at all he was interested to continue in the services of Research Institute. He could be treated on deputation to the said institute if he was willing to continue his lien on the post in the Forest Department. The petitioner took part in the selection, got an order of appointment in this respect in the Institute, but never relinquished the post in the Forest Department. This being so, he was treated as a Forest Botanist in the Forest Department and was allowed to continue as Senior Research Scientist in the Research Institute only on deputation. A person sent on deputation is not entitled to the salary of the post on which he was working on deputation. At the best he will get the benefit of deputation allowance. That being so, the petitioner would not be entitled to claim the salary of the post of

Senior Scientist in the Research Institute, it is further submitted by the respondent that since the petitioner has not resigned from his post in the Govt.Department, he was granted the benefit of Kramonnati. Merely because Kramonnati was granted, there was upgradation in the pay scale of petitioner, but his post remained the post of Forest Botanist in the Forest Department. This being so, again the petitioner even after grant of Krarnonnati was not entitled to the benefit of higher spay scale on the post of Senior Scientist. This being so, the recovery was directed in appropriate manner. It is contended that the petitioner himself has made the representation accepting the said situation and made a request that the amount may not be recovered from him in lumpsum but the same may be recovered in installments from his salary. Thus, it is contended that the entire claim made by the petitioner is misconceived and the petition deserves to be dismissed.

4. After hearing learned counsel for parties at length and perusing the record, this Court is of the opinion that the petitioner had never relinquished the post of Forest Botanist in the Forest Department of Govt. of M.P. On earlier occasion also he was simply sent to work in the Research Institute when he was in the bolds of the State Government. When the Institute became an autonomous body, it was necessary on the part of the petitioner to seek permission of his employer to take part in the selection for appointment on any of the post in the Research Institute. Merely because the petitioner has made an application through proper channel, it cannot be said that sanction was accorded to take part in such selection. Even otherwise when the order of appointment was issued in respect of petitioner, appointing him in the services of the Research Institute, he was required to submit his resignation in the Forest Department in appropriate manner. Though the State Govt. has issued circulars in this respect way back directing that formal notice of resignation would not be necessary in such circumstances, but at least resignation was required to be given. Since this was not done, the petitioner was not relieved from the Department of the Government to take over the charge on the post in the Research Institute and, therefore, his joining could not have been accepted at all by the Research Institute.

5. The other aspect is that the petitioner himself has admitted that he was willing to continue in the services of the Forest Department of Govt. of M.P. If he was willing to continue in the Department, there was no question of his resignation .If he has not resigned and his lien continues in the Forest Department, at the best he could be treated as working on deputation in the

Research Institute. Thus, there was a mistake committed by the authorities in making payment of salary to the petitioner on the pay scale which was not applicable on his substantive post. If such a mistake is committed, well settled law is that it can be remedied at a later stage. In the case in hand it was expeditiously done and, therefore, it cannot be said that any wrong was committed by the respondents.

6. The Apex Court in *Chandi Prasad Uniyal and others vs. State of Uttarakhand and others* (2012) 8 SCC 417 has held that in case any amount has been paid in excess even without the fault of recipient party, if the law so permits, an obligation is always on the payee to recover the said amount. Even recovery of the amount can be made from the retiral dues if the same is paid in excess to the entitlement of an employee. The law laid down by the Apex Court in the case of *Sahib Ram vs. State of Haryana* 1995 Supp (1) SCC 18 has also been considered in the aforesaid case.

7. In view of the aforesaid annunciation of law by the Apex Court recently, the petitioner has no right to claim the refund of amount recovered from him. Consequently, the writ petition fails and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 314
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 24/2010 (S) (Gwalior) decided on 27 November, 2012

RAM SIYA SHARMA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Fundamental Rules - 22-D - Krammonati **- Krammonati and F.R. 22-D are different - Krammonati is granted when employee is not getting promotion for a considerable long time - To avoid stagnation, he is granted financial up-gradation - F.R. 22-D is given when employee is promoted from one post to another carrying same pay scale but having greater responsibilities and duties - Post of Head Master is carrying greater responsibilities and duties - F.R. 22-D is applicable - Stand of respondents that F.R. 22-D is not applicable because of grant of financial up-gradation is without any basis and substance - Petition allowed. (Para 6)**

मूलभूत नियम – 22–डी– क्रमोन्नति – क्रमोन्नति और मूलभूत नियम 22–डी भिन्न हैं – क्रमोन्नति तब प्रदान की जाती है जब कर्मचारी को काफी लंबे समय तक पदोन्नति नहीं मिल रही हो – वृद्धिरुद्धता से बचने के लिए, उसे वित्तीय उन्नयन प्रदान किया जाता है – मूलभूत नियम 22–डी तब दिया जाता है जब कर्मचारी को एक पद से दूसरे पर पदोन्नत किया जाता है जिसका वेतनमान समान है परंतु उत्तरदायित्व और कर्तव्य अधिक है – मुख्याध्यापक के पद के उत्तरदायित्व और कर्तव्य अधिक हैं – मूलभूत नियम 22–डी लागू होता है – प्रत्यर्थीगण का मत कि मूलभूत नियम 22–डी लागू नहीं होते क्योंकि वित्तीय उन्नयन प्रदान किया गया है, बिना किसी आधार या सार का है – याचिका मंजूर।

Case referred :

2004(3) MPLJ 397.

Anil Sharma, for the petitioner.
Anil Shrivastava, P.L. for the respondents/State.

ORDER

SUJOY PAUL, J.: By filing this petition under Article 226 of the Constitution, the petitioner has prayed for grant of benefit of F.R. 22-D and prayed for quashing the recovery made against him.

2. Brief facts necessary for adjudication of the matter are as under:-

> The petitioner at the relevant time was working as Upper Division Teacher. The petition was promoted as Head Master middle school by order dated 30.6.2005. As an Upper Division Teacher, the petitioner was getting Krammonati scale of Rs:5500-9000. The pay scale on promotion as Head Master was also same i.e. 5500-9000. The post of Head Master involves duties of higher responsibilities. On completion of age of superannuation, the petitioner retired on 31.7.2009. At the time of retirement, an objection was raised that petitioner was promoted in the same pay scale, and therefore, F.R. 22-D is not applicable. Consequently, by taking away the said benefit, it is held that recovery be made.

3. The learned counsel for the petitioner by relying the judgment of this Court reported in 2004 (3) M.P.L.J. 397 (*R.S.Sikarwar Vs. State of M.P. and others*), submits that this matter is squarely covered by the said judgment.

4. Per contra, Shri Shrivastava, learned Panel Lawyer for the State,

submits that petitioner has already enjoyed the benefits of Krammonati scale, and therefore, no further benefits under F.R. 22-D are permissible. It is stated that objection was raised by Joint Director, Treasury and Accounts, Chambal Division, and therefore, department has taken the action.

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

6. The reasons for grant of Krammonati and F.R. 22-D are different. It has no co-relation with each other. It is settled in law that benefit of Krammonati or financial up-gradation is granted when employee is not getting promotion for a considerable long time/stipulated period. To avoid the stagnation, he is being granted financial up-gradation which does not involve any change of nature of duties and responsibilities. In other words, upon grant of Krammonati, the employee performs same nature of duties with same designation, but gets higher scale of pay, whereas F.R. 22-D is given when employee is promoted from one post to another carrying same pay scale but having greater responsibilities and duties. Petitioner's specific assertion that the post of Head Master is carrying greater responsibilities and duties is not disputed by the other side. Thus, F.R. 22-D is clearly applicable. This Court in *R.S.Sikarwar* (supra) has also considered the same and decided to extend the benefit to the petitioner. Consequently, the stand of the respondents that F.R. 22-D is not applicable because of grant of financial up-gradation is without any basis and substance. No provision is shown to this Court which deprives the benefit of F.R. 22-D to the petitioner on grant of financial up-gradation. Consequently, the recovery arising out of taking away the benefit of F.R. 22-D is also impermissible.

7. Resultantly, petition is allowed. The respondents are directed to restore the benefit of F.R. 22-D to the petitioner from due date with all consequential benefits. Recovery to that extent is also set aside. No costs.

Petition allowed.

I.L.R. [2013] M.P., 316
WRIT PETITION
Before Mr. Justice J.K. Maheshwari & Mr. Justice G.D. Saxena
W.P. No. 6635/2011 (Gwalior) decided on 4 December, 2012

REGIONAL COMMISSIONER ...Petitioner
Vs.
MAHESHWARI NURSING HOME & anr. ...Respondents

Constitution - Article 227 - Maintainability of writ petition - **Petitioner/Regional Provident Fund Commissioner has filed the writ**

petition challenging the order of Provident Fund Appellate Tribunal - Section 7L(4) of EPF Act, 1952 provides that order made by a Tribunal finally disposing of an appeal shall not be questioned in any Court of law - If the EPF organization wants to challenge the order of the Tribunal, authorization for presenting officer as well as the Legal Practitioners must be by way of notification by Central Govt., to present a writ petition-In absence of any such notification, writ petition challenging the order of Tribunal is not maintainable - Petition dismissed.(Para 16)

संविधान – अनुच्छेद 227 – रिट याचिका की पोषणीयता – याची/प्रादेशिक भविष्य निधि आयुक्त ने भविष्य निधि अपीली अधिकरण के आदेश को चुनौती देते हुए रिट याचिका प्रस्तुत की – ई.पी.एफ. अधिनियम 1952 की धारा 7एल(4) उपबंधित करती है कि अधिकरण द्वारा अपील का अंतिम निपटारा करते हुए दिये गये आदेश को किसी न्यायालय में नहीं उठाया जा सकता – यदि ई.पी.एफ. संगठन अधिकरण के आदेश को चुनौती देना चाहता है, प्रस्तुतकर्ता अधिकारी और साथ ही विधि व्यवसायी को रिट याचिका प्रस्तुत करने हेतु प्राधिकार, केन्द्र सरकार की अधिसूचना के जरिए दिया जाना चाहिए – उक्त किसी अधिसूचना की अनुपस्थिति में, अधिकरण के आदेश को चुनौती देने वाली रिट याचिका पोषणीय नहीं – .याचिका खारिज।

Cases referred :

(2007) 8 SCC 254, 2012 LLR 427 (Kerala), 2011 LLR 28 (Bombay), 2009 (120) FLR 442(Madras), (2001) 1 SCC 582, AIR 1961 SC 182, AIR 1964 SC 477.

S.L. Gupta, for the petitioner.
D.K. Agrawal, for the respondents No.1.

ORDER

The Order of the Court was delivered by,
J.K. MAHESHWARI, J.: This order shall govern disposal of W.P. No.6635/11 & W.P. No.3263/12. In both these petitions, by filing IA. No.99 and I.A. No.7182/12 by the respondent, the preliminary issue is raised regarding maintainability of the petition filed by the Regional Provident Fund Commissioner and Employees Provident Fund Organization through its Assistant Commissioner. Issue of maintainability, which is common and required to be answered first, therefore, the question of maintainability is being decided.

2. Both the writ petitions have been filed by the Regional Provident Fund Commissioner and Employees Provident Fund Organization through its

Assistant Commissioner invoking the jurisdiction under Article 227 of the Constitution of India for issuance of the writ and directions to quash the order Annexure-P/1 passed by the Provident Fund Appellate Tribunal in case Nos. ATA 382(8)/2006 and ATA 30(8)/2006 vide orders dated 14/07/2011 and 08/02/2012. Petitioners being dis-satisfied with the orders of the appellate Tribunal, therefore, preferred both these petitions.

3. The facts with respect to W.P. No.6635/11 in brief are that the respondent No.1 is running a private nursing home in the name of 'Maheshwari Nursing Home" through its proprietor Dr. Virendra Maheshwari. The said hospital has been covered under the Employees Provident Funds and Miscellaneous Providisions Act, 1952 (for brevity 'the Act 1952') w.e.f. 07/01/2000 with code No.MP-15057. Subsequently, an inspection was carried out on 07/07/2004 wherein it was alleged that 23 employees were engaged in the respondent-institution w.e.f. 01/05/1993 and the provisions of the Act of 1952 were not complied with in the matter of depositing the employers contribution. After conducting the enquiry under Section 7A of the Act, 1952, vide order dated 06/10/2004 an amount of Rs.12,37,048/- for the period in between 01/05/1993 to 07/01/2000 has been directed to be deposited as EPF contribution.

4. It is not in dispute that the said due amount of Rs.12,37,048/- was deposited prior to passing the order through challans dated 14/08/2004, 13/09/2004 and 15/09/2004. Thereafter, the Assistant Commissioner of Provident Fund has issued a show-cause notice why the damages as provided under Section 14B of the Act, 1952 should not be recovered. Reply to the said notice was submitted by the respondent on 11/05/2011, however, without due consideration to the points raised in the reply, final order was passed on 27/03/2006 imposing the damages and interest as per Section 14-B and 7-Q of the Act, 1952 directing recovery of Rs.15,45,922/-. Against the said order, an appeal was preferred before the appellate tribunal, which was decided by the order impugned on 14/07/2011 and the matter was remanded back to the petitioner to reassess the liabilities inclusive interest at the rate of 22%. Being aggrieved by the said order , this petition has been preferred in the name of Regional Commisioner, Employees Provident Fund through its Assistant Commissioner by filing an affidavit of the Assistant Provident Fund Commissioner. Any authorization by the Employees Provident Fund Organisation either in favour of the Regional Provident Fund Commissioner or in favour of the Assistant Provident Fund Commissioner is neither pleaded

nor filed showing any power to challenge aforesaid two orders dated 14.7.2011 and 8.2.2012 passed by the Employees Provident Fund Appellate Tribunal, New Delhi.

5. The facts in brief with respect to W.P. No.3263/12 are that the respondent No.1-M/s Modern Gas Agency has been engaged in LPG distributorship of Indian Oil Corporation. It is stated that the establishment of the respondent was inspected by the Enforcement Officer on 04/01/2000, wherein 07 regular, 12 contract workers and one part time accountant were found working. On the basis of the inspection report, a covering letter was issued on 30/05/2000 to respondent informing therein that respondent is covered under E.P.F. Act, 1952 w.e.f. 4.1.2000 and by allotment of Code M.P.-15101 directions were issued for compliance of the provisions of the Act. Indicating non-compliance, a show cause notice was issued on 14/01/2005 initiating an action against the respondent under Section 7-A of the Act, 1952. After receiving reply, without due consideration of the material so produced by the respondent, final order was passed on 17/11/2005 imposing liability of Rs.2,79,190/- for the period from January, 2000 to March, 2003. On filing an appeal under Section 77-I of the Act, it was upheld vide order dated 11.07.2011. The respondent has assailed the said order by filing W.P. No.7495/11, the same was disposed of on 17/11/2011 and the matter was remanded back to the appellate Tribunal to decide it on merits. Thereafter, a counter reply was filed by the respondent indicating that the delivery charges paid to the delivery boys engaged for distribution of LPG Cylinders would not fall within the purview of wages and the delivery boys would not fall within the purview of employees of the establishment. Tribunal vide order dated 8.2.2012 held that delivery boys who are getting commission/ charges would not fall within the purview of employees of the gas agency and will not be covered under Section 2(f) of the Act, 1952. Being aggrieved by the order passed the appellate Tribunal, the Employees Provident Fund Organization through its Assistant Commissioner has filed the present petition under Article 227 of the Constitution of India.

6. Learned counsel Shri D.K. Agarwal appearing on behalf of the respondent No.1 in both the writ petitions, has raised a preliminary objection that the petition filed by the Regional Commissioner Provident Fund or Assistant Provident Fund Commissioner in the name of Employees Provident Fund Organization through its Assistant Provident Fund Commissioner is not maintainable. It is contented that the Assistant Provident Fund Commissioner

being quasi-judicial authority passed the orders and decided the dispute against the respondents and those orders were challenged before the Employees Provident Fund Appellate Tribunal. Learned Tribunal after setting aside the order dated 27.3.2006 passed by the said authority remanded the matter back in view of the finding recorded by the Tribunal. In the matter of Modern Gas Agency, the order dated 17.11.2005, communicated on 2.12.2005 by the Assistant Provident Fund Commissioner has been quashed by the Appellate Tribunal. However, for the orders passed by the Tribunal the authority lower in rank and status to the Appellate Tribunal cannot be permitted to challenge the said order. It is further stated that there is nothing on record to show that "Employees Provident Fund Organization", being Trust, has specifically delegated or authorised the Assistant Provident Fund Commissioner to prefer any writ petition or appeal on behalf of the Regional Provident Fund Commissioner or on behalf of the Employees Provident Fund Organization. In such circumstances, the challenge so made by the petitioner, is without having any authority of law, therefore, petitions led by the petitioner are not maintainable. In support of such contention, reliance has been placed on the judgments of various Courts are as under:-

(i) *Mohtesham Mohd. Ismail Vs. Spl. Director, Enforcement Directorate and another* [(2007) 8 SCC 254].

(ii) *Assistant Provident Fund Commissioner Vs. West Coast Petroleum Agency* [2012 LLR 427 (Kerala)]

(iii) *Assistant Provident Fund Commissioner Vs. Nirmittee Holidays (P) Ltd.,* [2012 LLR 28 (Bombay)]

(iv) *Regional Provident Fund Commissioner Vs. Prabha Beverages Private Limited an another* [2009 (120) FLR 442 (Madras)]; and

(v) *Union of India Vs. K.M. Shankarappa* [(2001) 1 SCC 582].

7. Per Contra, learned counsel Shri S.L. Gupta appearing on behalf of the petitioner has urged that on filing of the writ petitions in various cases before this Court, the orders passed by the appellate Tribunal have been set aside. In such circumstances, the point of maintainability so raised is not germane. It is further urged that while exercising the supervisory jurisdiction of this Court under Article 227 of the Constitution of India, this Court is having

ample power to set aside the orders passed by the tribunal arbitrarily and illegally without considering the provisions of law. Learned counsel has made his submissions assailing the orders passed by the appellate Tribunal and also supported the case on merits. The counsel has also argued that the Assistant Provident Fund Commissioner has general power to challenge any order passed by any superior authority.

8. In the facts of the case, the preliminary objection so raised by the respondent relating to maintainability of the petition is being considered and decided first.

9. After hearing learned counsel appearing on behalf of the parties at length on the point of maintainability of the petitions and to adjudicate the aforesaid issue, the judgments so relied upon are reuired to be noticed. In the judgment of *Mohtesham Mohd. Ismail* (supra), the question posed for determination before the Hon'ble Apex Court is as under:-

> **"9.** Before embarking upon the rival contentions raised on behalf of the parties, let us have a look at the relevant provisions of.the Act.
>
> **10.** Section 3 of the Act provides for classes of officers of Enforcement. Section 4 of the Act empowers the Central Government to appoint such persons, as it thinks fit, to be officers of Enforcement and for the said purpose confer power thereupon. Sub-section(3) of Section 4 reads as under:
>
> **"4. (3)** Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act".
>
> **11.** Section 5 providing for delegation of the powers in relation to functions of the Director or other officers of Enforcement, reads as under:-
>
> **"5** Entrustment of functions of Director or other officer of Enforcement:- The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of Customs or any Central Excise Officer or any police officer or any other officer of the Central

Government or a State Government to exercise such of the powers and discharge such of the duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be specified in the order."

12. Section 9 provides for restrictions on payments; Clauses (c) and (d) of sub-section (1) whereof read as under:-

* * *

"9. Restrictions on payments:- (1) Save as may be provided in and in accordance with any general or special exemption from the provisions of this sub-section which may be granted conditionally or unconditionally by the Reserve Bank, no person in, or resident in, India shall

* * *

(c) draw, issue or negotiate any bill of exchange or promissory note or acknowledge any debt, so that a right (whether actual or contingent) to receive a payment is created or transferred in favour of any person resident outside India;

(d) Make any payment to, or for the credit of any person by order or on behalf of any person resident outside India;

* * *"

13. Section 52 of the Act provides for an appeal to the Board. Section 53 thereof provides for the powers of the adjudicating officers and the Board to summon witnesses, etc. Section 54 which provides for an appeal to the High Court, reads as under:

"54. Appeal to High Court:- An appeal shall lie to the High Court only on questions of law from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of Section 52:

Provided that the High Court shall not entertain any appeal under this section if it is filed after the expiry of sixty days of the date of communication of the decision or order of

the Appellate Board, unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

Explanation- In this section and in Section 55, 'High Court' means-

(i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

(ii) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents ordinarily resides or carries on business or personally works for gain."

14. The Act imposes restrictions on transactions of money from one country to the another. The Central Government for the purpose of enforcing the provisions of the Act is empowered to appoint officers. From a bare perusal of Section 5 of the Act, it would be evident that notifications are required to be issued by the Central Government delegating specific functions under the Act.

16. An adjudicating authority exercises a quasi-judicial power and discharges judicial functions. When its order had been set aside by the Board, ordinarily in absence of any power to prefer an appeal, it could not do so. The reasonings of the High Court that he had general power, in our opinion, is fallacious. For the purpose of exercising the functions of the Central Government, the officer concerned must be specifically authorised. Only when an officer is so specifically authorised, he can act on behalf of the Central Government and not otherwise. Only because an officer has been appointed for the purpose of acting in terms of the provisions of the Act, the same would not by itself entitle an officer to discharge all or any of the functions of the Central Government. Even ordinarily a quasi-judicial authority cannot prefer an appeal being aggrieved by and dissatisfied with the authority cannot prefer

an appeal being aggrieved by and dissatisfied with the judgment of the appellate authority whereby and whereunder its judgment has been set aside. An adjudicating authority, although an officer of the Central Government, should act as an impartial tribunal. An adjudicating authority, therefore, in absence of any power conferred upon it in this behalf by the Central Government, could not prefer any appeal against the order passed by the Appellate Board".

10. The Apex Court in the case of *Union of India Vs. K.M. Shankarappa* reported in (2001) 1 SCC 582 in Para 7 held as under:

"7. We are unable to accept the submission of the learned counsel. The Government has chosen to establish a quasi-judicial body which has been given the powers, inter alia, to decide the effect of the film on the public. Once a quasi-judicial body like the Appellate Tribunal, consisting of a retired Judge of a High Court or a person qualified to be a Judge of a High Court and other experts in the field, gives its decision that decision would be final and binding so far as the executive and the Government is concerned. To permit the executive to review and/or revise that decision would amount to interference with the exercise of judicial functions by a quasi-judicial Board. It would amount to subjecting the decision of a quasi-judicial body to the scrutiny of the executive. Under our Constitution the position is reverse. The executive has to obey judicial orders. Thus, Section 6(1) is a travesty of the rule of law which is one of the basic structures of the Constitution. The legislature may, in certain cases, overrule or nullify a judicial or executive decision by enacting an appropriate legislation. However, without enacting an appropriate legislation, the executive or the legislature cannot set at naught a judicial order. The executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts decides matters quasi-judically. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal.

11. The aforesaid judgment of Hon'ble Apex Court has been relied upon by the Kerala High Court in *Assistant Provident Fund Commissioner Vs. West Coast Petroleum Agnecy*, 2012 LLR 427, Kerala High Court has further relied upon various other judgments and held as under :-

> "12. The principle that emerges from the decisions referred to above is that an adjudicating authority which exercises quasi-judicial powers and discharges quasi -judicial functions cannot in the absence of any specific conferment of power, challenge an order passed by the Appellate Authority. It is evident from the provisions contained in S.7A of the Act that before passing an order thereunder, the officer conducting the enquiry has to issue notice to the parties against whom the proceedings are initiated and afford them an opportunity of being heard. The officer holding the enquiry is also vested with the powers of a civil court. An enquiry under Section 7A of the Act is also deemed to be a judicial proceedings within the meaning of Section 193 and 228 of the Indian Penal Code. Such being the situation, applying the principles laid down in the decisions referred to above, it has to be necessarily held that the Assistant Provident Fund Commissioner, who passed Ext. P1 order, is not competent to maintain this Writ Petition."

In view of above, holding that the preliminary objection is sustainable, the writ petition was found not maintainable by Kerala High Court.

12. The similar issue regarding maintainability of the writ petition has also come up for consideration before the Bombay High Court in the case of *Assistant Provident Fund Commissioner Vs. Nirmittee Holidays (P) Ltd.*, 2011 LLR 28, the Court held as under:

> "4. Bare perusal of the provisions of the Act and particularly Section 7A and Section 7-1 of the Act discloses that while discharging jurisdiction under section 7A of the Act, the Petitioner was discharging quasi-judicial functions and the said order was challenged by the Respondent in an appeal filed under Section 7-1 of the Act and the Appellate Authority by discharging quasi-judicial functions has allowed the appeal preferred by the Respondent. Once it is clear that the Petitioner was exercising quasi-judicial functions while passing the order

which has been set aside by the Appellate Authority, in my considered opinion, it would not be permissible for the Petitioner to challenge the order passed by the Appellate Authority reversing his order. Permitting such an exercise would be subversive of judicial discipline. It is well-settled that an authority while discharging quasi-judicial functions cannot challenge the order passed by the Appellate Authority, reversing his/her order. In my considered opinion. the ratio laid down in the case of Village Panchayat of Velim and in the case of *Village Panchayat of Sancoale*, (Supra), relied upon by the learned Counsel for the respondent would be squarely applicable. I do not find any merit in the submission of Mr. Singh, learned Counsel appearing for the petitioner that the petition is maintainable hence the Petitioner himself is not benefited by challenging the order passed by the Appellate Authority and he has filed the present petition only to protect the interest of the employees of the respondent. In my opinion, this issue does not arise in the present petition. An authority exercising judicial or quasi-judicial functions; is not even supposed to defend its own order when challenged before higher forum. In this connection, it would be appropriate to refer to the judgment of the Apex Court in the case of *Syed Yakoob Vs. K.S.Radhakrishnan and others,* AIR 1964 SC 477), in which the Apex Court has held that the Tribunals are not suppose to defend his own orders unless allegations are made against them. It is therefore well-settled that the Tribunal discharging quasi-judicial functions its not supposed to defend its action even when its order are challenged before the higher forum, as has been held in the case of *Syed Yakoob* (supra).

5. In view of the above, I find that the present petition is not maintainable. Accordingly, the petition stands dismissed."

13. The identical issue earlier came up before the Madras High Court in the case of *Regional Provident Fund Commissioner Vs. Prabha Beverages Private Limited and another* (2009 (120) FLR 442], wherein Para 6 the Court has observed as under:-

"6. In more or less similar circumstances, under the

Cinematograph Act, the Supreme Court vide its decision in *Union of India v. K.M.Shankarappa,* held in para 7, which is as follows :-

"7. The executive cannot sit in an appeal or review or revise a judicial order. The Appellate Tribunal consisting of experts decides matters quasi-judicially. A Secretary and/or Minister cannot sit in appeal or revision over those decisions. At the highest, the Government may apply to the Tribunal itself for a review, if circumstances so warrant. But the Government would be bound by the ultimate decision of the Tribunal".

(Emphasis added)

14. In the context of the above referred judgments, it is apparent that when an adjudicating authority exercises quasi-judicial powers and discharges judicial functions and its order had been set aside by the appellate authority, ordinarily in absence of having specific power to adjudicating authority to challenge the order of appellate authority they cannot be permitted to challenge further. It is to be observed that when an officer is so specifically authorised, he can act on behalf of the Central Government or the Board or the Corporation or the Organization or the other authorities. It has further been clarified that if a person has been appointed for the purpose of discharging the functions in terms of the provisions of the Act, the same would not itself automatically entitle the said officer to discharge all or any of the functions of the Central Government, Board, Corporation or Organization. It has also been observed that a quasi-judicial authority cannot prefer any appeal being aggrieved by or dissatisfied with the judgment of the appellate Tribunal whereby and whereunder its judgment has been set aside. An adjudicating authority, although may be an officer of the Central Government or Board or Corporation or Organisation should act as an impartial person. In absence of any power conferred upon him in this behalf by the Central Government or by the Organization or by the Board such authority could not prefer any appeal or writ petition against the order passed by the Tribunal.

15. In the foregoing judgment in *Mohtesham Mohd. Ismail* (supra) the provisions of Foreign Exchange Regulation Act, 1973 has been considered. However, to adjudicate the point of the maintainability, so raised by the, respondent, the relevant provisions of the EPF Act, 1952 are required to be seen, to examine the issue of maintainability. Section 2(aa) of the Act, 1952

defines the authorised officer. Its definition is reproduced as under: -

> 2(aa) "authorised officer" means the Central Provident Fund Commissioner, Additional Central Provident Fund Commissioner, Deputy Provident Fund Commissioner, Regional Provident Fund Commissioner or such other officer as may be authorised by the Central Government, by notification in the Official Gazette,

Section 5-A of the Act deals with the Central Board, which is reproduced as under :-

> 5A Central Board- (1) The Central Government may, by notification in the Official Gazette, constitute, with effect from such date as may be specified therein, a Board of Trustees for the territories to which this Act extends (hereinafter in this Act referred to as the Central Board) consisting of the following [persons as members], namely:-

Section 5-C of the Act deals with the power of Board of Trustees which is body corporate, is reproduced as under:-

> "5C. **Board of Trustees to be body corporate:-**
>
> Every Board of Trustees constituted under section 5A or section 5B shall be a body corporate under the name specified in the notification constituting it, having perpetual succession and a common seal and shall by the said name sue and be sued.

Section 5-E of the Act deals with the delegation of the power, which is reproduced as under:-

> 5E. Delegation:- The Central Board may delegate to the Executive Committee or to the Chairman of the Board or to any of its officers and a State Board may delegate to its chairman or to any of its officers], subject to such conditions and limitations, if any, as it may specify, such of its powers and functions under this Act as it may deem necessary for the efficient administration of the scheme [the [Pension] Scheme and the Insurance Scheme].

The issue of determination of the money dues from employer has been specified under Section 7A of the Act, which is reproduced as under:-

> **7A Determination of moneys due from employers:-** (1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner may, by order-

Section 7-I deals with the appeals to the Tribunal, which is reproduced as under:-

> 7-I Appeals to Tribunal:- (1) Any person aggrieved by a notification issued by the Central Government, or an order passed by the Central Government or any authority, under the proviso to sub-section (3), or sub-section (4) of section 1, or section 3, or sub-section (1) of section 7A, or section 7B [except an order rejecting an application for review referred to in sub-section (5) thereof, or section 7C, or section 14B, may prefer and appeal to a Tribunal against such notification or order.

Section 7K of the Act deals with the right of appellant to take assistant of legal practitioners, which is reproduced as under:

> **7K. Right of appellant to take assistance of legal practioner and of Government, etc., to appoint presenting officers:-** (1) A person preferring an appeal to a Tribunal under this Act may either appear in person or take the assistance of a legal practitioner of his choice to present his case before the Tribunal.
>
> (2) The Central Government or a State Government or any other authority under this Act may authorised one or more legal practitioners or any of its officers to act as presenting officers and every person so authorised may present the case with respect. to any appeal before a Tribunal.

Section 7L of the Act indicates regarding orders of the Tribunal Section 7L(4) reads as under:-

> **7L(4)** any order made by a Tribunal finally disposing of an appeal shall not be questioned in any court of law.

Section 19 of the Act further specifies delegation of the general powers, which is reproduced as under:-

> **19. Delegation of powers:-** The appropriate Government may direct that any power or authority or jurisdiction exercisable by it under this Act [the Scheme [the [pension] Scheme or the Insurance Scheme]] shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also-
>
> (a) where the appropriate Government is the Central Government, by such officer or authority subordinate to the Central Government or by the State Government or by such officer or authority subordinate to the State Government, as may be specified in the notification; and
>
> (b) where the appropriate Government is a State Government, by such officer or authority subordinate to the State Government as may be specified in the notification.

16. On reading of the aforesaid provisions, it is apparent that the Commissioner of the Provident Fund up to the rank of Regional Provident Fund Commissioner or such other officer may be authorised by the Central Government shall be called as 'Authorised Officer". The said 'Authorised Officer" may have power to carryout the functions under this Act subject to such conditions and limitations, which has been delegated to him by the Central Board. The determination of the money due from the employer and the issue of payment of interest, damages can be decided by the Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner, or any Assistant Provident Fund Commissioner by its orders. Against such orders, appeal would lie under Section 7-I of the Act, by the aggrieved person. As per sub-section (2) of Section 7K of the Act, it is apparent that Central Government or State Government, as the case may be, under the Act may authorize one or more legal practitioners or any of its presenting officer to present an appeal before the Tribunal. But as per Section

7L(4) of the Act, the order passed by the Tribunal finally disposing of an appeal shall not be questioned in any court of law. In such circumstances, up to filling an appeal before the appellate Tribunal, the authority for presentation of the appeal can be conferred to any of the officers of the Central Government or the State Government as the case may be. However, if the order passed by the appellate Tribunal is required to be challenged before this Court, by or on behalf of the Employees Provident Fund Organization, the authorization for presenting officer as well as the legal practitioners must be by way of a notification to present a writ petition before this Court. In the present case, learned counsel appearing on behalf of the respondent is unable to show any notification authorizing the Assistant Commissioner, Provident Fund, Gwalior to present this writ petition. In absence of any notification issued by the Central Government authorizing the Assistant Provident Fund Commissioner to present the writ petition, the Assistant Provident Fund Commissioner cannot be permitted to challenge the order of Appellate Authority by filing writ petitions in view of the judgment of the Hon'ble Apex Court in *Mohtesham Mohd. Ismail* (supra).

17. It is to be further observed that Kerala High Court in the case of *West Coast Petroleum Agency* (supra) has dealt with the issue of maintainability in the light of the judgment of the Hon'ble Apex Court. The same view has been taken by Bombay High Court in the case of *Nirmittee Holidays (P) Ltd.* (supra). The Madras High Court in the case of *Prabha Beverages Private Limited* (supra) has also taken the same view. Thus, in view of the foregoing discussion, this Court respectfully agree with the view taken by the Kerala High Court, Bombay High Court and Madras High Court in the aforesaid cases and we are of the considered view that before this Court the Assistant Provident Fund Commissioner being adjudicating authority cannot be permitted to challenge the order of the appellate authority on its own without having any authorization by the Central Government or the State Government as the case may be by issuing the notification.

18. In the light of aforesaid finding, the judgment of the Constitutional Bench of the Hon'ble Apex Court reported in the case of *Bhopal Sugar Industries Ltd vs. Income Tax Officer,* AIR 1961 SC 182, in Para 8 & 9 will also govern the situation which is reproduced as under :-

> 8. We think that the learned Judicial Commissioner was clearly in error in holding that no manifest injustice resulted

from the order of the respondent conveyed in his letter dated March 24, 1955. By that order the respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on a hierarchy of Courts. If a sub-ordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have indeed found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the respondent for refusing to carry out the directions of the superior tribunal, yet held that no manifest injustice resulted from such refusal.

9. It must be remembered that the order of the Tribunal dated April 22, 1954, was not under challenge before the Judicial Commissioner. That order had became final and binding on the parties, and the respondent could not question it in any way. As a matter of fact the Commissioner of Income tax had made an application for a reference, which application was subsequently withdrawn. The Judicial Commissioner was not sitting in appeal over the Tribunal and we do not think that in the circumstances of this case it was open to him to say that the order of the Tribunal was wrong and, therefore, there was no injustice in disregarding that order. As we have, said earlier such a view is destructive of one of the basic principles of the administration of justice.

(emphasis supplied)

19. Similarly, the Hon'ble Apex Court in the case of *Syad Yaqub Vs. K.S. Radha Krishnan*, AIR 1964 SC 477 has observed that the Tribunal are not supposed to defend its own orders unless the allegations are made against them. It is therefore, well settled that the officers or Tribunal discharging quasi-judicial functions are not supposed to support their own orders even when orders are challenged before the higher forum.

20. In view of the foregoing discussion, in the considered opinion of this Court, the preliminary objection raised by the respondent regarding maintainability of the petitions filed by the Regional Provident Fund Commissioner, or Provident Fund Organisation through the Assistant Provident Fund Commissioner appears to be just and proper, therefore, upheld. Accordingly, the petition stands dismissed as not maintainable. It is to be further observed here that in view of the foregoing, petitions itself are not found maintainable, therefore, the merits of the case are not required to be dealt with by this Court.

21. Accordingly, both the petitions stand dismissed as not maintainable and I.A. No.7185/2012 and I.A. No.7187/2012 filed by the respondent for the dismissal of the petition are hereby allowed. In the facts and circumstances of the case, parties are directed to bear their own costs.

Petition dismissed.

I.L.R. [2013] M.P., 333
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P.No. 18115/2012 (Jabalpur) decided on 11 December, 2012

ALKA JAIN (Smt.) ...Petitioner
Vs.
SMT. NIRMALA PATHAK ...Respondent

Civil Procedure Code (5 of 1908) Order 26 Rule 1 - Examination on Commission **- Respondent No.1 is an elected Mayor attending her duties and all functions even after angioplasty surgery was carried out near about 2 years back - It cannot be said that she is not in a position to record her deposition before the Court - Order directing her examination on Commission not sustainable - Petition allowed.**
(Paras 12 & 14)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 1 – कमीशन द्वारा परीक्षण किया जाना – प्रत्यर्थी क्रं. 1 निर्वाचित महापौर है जो करीबन 2 वर्ष पहले कराई गई एन्जियोप्लास्टी शल्यक्रिया के पश्चात भी अपने कर्तव्यों का एवं कार्यों का निर्वहन कर रही है – यह नहीं कहा जा सकता कि वह न्यायालय के समक्ष अपना कथन अभिलिखित कराने की स्थिति में नहीं है – कमीशन द्वारा उसका परीक्षण करने का आदेश पोषणीय नहीं – याचिका मंजूर।

Cases referred :

2009(1) MPHT 144, 2004(1) W.N. 98, 1988(2) Crime 107.

Rakesh Jain, for the petitioner.
Adarshmuni Trivedi with *Sampurna Tiwari*, for the respondent.

ORDER

U.C. MAHESHWARI, J.: The petitioner has filed this petition under Article 227 of the Constitution of India for quashment of the order dated 10.9.2012, (Ann. P-1), passed by IIIrd Additional District Judge, Katni in Election Petition/MJC-5/12 whereby allowing the application of the respondent filed under Order 26 Rule 1, r/w Section 151 of CPC, (Ann. P-4) the direction to record her statements on commission has been passed. Pursuant to that the Commissioner has also been appointed.

(2) The facts giving rise to this petition in short are that the respondent herein after being elected as Mayor of Municipal Corporation, Katni is facing the trial of aforesaid Election Petition filed by the petitioner to challenge her election of Mayor. After recording the evidence of the petitioner on behalf of respondent the impugned application, Ann. P-4 to examine herself on commission was filed. *Inter-alia* in such application, it was stated that she being heart patient, her Angioplasty has been carried out on 1.9.2010 , subsequent to that she is not in a position to walk on stairs. The Doctor has also advised her to avoid the activities of exertions. In further averments it is stated that on 1.9.2012 some problem occurred in her chest on which she got examined herself in Chandak Hospital and Diagnosis Centre on 1.9.2012. On such date the Doctor has advised her to take bed rest and avoid exertions activities for fifteen days and thereafter she was permitted to continue her regular life in accordance with the direction of Scott Hospital, New Delhi. In this regard some medical papers were also annexed with the application. In further averments, it is stated that concerning trial court of Katni is situated on the first floor and to reach such court a person is bound to go through stairs and in the aforesaid circumstances she is not in a position to go and attend the court for recording her deposition. With these averments the prayer for recording her depositions on commission is made.

(3) The aforesaid prayer was seriously opposed on behalf of the petitioner on the ground that respondent no. 1 being elected Mayor is used to visit

various places in the Municipal Corporation area of Katni to look after the work of Municipal Corporation. Besides this, she being political leader and Mayor is also attending various meetings of Corporation and also the functions and attending he political functions and meeting by going through the stairs on the Dais. In support of such contentions, some cutting of the daily newspapers were also placed on record to show that she is attending various functions either at the ground floor or on the Dais in the township of Katni. It also appears from the impugned order that such application is opposed on the ground that being elected Mayor she is always in a position to go anywhere for the work of the Municipal Corporation just to serve the public at large and in such circumstances she could come to the court also for recording her depositions and in such premises prayer for dismissal of the application was made.

(4) On consideration the trial Court has allowed the application of respondent no.1 for appointing of Commissioner on which the petitioner has come with this petition.

(5) Shri Rakesh Jain, learned counsel for the petitioner after taking me through the averments of the petition as well as papers placed on record alongwith the impugned order said that even on taking into the consideration entire papers annexed with the application, Ann. P-4 as accepted in its entirety even then, after fifteen days from the date of 1.9.2012, the respondent has become in a position to visit anywhere and discharge her duties as Mayor of the town. In continuation, he said that mere on account of Angioplasty of the respondent no.1 in the available scenario of the matter, the respondent could not be permitted to get recorded her depositions on commission, specially when she is visiting various places of town to discharge her duties as a Mayor. She is also participating in the meetings of the Municipal Corporation and its different committees. The Municipal Corporation office is also public office and in such premises she can come to the court also for her examination. He also said that if there is some problem with the respondent then in that circumstances, subject to appropriate order of the trial court her statements could be recorded at the ground floor of the court premises by the Commissioner so appointed by the Court. He also argued that looking to the nature of the dispute involved in the matter, the petitioner should not be insisted to visit the place of respondent either for recording her deposition or to cross examine her. He further said that cutting of the newspapers placed on record

with this petition, Annexure P-6 collectively is sufficient to draw inference that the respondent is carrying out all other activities everywhere in the town not only on the ground floor but on the Dice for which a person is bound to go on height through stairs. Thus, only on account of Angioplasty Surgery, she could not be permitted to avoid her presence before the court to record her deposition. It was also argued that under the discretionary provision of Order 26 Rule 1 of the CPC, the respondent could not be extended the benefit to record her deposition on commission, who persistently for some ulterior reasons does not want to come to the Court for recording the deposition, and prayed for setting aside the impugned order by allowing this petition. In alternate, he prayed that in any case the trial court may be directed to record the depositions of respondent through Commissioner by making arrangements at the ground floor of the Court building.

(6) Shri Adarshmuni Trivedi, learned Sr. Adv assisted by Shri Sampurna Tiwari, learned counsel for the respondent by justifying the impugned order said that the same being based on proper appreciation of the averments of the application, Ann. P-4 is in accordance with law and does not require any interference at this stage. In continuation he said that the respondent being heart patient should not be insisted to attend the court for recording her deposition. By referring the provisions of Order 26 Rule 1 of the CPC he argued that on sufficient circumstances the court has discretion to permit the party to examine himself/herself or the witnesses on commission and in such premises, the trial court has not committed any error in passing the impugned order. As the same was passed taking into consideration the medical papers and existing circumstances of the respondent as stated in the application, Annexure P-4. He further said that although the respondent no. 1 being elected Mayor of Katni is used to visit various places to look after the work of Municipal Corporation and also attending the meetings of the Municipal Corporation and it's different committees but in any case, she is not in a position to go on first floor through staircase. Thus, she could not be insisted to come and record her depositions in the court. In support of his contention, he also placed his reliance on reported decisions in the matter of *Smt. Annapurna Dubey Vs. Champalal @ Chaua and another* reported in 2009 (1) MPHT, 144, in the matter of *Ramrakhi Bai (Smt.) Vs. Pitambhardas* reported in 2004, (1) Weekly Note 98 and in the matter of *Laxmi Raj Shetty and anr. Vs. State of Tamil Nadu* reported in 1988 (2) Crime 107 and prayed for dismissal of this petition.

(7) Having heard the counsel at length keeping in view their arguments advanced, I have carefully gone through the petition as well as papers annexed with it alongwith the impugned order, Annexure P-1.

(8) It is undisputed fact in the matter that the petitioner herein being defeated candidate from the respondent in the election of Mayor of the Municipal Corporation, Katni has filed the impugned election petition. Obviously it appears that there is political rivalry between the parties. So while deciding the impugned application, Annexure P-4 such aspect should have also been taken into consideration by the trial court whether in such scenario either of the parties should be directed to visit the place of the other party for recording the evidence through Commission. But it is apparent from the impugned order that such aspect was not taken into consideration by the trial court while allowing such application.

(9) It is undisputed fact that from the date of electing the Mayor of Katni the respondent no. 2 is discharging her duties not only by attending the various meetings of the Municipal Corporation and its different committees but also visited various places where at the instance of the Municipal Corporation the development activities are being carried out. In the available circumstances and from the cuttings of different newspapers, Annexure P-6 collectively, it is apparent that the respondent being Mayor is used to visit various political functions and in that connection she also goes on Dais to deliver speech and it is a matter of fact that to approach the Dais a person has to go by the staircase. In such premises when the respondent no. 1 is visiting the various places for her political activities and the activities of the Municipal Corporation, then it could not be said that she is not in a position to come and attend the court for recording her deposition.

(10) Apart the above, it is apparent that her Angioplasty Surgery was carried out near about before two years in the year 2010 and subsequent to that she has been discharging her duties as a Mayor and also as a political leader and such Angioplasty Surgery is not coming in her way to discharge such duties. But on account of such decease, she wants that her deposition should be recorded on commission at her residence as prayed in the application, Annexure P-4. Such conflicting position was not considered by the trial court with proper approach while passing the impugned order. It is needless to state here that the various Officers and officials of public sector who are facing such type of physical problems are working on their posts

regularly and discharging their duties in regular course in their Offices, out of which some Offices are situated at the first floor or the other floor and to reach the same they use the staircase.

(11) So, in view of aforesaid discussions mere on averments stated in the application it could not be said that she is not in a position to record her deposition before the Court or in any case, subject to order of the Court through Commissioner on the ground floor of the court premises.

(12) In view of the aforesaid discussion according to which, the respondent is visiting and working at various public places of town for the public cause and also discharging duties as Mayor of the Municipal Corporation by attending the meetings and inspecting the work carried out by the Corporation in regular course, then i it could not be said that she is not in a position to come and attend the Court to record her deposition. On the contrary, it appears that persistently the respondent is avoiding to attend the court for recording her deposition.

(13) So far the case laws cited on behalf of the respondent are concerned, this court does not have any dispute regarding principles laid down in such cases but same are not giving the benefit to the respondent. The case law of *Smt. Annapurna Dubey* (supra) was decided taking into consideration that the concerning woman being age of 80 years was the patient of Arthritis and it is matter of fact that the patient of Arthritis can not walk properly and in such circumstances, the Commission was directed. In the present case, the age of respondent is only 60 years and she is not suffering any such decease like Arthritis. Other cases were also decided taking into consideration the different facts and circumstances in which the concerned person were neither the elected person nor the political Leader and in such situation by invoking the discretionary jurisdiction of the court, the Commission was directed. Besides this, in such cases two different stories of facts were not involved but in the present case one side the respondent is doing and discharging the function of Mayor and political leadership and other side she does not want to come to the court for recording her deposition. Thus, the cited cases are not helping to the respondent.

(14) In the available circumstances the impugned order being perverse and contrary to the available scenario of the matter is not sustainable, hence by

allowing this petition, the impugned order Annexure P-1 is set aside and pursuant to it the application of the respondent no. 3 filed under Order 26 Rule 1 of the CPC, Ann. P-4 is hereby dismissed and pursuant to it, the trial court is directed to record the deposition of respondent in the court. Simultaneously in alternate the trial court is directed that on facing any problem by the respondent to come on the first floor of the Court premises for recording deposition, then on making the request on her behalf, then her deposition be recorded through Commissioner by making arrangement at the ground floor of the court premises.

(15) The petition is allowed with aforesaid observations.

C c as per rules.

Petition allowed.

I.L.R. [2013] M.P., 339
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P.No. 9569/2012 (Indore) decided on 13 December, 2012

PITHAMPUR STEELS LTD. ...Petitioner
Vs.
M/S KOTAK MAHINDRA BANK LTD. & anr. ...Respondents

***A. Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act (51 of 1993), Section 2(g) & Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Section 2 (ha) - Debt* - Includes any liability whether payable under a decree or order of any civil Court or any arbitration award or otherwise or under a mortgage and subsisting on and legally recoverable on the date of application.**

(Para 9)

क. बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली (RDDBFI) अधिनियम (1993 का 51), धारा 2(जी) व वित्तीय अस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धारा 2 (एचए) – ऋण – कोई दायित्व जो कि किसी सिविल न्यायालय के किसी आदेश या डिक्री अथवा किसी माध्यस्थम अवार्ड या अन्यथा द्वारा या किसी बंध पत्र के अंतर्गत देय है और आवेदन करने की तिथि को बकाया है और वैध रुप से वसूले जाने योग्य है, समाविष्ठ है।

***B. Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act (51 of 1993), Section 2(g) & Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, (54 of 2002), Sections 2(ha), 13 & 37 - Debt Recovery Measures* - Bank proceeded to take action under RDDBFI Act - It can still proceed under SARFAESI Act. (Para 9)**

ख. बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धारा 2(जी) व वित्तीय अस्तियों का प्रतिभूतिकरण और पुनर्गठन तथा प्रतिभूति हित का प्रवर्तन (SARFAESI) अधिनियम, (2002 का 54), धाराएँ 2(एचए) 13 व 37 – ऋण वसूली उपाय – बैंक ने **RDDBFI** अधिनियम के अंतर्गत कार्यवाही की – तब भी वह **SARFAESI** अधिनियम के अंतर्गत कार्यवाही कर सकती है।

***C. Recovery of Debts Due to Banks and Financial Institutions (RDDBFI) Act (51 of 1993), Section 24 - Limitation* - Decree passed under the RDDBFI Act was already put to execution and recovery proceedings were pending - Held - It was a "live claim" and therefore, the DRAT has rightly held that the proceedings could not have been treated to be barred by limitation. (Para 10)**

ग. बैंकों और वित्तीय संस्थाओं को शोध्य ऋण वसूली अधिनियम (1993 का 51), धारा 24 – परिसीमा – **RDDBFI** अधिनियम के अंतर्गत पारित की गई डिक्री का पहले ही निष्पादन किया गया और वसूली की कार्यवाहियां लंबित थी – अभिनिर्धारित – वह 'जीवित दावा' था और इसलिए **DRAT** ने उचित रुप से अभिनिर्धारित किया कि कार्यवाहियों को परिसीमा द्वारा वर्जित नहीं माना जा सकता।

Cases referred :

2012(1) DRTC 325(All.), 2009 (75) ALR 701, AIR 2007 SC 712, (2008) 1 SCC 125.

P.M. Jain, for the petitioner.
Cyrus Ardesir with *Gaurav Chhabra*, for the respondents.

ORDER

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

Through this petition under Article 226/227 of the Constitution of India, the petitioner borrower has challenged the order dated 23.08.2012 (Annexure

P3) passed by Debts Recovery Appellate Tribunal (for short DRAT) Allahabad by which the first respondent's Appeal No.R122/ 2011 challenging the order dated 07.09.2011 passed by Debts Recovery Tribunal, Jabalpur (for short DRT) in Securitisation Application No.162/2011 has been allowed and the case has been remanded back to the DRT for deciding the questions other than the questions decided by the said order.

2. Briefly stated the petitioner company had availed the cash credit facility from the State Bank of India (for short the SBI). As the petitioner defaulted in making payment a Civil Suit No.2-A/ 1998 for recovery of Rs.1,58,34,341.84-N. P. was instituted against it by the SBI before the District Judge, Indore. On establishment of the Tribunal under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short RDDBFI Act) the said Civil Suit was transferred to the Tribunal and was registered as T.A.No.905/98. The Tribunal vide order dated 15.11.2000 decreed the said TA in favour of the SBI. The appeal filed by the petitioner under Section 20 of the RDDBFI Act before the DRAT bearing No.R02/2001 was dismissed by the DRAT vide order dated 07.03.2011. The decree holder SBI filed execution proceedings for recovery of the decretal amount before the recovery officer. During the pendency of the execution on account of acquisition of rights and interest in the financial assets of the SBI by the first respondent Kotak Mahindra Bank, the first respondent was impleaded in the said execution in place of the SBI.

3. Thereafter, invoking the provision under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the SARFAESI Act) the first respondent Kotak Mahindra Bank issued a notice dated 31.12.2010 to the petitioner, requiring the petitioner to discharge the liability. Since the petitioner failed to discharge its liability within time specified in the said notice, possession of the secured assets of the petitioner was taken by the first respondent under Section 13 (4) of the SARFAESI Act.

4. Challenging the action of taking over of the possession by the first respondent, the petitioner approached the DRT by filing an application under Section 17 of the SARFAESI Act. The petitioner raised the grounds that (a) the action taken by the first respondent under Section 13 (2) is illegal as no valid notice was issued and (b) the said action taken under Section 13 (2) was barred by limitation. The DRT vide order dated 07.09.2011 allowed the

application and set aside the notice dated 31.12.2010 issued by the first respondent under Section 13 (2) of the SARFAESI Act and also directed the first respondent to re-deliver the possession of secured assets to the petitioner, which was taken by it under Section 13 (4) of the SARFAESI Act.

5. Aggrieved by the order dated 07.09.2011 passed by the DRT the petitioner filed an appeal under Section 18 of the SARFAESI Act before the DRAT. The DRAT vide order dated 28.03.2012 passed in Appeal No. R122/ 2011 allowed the appeal filed by the first respondent and remanded the matter back to the DRT for deciding the other question except the question decided in appeal by DRAT. Feeling aggrieved, the petitioner has filed this petition.

6. We find that before the DRAT two questions were raised by the first respondent. Firstly, that the DRT was not justified in holding that since the Bank has proceeded to take action under the RDDBFI Act, it could not have proceeded to take action under the SARFAESI Act and secondly that the DRT had committed error in holding that the initiation of the proceedings by the first respondent under Section 13 (2) was barred by limitation.

7. Heard learned counsel for the parties at length, perused impugned order and annexures.

8. Although learned counsel for the petitioner did not seriously urged the two grounds deciding which the matter was remanded to the DRT, however we are dealing with both the said grounds. We are also dealing with the ground strenuously urged by the learned counsel for the petitioner that in the absence of declaration of NPA in the notice under Section 13 (2) the entire action of the first respondent is vitiated.

9. As regards the first ground raised before and decided by the DRAT we find that in the case of *Modern Times Industries Vs. DRAT, Allahabad* 2012 (1) DRTC 325 (All.) and *M/s ACE Media Advertisers Vs. Bank of Baroda* 2009 (75) ALR 701 the Allahabad High Court has held that the remedy under RDDBFI Act and SARFAESI Act are not the separate remedies but are the remedies which are supplementary to each other. While holding so the Allahabad High Court relied upon the judgment of the Supreme Court in the case of *M/s Transcore v. Union of India* AIR 2007 SC 712 = (2008) 1 SCC 125 in which it was observed that it is wrong to say that the RDDBFI Act and SARFAESI Act provide parallel remedies. The remedy under RDDBFI Act short as compared to the SARFAESI Act, which refers to

acquisition and assignment of the receivables to the asset reconstruction company and which authorizes banks / financial institutions to take possession or to take over management which is not there in RDDBFI Act. It is for this reason, the SARFAESI Act is treated as an additional remedy in Section 37 of the SARFAESI Act, which is not inconsistent with the RDDBFI Act. It has been further observed by the Supreme Court that the remedies of enforcement of security interest under the SARFAESI Act and RDDBFI Act are complimentary to each other and there is no inherent or implied inconsistency between these two remedies under the two different Acts, and as such, the doctrine of election has no application in the matter for exhausting the remedy by invoking the provisions of Section 13 (2) of SARFAESI Act. In the circumstances, we affirm the view taken by the DRAT that the first respondent Kotak Mahindra Bank was entitled to proceed under SARFAESI Act inspite of the fact that it had initiated recovery proceedings under the RDDBFI Act. It is also pertinent to mention here that the term 'Debt' as defined under Section 2 (g) of the RDDBFI Act includes any liability whether payable under a decree or order of any civil Court or any arbitration award or otherwise or under a mortgage and subsisting on and legally recoverable on the date of application. The definition of 'Debt' under RDDBFI Act has been adopted under Section 2 (ha) of the SARFAESI Act. In this view of the matter the view taken by the DRAT in this regard is upheld.

10. As regards the question of limitation decided by the DRAT, since the decree passed under the RDDBFI Act was already put to execution and recovery proceedings were pending, it was a "live claim" and therefore, the DRAT has rightly held that the proceedings could not have been treated to be barred by limitation.

11. In the circumstances, we find that the view taken by the DRAT for deciding both the questions raised before it, is perfectly legal and proper and needs no interference in this writ petition.

12. Learned counsel for the petitioner next contended that in the notice dated 31.12.2010 issued under Section 13 (2) there exists no declaration of NPA, therefore, the notice was invalid and, as such, no further action could have been taken on the basis of the said invalid notice. So far as this argument is concerned, in our considered view, it is wholly misconceived. Section 13 (2) requires the debt to be classified as NPA and also requires issuance of notice in writing to discharge the liability. On going through the notice dated

31.12.2010 which was issued by the first respondent under Section 13 (2) of the SARFAESI Act, we find that the first respondent Kotak Mahindra Bank had clearly stated as under :

> "The Company failed to maintain financial discipline and defaulted in the repayment of the loan amounts as and when the same fell due for payment. In view of the defaults committed by the Company, SBI in accordance with the Reserve Bank of India directives and guidelines classified in its books the account of the Company as Non Performing Asset [NPA]. SBI also filed a recovery suit before the Hon'ble Debts Recovery Tribunal – Jabalpur (DRT). The said suit was decreed in favour of SBI by the Hon'ble DRT and a Recovery Certificate was issued in favour of SBI.
>
> During the pendency of the recovery proceedings, SBI had assigned the debts of the Company together with the underlying securities in favour of Kotak Bank. SBI has assigned all its rights, title and interest in all the agreements, deeds, documents and benefits under the decree and/or recovery certificate, issued by any Court/Authority and/or Tribunal in respect thereof; in relation to or in connection with the facilities to Kotak Bank. Kotak Bank is therefore entitled to initiate, adopt appropriate legal action and/or continue to pursue any existing legal action in its own name against the Company, its Directors/Guarantors for recovery of the outstanding amounts due and payable by the Company and its Directors/Guarantors under the said facilities.
>
> Despite repeated requests made to the Company to discharge its liability and despite issuance of Recovery Certificate by Hon'ble Debts Recovery Tribunal – Jabalpur, the Company has failed and neglected to repay the said dues/ outstanding liabilities.
>
> Taking into account the Company's conduct with respect to the nonpayment of the legitimate dues, Kotak Bank has become entitled to and does issue this notice to you U/s 13 (2) of SARFAESI Act.
>
> Under the circumstances, Kotak Bank hereby calls

upon the Company, Pithampur Steels Limited and demands to pay to Kotak Bank at Mumbai within a period of 60 (Sixty) days from the date of this notice; an amount of Rs.14,02,94,627/(Rupees Fourteen Crores Two Lakhs Ninety Four Thousand Six Hundred And Twenty Seven Only) outstanding as on December 31, 2010 being the aggregate of the amounts inclusive of interest due and payable by and demanded of the Company in respect of all the financial assistance availed by the Company. Annexed and marked as **Annexure "C"** is the detail of the outstanding amounts payable as on December 31, 2010."

(Emphasis supplied)

13. In view of the aforesaid categorical averments in the notice dated 31.12.2000 issued by the first respondent, making it clear that the debt has been classified as NPA and requiring the petitioner to discharge the liability, in our considered opinion, the first respondent had duly complied with the requirement of the notice under Section 13 (2) of the SARFAESI Act. As a result the petitioner's contention that there is no compliance of statutory requirement about NPA in the notice under Section 13 (2) of the SARFAESI Act cannot be accepted.

14. Accordingly, we find no merit in this petition. The petition fails and is hereby dismissed.

15. No orders as to the costs.

Petition dismissed.

I.L.R. [2013] M.P., 345
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 6609/2012 (Gwalior) decided on 19 December, 2012

DINESH KUMAR & ors. ...Petitioners
Vs.
SMT. SARVESHARI & ors. ...Respondents

A. ***Land Revenue Code, M.P. (20 of 1959), Section 110 - Mutation - 'Person interested'*** **- Petitioners claiming title on basis of an unregistered document which should have been registered - Petitioners cannot enter into the shoes of a 'person interested' - They were not**

required to be noticed by the Tahsildar. **(Para 13)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 110 – नामांतरण – 'हितबद्ध व्यक्ति' – याचीगण ऐसे अपंजीकृत दस्तावेज के आधार पर हक का दावा कर रहे हैं जिसे पंजीकृत किया जाना चाहिए था – याचीगण 'हितबद्ध व्यक्ति' नहीं हो सकते – उन्हें तहसीलदार द्वारा सूचित किया जाना आवश्यक नहीं था।

B. Registration Act (16 of 1908), Section 17 - Document, whether compulsorily registrable or not **- Microscopic reading of document 34(A) shows that rights are relinquished/extinguished/created and declaration in this regard is made - The document is not only a list of events of earlier partition, but in fact and in effect is a document which created /extinguished rights etc. - Thus, it should have been registered.** **(Para13)**

ख. रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17 – दस्तावेज, क्या अनिवार्य रुप से पंजीकृत होना चाहिए अथवा नहीं – दस्तावेज 34(ए) को सूक्ष्मता से पढ़े जाने पर उपदर्शित होता है कि अधिकारों का त्यजन/समाप्ति/सृजन किया गया तथा इस संबंध में घोषणा की गई – दस्तावेज न केवल पूर्वतर विभाजन की घटनाओं की सूची है बल्कि वास्तव में और प्रभावी रुप से ऐसा दस्तावेज है जो अधिकारों का सृजन/ समाप्ति इत्यादि करता है – अतः उसे पंजीकृत किया जाना चाहिए था।

Cases referred :

2010(3) JLJ 16, 2011(3) MPLJ 91, W.P. No. 5269/2012, 2003 (3) MPHT 422, AIR 1938 Nagpur 434, AIR 1988 SC 881.

R.K. Soni, for the petitioners.
Prakash Bararu, for the respondents.

ORDER

Sujoy Paul, J.: By filing this petition under Article 226 of the Constitution, the petitioner has called in question the order of the Revenue Board dated 1.5.2012.

2. Brief facts necessary for adjudication of this matter are as under:-

The petitioners claim is that the father of petitioners, namely, Prahlad and his brothers Raghunath and Keshav were owners of the land bearing survey nos. 386 and 387, situated in village Kutdhan, Patwari Halka No. 24, Tahsil Sabalgarh, District Morena. Respondents No.1 to 5 got their names mutated in revenue record on the said survey numbers. When the petitioners

came to know about the said mutation, they preferred an appeal before Sub-Divisional Officer (SDO), which was registered as Appeal No. 45/2008-09. The appellate court initially granted temporary injunction but ultimately dismissed the appeal by order dated 4.12.2009 on merits. Feeling aggrieved with the order of SDO aforesaid, the petitioner preferred an appeal before Additional Commissioner, Chambal Division, which was registered as Appeal No. 28/2009-10. By order dated 4.2.2010 the appellate court allowed the appeal of the present petitioners, set aside the order of SDO and remitted the matter back to the Tahsildar to pass orders in accordance with law after giving opportunity to the parties. The respondents herein filed a revision before the Board of Revenue, which was decided by impugned order dated 1.5.2012.

3. The case of the petitioners is that the father of the petitioners, namely, Prahlad and Keshav and Raghunath were brothers. They were co-owners of the property. Keshav died in the year 2000 and as per family partition deed, the land was required to be mutated in favour of the petitioners. A civil suit is also pending in the court of Civil Judge Class-2, Sabalgarh and, therefore, Tahsildar has committed an error in not noticing the petitioners.

4. Shri R.K.Soni, learned counsel for the petitioners submits that as per section 110 of M.P.Land Revenue Code (MPLRC), it was obligatory for the Tahsildar to notice all persons appearing to him to be interested and in absence thereof the mutation proceedings are vitiated. He submits that the appellate authority has rightly set aside the order of SDO and Board of Revenue has committed an error in interfering in the matter.

5. Learned counsel for the parties, during the course of arguments, fairly admitted that core issue to be decided in this matter is whether under section 110 of the MPLRC, the petitioners can be treated to be "person interested" and if petitioners are not noticed, what is the effect of the same. Shri R.K.Soni, in support of his contention, heavily relied on the document at page 34(A) and submits that this document dated 3.6.1984 shows that there was an oral partition which took place earlier and as per this, the petitioners have acquired right on the land in question. He relied on 2010 (3) JLJ 16 (*Guljarilal Jain vs. Ravikant Shirke*) and 2011 (3) MPLJ 91 (*Suresh Kumar Agarwal and others vs. State of MP & others*). Learned counsel for the petitioners criticized the order of Board of Revenue, whereby the petitioners were not treated to be persons interested. He submits that the aforesaid document at page 34(A)l makes it crystal clear that there was an earlier oral partition and, therefore, said document was not required to be registered. Aforesaid

judgments were cited in support of this contention. In addition to aforesaid, Shri R.K.Soni heavily relied on the finding of the Additional Commissioner, Chambal Division in para 4 of his order wherein it is mentioned that the defendants have taken a stand that the partition between Keshav Prasad and Prahlad took place on 3.6.1984. Keshav Prasad died on 28.3.2000 and Prahlad died on 20.4.2007. By placing heavy reliance on the aforesaid stand, it is stated by learned counsel for the petitioners that the document at page 34(A) is admitted by the present respondents and, therefore, as per the said document petitioners have acquired a right and, therefore, the person interested as per section 110 of MPLRC.

6. *Per Contra,* Shri Bararu supported the order passed by the Board of Revenue. Shri Bararu submits that petitioners have not taken any pains to get the document at page 34(A) registered nor they made effort to get the revenue records straight. In other words, it is stated that the petitioners have not taken any steps for correction of entries in the relevant revenue record in their favour. By strongly refuting the stand of Shri Soni, learned counsel for the respondents submits that a careful reading of order, Annexure P-5, shows that the defendants had not accepted the factum or existence of document at page 34(A). He submits that in alleged admission mentioned in Annexure P/5 there is a mention of partition on 3.6.1984 but there is no mention of document of page 34(A). On the contrary, he submits that as per the stand recorded by the appellate court in Annexure P-5, partition took place on 3.6.1984 whereas as per the stand of the petitioners and as per page 34(A), the partition took place earlier orally. Thus, it cannot be said that factum of existence of page 34(A) is established and, therefore, there is no partition deed in the eyes of law. Apart from this, he submits that the petitioners have filed a civil suit, wherein they have prayed for various reliefs. They have although filed the copy of civil suit in this proceeding but did not approach this Court with clean hands and did not inform this Court that the said civil suit was subsequently amended. By drawing the attention on the amended relief clause 19(a), Shri Bararu submits that lateron the suit was amended and it was prayed that the petitioners have a preferential right. Thus, the question whether the petitioners have a preferential right or any other right is already subject matter of challenge before the competent trial court and no interference is warranted. Apart from this, he submits that the court below has rightly given a finding that by an unregistered document no right or title is accrued in favour of the petitioners. The property is above Rs.100/- and, therefore, it was required to be registered under the Registration Act, 1908.

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

8. The SDO gave a finding that no efforts were made by the petitioners for getting their names entered in the revenue records. The document at page 34(A) is written on a plain paper and it is an unregistered document, which does not provide any right in favour of the petitioners. This finding is reversed by the appellate court on the assumption that the factum of existence of page 34(A) is not in dispute. However, a careful reading of the stand of the defendants in Annexure P-5 shows that there is no admission regarding existence of the said document. There is only a statement which shows that the partition took place on 3.6.1984. This statement, if examined in juxtaposition to the document page 34(A), would show that the document refers to some earlier oral partition. Thus, it is not the case of the petitioners that partition took place on 3.6.1984, on the contrary their stand is that partition took place much prior to it.

9. Apart from this, all parties to the alleged partition have not put their signatures in Annexure P-8 [Page 34(A)]. The Board of Revenue, in the considered opinion of this Court, has rightly held after perusal of the record that on 26.1.2008 advertisement was issued by the Tahsildar, no objections are received by any party within the time framed and thereafter the said authority had rightly mutated the names of the respondents. The petitioners have failed to show that they have acquired any right or title on the land in question. The petitioners have already filed a civil suit for the relief in question.

10. Although Shri Soni relief on the judgments of this Court in cases of *Guljarilal Jain and Suresh Kumar Agarwal* (supra), the said judgments are based on different fact situations and cannot be applied in the present case. He relied on a recent order of this Court delivered in *Writ Petition No. 5269/2012* (*Smt. Shakuntalabai vs. Chatur Singh and others*). In the said case this Court interfered because it was found that the petitioner therein was interested party and, therefore, proceedings under section 110 of Tahsildar were found erroneous. Apart from this, on perusal of the original record in the said matter it was found that there is no mention as to when advertisement was issued, when notices were given to the persons interested etc. Thus, there was a serious procedural irregularity and due process was not followed. On both counts, i.e., petitioner was interested and due process was not followed, interference was made. In the present case, Board of Revenue has rightly held that page 34(A), Annexure P/8, should have been registered.

11. I also found force in the argument of Shri Bararu that a careful reading of page 34(A) shows that the rights were relinquished to some extent in favour of Prahlad. In that event, the partition deed should have been compulsorily registered. I find force in the argument on account of the judgment of this Court reported in 2003 (3) MPHT 422 (*Smt. Rukayya Bai vs. Smt. Munni Bai and another*). The relevant portion reads as under:-

> "It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case memorandum itself does not create or extinguish any right in immoveable properties."

12. Apart from this, it is apt to quote the relevant portion of page 34(A) which will determine the nature of this document:-

> "मेरा एवं भाई प्रहलाद एवं कृतघान की भूमि में से है जिस पर आज तक भाई प्रहलाद खेती करते है सबलगढ वाले मकान एवं भाई प्रहलाद अपने हिस्से सहित बरत रहे है जिसमें भाई प्रहलाद और मै शिक्षक होकर ग्वालियर में अपने बच्चों सहित रहता हूं इस लिये मुझे ग्वालियर के मकान की आवश्यकता है अपने हिस्से की सबलगढ वाले मकान एवं कृतघान मौजे को भाई प्रहलाद को आज सोप कर अपना हिस्सा भाई प्रहलाद के हित त्याग रहा हूं। तथा मेरा हिस्सा मकान खाते की जमीन के बदले में भाई प्रहलाद मेरे लिये प्लाट कय मकान बनवा कर देगें। मेरा आज के बाद सबलगढ वाले मकान एवं कृतघान मौजे की खाते की जमीन मेरा अधिकार समाप्त समझा जावे तथा आज के बाद मेरे हिस्से का मकान एवं कृतघान खाते की जमीन पर भाई प्रहलाद काबिज होकर मालिक होगे। भविष्य में इस सम्पत्ति पर मेरा एवं मेरे वारिसानों का कोई सरोकार नहीं होगा मेरे मरने के बाद मेरा वारिसान अगर कोई आपत्ति करता है तो उसे झूठा एवं मिथ्या समझा जावे।"

In AIR 1938 Nagpur 434 (*Narayan Sakharam Patil vs. Co-operative Central Bank Malkapur*), the Division Bench of this Court has held that mere lists of property do not form an instrument of partition, and therefore, does not require any registration. However, what is required to be determined whether these documents are mere lists or in themselves purport to create, declare, assign, limit or extinguish any right, title or interest. In a

property which is admittedly over Rs.100 of value, if any right is created, declared, assigned, extinguished etc., registration is necessary. The same view is followed in AIR 1988 SC 881 (*Roshan Singh and others vs. Zile Singh and others*). The principle of law laid down is the same i.e. nature of the document which will determine whether it was required to be registered.

13. Applying the aforesaid tests on the aforesaid document would show that certain rights are extinguished and few are created in favour of the other brothers. A microscopic reading of document 34(A) shows that rights are relinquished/extinguished/created and declaration in this regard is made. Thus, the document aforesaid is not only a list of events of earlier partition, but in fact and in effect is a document which created extinguished rights etc. Thus, it should have been registered. I find no legal flaw in the order of the Board of Revenue wherein it is held that in absence of registration of this document, no rights are created in favour of the petitioners. Since no rights are created, the petitioners, by no stretch of imagination, can enter into the shoes of a 'person interested', and therefore, they were not required to be noticed by the Tahsildar. This finding of Board of Revenue is in accordance with law and does not require any interference from this Court. The petitioner although has relied on certain judgments including the judgment in *Suresh Kumar Agarwal* (supra), but a detailed examination of this judgment would show that it is based on the aforesaid judgment of Nagpur Bench in *Narayan Sakharam Patil* (supra). This Court has not deviated from the principle of law laid down by the Nagpur Bench.

14. Considering the aforesaid, no error can be found in the order of Board of Revenue. Petition sans substance and is hereby dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 351
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 14663/2012 (Jabalpur) decided on 9 January, 2013

SUBHASH KUMAR DUBEY ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***A. Fundamental Rule 22(a), Revision of Pay Rules, M.P. 1998, Rule 10(2) - Benefit of Krammonati Pay Scale* - Benefit of**

Krammonati pay scale is extended to such government servant who in the period of 24 years have not earned advancement/promotion - Petitioner who got two promotions, is rightly held not entitled for benefit of Krammonati pay scale - Petition dismissed. (Para 12)

क. मूलभूत नियम 22(ए), वेतन पुनरीक्षण नियम, म.प्र. 1998, नियम 10(2) – क्रमोन्नति वेतनमान का लाभ – क्रमोन्नति वेतनमान का लाभ ऐसे सरकारी कर्मचारी को दिया जाता है जिसने 24 वर्षों की अवधि में उन्नयन/पदोन्नति अर्जित नहीं की – याची जिसे दो पदोन्नतियां मिली हैं, वह क्रमोन्नति वेतनमान के लाभ हेतु हकदार नहीं होने की धारणा उचित रुप से की गई है – याचिका खारिज।

***B. Fundamental Rule 22-D, Revision of Pay Rules, M.P. 1998, Rule 10(2)* - Rule 10 does not create a right but only protects the special pay which an incumbent earns while discharging onerous duties - Special pay not attached with the post of Camp Coordinator - The petitioner gets no benefit of Rule 10(2) - Petitioner, therefore, has rightly been held not entitled for special pay. (Paras 9 & 10)**

ख. मूलभूत नियम 22 डी, वेतन पुनरीक्षण नियम, म.प्र. 1998, नियम 10(2) – नियम 10 अधिकार का सृजन नहीं करता बल्कि केवल विशेष वेतन का रक्षण करता है जिसे पदधारी, दुर्भर कर्तव्यों के निष्पादन में अर्जित करता है – विशेष वेतन, कैम्प कोआर्डीनेटर के पद से संलग्न नहीं – याची को नियम 10(2) का कोई लाभ प्राप्त नहीं होता – याची को इसलिए, विशेष वेतन के लिए हकदार नहीं होने की धारणा उचित रुप से की गई।

C.L. Patel, for the petitioner.

ORDER

SANJAY YADAV, J.: Heard.

1. Petitioner, retired Junior Accounts Officer, Health and Family Planning Department, Government of Madhya Pradesh, seeks quashment of communication dated 10.5.2012; whereby, while declining the claim of the petitioner for grant of second Kramonnati Pay Scale of Rs.5000-8000, the petitioner is also informed that he will not be entitled for special pay of Rs.250 claimed on the anvil of Madhya Pradesh Fundamental Rule 22D and Rule 10 (2) of M.P. Revision of Pay Rules, 1998.

2. Petitioner was initially appointed on 17.12.1971 as accountant cum clerk. On 27.6.1995 he was promoted to the post of Head Clerk. Thereafter on 5.8.1998 the petitioner got second promotion to the post of Camp

Coordinator. The petitioner retired from service on attaining the age of superannuation on 30.6.2008 from the post of Junior Accounts Officer. After his retirement petitioner preferred a representation to the respondents for grant of two Kramonnati on completion of 12 years and 24 years of service in accordance with circular dated 17.4.1999. Since no decision was taken on the representation, petitioner preferred W.P. No. 7970/2010 (S). The petition was disposed of on 6.5.2011 with the direction to the respondents to consider the claim of petitioner for grant of Kramonnati Pay scale after completion of 12 years and 24 years of service in accordance with the policy within a period of 3 months.

3. In pursuance thereto respondents on 1.8.011 passed an order holding that the petitioner while in service had earned two promotions was not entitled for the benefit of first Kramonnati under the scheme of 1999. However, in respect of second Kramonnati he was held entitled for Rs.5000-8000 w.e.f 19.4.1999 subject to approval by the Joint Director (Treasuries and Accounts), reasons assigned were that the second promotion on the post of Camp Co-ordinator since was in the same pay scale of Rs.4500-125-7000, therefore, was held entitled for the second Kramonnati.

4. The Joint Director, Treasury and Accounts from whom approval was sought held that since the petitioner was given two promotions, firstly as Head Clerk on 27.6.1995 and as Camp Coordinator on 5.8.1998 will not be entitled for the Kramonnati Pay Scale. In respect of Special Pay, it was held that Special Pay under F.R. 22-D since is available in lieu of onerous duty and the petitioner since was not assigned the onerous duty was not entitled for the same. The Director opined :

> "म.प्र. शासन सामान्य प्रशासन विभाग मंत्रालय क. एफ–1–1/1/वे आप्र./ 99, भोपाल दिनांक 17.03.99/19.04.99 अनुसार पूरे सेवाकाल में प्रवेश के समय लागू वेतनमान के अतिरिक्त एक से अधिक उच्चतर वेतनमान पदोन्नति। कमोन्नति/चयन/अपग्रेडेशन अथवा किसी माध्यम से न मिले हो को ही 24 वर्ष की सेवा पूर्ण होने पर द्वितीय कमोन्नति की पात्रता है।
>
> जबकि श्री सुभाष कुमार दुबे की प्रथम पदोन्नति मुख्य लिपिक के पद पर दिनांक 27.06.1995 को एवं द्वितीय कमोन्नति केम्पोर्डीनेटर के पद पर दिनांक 05.08.1998 को हुई है। म.प्र. शासन वित शासन वित विभाग मंत्रालय के आदेश क0 एफ.1–5/2007 नि.4 दिनांक 09.04.2007 अनुसार समय वेतनमान में पदोन्नति यदि उच्चतर दायित्व एवं कर्तव्य के पद पर हो तो

मूलभूत नियत 20–D का लाभ अनुज्ञेय होगा कर्मचारी का विशेष वेतन रू. 250 की पात्रता नहीं होगी।

उपरोक्त आदेशानुसार कर्मचारी को द्वितीय कमोन्नति (5000–8000) की पात्रता नहीं बनती है।"

5. It is contended on behalf of petitioner that, the respondents have misconstrued the circular dated 17.3.1999/ 19.4.1999. It is urged that since the promotion of the petitioner as Camp Coordinator being in the same scale of pay drawn by the petitioner as Head Clerk the same ought not to have been treated as promotion. There is no substance in the contention. It is not in dispute that the post of Camp Coordinator is a higher post in the hierarchy and the promotion is from the feeder post, i.e., Head Clerk. On being promoted the pay scale is fixed as per F.R. 22 (a) (ii).

F.R. 22 (a) stipulates:

"22 Initial Pay on appointment to posts on time scale pay.The initial substantive pay of a Government servant who is appointed substantively to a post on a timescale of pay, is regulated as follows:

(a) If he hold a lien on a permanent post, other than a tenure post, or would hold a lien on such a post had his lien not been suspended-

(i) When appointed to the new post involves the assumption of duties and responsibilities of greater importance (as interpreted for the purposes of Fundamental Rule 30) than those attaching to such permanent post, he will draw as initial pay, the stage of the time-scale next above his substantive pay in respect of the old post.

(ii) When appointment to the new post does not involve such assumption, he will draw as initial pay the stage of the time-scale which is equal to his substantive pay in respect of the old post, or if, there is no such stage, the stage, next below that pay plus personal pay equal to the difference, and in either case will continue to

> draw that pay until such time as he would have received an increment in the time scale of the old post, or for the period after which an increment is earned in the timescale of the new post, whichever is less. But, if the minimum pay of the time-scale of the new post is higher than his substantive pay in respect of the old post, he will draw that minimum as initial pay.

6. In the case at hand since the post of Camp Coordinator is in direct line of promotion from Head Clerk, it cannot be assumed that, there was an assumption of duties or responsibilities of greater importance than those attaching to such permanent post. No material is either commended at in that regard; therefore, petitioner's pay could not have been fixed under F.R. 22 (a) (i), but under F.R. 22 (a) (ii). And while fixing his pay under F.R. 22 (a) (ii) a pay equal to the difference treated as personal pay gets merged with future increment. Such personal pay in the considered opinion of this Court, cannot be treated as special pay as provided under F.R. 22 D.

7. F.R. 22 D stipulates that "Notwithstanding anything contained in these rules, where a Government servant holding a post in a substantive, temporary or officiating capacity, is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him his initial pay in the time-scale of the higher post, shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued:

8. Provided that the provisions of this rule, shall not apply where a Government servant holding a Class I post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to a higher post which is also a Class I post."

9. Since the special pay was not attached with the post of Camp Coordinator, the petitioner gets no benefit of Rule 10 (2) of M.P. Pay Revision Rules, 1998. Rule 10 provides that:

> "10. Special Pay.(1) Except in the case of Government Servant who are in receipt of special pay in addition to pay in the existing scale of pay and where the existing scale of pay

with special pay has been replaced by a scale of pay without any special pay, the special pay as attached to any other post will continue to be so attached with the revised scale of pay till the State Government otherwise directs.

(2) In such cases where the existing scale of pay of any posts before and after promotion were different and revised scales of pay of such two posts are merged into one scale of pay under these rules, then the Government servants who are holding the existing posts after promotion shall be entitled to draw a special pay of Rs.250.00 per month in the scale of pay revised under these rules.

(3) The special pay shall be treated as part of pay for the purpose of pay fixation in the case of the Government servant is promoted to a higher post carrying a higher pay scale.

10. Thus, Rule 10 does not create a right but only protects the special pay which an incumbent earns while discharging onerous duties. The petitioner, therefore, has rightly been held not entitled for special pay of Rs.250/.

11. Next submission by the Counsel for the petitioner is thjat Kramonnati Pay has wrongly been deprived. Clause 2 of circular F1-1/ 1/वे.आ.प्र./99 dated 17.3.1999/19.4.1999 stipulates:

2. राज्य शासन की सेवा में नियुक्त ऐसे समस्त कर्मचारी जो संबंधित सेवा भरती नियमों के अंतर्गत नियमित रूप से नियुक्त किये गये हों तथा उसके पश्चात् एक ही वेतनमान (तत्स्थानी वेतनमान सहित) में 12 वर्ष अथवा उससे अधिक की अवधि से निरन्तर कार्यरत हों, तो उन्हें निम्नांकित शर्तों के अधीन, संलग्न सूची में दर्शाये गये अनुसार उच्च वेतनमान में क्रमोन्नत किया जा सकता है।

(क) यदि उक्त शासकीय कर्मी की नियमित सेवा में नियुक्ति पश्चात् की सेवा अवधि 12 वर्ष से अधिक परन्तु 24 वर्ष से कम है, तथा उसे सेवा में भरती के समय लागू प्रारंभिक वेतनमान अथवा उसके तत्स्थानी वेतनमान के अतिरिक्त कोई अन्य वेतनमान पदोन्नति/क्रमोन्नति/चयन/अपग्रेड करके अथवा अन्य किसी माध्यम से प्राप्त नहीं हुआ है।

(ख) यदि उक्त शासकीय कर्मी की नियमित सेवा में नियुक्ति के पश्चात् की सेवा अवधि 24 वर्ष से अधिक है, तथा उसे सेवा में प्रवेश के समय लागू वेतनमान के अतिरिक्त एक से अधिक उच्चतर वेतनमान

पदोन्नति/क्रमोन्नति/चयन/अपग्रेडेशन अथवा अन्य किसी माध्यम से न मिला हो।

(ग) इस योजना के अंतर्गत क्रमोन्नति का लाभ प्रदान करने के लिये उक्त कर्मचारी/अधिकारी के विगत 5 वर्षों के गोपनीय प्रतिवेदनों का परीक्षण उसी प्रकार किया जायेगा जिस प्रकार पदोन्नति के प्रकरणों में किया जाता है, तथा उपयुक्त पाये जाने पर ही क्रमोन्नति का लाभ दिया जायेगा।

(घ) क्रमोन्नति होने पर वेतन का निर्धारण क्रमोन्नति वेतनमान में अगली स्टेज पर निर्धारित किया जावेगा। परन्तु यदि भविष्य में इसी वेतनमान में पदोन्नति की जाती है तो उसके उपरांत वेतन निर्धारण ऐसा मानते हुए जावेगा। जैसे कि संबंधित कर्मचारी पूर्व के वेतनमान में ही चला आ रहा हो तथा उसे क्रमोन्नति के फलस्वरूप वेतन निर्धारण का लाभ नहीं मिला हो।

(च) इस क्रमोन्नति के फलस्वरूप संबंधित अधिकारी/कर्मचारी के पदनाम में किसी प्रकार का परिवर्तन नहीं किया जायेगा।

12. Apparent it is from above provision that the benefit of Kramonnati pay scale is extended to such government servant who in the period of 24 years have not earned advancement/promotion in service. In the case of petitioner since he got two promotions he is rightly held not entitled for benefit of Kramonnati pay scale.

In view whereof no interference is caused.

In the result petition fails and is hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2013] M.P., 357
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 1314/2012 (Jabalpur) decided on 10 January, 2013

NEENA V. PATEL (DR.) ...Petitioner
Vs.
SMT. JYOTSNA BEN P. PATEL & ors. ...Respondents

***Succession Act (39 of 1925), Sections 283 & 284 - Party in a probate case* - Unless there is an interest in the estate of the deceased a person cannot be made party in probate proceedings - Public at large being not a person interested in the estate of the deceased could not have been directed to be impleaded as non-applicant - Directing for**

impleadment of public at large in a probate case is beyond the jurisdiction of the probate judge. (Para 19)

उत्तराधिकार अधिनियम (1925 का 39), धाराऐं 283 व 284 – प्रोबेट प्रकरण में पक्षकार – जब तक कि मृतक की सम्पदा में कोई हित न हो, किसी व्यक्ति को प्रोबेट कार्यवाहियों में पक्षकार नहीं बनाया जा सकता – चूंकि सर्वसामान्य, मृतक की सम्पदा में हित रखने वाला व्यक्ति नहीं है, उसे अनावेदक के रुप में पक्षकार बनाए जाने के लिए निदेशित नहीं किया जा सकता था – प्रोबेट प्रकरण में सर्वसामान्य को पक्षकार बनाए जाने के लिए निदेशित करना, प्रोबेट जज की अधिकारिता से परे है।

Cases referred :

(2008) 4 SCC 300, (2010) 7 SCC 417.

V.S. Shroti with *Priyankush Jain*, for the petitioner.
Akshat Agrawal, for the respondent No.1.
Rajas Pohankar, for the respondents No.2 to 5.

ORDER

SANJAY YADAV, J.: Heard.

1. Order dated 10.1.2012 passed by VI Additional District Judge, Jabalpur in Probate Case No. 7/2005 is being assailed vide this petition under Article 227 of the Constitution of India. Vide impugned order the Trial Court while entertaining an interlocutory application filed by respondent No.1/ applicant directed for impleadment of Public in General as respondent in the Probate case.

2. The probate case, at the instance of respondent No. 1/applicant, wife of late P.B. Patel, is for grant of probate based on Will dated 23.12.1991 of late P.B. Patel. The petitioner and respondent Nos. 2 to 5 are daughters and son of late P.B. Patel who are non-applicants in the probate case.

3. That, an application, I.A. 25 was filed by respondent No.1/ applicant; whereby she sought impleadment of Public in General as party respondent/ non-applicant No. 6. It was contended vide paragraph 6 of the application that although there is no provision in Indian Succession Act, 1925 to implead Public in General as party to the probate application, but as a matter of procedure to avoid any dispute in future by public against the estate of late

Parmanand Bhai Patel, which is subject matter of Will, it is necessary to implead Public in General as party respondent/non applicant No. 6.

4. The application was opposed by present petitioner/non-applicant No.1.

5. The Trial Court by impugned order allowed the application and directed for impleadment of Public in General as non applicant No. 6. Aggrieved, the petitioner/non-applicant No. 1 has assailed the said order vide this petition.

6. It is contended that the Trial Court ignoring the provisions contained under Sections 283 and 284 of Indian Succession Act, 1925 as also the principles culled out from Order 1 Rule 3 and order I Rule 10 Code of Civil Procedure, 1908 in respect of impleadment of necessary and/or proper party has erred in directing for impleadment of public in general as non-applicant No. 6. It is urged that the trial court exceeded its jurisdiction vested in it in directing the impleadment of Public in General. Reliance is placed on the decision in *Krishna Kumar Birla v. Rajendra Singh Lodha and others* [(2008) 4 SCC 300] and *Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Ltd. and others* [(2010) 7 SCC 417].to bring home the submission that unless necessary or a proper party, public at large cannot be impleaded as nonapplicant in a probate proceeding.

7. Learned counsel appearing for respondent No. 1 on his turn supports the impugned order. It is urged that with the impleadment of public in general, notices have already been issued by publication and the evidences have already been led as such the challenge to an order directing impleadment of public in general has lost its tenacity. It is further contended that no prejudice would be caused even if the impugned order is allowed to remain.

8. Learned counsel appearing for respondent Nos. 2 to 5 adopts the submission put-forth on behalf of respondent No. 1/ applicant.

9. Considered the rival submissions.

10. The issue which crops up for consideration is as to whether it was within the jurisdiction of the Trial Court to have directed for impleadment of public in general by entertaining an application for its impleadment.

11. Section 276 of the Act of 1925 makes a provision regarding petition for probate. It stipulates that an application for probate or for letters of

administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating there in the time of the testator's death, that the writing annexed is his last will and testament, that it was duly executed, the amount of assets which are likely to come to the petitioner's hands, and when the application is for probate, that the petitioner is the executor named in the will. Subsection (2) of Section 276 further obligates that, the petition shall further state when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

12. Subsection (3) of Section 276 provides for that where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.

13 Section 283 of the Act of 1925 provides for the powers of District Judge. It stipulates:

> 283. Powers of District Judge.(1) In all cases the District Judge or District Delegate may, if he thinks proper,
>
> (a) examine the petitioner in person, upon oath;
>
> (b) require further evidence of the due execution of the will or the right of the petitioner to the letters of administration, as the case may be;
>
> (c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.
>
> (2) The citation shall be fixed up in some conspicuous part of the court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

> (3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.

14. Apparent it is from clause (c) of sub-section (1) of Section 283 that it is within the power of District Judge or District Delegate to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

15. Sub Section (2) of Section 283 provides that the citation shall be fixed up in some conspicuous part of the court-house, and also in the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

16. Apparent it is from above provision that, the citation is issued to enable a person interested in the estate of the deceased to have a say which could be after taking note of citation and by invoking provisions of Section 284 of Act of 1925. Public at large cannot be said to be a person interested in the estate of the deceased.

17. In *Krishna Kumar Birla* (supra) in the context of conferment of discretion upon a Court vide clause (c) of sub-section (1) of Section 283, it has been observed:

> 85. Section 283 of the 1925 Act confers a discretion upon the court to invite some persons to watch the proceedings. Who are they? They must have an interest in the estate of the deceased. Those who pray for joining the proceeding cannot do so despite saying that they had no interest in the estate of the deceased. They must be persons who have an interest in the estate left by the deceased. An interest may be a wide one but such an interest must not be one which would not (sic) have the effect of destroying the estate of the testator itself. Filing of a suit is contemplated inter alia in a case where a question relating to the succession of an estate arises.
>
> Section 284 of the Act of 1925 stipulates:

284. Caveats against grant of probate or administration.

(1) Caveats against the grant of probate or administration may be lodged with the District Judge or a District Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had a fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

(4) Form of caveat.The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V.

While dwelling upon the aspect of caveatable interest it has been held in *Krishna Kumar Birla* (supra):

"85. We may, by way of example notice that a testator might have entered into an agreement of sale entitling the vendee to file a suit for specific performance of contract. On the basis thereof, however, a caveatable interest is not created, as such an agreement would be binding both on the executor, if the probate is granted, and on the heirs and legal representatives of the deceased, if the same is refused.

86. The propositions of law which in our considered view may be applied in a case of this nature are:

(i) To sustain a caveat, a caveatable interest must be shown;

(ii) The test required to be applied is: does the claim of grant of probate prejudice his right because it defeats some other line of succession in terms whereof the caveator asserted his right.

(iii) It is a fundamental nature of a probate proceeding that whatever would be the interest of the testator, the same must be accepted and the rules laid down therein must be followed. The logical corollary whereof would be that any person questioning the existence of title in respect of the estate or.

capacity of the testator to dispose of the property by Will on ground outside the law of succession would be a stranger to the probate proceeding inasmuch as none of such rights can effectively be adjudicated therein."

18. Thus, on a citation being issued under Section 283 (1) (c), a person having a caveatable interest in the estate of the deceased gets an opportunity under Section 284 to lodge the caveat in the proceedings.

19. When overall scheme of Sections 283 and 284 of the 1925 Act is taken into consideration, it is clear that unless there is an interest in the estate of the deceased a person cannot be made party in probate proceedings. In other words public at large being not a person interested in the estate of the deceased could not have been directed to be impleaded as non-applicant No. 6. At most the trial court could have exercised the discretion vested in it under Section 283 (1) (c) of Act of 1925. However, directing for impleadment of public at large in a probate case being beyond the jurisdiction of the probate judge, the impugned order cannot be given the stamp of approval.

20. The impugned order dated 10.1.2012 is accordingly set aside.

In the result petition is allowed to the extent above.

C.c. as per rules.

Petition allowed.

I.L.R. [2013] M.P., 363
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 13287/2009 (Jabalpur) decided on 17 January, 2013

DEVI DAYAL JHA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

*A. **Interpretation of Statutes - Delegation** -* **Collector was the appointing authority of Patwari - However, the appointment of patwari was delegated to S.D.O. by State Govt - However, it is well established in law that the delegating authority will not only retain the power to revoke the grant but also the power to act concurrently on matters within the area of delegation, except in so far as it may already have become bound by act of its delegate. (Para 6)**

क. कानूनों का निर्वचन – प्रत्यायोजन – पटवारी का नियुक्ति पाधिकारी कलेक्टर था – परंतु, पटवारी की नियुक्ति को राज्य सरकार द्वारा एस.डी.ओ. को प्रत्यायोजित किया गया – तथापि, विधि में यह भलीभांति स्थापित है कि प्रत्यायोजन करने वाला प्राधिकारी न केवल मंजूरी वापस लेने की शक्ति रखता है बल्कि प्रत्यायोजन के अधिकार क्षेत्र के भीतर मामलों पर साथ–साथ कार्यवाही करने की भी शक्ति रखता है, सिवाय जहां तक उसके प्रतिनिधि की कार्यवाही द्वारा वह पहले ही आबद्ध हो गया हो।

***B. Service Law - Termination - Appointing/Disciplinary Authority* - Petitioner was appointed as Patwari by the Collector - S.D.O. has no authority to pass the order of termination of service. (Para 7)**

ख. सेवा विधि – सेवा समाप्ति – नियुक्ति/अनुशासनिक प्राधिकारी – कलेक्टर द्वारा याची को पटवारी के रुप में नियुक्त किया गया – एस.डी.ओ. को सेवा की समाप्ति का आदेश पारित करने का कोई प्राधिकार नहीं।

Cases referred :

2008(4) MPLJ 44, AIR 1966 SC 1404, (2005) 2SCC 334.

D. Chandra Mallik, for the petitioner.

Piyush Dharmadhikari, G.A. for the respondents .

ORDER

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

2. In this petition, the petitioner has assailed the validity of the order dated 7.11.2009 by which the appeal preferred by the petitioner against the order of dismissal has been rejected. The petitioner inter alia also seeks a direction to accord him all consequential benefits.

3. The facts, leading to filing of the writ petition, briefly stated, are that the petitioner was appointed on the post of patwari on 18.7.1961 by the Collector and was posted in patwari circle- Pali, tahsil - Jatara, district - Tikamgarh. By order dated 19.9.1990 the petitioner was placed under suspension by the Sub-Divisional Officer. The petitioner assailed the validity of the aforesaid order in original application before the erstwhile M.P. Administrative Tribunal, Jabalpur (in short 'the tribunal'). The tribunal vide order dated 26.12.1990 inter alia held that in view of the automatic revocation of suspension as provided under rule 9 of the M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (in short 'the 1966 Rules') the respondents may permit the petitioner to join his duties or show cause. In compliance of the aforesaid order, the petitioner submitted his joining

on 7.1.1991. Thereafter a departmental enquiry was instituted against the petitioner and vide order dated 2.1.1991 the penalty of dismissal was imposed on the petitioner by the Sub-Divisional Officer. Against the aforesaid order, the petitioner filed an appeal under rule 23 of the 1966 Rules. The petitioner also challenged the validity of the order of dismissal in original application, namely, O.A. No.928/1992 before the tribunal. On abolition of the tribunal, the aforesaid original application was transferred to the High Court and was registered as W.P. No.7382/2003. The writ petition was disposed of by a Bench of this Court by order dated 18.9.2007 with the direction to the petitioner to prefer an appeal before the appellate authority and the appellate authority was directed to consider the quantum of punishment and decide the appeal within a period of three months. In compliance of the aforesaid order, the appellate authority vide order dated 7.11.2009, dismissed the appeal preferred by the petitioner.

4. Learned counsel for the petitioner while inviting the attention of this Court to Section 104 of the M.P. Land Revenue Code, 1959 (in short 'the Code') submitted that the Collector is the appointing authority of the petitioner and, therefore, the Sub-Divisional Officer has no authority in law to pass the impugned order. It is further submitted that the impugned order passed by the Sub-Divisional Officer in the capacity of disciplinary authority is per se without jurisdiction and ab initio void. However, the aforesaid aspect of the matter has not been properly considered by the appellate authority. In support of his submissions, learned counsel for the petitioner has placed reliance on the decision in *Vinod Kumar Khare v. State of M.P. and Others*, 2008 (4) MPLJ 44 as well as the order dated 10.1.2005 passed in W.P. No.7785/2003.

5. On the other hand, learned Government Advocate submitted while inviting the attention of this Court to the order passed by the appellate authority submitted that, in fact, by a notification dated 9.10.1959, the power of appointment of patwari was delegated by the State Government to the Sub-Divisional Officer and the Sub-Divisional Officer is appointing authority of the petitioner and, therefore, action has been taken against the petitioner by the competent authority which does not call for interference. It is further submitted that in the case of *Vinod Kumar Khare* (supra) and in the order dated 10.1.2005 passed in W.P. No.7785/2003, the notification dated 9.10.1959 has not been considered.

6. I have considered the submissions made by learned counsel for the parties. Section 104 (2) of the Code provides that the Collector shall appoint one or more patwaris to each patwari circle for the maintenance and correction

of land records and for such other duties as the State Government may prescribe. By notification dated 9.10.1959 the State Government has delegated the power of appointment of patwari to the Sub-Divisional Officer. However, it is well settled in law that the delegating authority will not only retain the power to revoke the grant but also the power to act concurrently on matters within the area of delegation, except in so far as it may already have become bound by act of its delegate. [See: *Godavari S. Parulekar v. State of Maharashtra*, AIR 1966 SC 1404 and *Ishwar Singh v. State of Rajasthan and Others*, (2005) 2 SCC 334]

7. In view of the aforesaid well settled legal position, notwithstanding the notification dated 9.10.1959 the Collector was competent to appoint the petitioner to the post of patwari. From perusal of the order dated 7.11.2009, it is apparent that the Collector himself recorded a finding that the petitioner is appointed by the Collector. The petitioner has annexed a copy of the relevant extract of service book (Annexure P-1) from which it is evident that the petitioner was appointed by the Collector. Thus, the Collector is appointing authority as well as the disciplinary authority of the petitioner. Admittedly, the order of dismissal was passed by the Sub-Divisional Officer in the capacity of disciplinary authority which cannot be sustained in the eye of law.

8. In view of the preceding analysis, the order dated 7.11.2009 and the order of dismissal of the petitioner dated 2.1.1991 are hereby quashed. It is well settled in law that question of grant of full backwages has to be considered in the facts of each case. [See: *Kanpur Electricity Supply Company Ltd. v. Shamim Mirza*, (2009) 1 SCC 20] In the instant case, though on 2.1.1991 the order of dismissal was passed by the Sub-Divisional Officer, the petitioner against the aforesaid order filed an appeal before the appellate authority under rule 23 of the 1966 Rules and simultaneously approached the erstwhile tribunal. Eventually, the original application preferred by the petitioner was registered as writ petition and was decided by this Court vide order dated 18.9.2007. Thus, the petitioner had prosecuted two remedies simultaneously. In the facts of the case, the petitioner in quite promptitude ought to have prosecuted the appeal diligently and should have ensured its' early decision. Thus, the petitioner cannot be allowed to take advantage of his inaction. Taking into account the conduct of the petitioner and in the facts of the case, I deem it appropriate to restrict the benefit of arrears of salary to the petitioner to 40%. However, the services of the petitioner shall be counted for the purpose of retiral dues and the petitioner shall be entitled to all consequential benefits.

Accordingly, the writ petition is allowed.

C.C. as per rules.

Petition allowed.

I.L.R. [2013] M.P., 367
WRIT PETITION
Before Mr. Justice Ajit Singh
W.P. No. 15036/2007 (Jabalpur) decided on 23 January, 2013

SATNA DIOCESAN SOCIETY ...Petitioner
Vs.
THE MUNICIPAL CORPORATION, REWA & anr. ...Respondents

A. Constitution - Article 226, Municipal Corporation Act, M.P. (23 of 1956), Section 149 - Alternative Remedy - **Availability of alternative remedy to file appeal does not take away the jurisdiction of High Court - It is a matter of discretion of the High Court to interfere or not to interfere.**

It is to be noted that, the present petition was entertained in the year 2007 and return has been filed - The petition involves a question whether the use of building and land by educational institution for education is covered under the exemption clause (c) of Section 136 of the Act from levy of property tax - In these circumstances, I do not think that it will be a proper exercise of discretion to throw away the petition because of the provision for appeal. (Para 8)

क. संविधान – अनुच्छेद 226, नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 149 – वैकल्पिक उपचार – अपील प्रस्तुत करने के वैकल्पिक उपचार की उपलब्धता, उच्च न्यायालय की अधिकारिता को नहीं हटाती – यह उच्च न्यायालय के विवेकाधिकार में है कि वह हस्तक्षेप करे या न करे।

B. Municipal Corporation Act, M.P. (23 of 1956), Section 136(c) - Exemption from property Tax - **Demand notices for property tax to the petitioner, a private educational institution - No express provision that exemption will not apply to private educational institution - Held - The petitioner's educational institution/school is exempted from the imposition of property tax in respect of building and land used by it exclusively for educational purposes. (Para 7)**

ख. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 136(सी)

– *सम्पत्ति कर से छूट* – याची, एक निजी शैक्षणिक संस्था को सम्पत्ति कर हेतु मांग नोटिस – कोई अभिव्यक्त उपबंध नहीं कि निजी शैक्षणिक संस्था को छूट लागू नहीं होगी – अभिनिर्धारित – याची की शैक्षणिक संस्था/शाला को उसके द्वारा अनन्य रुप से शैक्षणिक प्रयोजनों हेतु उपयोग में लाये जा रहे भवन व भूमि के संबंध में सम्पत्ति कर के अधिरोपण से छूट दी गई।

Rajesh Maindiretta, for the petitioner.
Harjas Singh Chhabbra, for the respondents.

ORDER

AJIT SINGH, J.: The petitioner is a society registered under the Madhya Pradesh Society Registrikaran Adhiniyam, 1973. It is running an educational institution Jyoti Senior Secondary School, Rewa in a building and land within the limits of Municipal Corporation, Rewa. The certificate dated 13.1.2000, Annexure P15, issued by the Tahsildar, Rewa confirms that the land on which Jyoti Senior Secondary School has been constructed also belongs to it. In the present petition, the petitioner has challenged the validity of demand notices, Annexures P2 and P5 issued to it by the Municipal Corporation, Rewa for payment of property tax relating to the land and building of the Jyoti Senior Secondary School.

2. The case of petitioner is that since it is using building and land exclusively for educational purposes, it is exempted from the levy of property tax under section 136(c) of the Municipal Corporation Act, 1956 (in short, "the Act") and, therefore, the impugned demand notices for payment of property tax being bad in law be quashed.

3. The Municipal Corporation, Rewa, in reply has defended the validity of demand notices for the property tax on the ground that petitioner, being a private educational institution is imparting education after charging fee and, therefore, it is not exempted from levy of property tax under section 136(c) of the Act. A plea has also been taken for the dismissal of petition in view of the availability of alternative remedy of appeal to the petitioner under section 149 of the Act against the demand of property tax.

4. The main question which calls for consideration is whether the petitioner's educational institution Jyoti Senior Secondary School is exempted from levy of property tax.

5. Chapter XI of the Act deals with taxation by Corporation. Sections 132,133,135 and 136 of the Act with which I am concerned occur in this

chapter. Section 132(1) relates to taxes which the Corporation must impose. Its relevant sub-section (1) (a) reads as under :

> **"132. Taxes to be imposed under this** Act.-(1) For the purpose of this Act, the Corporation shall, subject to any general or special order which the State Government may make in this behalf, impose in the whole or in any part of the Municipal Area, the following taxes, namely:-
>
> (a) a tax payable by the owners or building or lands situated within the city with reference to the gross annual letting value of the buildings or lands, called the property tax, subject to the provisions of Sections 135, 136 and 138."

6. Section 133 of the Act provides a procedure to be adopted by the Corporation while imposing any tax. Section 135 deals with the rate at which property tax can be imposed by the Corporation for each financial year. Section 136 provides for exemption from levy of property tax under section 135. The relevant clause (c) of section 136 reads as under :

> **"136. Exemptions.**- The property tax levied under section 135 shall not be leviable in respect of the following properties, namely:-
>
> (c) buildings and lands or portions thereof used exclusively for educational purposes including schools, boarding houses, hostels and libraries if such buildings and lands or portions thereof are either owned by the educational institutions concerned or have been placed at the disposal of such educational institutions without payment of any rent."

7. A bare reading of the above referred provisions clearly establishes that property tax is one of the taxes which the Corporation must impose but the imposition of this tax is subject to the provisions of sections 135 and 136. Clause (c) of section 136 also clearly states that exemption from levy of property tax applies to all the buildings and lands or portions thereof used exclusively for educational purposes. The only restriction is that buildings and lands should be owned by the educational institutions concerned or placed at the disposal of such educational institutions without payment of any rent. There is no express provision in the clause that exemption will not apply to private

educational institution which is imparting education and while doing so it is making profit. It is also not possible to read such an implied provision in the exemption clause. The expression used "exclusively for educational purposes" is wide enough to cover use for education by private schools. For these reasons, I have no hesitation in holding that the petitioner's educational institution Jyoti Senior Secondary School is exempted from the imposition of property tax in respect of building and land used by it exclusively for educational purposes.

8. As regards the plea taken by the Municipal Corporation, Rewa, for the dismissal of the petition on the ground of availability of alternative remedy to file appeal before the District Court under section 149 of the Act, I am of the view that provision for appeal does not take away the jurisdiction of High Court conferred under Article 226 of the Constitution. It is a matter of discretion of the High Court to interfere or not to interfere in case of such a provision. It is to be noted that, the present petition was entertained in the year 2007 and return has been filed. The petition involves a question whether the use of building and land by educational institution for education is covered under the exemption clause (c) of section 136 of the Act from levy of property tax. In these circumstances, I do not think that it will be a proper exercise of discretion to throw away the petition because of the provision for appeal.

9. The petition is allowed and the demand notices, Annexures P2 and P5 for property tax relating to the building and land of Jyoti Senior Secondary School used exclusively for educational purposes are quashed. No order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 370
WRIT PETITION

Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice M.A. Siddiqui
W.P. No. 16467/2012 (Jabalpur) decided on 28 January, 2013

IDEAL CARPETS LTD. ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

Customs Act (52 of 1962), Section 18, Customs (Provisional Duty Assessment) Regulation, 1963 - Regulations 2 & 4 - Condition of payment and surety - **Provisional duty assessed at Rs. 9,65,585/- and**

expected duty is Rs. 38,25,658/- - Petitioner was asked to deposit in cash Rs. 9,65,585/- and to execute a bond and Bank guarantee for Rs. 38,25,658/- - Held - Amount which could have been demanded from the petitioner should be 20% of the provisional assessment duty and for remaining duty, a bond with or without surety or security or both - Order demanding bank guarantee and deposit of full provisional assessment duty is contrary to the Regulations. (Para 9)

सीमा–शुल्क अधिनियम (1962 का 52), धारा 18, सीमा (अनंतिम शुल्क निर्धारण) विनियमन, 1963 – विनियम 2 व 4 – भुगतान की शर्त एवं प्रतिभू – अनंतिम शुल्क, रु. 9,65,585/– निर्धारित किया गया और प्रत्याशित शुल्क रु. 38,25,658/– है – याची को रु. 9,65,585/– नगद जमा करने के लिए कहा गया और रु. 38,25,658/– की बैंक प्रत्याभूति व बंधपत्र निष्पादित करने के लिये कहा गया – अभिनिर्धारित – याची से मांगी जा सकने वाली रकम, अनंतिम निर्धारण शुल्क का 20 प्रतिशत होनी चाहिए और शेष शुल्क हेतु, प्रतिभू या प्रतिभूति या दोनों के साथ अथवा उसके बिना बंधपत्र – बैंक प्रत्याभूति की मांग एवं संपूर्ण अनंतिम निर्धारण शुल्क को जमा करने का आदेश विनियमनों के विरुद्ध है।

Case referred :

2012 (275) ELT 303(Kerala).

Sudha Pandit & Pritam Jaiswal, for the petitioner.
S.A. Dharmadhikari, for the respondents.

ORDER

The Order of the Court was delivered by,
K.K. LAHOTI, J.: This petition is directed against an order Annexure P/10 dated 20.6.2012 by which a provisional assessment order has been framed against the petitioner. For ready reference, we quote the entire order which reads thus:-

> "Consequent upon the order dated 10.05.2012 of Hon'ble High Court of M.P. at Jabalpur in WPNo.378/2012, the importer M/s Ideal Carpets Ltd was personally heard on 21.05.2012. The importer contended during hearing that goods have been in ICD for more than 12 months. The condition of the imported cargo has been deteriorated considerably and value should be assessed considering this fact and assessment as well as clearance should be done accordingly. In their

written submission they requested that the order passed by Hon'ble High Court of MP at Jabalpur in WP No.378/2012 may be complied with and consignment involved in B/E No.2842630 dated 24.02.2011 and B/E 3470916 dated 11.05.2011 may be released accordingly. As per direction of the Hon'ble Court and hearing held on 21.05.2012. In view of the fact that investigation by DRI into the undervaluation of the consignment covered in these two B/Es is still not over, the duty liability on these two Bills of Entry are hereby ordered to be provisionally assessed under Section 18 of the Customs Act, 1962 subject to the importer executing a bond and bank guarantee for Rs.38,25,658/- separately and depositing in cash the provisionally assessed duty of Rs.9,65,585/-. The said amounts have been calculated considering the provisional value @USD 7 per sq.yard and value likely to be finally assessed @ 22 USD per Sq.Yard. Penalties expected to be imposed under Sections 112 read with Sec. 111(m) and 114A of the Customs Act, 1962, for undervaluation and short levy due to willful mis-statement or suppression of facts, if any, as may be found as a result of the ongoing investigation, has also been taken into account for the purpose of estimating the amounts of bond and bank guarantee, as DRI in letter dated 25.08.2011 and 26.09.2011 has directed that the bond and bank guarantee should be finalized considering the additional duty liability, if any, along with penalty which may be imposed later on.

2. The importer has also imported 13 no. of furniture and office equipment vide Bill of Entry No.3470916 dated 11.05.2011. The value of the imported furniture being not under dispute, the importer has to pay duty liability of imported furniture i.e. Rs.3720/- also at the time of release of goods."

2. It will be pertinent to mention here that before this order, the petitioner had filed a writ petition before this Court which was registered as W.P.No.378/2012 and was finally disposed of on 10.5.2012 by which respondents were directed to extend an opportunity of personal hearing to the petitioner and to pass a fresh order in respect of provisional assessment. By an earlier order dated 12.10.2011, respondents herein had directed the petitioner to furnish

bond and bank guarantee of Rs.1,68,32,900/- which included differential duty of Rs.84,16,450/-, penalty of equal amount and an additional deposit of Rs.28,78,410/- towards provisional duty for provisionally releasing the goods. In the earlier round of litigation, it was intimated to the Court that the goods of the petitioner were not seized, but were retained subject to provisional assessment under Section 18 of the Customs Act, 1962 and respondents were ready to release the goods in case the amount so assessed is deposited. The Division Bench of this Court in W.P.No.378/2012 directed the respondents to hear the petitioner and pass an order in accordance with law. In consequence to the order in W.P.No.378/2012, the order quoted hereinabove has been passed by the respondents. This order has been assailed by the petitioner on the following grounds:-

> (i) That, under Regulation 2 of the Customs (Provisional Duty Assessment) Regulations, 1963, only 20% of the provisional assessment duty could have been directed to be deposited and for remaining duty, respondents could have demanded a bond with or without surety or security or both, as they may deem fit, but directing the petitioner to deposit entire amount of provisional assessment order is without jurisdiction.
>
> (ii) That, since 24.2.2011, the goods are lying with the respondents, but no final assessment order has been framed.

3. It is submitted that the respondents may be directed to accept 20% of the provisional duty and to release the goods forthwith.

4. Shri Dharmadhikari, learned counsel appearing for respondents opposed the aforesaid contentions and submitted that as per provisional assessment order, there is a finding that the goods were undervalued. As per petitioner, price of the goods was shown as US Dollar 7 per Sq.Yard while price of the goods was 22 US Dollar per Sq.yard and the aforesaid amount of Rs.38,25,658/- is the amount which could have been found by way of duty against the petitioner, but inspite of this, provisional assessment duty has been assessed at Rs.9,65,585/-. It is submitted that the petitioner may deposit provisional assessed duty and may furnish bond and bank guarantee of Rs.38,25,658/- as has been shown in the order. It is also submitted that in case the goods are released on deposit of 20% of the provisional assessment amount, there may be a possibility that remaining amount of the duty as may be finally assessed may not be recovered from the petitioner as petitioner

company is based at Bhadohi (U.P.) and the respondents are not in a position to say that the remaining amount can be recovered from the petitioner. Reliance is placed to a judgment of a Division Bench of Kerala High Court in *Mohammed Fariz and Co. Vs. Commissioner of Customs* reported as 2012 (275) E.L.T. 303 (Kerala) and submitted that this petition may be dismissed.

5. To appreciate the aforesaid contentions, it would be appropriate, if the regulations 2 & 4 of the Regulations are referred, which read thus:-

> **2. Conditions for allowing provisional assessment. —** Where the proper officer on account of any of the grounds specified in sub-section (1) of section 18 of the Customs Act, 1962 (52 of 1962), is not able to make a final assessment of the duty on the imported goods or the export goods, as the case may be, he shall make an estimate of the duty that is most likely to be levied hereinafter referred to as the provisional duty. If the importer or the exporter, as the case may be, executes a bond in an amount equal to the difference between the duty that may be finally assessed and the provisional duty and deposits with the proper officer such sum not exceeding twenty per cent of the provisional duty, as the proper officer may direct, the proper officer may assess the duty on the goods provisionally at an amount equal to the provisional duty.
>
> **4. Surety or security of the bond. —** The proper officer may require that the bond to be executed under these regulations may be with such surety or security, or both, as he deems fit.

6. Aforesaid regulations specifically provide that under Section 18(1) of the Customs Act, if a final assessment cannot be made, the assessing authority shall make an estimate of the duty that is most likely to be levied as the provisional duty and if the importer executes a bond in an amount equal to the difference between the duty that may be finally assessed and the provisional duty and deposits with the proper officer such sum not exceeding 20% of the provisional duty, as the said officer may direct, the proper officer may assess the duty on the goods provisionally at an amount equal to the provisional duty. Regulation 4 further provides that a bond may be asked with surety or security or both as the authority may deem fit. Aforesaid provision is very clear. It

provides that 20% of the provisional assessment duty has to be deposited by the importer and for remaining amount of the provisional duty, a bond may be asked with surety or security or both. For the difference of the duty which can be levied on the petitioner, a bond can be asked from the importer.

7. The Division Bench of Kerala High Court considering the similar provision in *Mohammed Fariz & company* (supra), held in paras 12 and 13 thus:-

> "12. Since we have considered the scope of provisional assessment under Section 18 of the Act, we have to necessarily deal with the conditions with regard to collection of duty and security and release of goods pursuant to orders issued under Section 18 of the Act. In this regard conditions of provisional assessment and release of goods are contained in Regulation 2 & 4 of the Regulations framed under Section 157 read with Section 18(1) of the Act, which are extracted hereunder for easy reference;
>
> **2. Conditions for allowing provisional assessment.** — Where the proper officer on account of any of the grounds specified in sub-section (1) of section 18 of the Customs Act, 1962 (52 of 1962), is not able to make a final assessment of the duty on the imported goods or the export goods, as the case may be, he shall make an estimate of the duty that is most likely to be levied hereinafter referred to as the provisional duty. If the importer or the exporter, as the case may be, executes a bond in an amount equal to the difference between the duty that may be finally assessed and the provisional duty and deposits with the proper officer such sum not exceeding twenty per cent of the provisional duty, as the proper officer may direct, the proper officer may assess the duty on the goods provisionally at an amount equal to the provisional duty.
>
> **4. Surety or security of the bond.** — The proper officer may require that the bond to be executed under these regulations may be with such surety or security, or both, as he deems fit.
>
> "13. What is clear from Section 18(1) read with the above

Regulations is that the Officer could make provisional assessment and release goods under Section 18 of the Act pending final adjudication only after ensuring that the actual duty that could be levied later will be recoverable from the party. For this purpose, the provisions of the Act and the Regulations above referred provide for determination of duty based on available documents, evidence and claim made by the party and also estimation of duty which according to the Officer is likely to be levied finally. So much of the duty determined based on the documents and claim of the party is the admitted duty which the party has to straightly remit. The duty provisionally determined is nothing but the duty which the Officer estimates over the duty admitted by the party as payable based on his estimation on the value, classification or the rate applicable, which is essentially a matter to be determined by the Officer. Regulation 2 makes it clear that besides remittance of the admitted duty in terms of the claim of the importer/ exporter the officer can demand payment of duty up to 20% of the duty provisionally determined by him which is over and above the admitted duty payable in accordance with the claim of the party and assessed by the Officer. After remitting the duty in terms of the claim made by the party (admitted duty) and up to 20% of the provisional duty demanded by the Officer, the Officer is bound to collect security for the balance of the provisional duty which under Regulation 4 is through execution of bond supported by surety or security or both as the Officer deems fit. But we feel from the past follies of the Department stated by the learned Standing Counsel that the proper Officers provisionally assessing duty are under misunderstanding on the scope of Regulation (4) which requires surety or security in support of the bond executed which is noting but an undertaking to pay duty on demand. However, a surety bond should be valid only when it is supported by proper security, which may be by way of mortgage of immovable property or Bank Guarantee in favour of the Department or otherwise, and bond executed without proper security would serve only as a document to claim the amount. The Officer should realise that the best and safest course open to the Department is to demand

> Bank Guarantee from the local branch of a Nationalised Bank for balance provisional duty determined, so that recovery is ensured without any necessity for the Department to chase the parties and looking for their assets. In fact, credentials of the importer/exporter and such other matters should weigh with the Department in relaxing the condition for security, which in the normal course should be Bank Guarantee."

8. Aforesaid order does not say that importer is required to deposit entire amount of provisional duty, but interpreted Regulations 2 and 4 by saying that only 20% of the provisional duty is to be deposited and for remaining amount of duty, bond and bank guarantee can be asked from the importer and the action of the department in this regard was held to be justified.

9. The factual position in the present case is entirely different. As per order Annexure P/10 dated 20.6.2012, it is apparent that the provisional duty has been assessed at Rs.9,65,585/- which has been directed to be deposited while the petitioner herein has been directed to execute bond and bank guarantee for an amount of Rs.38,25,658/-. The reason assigned in the aforesaid order appears to be that the goods may be valued at the rate of 22 US Dollar per Sq. Yard while price was shown at the rate of 7 US Dollar per Sq.yard, apart from the penalty etc. Apparently, provisional assessment duty is for Rs.9,65,585/- and expected duty is Rs.38,25,658/-. The provisional assessment order was framed on 20.6.2012 and the period of nearabout seven months have elapsed from the date of provisional assessment order. The goods are lying with the respondents since February, 2011 and apparently nearabout two years have elapsed from the date when the aforesaid goods were retained by the department. In these circumstances, there appears to be no justification for asking bond and bank guarantee for Rs.38,25,658/- from the petitioner. The amount which could have been demanded from the petitioner should be 20% of the provisional assessment duty and for remaining duty, a bond with or without surety or security or both could have been asked from the petitioner. In view of aforesaid, it is apparent that order Annexure P/10 is contrary to the Regulations 2 and 4 and deserves modification by this Court. We could have remitted the matter to the respondents for passing another provisional assessment order, but looking to the fact that the goods are lying with the respondents since February, 2011, we propose to modify the order in following terms:-

(1) The petitioner herein is directed to deposit 20% of the provisional assessment duty Rs.9,65,585/- in cash or by way of demand draft as the case may be. For remaining amount of duty of Rs.9,65,585/-, petitioner shall furnish a bond alongwith bank guarantee to the respondents. For Rs.38,25,658/-, petitioner shall furnish a bond to the respondents that in case such duty is imposed, the petitioner shall deposit aforesaid amount with the respondents.

(2) Petitioner shall further execute a bond that in case some penalty is also imposed upon the petitioner in respect of undervaluing the goods, petitioner shall make payment of such amount within a period of 30 days from the date of such order subject to appeal, if any.

With the aforesaid directions, this petition is finally disposed of, with no order as to costs.

C.C. as per rules.

Petition disposed of.

I.L.R. [2013] M.P., 378
REVIEW PETITION
Before Mr. Justice R.C. Mishra
Review Petition No. 544/2012 (Jabalpur) decided on 29 January, 2013

UNION OF INDIA ...Petitioner
Vs.
UDAY PAL ...Respondent

A. Civil Procedure Code (5 of 1908), Order 47 Rule 1 - Review - **It is not permissible for an erroneous decision to be 'reheard and corrected'.** **(Para 8)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 47 नियम 1 – पुनर्विलोकन – गलत निर्णय की 'पुनः सुनवाई एवं सुधार' अनुज्ञेय नहीं।

B. Words and Phrases - 'erroneous decision' and an 'error apparent on the face of record' - Distinction between - **While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction.** **(Para 8)**

ख. शब्द और वाक्यांश – 'गलत निर्णय' एवं 'गलती जो अभिलेख से प्रकट होती है' – के बीच अंतर – जब कि पहला उच्चतर न्यायालय द्वारा सुधारा जा सकता, बाद का केवल पुनर्विलोकन अधिकारिता के प्रयोग द्वारा ही सुधारा जा सकता है।

Cases referred :

AIR 1976 SC 331, AIR 2004 SC 2321, AIR 1977 MP 116, (1997) 8 SCC 715.

N.S. Ruprah, for the petitioner.

ORDER

R.C. MISHRA, J.: Arguments concluded.

1. This is a petition, under Order XLVII Rule 1 of the Code of Civil Procedure, for review of the order-dated 5/3/2012 passed in M.A. No.464/2012, directing the Registry to return the appeal for its presentation before the Bench at Gwalior in view of the fact that cause of action had arisen at a place between Jora Alapur and Sumaoli Railway Stations located in Distt. Morena, that falls within the territorial jurisdiction of the Bench of this Court at Gwalior.

2. Learned counsel for petitioner, the Union of India, has strenuously contended that the order deserves to be reviewed as the order passed by the Tribunal, situated within the jurisdiction of the Principal Seat of this Court, constituted a part of cause of action and for the purpose, an analogy could have been drawn from Article 226(2) of the Constitution of India. To buttress the argument, implicit reliance has been placed on a four-judge Bench decision of the Apex Court in *Nasiruddin v. State Transport Appellate Tribunal* AIR 1976 SC 331, that has been explained in *Ms. Kusum Ingots and Alloys Ltd. v. Union of India and another* AIR 2004 SC 2321. Particular reference is made to Paragraph 24 and 25 of the Judgment in *Ms. Kusum Ingots and Alloys Ltd.*

3. Relevant extracts of Paragraph 24 and 25 (in extenso) may be reproduced here-in-below -

> *"24.....So far as the decision of this Court in Nasiruddin v. State Transport Appellate Tribunal (supra) is concerned it is not an authority for the proposition that*

the situs of legislature of a State or the authority in power to make subordinate legislation or issue a notification would confer power or jurisdiction on the High Court or a bench of the High Court to entertain petition under Art. 226 of the Constitution. In fact this Court while construing the provisions of United Provinces High Courts (Amalgamation) Order, 1948 stated the law thus :-

"The conclusion as well as the reasoning of the High Court is incorrect. It is unsound because the expression "cause of action" in an application under Art. 226 would be as the expression is understood and if the cause of action arose because of the appellate order or the revisional order which came to be passed at Lucknow then Lucknow would have jurisdiction though the original order was passed at a place outside the areas in Oudh. It may be that the original order was in favour of the person applying for a writ. In such case an adverse appellate order might be the cause of action. The expression "cause of action" is well-known. If the cause of action arises wholly or in part at a place within the specified Oudh areas, the Lucknow Bench will have jurisdiction. If the cause of action arises wholly within the specified Oudh areas, it is indisputable that the Lucknow Bench would have exclusive jurisdiction in such a matter. If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the dominus litis to have his forum conveniens. The litigant has the right to go to a Court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen partly within specified areas in arisen in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court is rightly

attracted by the alleged cause of action".

25. The said decision is an authority for the proposition that the place from where an appellate order or a revisional order is passed may give rise to a part of cause of action although the original order was at a place outside the said area. When a part of the cause of action arises within one or the other High Court, it will be for the petitioner to choose his forum."

4. The statutory provision in the form of sub-section (1) of Section 23 of the Railway Claims Tribunal Act, 1987 reads as under -

*23. **Appeals**.—(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or in any other law, an appeal shall lie from every order, not being an interlocutory order, of the Claims Tribunal, to the High Court having jurisdiction over the place where the Bench is located.*

(Emphasis supplied)

5. Observing that the language used in the amalgamation order is in *pari materia* with the language of the Notifications dated 28-11-1968 issued by President constituting permanent Benches at Gwalior and Indore President's Order read with S.51 (2) of the States Reorganisation Act, 1956 and both have been enacted to meet similar situations and with regard to a similar subject, a Full Bench of this Court in *Abdul Taiyab Abbasbhai Malik vs. Union of India* AIR 1977 MP 116, proceeded to follow the ratio in *Nasiruddin's* case (supra). G.L. Oza, J. (as his Lordship then was), speaking for the majority, made the following illuminating observations -

"High Court of Madhya Pradesh" only means the Chief Justice and such other Judges as may be appointed by the President to the said High Court. The place of sitting may be one or more, may be principal or otherwise; but it does not mean that the High Court means only the High Court sitting at the principal seat. The place of sitting is provided for the convenience of the litigating public and therefore sitting at different places they may hear cases from the respective districts only. S.51 of the States Reorganisation

Act itself contemplated the sitting of the High Court at more than one place. It is, therefore, clear that in view of the scheme of the States Reorganisation Act and in view of the context it could not be doubted that the provisions of the States Reorganisation Act contemplated the sitting of the High Court at different places with jurisdiction exercised by the Judges while sitting at those places in respect of areas allotted to those places for that purpose. The President's Notifications dated 28-11-1968 confers exclusive territorial jurisdiction on the respective Benches and it is not in contravention of Art.214 of the Constitution or Item 3 in List II of the Seventh Schedule of the Constitution.

The question whether a particular case arises in a particular district or not can properly be examined with due regard to the facts and circumstances of the case itself; and it would not be possible to deal with it hypothetically. References under the Income-tax Act, the Wealth-tax Act and other tax references do arise out of cases before statutory tribunals. For purposes of such references it would be necessary to find out where the case arose which gave rise to the reference and that would be the determining factor for purpose of the expression 'cases arising' in the districts specified in the Presidential orders. It cannot therefore, be said that such references do not fall within the expression 'cases arising' within a particular district and as such the Presidential order is not applicable to them at all and they must necessarily be instituted at the principal seat of the High Court. Such references are not outside the scope of the Presidential orders.

(underlined by me)

6. Accordingly, in absence of any order, issued by the Chief Justice in exercise of the powers conferred on him by the proviso to the aforesaid Presidential orders, directing that the appeals against the orders passed by the Tribunal in cases arising from the Revenue districts falling within the jurisdiction of the Gwalior and Indore Benches shall be heard and decided at Jabalpur, the

appeal ought to have been filed before the Bench at Gwalior only.

7. This apart, in *Ms. Kusum Ingots and Alloys Ltd' s* case (above), the Supreme Court also sounded a note of caution in the following terms -

> *"We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens."*
>
> (See. Paragraph 30)

8. There is yet another aspect of the matter. The review jurisdiction cannot be used as the appellate jurisdiction. In exercise of the jurisdiction under Order 47 Rule 1 CPC, it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review Jurisdiction (*Parsion Devi v. Sumitri Devi* (1997) 8 SCC 715 referred to).

9. To sum up, viewed from any angle, there is no error apparent on the face of record requiring reconsideration of the order-dated 5/3/2012 (supra).

The petition, therefore, stands dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 383
APPELLATE CIVIL
Before Mr. Justice G.S. Solanki
F. A. No. 139/2007 (Jabalpur) decided on 12 September, 2011

SURESH KUMAR KESHWANI & ors. ...Appellants
Vs.
KISHAN LAL VISHWAKARMA & ors. ...Respondents

Transfer of Property Act (4 of 1882), Section 52 - Transfer of property pending suit relating thereto **- Sale Deed was executed on 05.09.1983 whereas suit for declaration of title was filed on 02.11.1983**

- Sale deed was not challenged - Finding that sale deed was executed during the pendency of the suit and is not sustainable in law is perverse - However, as it was held in the previous suit that the property is a joint family property of plaintiff and defendant, therefore, the sale deed executed to the extent of share of the defendant is valid - Plaintiff is entitled to get partition of property and the defendants are under obligation to handover the vacant possession to the plaintiff.

(Paras 14, 18, & 19)

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 52 – लंबित वाद से संबंधित सम्पत्ति का अंतरण – विक्रय विलेख 05.09.1983 को निष्पादित किया गया जबकि हक की घोषणा हेतु वाद 02.11.1983 को प्रस्तुत किया गया – विक्रय विलेख को चुनौती नहीं दी गई – निष्कर्ष कि विक्रय विलेख को वाद लंबित रहने के दौरान निष्पादित किया गया और विधि अंतर्गत कायम रखने योग्य नहीं और विपर्यस्त है – तथापि, जैसा कि पूर्वतर वाद में अभिनिर्धारित किया गया था कि सम्पत्ति वादी और प्रतिवादी के संयुक्त परिवार की सम्पत्ति है इसलिए प्रतिवादी के हिस्से की सीमा तक निष्पादित किया गया विक्रय विलेख वैध है – वादी, सम्पत्ति का बंटवारा कराने के लिए हकदार है और प्रतिवादीगण रिक्त कब्जा वादी को सौंपने के लिए बाध्यताधीन हैं।

A.K. Jain, for the appellants.
Ashok Kumar Sharma, for the respondents.

JUDGMENT

G.S. Solanki, J. :- This appeal has been preferred by the appellants being aggrieved by judgment and decree dated 17.11.2006 passed by Fifteenth Additional District Judge (Fast Track Court), Jabalpur in C.S. No. 8-A/2006.

2. The facts giving rise to this appeal, in short, are that respondent No. 1 Kishan Lal Vishwakarma filed a suit for declaration, partition and possession before the trial Court in respect of house Nos. 183, 184 and 185 situated at Cherital, Damohnaka, Jabalpur. Plaintiff/respondent No. 1 pleaded that he and Ghanshyam Vishwakarma (since deceased) (father of respondent Nos. 3,4 and 5) were real brother, they have joint Hindu family property/house situated at Cherital, Damoh Naka, Jabalpur bearing Nos. 183, 184 and 185. It was further pleaded that in the year 1983 Ghanshyam ousted the plaintiff from the aforesaid property and did not allow him to collect the rent. House No. 184 was given on rent to appellant No. 1/defendant No. 1 Suresh Keshwani, who at that time was running a hotel in the name and style of 'Anand

Hotel'. It was further pleaded that Suresh Keshwani also refused to pay the rent to the plaintiff. Ghanshyam Vishwakarma used tricks and managed the property not to be recorded in the name of plaintiff Kishan Lal Vishwakarma.

3. In the aforesaid circumstances, plaintiff was forced to file Civil Suit No. 62-A/83 for declaration of his rights in the Court of Fifth Additional Judge to the Court of District Judge, Jabalpur, which was decreed on 29.2.1988 and right of plaintiff Kishanlal was declared. But defendant Ghanshyam filed an appeal F.A. No. 745/88 against the aforesaid judgment and decree, which was ultimately dismissed for want of prosecution on 4.1.1993. In this way the judgment and decree dated 29.2.1988 passed by the Fifth Additional Judge became final and effective. It was further pleaded that on the basis of aforesaid judgment, the plaintiff is entitled to ask for half of rent of Anand Hotel, which is situated at House No. 183. It was further pleaded that plaintiff sent a demand notice to Suresh Kumar and demanded the rent for the period of 3 years.

4. In the meantime, the then defendant Ghanshyam filed a suit against one Rajaram and another C.S. No. 23-A/92, in which a Commissioner was appointed for measurement of the spot. At the time of aforesaid measurement, Suresh Keshwani, appellant/defendant No. 1 appeared before Commissioner and announced that he is the owner of Anand Hotel. On the basis of aforesaid statement on record, plaintiff enquired into the matter and found that Ghanshyam Vishwakarma (father of respondents No. 3,4 and 5) sold this Anand Hotel to one Smt. Mom Bai/defendant No. 4 by registered sale deed dated 5.9.1983 and Smt. Mom Bai sold this portion to appellant Nos. 1,2 and 3/defendants by registered sale deed dated 31.3.1987.

5. It was further pleaded that both the aforesaid sale deeds were executed during the pendency of C.S. No. 62-A/83. Ghanshyam Vishwakarma designed that plaintiff Kishan Lal should not get anything even if he wins, therefore, he deliberately and quietly sold this property to Smt. Mom Bai/ defendant No. 4. Since aforesaid sale deeds were executed during the pendency of C.S. No. 62-A/83, in view of the provision of Section 52 of the Transfer of Property Act, purchasers in such cases are bound by the decree. Since in the aforesaid suit, plaintiff was declared joint owner of disputed property, therefore he has right to get declaration against these two sale deeds that they are void and ineffective. Alternatively, it was also pleaded that if the Court arrives at the conclusion that the title of half share of suit land transferred

by Ghanshyam Vishwakarma, by way of aforesaid two sale deeds, passed to subsequent purchasers, then plaintiff is entitled for partition of half share of the suit house.

6. Appellants No. 1 to 3/defendants filed their written statement before the trial Court. They admitted that plaintiff and defendant Ghanshyam Vishwakarma are real brother but denied that house Nos. 183, 184 and 185 situated at Cherital, Jabalpur is the property of joint Hindu family of plaintiff and Ghanshyam Vishwakarma. They further denied the tenancy between the plaintiffs and defendant No. 1 and pleaded that Ghanshyam Vishwakarma sold the aforesaid house to one Smt. Mom Bai. Respondent no. 4 and this defendant purchased the same property from Smt. Mom Bai. Though they denied that suit No. 62-A/83, pending before Fifth Additional District Judge, Jabalpur, was decreed in favour of the plaintiff, however, they pleaded that the Court declared house No. 183, 184 and 185 (ABC) joint family property of plaintiff, defendant Ghanshyam Vishwakarma and his brother Bhagwan Das.

7. Primarily it was contended that Ghanshyam Vishwakarma was the exclusive owner of the property, which was transferred to one Smt. Mom Bai/respondent No. 2 and Smt. Mom Bai transferred the same in favour of appellants/defendant Nos. 1, 2 and 3. Alternatively, it was prayed that the entire sale deed could not have been declared as null and void, as even if the decree of the earlier civil suit is taken into consideration that the property was joint between respondent No. 1 and late Ghanshyam Vishwakarma, still the transfer in favour of respondent No. 2 by late Ghanshyam Vishwakarma to the extent of his half undivided share was valid. It was further contended that these appellants were not party to the aforesaid civil suit filed by respondent No. 1 against late Ghanshyam Vishwakarma, therefore, appellants were bonafide purchasers of the aforesaid property. On the basis of aforesaid pleadings, prayer was made for dismissal of suit.

8. Learned trial Court framed as many as 6 issues and on appraisal of evidence and other material on record, partly decreed the suit in favour of respondent No. 1 by holding that sale deeds dated 5.9.1983 and 31.3.1987 were void transactions being hit by the provision of Section 52 of Transfer of Property Act. It was further declared that plaintiff is entitled to get partition of Anand Hotel/old house No. 184(ABC) New No. 2066 situated at Cherital, Jabalpur. Appellants were directed to hand over the vacant possession of half portion of aforesaid Anand Hotel to plaintiff/resopndent No. 1, hence this

appeal.

9. Learned counsel for the appellants has submitted that during pendency of this appeal he filed I.A. No. 1433/2007, an application under Order 41 Rule 27 read with section 151 of CPC for taking first order sheet of C.S. No. 62-A/1983 on record. He has further submitted that same is necessary for just decision of the appeal.

10. Learned counsel for respondents opposed the aforesaid application.

11. It is true that appellants could have produced the aforesaid order sheet during trial, however, in my opinion, the same is a public document and is necessary for just and proper adjudication of this appeal, hence application is allowed. Document is taken on record.

12. Learned counsel for the appellants further submitted that since execution of sale deed dated 5.9.1983 took place before institution of C.S. No. 62-A/1983 and Smt. Mom Bai was not made party in aforesaid suit and appellants bonafidely purchased property by sale deed on 31.3.1987, therefore, aforesaid transactions were not challenged in earlier suit, hence judgment and decree passed in 62-A/83 is not binding on any one of the purchasers. It is further submitted that late Ghanshyam Vishwakarma had purchased the property from Suresh Patel on 2.5.1983 and thereafter same was sold to Smt. Mom bai/ respondent No. 2 on 5.9.1983, in this way late Ghanshyam Vishwakarma had right to alienate the property to respondent No. 2 as he was the exclusive owner of the property. In the alternative, he contended that even assuming, although not admitting, judgment passed in earlier suit No. 62-A/83 declared the right of respondent No. 1 and late Ghanshyam Vishwakarma was having half share in the property, in this way Ghanshyam Vishwakarma had right to sell disputed property to respondent Smt. Mom Bai to the extent of his half share and consequently, Smt. Mom Bai executed the sale deed in favour of the appellants, therefore, transaction of appellant was valid up to the extent of half share of late Ghanshyam Vishwakarma, thus, the trial Court committed illegality in holding that all the sale deeds were null and void in the eyes of law, therefore, counsel has prayed for setting aside the judgment and decree passed by the trial Court.

13. Learned counsel for the respondents has submitted that Ghanshyam Vishwakarma deliberately disposed of disputed house in favour of Smt. Mom Bai behind the back of the plaintiff. He further contended that late Ghanshyam

Vishwakarma was not the exclusive owner of the aforesaid house because this fact was contested between respondent No. 1 Kishan Lal Vishwakarma and late Ghanshyam Vishwakarma in C.S. No. 62-A/1983, in which late Ghanshyam Vishwakarma cited Suresh Patel (seller of disputed house and executor of sale deed dated 8.5.1983) as witness in favour of Ghanshyam Vishwakarma. After appreciating whole evidence on record, trial Judge of that suit was of the view that merely on the basis of fact that property was purchased in the name of one brother during joint family, nature of property does not change, same still remains property of plaintiff (Kishan Lal) and defendant No. 1 late Ghanshyam Vishwakarma. Counsel has further submitted that this point was further challenged in appeal, which was dismissed, hence order has attained finality, therefore, late Ghanshyam Vishwakarma and thereafter, his heirs respondents No. 3, 4 and 5 had not challenged this matter before the trial Court and the appellants being successive purchasers of the aforesaid property, also have no right to challenge the same, therefore, he prays for dismissal of appeal.

14. I have perused the impugned judgment, evidence recorded by the trial Court, additional evidence adduced before this Court and other material on record. On perusal of order sheet dated 2.11.1983 of C.S. No. 62-A/1983, it reveals that civil suit titled as (*Kishan Lal Vishwakarma Vs. Ghanshyam Vishwakarma and others*) was filed on 2.11.1983 before Additional District Judge, Jabalpur. It is not disputed on record that alleged sale deed dated 5.9.1983 was executed by late Ghanshyam Vishwakarma in favour of Smt. Mom Bai/respondent No. 2 is prior to the date of filing of C.S. No. 62-A/83, therefore, finding of the trial Court in regard to fact that sale deed dated 5.9.1983 was executed during the pendency of C.S. No. 62-A/1983, is not sustainable in the eyes of law. It is also on record that Smt. Mom Bai was not party to C.S. No. 62-A/1983 and appellants were also not party to the aforesaid suit, but it is well established principle of law that a member of joint family can transfer the property only upto the extent of his share in the undivided joint family property. On perusal of judgment dated 29.2.1988 passed in C.S. No. 62-A/1983, it reveals that after recording the evidence and elaborate discussion of evidence on record, adduced by both brothers Kishan Lal and Ghanshyam Vishwakarma, it was held that disputed property was a joint family property of plaintiff/respondent No. 1 Kishan Lal and late Ghanshyam Vishwakarma/defendant No. 1.

15. It is also on record that since despite pleaded case of plaintiff/

respondent of this suit, late Ghanshyam Vishwakarma and thereafter his heirs respondents No. 3, 4 and 5 had not filed written statement to the aforesaid pleadings of entitlement of half share of plaintiff. As mentioned hereinabove, appeal of C.S. No. 62-A/1983 was dismissed and in this way the entitlement of half share of plaintiff in the disputed property attained finality between Kishan Lal respondent No. 1 and late Ghanshyam Vishwakarma and thereafter his heirs respondents No. 3 to 5.

16. Learned counsel for appellants further submitted that late Ghanshyam Vishwakarma purchased the disputed property from Suresh Patel by registered sale deed dated 2.5.1983 (Ex.D-1) but as mentioned hereinabove, this was elaborately discussed in previous suit No. 62-A/1983 in which Suresh Patel, seller/executent of the aforesaid sale deed (Ex.D-1) was examined as defence witness, but ultimately it was found that mere purchasing the property in the name of one of brothers of joint Hindu family, nature of property does not change and ultimately it was held that disputed property is joint family property. This finding has attained finality. I am also of the same view that mere purchasing the property in the name of late Ghanshyam Vishwakarma, during the joint family of Kishanlal Vishwakarma and Ghanshyam Vishwakarma, Ghanshyam Vishwakarma, cannot be said to be the exclusive owner of the aforesaid property.

17. Kishanlal/respondent No. 1 in C.S. No. 62-A/1983 filed by Ghanshyam Vishwakarma specifically denied in his cross-examination Paragraph - 6 that he admitted the fact that partition had taken place between him and Ghanshyam Vishwakarma on 22.2.1980. Since no such document filed on record in regard to C.S. No. 62-A/1983 and respondent No. 1 specifically denied this fact, therefore, it cannot be said that partition took place in the year 1980 and late Ghanshyam Vishwakarma was the exclusive owner of the disputed house.

18. On careful scrutiny of aforesaid oral and documentary evidence on record, I am of the view that trial Court committed illegality in declaring the sale deed dated 5.9.1983 executed by Ghanshyam Vishwakarma in favour of Smt. Mom Bai and sale deed dated 31.3.1987 executed by Mom Bai in favour of appellants null and void as a whole. This finding is unsustainable in the eyes of law, however, the trial Court rightly held that respondent No. 1/ plaintiff is entitled to get partition of old House No. 184(ABC), New No. 2066, Cherital, Damoh Naka, Jabalpur. Appellants/defendants no. 1 to 3 are

obliged to hand over the vacant possession to respondent No. 1/plaintiff.

19. In the result, the appeal is partly allowed. Impugned judgment and decree in regard to declaration of sale deed dated 5.9.1983 and 31.3.1987 as null and void as a whole, is hereby set aside. Same is held to be valid up to the extent of half share only. However, with respect to entitlement of half share of respondent No. 1 of old House No. 184(ABC), new No. 2066, Cherital, Jabalpur as well as direction to appellants/defendants No. 1 and 2 to hand over the vacant possession of aforesaid property/Anand Hotel, is hereby affirmed.

20. Appellants to bear their own cost and cost of respondents. Advocates' fee as per schedule or certificate, whichever is less.

21. Decree be drawn accordingly.

Appeal partly allowed.

I.L.R. [2013] M.P., 390
APPELLATE CIVIL
Before Mr. Justice R.C. Mishra
M.A. No. 3920/2011(Jabalpur) decided on 18 May, 2012

WOCKHARDT LIMITED ...Appellant
Vs.
D.M. PHARMA & anr. ...Respondents

A. Trade Marks Act (47 of 1999), Section 91 - Appeal - **Application for registration of trade mark was pending on the date when the suit for infringement of trade mark was filed - Suit was maintainable as the right to appeal would arise only after order or decision by the Registrar. (Para 6)**

क. व्यापार चिन्ह् अधिनियम (1999 का 47), धारा 91 – अपील – व्यापार चिन्ह् के पंजीयन हेतु आवेदन उस तिथि को लंबित था जब व्यापार चिन्ह् के अतिलंघन के लिये वाद प्रस्तुत किया गया – वाद पोषणीय था क्योंकि अपील का अधिकार केवल रजिस्ट्रार द्वारा आदेश या निर्णय के पश्चात उत्पन्न होगा।

B. Trade Marks Act (47 of 1999), Section 2(1) - Trade Mark - **Includes Name or Word also. (Para 7)**

ख. व्यापार चिन्ह् अधिनियम (1999 का 47), धारा 2(1) – व्यापार चिन्ह् – में नाम या शब्द भी समाविष्ट है।.

C. Trade Marks Act (47 of 1999), Section 29 - Trade Mark - Passing off - **Factors required to be seen - Discussed.** **(Para 9)**

ग. व्यापार चिन्ह् अधिनियम (1999 का 47), धारा 29 – व्यापार चिन्ह् – स्वीकार किया जाना – कारक जिन्हें देखा जाना अपेक्षित है – विवेचित।

D. Trade Marks Act (47 of 1999), Section 2(1)h - Deceptively Similar - **Suit has been filed for restraining the respondents from using the word DEXOLAM as it is identical or deceptively similar or resembling to the appellant's registered trade mark DEXOLAC - Held - Predominant factor is that both the products concern public health and ailing public requires protection against use of phonetically similar trade names, injury to appellant cannot be compensated in terms of money and balance of convenience is also in favor of appellant - Respondents restrained from using the trade mark including the trade name DEXOLAM.** **(Para 20)**

घ. व्यापार चिन्ह् अधिनियम (1999 का 47), धारा 2(1)एच – इतना समरुप, जिससे धोखा हो जाए – प्रत्यर्थीगण को शब्द डेक्सोलम **(DEXOLAM)** के उपयोग से रोकने हेतु वाद प्रस्तुत किया गया है क्योंकि वह अपीलार्थी के पंजीकृत व्यापार चिन्ह् डेक्सोलेक **(DEXOLAC)** के तद्रुप या इतना समरुप कि धोखा हो जाए या मिलता जुलता है – अभिनिर्धारित – प्रधान कारक यह है कि दोनों उत्पादन लोक स्वास्थ्य से संबंधित है और बीमार लोगों को सुनने में समान व्यापार नामों के उपयोग के विरुद्ध संरक्षण आवश्यक है, अपीलार्थी को कारित क्षति की पूर्ति रुपयों में नहीं की जा सकती तथा सुविधा की दृष्टि से अपीलार्थी का पलड़ा भारी है – प्रत्यर्थीगण को व्यापार चिन्ह् तथा व्यापार नाम डेक्सोलम **(DEXOLAM)** का उपयोग करने से प्रतिबंधित किया गया।

Cases referred :

AIR 2010 SC 3221, (1893) 10 R.P.C. 2000, AIR 1972 SC 2488, AIR 1965 SC 980, AIR 2001 SC 1952, 1962 RPC 265, AIR 1970 SC 2062, 1969 BLR 528, AIR 1989 Delhi 77, AIR 2003 All 114, AIR 2008 Bombay 122, AIR 1993 Bombay 237, AIR 1960 SC 142, AIR 2000 SC 2114.

R.N. Singh with *N.A. Padhye & A.J. Pawar,* for the appellant.
None for the respondent No.1.
Akhilesh Jain, for the respondent No.2.

ORDER

R.C. MISHRA, J.: This appeal, under Order XLIII Rule 1(r) of the Code of Civil Procedure (hereinafter referred to as 'the Code'), has been preferred against the order-dated 17.8.2011 passed by XIX Additional District Judge, Jabalpur in Civil Suit No.86-A/2011. By that order, the appellant's application, under Order 39 Rule 1 & 2 read with S.151 of the Code, for grant of temporary injunction, restraining the respondents from using the trade name/trade mark 'DEXOLAM' or any trade name/trade mark, which is identical or deceptively similar or resembling to the appellant's registered trade mark DEXOLAC, was dismissed.

2. The suit was filed, under Section 134 of the Trade Marks Act, 1999 (for short 'the Act') for infringement of Trade Mark 'DEXOLAC' registered in the name of appellant-Company and also for passing-off arising out of the use of trade name of DEXOLAM by defendants/respondents. The plaintiff/ appellant also prayed for relief of permanent injunction to the aforesaid effect together with ancillary reliefs including rendition of accounts of profits earned by the defendants by manufacturing and selling pharmaceutical preparation under the trade name of DEXOLAM.

3. As pleaded by the appellant -

(i) It is a company registered under the Companies Act, 1956, and its predecessors had started manufacturing and marketing of pharmaceutical and medicinal preparations in India way back in the year 1963. It has earned a wide reputation and goodwill of being one of the leading manufacturers of pharmaceutical and medicinal preparations of high quality. It is the registered proprietor of various trade marks including DEXOLAC, which is used by it in respect of food supplements for infants and invalids included in Class 5 of the Fourth Schedule to the Trade Marks Rules, 2002 under the Act. The trade mark has been openly, continuously and extensively used since 1982 and in the meanwhile, it had introduced several line extensions to the DEXOLAC brand such as DEXOLAC 1, DEXOLAC 2, DEXOLAC 3 and DEXOLAC SPECIAL CARE etc. Thus, the said trade mark has a distinctive character and has come to be identified exclusively with the medicinal and pharmaceutical preparations

manufactured by it.

(ii) Somewhere in the month of February, 2011, it was brought to the notice of its office bearers that one BMW Pharmaco India Ltd. (for brevity 'BMW') have been manufacturing medicinal and pharmaceutical preparation under the mark DEXOLAM (hereinafter referred to as 'the suit mark') and after making further enquiries, it was found that the respondents are the subsidiaries of the BMW. The medicine DEXOLAM contains the molecule "Alprazolam", which is a Scheduled H Drug used in the treatment of hypertension and none of the other products manufactured by BMW contains the prefix DEXO. It was further noticed that the application moved on behalf of the respondents for registration was pending before the Registrar of Trade Marks.

(iii) Adoption and use of the suit mark is going to create confusion in the mind of public and is likely to result dangerous to the public health particularly of infants and invalids, as even the doctors and physicians are not infallible and any mistake in administering the drug having a different composition and notified as Scheduled H Drug, may result in disastrous results.

4. The respondent no.1 did not prefer to contest the injunction application whereas the respondent no.2 fairly admitted use of the suit mark in respect of its product. However, it pleaded ignorance of the fact that the appellant is the registered holder of the Trade Mark DEXOLAC and submitted that there was no reasonable ground for believing that such a trade mark was registered and was in use.

While denying the allegations regarding infringement of the Trade Mark or passing off as false and baseless, the respondent no.2 has raised preliminary objection that the suit was without cause of action and was premature as the appellant had an alternative remedy of appeal, under Section 91 of the Act, against the order of decision of the Registrar, upon his application for registration of trade mark 'DEXOLAM'. In this regard, attention has been invited to the fact that after filing notice of opposition on 7.3.2011, the appellant had filed the suit, even without waiting for the decision of the Registrar.

In support of the explanation that there is nothing in the use of suit

mark that can mislead or deceive the consumers, it had not only pointed out that colour, get-up and price of both the products are totally different but has also highlighted the following distinctive dissimilarities between DEXOLAC and the suit mark *viz,* DEXOLAM -

S. No.	DEXOLAC is	DEXOLAM is
(i)	a milk product that can be sold even without any medical prescription.	a Scheduled H Drug to be sold only on prescription of a registered medical practitioner.
(ii)	available in packed tins.	available in strips of 10 tablets
(iii)	a vitamin and medicated product to be used as food supplement for infants and invalids	to be used in treatment of anxiety/tension

5. Scope of the appeal against the order refusing injunction in the case of infringement of the trade mark is well defined. Accordingly, the question is as to whether the discretion exercised by trial Court in refusing to entertain the prayer for temporary injunction is vitiated by an error apparent or perversity resulting in manifest injustice (*Skyline Education Institute (Pvt.) Ltd. v. S. L. Vaswani* AIR 2010 SC 3221 referred to).

6. At the outset, it may be observed that in view of the admitted fact that the application moved by the respondent no.2 for registration of the suit mark was pending before the Registrar on the date of the presentation of the suit, the objection as to its maintainability is apparently misconceived simply because right to appeal, under sub-section (1) of Section 91, is conferred upon the person aggrieved by the order or decision of the Registrar under the Act.

7. Before adverting to the factual aspects of the matter, it may be observed that definition of 'trade mark' as given in clause (zb) of Section 2(1) of the Act includes amongst other things 'name' or 'word' also. Meaning of 'trade mark' is best expressed by Bowen, L. J. (*In re, Powell's Trade Mark* (1893) 10 R.P.C. 2000) in these words -

> *"A trade mark means a mark used in relation to goods for the purpose of indicating a connection in the course of trade between the goods and some person having the right to use that mark. The function of a trade mark is*

to give an indication to the purchaser or a possible purchaser as to the manufacture or the quality of the goods, the give an indication to his eye of the trade source or the trade hands through which they pass on their way to the market"

(Quoted with approval by the Apex Court in *Sumat Prasad Jain v. Sheojanan Prasad* AIR 1972 SC 2488).

8. A bare perusal of the pleadings would reveal that, in essence, it is a suit for infringement of the trade mark and not for passing-off. For this, reference may be made to the decision of the Supreme Court in *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharmaceutical Laboratories* AIR 1965 SC 980 wherein distinction between an action for passing off and that for infringement of trade mark was explained thus -

"An action for passing off is a Common Law remedy being in substance an action for deceit, that is, a passing off by a person of his own goods as those of another. But that is not, the gist of an action for infringement. The action for infringement is a statutory remedy conferred on the registered proprietor of a registered trade mark for the vindication of "the exclusive right to the use of the trade mark in relation to those goods. The use by the defendant of the trade mark of the plaintiff is not essential in an action for passing off, but is the sine qua non in the case of an action for infringement. No doubt, where the evidence in respect of passing off consists merely of the colourable use of a registered trade mark, the essential features of both the actions might coincide in the sense that what would be a colourable imitation of a trade mark in a passing off action would also be such in an action for infringement of the same trade mark. But there the correspondence between the two ceases. In an action for infringement, the plaintiff must, no doubt, make out that the use of the defendant's mark is likely to deceive, but where the similarity between the plaintiffs and the defendant's mark is so close either visually, phonetically or otherwise and the Court reaches the conclusion that

there is an imitation, no further evidence is required to establish that the plaintiff's rights are violated. Expressed in another way, if the essential features of the trade mark of the plaintiff have been adopted by the defendant, the fact that the get up, packing and other writing or marks on the goods or on the packets in which he offers his goods for sale show marked differences, or indicate clearly a trade origin different from that of the registered proprietor of the mark would be immaterial; whereas in the case of passing off, the defendant may escape liability if he can show that the added matter is sufficient to distinguish his goods from those of the plaintiff"

(Emphasis supplied)

9. Further, in an action for passing off on the basis of unregistered trade mark generally for deciding the question of deceptive similarity, the following factors are required to be considered -

(a) The nature of the marks i.e. whether the marks are word marks or label marks or composite marks, i.e. both words and label works.

(b) The degree of resembleness between the marks, phonetically similar and hence similar in idea.

(c) The nature of the goods in respect of which they are used as trade marks.

(d) The similarity in the nature, character and performance of the goods of the rival traders.

(e) The class of purchasers who are likely to buy the goods bearing the marks they require, on their education and intelligence and a degree of care they are likely to exercise in purchasing and/or using the goods.

(f) The mode of purchasing the goods or placing orders for the goods and

(g) Any other surrounding circumstances which may be relevant in the extent of dissimilarity between the

competing marks.

[Weightage to be given to each of the aforesaid factors depends upon facts of each case and the same weightage cannot be given to each factor in every case] (See. Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd. AIR 2001 SC 1952)

10. Under sub-section (1) of Section 28 of the Act, the proprietor of the Registered Trade Mark gets exclusive right to use the trade mark in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of infringement of the trade mark, which is explained in sub-section (1) of Section 29 of the Act as under -

"A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to, the trade mark in relation to goods or services in respect of which the trade mark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trade mark"

11. The words 'deceptively similar' have been defined in Clause (h) of Section 2(1) of the Act. It reads thus -

"deceptively similar" a mark shall be deemed to be deceptively similar to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion;

12. Lord Denning explained the words 'to deceive' and the phrase 'to cause confusion' in *Parker Knoll Ltd. v. Knoll International Ltd.,* 1962 RPC 265 in the following manner-

"Secondly, 'to deceive' is one thing. To 'cause confusion' is another. The difference is this: When you deceive a man, you tell him a lie. You make a false representation to him and thereby cause him to believe a thing to be true which is false. You may not do it knowingly, or intentionally, but still you do it, and so you deceive him. But you may cause

confusion without telling him a lie at all, and without making any false representation to him. You may indeed tell him the truth, the whole truth and nothing but the truth, but still you may cause confusion in his mind, not by any fault of yours, but because he has not the knowledge or ability to distinguish it from the other pieces of truth known to him or because he may not even take the trouble to do so."

[Quoted by the Supreme Court in F. *Hoffimann-La Roche and Co. Ltd. v. Geoffrey Manners and Co. Private Ltd.* AIR 1970 SC 2062]

13. The decision in *Roche's* case (supra) is an authority for the proposition that the true test to be applied for judging an infringement is whether the offending trade mark is such that it is likely to cause deception or confusion or mistake in the minds of persons, accustomed to the existing registered trade mark.

14. For a ready reference, relevant extracts of Section 29(4) of the Act may be reproduced as follows -

"Section 29. Infringement of registered trade marks

(4) A registered trade mark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which-

(a) is identical with or similar to the registered trade mark; and

(b) is used in relation to goods or services which are not similar to those for which the trade mark is registered; and

(c) the registered trade mark has a reputation in India and the use of the mark without due cause takes unfair advantage of or is detrimental to, the distinctive character or repute of the registered trade mark"

15. Learned Senior Counsel has submitted that the respondents with a deliberate and systematic intent to make wrongful gain by adopting the suit

mark even before getting it registered are encashing goodwill and reputation earned by it during a considerable period. He is further of the view that as both the products, having a predominant similarity of 'DEXOLA' deal with human life, the paramount consideration in exercise of discretion is the public interest. According to him, the probability cannot be ruled out that the confusion arising from the marks which are deceptively similar may result in appreciable harm to infants or invalids.

16. *Per contra*, learned counsel for the respondent no.2 has strenuously contended that being Scheduled H drug, DEXOLAM cannot be sold without production of prescription of the registered medical practitioner. He is also of the opinion that any chemist is not expected to make such a mistake particularly when both the products are meant to serve altogether different purposes.

17. However, as observed by *Mody J, in Himalaya Drug Co. v. Warner-Lambert Pharmaceutical Co. 1969 Bombay Law Reporter 528*, though in a different context, after-all, the goods to which both the rival marks are to apply are drugs or pharmaceutical products and not articles like toys or combs or shoes or the like, in which cases, confusing one mark for the other would not result in some appreciable harm. In the case of drugs or pharmaceutical products, the ailing public requires a very great degree of protection and particularly, so when the result of a confusion occurring would be disastrous. Reference may also be made to the decisions in the following cases, pertaining to infringement of trade mark, justifying grant of temporary injunction to the plaintiff -

(i) *Bombay Oil Industries Pvt. Ltd. v. Ballarpur Industries Ltd. AIR* 1989 DELHI 77, wherein the marks "Saffola" and "Shapola" were held to be so phonetically similar as to give rise to confusion.

(ii) *Mumtaz Ahmad v. M/s. Pakeeza Chemicals AIR 2003 ALLAHABAD* 114 wherein plaintiff using trade mark "Pakeeza" super liquid blue" on its product of indigo was found entitled to grant of ad interim injunction against defendant using similar trade mark "Golden Pakeeza Super Liquid Blue" on its product of indigo, while observing that infringement causes injury to goodwill of aggrieved party and it also loses its faith in mind of public and there is also possibility of spurious goods being supplied under that trade mark and such type of injury

cannot be compensated in terms of money

(iii) *D. R. Cosmetics Pvt. Ltd. v. J. R. Industries AIR 2008 BOMBAY 122,* wherein the plaintiff manufacturing soap strips consisting of special paper on which a thin coating of soap is applied, was found entitled to injunction against the defendant, who was found using mark "BUFER" for their similar product in view of the fact that defendant commenced business in 2003, well over three decades after commencement. It was also held that plea of delay by plaintiffs in approaching the Court in absence of material on record to show that plaintiffs had acquiesced in use of offending mark by defendant would not be maintainable.

(iv) *Poddar Tyres Ltd. v. Bedrock Sales Corporation Ltd.* AIR 1993 Bombay 237 wherein the contentions that any trader who exclusively sells the goods bearing a registered trade mark, has a right to adopt a trade name which could include the said trade mark and that such adoption would not amount to infringement or passing off, were rejected holding that prima facie, existence of both was established.

18. In the background facts and circumstances of the case as well as the well settled position of law on the subject, it is not possible to hold that exercise of discretion in refusing to grant temporary injunction was based upon objective consideration of the material placed before the Court. Further, in case of infringement, it is for the Court to decide whether the marks are similar and the Court is required to approach it from the point of view of a man of average intelligence and imperfect recollection (*Corn Products Refining Co. v. Shangrila Food Products Ltd.* AIR 1960 SC 142).

19. This apart, while summing up the legal position by referring to almost all the earlier decisions and overruling its verdict in *S.M. Dyechem Ltd., M/s. v. M/s. Cadbury (India) Ltd.* AIR 2000 SC 2114, the Supreme Court in Cadila's case (ibid) reiterated the preposition that in a case of infringement of trade mark, dissimilarities cannot be given importance against similarities.

20. To sum up, negative findings on the issues of *prima facie* case, irreparable injury and balance of convenience deserve to be interfered with for these reasons -

(a) Predominant factor is that both the products concern public health and the ailing public requires protection against use of phonetically similar trade- names

(b) Injury to the appellant cannot be compensated in terms of money and

(c) Balance of convenience is in favour of the appellant in view of considerably long user of the trade mark.

21. Accordingly, the appeal is allowed. The respondents are restrained from using the trade mark including the trade name 'DEXOLAM' or any trade name/trade mark, which is identical or deceptively similar or resembling to the appellant's registered trade mark 'DEXOLAC' in any of their products. They may, however, carry on their business in any other name insofar as manufacturing of the Alprazolam tablets is concerned as per the terms of the licence granted to them.

22. In order to ensure early decision of the issues involved, it is further directed that the temporary injunction shall remain in force for a period of 6 months and within this period, the trial Court shall decide the suit on merits, in accordance with law.

Appeal allowed.

I.L.R. [2013] M.P., 401

APPELLATE CIVIL

Before Mr. Justice U.C. Maheshwari

S.A. No. 490/2012 (Jabalpur) decided on 10 July, 2012

HARGOVIND ...Appellant

Vs.

SAGUN BAI & ors. ...Respondents

A. ***Hindu Succession Act (30 of 1956), Section 8 - Share of parties*** **- After the death of father, the name of plaintiff, her brother and respondent No. 7 were mutated in revenue records being natural heirs - Name of plaintiff was subsequently excluded from revenue record - Entry in revenue record like khasra and khatoni could not be treated as document of title - Such record is prepared only for the purposes of saddling the liability to pay revenue of such land and not for any other purposes - Plaintiff was rightly held to be entitled for 1/ 3rd share. (Para 8)**

क. हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 8 – पक्षकारों का हिस्सा – पिता की मृत्यु के पश्चात वादी, उसके भाई व प्रत्यर्थी क्रं. 7 का नाम, प्राकृतिक वारिस होने के नाते राजस्व अभिलेख में नामांतरित किया गया – तत्पश्चात वादी का नाम राजस्व अभिलेख से अपवर्जित किया गया – खसरा और खतौनी जैसे राजस्व अभिलेख में प्रविष्टि को हक का दस्तावेज नहीं माना जा सकता – ऐसे अभिलेख केवल उक्त भूमि के राजस्व के भुगतान हेतु दायित्व लादने के प्रयोजनों हेतु तैयार किया जाता है और न कि किसी अन्य प्रयोजनों हेतु – वादी को उचित रुप से 1/3 हिस्से का हकदार अभिनिर्धारित किया गया।

***B. Hindu Succession Act (30 of 1956), Section 8 - Share of parties* - Affidavit/Relinquishment deed - Affidavit alleged sworn by plaintiff cannot be treated as relinquishment deed - Plaintiff had never relinquished her share in favor of appellant by executing the registered Release Deed or other admissible document - Co-ownership property cannot be released or transferred by one of the co-owners in favor of other without documentation of release deed or document of transfer. (Para 9)**

ख. हिन्दू उत्तराधिकार अधिनियम (1956 का 30), धारा 8 – पक्षकारों का हिस्सा – शपथ पत्र/त्यजन विलेख – अभिकंथित रुप से वादी की शपथ के शप्रथ पत्र को त्यजन विलेख के रुप में नहीं माना जा सकता – वादी ने अपने हिस्से का कभी भी अपीलार्थी के पक्ष में पंजीकृत मोचन विलेख या अन्य ग्राहय् दस्तावेज निष्पादित करके त्यजन नहीं किया है – सह–स्वामित्व की सम्पत्ति को एक सह–स्वामी द्वारा अन्य के पक्ष में, मोचन विलेख का दस्तावेज बनाये बिना या अंतरण के दस्तावेज के बिना विमुक्त या अंतरित नहीं किया जा सकता।

***C. Stamp Act (2 of 1899), Section 35 - Registration of document* - Document not drawn up on the proper stamp duty and the same is not registered under the prescribed procedure, then such document is inadmissible under the law. (Para 11)**

ग. स्टाम्प अधिनियम (1899 का 2), धारा 35 – दस्तावेज का पंजीकरण – उचित स्टाम्प डयूटी पर दस्तावेज नहीं बनाया गया और उसे विहित प्रक्रिया के अंतर्गत पंजीकृत नहीं किया गया, तब उक्त दस्तावेज विधि अंतर्गत अग्राहय् है।

Cases referred :

AIR 1994 SC 1653, 1997 RN 195.

Sandeep Koshta, for the appellant.

ORDER

U.C. MAHESHWARI, J.: The appellant – defendant has challenged the sustainability of the judgment dated 23.1.2012 passed by the Ist Additional District Judge, Khurai, district Sagar in Civil Regular Appeal no. 18-A/2011 affirming the judgment and decree dated 29.10.2007 passed by IInd Civil Judge, Class-II, Khurai in Civil Original Suit No. 243-A/2005 decreeing the suit filed by one Sagun Bai, since deceased, the predecessor in title of respondent nos. 1 to 6 declaring her 1/3rd share in the disputed agricultural land against her brother and sister, the appellant and the respondent no. 7.

2. The facts giving rise to this appeal in short are that abovenamed Sagun Bai the the predecessor in title of respondent nos. 1 to 6 in her life time filed the suit against her real brother and appellant, defendant no. 1 and respondent no.7 for declaring her 1/3rd share and separate possession of the agricultural land bearing survey no. 109/2, area 1.59 hectares situated at village Chamrua and survey no. 830 area 0.38 hectare situated at village Malasunedi, contending that land was recorded in the revenue record as Bhumiswami in the name of their father Sattu, son of Mohanlal, who passed away before ten years from the date of filing the suit, i.e. 20.12.2002. After the death of father, the name of appellant, Sagun Bai- plaintiff and respondent no. 7 was mutated in such revenue record as natural heir and legal representatives of said Sattu. In the month of December 2001 on obtaining copy of the revenue record, Sagun Bai- the principle plaintiff came to know that her name has been excluded from the revenue record. It is further stated that on some occasion, the appellant asking her to get loan for construction of a well on the field and brought her to court and had taken her thumb impression on some papers. It is also stated that she has never left her share in the above mentioned land of her father in favour of the appellant. She being uneducated woman does not understand the technicalities of law. With these pleadings the aforesaid suit was filed.

3. In the written statement of the appellant by denying the averments of the plaint, it is further sated that the disputed land was bought by one Ramchander but by practicing fraud said Sattu had got mutated on his name in the revenue record. It is also stated that since 21.10.1999, it was known to the principle plaintiff that her name has not been mutated and recorded in the revenue record as Bhoomiswami because she herself appeared in the Revenue Case No. 07-A-06/99/2000 and by submitting the affidavit left her share in favour of the appellant. Accordingly the plaintiff voluntarily released her share

of the disputed property in favour of the appellant. In such premises, the plaintiff is not having any share in the disputed land. It is further stated that the principle plaintiff- Sagun Bai was never remained in possession of the disputed land pursuant to it, she could not be deemed to be the co-owner of the land with the appellant and, therefore, she did not have any right to get partition of the same. It is also stated that on account of his long possession of 25 years over the land, the alleged right of the plaintiff, if any in such property has also come to an end. With these pleadings, the prayer for dismissal of the suit is made.

4. On behalf of the respondent no. 7, neither the appearance was given nor written statement was filed, on which she was proceeded exparte in the trial court.

5. After framing the issues on aforesaid pleadings the evidence was recorded. On appreciation, the suit of the appellant was decreed by trial court holding her 1/3rd share in the disputed property with direction to give separate share. On challenging such decree by the appellant before the subordinate Appellate Court on consideration by dismissing his appeal, the decree of the trial court was affirmed, on which the appellant has come to this Court under Section 100 of the Code of Civil Procedure.

6. Shri Sandeep Koshta, learned appearing counsel for the appellant after taking me through the record of the trial court alongwith the judgment of the Courts below prayed to admit this appeal on the substantial questions of law proposed in the appeal memo.

7. Having heard the counsel at length, keeping in view their arguments, after perusing the record alongwith the impugned judgment, I am of the considered view that this appeal is not involving any question of law rather than substantial question of law for admission of this appeal.

8. Undisputedly, the disputed land was initially recorded in the name of said Sattu as Bhumiswami the father of the deceased – plaintiff as well as appellant and respondent no. 7, who passed away before ten years from the date of filing the suit. Subsequent to his death the deceased plaintiff, -appellant and respondent no. 7 being his natural hears and legal representatives inherited such property jointly and became co-owners of the same. It is settled proposition of law that entry of the revenue record like khasra and khatoni could not treated to be document of title. Such record is prepared by the Revenue Department only for the purposes of saddling the liability to pay the

revenue of such land and not for any other purpose. So in such premises, mutation proceeding or record could not be considered as document of title for any of the parties unless such right and title is proved by procedure prescribed under the law in this regard. After death of father in the lack of his any testamentary document like Will, his property shall be treated to be governed by the Hindu Succession Act and its Schedule, according to which deceased plaintiff – Sagun Bai, appellant and respondent no. 7 being daughter of the recorded Bhumiswami are entitled for equal share with the appellant, i.e. 1/3rd share and such right could not be excluded on the basis of the affidavit, as alleged sworn by the deceased plaintiff in favour of appellant. Such alleged affidavit could not be treated to be a document of Release or Relinquishment Deed of the property in favour of the appellant. As the same was neither drawn up as Relinquishment Deed by the deceased nor got registered by her with the Sub Registrar in accordance with the provision of Registration Act as well as Stamp Act.

9. It is undisputed fact and findings of the court below on record that the deceased -plaintiff had never relinquished her share in favour of the appellant by executing the registered Release Deed or other admissible document. The co-ownership property could not be released or transferred by one of the coowners in favour of the other co-owners or others without documentation of the Release Deed or the document of transfer. Besides this, on the basis of revenue record or mutation proceeding drawn up by the Tahsildar, Ex. D-1 to D-5 also it could not have been assumed or deemed by the Courts below that the deceased -plaintiff had left her share in favour of the appellant – defendant no. 1. In such circumstances, at this stage of Second Appeal the approach of the trial court holding 1/3rd share of the plaintiff in the disputed land does not require any interference. My aforesaid approach is based on the principle laid down by the Apex Court in the matter of *Jattu Ram Vs. Hakam Singh and others*, reported in AIR 1994 SC 1653.

10. So far question raised by the appellant's counsel that the appellant perfected the title on the share of the plaintiff by long or adverse possession is concerned, it is undisputed fact on record that before ten years from the date of filing the suit the aforesaid Sattu, father of the parties had passed away and thereafter at any point of time the appellant by declaring himself to be sole owner of the property in the knowledge of the deceased plaintiff against her right, title and share was not remained in uninterrupted possession of the property for twelve years, thus, in the lack of such material ingredients, it

could not be assumed or deemed that appellant had perfected his right and title over the disputed property against the deceased – plaintiff by adverse possession. Even otherwise, it is settled proposition of law that co-owner of the property if was remained in possession of the co-ownership property, then such possession of the co-owner is also deemed on behalf of other coowners as trustee of them. So in such premises, also it could not be said that the appellant had perfected his right on the share of the property of deceased – plaintiff. Besides this, as per settled prepositions the concurrent findings on the question of adverse possession being finding of fact could not be interfered under Section 100 of the CPC at the stage of second appeal, as laid down by this Court in the matter of *Ram Singh Vs. Kashiram* reported in 1997, R.N. 195.

11. In the lack of any registered document of the Release Deed as per requirement of the Registration Act merely on the basis of affidavit, (Ex. D-6) filed in the Court of Tahsildar, it could not be deemed or assumed that the deceased -plaintiff had relinquished her share in the disputed property in favour of the appellant. In view of provision of Section 35 of the Stamp Act, if the document is not drawn up on the proper stamp duty and the same is not registered under the prescribed procedure, then such document is inadmissible under the law and in such premises, also on the basis of affidavit, Ex.D-6 the appellant was not entitled to get any benefit against the share of deceased - plaintiff in the property in dispute.

12. So far the arguments of the appellant's counsel that the aforesaid affidavit, Ex. D/6 could have been relied on by the trial court after imposition of the penalty in accordance with the provisions of the Stamp Act and the Registration Act is concerned, firstly the appellant could not be permitted to raise this question first time at the stage of second appeal when the same was not raised before any of the Courts below. Secondly the alleged affidavit filed in some revenue proceeding could not be treated to be the document of relinquishment of the disputed property and, therefore, the Courts below could not consider the same as admissible document even by imposition of penalty treating such document to be a Relinquish Deed. So this question is also not giving rise any substantial question of law requiring consideration under Section 100 of the Code of Civil Procedure.

13. In view of aforesaid discussion, I have not found any question of law rather than substantial question of law requiring any consideration or

interference in the judgment impugned under Section 100 of the CPC at the stage of second appeal. Consequently this appeal being devoid of any merits is hereby dismissed at the stage of motion hearing.

Appeal dismissed.

I.L.R. [2013] M.P., 407
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
M.A. No. 1248/2012 (Jabalpur) decided on 21 August, 2012

MANOJ KUMAR & COMPANY ...Appellant
Vs.
GENERAL MANAGER WORKS & anr. ...Respondents

***Civil Procedure Code (5 of 1908), Section 20, Contract Act (9 of 1872), Section 28 - Territorial Jurisdiction - Satna and Jaipur Courts are having jurisdiction* - Parties by agreement conferred territorial jurisdiction to Courts at Jaipur only - Court at Satna rightly returned the plaint for filing of the same before the Court of competent jurisdiction at Jaipur. (Paras 8 to 10)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 20, संविदा अधिनियम (1872 का 9), धारा 28 – क्षेत्रीय अधिकारिता – सतना एवं जयपुर के न्यायालयों को अधिकारिता है – अनुबंध द्वारा पक्षकारों ने केवल जयपुर के न्यायालयों की क्षेत्रिय अधिकारिता मान्य की – सतना न्यायालय ने वादपत्र को जयपुर के सक्षम अधिकारिता के न्यायालय के समक्ष उसे प्रस्तुत किये जाने हेतु उचित रुप से वापिस किया।

Cases referred :

1992 MPLJ 323, AIR 1971 SC 740, (1995) 4 SCC 153, (2004) 4 SCC 671, (1989) 2 SCC 163.

V.K. Dubey, for the appellant.
Akshay Sapre, for the respondents.

JUDGMENT

A.K. Shrivastava, J. :- Feeling aggrieved by the order dated 24.11.2009 passed by the learned 2nd Addl., District Judge Satna in C.S. No. 4-B/2009 whereby the plaint has been returned to the plaintiff by directing him to present before the competent Court, this appeal under Order 43 Rule 1(a) of the CPC has been filed by the plaintiff.

2. Facts shorn of unnecessary detail lie in a narrow compass. A suit for realization of Rs. 4,68,000/-has been filed by the plaintiff/appellant in the Court of learned 2nd. Addl. District Judge, Satna praying that the suit be decreed along with the interest. An application under section 34 of the Arbitration Act, 1940 (in short 'old Act') read with section 8 of the Arbitration and Conciliation Act 1996 was filed in the suit by the defendants/respondents praying that an agreement was executed between the parties on 25-26/7/2004 wherein there is a clause of arbitration and further it was agreed upon by the parties that if any dispute would arise, the Jaipur Court shall have the territorial jurisdiction. Hence it was prayed that the matter be stayed by referring the dispute to the arbitrator.

3. The learned court below by the impugned order has directed the plaintiff to file the suit before the Jaipur Court in terms of the agreement and by exercising power conferred under Order 7 Rule 10 CPC returned the plaint to the plaintiff for filing the same before the Court at Jaipur. In this manner this appeal has been filed by the plaintiff assailing the impugned order of the Court below.

4. By placing reliance on the Full Bench decision of this Court in *Laxminarayan V. Food Corporation of India. Raipur* 1992 MPLJ 323 it has been submitted by the learned counsel for the appellant that after putting appearance through counsel by the defendants, even if there is a clause of arbitration in the agreement, the same has been forfeited and waived by the defendants and therefore, Satna court is having jurisdiction to try the suit. Learned counsel further submits that since the cause of action arose at Satna therefore, rightly the suit has been filed at Satna.

5. On the other hand, Shri Sapre learned counsel for the respondents has argued in support of the impugned order and submitted that because the parties have agreed in the agreement that Civil Court at Jaipur will have territorial jurisdiction, rightly the impugned order has been passed by learned Court below returning the plaint to the plaintiff to file it at Civil Court Jaipur. In support of his contention learned counsel has placed reliance upon three decisions of the Supreme Court *Hakam Singh V. M/s. Gammon (India) Ltd.* AIR 1971 SC 740, *Angile Insulations V. Davy Ashmore India Ltd and another* (1995) 4 SCC 153 and *Hanil Era Textiles Ltd V. Puromatic Filters (P) Ltd.* (2004) 4 SCC 671. Hence, it has been prayed that this appeal be dismissed.

6. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be dismissed.

7. So far as first objection raised by the learned counsel for the appellant that the defendants have waived their rights to refer the matter for arbitration is concerned, suffice it to say that on the first date of hearing after the defendants were served with the summons, they filed an application under section 34 of the old Act and also filed an application under section 8 of the Act of 1996 to refer the matter to the arbitrator and therefore it cannot be said that respondents/ defendants have waved their rights. Hence, the Full Bench decision of this Court in *Laxminarayan* (supra) is not applicable in the present case.

8. On the point of territorial jurisdiction section 20 CPC is quite clear. However, in the present case Civil Court at Satna and Civil Court at Jaipur both are having territorial jurisdiction and, therefore, in these circumstances if the parties have agreed to confer the territorial jurisdiction to Satna Court, said Clause in the agreement cannot be said to be in contravention of Sections 23 and 28 of the Indian Contract Act. The matter would have been certainly different if the Jaipur Court was not at all having any territorial jurisdiction. In that. situation, it can be very well said that Civil Court at Satna is not having territorial jurisdiction. In this context, I may profitably place reliance on the decision of the Supreme Court *Hakam Singh* (Supra) wherein it has been categorically held that it is not open to the parties by agreement to confer jurisdiction on a Court which it does not possess under the Code. But where two, courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy and such an agreement would not in contravention of section 28 of the Contract Act. In later decisions *Angile* (supra) and *Hanil* (supra) same principles have been reiterated by the Apex Court.

9. In the decision of *Angile* (Supra), the Supreme Court by placing reliance on the principles laid down in its earlier decision in *ABC Laminart (P) Ltd. A.P. Agencies* (1989) 2SCC 163 has laid down the following law:-

> "The controversy has been considered by this Court in *A.B.C. Laminart (P) Ltd. V. A.P. Agencies.* Considering the entire case law on the topic, this Court held that the citizen has the right to have his legal position determined by the ordinary Tribunal except, of course, subject to contract (a) when there an arbitration clause which is valid and binding under the law, and (b) when parties to a contract agree as to the jurisdiction

to which dispute in respect of the contract shall be subject. This is clear from Section 28 of the Contract Act. But an agreement to oust absolutely the jurisdiction of the Court will be unlawful and void being against the public policy under section 23 of the Contract Act. We do not find any such invalidity of clause (21) of the contract pleaded in this case. On other other hand, this Court laid that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewith, if the parties to the contract agreed to best jurisdiction in one such court to try the dispute which might arise as between themselves, the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague, it is not hit by Sections 23 and 28 of the Contract Act. This cannot be understood as parties contacting against the statute. Mercantile law and practice permit such agreements."

10. By testing aforesaid principles laid down by the Apex Court on the touchstone and anvil on the given case in hand, I find that same situation has arisen here also and therefore all the aforesaid case laws cited by learned counsel for the respondents are squarely applicable in the present case.

11. I have gone through the reasonings assigned by the learned Court below for returning the plaint to the plaintiff to file it before Jaipur and I do not find any illegality in it.

12. Resultantly this appeal fails and is hereby dismissed. No costs.

Appeal dismissed.

I.L.R. [2013] M.P., 410
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
F.A. No. 334/1996 (Jabalpur) decided on 5 September, 2012

KASHIRAM ...Appellant
Vs.
MITTHULAL & anr. ...Respondents

A. Specific Relief Act (47 of 1963), Section 20 - Specific Performance of Contract - Discretion of Court - **An agreement is read as a whole in order to ascertain true intention of the parties and if it is**

carved out that description of the property is not certain, the suit of specific performance of contract cannot be decreed. (Para 18)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – संविदा का विनिर्दिष्ट पालन – न्यायालय का विवेकाधिकार – पक्षकारों का वास्तविक आशय सुनिश्चित करने के लिए करार को संपूर्णता से पढ़ा जाता है और यदि दर्शित होता है कि सम्पत्ति का विवरण निश्चित नहीं है, तब संविदा के विनिर्दिष्ट पालन का वाद डिक्रीत नहीं किया जा सकता।

***B. Contract Act (9 of 1872), Section 29 - Uncertainty of agreement* - Land which was to be sold by defendant has been incorrectly described and is uncertain - The said agreement is void ab initio - Void document cannot be specifically enforced in a suit for specific performance of contract.**

On account of the uncertainty and the incorrect description of the suit property made in the document of agreement of sale, the same is void in terms of Section 29 and as such void document cannot be specifically enforced in a suit for specific performance of contract. (Para 26)

ख. संविदा अधिनियम (1872 का 9), धारा 29 – करार की अनिश्चितता – भूमि जिसका प्रतिवादी द्वारा विक्रय किया जाना था गलत रुप से वर्णित किया गया और अनिश्चित है – उक्त करार आंरभ से शून्य है – संविदा के विनिर्दिष्ट पालन हेतु वाद में शून्य दस्तावेज को विनिर्दिष्ट रुप से प्रवर्तित नहीं किया जा सकता।

Cases referred :

(2008) 5 SCC 58, 1979(1) MPWN SN 306, AIR 1958 SC 448, (2006) 1 SCC 697, AIR 2003 SC 2418, AIR 1974 SC 873, AIR 1951 Calcutta 10, AIR 1945 Madras 10.

Avinash Zargar, for the appellant.
Sankalp Kochar, for the respondents.

JUDGMENT

A.K. Shrivastava, J. :- Feeling aggrieved by the judgment and decree dated 15.05.1996 passed by learned 2nd Additional Judge to District Judge, East Nimar, Khandwa in Civil Suit No.85-A/1995 whereby the suit of specific performance of contract has been decreed, this appeal under Section 96 of CPC has been filed by the appellant/defendant.

2. Shorn of unnecessary detail, the facts of the case lie in a narrow compass. Suffice it to say that a suit for specific performance of contract has been filed by plaintiffs/respondents against the present appellant/defendant on the averments that he (defendant) is having open land, the description whereof has been mentioned in the Schedule attached to the plaint and which is also the part of the plaint. As per the plaint averments the parties entered into an agreement of sale on 1.12.1991 and it was agreed by the defendant to sell the suit land in favour of plaintiffs for a consideration of Rs.24,000/- and in advance a sum of Rs.3000/- was paid by the plaintiffs to him. A document of agreement of sale on the same day was also executed mentioning the factum of receipt of Rs.3000/- as advance. In the same agreement it has been further mentioned that on 1.1.1992 the plaintiffs shall also pay a further sum of Rs.7,000/- and the balance amount of Rs.14,000/- shall be paid by them on or before 5.4.1992 and thereafter the land in question mentioned in the schedule to the plaint shall be sold by the defendant by executing a registered sale-deed.

3. It is the further case of the plaintiffs that in terms of the agreement dated 1.12.1991, the plaintiffs came to the residence of defendant on 01.01.1992 with Rs.7000/- but at that juncture he was going to graze his she-buffaloes and told the plaintiffs that he will obtain Rs.7000/- in Court where he shall also pass on the receipt. At that juncture, Gyarsilal was also with the plaintiffs. The plaintiffs throughout remained in the Court upto 4.00 p.m. but when the defendant did not come on that day they sent a notice through their Counsel by registered AD post to the defendant stating therein that in terms of the agreement of sale they tried to pay Rs.7000/- and were also present in the Court as directed by the defendant but he did not come and therefore it appears that he is avoiding to perform his part of contract. Thus, by the said notice the defendant was asked to get the sale-deed executed. According to the plaintiffs, a wrong reply of the said notice was sent by the defendant in which it has been stated that the four boundaries mentioned in the document of agreement of sale are not correct and therefore he (defendant) is unable to perform his part of contract by executing the sale-deed. But, according to plaintiffs the said plea which has been taken in reply is not correct.

4. Thereafter before the agreed date i.e. 5.4.1992 on or before which the sale deed was to be executed, when the defendant did not execute the sale-deed another notice dated 10.02.1992 was sent by plaintiffs through their counsel by registered AD post to defendant and further he was asked to get the sale-deed executed. But, again a wrong reply was sent by him stating

the same stand which he took in his earlier reply. It has also been pleaded by the plaintiffs that they always remained ready to perform their part of contract but the defendant avoided to get the sale-deed executed. Hence present suit is being filed.

5. The defendant by filing written-statement specifically admitted the factum of execution of agreement of sale on 1.12.1991 for a consideration of Rs.24,000/- and also admitted that he obtained a sum of Rs.3000/- on that date as advance, but, specifically he has pleaded denying the factum that land in question was agreed to be sold for the simple reason that defendant does not own land, the description whereof has been mentioned in the document of agreement of sale and the land of such a description does exist at the spot and therefore said agreement on account of its uncertainty is null and void. The other averments of plaintiffs that on 1.1.1992 they came alongwith Rs.7000/- at 8.00 a.m. at his residence and at that juncture defendant was going to graze his she-buffaloes and further he asked the plaintiffs to come to Court where he shall obtain Rs.7000/- and other averments made in para 3 of the plaint have been specifically denied in the writtenstatement. The averments in regard to readiness and willingness have also been denied by the defendant.

6. In special pleas, the defendant has specifically pleaded that although the factum of execution of document of sale dated 01.12.1991 is admitted to him but he did not agree to mention the four boundaries described in the said document. Specifically defendant has pleaded that on the date of execution of agreement of sale he was disturbed because on that day his valuable she-buffalo was missing, as a result of which, without reading the document of agreement of sale he put his signature under the pressure of plaintiffs because they were insisting to sign it. However, lateron when plaintiffs gave a photocopy of the agreement of sale then only defendant came to know that four boundaries which are mentioned in the document of agreement of sale have been incorrectly described and as per the description of the four boundaries mentioned in the document there exists no open land of defendant. This fact was also disclosed to plaintiffs from time to time and particularly in the written reply sent by him twice against plaintiffs' notices. Hence the plaintiffs are not entitled for the relief which they have claimed and prayed that suit be dismissed.

7. Learned Trial Court framed necessary issues and after recording evidence of the parties decreed the suit by passing a decree of specific performance of the contract.

8. In this manner this first appeal has been filed by the defendant assailing the judgment and decree of learned Trial Court.

9. The contention of Shri Avinash Zargar, learned counsel for the appellant/ defendant is that it is borne out from the pleadings of the defendant in written-statement as well as in reply to plaintiffs' notices Ex.D/1 and D/2 that four boundaries of the land which is to be sold are not correct and since the defendant is not the owner of the disputed land and description of the four boundaries mentioned is uncertain, therefore, the contract (agreement of sale) Ex.P/1 dated 1.12.1991 is void *ab initio* in terms of Section 29 of the Indian Contract Act, 1872 (in short "Contract Act"). In support of his contention, learned counsel has placed heavy reliance on the decision of the Supreme Court *Vimlesh Kumari Kulshrrestha vs. Sambhajirao and another* (2008) 5 SCC 58 and Single Bench decision of this Court *Abdul Gaffar v. Kouleshiya Bai,* 1979(1) MPWN SN 306. By inviting my attention to the Section 14 of the Contract Act it has been put-forth by learned counsel that defendant was disturbed on the date of execution of the document of agreement of sale dated 1.12.1991 since his valuable she-buffalo was missing and under the pressure of plaintiffs he signed the document of agreement of sale having incorrect and uncertain description of the land to be sold and thus the signature which has been obtained by the plaintiffs was not with the free consent of defendant. Learned counsel has also invited my attention to Section 18 of the Contract Act defining the misrepresentation. Thus, it has been prayed that by allowing this appeal, the impugned judgment and decree be set aside and the suit of the plaintiffs be dismissed.

10. Combating the aforesaid submissions, it has been submitted by Shri Kochar learned counsel appearing for respondents/plaintiffs that the description has been properly mentioned in the document of agreement of sale and the same description has been stated in the schedule attached to the plaint. Learned counsel has invited my attention to wordings "or capable of being made certain" and submitted that the testimony of plaintiff No.1 Mitthulal (PW1) in para 5 is to be read in the contest to these wordings embodied in section 29 of the Contract Act and therefore it cannot be said that the contract is uncertain and hence it is void. Learned counsel has placed reliance upon the illustration (e) to Section 29 of the Evidence Act. He has also placed reliance on Section 91 and 92 of the Evidence Act and submitted that if a term of contract has been embodied in the document, no oral evidence can be given in proof of the

terms to that agreement except the document itself. In support of his contention learned counsel has placed reliance on certain decisions of Supreme Court *Bai Hira Devi and others vs. Official Assignee of Bombay,* AIR 1958 SC 448, *R. Janakiraman v. State* (2006) 1 SCC 697, *Roop Kumar v. Mohan Thedani,* AIR 2003 SC 2418 and *Mohindra Singh & Another v. State of Haryana* AIR 1974 SC 873. Hence, it has been prayed that this appeal be dismissed.

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

12. The factum of execution of agreement of sale dated 01.12.1991 between the parties is not disputed. Indeed the defendant himself is admitting the execution of this document and acceptance of Rs.3000/- towards advance mentioned in the document. But his plea is that description of the suit property is not correct and therefore the agreement is uncertain and void. It would be condign to quote the description of the land which was to be sold and the four boundaries mentioned in the document of agreement of sale which reads thus;

संपत्ति का वर्णन

1 आराजी खसरा नंबर 137/2 रकबा 6–37 डी. इस भूमि में से उत्तर तरफ से भण्डारिया रोड के पास से 18 फुट बाय 10 फुट की जमीन को छोड़कर आपको 00–12 डी बारह डेसीमल जमीन जमा 10 पैसे की है आपको बेचने का सौदा किया है । सौदा सुदा बारह डेसीमल जमीन की चतुरसीमा पूर्व को रामअवतार माली का खेत है पश्चिम को इसी नंबर में से हमारे द्वारा छोड़ा गया दस फुट चौड़ा रास्ता बाद मिट्टी प्रशिक्षण केंद्र की जमीन है उत्तर को हमारे द्वारा इसी नंबर की बाकी जमीन सौदा सुदा संपत्ति में आने जाने का रास्ता दस फुट छोड़े रास्ते से है व रहेगा बाकि खण्डवा तरफ मानकर की जमीन को आपको बचेने का सौदा किया है ।

13. In the present case, the defendant appears to be quite honest and his conduct is quite fair. If this Court goes prior to 3.4.1992 the date when the suit was filed and when the averments made in the pleadings were not there and particularly when this Court travels back to the date 11.02.1992 when the defendant sent his reply (Ex.D/1) to the notice of plaintiffs dated 1.1.1992 (Ex.P/2) this Court finds that the factum of execution of document has been admitted by the defendant so also receiving the amount of Rs.3000/- in advance and further term of agreement that amount of Rs.7000/- was to be paid on 01.01.1992 but specifically in para 2 of the reply (Ex.D/1) it is gathered that

on the date of execution of document of agreement of sale the valuable she-buffalo of defendant was missing and the defendant was disturbed. The plaintiffs on that date brought the typed document of agreement of sale by deliberately mentioning the mis-description of the property and although the defendant stated that today he is little bit disturbed but upon the insistence of plaintiffs he put his signature upon the document of agreement of sale under the pretext and assurance given by the plaintiffs that he would give photocopy of the document and in case there is some defect in the document it will be cured. Upon this assurance, the defendant put his signature. Thereafter lateron when the defendant received the photocopy of the document of agreement of sale he after going through it found that four boundaries mentioned in the document has been incorrectly mentioned and the description of the land which has been mentioned is not of defendant. In a very fair manner it has been stated in para 2 and 3 of the reply (Ex.D/1) that even today he (defendant) is ready to get his land sold to the plaintiffs and despite the defendant asked the plaintiffs to correct the description of the land, he is not ready and is avoiding to correct the four boundaries. Even today the defendant is ready to get his own land sold provided that four boundaries mentioned in the document should be corrected. The same stand has been again taken by him in his another reply dated 05.03.1992 (Ex.D/2) which was sent by him against the notice of plaintiffs dated 10.02.1992 (Ex.P/3). Thus, as soon as the defendant came to know that the four boundaries and description of land has been incorrectly and mistakenly written in the document of agreement of sale, repeatedly he was insisting the plaintiffs to get it corrected since he wants to sell his own land and not the land which he does not own and possess.

14. It be seen that when the defendant sent two replies Ex.D/1 and D/2, there was no suit. If the defendant would have been dishonest or unfair straightway he could have denied the execution of document of agreement of sale or might have raised some other stand in order to nullify the document of agreement of sale. The aforesaid replies were sent by the defendant through his counsel and therefore certainly upon the legal advice provided to the defendant that if any suit for specific performance of contract is filed, the same will be dismissed because contract is uncertain in regard to subject matter of the property. But, very fairly on 10.02.1992 itself in the reply defendant while admitting the execution of document of agreement of sale as well as factum of receiving advance amount of Rs.3000/- has stated that he is still ready to sell his own land having correct description mentioned in the document

of agreement of sale so that with certainty he could sell the land to the plaintiffs of his own.

15. Even after filing of the suit the same stand has been pleaded by the defendant in his written-statement specifically in the special pleas. The plaintiffs have specified the suit land in verbatim in the schedule to the plaint which has been described in the document of agreement of sale Ex.P/1 and which I have already quoted hereinabove.

16. According to me, Shri Zargar learned counsel for appellant appears to be quite correct that contract is uncertain because description of land is not certain. On going through the description of property which was to be sold by defendant, this Court finds that on northern side of the suit property it has been mentioned that it is situated by leaving aside 18'x10' of land of survey No.137/2 area 6.37 acre. Indeed on the northern side after leaving 18'x10', which should be the starting point of survey No.137/2, it is not clear. Thus, the uncertainty is that the suit property which is said to be situated on the northern side of survey No.137/2 and which is having very long area 6.37 acre which should be the starting point to compute in order to locate the suit property. Alongwith the document of agreement of sale ex.P/1 the map is not attached in order to locate the suit land. The factum of receiving the replies Ex.D/1 and D/2 sent by the defendant against plaintiffs' notices Ex.P/2 and P/3 has been admitted by the plaintiff in para 6 of his cross-examination. In para 4 of his cross-examination, the plaintiffs have admitted that the document of agreement of sale was brought by him only to the defendant. Thus, the stand of defendant appears to be correct that plaintiffs themselves prepared and brought the document of agreement of sale (Ex.P/1). Hence, according to me the defendant cannot be blamed for mentioning the incorrect description of the land in the document of agreement of sale Ex.P/1.

17. If the description of the property mentioned in the document of agreement of sale (Ex.P/1) which is uncertain is tested on the touchstone and anvil of present factual scenario and particularly qua cross-examination of plaintiff Mitthulal (PW1) para 5 it is found that he has admitted that the description of the suit property which has been stated in the document no such land exists of said description at the spot. Thus, from the plaintiff's own admission on account of incorrect description of the suit land, the agreement is not certain and therefore according to me because the agreement is uncertain, hence it is void as envisaged under Section 29.

18. According to me, before passing a decree of specific performance of contract the Court should give effect to the terms of agreement but at the same time if an agreement is read as a whole in order to ascertain true intention of the parties and if it is carved out that description of the property is not certain, the suit of specific performance of contract cannot be decreed in favour of plaintiffs in regard to property which does not exist and particularly when in the present case which is not owned by the defendant. No plan has been attached to the document of agreement of sale (Ex.P/1) in order to locate the land. In this context rightly reliance has been placed by learned counsel for appellant upon the decision of the Supreme Court *Vimlesh Kumari Kulshrestha* (supra) and also Single Bench decision of this Court *Abdul Gaffar* (supra). In order to constitute a valid contract parties must so express in regard to subject matter that its meaning can be determined with a reasonable decree of certainty. It should be plain enough and should not be based upon conjectures (see Full Bench decision of Calcutta High Court *Dwarkadas & Co. v. Daluram Goganmull* AIR 1951 Calcutta 10 and Division Bench decision of Madras High Court *Komaru Kollappa Devara v. Kumar Krishna Mitter and another* AIR 1945 Madras 10).

19. I would also like to put my endeavour and emphasis to **Halsbury's Laws of England and also Corpus Juris Secundum.** If I go through the terminology of the words 'impossibility', 'mistake' and 'frustration' as embodied in Vol.9 para 441 of 4th edition of **Halsbury's Laws of England** it is gathered that on account of non-existence of some fact it destroys the basis upon which the agreement was reached so that the agreement is discharged or in some other way vitiated and or where performance is already impossible at the time of contract of the case of initial impossibility or mistake. It would be profitable to quote para 441 which reads thus;

> 441. Impossibility, mistake and frustration. The problem dealt with in the following paragraphs concern situations where the parties have reached agreement but the question arises whether the existence or non-existence of some fact or the occurrence or non-occurrence of some event destroys the basis upon which that agreement was reached so that the agreement is discharged or in some other way vitiated. Where performance is already impossible at the time of contracting the case is one of initial impossibility or mistake; where impossibility arises after the formation of the contract there is a case of subsequent

impossibility or frustration. However, despite the common element of impossibility in the above cases, certain types of mistake may invalidate a contract or deprive it of full effect even though there is no impossibility of performance.

20. Para 442 of the aforesaid volume speaks about impossibility and frustration in general. According to this para generally a contract which is incapable of performance at the time when it is made will be void *ab initio*. Thus, since the land which was to be sold by defendant has been incorrectly described and is uncertain the said agreement is void *ab initio*. Para 447 of same volume speaks about impossibility *ab initio*, and this para is also fully applicable in the present case. According to this para where the subject matter of the contract, without the knowledge of the other party cease to exist (*res extincta*) before the contract was made, the contract may be void on the ground of mistake and the similar principle would apply where property has never existed even though parties believe otherwise. This para of Halsbury's Laws of England if tested on the touchstone and anvil of present factual scenario because in the present case also the property which was agreed to be sold does not exist even if it is held that parties believe otherwise, the contract is uncertain and thus void.

21. Para 458 of vol.7 of **Halsbury's Laws of England** 2nd Edition speaks about uncertainty and according to which where parties have put their agreement into such vague and uncertain language as to be unintelligible, the contract is altogether void unless the uncertain part of the agreement can be separated from the substantial part thereof.

22. If we go through Vol. 17A of **Corpus Juris Secundum** para 147 this Court finds that it speaks about definition of mistake and according to this para mistake in the law of contracts is an intentional act or omission arising from ignorance, surprise or misplaced confidence. Mistake of fact consists in ignorance of existence or non-existence of a fact material to the contract. If this para is tested to the present case, it would reveal that there was a mistake of fact about the ignorance of the existence of the land which was described in the document of agreement of sale (Ex.P/1) at the time of its execution on the part of defendant because there is positive evidence of the defendant that the document of agreement of sale was prepared and produced by the plaintiffs themselves and upon their insistence he signed document at that point of time when he was not ready to sign it because he was disturbed on account of

missing of his she-buffalo.

23. I have already held hereinabove that the document of agreement of sale (Ex.P/1) is uncertain and void. The first plaintiff in para 5 of his cross-examination has given certain description of the property of defendant but said description is not mentioned in the document of agreement of sale (Ex.P/1) and if that would be position Section 93 of the Evidence Act would be applicable in the present case which speaks about exclusion of evidence to explain or amend unambiguous document. According to this provision when the language used in the document is on its face is ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its meaning. The language of the document of agreement of sale Ex.P/1 is ambiguous and therefore in evidence if plaintiff is saying by describing some other property of defendant, his evidence cannot to be accepted.

24. I do not find any merits in the contention of learned counsel for respondents/plaintiffs that in cross-examination para 5 at one place the plaintiff has stated the description of the property mentioned in the document of agreement of sale (Ex.P/1), therefore, his evidence should be relied upon. If para 5 of the cross-examination of the plaintiff is considered in its entirety it would reveal that again and again the plaintiff is changing his version in the cross-examination in regard to description of the property because he is very well aware that property as mentioned in the document (Ex.P/1) is uncertain and does not exist at the spot. True at one place in para 5 of the cross-examination, the first plaintiff (PW1) has given description of the property, which is mentioned in the document (Ex.P/1) but in the same para itself he has admitted that such property does not exist at the spot.

25. The word "uncertainty" has been explained in the Major Law Lexicon by P. Ramanatha Aiyar 4th Edition (2010) Vol.6 at page 6966 which means where the words of a deed or will are so vague that no definite meaning can be assigned to them, the grant or gift is void for uncertainty.

26. According to me, on account of the uncertainty and the incorrect description of the suit property made in the document of agreement of sale, the same is void in terms of Section 29 and as such void document cannot be specifically enforced in a suit for specific performance of contract.

27. All the decisions placed reliance by the learned counsel for the respondents are in regard to applicability of Section 91 and 92 of the Evidence

Act. There is no quarrel to the aforesaid proposition but when the document of agreement of sale Ex.P/1 itself is uncertain, it is void and therefore these decisions are not applicable in the present case.

28. For the reasons stated hereinabove, the plaintiffs are not entitled for a decree of specific performance of contract and is only entitled to a decree of refund of earnest money Rs.3000/-. Since before filing of the suit the defendant was insisting plaintiffs to correct the description of the suit property so that land of correct description of his own could be sold and the plaintiffs avoided to correct the document of agreement of sale, the defendant/appellant cannot be blamed and therefore plaintiffs are not entitled for the interest upon the refund of earnest money Rs.3000/-.

29. Resultantly, this appeal succeeds in part and is hereby allowed. The suit of the plaintiffs of specific performance of contract is hereby dismissed. However, a decree is passed against defendant/ appellant to refund the earnest money Rs.3000/- to plaintiffs without any interest. Looking to the facts and circumstances of the case, parties are hereby directed to bear their own costs throughout.

Appeal allowed.

I.L.R. [2013] M.P., 421
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
M.A. No. 1085/2003 (Jabalpur) decided on 17 December, 2012

ASHOK KUMAR GOPICHAND ...Appellant
Vs.
EMPLOYEES STATE INSURANCE CORPORATION & anr. ...Respondents

Employees State Insurance Act (34 of 1948), Sections 2(12), 38 & 39 - Factory **- Report of E.S.I. Inspector that establishment of employer is consisted of 10 or more employees - E.S.I. Inspector did not record the name, father's name, place from which employees hails, designation, length of service & emoluments etc. and the signature or thumb impression - Such report cannot be relied upon by the E.S.I. Court - Order of E.S.I. Court directing the employer to pay E.S.I. contribution set aside.** **(Para 5)**

कर्मचारी राज्य बीमा अधिनियम (1948 का 34), धाराऐं 2(12), 38 व 39 – फैक्टरी – ई.एस.आई. निरीक्षक की रिपोर्ट कि नियोक्ता की स्थापना में 10 या उससे अधिक कर्मचारियों का समावेश है – ई.एस.आई. निरीक्षक ने नाम, पिता का नाम, स्थान, कर्मचारीगण जहां के रहने वाले हैं, पदनाम, सेवा अवधि व परिलब्धियां इत्यादि एवं हस्ताक्षर या अंगुठा निशानी अभिलिखित नहीं की – उक्त रिपोर्ट पर ई. एस.आई. न्यायालय द्वारा विश्वास नहीं किया जा सकता – ई.एस.आई. न्यायालय का ई.एस.आई. अंशदान का भुगतान करने के लिये नियोक्ता को निदेशित करने का आदेश अपास्त।

Case referred :

1991 (VOL.79) FJR 188.

Uttam Maheshwari, for the appellant.
Anubhav Jain, for the respondent No.1.

ORDER

A.K. SHRIVASTAVA, J.: This appeal under Section 82 of the Empolyees State Insurance Act, 1948 (for short "The ESI Act") has been filed by the employer against the order dated 5.3.2003 passed by the ESI Court in Case No.3795/ESI whereby the appellant has been directed to pay Rs.8,978.40 towards the ESI contribution.

2. The contention of learned counsel for the appellant is that the provisions of the ESI Act shall be applicable only if 10 or more employees are employed in the manufacturing process with the aid of power irrespective of the fact whetherthey are employed as daily wager or on permanent basis. In this regard, my attention has been drawn to Section 2(12)(a) of the unamended ESI Act. The present definition of "factory" under Section 2(12) has been enacted with effect from 01.06.2010. Learned counsel by placing reliance upon the decision of Karnataka High Court in *Employees' State Insurance Corporation vs. Karnataka Asbestos Cement Products*, 1991 (Vol.79) FJR 188 has contended that ESI Inspector on visiting the establishment was required to mention the name, father's name, place from which the employee hails, the designation, the length of service and emoluments etc. if he finds that the employees are 10 or more in the establishment. Since this has not been done, fastening of the liability upon the employer to the extent of Rs. 8,978.40 is illegal and contrary to the material on record. Further it has been argued by him

that even otherwise there is no material on record in order to hold that 10 or more persons are employed in the establishment of the appellant which is being carried out with the aid of power.

3. On the other hand, Shri Anubhav Jain, learned counsel appearing for the respondents by placing reliance upon the show cause notice dated 26.2.1992 issued to the employer directing to fill the Form No.1 submitted that since during the course of inspection it was found that in the office total 10 persons were found by the Inspector, therefore, they are covered under the ESI Act and rightly the order has been passed.

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

5. Despite going through the record the learned counsel for the respondents could not point out that how and in what manner and on what basis the finding has been arrived at by learned ESI Court directing the employer/appellant to pay the ESI contribution. I have gone through the reasonings assigned by the ESI Court and I do not find that on the basis of any material such a finding has been arrived at that 10 or more employees are working in the establishment of the employer with the aid of power. The finding is also not specific that at the time of inspection by the Inspector Mr. Ladange it was found that in total there are 10 or more employees working in the establishment of the appellant with the aid of power. Even otherwise if during the course of inspection, ESI Inspector finds that the establishment of the employer is consisted of 10 or more employees he should have recorded the name, father's name, place from which the employee hails, his designation, length of service and emoluments etc. and the signature or thumb impression of the employee should have been obtained. Since this has not at all been done by the Inspector Mr. Ladange, I am of the view that his report cannot be relied upon by the ESI Court. The decision of Karnataka High Court, *Karnataka Asbestos Cement Products* (supra) is squarely applicable in the present case.

6. Resultantly, this appeal succeeds and is hereby allowed. The order passed by the ESI Court is hereby set aside. No costs.

Appeal allowed.

I.L.R. [2013] M.P., 424
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
S.A. No. 449/1997 (Jabalpur) decided on 24 January, 2013

RAM KRIPAL ...Appellant
Vs.
VEERBHADRA & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 5 Rules 17 & 19 - Service of Summons **- Defendant was not found at the given address - Wife of the defendant refused to accept the notice - Process server affixed the notice on the door - Process server neither filed any affidavit nor was examined - As the provisions of Order 5 Rules 17 & 19 were not followed therefore, exparte decree granted against appellant set aside - Matter remanded back for adjudicating the matter afresh after giving due opportunity of hearing and recording of evidence - Appeal allowed.**
(Paras 16 & 17)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 5 नियम 17 व 19 – समन की तामीली – दिये गये पते पर प्रतिवादी नहीं मिला – प्रतिवादी की पत्नी ने नोटिस लेने से इंकार किया – आदेशिका तामीलकर्ता ने दरवाजे पर नोटिस चस्पा की – आदेशिका तामीलकर्ता ने न तो कोई शपथ पत्र प्रस्तुत किया और न ही उसका परीक्षण किया गया – चूंकि आदेश 5 नियम 17 व 19 के उपबंधों का पालन नहीं किया गया, इसलिए अपीलार्थी के विरुद्ध प्रदान की गई एकपक्षीय डिक्री अपास्त – मामले में सुनवाई का पर्याप्त अवसर देने और साक्ष्य अभिलिखित करने के पश्चात नये सिरे से न्यायनिर्णित करने हेतु मामला प्रतिप्रेषित – अपील मंजूर।

Cases referred :

1986 MPLJ 67, AIR 1998 MP 16, 1991 MPLJ 843, AIR 1972 SC 2538, 1972 Tax Law Reporter 1104.

Shiv Kumar Dubey, for the appellant.
Satyendra Prasad, for the respondents No. 1 to 3.

JUDGMENT

R.S. Jha, J. :- The appellant/defendant has filed this appeal being aggrieved by the judgment and decree dated 13-9-1995 passed by the 4th Additional District Judge, Rewa, in Appeal Case No. 15-A/1993 whereby the judgment and decree dated 22-2-1991, passed by Civil Judge Class I,

Mauganj, District Rewa, in Case No. 198-A/1991, has been affirmed.

2. The brief facts giving rise to the present appeal are that the respondents alongwith their mother, Smt. Sumitra wife of Kaushal Prasad filed a civil suit for declaration in respect of Khasra No. 192, area 0.69 decimal situated in village Virha Gopal, Tahsil Hanumana, District Rewa, on the ground that the land, in question, initially belonged to one Omkarnath who died leaving behind only one issue i.e. Sumitra, who had executed a Will in favour of the respondents No. 1, 2 and 3 and that they are in possession of the said land since then but the appellant on false averments has got the land mutated in his name and was attempting to interfere in their possession. The respondents No. 1 to 3 therefore sought a decree for declaring the proceedings of the revenue authorities dated 22-11-1982 passed in Case No. 168-B-21/78-79 as null and void.

3. Notice of the suit was issued to the appellant by the trial Court on 11-7-1985 for taking up the matter on 6-12-1985 on which date the Court proceeded ex parte against the appellant by taking note of the fact that the notice has been served by affixation and passed an ex parte judgment and decree on 22-2-1991. The appellant being aggrieved, filed an appeal against the aforesaid judgment and decree of the trial Court which has also suffered dismissal by the impugned judgment and decree passed by the lower appellate Court, dated 13-9-1995. Hence, this appeal.

4. This Court by order dated 17-2-2010 has admitted this appeal on the following substantial questions of law :-

> "Whether the courts below have committed grave error in holding that the summons of the suit was duly served on the appellant when the same was not sent for service alongwith copy of the plaint, in compliance of the mandatory provision of Order 5 Rule 2 of the CPC. If so then its effect ?

5. It is submitted by the learned counsel for the appellant that the Courts below have proceeded ex parte against the appellant by treating the notice to have been served on the endorsement of the process server who has made a note on the notice that the appellant was not available in his house, his wife was sought to be served with the notice who refused to accept the same and, therefore, the notice was affixed. It is submitted that the service of notice on the appellant is in fact contrary to the provisions of Order 5 Rules 17 and 19

of the Code of Civil Procedure inasmuch as service of notice by affixation could only be effected in case the requirement of Rule 17 were fulfilled and completed and the service could have been declared to have been effected only after obtaining an affidavit of the process server or examining him in accordance with Rule 19 of Order 5 of the Code of Civil Procedure. It is submitted that the trial Court has failed to do so and, therefore, the ex parte decree passed by the trial Court and affirmed by the lower appellate Court deserves to be set aside.

6. It is also contended by the learned counsel for the appellant that a copy of the plaint alongwith the notice was also required to be attached but as the same was not done, therefore, the service was not proper and could not be said to be in accordance with law in view of mandatory provisions of Order 5 Rule 2 of the Code of Civil Procedure.

7. The learned counsel appearing for the appellant/defendant relied upon the decision of this Court rendered in *Sitaram v. Kalawati,* 1986 MPLJ 67, *Charanlal Patel v. Smt. Kavita Jain and another,* AIR 1998 MP 16, Suresh *Kumar v. Godavaribai,* 1991 MPLJ 843, *State of Jammu & Kashmir and others v. Haji Wali Mohammed and others,* AIR 1972 SC 2538 and T*he Commissioner of Income Tax, West Bengal III, Calcutta and others v. Ramendra Nath Ghosh etc.,* 1972 Tax Law Reporter 1104 in support of his submissions.

8. The learned counsel appearing for the respondents, per contra, submits that notice of the suit was issued by the trial Court in accordance with law and as the appellant was not found at home, notice on his wife was sought to be served by the process server in view of the provisions of Order 5 Rules 15 and 17 of the Code of Civil Procedure but as she refused to accept the notice, it was duly affixed and a report to that effect was submitted before the Court. It is submitted that in view of the aforesaid facts and circumstances both the Courts below have rightly held the service to be complete and in accordance with law in view of Rule 17 of Order 5 of the Code of Civil Procedure and in such circumstances no fault can be found with the impugned judgment and decree passed by the Courts below and no substantial question of law arises for adjudication in the present appeal.

9. The learned counsel for the respondents further submits that the notice was sent alongwith a copy of the plaint as is evident from the seal affixed on

the same, however, as the appellant was not available in the house and as his wife refused to accept the notice, therefore, the summons was affixed and in such circumstances non-affixation of the plaint would not make the service of notice violative of Order 5 Rule 2 of the Code of Civil Procedure.

10. I have heard the learned counsel for the parties at length and perused the record of the case.

11. From a perusal of the provisions of Order 5 Rule 15 of the Code of Civil Procedure it is clear that where the defendant is absent from his residence at the time when service of summons is sought to be effected on him and there is no likelihood of his being found at the residence within a reasonable time and he has no agent empowered to accept service of summons on his behalf, service of summon could be made on any adult member of his family whether male or female who is residing with him. Order 5 Rule 17 provides for the contingency where the defendant either refuses to accept the service or cannot be found and lays down that where the defendant is absent from his residence at the time when service is sought to be effected on him and there is no likelihood of his being found at the residence within a reasonable time and there is no other person on whom service can be made or he refuses to accept the summon, the serving officer shall affix a copy of the summon on the door or other conspicuous part of the house in which the defendant ordinarily resides and the server shall thereafter return the original to the Court from which it was issued with the report endorsed thereon stating that he has so affixed the copy, the circumstances under which he did so and the name and address of the person, if any, by whom the house was identified and in whose presence the copy was affixed. Order 5 Rule 19 of the Code of Civil Procedure lays down that where the summon is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit.

12. From a conjoint reading of the aforesaid three rules it is apparent that where the serving officer is unable to serve the defendant as he is not available at his residence and if there is no likelihood of his being found at the residence within a reasonable time, he may serve the notice on any other adult member

of his family whether male or female who resides with him and in case the defendant refuses to accept the notice or in his absence such other member also refuses to accept the notice, the serving officer may affix a copy of the notice on the outer door or on some conspicuous part of the house in which the defendant ordinarily resides and return the original to the Court from which it was issued with an endorsement thereon or affixed thereto stating that he has so affixed the copy, the circumstances under which he did so and the address of the person by whom the house was identified and in whose presence the copy was affixed. The provisions of law specifically, Rule 19 of Order 5 further provides that in case such summon is returned under Rule 17, the Court must obtain an affidavit of the serving officer and may if necessary also examine him and in case no such affidavit is filed, must examine the serving officer on oath and make such further enquiry as it deems fit regarding service of summon on the defendant and thereafter must declare, either that the summon has been duly served or pass such further orders regarding service as it thinks fit.

13. The aforesaid interpretation of the provisions of Order 5 Rules 15, 17 and 19 has also been made before this Court in the case of *Suresh Kumar v. Godavaribai,* 1991 MPLJ 843, in paragraph 6 in the following terms :-

> "6. Rule 19 of Order 5, C.P.C. provides that if the summons is returned under Rule 17, the court shall if the report is not verified by the affidavit of the serving officer, examine the serving officer and make such further enquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit. Now in the instant case, it is clear that the process-server has not stated in the report that although the defendant was absent from his residence at the time of the service, but there was no likelihood of his being found at the residence within a reasonable time. In the absence of this report of the process server, the service could not be made on an adult member of the family. As such, one of the ingredients for serving the summons on the father of the present applicant being absent, it cannot be said that the provisions of Rule 15 of Order 5, C.P.C. were complied with. Similarly when the father of the defendant refused to accept the service, then the procedure as provided under Rule 17 of Order 5, C.P.C. had to be adopted. But it appears that neither the provisions

of Rule 15 of Order 5 have been complied with in the instant case, nor that under Rule 17 of Order 5 have been pressed into service by the bailiff and consequently the court has also not followed the procedure provided under Rule 19 of Order 5, C.P.C. Shri Agrawal learned counsel for the applicant has cited various authorities in support of his argument but in view of the clear provisions of law as stated above, I need not burden this order with the discussion of the aforesaid authorities."

In the case of *Sitaram v. Kalawati,* 1986 MPLJ 67, in paragraph 22 it has been held as under :

"22. In relation to service under Order 5, Rule 17 Civil Procedure Code we have the further provision embodied in Order 5, Rule 19 Civil Procedure Code, it reads thus :

> Where a summon is returned under rule 17 the Court shall if the return under that rule has not been verified by the affidavit of the serving officer and may if it has been so verified examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings and may make such further enquiry in the matter as it thinks fit and shall either declare that the summons has been duly served or order such service as it thinks fit.

It is clear from the aforesaid provisions that before acting on the report of the service officer where he has not verified his report by affidavit the law makes it obligatory on the Court to examine the serving officer or to get him examined by another Court touching his proceedings. The Court is also empowered to make such further enquiry in the matter as it thinks fit and it is specifically required that the Court shall then declare that summons has been duly served. Import of the expression 'duly served' is that service is in a manner as to give the defendant information of the proceedings against him. Before holding that there has been due service the Court must be satisfied that the provisions of order 5, Rule 17 Civil Procedure Code were really complied with."

Similar view has been taken by this Court in the case of *Charanlal Patel v. Smt. Kavita Jain and another*, AIR 1998 MP 16.

14. In the case of *State of Jammu & Kashmir and others v. Haji Wali Mohammed and others*, AIR 1972 SC 2538 the Supreme Court, while interpreting the provisions of Section 239 of the Jammu and Kashmir Municipal Act, which makes the provisions of the Code of Civil Procedure applicable, has held that in cases of service of notice or summon by affixation the provisions of Order 5 Rule 19 of the Code of Civil Procedure should be complied with in the following terms :

> "11. It cannot be and indeed it has not been disputed that notices were not served in accordance with the procedure prescribed for service of summons in the Civil Procedure Code. Even if we accept what Dr. Singhvi says that there was a refusal to accept the summons and that was the reason for effecting service by affixation the provisions of O.5, R.19 of the Code were not complied with by the filing of an affidavit of the serving officer etc. All that has been pointed out by Dr. Singhvi is that the notices were produced along with the writ petitions which showed that they had been affixed to the premises and that in the writ petitions it was admitted that notices had been affixed on January 9, 1968 on the properties of the petitioners. We do not consider that any such averment dispensed with the requirement of the statutory provision contained in S.239 of the Municipal Act in the matter of service of notices."

15. In the case of the *Commissioner of Income Tax, West Bengal III, Calcutta and others v. Ramendra Nath Ghosh etc.*, 1972 Tax Law Reporter, 1104 the Supreme Court, while considering the provisions of Section 33-B of the Income Tax Act, which provides for service of notice by affixation, has held that in the absence of disclosure of the name and address of the person who identified the place of business, the possibility of the officer serving notice having gone to a wrong place cannot be ruled out and, therefore, the service of notice has to be treated as not in accordance with law. In paragraph 7 it has been held as under :-

> "7. Admittedly, the assessees have not been personally served in these cases. Therefore, we have to see whether the alleged

service by affixation was in accordance with law. It is necessary to mention that, according to the assessees, they had no place of business at all. They claim that they have closed their business long before the notices were issued. Hence, according to them, Mr. Neogi must have gone to a wrong place. This contention of the assessees has been accepted by the appellate bench of the High Court. Bearing these facts in mind, let us now. proceed to consider the relevant provisions of law. Section 63(1) of the Act reads:

"notice or requisition under this Act may be served on the person therein named either by post or, as if it were a summons issued by a court, under the Code of Civil Procedure, 1908 (V of 1908).

Rule 17 of Order V of the Civil Procedure Code reads:

"Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

(emphasis applied)

As seen earlier the contention of the assessees was that at the relevant time they had no place of business. The report of the serving officer does not mention the names and addresses of the person who identified the place of business of the assessees. That officer does not mention in his report nor in the affidavit

filed by him that he personally knew the place of business of the assessees. Hence, the service of notice must be held to be not in accordance with the law. The possibility of his having gone to a wrong place cannot be ruled out. The High Court after going into the facts of the case very elaborately, after examining several witnesses, has come to the conclusion that the service made was not a proper service. Hence, it is not possible to hold that the assessees had been given a proper opportunity to put forward their case as required by Section 33-B."

16. From a perusal of the record of the present case it is clear that the serving officer sought to serve the summon of the suit on the defendant on 18-9-1985 on which date he has made an endorsement that the defendant was not available and, therefore, his wife who was residing with him, was sought to be served with the notice but she refused to accept the notice and, therefore, a copy of the notice was affixed on his house. However, though the name of one witness Ramsiya has been mentioned in the said notice, his address has not been stated therein nor has it been stated that the house was verified and identified by the witness. From the record it is further clear that the officer serving the notice did not file any affidavit as required by Order 5 Rule 19 of the Code of Civil Procedure nor was he examined by the trial Court which was necessary in the absence of such an affidavit. It is further apparent from a perusal of order sheets of the trial Court that the Court has not complied with the requirements of Order 5 Rule 19 of the Code of Civil Procedure by declaring that the same has been duly served or examining as to whether some other mode of service was required to be adopted, but has simply stated that the notice was served in spite of which the defendant has not appeared and has thereafter proceeded ex parte against the defendant. Apparently, there is non-compliance of the provisions of Order 5 Rules 17 and 19 of the Code of Civil Procedure and in such circumstances the ex parte judgment and decree passed by the Court below and affirmed by the lower appellate Court deserve to be set aside.

17. In the circumstances, the appeal filed by the appellant stands allowed. The impugned judgment and decree passed by the Courts below are hereby set aside and the question of law framed by the Court is accordingly answered in favour of the appellant. The matter is remitted back to the trial Court for adjudicating the same after giving due opportunity of hearing and adducing

evidence to the appellant/defendant as provided and prescribed under the provisions of the Code of Civil Procedure. It is further directed that till the decision of the suit status quo, as it exists today, in respect of the disputed property, shall be maintained by the parties.

18. Looking to the fact that the matter is very old, it is directed that the parties shall appear before the trial Court on 12th March, 2013 and on such further dates as ordered by the Court and the Court shall thereafter take up the matter and decide the same afresh as expeditiously as possible as the appellant and the respondents, both undertake to extend full assistance and cooperation to the trial Court for an early decision in the matter.

19. In view of the aforesaid, the appeal filed by the appellant stands allowed accordingly.

Appeal allowed.

I.L.R. [2013] M.P., 433
APPELLATE CRIMINAL
Before Mr. Justice G.S. Solanki
Cr. A. No. 1380/1995 (Jabalpur) decided on 21 June, 2011

RAJMAL & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 376(2)(g) - Gang Rape **- Prosecutrix was earning her livelihood by singing and dancing - She was going in a bus along with her uncle and the appellants to perform - Bus was stopped by the appellants in the mid way and the prosecutrix and her uncle were taken to a near tubewell - Appellant No. 2 dragged the uncle of the prosecutrix towards the road and appellant No.1 committed rape on the prosecutrix - It cannot be said that both the accused shared common intention - Appellant No.2 acquitted and appellant No.1 convicted under Section 376 of I.P.C. (Para 13)**

क. दण्ड संहिता (1860 का 45), धारा 376 (2)(जी) – सामूहिक बलात्कार – अभियोक्त्री नाच गाना करके अपनी आजीविका अर्जित करती थी – वह अपने मामा और अपीलार्थीगण के साथ कार्यक्रम करने बस से जा रही थी – अपीलार्थीगण द्वारा बस को बीच रास्ते में रोका गया और अभियोक्त्री तथा उसके मामा को नजदीकी टयूबवेल पर ले जाया गया – अपीलार्थी क्रं. 2 ने अभियोक्त्री के

मामा को सड़क की ओर घसीटा और अपीलार्थी क्रं. 1 ने अभियोक्त्री का बलात्कार किया – यह नहीं कहा जा सकता कि दोनों अभियुक्तगण का समान आशय था – अपीलार्थी क्रं. 2 दोषमुक्त और अपीलार्थी क्रं. 1 को भा.द.सं. की धारा 376 के अंतर्गत दोषसिद्ध किया गया।

B. Penal Code (45 of 1860), Section 376 - Rape - Character of Prosecutrix - **Prosecutrix admitted that once she had lodged a report against one person regarding abduction and thereafter had compromised the matter and the girls of her community are normally involved in sexual activities - Does not mean that prosecutrix or other girls of her community are public property - They also have a right to privacy and right to live - Woman of even easy virtue is entitled to privacy and cannot be invaded by any person.** **(Para 12)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री का चरित्र – अभियोक्त्री ने स्वीकार किया कि उसने एक बार एक व्यक्ति के विरुद्ध अपहरण से संबंधित रिपोर्ट दर्ज कराई थी और बाद में मामले में समझौता कर लिया था और उसके समुदाय की लड़कियां सामान्यतः लैंगिक कार्यकलाप में समाविष्ट रहती हैं – इसका अर्थ यह नहीं होगा कि अभियोक्त्री या उसके समुदाय की अन्य लड़कियां लोक सम्पत्ति है – उन्हें भी एकांतता तथा आजीविका का अधिकार है – चरित्रहीन महिला भी एकांतता की हकदार है, उसे किसी व्यक्ति द्वारा अधिक्रांत नहीं किया जा सकता।

Cases referred :

(2009)15 SCC 566, (2007) 12 SCC 57, AIR 1991 SC 207, AIR 1990 SC 538.

S.C. Datt with *Pushpendra Dubey*, for the appellants.
B.P. Pandey: G.A. for the State.

JUDGMENT

G.S. Solanki, J. :- Appellants have preferred this appeal being aggrieved by judgment and finding dated 9.10.1995 passed by Special/ Sessions Judge, Sehore in Special Case No. 118/94 whereby the appellants have been convicted under section 376(2)(g) of IPC and sentenced to R.I. for 10 years and fine of Rs. 2000/-, in default of payment of fine to undergo further R.I. for six months.

2. The prosecution case, in short, is that prosecutrix Julie Bai (PW-1) belongs to the Bedani caste, who earns her livelihood by singing and dancing.

Anokhilal (PW-5) and Babulal (PW-3) contacted her and her maternal uncle Gudda Bedia (PW-2) and booked her to perform in some domestic function at village Hirapur on 7.4.1994. As agreed, on 7.4.1994 prosecutrix and her maternal uncle reached to Bhopal, where Anokhilal met them and boarded them in a private bus along with appellants Rajmal and Vishnu resident of Hirapur. It is alleged that appellants stopped the bus before 2-4 Kms from Hirapur and took the prosecutrix and her maternal uncle near tube well, where appellants proposed the prosecutrix to have sexual intercourse and when she refused, the appellants abused prosecutrix and her uncle. It is further alleged that appellant Vishnu grappled with Gudda Bedia and dragged him towards the road and at the same time appellant No. 1 Rajmal dragged the prosecutrix behind a Mango tree and committed rape on her, thereafter, prosecutrix and her uncle tried to stop and board in a Jeep but appellant No. 1 Rajmal restrained prosecutrix thereafter that Jeep had gone ahead. The prosecutrix reached to village prosecutrix Hirapur and narrated the whole incident to Anokhilal and Babulal. It is alleged that Babulal informed the prosecutrix that her maternal uncle had already reported the matter to the police, thereafter, prosecutrix also lodged the report (Ex.P-1).

3. During investigation, prosecutrix was examined by Dr. Neera Shrivastava (PW-6), she prepared MLC report (Ex.P-8). She prepared two slides of her vaginal swab and sealed her petticoat and handed over the same to a constable, who prepared seizure memo Ex.P-10. Slides and petticoat were sent for chemical examination along with the memo of Supdt. Of Police, Sehore (Ex.P-15). Assistant Chemical Examiner found human spermatozoa on the slides and petticoat.

4. Appellants were arrested and medically examined. Appellant No. 1 Rajmal was found capable of doing sexual intercourse, his semen slide was prepared, same was handed over to a police constable and sent to Assistant Chemical Examiner, who found spermatozoa on the same.

5. After usual investigation, appellants were charge sheeted before Special Judge, Sehore. Special Judge framed charges under section 3(2)(5) of S.C./S.T. (Prevention of Atrocities) Act and Section 376(2)(g) of IPC.

6. On appraisal of evidence on record, learned Special Judge acquitted the appellants from the charges under section 3(2)(5) of SC/ST (Prevention of Atrocities) Act, however, appellants have been convicted under section 376(2)(g) of IPC, as mentioned hereinabove.

7. Learned counsel for appellants has submitted that the learned trial Court has failed to appreciate the evidence on record in its proper perspective. He has further submitted that Gudda (PW-2) maternal uncle of prosecutrix lodged report (P-11) in which there is no allegation of rape against the appellants. Counsel has further submitted that prosecutrix and her uncle Gudda were not known to the appellants. Prosecutrix herself admitted that she did not know the name of appellants till the lodging of the FIR (Ex.P-1). There was no test identification parade conducted by the prosecution, despite that the learned trial Court believed the version of the prosecutrix. Counsel has further submitted that the prosecutrix belongs to a community, the girls of which are normally involved in singing and dancing and the prosecutrix herself has accustomed herself in sexual activities. Learned counsel for the appellant has submitted that appellants were not known to the prosecutrix till the lodging of the FIR, there was no test identification parade conducted in this case. Counsel has further submitted that prosecutrix herself admitted that once she lodged the report against one Nannu regarding abduction and rape and thereafter compromised with him, in the community of prosecutrix, normally girls are involved in sexual activities before marriage and after marriage they leave this profession. The prosecutrix herself admitted that she is unmarried. In view of the above, the version of the prosecutrix cannot be said to be reliable. He has placed reliance on the decision of *Tameezudding @ Tammu Vs. State (NCT of Delhi)* - 2009(15) SCC 566 and *Radhu Vs. State of M.P.* - 2007 (12) SCC 57.

8. Learned counsel for the State has supported and justified the finding and judgment passed by the trial Court.

9. I have perused the impugned judgment, evidence and other material on record. Prosecutrix (PW-1) deposed that Anokhilal (PW-5) and Babulal (PW-3) booked her for singing and dancing in some domestic function, in connection of which she had gone to Bhopal along with her maternal uncle Gudda (PW-2). As per the prosecutrix, the appellants stopped the bus before 2 Kms. from Hirapur, took her and her uncle near a tube well. She further deposed that appellants offered her a sum of Rs. 50/- to have sexual intercourse with her and when she refused to do so, Vishnu dragged her uncle towards the road and Rajmal committed rape on her. Thereafter her uncle stopped a Jeep and boarded in that jeep, but Rajmal restrained her to board on that Jeep. She further deposed that when she reached to Hirapur and narrated about the incident to Anokhilal and Babulal, they took her to the police station

where report (Ex.P-1) was lodged. Gudda (PW-2) supported the version of the prosecutrix. Gudda (PW-2) deposed that Anokhilal met them at Bus Stand, Bhopal and boarded them on the bus along with the appellants for Hirapur. He further deposed that Rajmal committed rape on prosecutrix before him.

10. Anokhilal (PW-5) and Babulal (PW-3) supported the prosecutrix to the extent that they booked her for singing and dancing in some domestic function. Anokhilal further deposed that prosecutrix and her uncle met him at Bus Stand, Bhopal, thereafter, Anokhilal and Babul did not support the prosecution story, they were declared hostile.

11. On careful scanning of evidence on record, I am of the view that Gudda (PW-2) improved his version before the Court because he admitted that he lodged the report (Ex.P-11) at the police station, which did not find place in the report lodged by the prosecutrix (Ex.P-1), thus the version of this witness cannot be said to be believable regarding commission of rape. It is well established principle of law that conviction can be based on single testimony of prosecutrix, if same is found worthy of credence. Counsel has placed reliance on the decision of *Tamizudding'a* case (supra), in which the Apex Court observed that there was no occasion for prosecutrix and her husband to have come to factory as no payment was due to him on any account as well as the person alleged to be present in the premises of factory was also not examined, therefore, prosecutrix and prosecution story became doubtful. In *Radhu's case* (supra), statement of prosecutrix was found full of discrepancies and there were glaring discrepancies in the statements of mother and father also, therefore, reliance was not placed on the testimony of prosecutrix.

In the instant case, on careful scanning of evidence of prosecutrix, I am of the view that statement of prosecutrix is corroborated by the statement of Gudda (PW-2) to the extent that she was dragged by Rajmal. It is true that she admitted that she did not know the appellants till the lodging of the FIR, however, at the same time she also stated that Anokhilal told her that he will send her and her uncle along with Rajmal and Vishnu to Hirapur. Subsequently, she identified Rajmal during trial and deposed in Para 20 of her statement that he is the person, who raped her and restrained her from boarding in the Jeep. In these circumstances, it is not a case of misidentity.

12. It is also true that she admitted that once she lodged report against

one Nannu regarding abduction and thereafter compromised the matter and in her community girls are normally involved in sexual activites, but that doesn't mean that the prosecutrix or other girls of her community are public property, they also have the right to privacy and right to live, woman of even easy virtue is entitled to privacy and it cannot be invaded by any person as observed by the Apex Court in the matter of *State of Maharashtra and another Vs. Madhukar Narayan Mardikar* - AIR 1991 SC 207. In *State of Haryana Vs. Prem Chand and others* - AIR 1990 SC 538, the Apex Court has observed that factors like character or reputation of victim are wholly alien to very scope and object of S. 376, they can never serve either as mitigating or extenuating circumstances for imposing sub-minimum sentence with the aid of proviso to S. 376.

13. In the instant case, on careful scanning of evidence on record, it reveals that appellant No. 1 Rajmal committed rape on the prosecutrix and appellant No. 2 Vishnu dragged her uncle towards the road, thus, the trial Court has erred in holding the common intention of both the appellants for committing rape of prosecutrix. Prosecutrix specifically stated that appellant No. 1 Rajmal committed rape on her against her will and her version is also corroborated by the medical evidence as 6 abrasions were found on her body by Dr. Neera Shrivastava (PW-6) and the FIR (Ex.P-1), thus in my opinion, the prosecution has succeeded in proving the offence of rape against appellant No. 1 Rajmal, however, the case of appellant No. 2 Vishnu would not fall under section 376(2)(g) of IPC.

14. In the result, the appeal of appellant No. 2 Vishnu is allowed. Conviction and sentence recorded against him is set aside. Appeal of appellant No. 1 Rajmal is partly allowed. He is convicted under section 376 of IPC instead under section 376(2)(g) of IPC and is sentenced to R.I. for 7 years instead of 10 years and fine of Rs. 2000/-, in default of payment of fine he has to undergo further R.I. for 6 months.

15. Appellants are on bail, their bail bonds and surety bonds stand discharged. Appellant No. 1 Rajmal is directed to surrender before the concerned trial Court on or before 27.7.2011. Set off period of Rajmal spent as under trial be given by the trial Court at the time of preparation of supersession warrant.

Order accordingly.

I.L.R. [2013] M.P., 439
APPELLATE CRIMINAL
Before Mr. Justice G.S. Solanki
Cr. A. No. 807/1995 (Jabalpur) decided on 4 July, 2011

HALKE ALIAS HAKKE ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 304 Part II - Culpable Homicide not amounting to murder - Sentence* - Incident took place in the year 1991 at a spur of moment which was not premeditated - Also considering the nature of injuries caused, the jail sentence is reduced to 4 years from 5 years. (Para 16)**

दण्ड संहिता (1860 का 45), धारा 304 भाग II – हत्या की कोटि में न आने वाला आपराधिक मानव वध – दण्डादेश – घटना वर्ष 1991 में अचानक घटित हुई जो पूर्व चिंतन में नहीं थी – कारित की गई क्षतियों के स्वरुप को भी विचार में लेते हुए कारावास का दण्डादेश 5 वर्ष से घटाकर 4 वर्ष किया गया।

A. Usmani. for the appellant.
P.C. Jain, P.L. for the respondent.

J U D G M E N T

G.S. Solanki, J. :- Second Additional Sessions Judge, Raisen has passed the impugned judgment dated 25.05.1995 in ST No. 236/1991 whereby appellant has been convicted under Section 304-Part II of IPC and sentenced to RI for 5 years.

2. Being aggrieved, appellant preferred this appeal under Section 374 of Cr.P.C.

3. The prosecution case, in short, is that on 02.06.1991 at about 4-5 p.m., when deceased Bhagwandas was unloading bricks from bullock-cart, appellant had pushed him. In turn, Bhagwandas objected. Then appellant had assaulted him by Khadrua (wooden piece used in cart) on his neck, arms and other parts of the body. Incident was witnessed by Govardhan (PW-9) and Ramgopal (PW-8). The matter was reported to police-station Deori. During investigation, primarily, Bhagwandas was examined by Dr. M.L.Badkul (PW-12) who found simple injury on his body. He remained in hospital for 3 days and then, he died. Dead body of Bhagwandas was sent

for post-mortem. Dr. M.L.Badkul (PW-12) performed autopsy on the body of deceased and found 4"x2" rupture on left jugular vein and according to him, cause of death was haemorrhage from the ruptured jugular vein and prepared post-mortem report (Ex.P.8).

4. After usual investigation, appellant was charge-sheeted before JMFC Udaipura who committed the case to the Court of Sessions. Second Additional Sessions Judge, Raisen framed charges under Section 302 of IPC against appellant. Appellant abjured his guilt and pleaded that he has been falsely implicated and examined Dr. S.K.Sharma (DW-1) in his defence.

5. On appraisal of evidence on record, though appellant has been acquitted to the charge under section 302 IPC, however, he was convicted and sentenced under section 304-II of IPC as mentioned hereinabove.

6. Learned counsel for the appellant submitted that the trial Court committed illegality, in not appreciating the evidence on record in its proper perspective. He further submitted that trial Court failed to consider the evidence of defence witness Dr. S.K. Sharma (DW-1) who opined that in the event of rupture of left jugular vein, deceased would not have survived for more than 2-3 hours. He, therefore, prays for setting aside the conviction and sentence recorded by the trial Court and further prays for acquittal of appellant.

7. The learned counsel for the State has justified and supported the judgment and finding recorded by the trial Court.

8. I have perused the impugned judgment, evidence and other material on record.

9. Ramgopal (PW-8) deposed that appellant assaulted Bhagwandas by Khadarua. This fact is further supported by eye-witness Govardhan (PW-9). Names of both these eye-witnesses find place in FIR. They remained undeviated despite extensive cross-examination, though they are chance witnesses, however, their presence on the spot appears to be believable. Khadagram (PW-7) father of deceased tried to pose himself as eye-witness but after considering his police statement (Ex.D/1), I am of the view that trial Court rightly disbelieved him, because he substantially improved his version before the Court.

10. Deendayal (PW-1) whose house was just near the place of incident, deposed that deceased Bhagwandas was unloading the bricks from bullock-

cart. He further deposed that on the hue and cry made by Bhagwandas, he came from his house and saw that appellant Halke was running away from the spot. Though he was declared hostile, yet he has partly supported the prosecution story and from his evidence, the presence of appellant is established on the spot. Nathuram Kotwar (PW-2) deposed that after the incident, he went with father of complainant Khadagram (PW-7) for lodging the report. Same facts are corroborated by Khadagram.

11. On careful scanning of evidence available on record, it is proved that appellant assaulted deceased Bhagwandas by Khaderua, (a heavy wooden piece) used in bullock-cart.

12. Learned counsel for the appellant submitted that as per defence witness Dr. S.K.Sharma (DW-1), deceased could not have survived more than 2-3 hours after receiving injuries as mentioned by prosecution. The trial Court did not consider this fact. He further submitted that this injury may be caused afterward and appellant has been falsely implicated.

13. I have perused the statement of Dr. M.L.Badkul (PW-12), who categorically deposed that he found 4"x2" contusion with abrasion. He further deposed that injury was anti-mortem in nature and after dissection, he found full of blood between the cavity of left clavicle and scapula as well as jugular vein was ruptured with adjoining muscles. He further deposed that there may be bleeding from ruptured jugular vein since 24-48 hours. Dr. S.K.Sharma (DW-1) deposed that due to injury 2" long on jugular vein, the patient could not have survived for more than 2-3 hours.

14. When I considered both statements on record along with the post-mortem report, there was contusion 4"x2", corresponding to ruptured vein. Dr. M.L. Badkul (PW-12) found full of blood between the cavity of clavicle and scapula which shows that jugular vein with muscles were ruptured and same was bleeded for more than 24-48 hours and thereafter, appellant died due to shock. In these circumstances, trial Court did not commit any illegality in appreciating the evidence on record.

15. Considering the facts and circumstances of the case, in which the complainant assaulted by Khadarua resulting in rupture of jugular vein which was likely to cause death thereby appellant committed culpable homicide not amounting to murder. In these circumstances, conviction recorded under Section 304-II of IPC by trial Court is hereby affirmed.

16. Looking to the nature of injuries and the facts of case in which incident took place on the spur of moment, was not premeditated. End of justice would be met if appellant be convicted for period of 4 years jail sentence. Thus, appeal is partly allowed and conviction under section 304-II of IPC is affirmed. Jail sentence of appellant is reduced to R.I. for 4 years.

17. Appellant is on bail. His bail bonds and surety bonds stand discharged. He is directed to surrender before the trial Court on or before 30-08-2011.

Record of the trial Court be sent back along with copy of this judgment for compliance and necessary action.

Appeal partly allowed.

I.L.R. [2013] M.P., 442
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal
Cr. A. No. 491/1994 (Jabalpur) decided on 9 October, 2012

STATE OF M.P. ...Appellant
Vs.
RAVIKUMAR SINGH MALHOTRA ...Respondent

A. Criminal Procedure Code, 1973 (2 of 1974), Section 378 - Appeal against acquittal - Powers of Appellate Court - **Law Discussed. (Para 11)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378 – दोषमुक्ति के विरुद्ध अपील – अपीली न्यायालय की शक्तियां – विधि विवेचित।

B. Evidence Act (1 of 1872), Section 3 - Witness - **With a view to explain a thing in a better way, if something new is added then such contradiction cannot be said to be material. (Para 21)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – किसी तथ्य को बेहतर ढंग से स्पष्ट करने के इरादे से, यदि कुछ नया शामिल किया जाता है तब कुछ विरोधाभास तात्विक नहीं कहा जा सकता।

C. Penal Code (45 of 1860), Section 302 - Murder - **Deceased was second wife of respondent - Child aged about 5 years was found by a truck driver on the road in naked condition - Child was taken to police station - Dead bodies of deceased along with her 2 years old child was found - On the basis of clues and leads given by the**

child, I.O. reached to his school and to the house - He had no occasion and reason to be tutored - Motive and suspicious conduct of respondent and evidence of child establishes the guilt of the respondent - Acquittal of respondent set aside - Respondent is convicted under Sections 302, 201 of I.P.C. (Paras 33 to 37)

ग. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – मृतिका प्रत्यर्थी की दूसरी पत्नी थी – लगभग 5 वर्ष का बालक ट्रक चालक ने नग्न अवस्था में सड़क पर पाया था – बच्चे को पुलिस थाने लाया गया – मृतिका के शव के साथ उसका 2 वर्ष आयु का बालक पाया गया – बालक द्वारा दिये सुराग एवं संकेतों के आधार पर जांच अधिकारी उसके विद्यालय और घर गया – उसके पास सिखाऐ पढ़ाऐ जाने का कोई अवसर और कारण नहीं था – प्रत्यर्थी की संदिग्ध परिस्थतियां और उद्देश्य एवं बालक की साक्ष्य प्रत्यर्थी के अपराध को स्थापित करते हैं – प्रत्यर्थी की दोषमुक्ति अपास्त – प्रत्यर्थी भा.द.सं. की धाराऐं 302, 201 के अंतर्गत दोषसिद्ध।

Cases referred :

2012 Cr.L.J. 3005, 2012 Cr.L.J. 3363, AIR 1983 SC 753, AIR 2009 SC (Supp) 2622.

Nirmala Nayak, G.A. with Amit Pandey, P.L. for the appellant.
Jagat Sher Singh with *A.K. Dubey*, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by, **T.K. KAUSHAL, J. :-** This judgment shall govern the disposal of both the above appeals. Both of the above State appeals have been directed against the judgment dated 14/12/1993 passed by Additional Sessions Judge, Panna in Sessions Trial No.86/1991 acquitting the respondent/accused of the charge under sections 302 and 201 IPC for committing murder of his wife Sushma (since deceased) and for destroying evidence thereof.

2. Facts of the case, in short, are that on 26/09/1989 in Bhairavdev ghati of District Panna Mohd. Naeemuddin, a Truck Driver (PW-31) saw Abhinav, aged 5 years (PW-28) crying and wandering on the road in naked condition. PW-31 brought the boy PW-28 to the hut of Naga Baba (PW-7). PW-28 was then taken to police station Mandla, District-Panna. On 26/09/1989 about 6.00 pm dead body of deceased Sushma alongwith dead body of her another son aged 2 years viz. Shashank was also found lying at some

distance from the road side in the forest. Dead bodies were in decomposed condition.

3. According to prosecution, deceased was living as second wife of respondent/accused, a Chartered Accountant, along with her two sons i.e. Shashank, aged 2 years (since deceased) and Abhinav, aged 5 years (PW-28) in a rented house of Neeraj Kohli (PW-22) situated in Sarojini Nagar, Kanpur. PW-28 was studying in Bona-Bista School, Kanpur. After about 6 years of their married life, deceased agreed to live, separate along with two children, in a rented house and respondent, as usual, started living with his parents, first wife and other family members in different locality in Kanpur. Respondent with the help of absconding co-accused arranged a trip with the deceased and children to Khajuraho. With a view to execute the plan, they took the deceased and children in a truck towards from Khajuraho to Bhairavdev ghati and committed murder of the deceased by strangulation with the help of a rope and also killed Shashank. He also tried to kill Abhinav (PW-28) and thereafter carried all of them to forest in lonely place. For disposal of their bodies, he poured acid on them. Fortunately, PW-28 survived and next day morning came on the road and was found by PW-31. Police Mandla District- Panna on 28/09/1989 sent dead body of deceased as an unknown lady to District Hospital Panna. Dr. O.P. More (PW- 1) conducted postmortem of the body and prepared postmortem report Ex.P-1. Dead body was in the advance stage of decomposition. Age of the deceased was found to be about 30 years, her viscera was preserved. However, no definite opinion about cause of death was given.

4. On the basis of information given by Naga Baba (PW-7) marg was registered for the death of boy aged about 3 years, whose dead body was found in the forest and on searching the spot further, dead body of deceased lady was also found and another marg proceeding was registered. Abhinav (PW-28), after a day became able to disclose his own identity, his name and name of family members etc. to police. For ascertaining the information given by PW-28, Rajeev Singh Bhadoria (PW- 21) went to Kanpur at his school and residence. Thereafter he registered 2 cases, at Crime No. 22/1989 (Ex.P-44) and Crime No. 23/1989 (Ex.P-45). During investigation, from rented house of deceased at Kanpur, Rent Note Ex.P-5 was obtained. This rent note had been executed by the respondent for providing residence to the deceased. From school of PW-28, educational record was recovered wherein respondent was shown as father of PW-28. Police tried to search respondent/accused, at

his office and residence, but finding him absconded initiated the proceeding against him. After a period of about 6 months i.e on 08/03/1990, respondent was arrested.

5. During investigation, clothes and other articles found near the body of the deceased persons got identified by sister of the deceased Smt. Meera Rangwani (PW-32). Photographs of deceased and her children were seized from her residence at Kanpur. School record regarding payment of fees etc was obtained as her link with the respondent/accused. Statement of Ramswaroop Soni, Hotel owner of Khajuraho (PW-2) was recorded. Similarly statements of neighbours of the house of deceased at Kanpur were recorded for showing relationship of the respondent with the deceased. Report of Handwriting expert was obtained to compare the writing of the respondent with the letter submitted by him in the school of PW-28.

6. Charge sheet under Section 302 IPC on two counts under Section 201 and under Section 307, was submitted by police Mandla, District-Panna, against the respondent in the court of concerned judicial magistrate citing PW-28 as injured eyewitness and documentary circumstantial evidence in respect of relations, conduct and motive of the respondent for the incident. Case was committed to the court of sessions for trial. However, trial Court framed charges in respect of death of the deceased only under Section 302 and 201 IPC against the respondent. Respondent abjured guilt and pleaded innocence stating that for last more than about 1 year of the incident, he had practically no relations with the deceased whatsoever. He pleaded false implication in this case on suspicion and imagination of the prosecution.

7. To substantiate case of the prosecution, statements of Dr. O.P. More (PW-1), Ram Swaroop Soni (PW-2), Shankarlal (PW-3), Bahadur Singh (PW-4), Maharaj Singh (PW-5), Dr. Anju (PW-6), Naga Baba (PW-7), Dharam Singh (PW-8), Shiv Prasad Arajaria (PW-9), Ajmat Ulla (PW-10), L.S. Mishra, SHO, Mandla (PW-11), Thakur Prasad, Patwari (PW-12), Jugla (PW- 13), Kalika Prasad (PW-14), Vishwanath (PW-15), Dr. Ashok Tiwari (PW-16), Shadilal (PW-17), Vipin Gosai (PW-18), Kailash (PW-19), Dr. D.K. Jain (PW-20), Rajeev Singh Bhadoria, S.I (PW-21), Neeraj Kohli (PW-22), Sudarshan Kumar Agrawal (PW-23), Vijay Arora (PW-24), Bachchu (PW-25), R.S. Rajput, SHO (PW-26) Shiv Prasad, Head Constable (PW-27), Abhinav, injured eyewitness (PW-28), Munni Lal Ahirwar (PW-29), Mahadev, uncle of the deceased (PW-30), Mohd. Naeemuddin, Truck driver

(PW-31), Smt. Meera Rangwani, sister of the deceased (PW-32), Smt. Veena Rangwani, niece of the deceased (PW-33) and Kishan Kumar Shekhchandani, brother of the deceased (PW-34) were recorded. After appreciating the aforesaid evidence and having disbelieved the testimony of Abhinav, injured child eyewitness (PW-28), learned Trial Judge extended benefit of doubt and acquitted the respondent of the charges.

8. These appeals have been filed by the State assailing the impugned judgment on the ground that Trial Court failed to appreciate the evidence of prosecution in correct manner. Material evidence regarding circumstances have been grossly ignored by the trial court. Evidence of child witness has not been appreciated properly. Finding of acquittal has been given in utter disregard of evidence available on record and is against the settled principles of law. Such findings are perverse and require re-appreciation and interference.

9. On the other hand, learned counsel for the respondent/accused submitted that trial court has rightly appreciated evidence. Most of the material witnesses did not support the prosecution in the trial court and were declared hostile. Evidence of PW-28 is full of suspicion and shaky. Prosecution witnesses failed to prove the case against the respondent, so the same has been rightly observed and held by the trial court. At this stage also presumption of innocence of the respondent will prevail and finding of the trial court cannot and should not be disturbed.

10. This Court is very much conscious and aware about the scope of re-appreciation of evidence in State appeals filed against the acquittal. Such findings are not to be unsettled in normal course unless findings of trial court has been given in absence of the evidence and findings are perverse and grossly wrong causing grave injustice. We are also aware of the fact that there is presumption of innocence prevailing in favour of respondent/accused. At the same time, it has also to be ensured that due weightage is given to circumstantial evidence, in view of the facts and circumstances of the case in hand.

11. In para 26 and 27, Apex Court in 2012 Cri. L. J. 3005 (*Jugendra Singh v. State of U.P.*) has observed that-

"26. In Chandrappa v. State of Karnataka[16], this Court held as under: -

> *"42 From the above decisions, in our considered view, the following general principles regarding powers of the*

appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

27. *In S. Ganesan v. Rama Raghuraman and others,*

one of us (Dr. B.S. Chauhan,J.), after referring to the decision in Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra, considered various aspects of dealing with a case of acquittal and after placing reliance upon earlier judgments of this Court, particularly in Balak Ram v. State of U.P., Budh Singh v. State of U.P., Rama Krishna v. S. Rami Reddy, Aruvelu v. State and Babu v. State of Kerala, held that unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal. Similar view has been reiterated in Ranjitham v. Basvaraj and others and State of Rajasthan v. Shera Ram @ Vishnu Dutta."

12. Dead body of the deceased was recovered from the forest in decomposed condition and was sent to hospital for postmortem. Police prepared Naksha Panchayatnama of the dead body Ex.P-37 in presence of witnesses and from dead body of the deceased kangan, tops, salwar-kurti, hair etc were seized along with viscera of the deceased were preserved by the doctor. Smt. Meera Rangawani (PW-32) also stated that her sister (deceased) was heard to be dead and she did not see her last about 3-4 years.

13. According to PW-28, dead bodies of his brother and mother were found near the place of occurrence. Shankarlal (PW-3), Jugla (PW-13), Kalika Prasad (PW-14), Vishwanath (PW-15) and Bachchu (PW-25) were panch witnesses of the inquest proceedings and Naksha Panchayatnama of the dead bodies of deceased and her son, aged 3 years. Rajeev Singh Bhadoria, S.I (PW-21) also endorsed the fact of preparation of Naksha Panchayatnama of dead bodies and about sending of the dead bodies for the postmortem. In view of the aforesaid, it can safely be held established that dead bodies in question were that of deceased Sushma and Shashank only and they died of homicidal death.

14. Before appreciating the evidence of child witness PW-28, it would be proper to look at the evidence of Mohd. Naeemuddin, Truck Driver (PW-31) who was taking Truck No. MP.F.7079 from Panwadhi to Maihar. At about 7.00 am, he saw a naked boy, aged 4-5 years, standing on the road side, who tried to give signal by hands to stop the vehicle. He saw some abrasions and injuries on the stomach of the boy. Boy appeared to be panic stricken and was not speaking anything. He handed over the boy to Naga

Baba (PW-7) and also gave his own address to him.

15. Naga Baba (PW-7) after receiving custody of the injured boy from Mohd. Naeemuddin, Truck Driver (PW-31), took him to police station-Mandla. Concerned police officials gave priority to the treatment of child, thereafter started proceedings. While PW-7 took the boy to the police station-Mandla, police recorded its entry at Sanha No. 606 (Ex.P-33) having a mention that boy was found in the forest by truck driver and boy was not able to give his name also. Police permitted PW-7 to keep that boy one day more with him. When FW-7 fed the boy some edibles, thereafter child became fit for saying something. Police officials also made efforts that child may speak something relevant. According to PW-7, child could speak his name, his father's name and about his residence.

16. In aforesaid backdrop, evidence of PW-28 has to be appreciated. PW-28 was a boy, aged about 5 years residing at Kanpur and was found on road side in forest in nude condition. Obviously, in the beginning he was in panic and was not able to say anything. After eating something and by passage of time, he could become normal and able to speak and express to PW-7 and to police. The boy was given in custody of some police official to keep him with his own family. After about two weeks, police produced the boy in the court of magistrate for recording his statement under section 164 Cr.P.C.

17. On 26/09/1989 PW-28's statement (Ex.P-6) was recorded by Investigating Officer PW-21. Thereafter on 20/10/1989 statement of PW-28 (Ex.P-66) was recorded by Judicial Magistrate First Class Ajaygarh under section 164 Cr.P.C. During trial his statement was recorded on 4th October, 1993 as PW-28. At the time of incident boy was of 4- 5 years of age and at the time of recording of court statement he was of about 8 years age.

18. On careful perusal of statement of PW-28, it is evident that boy was able to say his name, his identity, names of his family members. PW-28 was a student of Kg-I studying in Bona-Bista School, Kanpur. It is pertinent to note that it was the same boy, who gave the information firstly regarding his own identity and then identity of the deceased persons. Further he became able to disclose about his place of residence and place of study in Kanpur also. His clues and leads proved true while PW-21 went to Kanpur at the same place of residence and school as told by PW-28. Meaning thereby child was able to understand the questions and capable of giving the replies also. In para 49 of the judgment, Trial court has branded the boy with a "rattu tota". In above

backdrop, it is totally unwarranted, undesired and is against the fact situation of the case. Trial Court failed to appreciate the peculiar situation in which boy was found hundreds kilometres away from his residence alone and had seen murder of his mother and brother. Approach of trial court thus in this regard is totally perverse.

19. On careful perusal of statement of PW-28 given in the court, it is apparent that for a considerable period prior to the date of Court statement, he lived with family of a police official. They, admittedly, had no enmity or ill will against the respondent. Rather they extended help to abandoned child. On all the three occasions i.e before police in Ex.P-6, before Magistrate in Ex.P-66 and in court statement before the Sessions Judge, child told his name and other details correct. He clearly stated that respondent came with deceased, with him and his brother from Kanpur to Khajuraho and then to Bhairavdevghati in the night. He saw the strangulation of his mother done by his father with the help of rope. He narrated activities done with him also by his father in court statement.

20. In so far as appreciation of evidence of child witness is concerned, Apex Court in 2012 Cr. L.J. 3363 (*Alagupandi alias Alagupandian v. State of Tamil Nadu*) in para 23 has observed that-

> *"The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and that there exists no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated by other evidence before a conviction can be allowed to stand but as a rule of prudence the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. Further, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. (Ref. Dattu Ramrao Sakhare v.State of Maharashtra [(1997) 5 SCC 341] and Panchhi v. State of U.P. [(1998) 7 SCC 177]."*

21. It is submitted by learned counsel for the respondent that child witness has improved his version in trial court asfrom his earlier statement Ex.P-6 and

such improved version cannot be believed. It is pertinent to note that each and every contradiction and omission is not material. It is matter of time also, contradictions and omissions are material only when these are leading towards falsehood. With a view to explain a thing in a better way if something new is added then such contradiction cannot be said to be material. Discrepancies, contradictions and omissions in the evidence of a witness should be evaluated with a balanced approach in right perspective, the Apex Court, in this regard, in AIR 1983 SC 753 (*Bharwada Bhoginbhai Hirjibhai Vs. State of Gujrat*)in para 5 observed as follows:-

> "Over much importance cannot be attached to minor discrepancies. The reasons are obvious:
>
> (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
>
> (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
>
> (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.
>
> (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
>
> (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person.
>
> (6) Ordinarily a witness cannot be expected to recall accurately

the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him- Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses.

22. PW-28 was subjected to a very lengthy cross examination by a senior seasoned counsel of the respondent in the trial court. But there appeared nothing to indicate that this witness improved to speak false making himself liable to be treated as a tutored witness or stated the version suggested by somebody. PW-28 responded each and every question to the best of his understanding according to his age and maturity. In Ex.P-6, Ex.P-66 and the court statement the difference appeared on account of time only. Expressions of a child of 5 years and that of a child of 8 years are bound to be different, but PW-28 consistently and through out stated what he saw on the spot. Though this witness was aged only 4-5 years at the time of occurrence but was able to say about his identity to that extent so that police could reach at his residence at Kanpur from the town of Panna. His that much of understanding should have been appreciated by the court. Trial court in para 15 in the impugned judgment in this regard, thus, a gave totally incorrect and perverse finding.

23. With a view to refresh the memory of a witness if something has been suggested by prosecution prior to examination of witness is one thing and to tutor a child witness to narrate a particular set of story is quite another thing.

If a child could give correct address to take police to his residence and to his school then his understanding and expression could not have been misunderstood or questioned, about what he saw in the night during the incident.

24. A child of 4-5 years is expected to be very much attached to his father, mother and brother. PW-28 stated in respect of three members what he saw in the night in the incident. Such type of child witness, at the most, may be put to requirement of corroboration only. It does not mean that he is not capable of giving evidence. Corroboration is not a rule of law, but by way of abundant precaution and as a matter of prudence, court may seek corroboration in such a matter to rule out the possibility of mixing of the fact with the imagination in the version of child given in the court.

25. In respect of evidence of relations and relationship between the deceased wife and the respondent, statement of Shadilal of Kanpur (PW-17) is worth mentioning. Rent Note Ex.P-5 was executed between him and the respondent for tenancy of a 2 room flat meant for residence of the deceased. Reminders of rent dues had been sent to the respondent in case of default made by the deceased. According to PW-17, respondent and deceased entered in love marriage and deceased begot two children from the respondent.

26. Vijay Arora (PW-24) is the son of Shadilal (PW-17). PW-24 corroborated the evidence of rent note. Neeraj Kohli of Kanpur (PW-22) was another Landlord of the deceased and the respondent, for a house situated in Sarojini Nagar, Kanpur prior to residing in the house of Shadilal (PW-17). Vipin Gosai (PW-18) and Sudarshan Kumar Agrawal (PW-23) were neighbours of the rented house of deceased at Kanpur. Evidence of these witnesses is sufficient to establish that respondent lived like a husband with the deceased. They had two children i.e. PW-28 and deceased Shashank.

27. In reply to question no.20 of statement of accused recorded under section 313 Cr.P.C, respondent stated that he and deceased agreed in the year 1988 to live separately. Relationship between him and the deceased remained no longer disputed. Paternity of PW-28 also did not remain a matter of controversy. At the most it can be inferred that later for some time, there had been lack of regular visits of the respondent to the house of the deceased. In such a back drop, the evidence of child witness stands further corroborated with the circumstance that respondent came with the deceased and him from Kanpur to Khajuraho and then to Panna. Child witness (PW-28) had no reason to state these things false, particularly regarding trip in which he lost his mother also.

28. Evidence of Kailash (PW-19), the peon of Bona-Bista School, Kanpur is material and is indicative of the fact that Abhinav (PW-28) was the son of the respondent, and was astudent of KG-I in that school. Though he has been declared hostile, but his statement remains reliable and relevant in respect of relationship between the parties.

29. Trial Court failed to give due weightage to the circumstances of relations and relationship of the respondent with the deceased. Such circumstances played a vital role to establish a link. It should have been viewed in totality of facts and circumstances of the case. Merely by counting faults and defects in each and every evidence, ultimate and total effect of entire evidence cannot be ignored or overlooked.

30. In respect of another circumstance of subsequent conduct of the respondent, L.S. Mishra, the then SHO, Mandla (PW-11) stated that vide Ex.P-9 on 08/03/1990 he arrested the respondent and on the basis of information furnished by him prepared memorandum Ex.P-6. Though it was not signed by the respondent. Rajeev Singh Badoria, S.I (PW-21) in Para 15 of his statement said that on 30/09/1989 he along with Landlord of the house of deceased went to Kanpur and searched the respondent in his house there. But he did not find the respondent at his house. PW-21 met to the wife and brother of respondent at his residence at Kanpur and kept on waiting for the respondent for quite some time. For next 6 months, respondent did not take care of his 5 years old son. He also did not bother that he had lost his wife and his another son too.

31. On the contrary in statement of respondent/accused under section 313 Cr.P.C what has been stated is that in the month of September, 1989, he scheduled a visit of India trip including Vaishnodevi Yatra and of places like Delhi, Jammu, Agra, Mumbai, Goa, Shirdi etc. On 09/02/1990, while police took his brother to police station, he came to know that a false case had been initiated against him and then he himself appeared before the police. Conduct of tendering a false explanation is again very material circumstance showing the guilty mind of the respondent. In para 65 of the judgment, Trial Court believed aforesaid explanation of the accused to be true. This, in our opinion, was palpably wrong on the part of trial court. Evidence of PW-21 should have been given proper weightage as compared to statement of accused recorded under section 313 Cr.P.C. as he, apparently had no grudge or bias against the accused.

32. PW-28 was found to have sustained some injuries, may be due to monkey bite. In so far as version about injuries caused due to acid burn is concerned, initially its possibility was opined by the doctor, but he denied in the trial court. As such this part of the testimony of PW-28 deserves to be ignored. For rest of the incident he has categorically narrated the incident in the court, which inspires confidence. Natural and reliable evidence of child witness has been disbelieved by the trial court on flimsy and baseless grounds. The Apex Court in AIR 2009 SC (Supp) 2622 (*Perla Samasekhara Reddy & ors Vs. State of A.P*) in Para 37 has observed:-

> *"37. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case."*

33. As discussed above, what we find established from the prosecution evidence is that -

> (i) Abhinav, injured child witness aged about 5 years (PW-28) was found in a forest on road hundreds kilometres away from his house of Kanpur. On the basis of clues and leads given by Abhinav (PW-28), the Investigating Officer (PW-21) reached to his school and to the house of the respondent in Kanpur.
>
> (ii) He had no occasion and reason to be tutored or to speak false against his father (respondent) in Ex.P-6, Ex. P-66 and in court as well, about his mother and brother.
>
> (iii) As corroboration, evidence of motive against the respondent is available that he wanted to get rid of the deceased, his second wife;
>
> (iv) Another circumstance against the respondent is his

subsequent suspicious conduct. Investigating Officer PW/21 met with his first wife, brother and other family members in Kanpur three days after the incident. Even then for a period of 6 months, the respondent did not bother to take care of his sons and deceased wife. At the same time, the respondent offered false explanation for this absence in his statement in Court under Section 313 Cr. P.C.

34. Trial court utterly failed to give due weightage to the aforesaid established circumstances and to the evidence of Abhinav (PW-28) whose presence at the spot was established. Trial Court extended undue and unreasonable benefit of doubt to the respondent. Appreciation of the evidence of Abhinav (PW-28) and findings of the trial court in this regard are not only incorrect but are perverse also.

35. With the circumstances of motive and suspicious conduct of the respondent, evidence of PW-28 is wholly reliable. Trial court committed error in discarding the aforesaid evidence and failed to reach irresistible conclusion of the guilt of the respondent.

36. From the sequence of events as narrated by Mohd. Naeemuddin, Truck Driver (PW-31), who found the child on a road side all alone, Naga Baba (PW-7) who received custody of child and consoled him and gave him some food etc. and had taken him to police station and Rajeev Singh Bhadoria, SI (PW-21) who recorded the statement Ex.P-6 on 29/09/1989 and also produced the child before the Magistrate on 14/10/1989 for recording his statement Ex.P-66 under Section 164 Cr.P.C, it becomes crystal clear that child could reveal his own identity as well of his family members and also could narrate the incident which occurred in the frightful night with his mother, brother and himself. Evidence of child witness stood corroborated from the circumstantial and also from medical evidence on material aspects of the prosecution case.

37. For the reasons aforesaid, judgment of acquittal of the respondent of the charges under Sections 302 and 201 IPC passed by the Trial Court is set aside. Respondent is convicted under Sections 302 and 201 IPC and is sentenced to undergo imprisonment for life and R.I. for two years, respectively on each count. He shall surrender forthwith to serve out the sentence.

Appeal is allowed.

Appeal allowed.

I.L.R. [2013] M.P., 457
APPELLATE CRIMINAL
Before Mr. Justice S.K. Seth & Mr. Justice M.C. Garg
Cr. A. No. 1004/2002 (Indore) decided on 30 November, 2012

BHAGIRATH ...Appellant
Vs.
STATE of M.P. ...Respondent

Penal Code (45 of 1860), Section 302 - Murder **- Appellant was carrying a small child in his lap and threw him in front of moving jeep - Child died because of injuries sustained by him - Appellant guilty of murder - Appeal dismissed. (Para 12)**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – अपीलार्थी अपनी गोद में एक नन्हा बालक ले जा रहा था और उसे उसने चलती जीप के सामने फेंका – बालक की चोटों के कारण मृत्यु हो गई – अपीलार्थी हत्या का दोषी – अपील खारिज।

JUDGMENT

The Judgment of the Court was delivered by : **S.K.Seth, J. :-** Facts leading to this appeal are quite simple but heart rending. Appellant stands convicted of an offence punishable under Section 302 IPC and was sentenced to undergo life imprisonment and fine of Rs. 500/- with default stipulation.

2. About the following facts, there is no dispute at this stage.

3. On the fateful day at about 9 or 9.30 in the morning, appellant was going on an open road carrying his infant son aged about 6 months on his arm. Near village Katchariya, a Tata Sumo was coming from the opposite direction and was being driven by Shantilal (PW2) and Dr. Rakesh Yati (PW1) and Katcharmal (PW15) owner of the vehicle were travelling in said vehicle as passengers. The said infant suffered injuries and was first taken to the Police Station Pipliya-Mandi along with the father where FIR Ex.P.1 was recorded at 10.10 am and a case was registered u/s. 307 IPC. Later on the infant succumbed to the injuries therefore, the appellant stands charged for the homicidal death of his infant son.

4. Prosecution case in brief is as under. At the time of the incident, the appellant threw something towards the moving vehicle when it was crossing

him and this was seen by passenger Dr. Rajesh Yati (PW1), who caused the vehicle to stop to investigate matters. On the vehicle stopping, Dr. Rajesh Yati(PW1); the driver Shantilal (PW2) and owner-cum-passenger Katcharmal (PW 15) got down and found a seeming bundle of clothes lying behind the vehicle. It was then discovered that it was in fact the infant son of the appellant which appeared to be a bundle and the child was injured. The appellant was apprehended on the spot by the said witnesses and taken to the Police Station as stated above in the admitted facts. The autopsy was performed on the dead body by Dr. A.K.Gulati (PW18) same day at about 12 noon and Ex.P.6 is the autopsy report. The report found a crushed wound on head and exposing the skull and tear of the scalp. Dr. Gulati further found that skull bones were crushed into many pieces in temporal occipital region. Cause of death was the head injury sustained within six hours of the autopsy.

5. With this material, prosecution case was that appellant-father had caused the homicidal death of his infant son.

6. The appellant abjured his guilt and stated that the cause of death was the vehicle dashing the infant which was an accident and the occupants of the vehicle to save themselves had falsely implicated him. The appellant has examined Gopal (DW1) as his defense witness in this behalf.

7. The trial Court rejecting the defense version as worthless and relying on the prosecution story has convicted the appellant to life imprisonment with fine of Rs. 500/- with default stipulation.

8. The point strenuously urged before us was about the legal insanity of the appellant. A feeble attempt was also made about the accident theory of the vehicle striking the child; and the offence would not travel beyond Section 304(II) of the IPC. In support of alleged insanity, considerable stress was laid on unnatural conduct of a father committing infanticide and we were taken through the evidence minutely. We may state that no evidence in this regard was led by the defense and what is more no suggestion was made to prosecution witnesses during their cross-examination about alleged insanity.

9. Mention may be made of the fact that this Court on 11.9.2012 at the request of appellant's counsel (he stated that as per his knowledge the appellant was admitted in the mental ward and was undergoing treatment at Central Jail, Ujjain) this Court ordered the Government Advocate to submit a report regarding the current health status of the appellant. In compliance of that order,

the appellant was referred by the Jail Authorities to Indore and the appellant was examined by Psychiatrist Dr. Sardesai of the M.Y. Hospital Indore. His report dated 2.10.2012 is on record. The report significantly states that the patient has 'feelings of dirt' and complains of 'bathing'; 'Depression' with a belief that some people will harm him; both the 'depression' and the 'obsession' still exist; patient is under treatment for both and is showing improvement.

10. It cannot by any stretch of imagination be said that this report of the expert leads to a conclusion that the appellant suffered from insanity, much less legal insanity at the time of the incident. As already stated, the appellant made no effort to lead any evidence touching his alleged insanity. It was reasonable to expect any number of witnesses coming forward to testify about his erratic or mad behaviour. The one defense witness examined Gopal(DW1) is silent on the subject.

11. The law on the subject of insanity is very clear. Section 84 IPC deals with legal insanity as a general exception to an offence punishable under the Penal Code or under any special or penal law. This section lays down the legal test of responsibility in cases of alleged unsoundness of mind. Under it, a person is not guilty of an offence, who at the time of doing such act by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. This is known as ***Mc'Naghten's Rule.*** The burden of proving insanity or ***non-compos mentis*** lies on the accused. It is for him to establish that his cognitive faculties were lost due to aberration of mind. In other words, defense of unsoundness of mind being one of the general exceptions to criminal liability, the prosecution having established the main ingredients of the offence the burden to prove insanity at the time of occurrence is on the defense. Everyone is presumed to know the nature or consequences of his act. The accused may rebut this presumption with cogent and reliable evidence about his insanity.

12. Let us now consider whether the prosecution has succeeded in establishing the case put up against the appellant. The evidence of the eye witnesses for the prosecution lies in a very narrow compass, viz. the evidence of the two co-passengers Dr. Rajesh Yati (PW1) and owner Katcharmal (PW15) and the driver Shantilal (PW2). Dr. Yati (PW1) who was just sitting behind the driver has stated thus :- he saw the appellant throwing something toward the moving vehicle when the vehicle had nearly crossed the accused and the accused had come abreast of the witness; he asked the driver to stop

and upon the vehicle being stopped, the passengers and the driver got down to investigate matters; they found a sort of bundle lying on the road and in that bundle they found an infant, instead of bundle of clothes as earlier thought. This version is fully corroborated by the testimony of driver Shantilal (PW2) and Katcharmal (PW 15). The trial Court has relied on this evidence, and this reliance cannot be faulted.

13. We now come to the defense evidence. The accused has examined only one witness viz. Gopal (DW1). His examination-in-chief clearly reveals that he is not an eye witness to the incident. All he has to say is that when he was going as a pedestrian, he heard the "Jeepwala" shouting all the way that the child met with an accident. In cross examination, he confessed that he was not aware that the appellant had thrown the child under the vehicle. In these circumstances no value attaches to the defense version and the trial Court rightly discarded that version. In the facts and circumstances of the case we also find that offence would not be covered by Section 304(II) of the IPC and there is no merit in the submission on that behalf.

14. From the above it seems to us that in this very unfortunate case, the appeal has no substance and as such deserves to be and is hereby dismissed.

15. Ordered accordingly.

Appeal dismissed.

I.L.R. [2013] M.P., 460
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena
Cr. A. No. 1047/1996 (Jabalpur) decided on 2 January, 2013

ASHOK MISHRA ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 307 & 324 - Attempt to commit murder **- When injuries have been caused to victim, the intention or the knowledge of the assailant could be gathered objectively from the nature of injuries and the part of body whereon the injuries were caused - Doctor did not say that injuries found on the body of 'R' were grievous or dangerous to his life - It remains in the region of suspense whether appellants intended or knew that by their acts they would cause the**

death - It would be preferable to hold that they intended to cause hurt to 'R' with deadly weapons making them liable to be punished u/s 324 or 324/149 of IPC. (Para 15)

दण्ड संहिता (1860 का 45), धाराऐं 307 व 324 – हत्या कारित करने का प्रयत्न – जब पीड़ित को क्षतियां कारित की गई हैं, तब हमलावर के आशय या ज्ञान का निष्कर्ष क्षतियों के स्वरुप से एवं शरीर के उस हिस्से से जहां क्षतियां कारित की गई, वस्तुनिष्ठ रुप से निकाला जा सकता है – चिकित्सक ने यह नहीं कहा है कि 'आर' के शरीर पर पाई गई चोटें गंभीर थी या उसके जीवन के लिये घातक थी – यह अनिश्चितता बनी रहती है कि क्या अपीलार्थीगण का आशय था या उन्हें ज्ञात था कि उनके कृत्य से वे मृत्यु कारित करेंगे – यह धारणा करना अधिमान्य होगा कि उनका आशय 'आर' को घातक शस्त्रों से उपहति कारित करना था, जो कि उन्हें भा.द.सं. की धारा 324 अथवा 324/149 के अंतर्गत दंडित किये जाने योग्य बनाता है।

Siddharth Datt, for the appellant.
Amit Pandey, P.L. for the respondent.

JUDGMENT

RAKESH SAKSENA, J. :- Since the aforesaid appeals arise out of the common impugned judgment of conviction, this judgment shall govern the disposal of both the appeals.

2. Appellants have filed this appeal against the judgment dated 21.6.1996 passed by Fourth Additional Sessions Judge, Jabalpur in Sessions Trial No. 252/1993, convicting the appellants under Sections 307/148, 323/148 and 324/148 of the Indian Penal Code and sentencing them to rigorous imprisonment for three years with fine of Rs. 5000/-, simple imprisonment for six months and simple imprisonment for one year, on each count respectively. All the sentences of imprisonment to run concurrently.

3. In short, the prosecution case is that on 13.3.1990 at about 10 O' clock in the night when Surendra, Ramswaroop, Jawahar along with Ajay Charls and Christopher were coming back from the house of Sanjay Khatri after attending a party, five accused persons viz. Ashok, Mohan, Ramesh, Alexander and Simon confronted them near Deevan Bada and assaulted them with swords, iron rods and lathi. Accused Ashok and Mohan were armed with swords, Ramesh and Alexander were armed with lathis and Simon had iron rod. It is said that there was some past dispute between Ajay Charls and the accused persons. As a result of assault, Ramswaroop, Jawahar and

Surendra suffered injuries. It is also alleged that accused persons set fire to Motorcycle and Luna moped of the injured persons. On receiving some information, police reached at the spot and carried injured persons to Police Station Ranjhi, where Sub Inspector A.H.Rizwi (PW8) recorded First Information Report Ex. P/1 on being lodged by Surendra (PW2). Injured persons were sent to Victoria Hospital, Jabalpur, where Dr. C.B.Arora (PW11) examined their injuries. Though, injured persons were referred to Medical College, Jabalpur for further treatment, but no evidence was adduced before the Court in that regard.

4. After arrest of the accused persons and completion of the investigation, police filed the charge sheet against five accused persons. The case was thereafter committed for trial.

5. Charges, against the accused persons were framed under Sections 148, 307, 307/149, 324, 324/149, 323 & 323/149 of the Indian Penal Code. Accused persons abjured their guilt and pleaded false implication. According to them, at the time of occurrence there was no light in the locality and that injured persons were assaulted by the mob of about 100-150 persons because in the past they had threatened the residents of Deevan Bada.

6. After appreciating the evidence adduced by the prosecution and the defence, learned trial Judge held the accused/appellants guilty, convicted and sentenced them as aforementioned. However, finding the evidence doubtful against accused Simon and Alexander, acquitted them of all the charges. Aggrieved by their conviction and sentence, appellants have filed the appeals.

7. Learned counsel for the appellants submitted that the learned trial Judge mis-appreciated the evidence of eye witnesses. Since there was no light at the time and place of occurrence, it was not possible for the aforesaid witnesses to have identified the assailants. At the time of occurrence, injured persons were under intoxication, therefore, they had indulged in quarrel with the residents of Deevan Bada. In the alternative, learned counsel submitted that the learned trial Judge committed error in holding the appellants guilty under Section 307 of the Indian Penal Code because it was not established by the prosecution evidence that intention of appellants was to commit murder of injured Ramswaroop. On the other hand, learned Panel Lawyer for the State justified the impugned judgment of conviction and sentence passed against the accused persons and submitted that it was amply proved by the prosecution evidence that appellants attempted to commit murder of Ramswaroop.

8. I have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

9. Prosecution case mainly rested on the evidence of injured eye witnesses viz. Surendra (PW2), Ramswaroop (PW3) and Jawahar (PW5). Other alleged eye witnesses viz. Ajay (PW6) and Ajit Singh (PW9) did not support the prosecution case, therefore, they were declared hostile. Complainant Surendra (PW2) stated that in the night he was going back after attending a party at the house of Sanjay Khatri. He was on Motorcycle with Ajay and Gandhi. Ramswaroop and Jawahar were riding another Luna. Christopher was also going on a separate Luna. As soon as they reached near Deevan Bada, accused Ashok, Mohan, Ramesh and two other persons to whom he did not know surrounded them. Ashok and Mohan had swords and Ramesh had lathi. They started assaulting them with their respective weapons. One person gave blow with rod on his face and accused Ashok dealt a sword blow on his right thigh. All the five accused persons assaulted to Ramswaroop and Jawahar also. Due to assault they suffered injuries on head, nose and mouth. Since, there had been light in the temple, he identified the appellants. After beating accused persons ignited their motorcycle and mopeds also . On shouting a number of persons from the locality reached there. They were taken to police station where he lodged first information report Ex. P/3. He, Ramswaroop and Jawahar were then sent to Victoria Hospital, Jabalpur. He denied that after consuming liquor he and other injured persons went to Deevan Bada to beat the boys residing there. He also denied that they abused the people of the locality therefore they were assaulted by them. Despite a lengthy cross examination nothing substantial could be elicited out to indicate that this witness was not assaulted by the appellants. His evidence stood corroborated from the evidence of Ramswaroop (PW3) and Jawahar (PW5). It was categorically stated by these witnesses that they were confronted by the accused persons when they happened to pass on their motorcycle and mopeds from near Deevan Bada. Accused Ashok and Mohan had assaulted them with swords and Ramesh had caused injuries to them with a lathi. Like Surendra, these witnesses also could not identify the other two accused persons. Ramswaroop (PW3) stated that Mohan dealt a blow of sword on the right side of his head and Ramesh inflicted lathi injury on his foot. He stated that people of the locality carried them to police station, but in the mean time accused persons set their vehicles on fire. The omissions or the contradictions pointed out in the evidence of these witnesses were in the matters of details and did not go

to effect the core of their evidence.

10. The evidence of Surendra (PW2) stood further corroborated by the first information report Ex. P/3 lodged by him immediately after the occurrence.

11. The evidence of defence witnesses Bharat Singh Lodhi (DW1), Deepak Lala (DW2) and Narendra Mishra (DW3) to the effect that there was no electricity in Deevan Bada and it must have been dark, does not inspire confidence since it was specifically stated by Surendra (PW2) that there was light in the temple. As far as the question of identification of appellants is concerned admittedly they were known to injured persons from before and they were beaten for about 15-20 minutes at-least. It has been suggested by the defence to the aforesaid witnesses that in the past they had intimidated the persons residing in Deevan Bada, and accused persons had lodged some report against them in the police station. In these circumstances, it cannot be held that the injured persons could not have been identified their assailants.

12. The evidence of Surendra (PW2), Ramswaroop (PW3) and Jawahar (PW5) stood further corroborated from the evidence of Dr. C.B.Arora (PW11), who examined their injuries in Victoria Hospital and found them to have been caused by sharp edged and hard/blunt weapons. Dr. Arora stated that on 13.3.1990, he examined Ramswaroop and found following injuries:

(i) Incised wound on right parietal area 2.5" x 1/2"x scalp deep

(ii) Incised wound on middle of forehead longitudinal.

(iii) Incised just above second injury 3/4" x 1/4" x scalp deep.

(iv) Lacerated wound on left lower 3rd portion of thigh anteriorly 2.5" x1.5".

(v) Lacerated wound on left leg small 3 in number on anterior side 1/2"x 1/2".

(iv) Lacerated wound on right leg, compound fracture with open injury.

In the opinion of Dr. Arora these injuries were caused by sharp edged, hard and blunt objects. The injury report is Ex. P/17.

On examining the person of Jawahar, he found:

(i) Lacerated wounds on parietal area of the scalp which were five in number-1/2" x 3/4", 1.5"x 1/4", 1.5"x1/2", 1/2"x1/2" and 2.5"x 1/4". All these wounds were scalp deep.

(ii) Abrasion 1/2"x1/2" on right foot.

(iii) Lacerated wound 1/2"x1/2", 1" above left eye brow.

(iv) Lacerated wound 1/2"x1/2" on nose.

(v) Lacerated wound 1/4"x1/4" on upper lip.

(iv) Contusion on both shoulders.

The aforesaid injuries were caused by hard and blunt object. The injury report is Ex. P/18.

On the person of Surendra, he found:

(i) Lacerated wound 1/2"x1/4" on upper lip.

(ii) Incised wound on right thigh cutting anterior muscles.

(iii) Incised wound 1/2"x1/4" on left thigh.

(iv) Incised wound on left leg in middle 1/3 portion.

(v) Contusion on both shoulders and wrist joint.

(vi) Hematoma on right eye.

(vii) Contusion on both parietal areas.

(viii) Lacerated wound 1.5" x 1/2" x scalp deep on left parietal area.

The aforesaid injuries were caused by sharp edged, hard and blunt objects. The injury report is Ex. P1/9.

13. Dr. Arora (PW11) stated that in the injury report of Ramswaroop Ex. P/17 though he had mentioned about the fracture of the bone of the leg, but final opinion could be given only after X-ray examination. He admitted that he had referred the patient to Medical College, but he did not refer him for X-ray examination.

14. After sincerely appreciating the evidence of injured eye witnesses in the light of medical evidence adduced by the prosecution, I am of the opinion that learned trial Judge committed no error in holding that appellants assaulted Surendra (PW2), Ramswaroop (PW3) and Jawahar (PW5) with sharp edged as well as hard and blunt weapons and caused injuries to them.

15. Learned counsel for the appellants next submitted that in the facts and circumstances of the case and from the nature of injuries suffered by injured Ramswaroop, no offence under Section 307 of the Indian Penal Code was made out, therefore, the conviction of appellants under Section 307 of the Indian Penal Code was wrong. At the most, appellants could have been convicted under Section 324 of the Indian Penal Code. Appellants have been convicted by the learned trial Judge under Sections 324 and 324/148 of the Indian Penal Code for causing injuries to Surendra (PW2) and Jawahar (PW5), whereas for the injuries caused to Ramswaroop (PW3) they have been held guilty under Section 307 of the Indian Penal Code. The learned trial Judge observed, and in my opinion rightly, that it's not only requisite intention which makes an accused liable under Section 307 of the Indian Penal Code, but it's his knowledge also, which is important. If from the circumstances it could be inferred with certainty that assailant knew that under those circumstances if he by his act caused death, he would be guilty of murder. Learned counsel submitted that prosecution failed to prove that appellants had any motive against the injured persons. The first information report disclosed that they entertained animus against Ajay Charls (PW6) only and further that at the time of occurrence injured Ramswaroop was under the spell of liquor as was evident from the statement of Dr. C.B.Arora (PW11). He submitted that there was nothing on record to indicate that assailants were prevented to cause further or serious injuries to Ramswaroop because of any intervention by some body. The injuries of Ramswaroop were not proved to be dangerous to his life. Learned Panel Lawyer for the State on the other hand submitted that from the conduct of assailants and the nature of injuries, it was rightly held by the trial Court that appellants knew that they were likely to cause death of Ramswaroop. It is true that incised injuries were caused by appellants on the head of Ramswaroop, but all the aforesaid injuries were simple in nature. If appellants intended to cause death of Ramswaroop they were not prevented to fulfill their design since none intervened to prevent them from doing so. It is true that an accused may be held liable for the offence under Section 307 of the Indian Penal Code even if no injury was suffered by the victim, but when

injuries have been caused to victim, the intention or the knowledge of the assailant could be gathered objectively from the nature of injuries and the part of body whereon the injuries were caused. It is important to note that Dr. C.B.Arora (PW11) did not say that injuries found on the body of Ramswaroop were grievous or dangerous to his life. In the circumstances of the case in hand, in my opinion, it remains in the region of suspense whether appellants intended or knew that by their acts they would cause the death of Ramswaroop, therefore, it would be preferable to hold that they intended to cause hurt to Ramswaroop with deadly weapons making them liable to be punished under Sections 324 or 324/149 of the Indian Penal Code.

16. In view of the foregoing discussion, the conviction of appellants under Section 307/148 of the Indian Penal Code is modified to one under Section 324/148 of the Indian Penal Code for causing injuries to Ramswaroop. The conviction of appellants on other counts i.e. under Sections 324/148 and 323/148 of the Indian Penal Code for causing injuries to other injured persons is affirmed.

17. As far as the question of sentence is concerned, learned counsel for the appellants submitted that the incident in question occurred in the year 1990 since then about 22 years have elapsed, therefore, the sentences of the appellants be reduced, but in the facts and circumstances of the case and in view of the nature of injuries caused to Ramswaroop (PW3), I am of the opinion that no much indulgence can be shown. Accordingly, for the offence under Section 324/148 of the Indian Penal Code for causing hurt to Ramswaroop, appellants are sentenced to rigorous imprisonment for one year and ordered to pay fine of Rs. 5000/- each. In default of payment of fine, they shall suffer further rigorous imprisonment for a period of three months. The conviction and sentence awarded to appellants by the trial Court under Sections 324/148 and 323/148 of the Indian Penal Code are affirmed. All the jail sentences awarded to appellants shall run concurrent. Bail bonds and surety bonds of appellants are cancelled. They shall surrender immediately for serving out their remaining sentence.

18. Appeal partly allowed.

A copy of this judgment be kept in the record of Criminal Appeal No. 1063/1996.

Appeal partly allowed.

I.L.R. [2013] M.P., 468
APPELLATE CRIMINAL
Before Mr. Justice N.K. Gupta
Cr. A. No. 1418/1996 (Jabalpur) decided on 3 January, 2013

BASANT KUMAR BHARGAVA & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Sections 307 & 326 - Attempt to commit murder or causing grievous hurt*** **- Assault on the hands and legs of the victims - One of the victims receiving blow on head, but not forceful - No brain haemorrhage was caused to her - Appellant did not intend to kill - Overt acts do not fall within any category of section 300 of IPC - Held - Offence would be u/s 326 and not u/s 307. (Para 13)**

क. दण्ड संहिता (1860 का 45), धाराऐं 307 व 326 – हत्या कारित करने का प्रयत्न या घोर उपहति – पीड़ितों के हाथों और पैरों पर वार – एक पीड़ित ने सिर पर वार सहन किया किन्तु आघात शक्तिशाली नहीं था – उसे मस्तिष्क में कोई रक्तस्त्राव कारित नहीं हुआ – अपीलार्थी का आशय मृत्यु कारित करना नहीं था – प्रत्यक्ष कृत्य भा.द.सं. की धारा 300 की किसी श्रेणी में नहीं आते – अभिनिर्धारित – अपराध धारा 326 के अंतर्गत आयेगा और न कि धारा 307 के अंतर्गत।

B. ***Penal Code (45 of 1860), Section 459 - House breaking*** **- Assault is done after completion of house breaking - Offence u/s 459 can not be constituted - Offence u/s 458 of IPC is made out. (Para 20)**

ख. दण्ड संहिता (1860 का 45), धारा 459 – गृहभेदन – हमला, गृहभेदन को पूर्ण करने के पश्चात किया गया – धारा 459 के अंतर्गत अपराध गठित नहीं हो सकता – भा.द.सं. की धारा 458 के अंतर्गत अपराध गठित होता है।

Surendra Singh with *Shivam Singh,* for the appellants.
Ajay Tamrakar, P.L. for the respondent/State.

J U D G M E N T

N.K. Gupta, J. :- This judgment passed by this Court shall govern the disposal of above mentioned Criminal Appeals, since both the appeals arise out of common impugned judgment.

2. These criminal appeals are preferred by the appellants being aggrieved

by the judgment and order of sentence dated 8/8/1996 passed by the Sessions Judge, Panna in ST No.64/1991, whereby the appellants were convicted for commission of offence punishable under Sections 459 and 307/34 of IPC. The appellants Basant Kumar Bhargava and Haleem Bakhs were sentenced for seven years' rigorous imprisonment with fine of Rs.2,000/- for each count and six months' rigorous imprisonment was directed for each default of payment of fine, whereas the appellant Munni @ Nunni was sentenced for five years' rigorous imprisonment with fine of Rs.500/- for each count and two months' rigorous imprisonment was also directed for each default of payment of fine.

3. The prosecution's case, in short, is that in the night of 7th and 8th March, 1991 the victim Shanta Devi (PW-2) was sleeping in her house along with her daughter Manjulata (PW-3) and Meena. Elder daughter Meena was sleeping in another room whereas Shanta Devi and Manjulata were sleeping in the same room. At about 3:00 AM in the night the appellants broke the common wall of the house and entered into the house. The appellant Basant had a baka, appellant Munni @ Nunni had a gupti and appellant Haleem had a knife. Initially they assaulted the victim Meena. On hearing the noise, Shanta Devi tried to rush to the room of the victim Meena, but in the meantime the appellants held her and assaulted her by various weapons. Manjulata tried to save her mother, but ultimately she was also assaulted by the appellants. One neighbour Santosh (PW-4), who was studying in his room, heard the noise, and therefore he came to the spot along with his brother Purshottam and mother Gyanwati (PW-6). After looking them, the appellants ran away. Santosh and Purshottam took the victims in a jeep to the Outpost Kakarhati of Police Station Kotwali, Panna where the complainant Shanta Devi lodged an FIR Ex.P-2. All the victims were sent for their medical legal examination.

4. Dr. H.N.Sharma (PW-10) examined the victims. He examined the victim Meena and gave a report Ex.P13C. He found four incised wounds to the victim Meena situated at the left temple, left hand, right index finger and left neck. The blood pressure of the patient was low as much blood had oozed from the wounds. She was referred for the X-ray examination and treatment. Dr. H.N.Sharma (PW-10) had examined the victim Manjulata and gave a report Ex.P-14C. He found five incised wounds on her person situated at the left hand, right wrist, right tempo-parietal region on the head, right ear and on the back of neck. She was also referred for radiological examination and treatment. Dr. Sharma also examined the victim Shanta Devi and gave his

report Ex.P-15C. Seven incised wounds were found to the victim Shanta Devi situated at right hand, left thumb, left temple, left parietal region on the head, left cheek and jaw, right temporal region and on the mid of her head. Her position was critical. She was referred for radiological examination and treatment. Dr. G.P.Singh (PW-5) examined all the three victims radiologically and he found that the victim Manjulata sustained a fracture of second metacarpal bond on the left hand. Similarly, the victim Meena sustained a fracture of fourth metacarpal bond in right hand, whereas the victim Shanta Devi sustained a fracture in left fronto parietal bone and also her two fingers in right hand viz. middle and ring were absent, because the same were chopped off. After due investigation, a charge sheet was filed before the CJM Panna, who committed the case to the Sessions Court, Panna.

5. The appellants-accused abjured their guilt. They took a specific plea that they were falsely implicated in the matter due to enmity. In defence, Mohd. Sadik (DW-1) was examined to show that there was no arrangement of light in that night, because there was blackout in that village and hence the victim Shanta Devi could not know as to who assaulted her and her daughters.

6. The learned Sessions Judge after considering the evidence adduced by the parties convicted the appellants for commission of offence punishable under Sections 459 and 307 read with Section 34 of IPC and sentenced as mentioned above.

7. I have heard the learned counsel for the parties.

8. Shri Surendra Singh, learned senior counsel for the appellants Basant and Nunni Bai has submitted that no injury was caused to the victims which were fatal in nature. Since much blood was oozed, therefore the position of the victims appeared to be critical at the time of their medico legal examination, but no injury was sufficient to cause their death. There was no common intention of the culprits to kill any of the victims, and therefore no offence under Section 307 of IPC is made out against the appellants. Similarly, no offence under Section 459 of IPC is made out. It is also submitted that there was no arrangement of light and the victims could not identify the actual culprits. There is a lot of contradiction between the statements of the witnesses and their previous statements. In the alternate, it is submitted that at present the appellant Nunni Bai is an old person of 70 years, who has faced the trial and appeal for last 21 years, and therefore where she remained in the custody for five and half months in the past, she may not be sent to the jail again. Similarly, it is

submitted that the appellant Basant remained in the custody for four and half months, and therefore his sentence may be reduced to the period which he has already undergone in the custody.

9. Shri A.K.Jain, learned counsel for the appellant Haleem has argued in the same tone. He has submitted that there was no enmity between the appellant Haleem and the victims, therefore there was no need to the appellants to visit the house of the victims. Actually, the appellant Haleem had an enmity with the witness Santosh and his family members, and therefore he was falsely implicated in the matter at the instigation of Santosh etc. It is also submitted that the appellant Haleem also suffered the trial and appeal for last 21 years and remained in the custody for a longer period, and therefore he may not be sent to the jail again.

10. On the other hand, the learned counsel for the State has submitted that the conviction as well as the sentence directed by the trial Court appears to be correct and there is no basis by which any interference may be done in the appeal.

11. .After considering the submissions made by the learned counsel for the parties and looking at the facts and circumstances of the case, it is to be considered as to whether the appeal of the appellants can be accepted? And whether the sentence directed by the trial Court against the appellants can be reduced?

12. In the present case, Shanta Devi (PW-2), Manjulata (PW-3), Santosh (PW-4) and Gyanwati (PW-6) were examined as eye-witnesses. They have stated that initially the appellants assaulted the victim Meena and thereafter when Shanta Devi called the victim Meena, on hearing her shouts the appellants held the victim Shanta Devi and assaulted her by various sharp cutting weapons causing so many injuries. Her two fingers were amputated by the appellants. The testimony of these witnesses is duly corroborated by the FIR Ex.P-2, which was lodged within one hour of the incident, whereas the victims were taken in a jeep by Santosh and Purshottam. Similarly, the testimony of the witnesses is duly corroborated by the Dr.H.N.Sharma (PW-10), who has proved the injuries caused to the victims Meena and Shanta Devi. The description of the injuries is not required to be mentioned in detail in the judgment. However, the victim Meena sustained four incised wounds, Manjulata sustained five incised wounds and Shanta Devi sustained seven incised wounds. Dr. G.P.Singh (PW-5) has proved that the victim Manjulata

sustained a fracture of second metacarpal bond on the left hand, whereas the victim Meena sustained a fracture of fourth metacarpal bond in right hand and the victim Shanta Devi sustained a fracture in left fronto parietal bone and her two fingers in right hand were chopped off.

13. According to the evidence given by Dr. H.N. Sharma and Dr. G.P.Singh, it is apparent that the victims sustained grave injuries by sharp cutting weapons. So far as the nature of injuries is concerned, initially Dr. H.N.Sharma has mentioned that cumulative effect of the injuries of each of the victims was dangerous to the life, but by any such injury no vital part of the body of any of the victims was damaged, and therefore it cannot be said that those injuries were fatal in nature. It is apparent that the appellants assaulted on the hands and legs of the victims. Victim Shanta Devi had received some blows on her head, temporal region and cheek, but those assaults were not forceful, and therefore though she sustained a fracture of fronto parietal region, but no brain hemorrhage was caused to her. She was found conscious by Dr. Sharma at the time of her first examination. Looking at the attitude of the appellants, their overt-acts do not fall within any category of Section 300 of IPC, and therefore it would be apparent that they did not intend to kill any of the victims. As it is discussed that except the injury of the head caused to the victim Shanta Devi, no fatal injury was found. Since there was no brain hemorrhage to the victim Shanta Devi, therefore the fracture caused on her head was not fatal in nature. Under such circumstances, neither the appellants were intended to kill any of the victims nor they caused any fatal injury to the victims so that anyone of them could die. Therefore, the injuries caused to the victims would fall within the purview of Section 320 of IPC, and therefore the injuries were grievous in nature. Hence the offence committed by the appellants would be under Section 326 of IPC and they could not be convicted for the offence under Section 307 of IPC.

14. The learned counsel for the appellants have tried to locate the contradictions between the statements of various witnesses and their previous statements. No material contradiction is visible in the case. It is apparent from the very beginning that the victim Meena was sleeping in one room, whereas Shanta Devi and Manjulata were sleeping in another room. The injuries were caused by each of the appellants and the narration of the witnesses was duly corroborated by the medical evidence. The overt-act of each of the appellants is very well mentioned by the witnesses. There is no material contradiction visible in their evidence or with their previous statements. Some minor

contradiction relating to the weapon etc. is visible, but it is apparent that each of the appellants had sharp cutting weapon. The FIR Ex.P-2 was lodged within one hour of the incident, whereas looking to the injuries of the victims, some time was required to stop their bleeding etc. and to arrange for the vehicle to take them, and therefore the FIR has been lodged within a reasonable period and the same should be believed.

15. The learned counsel for the defence gave some suggestion to the victim Shanta Devi that the victim Meena found with the witness Santosh (PW-4), and therefore Santosh assaulted them in such a manner and thereafter Shanta Devi shifted the guilt of Santosh upon the appellants due to enmity. It is true that there was an enmity between Shanta Devi and Munni @ Nunni. Both of them are sistersin- laws and there was a property dispute between their husbands, who were brothers. However, the suggestion given by the defence counsel appears to be baseless. If Santosh was the person, who assaulted the victims, then it was not possible for the victims to immediately visit the Police Outpost with Santosh and his brother Purshottam in their jeep. Secondly, Santosh would have run away instead of staying due to his guilt. He could not help the victims in lodging the FIR. The learned defence counsel has suggested such a defence to the witnesses only to impeach the credibility of Santosh and to show that there was some illicit relations of the witness Santosh and the victim Meena, but such suggestion appears to be baseless and was nowhere established by the defence evidence. Therefore, that suggestion has no affect in the prosecution evidence.

16. The learned counsel for the appellants have submitted that there was no arrangement of light in the room, and therefore the victims could not see the actual culprits. It is strange that the defence counsel did not ask any of the witnesses about arrangement of the light, but the defence witness Mohd. Sadik (DW-1) was examined to show that there was a blackout in that night in his village. Such type of evidence has no meaning, because such type of fact must have been proved by the authority of the Electricity Board that there was blackout in that night in the particular village. The witness Santosh claimed that he was studying in that night. Similarly, the victim Meena was also studying in the night, and therefore it would be apparent that there was light arrangement in the night. Secondly, the wall was broken, which was between the houses of the appellant Basant and the victims. That wall could not be broken by anyone else, if there was no arrangement of light and the appellants were implicated on the basis of enmity, then as to why the appellant Haleem Bakhs was

implicated, because there was enmity of the appellant Haleem with the victims and their family members. The victims were taken to the police station as early as possible so that their treatment could be started, and therefore there was no span of time with the victims to tell the name of enemies in place of actual culprits. The witnesses Santosh and Gyanwati, who reached to the spot after hearing the hue and cry of the victims, they also corroborated that the appellants were the persons, who assaulted the victims. Under such circumstances, it cannot be said that the witnesses could not identify the appellants due to darkness.

17. The enmity is a double edged weapon, that means due to enmity the appellants could assault the victims or due to that enmity the appellants could be falsely implicated by the victims, if the victims could not know about the actual culprits. In the present case, the wall between the houses of the victims and the appellant Basant was found broken and that wall was broken either by the members of the family of the victims or by the culprits. There was no need to the victims to break such a wall, and therefore looking to that broken wall, it is clear that the appellants were the actual culprits, who could have done such a crime. Under such circumstances, the prosecution has proved beyond doubt that the appellants were the persons, who assaulted the victims by sharp cutting weapons in such a brutal manner. The appellants could not create any doubt in the testimony of eye-witnesses. The testimony of eye-witnesses is duly corroborated by the FIR Ex.P-2 and the medical evidence given by Dr. H.N.Sharma and Dr.G.P.Singh. Hence, it is proved beyond doubt that the appellants assaulted the victims Shanta Devi, Manjulata and Meena by sharp cutting weapons.

18. The incident took place in the midnight and the victims were sleeping, therefore it cannot be said that any right of private defence was accrued to the appellants or any sudden or grave provocation was given by the victims. The appellants were armed with various sharp cutting weapons and they knew the result of their overt-acts, and therefore the assault caused by them were voluntarily assault to the victims, hence it is proved beyond that the appellants assaulted the victims by sharp cutting weapons voluntarily causing them grievous hurt. Therefore, each of the appellants is guilty for the offence under Section 326 of IPC.

19. All of them had participated in the crime. It is clear that appellant Basant chopped off the fingers of the victim Shanta Devi, whereas the appellant

Munni @ Nunni assaulted on her head causing a fracture and the appellant Haleem also assaulted the victims Manjulata and Meena, and therefore their overt-acts indicate their common intention. If the appellant Haleem had no common intention, then what was the necessity to him to accompany the appellant Basant and Munni. Under such circumstances, with the help of Section 34 of IPC, each of the appellants can be held guilty for the offence under Section 326 of IPC. The offence under Section 326 of IPC is inferior offence of the similar nature as of offence under Section 307 of IPC. Therefore, the appellants can be convicted under Section 326 of IPC read with Section 34 of IPC under the charge of Section 307 of IPC.

20. So far as the offence under Section 459 of IPC is concerned, it is proved beyond doubt that the appellants broke a wall which was between the houses of both the parties and entered into the house, and therefore they have done house breaking. There was no entry for the appellants by which they could go inside the house, and therefore it is apparent that house-breaking had been done by the appellants. However, the learned trial Court convicted the appellants for the offence under Section 459 of IPC, whereas one ingredient of that offence is missing. For the offence under Section 459 of IPC, one important ingredient is that assault should be done to complete the house breaking. If the assault has been done during the commitment of lurking house-trespass or house breaking, then offence under Section 459 of IPC is made out, but if assault is done after completion of the house breaking, then the offence under Section 459 cannot be constituted. In the present case, house breaking was done to enter into the house of the victims and no assault was caused during the house breaking, and therefore no offence under Section 459 of IPC is made out against the appellants. But looking to their overt-acts, offence under Section 458 of IPC is made out against the appellants, which is inferior offence of the same nature, and therefore the appellant can be convicted for that offence under Section 458 of IPC under the charge of Section 459 of IPC.

21. So far as sentence is concerned, it is true that the appellants remained in the custody for two and half months during the trial and thereafter three months during the appeal. The appellant Munni @ Nunni remained in the custody for eight days during the trial and thereafter she remained in the custody for two months during the appeal. It is true that the appellants have faced the trial and appeal for last 19-21 years but they were on bail. They assaulted three different victims in a brutal manner to settle their civil dispute, and

therefore looking to the overt-acts of the appellants, no lenient view can be taken against them. However, looking to the offence under Section 326 of IPC, three years' RI may be sufficient for them. Since the sentence has to run concurrently on all counts for all the victims, and therefore the trial Court has not directed three different sentences for three victims. Similarly, at present three different sentences are not required to be directed by this Court for three victims. The offence under Section 458 of IPC is part of offence done by the appellants in assaulting the victims, and therefore the appellants can be sentenced for two years' RI for the offence under Section 458 of IPC.

22. So far as the sentence of appellant Munni @ Nunni is concerned, it is true that at present she is 72 years old and she has also suffered the trial and appeal for last 19-21 years. The trial Court has also inflicted some lesser sentence against the appellant Munni @ Nunni. She remained in the custody for two and half months in all. She had participated in the crime equally with the other appellants, but looking to her age etc., it would not proper not to send the appellant Munni @ Nunni to the jail again, but some heavy fine is to be imposed upon her.

23. On the basis of the aforesaid discussion, the appeals of the present appellants are partly allowed. Their conviction and sentence directed by the trial Court under Sections 307/34, 459 of IPC are hereby set aside, but they are convicted for commission of offence under Section 326/34 and 458 of IPC. Appellants Basant Kumar Bhargava and Haleem Bakhs are sentenced for three years and two years' RI for the aforesaid crime respectively. The sentences shall run concurrently. Their custody period during the trial and appeal would be adjusted in the sentence. The appellant Munni @ Nunni is also convicted for the offence under Section 326/34 and 458 of IPC and is sentenced to the period which she has already undergone in the custody. Fine of Rs.20,000/- and 10,000/- is imposed respectively upon her for the aforesaid offences. She is directed to deposit the entire fine amount before the trial Court within two months from today, failing which she has to undergo one year and six months' RI respectively. Since it is default sentence for non-payment of fine, therefore it shall not run concurrently.

24. The appellants are on bail, and therefore their bail bonds are hereby cancelled. The appellants Basant Kumar Bhargava and Haleem Bakhs are directed to surrender before the trial Court forthwith and the trial Court shall send them to the jail for execution of remaining jail sentence. The appellant

Munni @ Nunni shall deposit the fine amount before the trial Court within the stipulated period, otherwise default sentence shall be executed.

25. A copy of this judgment be sent forthwith to the trial Court with its record for information and compliance.

Order accordingly.

I.L.R. [2013] M.P., 477
ARBITRATION APPEAL
Before Mr. Justice J.K. Maheshwari & Mr. Justice G.D. Saxena
Arb. A. No. 11/2012 (Gwalior) decided on 4 December, 2012

JOINT VENTURE OF ENVIO PURE AQUA SYSTEMS (P) LTD. ...Appellant
Vs.
MUNICIPAL CORPORATION, GWALIOR & ors. ...Respondents

Arbitration and Conciliation Act (26 of 1996), Sections 2(4) & 9, Madhyastham Adhikaran Adhiniyam, M.P. (29 of 1983), Section 17A, Civil Procedure Code (5 of 1908), Order 39 Rules 1 & 2 - Interim relief **- As per agreement the appellant may take recourse as permissible under the Adhiniyam, 1983 making a reference to the M.P. Arbitration Tribunal, Bhopal - Appellant cannot be permitted to jump upon for taking recourse of Section 9 of the Arbitration Act, 1996 for taking order of interim nature from the Civil Court - Trial Court committed no error in rejecting the application - Appeal dismissed. (Para 13).**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धाराऐं 2(4) व 9, माध्यस्थम् अधिकरण अधिनियम, म.प्र. (1983 का 29), धारा 17ए, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अंतरिम राहत – अनुबंध के अनुसार अपीलार्थी, म.प्र. माध्यस्थम अधिकरण, भोपाल को निर्देश पेश कर उपचार का अवलंब ले सकता है जैसा कि अधिनियम 1983 के अंतर्गत अनुज्ञेय है – अपीलार्थी को सिविल न्यायालय से अंतरिम स्वरुप के आदेश हेतु माध्यस्थम अधिनियम 1996 की धारा 9 का सीधा अवलंब लेने की अनुमति नहीं दी जा सकती – विचारण न्यायालय ने आवेदन अस्वीकार करने में कोई भूल नहीं कारित की – अपील खारिज।

Cases referred :

AIR 1991 MP 233, AIR 1988 MP 111, AIR 1996 SC 2684, (2012) 3 SCC 495, (2011) 13 SCC 261, (2012) 3 SCC 513, 2010 (2) MPHT 338.

Prashant Sharma, for the appellant.
Deepak Khot, for the respondent No.1.
J.D. Suryavanshi & Kunal Suryavanshi, for the respondent No.2.

ORDER

The Order of the Court was delivered by,
J.K. MAHESHWARI,, J.: This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 has been filed assailing the order dated 04.09.2012, passed in Arbitration Case No.29/2012, by the 7th Additional District Judge, Gwalior rejecting the application under Order 39 Rule 1 and 2 read with Section 151 of CPC and Section 9 of the Arbitration and Conciliation Act, 1996 seeking direction to restrain the respondent no.1 Bank from encashment of the bank guarantee in favour of respondent no.1 during the pendency of the proceedings before the Madhya Pradesh Arbitration Tribunal.

2. The facts in brief are that the respondent no.1 Corporation has invited the tender with respect to laying down the sewer line, which was accepted on 12.12.2010 and the contract was signed after the requisite security deposit. The work order was issued on 23.02.2011. As the work could not be performed within the specified time, as alleged on account of the encroachment over the land, however, it was rescinded vide order dated 31.05.2012. As per order dated 30.07.2012 the earnest money, security deposit, performance bank guarantee and amount unpaid for the work done had been forfeited, blacklisting the petitioner company. The order of blacklisting was challenged before the High Court in the writ petition, which was set aside and the appellant was directed to take the recourse of law as per Arbitration clause for remaining disputes. The appellant filed an application under Section-9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'Arbitration Act, 1996') read with Order XXXIX Rule 1 and 2 of the Code of Civil Procedure. Seeking relief to not to encash the bank guarantee in favour of respondent no.1, which is rejected by the order impugned, however, this appeal has been filed.

3. The respondent no.1 has filed the reply to the said application, *inter-alia* contending that the application is not maintainable because the dispute has not been filed, though as per the order of this Court passed on 23.08.2012 in Writ Petition No.5748/2012 it was directed that as per Clause-86.4 of the agreement the parties may take recourse by way of Arbitration in appropriate forum. It is further said that when the work was not performed by the appellant within time, intimation in this regard were given, even then the work was not

completed by him. However, in terms of Clause 82.1 of the agreement the order rescinding the contract has rightly been passed on 31.05.2012. After passing the order of forfeiting the security, bank guarantee the Mayor-in-Council has further granted permission to issue a fresh contract and an intimation to that effect was given to the appellant. In the said sequel of fact the application is not maintainable and on merit also appellant is not entitled to get any relief.

4. Learned trial Court after referring various provisions of the agreement and further referring various judgments held that as per the agreement clause 86.4 the appellant is having a right to file a reference before Madhya Pradesh Arbitration Tribunal and the jurisdiction to entertain the application to grant interim relief is not with the trial Court. It is further held that the provision of Section-9 of the Arbitration Act, 1996 is having no application in the present case accordingly the application was rejected.

5. Shri Prashant Sharma, learned counsel appearing on behalf of the appellant referring Clause-86.4 of the agreement has urged that the contractor is having the right to proceed for Arbitration and the reference is to be made to the Arbitration Tribunal. Merely having the said clause in the agreement, it would not debar the appellant to take the recourse of Section-9 of the Arbitration Act, 1996 in Civil Court seeking interim direction. However, the trial Court has committed grave error while rejecting the application, on the ground of jurisdiction to entertain it under Section 9 of the Arbitration Act, 1996.

6. *Per contra* Shri Deepak Khot, learned counsel appearing on behalf of the respondent no.1 Corporation contends that as per the provisions of Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 (hereinafter referred to as 'the Adhiniyam, 1983'), which is a special enactment in which the reference may be made for a dispute to the Arbitration Tribunal in terms of Clause-86.4 of the agreement after termination of the contract. As per said clause, appellant himself has agreed to take recourse under the Adhiniyam 1983. As per Section 2 (4) of the Arbitration Act, 1996 if the provisions of special enactment are inconsistent with the Arbitration Act then the special enactment shall prevail over. Under the Adhiniyam of 1983 as per Section 17-A proviso there to Tribunal is not having jurisdiction to grant any interim relief with respect to the dispute pending before them. In such circumstances under the special enactment interim protection cannot be directed. However,

only to take the benefit of interim protection the appellant cannot invoke the powers under Section-9 of the Arbitration Act, 1996. In such circumstances the trial Court has rightly rejected the application by the order impugned on the ground of jurisdiction to maintain it.

7. After hearing learned counsel appearing on behalf of the parties and on perusal of the record it is apparent that Clause-86 of the agreement enables the parties to resolve their dispute taking recourse of Arbitration before M.P. Arbitration Tribunal at Bhopal. The aforesaid clause is in two parts, first part consists of the Arbitration during continuation of the contract agreement and the relevant Clauses are 86.1 to 86.3 and the later part enables to the recourse after termination of the contract agreement which includes Clause-86.4 of the agreement. In the present case the contract agreement has been rescinded. However, Clause-86.4 having its application, which is reproduced as thus: -

> **"86.4- The Contractor shall have the right to proceed for Arbitration which shall be referred to Arbitration under Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983 under M.P. Arbitration Tribunal at Bhopal"**

Bare reading of the aforesaid, it is apparent that after termination of the contract, the contractor have right to proceed for arbitration which shall be referred under the Adhiniyam of 1983 to the Madhya Pradesh Arbitration Tribunal at Bhopal. The aforesaid bi-parte agreement has been signed by the appellant, however, applicability of the Adhiniyam of 1983 in the matter of Arbitration by a reference to the Tribunal is agreed by the parties.

8. Section 2 (1) of the Adhiniyam, 1983 defines the 'work contract' which is reproduce as under: -

> **"works-contract" means an agreement in writing for the execution of any work relating to construction, repair or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, well, bridge, culvert, factory, work-shop, powerhouse, transformers or such other works of the State Government or Public Undertaking as the State Government may by notification, specify in this behalf at any of its stages, entered into by the State Government or by any official of the State Government or Public Undertaking or its**

official for and on behalf of such Public Undertaking or its official for and on behalf of such Public Undertaking and incllllueds an agrrement for the supply of goods or material and all other matters relating to the execution of any of the said works."

As per Section 2 (d) the 'dispute' has been defined, which is reproduce as under: -

"dispute" means claim of ascertained money valued at Rupees 50,000 or more relating to any difference rising out of the execution or non-execution of a works contract or part thereof;

Bare reading of the aforesaid, it is apparent that on execution of the agreement in writing regarding any of the work so specified by the State Government or Public Undertaking the State Government by notification specified in this behalf at any stage for supply of goods or material and all other matters relating to execution of the said work may be decided by the Tribunal. In the present case the value of the contract is more than Rs.50,000/- with respect to non execution of the work within the stipulated time, however, contract was rescinded. As per Section-7 of the Adhiniyam, 1983 it is apparent that either party to a works contract may refer in writing the dispute to the Tribunal irrespective of the fact whether the agreement contains an arbitration clause or not for a works contract. In such circumstances as per Clause-86.4 of the agreement even after termination of the contract agreement the parties having a right to take recourse by making reference to the Arbitration Tribunal, Bhopal under the Adhiniyam, 1983.

9. In the context of the aforesaid statutory provisions in various judgments of this Court the aforementioned relevant provisions have been duly considered, which is required to be taken note of. In the Full Bench decision of this Court in the case of *Administrator, Municipal Corporation, Durg and others Vs. M/s Jainco Designers and Executors, Durg* reported in AIR 1991 MP 233 it is held that any dispute between the Administrator of the Corporation and the Contractor in execution of the work would cover up the Corporation (Public undertaking) as per Section 2 (g) of the Act. The Division Bench of this Court in the case of *MPS Spedra Engineering Corporation, Engineers and Contractors Bhopal Vs. State of Madhya Pradesh*, reported in [AIR 1988 MP 111] held that the provisions of the Adhiniyam, 1983 would

be applicable even in existence of Arbitration Act, 1940. In such circumstances in a case where the contract has been executed by the appellant with the Corporation applicability of the Adhiniyam, 1983 in the matter of works contract entered with contractor cannot be doubted. In the present case the contract has been entered into with the Municipal Corporation, Gwalior and petitioner and as per the terms of the agreement the dispute may he decided by the Tribunal as per the Adhiniyam 1983. However, the parties can take recourse in furtherance of the terms of the agreement under the Adhiniyam, 1983.

10. As per section 17-A of the Adhinyam, 1983 the Tribunal is conferred with the inherent power. The aforesaid provision is relevant for the purpose of the present case, however, it is reproduce as under: -

> "17-A. Inherent powers.-Nothing in this Act shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders may be necessary for the ends of justice or to prevent abuse of the process of the Tribunal:
>
> "Provided that no interim order by way of injunction, stay or attachment before award shall be granted.
>
> Provided further that the Tribunal shall have no power to review the award including the interim award."

Bare reading of the aforesaid, it is apparent that as per the first proviso no interim order by way of injunction, stay or attachment before award shall be passed by the Tribunal.

11. Section-9 of the Arbitration Act, 1996 offers the recourse to the party 'before' or 'during arbitral proceeding' or 'at any time after making the arbitral award' in the nature as specified in Clause-2 (a), (b), (c), (d) and (e) thereof is permissible. Thus, it is clear that during arbitral proceedings if applicability of "Arbitration Act, 1996" is there recourse of Section-9 is permissible. But simultaneously. Sub-Section (2), (3) and (4) of Section 2 of Arbitration Act is relevant which reads as under:"

> **"(2) This Part shall apply where the place of arbitration is in India.**
>
> **(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.**

> **(4) This Part except sub-section (1) of Section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to any arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."**

Bare reading of the aforesaid, it is apparent that Part-I of the Arbitration Act, 1996 consists from Section 2 to Section 43 and shall apply to every arbitration under any other enactment for the time being in force with the exceptions that the provisions of the other enactment applicable in terms of the agreement should not be in consistent with the first part of the Arbitration Act, 1996. Thus, on having inconsistency of the provisions of the other enactment with the first part of the Arbitration Act, 1996 the recourse specified in the said part is not permissible. Section 9 of the Arbitration Act, 1996 falls within the first part of the said Act, therefore, the applicability of such part in a case where the arbitration agreement describes the arbitration under the Adhiniyam, 1983 is not permissible. The guidance may be taken from the judgment of *Punjab State Electricity Board, Mahilpur V. M/s Guru Nanak Cold Storage & Ice Factory, Mahilur and another* [AIR 1996 SC 2684]. In the said judgment in the context of the other enactments where the inconsistency was there Hon'ble the Apex Court has observed as under:-

> "12. Sections 6 (1), 7, 12, 36 and 37 have been expressly excluded from the operation of statutory arbitration. The rest of the provisions per force would get attracted. But the provisions of the appropriate statute or rules should necessarily be consistent with the provisions of the Arbitration Act. In that event, despite absence of an arbitration agreement, rest of the provisions of Arbitration Act would apply (as if there was an arbitration agreement between parties) and the dispute becomes arbitrable under the Arbitration Act, as if there was an arbitration agreement between the parties. If there is any inconsistency, then the provisions of the Arbitration Act do not get attracted. Section 33 expressly gives power to the Civil Court to decide the existence or validity of the arbitration

> agreement or the award as such. if this question was to arise, necessarily the Civil Court would be devoid of jurisdiction to decide the dispute on merits but only in the forum of arbitration. The existence and validity of the arbitration agreement should be decided by the Civil Court. Arbitrator cannot clothe himself with jurisdiction to conclusively decide it by himself as a jurisdictional issue. It is for the Court to decide it. The dispute on merits should be resolved by the arbitrator and the legality of the award would be subject to decision by the Court under Section 33."

In the present case after termination of the contract prior to making a reference to the Tribunal, appellant has filed an application under Section-9 of the Arbitration Act, 1996 read with Order XXXIX Rule 1 and 2 of the Code of Civil Procedure. In view of the foregoing, to maintain the application under Section-9 of the Arbitration Act, 1996 read with Order XXXIX Rule 1 and 2 and to look into the finding so recorded by the learned trial Court is to be examined that in the matter of grant of injunction whether there is any inconsistency to the provisions of the Adhiniyam, 1983.

12. In the facts of the present case, it is apparent that the work contract was granted to the petitioner which could not be satisfactorily completed, however, it was rescinded by the order dated 31.05.2012. Clause 86.4 of the agreement applies after termination of the contract, whereby on having any dispute, the contractor shall right to proceed for arbitration, referring it to M.P. Arbitration Tribunal as per Madhya Pradesh Madhyastham Adhikaran Adhiniyam, 1983. The said agreement is the by-party agreement executed by petitioner as well as the Corporation putting their signatures, however, parties are bound by the terms of the said agreement. The Adhiniyam, 1983 is a special enactment and the parties have chosen to take recourse under the said enactment. As per Section 17A of the said Adhiniyam, it is clear that no interim order by way of injunction, stay or attachment before award shall be granted. While under Section 9 of the Arbitration Act, 1996, any party before or during arbitral proceedings may apply to the court seeking an order by way of interim measure. But as per sub-section 4 of Section 2 of the Act of 1996 if the provisions of part one of the said Act are inconsistent with the other enactment as specified in the arbitration agreement then the applicability of the Act of 1996 is excluded. Thus, the only recourse permissible to the parties is as per terms of the agreement and to enforce the provisions of the special enactment

of 1983 wherein the grant of interim stay prior to passing the award is not permissible. Therefore, on making request by the appellant interim relief cannot be prayed for on an application under Section 9 of the Arbitration Act, 1996 and the trial Court has rightly rejected the said application. In this respect judgment of Hon'ble the Apex Court in the case of *Madhya Pradesh Rural Road Development Authority and another V. L.G. Choudhary, Engineers and Contractor* (2012)3 SCC 495 can safely be relied upon wherein the judgment of *Va Tech Escher Wyass Floverl Limited Vs. Madhya Pradesh State Electricity Board and another* [(2011) 13 SCC 2613 has been found *per incurium* after detailed discussion, one of the Hon'ble Judges has made disagreement because the contract was not terminated and no specific terms in the agreement to take the recourse under the special enactment was there, however, the reference to the larger bench has been made. But in the present case as per clause 86.4, on termination of contract the applicability of the enactment of 1983 has been agreed upon by the parties therefore, the disagreement of one of the Hon'ble Judges is of no help to the appellant. Hon'ble Apex Court in the case of *Ravikant Bansal Vs. Madhya Pradesh Rural Road Development Authority and another* [(2012) 3 SCC 513] held that if arbitration clause specifies to take recourse before the M.P. Arbitration Tribunal under the Adhiniyam, 1983 then on having a dispute arbitration is to be done by the Tribunal in terms of the agreement. In the said context the decision of this Court in the case of *Municipal Corporation, Gwalior Vs. M/s A.P.S. Kushwaha* (SSI Unit) [2010 (2) MPHT 338]can safely be relied upon whereby the Division Bench of this Court held that in a case of work contract, as per **Notification no.17-E-85-96-21-B2** dated 04.11.2996 the provisions of the Adhiniyam, 1983 would be applicable to the public undertaking. The Court further observed that on having applicability of the Adhiniyam, 1983 recourse cannot be taken under the provisions of Arbitration Act, 1996 by appointment of sole arbitrator as per Section 11 and the award passed by the said Arbitrator was found without jurisdiction.

13. In view of the foregoing discussion, we have no scintilla of doubt that as per Clause 86.4 of the agreement, the appellant may take recourse as permissible under the Adhiniyam of 1983 making a reference to the M.P. Arbitration Tribunal, Bhopal. Under Section 17A of the Adhiniyam 1983 interim injunction, stay or attachment before award has been restricted. In such circumstances, the appellant cannot be permitted to jump upon for taking recourse of Section 9 of the Arbitration Act, 1996 for taking order of interim nature from the Civil

Court in view of sub-section 4 of Section 2 of the Arbitration Act, 1996, on having inconsistency with the provisions of the Adhiniyam, 1983 which has been agreed by the parties by way of an agreement, thus, the recourse specified in part one of the Arbitration Act, 1996 cannot be permitted to be resorted to.

14. in view of the aforesaid discussion, we are of the considered opinion that the trial court has not committed any error in rejecting the application under Section 9 of the Arbitration Act, 1996 by passing the order impugned. *Ex consequenti*, the appeal preferred by the appellant stands dismissed and the order passed by the learned trial court rejecting the application under Section 9 of the Arbitration Act, 1996 stands upheld for the reasons indicated herein above. Parties are directed to bear their own costs.

Appeal dismissed.

I.L.R. [2013] M.P., 486
CIVIL REVISION
Before Mr. Justice J.K. Maheshwari
Civil Rev. No 459/2004 (Jabalpur) decided on 17 December, 2012

HAMEEDA BEGAM (SMT.) ...Applicant
Vs.
SHRI POORAN CHAND JAIN & ors. ...Non-applicants

***Civil Procedure Code (5 of 1908), Sections 100 & 115, Order 47 Rules 1 & 7* - After passing of judgment and decree by the Appellate Court application for review was filed, it was rejected and decree passed by the lower Appellate Court was not interfered with in review - Held - The revision cannot be maintained and the only recourse is permissible u/s 100 of CPC.**

After rejection of the application, if the revision is maintained then as per Section 115 of CPC, the High Court shall not vary or reverse any decree or order against which any appeal lies before the Court under the Code of Civil Procedure - After rejection of the application for review the said order will merge into the basic judgment and decree passed by lower Appellate Court, which is appealable. (Para 8)

सिविल प्रक्रिया संहिता (1908 का 5), धाराऐं 100 व 115, आदेश 47 नियम 1 व 7 – अपीली न्यायालय द्वारा निर्णय व डिक्री पारित किये जाने के पश्चात्

पुनर्विलोकन हेतु आवेदन प्रस्तुत किया गया, उसे स्वीकार किया गया और पुनर्विलोकन में निचले अपीली न्यायालय द्वारा पारित डिक्री में हस्तक्षेप नहीं किया गया – अभिनिर्धारित – पुनरीक्षण पोषणीय नहीं हो सकता और केवल सि.प्र.सं. की धारा 100 के अंतर्गत उपाय अनुज्ञेय है।

Cases referred :

AIR 1977 SC 397, ILR (2010) MP 1904.

M. Hafizullah, for the applicant.

Akhilesh Jain, for the non-applicants No.2.

ORDER

J.K. MAHESHWARI, J.: A preliminary objection has been raised by learned counsel appearing on behalf of the respondent no.2 that after rejection of the review application against the judgment and decree passed by the Lower Appellate Court the revision under Section 115 of CPC is not maintainable, therefore, it may be dismissed.

2. Shri M. Hafizullah, learned counsel appearing on behalf of the applicant facing such objection prays for time on 03.09.2012, which was granted. Again on 24.09.2012 time was sought for, however, by way of last opportunity two weeks further time was allowed. Today the case has been heard on the question of maintainability, even on asking time by Mr. Hafizullah, because it is pending since last about eight years.

3.. Learned counsel for the applicant referring the provisions of Section 115 of CPC contends that the High Court may call for the record of any case, which has been decided by any Court subordinate to High Court and in which no appeal lies thereto, and if such subordinate Court exercised a jurisdiction not vested in it by law; or have failed to exercise the jurisdiction so vested; or have acted in the exercise of its jurisdiction illegally or with material irregularity, against the order rejecting the application for review no appeal lies, therefore, the revision is maintainable. In support of such contention reliance has been placed on a judgment of Hon'ble the Apex Court in the case of *Smt. Vidya Vati Vs. Shri Devi Das* [AIR 1977 SC 397] referring paragraph-7 of the said judgment it is contended that the order passed by the High Court rejecting the revision petition as not maintainable was found illegal. Learned counsel further relying upon the Division Bench Judgment of this Court in the case of *Anandi Prasad Dwivedi & anr. Vs. State of M.P.* [LL.R. (2010) M..P., 1904] has urged that as per Order 47 Rule 7 of CPC the order of rejection of

the application is not appealable, therefore, in reference to the said judgment the revision may be maintained by this Court.

4. Per contra Shri Akhilesh Jain, counsel representing the respondent no.2 contends that the judgment and decree passed by the Lower Appellate Court is appealable as per Section 100 of CPC and on filing such appeal if the Court is satisfed that the question of law is involved in any case it shall formulate that question and decide the same on merit. After passing the judgment and decree by the Lower Appellate Court review application was filed, which was rejected. However, the rejection thereof would entail the party to file an appeal as provided under Section 100 of CPC. It is further submitted that the judgment of Hon'ble the Apex Court so relied upon by the applicant is not applicable because in the said case the review petition was allowed and thereafter the appeal as provided under Order 43 Rule 1 (w) of CPC. In the said context Hon'ble the Apex Court has held that the High Court was not justified in dismissing the revision as not maintainable. In the Division Bench Judgment of this Court also the question after rejection of the application for review against the judgment and decree was not in issue, therefore, the said judgments are also having no application in the facts and circumstances of the case. More so in the said case also application for review was allowed, therefore, the Court made certain observation in the light of the Order 47 Rules 1 and 7 of CPC. In that view of the matter it is submitted that in a case where the application seeking review of the judgment and decree has been rejected the recourse permissible to the applicant is to avail the remedy to file appeal and the revision is not maintainable. The order of rejection would not fall within the purview of the Phrase that 'no appeal lies' against the order.

5. After hearing learned counsel appearing on behalf of the parties and on perusal of the record it is not in dispute that the appeal filed by the applicant was dismissed by the judgment and decree dated 29.08.2001 by Lower Appellate Court. Against the said judgment and decree a review application was filed by him, which was also rejected by the order impugned against which this revision has been preferred. The revision would lie before the High Court as specified under Section 115 of CPC. The aforesaid provision is relevant, however, it is reproduced in the context of the Madhya Pradesh Amendment as under: -

"STATE AMENDMENTS

Madhya Pradesh-For Section 115, substitute the following

Section, namely.

"115. Revision.- The High Court may call for the record of any cases which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law; or

(b) to have failed to exercise a jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit;

Provided that the High Court shall not, under this section, vary or reverse any order made or any order deciding an issue, in the course of a suit or other proceedings except where:

(a) the order, if it had been made in favour of the party applying for the revision, would have finally disposed of the suit or proceeding; or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

Explanation :- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding.."

6.. Bare reading of the aforesaid it is apparent that the High Court shall have power to call for the record of any case, which was decided by any Court subordinate to it and against which no appeal lies. The revisional jurisdiction may further be exercised by the High Court if the subordinate Court exercise the jurisdiction not vested on him or failed to exercise the jurisdiction so vested or acted in exercise of its jurisdiction illegally with material irregularity. Sub-section (2) makes it clear that the High Court shall not in exercise of the revisional jurisdiction vary or reverse any decree or order

against which an appeal lies either to the High Court or in any Court subordinate thereto. However, in the context of the aforesaid provision and in the facts of the present case where after passing the judgment and decree by the Appellate Court and on rejection of the application for review filed by any of the party where the appeal lies or not, If the appeal lies then revision would not be maintainable and if appeal does not lie then revision would be maintainable. As per Order 47 Rule 1 of CPC it is clear that if any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred and the said party from discovery of new and important matter or evidence which, after the exercise of due diligence was not in his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of record, or for any other sufficient reason, desire to obtain a review of judgment to the Court which passed the decree or made the order. Sub-rule (2) makes it clear that if the party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant. Thus, it is clear that under Sub-rule (1) or Order 47 of CPC review against the judgment and decree is maintainable when the appeal has not been preferred. Sub-rule (1) of Rule 4 confers the power to the Court that where it appears to the Court that there is no sufficient ground for a review, it shall reject the application while Sub-rule (2) specified for the reasons on which the application can be granted. Rule-7 deals the contingency that on rejection of the application the said order shall not be appealable, while order granting application may be objected to, at once by an appeal from the order granting the application or in an appeal from the decree or order finally passed or made in the suit. Thus, Rule-7 makes it clear that the order rejecting the application is not appealable as per the Order 43 Rule 1 (w) of CPC. The aforesaid appeal is by way of objection to order granting an application of review. Thus, it is clear that as per the Rules 1 and 7 of Order 47, CPC, the order rejecting the application shall not be appealable. Thus, the word appealable in the context of filing an appeal having not allowing application to raise the objection, which is specified under Order 43 Rule 1, CPC, and is having nothing to do with the regular appeal as specified under Section 96 or 100 of CPC.

7. The judgment of Hon'ble the Apex Court in the case of *Smt. Vidya Vati Vs. Shri Devi Das* (supra) relied upon by the learned counsel appearing on behalf of the applicant was in a case wherein the review application was

allowed by the said judgment to which the appeal lies to this Court as specified under Order 43 Rule 1 (w) of CPC, however, to maintain the said revision the finding of the High Court was found unsustainable while in the present case position is entirely different. Thus analogy drawn in the said judgment is having no application in the present case. So far as the judgment of this Court in the case of *Anandi Prasad Dwivedi & anr. Vs. State of M.P.* (supra) is concerned, it is also the case where against the judgment and decree passed by the Lower Appellate Court directing remand, review petition was filed that was granted, setting aside the judgment, and decree. However, the Court referring the provision under Order 47 Rules 1 & 7 of CPC has observed that the recourse as permissible to the Lower Appellate Court while passing the order on the application for review was specified under Rule-8 of Order 47 of CPC and not otherwise. In such circumstances the judgment so relied upon by the learned counsel for the applicant in having no application in the facts of the present case.

3. In the present case after passing the judgment and decree by the Appellate Court application for review was filed, which was rejected. The consequence thereof is the judgment and decree passed by the Lower Appellate Court has not been interfered with in review. In such circumstances the judgment and decree passed by the Lower Appellate Court has been maintained dismissing review against which the appeal would lie as per Section 100 of CPC. In this context it is necessary to observe that after rejection of the application if the revision is maintained then as per Section 115 of CPC the High Court shall not very or reverse any decree or order against which any appeal lies before the Court under the Code of Civil Procedure. In the present case after rejection of the application for review the said order will merge into the basic judgment and decree passed by lower appellate Court, which is appealable therefore, the revision cannot be maintained and the only recourse is permissible under Section 100 of CPC to appreciate to assail the original judgment and decree.

9. In view of the foregoing discussion, in the considered opinion of this Court the revision filed by the applicant is not maintainable, however, the preliminary objection raised by non-applicant No. 2 is hereby upheld. Consequently, this revision is hereby dismissed with the observation that applicant may take recourse as permissible under the law. In the facts of the case, parties to bear their own cost.

Revision dismissed.

I.L.R. [2013] M.P., 492
CRIMINAL REVISION
Before Mr. Justice R.C. Mishra
Cr. Rev.No. 858/2008 (Jabalpur) decided on 10 July, 2012

BABU KHAN ...Applicant
Vs.
ABDUL LATIF KHAN & anr. ...Non-applicants

A. ***Penal Code (45 of 1860), Section 500 - Defamation -*** **Applicant did not cross examine the complainant's witnesses inspite of opportunities granted to him - Therefore, he cannot argue that their evidence suffered from infirmities - Revisional jurisdiction cannot embark upon re-appreciation of evidence unless the finding of fact is illegal or perverse - Concurrent factual finding that applicant had made defamatory allegations cannot be said to be in any way uncalled for or not based on relevant evidence. (Para 8)**

क. दण्ड संहिता (1860 का 45), धारा 500 – मानहानि – आवेदक को अवसर प्रदान किये जाने के बावजूद, उसके द्वारा शिकायतकर्ता के साक्षीगण का प्रति परीक्षण नहीं किया गया – इसलिए वह तर्क नहीं कर सकता कि उनका साक्ष्य कमियों से ग्रस्त है – पुनरीक्षण अधिकारिता साक्ष्य का पुनः मुल्यांकन नहीं कर सकती जब तक कि तथ्य का निष्कर्ष अवैध या विपर्यस्त न हो – समवर्ती तथ्यात्मक निष्कर्ष कि आवेदक ने मानहानिकारक अभिकथन किये हैं, उसे किसी प्रकार से अनावश्यक या सुसंगत साक्ष्य पर आधारित न होना, नहीं कहा जा सकता।

B. ***Penal Code (45 of 1860), Sections 182 & 211 - Defamatory statement -*** **Written complaint which was addressed to S.H.O. containing allegations against the complainant was distributed by applicant - Applicant is not entitled to protection under Exception 8 to Section 499 in view of non-initiation of action against him by S.H.O. or S.D.O. for the offences punishable under Sections 182, 211 of I.P.C. (Para 9)**

ख. दण्ड संहिता (1860 का 45), धाराऐं 182 व 211 – मानहानिकारक कथन – लिखित शिकायत जो थाना प्रभारी को संबोधित थी, जिसमें शिकायतकर्ता के विरुद्ध आरोप समाविष्ट थे, उसे आवेदक द्वारा वितरित किया गया – थाना प्रभारी या उप खण्ड अधिकारी द्वारा उसके विरुद्ध भा.द.सं. की धाराऐं 182, 211 के अंतर्गत दण्डनीय अपराधों के लिए कार्यवाही आरंभ नहीं किये जाने को दृष्टिगत रखते हुए आवेदक धारा 499 के अपवाद 8 के अंतर्गत संरक्षण का हकदार नहीं।

Cases referred :

AIR 1953 SC 293, AIR 1970 SC 1372.

Ramesh Tamrakar with *Anwar Ahmad*, for the applicant.
A. Usmani, for the non-applicant No.1.
Pratibha Mishra, P.L. for the non-applicant No.2.

ORDER

R.C. MISHRA, J.: These three cases are interlinked and are, therefore, being disposed of by a common order.

2. The revisions, registered as Cri. Revision Nos.858/08 and 1450/08, are counter revisions preferred respectively by the accused namely Babu Khan (for short 'Babu') and complainant Abdul Latif Khan (for brevity 'Latif') against appellate judgment passed on 24.4.2008 by Shri Deepak Kumar Agrawal, Third Additional Sessions Judge, Hoshangabad in Cri. Appeal No.130/07, whereby Babu's conviction, under Section 500 of the IPC, as recorded by Shri Vivek Sharma, JMFC, Hoshangabad vide judgment dated 6.7.2007 in Cri.Case No.283/07 and consequent sentence of fine, were affirmed but the period of custodial sentence was reduced from 1 year to 6 months.

3. The MCrC, filed by Babu and numbered as MCrC No.11566/08, is a petition, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), for issuance of direction to the trial Court to lodge a complaint against Latif (examined as PW1) and one Shazad Ali (PW2) in respect of the offences punishable under Sections 193, 211 and 120B of the IPC.

4. At the relevant point of time, Babu and Latif were residing in the same vicinity at Seoni-Malwa. The complaint of defamation was made by Latif on 12.11.1999. According to him, Babu had defamed him by distributing amongst the inhabitants of the locality including Yakub, Shahjad & Anwar and residents of the town comprising Nawab Khan, Jameel Khan and Ayub Ali, copies of the application addressed to the SHO of Police Station Seoni-Malwa and the Sub-Divisional Magistrate and containing false imputations to the effect that -

(i) He in association with a person, Sindhi by caste, was involved in identifying the lands left by the persons migrated to Pakistan as well as in handing over possession thereof to his

associate and in the process, had earned considerable amount by way of commission.

(ii) After disassociating himself from the joint venture, he started getting forest timber stolen and trees of Mango, Neem, Peepal etc. standing in the agricultural fields belonging to various persons, cut for the purpose of sale.

(iii) He opened a timber mart on a land in dispute with a Mosque.

(iv) While constructing house, he encroached upon a piece of land belonging to Babu's wife.

(v) There were reports as to his indulgence in the communal riots that occurred in Ahmedabad in the year 1992 and during that period, had also taken precautions to conceal his presence for a long time at Seoni-Malwa.

(vii) His activities gave raise to suspicion that he was involved in unlawful activities and was a member of some banned organisation.

5. Latif (PW1) reiterated the averments made in the complaint and also tendered in evidence – copies of the application containing defamatory allegations, complaint made to the SHO, notice sent to Babu and corresponding postal receipts (Ex.P/1 to P/4 respectively). His evidence drew ample support from the statement of Shazad Ali (PW2). Inspite of grant of sufficient opportunities, Babu did not prefer to get them cross examined. In defence, he examined Nawab Khan (DW1) and Jameel Khan (DW3), who were cited as witnesses in the complaint, to disprove the allegations regarding distribution of copies of the application containing offending material, and Sheikh Nasir @ Chhuttu Bhaiya (DW2) to substantiate the allegation no.(i) [above]. However, none of them specifically denied the factum of circulation of copies of the application containing abovementioned imputations and only pleaded ignorance.

6. Learned counsel appearing on behalf of Babu still submitted that the evidence of Latif and Shahzad was not worthy of credence as it suffered from material inconsistencies with reference to contents of their respective statements recorded under Sections 200 and 202 of the Code respectively. Attention has

also been invited to the following facts –

(a) He had filed an application, under Section 340 read with Section 195 of the Code, requesting the trial Magistrate to initiate action against both Latif and Shahzad for the offences punishable under Sections 193, 211 and 120B of the IPC in the light of averments made therein.

(b) The order dated 2.3.2007 rejecting the application as premature was set aside by the Second Additional Sessions Judge, Hoshangabad on 14.5.2007 and the trial Magistrate was directed to consider the application at the time of Judgment.

(c) Learned Magistrate, while appreciating the evidence on record, failed to consider and decide the application and learned Additional Sessions Judge completely overlooked the non-compliance of the direction contained in his own order-dated 14.5.2007 (supra).

7. However, fact of the matter is that in Paragraph 15 of the judgment, learned Magistrate, while clearly opining that the offence of giving false evidence was not made out against Latif or Shahzad, had proceeded to reject Babu's complaint, though no formal order appears to have been passed on his application. Such a refusal was apparently appealable under sub-section (1) of Section 341 of the Code. Since Babu could have availed of an alternative and efficacious remedy under one of the specific provisions of the Code, the MCrC, seeking interference under the inherent powers, deserves to be rejected as not maintainable.

8. As indicated already, Babu, the accused, had failed to avail the opportunity to cross-examine Latif or Shahzad and thereby bring out contradictions with reference to their earlier statements. He could not, therefore, argue that their evidence suffered from infirmities. Learned Additional Sessions Judge, while deciding the appeal, has considered all the material aspects, whether factual or legal, in a right perspective. It is trite that the revisional jurisdiction can not embark upon re-appreciation of evidence unless the finding of fact is, on the face of it, illegal or perverse. However, the concurrent factual finding that Babu had made defamatory allegations against Latif without the least justification cannot be said to be, in any way, uncalled for or not based on relevant evidence.

9. Further, the contention that Babu was entitled to protection under exception 8 to Section 499 of the IPC in view of non-initiation of action

against him by the SHO or the SDM for the offences under Sections 182 and 211 of the IPC is also apparently misconceived. For this, reference may be made to the following observations made by Mehr Chand Mahajan J., speaking for a three-Judge Bench of the Supreme Court in *Basir-ul-Huq v. State of W.B.* AIR 1953 SC 293 -

> *"As regards the charge under S. 500, Penal Code, it seems fairly clear both on principle and authority that where the allegations made in a false report disclose two distinct offences, one against the public servant and the other against a private individual, that other is not debarred by the provisions of S. 195 from seeking redress for the offence committed against him. Section 499, Penal Code, which mentions the ingredients of the offence of defamation gives within defined limits immunity to persons making depositions in Court, but it is now well settled that that immunity is a qualified one and is not absolute as it is in English law. Under S. 198, Criminal P. C., a complaint in respect of an offence under S. 499, Penal Code, can only be initiated at the instance of the person defamed. In like manner as cognizance for an offence under S. 182 cannot be taken except at the complaint of the public servant concerned. In view of these provisions, there does not seem in principle any warrant for the proposition that a complaint under S. 499 in such a situation cannot be taken cognizance of unless two persons join in making it, i, e. it can only be considered if both the public servant and the person defamed join in making it, otherwise the peron defamed is without any redress. The statute has prescribed distinct procedure for the making of the complaints under these two provisions of the Indian Penal Code and when the prescribed procedure has been followed, the Court is bound to take cognizance of the offence complained of."*

10. For these reasons, none of the contentions raised against legality, propriety and correctness of the impugned conviction is acceptable.

11. This brings me to the question of sentence. Learned counsel for Latif has submitted that reduction of the term of custodial sentence, by a practically

unreasoned order, was not at all justified as one of the imputations made by Babu, an Ex-policeman, that he was a member of the organization involved in disturbing communal harmony in the Country, had caused an incalculable harm to his reputation. Placing reliance on the decision of the Apex Court in *Chaman Lal v. State of Punjab* AIR 1970 SC 1372, he has urged for restoration of the order of sentence passed by the Trial Court.

12. In *Chaman Lal's* case (ibid), reduction of simple imprisonment from 3 months to 2 months in order to save the accused from disqualification for continuing as the President of the Municipality was held to be not warranted. However, taking into consideration the social impact of the crime and other relevant circumstances of the instant case including that the offence of defamation, which is punishable with simple imprisonment for a term extending to 2 years, was committed in the year 1999, no interference with the appellate order of sentence is called for.

13. In the result, -

(i) Both the revisions are hereby dismissed.

(ii) The petition, under Section 482 of the Code, also stands dismissed with liberty to file an appeal, under Section 341 of the Code, along with an appropriate application for condonation of delay.

Copy of this order be retained in each one of the connected petitions.

Revision dismissed.

I.L.R. [2013] M.P., 497
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 403/2011 (Jabalpur) decided on 10 January, 2013

COL. GAS SERVICE (M/S) ...Applicant
Vs.
COLLECTOR, JABALPUR ...Non-applicant

***Essential Commodities Act (10 of 1955), Section 6-A, Dravikrat Petroleum Gas (Pradaya Aur Vitran Viniyam) Aadesh 2000 - Seizure & Confiscation of Essential Commodity* - District Supply Controller alongwith staff approached the Gas Agency of the petitioner and verified the entire stock and registers - He found that 70 Gas Cylinders of**

domestic category are short and some cylinders are kept in various vehicles instead of keeping them in the godown - Assistant Supply Officer, seized 70 Gas Cylinders and a report was submitted to the Collector - Collector after giving an opportunity of hearing, confiscated and the petitioner was directed to deposit the cost of those 70 Gas Cylinders so that those cylinders may be returned to the petitioner - Appeal was also dismissed by the Addl. Sessions Judge - Held - For the violation of the Control Order 2000 that 70 Gas Cylinders were found short in the stock, no confiscation order could be passed because there was nothing in the stock to be seized by the Supply Officers - Orders passed by the Collector and Addl. Sessions Judge set aside.

(Paras 2, 3, 11 & 13)

आवश्यक वस्तु अधिनियम (1955 का 10), धारा 6ए, द्रवीकृत पेट्रोलियम गैस (प्रदाय और वितरण विनियम), आदेश 2000 – आवश्यक वस्तु की जप्ती एवं अधिहरण – जिला आपूर्ति नियंत्रक अपने स्टाफ के साथ याची की गैस एजेंसी पहुंचा और संपूर्ण स्टॉक व रजिस्टरों को सत्यापित किया – उसने पाया कि 70 घरेलू श्रेणी की गैस सिलेण्डर कम है और कुछ सिलेण्डरों को गोदाम में रखने की बजाए विभिन्न वाहनों में रखा गया है – सहायक आपूर्ति अधिकारी ने 70 गैस सिलेण्डर जब्त किये और कलेक्टर को रिपोर्ट सौंपी – कलेक्टर ने सुनवाई का अवसर देने के बाद अधिहृत किया और याची को निदेशित किया गया कि वह उन 70 गैस सिलेण्डर की कीमत जमा करे जिससे कि उन सिलेण्डरों को याची को वापस किया जा सके – अपील को भी अति. सेंशस जज द्वारा खारिज किया गया – अभिनिर्धारित – 70 गैस सिलेण्डर स्टॉक में कम पाये जाने से नियंत्रण आदेश 2000 के उल्लंघन के लिए कोई अधिहरण आदेश पारित नहीं किया जा सकता क्योंकि आपूर्ति अधिकारियों द्वारा जब्त किये जाने के लिए स्टॉक में कुछ नहीं था – कलेक्टर एवं अति. सेंशस जज द्वारा पारित आदेशों को अपास्त किया गया।

Anshul Dixit, for the applicant.

G.S. Thakur, P.L. for the non-applicant.

ORDER

N.K. GUPTA, J.: The petitioner has challenged the judgment dated 23/11/2010 passed by the XVth Additional Sessions Judge, Jabalpur in Criminal Appeal No.357/2008 by which the order passed by the Collector, Jabalpur in Revenue Case No.88- B/121/07-08 was maintained by which it was directed that 70 gas cylinders be confiscated and their cost be deposited by the petitioner. Hence the petitioner has challenged both the orders passed by the Courts below.

2. The prosecution's case in short is that the petitioner is a dealer of cooking gas Indane authorized by the Indian Oil Corporation. The office of business is at Madan Mahal, Jabalpur whereas the godown was at Village Tewar. On 10.1.2008 Shri P. L. Barkade, District Supply Controller, Shri V. K. Choubey, Assistant Supply Officer and Shri Sanjay Khare and Smt. Anita Sorte, Junior Supply Officers approached the Gas Agency of the petitioner and verified the entire stock and registers. It was found that 70 Gas Cylinders of domestic category (14.2 kilogram capacity) were found short. According to the stock register 70 gas cylinders were found missing on the physical verification. It was also found that he kept some cylinders in various vehicles instead of keeping them in the godown. Similarly 11 commercial gas cylinders were found in lying position whereas those were required to be kept straight and therefore, Shri Choubey, Assistant Supply Officer, Jabalpur seized 70 gas cylinders and a report was submitted to the Collector Jabalpur.

3. The learned Collector, Jabalpur issued a notice under Section 6-B of the Essential Commodities Act to the petitioner. The petitioner has submitted in reply that the physical verification done by Supply Officers was not correct. The Supply Officers were informed that 70 cylinders were sent in a vehicle Tata 407 for supply to the consumers and therefore, they were not short. The supply officers seized 388 cylinders which were kept in a truck and those cylinders were sent by the filling authority to the petitioner and they were yet to be unloaded. Those cylinders could not be seized. Some other objections were also raised by the petitioner. The learned Collector after giving an opportunity of hearing to the petitioner and producing the evidence, passed the impugned order dated 21.5.2008 with the direction that 70 gas cylinders (domestic) were confiscated and the petitioner was directed to deposit the cost of those 70 gas cylinders so that those cylinders may be returned to the petitioner. On filing of the appeal the learned XVth Additional Sessions Judge, Jabalpur vide judgment dated 23.11.2010 dismissed the appeal.

4. I have heard the learned counsel for the parties at length.

5. The learned counsel for the petitioner has submitted that the Supply Officers had an erroneous approach. They seized 388 gas cylinders which were not connected to the crime and therefore, those could not be confiscated. The order passed by the learned Collector as well as the

learned XVth Additional Sessions Judge, Jabalpur is not maintainable.

6. On the other hand the learned Panel Lawyer has submitted that a violation of various provision of Control Order "Dravikrat Petroleum Gas (Pradaya Aur Vitran Viniyam) Aadesh 2000 (hereinafter it would be referred as to the "Control Order 2000") and therefore, the property seized under Section 6-A of the Essential Commodities Act (for short the "Act") can be confiscated by the Collector if any violation of that Control Order is found and therefore, order and judgment passed by the Collector as well as the appellate Court were correct.

7. Under the Essential Commodities Act there are two modes of action provided to the Supply Officer against a dealer who contravenes the provisions of any Control Order. The first mode is to prosecute the dealer for offence punishable under Section 3/7 of the Act. Secondly the seized property which was seized under the provisions of Section 6-A of the Act can be confiscated. In the present case, the Supply Officers found two to three violations done by the petitioner/dealer. It was found that 11 cylinders were kept in lying position which was a violation of the Control Order 2000. Similarly some cylinders were kept on the vehicles for storage whereas, they should be kept in the godown and thirdly 70 cylinders were found short according to the stock shown in the stock register. In the present case the learned Collector has confiscated 70 cylinders (domestic) and therefore, it appears that the Collector took notice of that violation which was only related to the shortage of the cylinders in the stock and therefore, it would not be necessary to discuss the violations relating to the cylinders found lying or cylinders which were found loaded in the various vehicles.

8. It was apparent from the various documents that the consignment of 388 cylinders was received by the dealer from a refilling station but, it was yet to be unloaded because it was necessary for the dealer to unload those 388 filled up cylinders and to return 388 empty cylinders by the same vehicle and 388 empty cylinders were not available therefore, the consignment could not be unloaded. It is nowhere alleged by the Supply Officers that a consignment of 388 cylinders was shown by the dealer in the stock and therefore, those 388 cylinders were not in the stock of the dealer and those were not connected with any violation of the Control Order 2000.

9. Under such circumstances, whether the Supply Officers could seize those 388 cylinders and out of those 388 cylinders whether the Collector could confiscate 70 cylinders ? In this connection the provisions of Section 6-A of the Act may be perused which is as under :-

> **"6-A. CONFISCATION OF ESSENTIAL COMMODITY.**
>
> (1) Where any (essential commodity is seized) in pursuance of an order made under Section 3 in relation thereto, (a report of such seizure shall, without unreasonable delay, be made to) the Collector of the district or the Presidency Town in which such (essential commodity is seized) and whether or not a prosecution is instituted for the contravention of such order, the Collector (may, if he things it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied) that there has been a contravention of the order (may order confiscation of :
>
> (a) The essential commodity so seized;
>
> (b) ....."

10. According to the provisions of Section 6-A of the Act any essential commodity may be seized if it was found in the violation of any Control Order passed under section 3 of the Act then it may be liable for confiscation if any violation of the provisions of that Control Order is found. In the present case, it is apparent from the record that those 388 cylinders were no where connected with any violation of the Control Order 2000. A consignment of 388 gas cylinders was received by the dealer but it was not taken into the stock of the dealer because it was not unloaded and therefore, such consignment was not at all connected with the violation of the Control Order 2000. The Supply Officers took a physical verification of the stock of the dealer but, those 388 cylinders were not in the stock of the dealer and therefore, those could not be seized and therefore, seizure of 388 cylinders was no where in pursuance of the provisions of the Control Order 2000 and therefore, the seizure of those 388 gas cylinders was not under the provision of Section 6-A of the Act.

11. When 70 gas cylinders were found short in the stock then it was a

violation of Control Order 2000 in the eye of Supply Officers. They could not seize those cylinders because they were missing. There was a shortage of 70 cylinders in the stock and therefore, nothing could be seized by the supply officers by way of seizure. The supply officers could prosecute the dealer for offence punishable under Section 3/7 of that Act if they so desired, but nothing could be seized for that violation. For the violation of the Control Order 2000 that 70 gas cylinders were found short in the stock then no confiscation order could be passed because there was nothing in the stock to be seized by the Supply Officers. It appears that the learned Collector and the Supply officers tried to punish the dealer otherwise. It was for them to prove the guilt of the dealer for offence punishable under section 3/7 of the Essential Commodities Act so that he could be punished. Instead of adopting that procedure the Supply Officers had seized 388 gas cylinders from a truck which were not in the stock of the dealer at the time of checking.

12. On the basis of the aforesaid discussion, it is apparent that no seizure could be done from the dealer relating to the shortage of 70 gas cylinders and therefore, the seizure done by the Supply Officers was not related in pursuance of the Control Order 2000 and therefore, the seizure done by the Supply Officers was not according to the provisions of Section 6-A of the Act and therefore, it was not a valid seizure in the eye of law. Seized property was no where connected with the violation done by the dealer under the Control Order 2000 and therefore, no confiscation order could be passed by the Collector. The learned Collector as well as the learned XVth Additional Sessions Judge, Jabalpur have committed an error of law in passing the order of confiscation and in maintaining that order. Neither the confiscation order nor the judgment passed by the appellate Court can be maintained.

13. Consequently, the revision filed by the petitioner is hereby allowed. Both the orders passed by the Courts below including the learned Collector and the learned XVth Additional Sessions Judge, Jabalpur are hereby set aside. The petitioner is entitled to get back 70 gas cylinders if they are kept by the Supply Officers or if the petitioner had deposited the cost of the cylinders then the petitioner shall be entitled to get the deposited cost of cylinders back from the Collector, Jabalpur.

14. Copy of the order be sent to the appellate Court as well as to the Collector, Jabalpur along with their records for information and compliance.

Petition allowed.

I.L.R. [2013] M.P., 503
CRIMINAL REVISION
Before Mr. Justice Ajit Singh & Mr. Justice U.C. Maheshwari
Cr. Rev. 2020/2012 (Jabalpur) decided on 28 January, 2013

PANKAJ PATHAK ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

Penal Code (45 of 1860), Section 109 - Charge of abetment - **Application for discharge on the ground that since the main accused has died they, being the alleged abettor, cannot be prosecuted and convicted - Held - A person can also be convicted of abetting an offence even in the event of the death of principal accused during the trial who allegedly committed that offence - Trial Court has rightly dismissed the applicant's application for his discharge of the offences. (Para 7)**

दण्ड संहिता (1860 का 45), धारा 109 – दुष्प्रेरण का आरोप – आरोपमुक्त किये जाने हेतु इस आधार पर आवेदन किया गया कि चूंकि मुख्य अभियुक्त की मृत्यु हो गई है, और वे अभिकथित दुष्प्रेरक होते हुए उन्हें अभियोजित एवं दोषसिद्ध नहीं किया जा सकता – अभिनिर्धारित – किसी व्यक्ति को किसी अपराध के दुष्प्रेरण के लिए दोषसिद्ध किया जा सकता है तब भी जब विचारण के दौरान प्रमुख अभियुक्त, जिसने अभिकथित रुप से उस अपराध को कारित किया, उसकी मृत्यु हो गई है – विचारण न्यायालय ने, आवेदक द्वारा अपराधों से स्वयं को आरोपमुक्त किये जाने हेतु आवेदन को उचित रुप से खारिज किया।

Cases referred :

AIR 1959 SC 673, AIR 1967 SC 553, AIR 1990 SC 1210, (1981) 2 SCC 299, Cr. Rev. No. 1111/2010, decided on 08.07.2011 by Jharkhand High Court, (1999) 6 SCC 559.

S.C. Datt with *Siddharth Datt*, for the applicant.
Aditya Adhikari, for the non-applicant.

ORDER

The Order of the Court was delivered by :
AJIT SINGH, J.: This revision is directed against the order dated 10.7.2012 passed in Special (Criminal) Case No.15/2005 by the Special Judge (Lokayukt), Jabalpur, whereby he has dismissed the applicant's application for discharge.

2. G. P. Pathak was posted as Superintending Engineer in the Public Works Department. The applicant and co-accused Prashant Pathak are his sons On 21.1.1995 respondent, Special Police Establishment Lokayukt, filed a charge sheet against G. P. Pathak under section 13(1)(e) read with section 13(2) of the Prevention of Corruption Act 1988 (in short, "the Act"). According to the respondent, during the check period from 1.1.1973 to 12.11.1995 G. P. Pathak accumulated wealth disproportionate to his known source of income. The respondent thereafter on 8.7.2009 filed a supplementary charge sheet against the applicant and Prashant Pathak for offences under section 109 of the Indian Penal Code read with sections 13(1)(e) and 13(2) of the Act and section 471 of the Indian Penal Code. The respondent has alleged that applicant and Prashant Pathak not only abetted G. P. Pathak to commit the offences but also submitted in different accounts fake vouchers and receipts of agricultural produce by using them as real.

3. The trial court framed charges under sections 13(1)(e) and 13(2) of the Act against G. P. Pathak and charges under section 109 of the Indian Penal Code read with sections 13(1)(e) and 13(2) of the Act and section 471 of the Indian Penal Code against the applicant and Prashant Pathak.

4. During trial, after recording of the evidence of 27 prosecution witnesses, G. P. Pathak died on 16.9.2010. The trial court thereafter vide order dated 18.6.2012 has closed the prosecution case against him. It is at this stage the applicant and Prashant Pathak filed an application for their discharge on the ground that since the main accused has died they, being the alleged abettor, cannot be prosecuted and convicted. The application was opposed by the respondent. The trial court disagreed with the applicant and by the impugned order dated 10.7.2012 dismissed his application for discharge.

5. It has been argued by the learned senior counsel for applicant that after the death of main accused, who was being prosecuted for offences under sections 13(1)(e) and 13(2) of the Act, the applicant, as an abettor of those offences, cannot be prosecuted and convicted. In support of his submission, the learned senior counsel has referred the decisions *Faguna Kanta Nath v. State of Assam* AIR 1959 SC 673, *Jamuna Singh v. State of Bihar* AIR 1967 SC 553, *Haradhan Chakrabarty v. Union of India* AIR 1990 SC 1210 and *State of Maharashtra v. Eknath Yeshwant Pagar* (1981) 2 SCC 299. The learned senior counsel has also placed reliance on the unreported decision dated 8.7.2011 of the Jharkhand High Court rendered in *Sant Kumar*

Gupta v. State of Jharkhand (Criminal Revision NO.1111/2010). The learned counsel for respondent, on the other hand, has cited the decision of *P. Nallammal v. State* (1999) 6 SCC 559 and even placed reliance on the case of *Jamuna Singh* (supra) cited on behalf of the applicant.

6. Under the Indian Penal Code abetment of an offence is a separate substantive offence. The Supreme Court in the case of *Faguna Kanta Nath* (supra) has categorically held that under the Indian Law for an offence of abetment it is not necessary that the offence should have been committed and a man may be guilty as an abettor whether the offence is committed or not. The Supreme Court later again in the case of *Jamuna Singh* (supra) has reiterated that it cannot be held in law that the person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The law on the point is, thus, settled that a person can very well be convicted of abetting an offence even though a person alleged to have committed that offence has been acquitted. Applying the same analogy, a person can also be convicted of abetting an offence even in the event of the death of principal accused during the trial who allegedly committed that offence.

7. In the present case, as already stated above, the allegation of respondent is that the applicant alongwith his co-accused brother Prashant Pathak not only abetted their father G. P. Pathak (main accused) in committing the offences under sections 13(1)(e) and 13(2) of the Act, they also deposited in different accounts fake receipts and vouchers regarding agricultural produce showing them as real and for this charge under section 471 of the Indian Penal Code has been framed against them. In *P. Nallammal* (supra) the Supreme Court has clearly held that a non-public servant can also be tried for abetment of an offence under section 13(1)(e) of the Act. For these reasons, we are of the considered view that the above referred cases cited on behalf of the applicant do not help him. In the fact situation of the case, the trial court has rightly dismissed the applicant's application for his discharge of the offences under section 109 of the Indian Penal Code read with sections 13(1)(e) and 13(2) of the Act and section 471 of the Indian Penal Code. It is reported that now the evidence of 39 prosecution witnesses have been recorded. The trial court is, therefore, expected to conclude the trial expeditiously.

8. The revision has no merit and is dismissed.

Revision dismissed.

I.L.R. [2013] M.P., 506
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
M.Cr.C. No. 3973/2011 (Jabalpur) decided on 26 April, 2012

ARUN KUMAR SINGHANIA ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 200 - Complaint by Company - Authorization **- A company can be represented by an employee or even by non-employee authorized and empowered to represent either by resolution or by a power of attorney - Merely because complaint is signed and presented by a person who is neither authorized nor is empowered under Articles of Association is no ground to quash the complaint since the defect is curable. (Para 9)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 200 – कम्पनी द्वारा शिकायत – प्राधिकृत किया जाना – कम्पनी का प्रतिनिधित्व किसी कर्मचारी द्वारा या गैर कर्मचारी द्वारा भी किया जा सकता है जिसे या तो संकल्प द्वारा या मुख्त्यारनामा द्वारा प्रतिनिधित्व करने के लिए प्राधिकृत या सशक्त किया गया है – मात्र इसलिए कि शिकायत पर ऐसे व्यक्ति के हस्ताक्षर एवं ऐसे व्यक्ति द्वारा प्रस्तुत किया गया है जिसे संगम अनुच्छेद के अंतर्गत न तो प्राधिकृत किया गया है और न ही सशक्त किया गया है, शिकायत अभिखंडित करने का आधार नहीं हो सकता क्योंकि त्रुटि सुधार योग्य है।

Cases referred :

AIR 2002 SC 182, AIR 2000 SC 637, (2010) 7 SCC 578, AIR 1998 SC 2796, AIR 1992 SC 604, AIR 1960 SC 866.

Jayant Nikhra, for the applicant.
R.P. Tiwari, G.A. for the non-applicant No.1/State.
None for the non-applicant No.2.

O R D E R

R.C. Mishra, J.: This common order shall govern disposal of all the aforesaid interconnected petitions preferred, under Section 482 of the Code of Criminal Procedure (for short 'the Code'), for quashing of the criminal proceedings, details whereof, for sake of convenient reference, may be tabulated in the following manner –

MCrC No.	Criminal Proceeding pending as	Document & amount forming subject matter of the offences.
3973/11	Case No. 27/11 pending before JMFC, Lakhnadon, in respect of the offences under Sections 409 and 420 of the IPC.	Sale-deed dated 21.12.09 executed by the petitioner relating to land bearing survey no.66, having a total area of 2.60 hectare, situated in Kevlari, for a considerable of Rs.65,000/-.
4537/11 and 10263/11	Case No. 387/11 pending before Shri A.S. Sisodiya, JMFC, Lakhnadon, in respect of the offences under Sections 420, 467, 468, 409 and 120B read with 34 of the IPC.	Sale-deed dated 21.12.09 executed by the petitioner Arun Singhania relating to land, bearing survey nos.101, 123/11, 165/3, 165/4 and 264, situated in Mouja Baiga-Pipariya, for a considerable of Rs.5,18,000/-.
4538/11	Case No. 386/2011 pending before Shri A.S. Sisodiya, JMFC, Lakhnadon, in respect of the offences punishable under Sections 420, 467, 468, 409 and 120B read with 34 of the IPC.	Sale-deed dated 21.12.09 executed by the petitioner relating to land bearing survey nos.46/2, 99/2, 134/3, 136/2, 165/5, 165/6, 267/2 and 321, having a total area of 21.32 hectare, situated in Mouja Baiga- Pipariya, for a considerable of Rs.8,52,800/-
4539/11	Case No. 385/11 pending before Shri A.S. Sisodiya, JMFC, Lakhnadon, in respect of the offences under Sections 420, 467, 468, 409 and 120B read with 34 of the IPC.	Sale-deed dated 21.12.09 executed by the petitioner relating to lands bearing survey nos.19/1, 19/2, 20, 21,22/4, 59, 61/1, 61/2,140, 146, 148, 149, 177, 206, 211, 212/1, 258/2, having a total area of 29.90 hectare, situated in Pindria, for a considerable of Rs.23,17,500/-

7717/11	Case No. 768/2011 pending before Shri A.S.Sisodiya, JMFC, Lakhnadon, in respect of the offences punishable under Sections 420, 467, 468, 409 and 120B of the IPC.	Sale-deed dated 21.12.09 executed by the petitioner relating to land bearing survey nos.30/12, 36, 38, 49/3, 49/4, 75/2, 101, 115/2, 115/3, 146, 270, having a total area of 21.48 hectare, situated in Mouja Kevlary, for a considerable of Rs.8,59,200/-
8288/11	Case No. 769/11 pending before Shri A.S. Sisodiya, JMFC, Lakhnadon, in respect of the offences under Sections 420, 467, 468, 409 and 120B read with 34 of the IPC.	Sale-deed dated 21.12.09 executed by the petitioner relating to land bearing survey nos.1/2, 1/3, 40, 60/2 and 120, having a total area of 8.59 hectare, situated in Mouja Karakwada-Maal, for a considerable of Rs.3,43,600/-

2. In all these cases, cognizance of the offences has been taken upon respective complaints made by respondent A.K. Agrawal, for and on behalf of M/s Cheer Developers and Distributor Pvt. Ltd., a company registered under the Companies Act, 1956 (hereinafter referred to as the 'Company'). However, by virtue of the order-dated 9.12.2011 passed in MCrC No.4537/11, it has to be treated as the lead case and accordingly, relevant annexures shall be referred to by their respective numbers, as given in that petition.

3. Complaints contained common allegations to the following effect -

> "In its meeting held on 10.12.2007, Board of Directors of the Company had only authorized Arun Kumar Singhania (for brevity "Arun Singhania"), the petitioner in all the petitions except MCrC No.10263/2011, to purchase properties for and on behalf of the Company and thereafter, he was neither authorized to sell or use the land nor was appointed as a Director thereof. However, in pursuance of a conspiracy to defraud the company, petitioner Arun Singhania, by making false documents purporting to be a resolution-dated 17.12.2007, authorizing him to sell the properties belonging to it and impersonating himself as a Director thereof, sold the

lands, as described in the respective complaints and further, misappropriated the amounts thus obtained as consideration from the purchasers whereas all the co-accused including petitioner K.L. Shivhare who, at the relevant point of time, was posted as Patwari, had rendered necessary assistance to Arun Singhania by committing various acts or illegal omissions in furtherance of the common design.

4. According to petitioner Arun Singhania, his prosecution for the offences is an abuse of the process of Court in view of the following background facts-

(i) He was authorized, by way of resolution taken by the Board in its meeting held on 17.12.2007 (Annexure P/1), to sell the property and this resolution was duly signed by Anil Sharda, one of the Directors of the company.

(ii) By the year 2010, nearly 1200 acres of land worth Rs.2 crores was purchased by him for and on behalf of the company and in the process, he had invested a sum of Rs.50 lacs as 20% of his share. However, upon his decision to leave the Company, he was authorized to collect the amount of Rs.50 lacs, invested by him, by selling useless pieces of land, purchased by him, for and on behalf of the Company and to adjust the considerations thereagainst and also to get two pieces of agricultural lands, admeasuring 10 acres and 4 acres, transferred in the name of his wife and respective amounts of consideration viz. Rs.5,50,000/- and Rs.4,00,000/- paid or credited to the Company.

(iii) Under the authority so granted, he, during the period from 8.12.2009 to 25.12.2009, had sold nine pieces of agricultural holdings for a total consideration of Rs.49,16,100/- and handed over the same, in cash, to Vinod Kumar Agrawal (for brevity 'Vinod Agrawal'), the Chairman of the Company,

(iv) While acknowledging the factum of his investment, the Board of Directors, in its meeting held on 26.12.2009 had resolved to return the amount of Rs.49,16,100/- and the corresponding resolution (Annexure P-2) bore the signature of Vinod Agrawal only on behalf of the Company.

(v) Since the amount remained unpaid despite repeated demands and reminders, he, on 21.4.2010, filed a complaint (Annexure P-3) against Vinod Agrawal and A.K. Agrawal alleging commission of the offences under Sections 420, 409, 500, 506-B and 507 read with 34 of the IPC and on 6.5.2010 instituted a suit (Annexure P-5) for settlement of accounts against the Company whereas, the complaints in question were filed on 7.6.2010 and 1.3.2011. Meanwhile, after due inquiry, vide order-dated 25.6.2010 (Annexure P-4) direction was given to issue process against both the persons arraigned as accused in the complaint (Annexure P-3) for the offences punishable under Sections 420, 406 and 507 of the IPC.

(vi) The complaint leading to registration of Case No. 27/11, was forwarded, under Section 156(3) of the Code, to S.H.O. of P.S. Ghansaur, for investigation and the police officer, in response, forwarded a report suggesting that the matter was purely of a civil nature.

5. Petitioner K.L. Shivhare, while supporting the case of Arun Singhania, has urged that he has also been unnecessarily dragged into the Court despite the fact that, being the Patwari, he had no role to play in the dispute between Arun Singhania and the Company.

6. In reply, respondent A.K. Agrawal has submitted that both the documents (Annexure P-1 and P-2) purporting to be the resolutions passed by the Board of Directors on 17.12.2007 and 26.12.2009, relied on by Arun Singhania to demonstrate that prima facie no case for prosecution is made out, are apparently forged documents. According to him, the words "sale of the properties" were fraudulently inserted in the original resolution dated 10.12.2007 so as to convert it in to the resolution passed on 17.12.2007 (Annexure P-1) and no meeting of the Board was even called on 26.12.2009, the day on which the resolution (Annexure P-2) containing acknowledgement of the liability by the Chairman to return the sum of Rs.49,16,100/- to Arun Singhania was said to have been passed. In order to fortify the argument, he has made extensive reference to copies of the Minutes of the Board meetings convened during the period from 30.7.2004 to 15.6.2011(Annexure R-1) indicating that the petitioner Arun Singhania was never appointed as Director of the Company and also that no meeting of the Board was held during the

period between 15.11.2009 and 4.12.2010. Attention has also been drawn to a specific allegation contained in some of the complaints that it was co-accused Sneh Gupta who had rendered necessary assistance to Arun Singhania in generating the above-mentioned false documents on computer.

7. During the course of arguments, while highlighting certain discrepancies in the dates and contents of the minutes of meetings, learned counsel for the petitioner Arun Singhania sought to bring a countercharge by asserting that no presumption, under Section 195 of the Companies Act, 1956, as to authenticity of the minutes can be drawn as the same have not been kept in accordance with the provisions of Section 193.

8. Adverting to the legal aspects, learned counsel for the petitioners have contended that –

> (A) Cognizance of the offences could not be validly taken upon the complaints made by A.K. Agrawal for and on behalf of the Company in absence of any resolution of its Board of Directors authorising him to do so.
>
> (B) Issuance of process in respect of the offences under Sections 409, 467 and 468 of the IPC, which have been made triable exclusively by the Court of Session in the State of M.P., is vitiated due to non-compliance with proviso to sub-section (2) of Section 202 of the Code.

9. Indisputably, in the complaint as well as in the Civil Suit filed by petitioner Arun Singhania, A.K. Agrawal has been impleaded as one of the persons in-charge of and responsible for conduct of business of the Company. Although, he claims that necessary authorisation was given to him by way of resolutions-dated 19.4.2010 and 10.2.2011 yet, it is well-settled that a company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney. Moreover, merely because complaint is signed and presented by a person, who is neither an authorised agent nor a person empowered under Articles of Association or by any resolution of the Board to do so, the same is no ground to quash the complaint since the defect is curable (*M.M.T.C. Ltd., M/s. v. M/s. Medchl Chemicals and Pharma (P) Ltd.* AIR 2002 SC 182). In this view of the matter, the contention (A) has no merit or substance.

10. In support of the contention (B), learned counsel for the petitioners

have cited observations made by Justice *K.T. Thomas in Rosy v. State of Kerala* AIR 2000 SC 637 to the effect that the proviso confer a compelling duty on the Magistrate to perform in a case relating to the offence triable exclusively by the Court of Session. However, the argument deserves to be rejected as apparently misconceived. It was explained in *Rosy's* case only that violation of mandate of the proviso to examine all the witnesses on behalf of the complainant would not vitiate trial unless prejudice caused to accused is established. In a subsequent decision on the point, rendered in *Shivjee Singh v. Nagendra Tiwary* (2010) 7 SCC 578, it has been pointed out that the word "shall" occurring in the proviso is though *prima facie* indicative of the mandatory character, yet non-examination of any or some of the witnesses cited by the complainant is, by itself, not sufficient to denude the Magistrate of the jurisdiction to take cognizance and issue process, provided that he is satisfied as to existence of a *prima facie* case.

11. Still, learned counsel for the petitioners, making reference to the decision of the Supreme Court in *Ashok Chaturvedi v. Shitul H. Chanchani* AIR 1998 SC 2796, have contended that in absence of material to indicate involvement of each of the accused, bald allegations in the complaint and the statement of the complainants could not be considered as sufficient to make out the offences. According to them, the complaints, containing averments constituting dispute predominantly civil in nature, were filed as a counter blast to the prosecution of Vinod Kumar and Ashok Kumar, with a view to wreaking vengeance, and therefore, fall within categories (1) and (7) of the cases, as enumerated in *State of Haryana v. Bhajan Lal* AIR 1992 SC 604, attracting exercise of the inherent powers for quashment thereof.

12. In *Bhcjan Lal's* case (above), nature, scope and purpose of Section 482 of the Code have been explained after analyzing all the leading decisions concerning the subject including the one rendered in *R.P. Kapur v. State of Punjab* AIR 1960 SC 866. In that case also, a three-Judge Bench of the Supreme Court illustrated categories of cases where the inherent jurisdiction to quash proceedings can and should be exercised. They are:

> *(i) Where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;*
>
> *(ii) Where the allegations in the first information report or complaint taken at their face value and accepted in*

their entirety do not constitute the offence alleged;

(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence, which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question.

(Emphasis supplied)

13. Thus, this Court's jurisdiction in quashing the complaint is confined to examination of documents annexed thereto as a whole without going into the merits of the allegations made therein. The acid test is whether any offence would be made out against the petitioner if the allegations are taken at their face value and accepted in their entirety. Further, the inherent powers, under Section 482 of the Code, are to be exercised *ex debito justitiae* to prevent abuse of the process of Court but not to stifle a legitimate prosecution, when the issues involved, whether factual or legal, can not be decided without sufficient material.

14. Reverting to the facts of the cases in hand, issues as to whether the documents (Annexure P-1 and P-2), relied on by Arun Singhania, are false and fabricated documents or the minutes (Annexure R-1) are not valid, are questions of fact to be determined on the evidence. Still, it may be observed that paragraph 7 of the plaint filed by Arun Singhania did not contain reference to any written authority to sell the lands belonging to the Company. Further, there is no official document to show that during the relevant period, petitioner Arun Singhania was inducted as one of the Directors of the Company on or before 17.12.2007, {the day on which the resolution (Annexure P-1) reflecting status of Arun Singhania as Director was said to have been passed}, despite the fact that the Companies Act has made specific provisions for all Companies registered with the Registrar of Companies to file a Return about the directors in the company.

15. For these reasons, *prima facie* none of the complaints is a case of no incriminating evidence or that of no criminal liability. The allegations made therein do not fall within anyone of the categories enumerated in *Bhajan Lal's case* (ibid) wherein a note of caution was also sounded that the power of quashing the criminal proceedings should be exercised very sparingly with circumspection and that too in the rarest of rare cases. Accordingly, no interference under the inherent powers is called for.

16. The petitions, therefore, stand dismissed. However, nothing contained herein shall be construed as any expression of opinion on the merits of the case. It shall still be open to the petitioners to raise all such pleas as are available under law.

Petition dismissed.

I.L.R. [2013] M.P., 514
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
M.Cr.C. No. 432/2011 (Jabalpur) decided on 3 October, 2012

AMITABH SHUKLA ...Applicant
Vs.
NATH NARAYAN MISHRA & anr. ...Non-applicants

***Penal Code (45 of 1860), Section 420 - Cheating* - Complaint filed alleging that applicant fraudulently obtained the consent of respondent No. 1 for marriage by representing that daughter of applicant was first class graduate in science and topper in M.Sc. and employed as teacher, whereas she was schizophrenic and not a post graduate and unemployed - Marksheets disclose that the daughter of the applicant has secured first division in graduation and is a post graduate - It was not possible to presume that the applicant had made any misrepresentation as to educational qualification or employment status - No legal evidence to establish prima facie that daughter of applicant is suffering from schizophrenia - Petition allowed - Proceedings quashed. (Paras 20 & 21)**

दण्ड संहिता (1860 का 45), धारा 420 – छल – यह अभिकथित करते हुए शिकायत दर्ज की गई कि आवेदक ने प्रत्यर्थी क्रमांक 1 को, यह दर्शाते हुए कि आवेदक की पुत्री विज्ञान में प्रथम श्रेणी स्नातक और एम.एस.सी. में (उच्च वरीयता प्राप्त) टॉपर एवं शिक्षिका के रुप में कार्यरत है, छलपूर्वक विवाह के लिए सहमति

प्राप्त की, जबकि वह मनोरोगी थी, स्नातकोत्तर नहीं थी और बेरोजगार थी – अंक तालिकाऐं यह दर्शाती हैं कि आवेदक की पुत्री प्रथम श्रेणी में स्नातक है और स्नातकोत्तर है – यह उपधारणा संभव नहीं है कि आवेदक ने शैक्षणिक योग्यता एवं रोजगार की स्थिति का कोई दुर्व्यपदेशन किया – प्रथम दृष्टया कोई विधिक साक्ष्य स्थापित नहीं कि आवेदक की पुत्री मनोरोग से ग्रसित है – याचिका मंजूर – कार्यवाहियां अभिखण्डित।

Cases referred :

1987 Cr.L.J. 1351, AIR 1960 SC 866, AIR 1992 SC 604, Cr.L.J. 3928, AIR 2000 SC 2474, 2004 (3) MPHT 518, AIR 1991 MP 205, AIR 1988 SC 2260, AIR 2010 SC 3624.

H.S. Dubey, for the applicant.

R.S. Patel, Shashank Upadhyay & Alok Vagrecha, for the non-applicant No.1.

R.K. Kesharwani, P.L. for the non-applicant No.2/State.

ORDER

R.C. Mishra, J.: This is a petition, under Section 482 of the Code of Criminal Procedure, (for short 'the Code') for quashing of the proceedings pending as Cri. (Complaint) Case No.11349/2010 in the Court of Shri Sanjay Kumar Sahi, JMFC, Jabalpur. In that case, vide order-dated 28.9.10, direction was given to issue process against the petitioner only in respect of the offence punishable under Section 420 of the IPC upon a complaint made by respondent no.1, alleging commission of the offence by as many as 8 persons including Pratibha, the daughter of petitioner.

2. On 9.7.2008, marriage of Pratibha was solemnized with Kamlesh, an advocate practicing at Jabalpur and son of respondent no.1, at Suhagi Distt. Rewa.

3. Relevant allegations may be summarized as under –

> "The petitioner fraudulently obtained consent of respondent no.1 for the marriage by representing that Pratibha was (a) hale and hearty (b) a First ClassGraduate in Science and (c) a University topper in M.Sc and employed as teacher whereas, in fact, she was (a) a schizophrenic, (b) not a post graduate and (c) unemployed"

4. Learned counsel appearing on behalf of the petitioner has contended that his prosecution for the offence is an abuse of the process of the Court in view of the following background facts –

(i) Before marriage, Pratibha had a brilliant academic career and passed B.A. Examination in the First Division in the year 2007.

(ii) At the time of marriage, she had not been suffering from any disease and

(iii) Before approving the marriage proposal, the respondent no.1 and his family members had, on as many as three occasions, discussed various matters with Pratibha so as to understand her nature and assess her level of intelligence. Thereafter, -

(a) On 25.5.2008, engagement ceremony was organized at Jabalpur.

(b) On 5.7.2008, Oli ceremony had taken place at Suhagi Distt. Rewa.

(c) On 6.7.2008, at the Tilak ceremonyperformed in Bareti Distt. Rewa, respondent no.1 made a demand for Rs.10 lacs and a Maruti Car in dowry but the petitioner was able to give a cash amount of Rs.5 lacs only.

(iv) Although, at the time of marriage, along with household articles and gold & silver ornaments, the petitioner had also gifted a car, bearing registration no.U.P.17-AV-8643 yet, at the time of second Bidai, the respondent no.1 and his family members reiterated the demand for a sum of Rs.5 lacs. However, being a Teacher, he could manage only an amount of Rs.1 lac for the purpose.

5. According to learned counsel, it was due to non-fulfillment of the demand for additional dowry that a petition, under Sections 12 and 13(1)(i-a) and (iii) of the Hindu Marriage Act, 1955 for annulment of marriage/divorce, was filed before the Family Court at Jabalpur on totally a non-existent of so-called mental disorder and with a view to fortifying the same, a false complaint was preferred. He has further contended that even the uncontroverted

allegations made in the complaint would not make out a case against the petitioner as there was absolutely no oral or documentary expert/medical evidence on record to indicate that at the time of marriage negotiations, Pratibha was a patient of schizophrenia or that an incorrect information as to her educational qualification or employment was given.

6. While opposing the prayer, learned counsel for the respondent no.1 have submitted that no interference with a legitimate prosecution is warranted under the inherent powers. For this, attention has been invited to (a) the averments made by Kamlesh in the petition for divorce (b) corresponding testimony of Dr. Ashutosh Kapoor & Dr. Namita Shukla, examined as AW3 and AW4 respectively and (c) contents of medical papers pertaining to treatment of Pratibha at Nagpal Neuro Medical Centre and Manjusha Nursing and Maternity Home at Jabalpur.

7. Reliance has also been placed on the decision in *Sadhu Ram v. Kishan Kumar* 1987 CRI.L.J. 1351 wherein learned single Judge of the Delhi High Court had declined to quash the complaint alleging that the accused had deliberately concealed the fact that his son had been suffering from a mental disease to obtain acceptance of his proposal for marriage of his son with complainant's daughter.

8. Before proceeding further, it is necessary to remind ourselves of the principles to be followed in quashing criminal prosecution under the inherent powers. In the leading decision of *R. P. Kapur v. State of Punjab* AIR 1960 SC 866, that has been followed in all subsequent pronouncements including the one rendered in *State of Haryana v. Bhajanlal* AIR 1992 SC 604, the Supreme Court proceeded to enumerate the categories of cases where the inherent jurisdiction to quash proceedings can and should be exercised. These are –

> *(i) Where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;*
>
> *(ii) Where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged;*
>
> *(iii) Where the allegations made against the accused person do constitute an offence alleged but there is either*

no legal evidence adduced in support of the case or the evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of cases it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence, which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question.

(Emphasis supplied)

9. Apparently, the case in hand does not fall in category (i) [above]. Further, the view taken by a learned single Judge of the Andhra Pradesh High Court in *L.H.V. Prasad v. Station House Officer, Alwal P.S.* CRI. L. J. 3928 to the effect that the offence of cheating defined under S.415 would not be made out in a case pertaining to acceptance of proposal of marriage based on a false representation, has already been disapproved by the Supreme Court. The relevant observations may be reproduced as under -

"..Section 415 has two parts. While in the first part, the person must "dishonestly" or "fraudulently" induce the complaint to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional..... ....

Thus, so far as second part of section 415 is concerned, "property", at no stage, is involved. Here it is the doing of an act or omission to do an act by the complainant, as a result on intentional inducement by the accused, which is material. Such inducement should result in the doing of an act or omission to do an act as a result of which the person concerned should have suffered or was likely to suffer damage or harm in body, mind, reputation or proper"

[Excerpted from Para 7 and 8 of the judgment rendered in G. V. Rao v. L.H.V. Prasad AIR 2000 SC 2474].

10. Accordingly, the case is also not covered by category (ii) [supra].

11. The point for determination, therefore, is as to whether the case against the petitioner falls under category (iii) [ibid] ?

12. The petition for annulment of marriage was filed on 12.1.10 whereas the complaint was made on 19.4.10. Interestingly, the petition contained no averment as to misrepresentation regarding Pratibha's educational qualification or employment. Further, a bare perusal of the order-dated 28.9.10, directing issuance of process against the petitioner, would reveal that in the preceding inquiry, no medical expert was examined and it was founded on the facts stated by respondent no.1 namely Nath Narayan Mishra (PW1), his son Kamlesh (PW4), Bhupendra Tiwari (PW3), who is also a practicing Advocate and Ram Pratap Yadav (PW2), a railway employee. However, evidence of all of them related to the events that followed the marriage.

13. Facts of the instant case are distinguishable from *Sadhu Ram's* case (above) inasmuch as, in that case, there was prima facie evidence in the form of statement of Dr. G.C. Mujral suggesting that the bridegroom had an attack some time in 1982 of 'manic depressive psychosis' and had remained admitted to G.B. Pant Hospital during the period from 22nd July to 9th August 1983 whereas, in the present case, neither any medical expert, who had the occasion to examine or treat Pratibha before her marriage, nor any resident of Village Suhagi/Bareti/Rewa, who had the occasion to assess her behavioral pattern and intellectual emotional development, was produced to prove the events that preceded/attended the marriage.

14. Learned counsel for the petitioner still, while making reference to relevant extracts of the treatise on 'Abnormal Psychology' by Irwin G. Sarason and Barbara R. Sarason (at Page 329 Chapter 11 of the Ninth Edition: 'Schizophrenia and Other Psychotic Disorders) and "Comprehensive Textbook of Psychiatry" edited by Alfred M. Freedman & Haroid I. Kaplan, has submitted that risk of development of schizophrenia is correlated with the genetic relationship or genetic overlap. In this regard, he has also referred to the history recorded by Dr. Ashutosh Kapoor that Pratibha's mother, being a schizophrenic, had committed suicide. However, fact of the matter is that Schizophrenia is a complex illness and its onset in most people is a gradual deterioration that occurs in early adulthood usually in a person's early 20s.

15. In *Smt. Shanta Deb v. Indraneel* Deb 2004 (3) MPHT 518 cited by learned counsel for the petitioner, the definition and Clinical Features of schizophrenia given by Rustol Jal Vakeel at Page No.1482 in 1973 Edition of

Text Book of Medicine, were reproduced. Accordingly, -

> "the illness usually begins in the 15 to 25 years age group, although the onset may be much earlier or much later. It may be precipitated by some emotional stress, such as failure in an examination, frustration in a love affair, financial loss in business, professional difficulties or the demise of a near relative or friend. In many cases, there is no apparent cause for the onset of the disease".

16. The judgment in *Smt. Shanta Deb's* case (above) also contains reference to an earlier decision rendered by *D.M Dharmadhikari, J.* (as his Lordship then was) in *Smt. Alka Sharma v. Abhinesh Chandra* AIR 1991 MP 205 wherein the following excerpts of the same book were quoted -

> *"The medical opinion is that there are several types of schizophrenia, of which 'paranoid schizophrenia' is one of the conditions. This type of schizophrenia is explained at page 1485 of the above cited book as under:--*
>
> *PARANOID SCHIZOPHRENIA*
>
> *The illness usually begins late in life, between the age of 25 and 35 years."*

17. It is pertinent to note here that in the divorce petition, age of Pratibha was reflected as 22 years. As such, she was around 20 years on the date of the marriage.

18. Further, as explained by the Apex Court in *Ram Narain Gupta v. Rameshwari Gupta* AIR 1988 SC 2260, mere branding of spouse as schizophrenic is not sufficient for establishing the ground of mental disorder as contemplated in Section 13(1)(iii) of the Act and degree of mental disorder of the spouse must be proved to be such that petitioning spouse cannot reasonably by expected to live with other.

19. There is yet another aspect of the matter. Each case has to be decided on its own circumstances and, therefore, expert evidence given by Dr. Ashutosh Kapoor and Dr. Namita Shukla or the medical papers placed on record of the case relating to matrimonial dispute cannot be read in the criminal case. Further, even the finding of facts recorded by the Family Court on merits would also not have any bearing on the Criminal Case (*Kishan Singh v. Gurpal Singh*

AIR 2010 SC 3624 relied on).

20. The marks sheet (Annexure A-3) reflects that Pratibha had secured First Division in B.A. Final (Correspondence) Examination conducted by Awadhesh Pratap Singh University, Rewa. In his examination, under Section 200 of the Code, the respondent no.1 did not say anything about misrepresentation as to Pratibha's post graduation in Science and none of the independent witnesses viz. Bhupendra Tiwari and Ram Pratap Yadav had acted as mediator to the marriage. In such a situation, it was not possible to presume that the petitioner had made any misrepresentation as to educational qualification or employment status.

21. To sum up, there was no legal evidence whatsoever to establish *prima facie* that at the relevant point of time, the petitioner knew or had reason to believe that Pratibha had been suffering from schizophrenia or that he had cheated the respondent no.1 by making any false representation about qualification or employment so as to obtain his consent or approval for the marriage.

22. For these reasons, I am inclined to hold that the case is squarely covered by category (iii) [above] and criminal proceedings against the petitioner are attended with mala fide for substantiating the claim for divorce.

23. Consequently, the petition stands allowed and the proceedings in Cri. (Complaint) Case No.11349/2010 (supra) are hereby quashed.

Petition allowed.

I.L.R. [2013] M.P., 521

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Anil Sharma

M.Cr.C. No.7246/2012 (Gwalior) decided on 30 November, 2012

SATYA PRAKASHI PARSEDIYA (SMT.) & anr. ...Applicants

Vs.

STATE OF M.P. & ors. ...Non-applicants

***Penal Code (45 of 1860), Section 341 - Wrongful restraint - Chakajaam* - Person concerned must have right to proceed and he should have been restrained from moving in that direction - Protest on the ground that feelings of a particular section/group have been hurt by an act or by some crime and demanding for arrest, does not amount**

to come within definition of restraint of person - No ground to proceed against petitioners - Petition allowed. (Para 3)

दण्ड संहिता (1860 का 45), धारा 341 – सदोष अवरोध – चकाजाम – संबंधित व्यक्ति को आगे बढ़ने का अधिकार था और उसे उस दिशा में बढ़ने से अवरुद्ध किया गया – इस आधार पर प्रदर्शन कि किसी अपराध या किसी कृत्य द्वारा किसी विशिष्ट वर्ग/समूह की भावनाओं को ठेस पहुंची है और गिरफ्तारी की मांग कर रहे हैं, व्यक्ति को अवरुद्ध करने की परिभाषा के भीतर आने की कोटि में नहीं आता –, याचीगण के विरुद्ध कार्यवाही का कोई आधार नहीं – याचिका मंजूर।

Prakash Braru, for the applicants.
J.M. Sahni, P.P. for the non-applicants/State.

ORDER

ANIL SHARMA, J.: Petitioners have filed this petition under section 482 of Cr.P.C. for quashing the FIR to the extent of petitioners registered at Crime No. 883/2008 at police station Dabra, District Gwalior (MP) for the offence punishable under section 341/147 IPC against the petitioners along with other persons for allegedly causing Chakajaam for arresting the persons who had damaged statue of Dr. Ambedkar.

2. For the offence punishable under section 341 IPC it is necessary that there must be specific allegation that somebody was restrained from moving in a particular direction where he wanted to go. Further for section 147 IPC, the action of the accused must be riotous. There is no evidence that any person wanted to go from the place where Chakajaam was organized and he could not go due to Chakajaam. There is no evidence that the persons whose number have been mentioned near about 500 were doing any riotous act or threatened that if anybody tried to move, he will have to face dire consequences. Merely making demand for arresting the accused persons does not amount to riot or gathering for making demand does not make wrongly restraint until and unless some individual has been restrained by the accused.

3. Necessary pre-condition for wrongful restraint is that person concerned must have right to proceed and he should have been restrained from moving in that direction but there is no such evidence against the petitioners. Further, protest on the ground that feelings of a particular section / group have been hurt by an act or by some crime and demanding for arrest does not amount to come within definition of restraint of person, therefore, there is no ground for proceedings against the petitioners for the offence punishable under section

341/147 IPC.

4. Therefore, the petition is allowed and the FIR registered at Crime No. 883/08 at police station Dabra, District Gwalior for the offence under section 341/147 IPC and further proceedings in consequent thereof are hereby quashed to the extent of the petitioners.

5. A copy this order be sent to the trial court for-information and compliance.

CC as per rules.

Petition allowed.

I.L.R. [2013] M.P., 523
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice M.A. Siddiqui
M.Cr.C. No. 2288/2007 (Jabalpur) decided on 17 January, 2013

KRASHAN KUMAR AGRAWAL & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent Powers **- Prima facie offence is not made out as the evidence produced by respondent No.2/Complainant do not disclose the commission of any offence and make out a case against the petitioners - Criminal proceeding is manifestly attended with mala fide and is maliciously instituted with an ulterior motive for wreaking vengeance and with a view to spite the petitioners due to private and personal grudge - Proceedings quashed.** **(Para 17)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्तियां – प्रथम दृष्ट्या अपराध नहीं बनता क्योंकि प्रत्यर्थी क्र. 2/शिकायतकर्ता द्वारा प्रस्तुत किया गया साक्ष्य किसी अपराध का कारित किया जाना प्रकट नहीं करता और याचीगण के विरुद्ध प्रकरण गठित नहीं करता – आपराधिक कार्यवाही प्रकट रुप से दुर्भावना के साथ की गई और व्यक्तिगत एवं निजी द्वेष के कारण, याची को परेशान करने के उद्देश्य से तथा बदला लेने के लिए, गूढ़ प्रयोजन के साथ द्वेषपूर्ण रुप से संस्थित की गई – कार्यवाहियां अभिखंडित।

Cases referred :

AIR 1990 SC 494, 1999 Supreme Appeals Reporter (Cri.) 732, 1999

Supreme Appeals Reporter (Cri.) 586, AIR 2000 SC 522, (2001) 4 SCC 350, (2002) 1 SCC 555, AIR 2010 SC 3191, M.CR.C. 26/1988 decided on 20.09.1988, 1989 (2) MPWN 80, 1996(II) MPWN 108, 1997(2) MPLJ 283, 1999(1) JLJ 411, 2004 (5) MPHT 75, 2006(2) MPLJ 393, 2007 CrLJ (NOC) 101(Bom.), (1988) 1 SCC 692, (2005) 1 SCC 122, 1992 Supp. (1) SCC 335, (2011) 9 SCC 527, (2011) 11 SCC 259, (2010) 11 SCC 226.

Amit Dubey, for the applicants.
Vivek Lakhera, P.L. for the non-applicant No.1/State.
Umesh Trivedi, for the non-applicant No.2.

ORDER

M.A. SIDDIQUI, J.: Since both the above petitions have been filed to quash the proceedings pending in the Court of JMFC, Tikamgarh in Criminal Case No.343/05 for alleged offence punishable under Sections 406,494,209,211,420, 506 and 120-B of IPC, hence they are being decided by this common order.

2. Brief facts, necessary for adjudication of this matter are that Mukta Agrawal alias Guddi (petitioner no.2 of M.Cr.C.No.2288/07) was married to respondent no.2 Nirmal Lohiya on 11.02.2001 according to Hindu rites at Chhatarpur and she came to reside with respondent no.2 at Tikamgarh.From the first night of marriage, respondent no.2 and his family members started misbehaving, harassing and torturing her and demand of dowry was made. So, she left the company of respondent no.2 and went back to Chhatarpur. She made a complaint at PS-City Kotwali, District-Chhatarpur against respondent no.2 and his family members and police registered offence punishable under Sections 498-A/34 of IPC and Section 3/4 of Dowry Prohibition Act and filed the Challan ,Criminal Case No.152/2003 is pending at Chhatarpur. Thereafter Mukta Agrawal filed a suit for divorce under Hindu Marriage Act and she was granted divorce on 24.3.03 by a competent Court of Chhatarpur and she entered into the second marriage with petitioner Krashan Kumar Agarwal on 11.05.03. Thereafter respondent no.2 Nirmal Lohiya filed a complaint case against the petitioners, statements were recorded and only against petitioner Smt. Mukta Agarwal case under Section 406 of IPC was registered by JMFC, Tikamgarh against which respondent no.2 filed a Criminal Revision in the Court of Sessions which directed to record additional statements under Section 202 of Cr.P.C. and thereafter, after examining the witnesses JMFC, Tikamgarh registered the aforesaid complaint case for alleged offence

punishable under Sections 406,494,209,211,420, 506 and 120-B of IPC against which these petition have been filed under Section 482 of Cr.P.C.to quash the proceedings pending in the Court of JMFC, Tikamgarh in Criminal Case No.343/05. It is an admitted fact that petitioner Mukta Agarwal has remarried with petitioner Krashan Kumar Agarwal and she is residing with him and proceedings of Criminal Case No.343/05 have been stayed by this Court from 7.3.07 in M.Cr.C.1790/07. The present petitions have been filed on the following grounds :-

"(1) That, though the marriage of said Mukta Agarwal was performed with non-applicant no.2 but said Mukta Agarwal has made a complaint against the Non-applicant no.2 and his family members that from the first night she was tortured and harassed by various means and even she was beaten and assaulted by non-applicant no.2 and his family members and on a report the Police of Kotwali, Chhatarpur against the non-applicant no.2 and his family members registered offence under Sections 498-A/34 of IPC and Section 3/4 of Dowry Prohibition Act and the said case is still pending before the Court;

(2) That, the said Mukta Agarwal has also filed a divorce petition against the Non-applicant no.2 and after obtaining divorce the said Mukta Agarwal has already performed second marriage with Krashan Kumar Agarwal;

(3) That, due to the aforesaid reason and to take revenge the non-applicant No.2 has filed a complaint case against the applicant and other near relatives of Smt. Mukta Agarwal;

(4) That, the Magistrate has also recorded the statements under Section 200 and 202 of Cr.P.C.;

(5) That, the applicant has challenged the order of registration before the Court of Sessions on the ground that from the material on record and from the statements under Section 200 and 202 of Cr.P.C.no prima facie case is made out against the applicants and other family members for the offence under Sections 406,494,209,211,420, 506 and 120-B of IPC;

(6) That, the allegations made against the applicant and other

family members are totally false and no case is made out against them but only to harass, the non-applicant no.2 has filed the complaint case so that there shall be compromise in the case under Section 498-A/34 of IPC and Section 3/4of Dowry Prohibition Act and the said case is still pending before the Court;

(7) That,according to the allegations made in the complaint case the Court of Tikamgarh has no jurisdiction as according to the complaint the incident has taken place within the jurisdiction of Chhatarpur Court;

(8) That, even the non-applicant no.2 has made an accused Santosh Tiwari, Advocate who was appearing as counsel of Smt. Mukta Agarwal so that in future no counsel of Tikamgarh can appear on behalf of the applicant and other accused persons;

(9) That, the impugned orders of the Courts below are illegal, erroneous and contrary to laws and the same deserve to be set aside;

(10) That, the articles and other things presented to Smt. Mukta Agarwal at the time of marriage by any person including the non-applicant no.2 are "Stridhan" and non-applicant no.2 has no right to move an application to obtain the said articles or things."

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

4. Learned counsel for respondent no. 2 has placed reliance on decisions in *Mrs. Dhanalakshmi vs. R.Prasanna Kumar and others* AIR 1990 SC 494, *K.Bhaskaran vs. Sankaran Vaidhyan Balan and another* 1999 Supreme Appeals Reporter (Criminal) 732, *Narendra Kumar Jain vs. State of Gujrat and another* 1999 Supreme Appeals Reporter (Criminal) 586, *Kanti Bhadra Shah and another vs. State of West Bengal* AIR 2000 SC 522, *Mohan Baitha and others vs. State of Bihar and another* (2001) 4 SCC 350, *Kamaladevi Agarwal vs. State of W.B. and others* (2002) 1 SCC 555, *K. Neelaveni vs. State rep. by Inspector of Police and* others AIR 2010 SC 3191, M.Cr.C.No.26/1988 (*S.D.Joshi vs. Rajendra Nahar*)

decided on 20.9.88 by a single Bench of this Court, *Charanjit Singh vs. State of M.P.* 1989 (2) MPWN Note No. 80, *Raghunath Prasad Khedia vs. State of M.P.* 1996 (II) MPWN 108, *Dhanesh Thakurdas Narvani and others vs. Ram Kumar Nandlalji Mansukhani* 1997 (2) MPLJ 283, *Dinesh Kumar and others vs. Rasik Bihari Joshi and another* 1999 (1) JLJ 411 , *Devendra Kumar @ Deva vs. State of Chhattisgarh and others* 2004 (5) MPHT 75, *Ram Behari vs. State of M.P.* 2006(2) MPLJ 393 and *Sau.Saroj Ganesh Kale and others vs. Ganesh Manikrao Katel and another* 2007 Cri.L.J.(NOC) 101 (Bom.) and supported the cognizance taken by learned Magistrate contending that the order be not interfered with as the case is in the primary stage and the defence of accused persons cannot be considered at this stage and ordinarily powers under Section 482 of Cr.P.C.should be exercised sparingly, appreciation of evidence cannot be done at this stage and jurisdiction point may be submitted before the concerned Court.

5. On the other hand, learned counsel for petitioners placed reliance on *Madhavrao Jiwajirao Scindia vs. Sambhajirao Chandrojirao Angre* (1988) 1 SCC 692, *Zandu Pharmaceutical Works Ltd. vs. Mohd. Sharaful Haque* (2005) 1 SCC 122 , *State of Haryana vs. Bhajan Lal* 1992 Supp (1) SCC 335 and *Thota Venkateswarlu vs. State of A.P.* (2011) 9 SCC 527 and has made the submission that though appreciation of evidence is not permissible at length, but consideration of defence at the primary stage by the High Court under its inherent powers is not absolutely barred. In order to prevent the injustice or abuse of process or to promote justice, High Court may look into materials which have significant bearing on the matter at prima facie stage. High Court can quash complaint if materials relied upon by accused are beyond suspicion or doubt or which are in the nature of public documents and are uncontroverted. Criminal prosecution is a serious matter as it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In the above cases it has also been held that the power under Section 482 Cr.P.C. is wide but has to be exercised with great care and caution. The interference must be on sound principle and the inherent power should not be exercised to stifle the legitimate prosecution. Inherent powers under Section 482 of Cr.P.C.can be used : (i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings; (ii) where the allegations in the first information report or complaint taken at their face value and accepted in their entirety do not constitute the offence alleged; (iii) where the allegations constitute an offence but there is no legal evidence adduced or

the evidence adduced clearly or manifestly fails to prove the charge as has been held in *Asmathunnisa vs. State of A.P.* (2011) 11 SCC 259. Powers under Section 482 of Cr.P.C. may be exercised where the prosecution is launched maliciously or with ulterior motive.

6. While exercising powers under Section 482 of Cr.P.C., the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Court. It is true that the Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, otherwise, it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time, Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and bring about its closure without full-fledged enquiry. Though the High Court may exercise its power relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice, the power should be exercised sparingly. For example, where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused or allegations in the FIR do not disclose a cognizable offence or do not disclose commission of any offence and make out a case against the accused or where there is express legal bar provided in any of the provisions of the Cr.P.C.or in any other enactment under which a criminal proceeding is initiated or sufficient material to show that the criminal proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused due to private and personal grudge, the High Court may step in. Though the power possessed by the High Court under Section 482 of Cr.P.C. are wide, however, such power requires care/caution in its exercise. The interference must be on sound principles and the inherent power should not be exercised to stifle a legitimate prosecution. However, if the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of inherent powers under Section 482 of Cr.P.C. as has been held in *State of A.P. vs. Gourishetty Mahesh* (2010) 11 SCC 226.

7. In the light of above decisions, now we will consider the submissions made by learned counsel for the parties.

8. Learned counsel appearing for petitioners submitted that petitioner

Mukta Agarwal was harassed from the first night of her marriage by respondent no.2 and his family members for demand of dowry, and as Criminal Case No.152/03 under Sections 498-A/34 IPC and Section 3/4 of Dowry Prohibition Act is pending against respondent no.2 so, as a counter blast, respondent no.2 Nirmal Lohiya filed complaint case on 30.12.04, after near about three years of the marriage in order to harass the petitioners. It is further submitted by petitioners' counsel that Smt. Mukta Agarwal has remarried and she is living with her husband Krashan Agarwal and marriage has been solemnized after the decree of divorce was obtained by a competent Court at Chhatarpur.

9. On the other hand, learned counsel appearing for respondent no.2 submitted that decree of divorce was obtained fraudulently in ex-parte against which an appeal has been preferred in this Court and in that case stay has been granted against the decree on 16.05.03, and in contravention of the decree, on 22.06.03 remarriage was performed and certificate of prior date of 12.05.03 has been obtained.

10. Another contention of learned counsel for petitioners is that as per complaint case and statements, marriage was performed at Chhatarpur and ornaments, clothes, etc. were given at the time of marriage, that was "Stridhan", and as per allegation, if something was given at Tikamgarh after the marriage, then it was also to be treated as "Stridhan" .No report to the police or any allegation was there prior to registration of criminal case under Section 498-A/34 of IPC and Section 3/4 of Dowry Prohibition Act by petitioner *Smt. Mukta Agarwal*, and the Criminal Case no.343/05 has been filed on 30.12.04 by respondent no.2 as a counter blast.

11. Learned counsel for respondent no.2 submitted that at least at Tikamgarh joint presents were given by relatives and friends to both Smt. Mukta Agarwal and respondent no.2 Nirmal Lohiya so it cannot be said to be a "Stridhan".

12. Learned counsel for petitioners submitted that no cause of action arose at Tikamgarh and even case under Section 494 IPC is not made out as second marriage took place after the decree of divorce and the same cannot be said to be illegal. He submitted that matter is sub-judice before this Court and it is to be decided that whether second marriage is legal or not so on such allegation of adultery,no case ought to have been registered by the learned trial Court and it is not maintainable when matter is to be decided by the High Court.

13. Learned counsel for petitioners submitted that the marriage took place on 11th February, 2001 at Chhatarpur and from the first night petitioner Smt. Mukta Agarwal was harassed and demand of dowry was there and it is evident that marriage survives only for few months and on 24th March,2003 decree of divorce was obtained. The allegation is there that re- marriage took place on 22.06.03 at Chhatarpur though it was resisted by complainant Krashan Kumar/respondent no.2, but in the complaint itself it was pleaded that certificate was obtained on 12.05.03 of re-marriage. It is submitted that no complaint was made to police about mis-appropriation of the ornaments for more than two years and on 30.12.04 suddenly a complaint was filed. It is submitted that this complaint was filed with an ulterior motive not only to harass the petitioners, but a case was also registered against the defending counsel who came to defend the petitioners at Tikamgarh. Had the ornament been taken up to the value of Rs.35 Lacs, then at least a complaint could have been filed immediately, but it was filed in the last month of 2004, after lapse of more than two years.

14. Further submission of petitioners' counsel is that as per complaint case ornaments were given at the time of marriage at Chhatarpur so that was "Stridhan" and whatever was given afterwards at the time of marriage is also "Stridhan". "Stridhan" is the personal property of a woman. If it is presumed that ornaments were taken by Smt. Mukta Agarwal, then too it cannot be said that she was not entitled for it.

15. Further submission of petitioners' counsel is that initially learned JMFC on the evidence under Section 200/202 Cr.P.C.registered the case under Section 406 of IPC only against petitioner Smt. Mukta Agarwal and no cognizance was taken against rest of the petitioners, but on the order of revisional Court, after taking evidence of two witnesses, the present case was registered against all the petitioners for the aforesaid offences. Counsel submitted that even the two witnesses who were examined have not stated that before them ornaments were taken. Counsel submitted that though while invoking power under Section 482 Cr.P.C.,minute observations cannot be made and evidence cannot be marshelled, but under Section 482 Cr.P.C.for invoking inherent powers on taking the allegations made against the petitioners in the application at their face value and accepting in their entirety, no justification of initiation of action against them would be made out in view of the admitted fact that the complaint was brought mala fide with ulterior motive either to take revenge or to take defence in the pending criminal case at

Chhatarpur in order to put pressure. So, the matter falls in the category of attracting interference under the inherent powers of this Court.

16. After analyzing the above submissions, I am of the considered view that the arguments advanced by learned counsel for petitioners are near to the truth and acceptable. It seems that petitioners herein have been dragged in criminal complaint with ulterior motive and if the proceedings are allowed to be continued, then grave miscarriage of justice would take place.

So far as the contention that ornaments worth Rs.35 Lacs were taken by Smt. Mukta Agarwal, though it was not clearly brought forward that she took the ornaments with her, even assuming that she took the ornaments with her, then too the same being *"Stridhan"*, Mukta Agarwal was having legal authority to hold them.

As far as second marriage is concerned, the matter is sub-judice and at least a decree for divorce was there, and it is clearly visible that the complaint was filed after so many months from the date of alleged incident in order to harass the petitioners herein and to put pressure in the aforesaid criminal case.

17. It is worth to refer the decision of Apex Court in *State of Haryana vs. Bhajan Lal* (supra) wherein it has been held that the inherent powers under S.482 Cr.P.C.can be exercised by the High Court either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised :

> "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the FIR and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under S.156(1) of the Code except under an order of a Magistrate within the purview of S.155(2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same

do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under S.155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with *mala fide* and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

In the present case also *prima facie* offence is not made out as the evidence produced by respondent no.2/complainant do not disclose the commission of any offence and make out a case against the petitioners. The criminal proceeding is manifestly attended with mala fide and is maliciously instituted with an ulterior motive for wreaking vengeance and with a view to spite the petitioners due to private and personal grudge.

18. As per above discussion, I find that the petitions deserve to be and are hereby allowed. The proceedings pending in the Court of JMFC, Tikamgarh in Criminal Case No. 343/05 for alleged offence punishable under Sections 406,494,209,211, 420, 506 and 120-B of IPC are hereby quashed. Petitioners are acquitted of the offence.

Petition allowed