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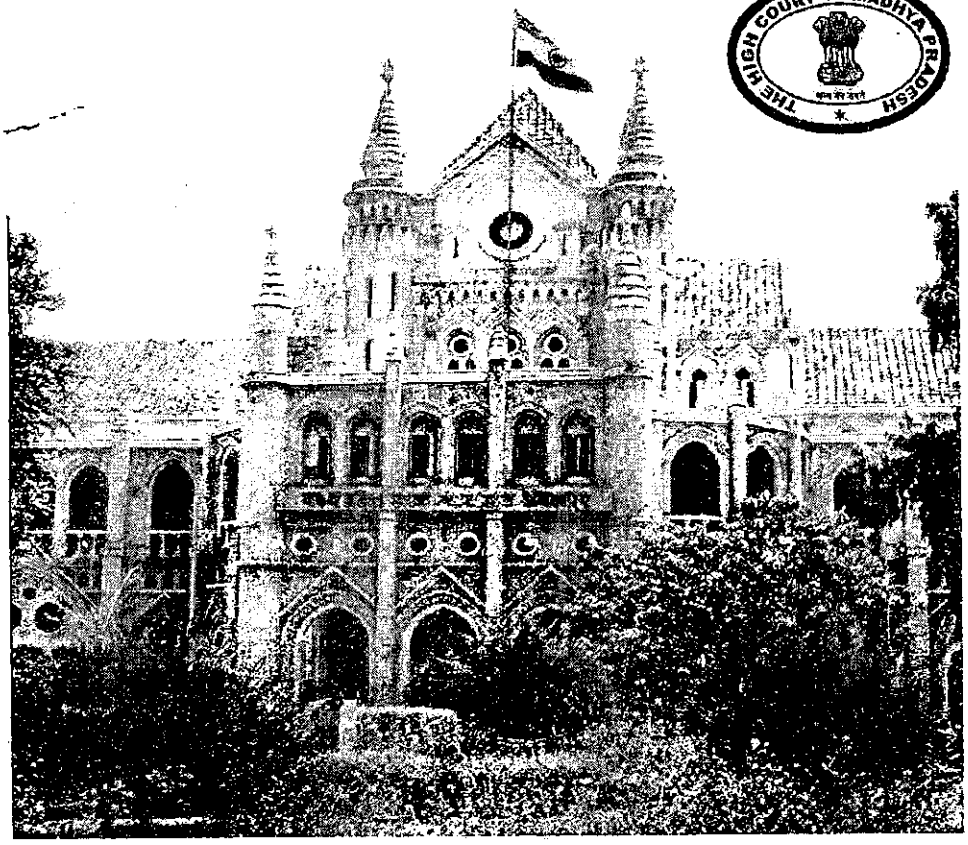

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consequential benefits - However, the respondents are free to proceed in the matter by conducting proper departmental enquiry. [Pramod Tiwari Vs. Chancellor, JNKVV] ...80

Constitution - Article 14 - Right to equality - Article 14 guarantees to every citizen the right of equality before the law but it does not forbid different treatment of unequals. [Rupendra Kumar Bhatt Vs. State of M.P.] ...130

Constitution - Article 14 & 41 - Right to Education - Article 41 obliges the State to make effective provisions for securing right to education - It is supplement to the Article 14 and therefore, is enforceable under Article 32 of the Constitution of India. [Purshottam Mahavidyalaya (Shri) Vs. State of M.P.] (DB)...27

Constitution - Article 21 & 23 - Right to Life - Article 21 includes the right of women to live and to be treated with decency and proper dignity - Article 23 prohibits traffic in human beings and forced labour, selling and purchasing of woman is strictly prohibited. [Kunwar Singh Vs. State of M.P.] ...*5

Constitution - Article 215 - Contempt of Court - Directions were issued to allot students against vacant seats in the respective institutions for admission in B.Ed. course - Review petition filed by State dismissed - S.L.P. filed before Supreme Court also dismissed - After dismissal of review petitions time was sought for compliance of the order - Non-allotment of seats on the ground of another order passed by Principal bench - Principal bench had not decided the matter on merits but had directed to decide the representations - It is crystal clear that directions issued have not been complied with - Contempt is made out - Respondent is directed to remain present for hearing on the question of punishment. [Gunmala Shanti Foundation Trust's (Smt.) Vs. V.S. Niranjan] (DB)...141

Constitution - Article 226 - Jurisdiction - A writ court exercising limited jurisdiction in a petition under Article 226 of the Constitution cannot enter into the allegations levelled against the petitioners on merits and exonerate them by holding that the petitioners were only exercising their right to freedom available to them. [Samir Banerji Vs. State Bank of India] ...114

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Constitution - Article 226 - Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69,70 - Appointment of Panchayat Karmi - No advertisement was issued inviting applications for appointment of Panchayat Karmi - Secretary was not authorized to issue notice in this regard - Further no notice was placed on the notice board of the Janpad Panchayat - Public at large was not informed about such an intention of filling the post of Panchayat Karmi - Process was not initiated in appropriate manner and improperly the resolution was passed for making appointment of Panchayat Karmi - Resolution quashed in exercise of powers under Article 226 of Constitution of India. [Raj Kumar Kushwaha Vs. State of M.P.] ...53

Constitution - Article 226 - Quarry Lease - Non-operation of - Petitioner who was granted quarry lease was not permitted to operate in view of the interim order passed by High Court - Writ Petition was dismissed later on, however, during this period the quarry lease granted in favour of petitioner expired - Petitioner was deprived without his fault to operate the sand quarry for full period - When the Petitioner was wrongfully disallowed to operate the mining lease for full lease period and the lease has remained un-operated and no third party right is created, he must be allowed to operate the mining for the full period of lease subject to adjustment for the period for which he has already operated - Petition allowed. [Ravi Shankar Naik Vs. State of M.P.] (DB)...111

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of F.I.R. - No cogent material collected against the applicant although three years have passed - I.O. has merely stated that the applicant in collaboration with the Revenue Officials is trying to evade the Stamp Duty and got the sale deed executed - This statement of I.O. is without any cogent material on record - I.O. is merely prolonging the investigation - F.I.R. and investigation quashed so far as it relates to applicant. [Sanjeev Saxena Vs. State of M.P.] (DB)...261

Evidence Act (1 of 1872), Section 3 - Related witnesses - Evidence of witnesses cannot be discarded merely on the ground of their close relationship - However, their evidence should be examined with caution and circumspection. [Mangna @ Mahendra Vs. State of M.P.] (DB)...216

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना रिपोर्ट का अभिखंडित किया जाना – आवेदक के विरुद्ध कोई तर्कपूर्ण तात्विक सामग्री एकत्रित नहीं, यद्यपि तीन वर्ष बीत गए हैं – अन्वेषण अधिकारी ने मात्र कहा है कि आवेदक, राजस्व कर्मचारियों से मिलकर स्टाम्प शुल्क से बचने का प्रयास कर रहा है और विक्रय विलेख निष्पादित कराया – अन्वेषण अधिकारी का यह कथन, अभिलेख पर किसी तर्कपूर्ण सामग्री के बिना है – अन्वेषण अधिकारी मात्र अन्वेषण को विलंबित कर रहा है – प्रथम सूचना रिपोर्ट एवं अन्वेषण, जहां तक आवेदक से संबंधित है, अभिखण्डित। (संजीव सक्सेना वि. म.प्र. राज्य) (DB)...261

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Evidence Act (1 of 1872), Section 3 - See - Penal Code, 1860, Section 302 [In Reference Vs. Dilip @ Dipu] (DB)...*4

Evidence Act (1 of 1872), Section 32 - Dying Declaration - Recorded by Naib Tahsildar - Before recording the above statement, the doctor concerned certified that the deceased was fit for giving statement - The doctor also certified that the patient was conscious while giving the dying declaration - There is no reason to reject the same - Prosecution is fully justified in relying on the same. [Ram Viswas Vs. State of M.P.] (SC)...1

Evidence Act (1 of 1872), Section 32, Penal Code (45 of 1860), Section 302 - Dying Declaration - Deceased was kept as a mistress - She demanded money for the marriage of her daughter which was denied by the appellant - Dying Declaration and statement of deceased were recorded - On careful perusal of dying declaration along with statement, the dying declaration is not beyond doubt as the deceased was in a state of helplessness and frustration on account of refusal of appellant for giving marriage expenses to her - Conviction of appellant not sustainable - Appeal allowed. [Ram Kripal Kahar Vs. State of M.P.] (DB)...205

Evidence Act (1 of 1872), Section 32 - See - Penal Code, 1860, Section 302 [Moved by Sessions Judge, Burhanpur Vs. Jitendra] (DB)...223

Evidence Act (1 of 1872), Section 65 - Photo copy of document - Petitioner filed application for taking photo copy of the receipt on the ground that the original was taken away by the husband of the plaintiff/ respondent on false pretext - In application for taking secondary evidence on record, it is nowhere mentioned that the photocopy was made from the original and it was compared with original - Name of person who has obtained the photocopy by mechanical process has also not been mentioned and further who compared the same with original is also not mentioned - Photo copy cannot be taken on record as secondary evidence. [Aneeta Rajpoot (Smt.) Vs. Smt. Saraswati Gupta] ...43

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the witnesses in order to prove the contents of original receipt - Trial Court shall allow such an application and shall permit the petitioner/ defendant and her witnesses to adduce secondary evidence in regard to contents of said document and said evidence should not be side-lined or should be treated as an inferior evidence merely because the petitioner is unable to produce the original receipt as plaintiff by playing a trick has concealed the document in question. [Aneeta Rajpoot (Smt.) Vs. Smt. Saraswati Gupta] ...43

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Income Tax Act (43 of 1961), Section 80-IC - Deduction under - Appellant manufacturing advanced microprocessor based Fast Bus Transfer Scheme for Power Generation segment - Contention of appellant that it is a manufacturing process - The CIT (Appeal) considered the matter in a different aspect while the Tribunal had looked into the expenditure aspect and also in respect of the employment of certain persons - None of the authorities had considered how product namely Fast Bus Transfer Scheme Panel is manufactured or assembled - Held - Unless and until some technical expert person examines this aspect, the nature of the product cannot be ascertained whether this is a manufacturing process or is an assembling process. [Aartech Solonics Ltd. (M/s.) Vs. The Commissioner of Income Tax] (DB)...234

Medical Negligence - Proof - Delivery of the child took place about seven months after the sterilization operation - It cannot be held that the sterilization operation had failed. [Uma (Smt.) Vs. State of M.P.] (DB)...172

Medical Negligence - Proof - Plaintiff's witnesses do not disclose any negligence on the part of the respondent in performing the sterilization operation - No such evidence on record that reasonable standard of care was not taken in the operation - No material on record to establish the negligence on the part of the respondent in performing the sterilization operation - Appeal dismissed. [Uma (Smt.) Vs. State of M.P.] (DB)...172

Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Owner did not turn up to give his statement before

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मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का दायित्व – स्वामी अधिकरण के समक्ष अपना कथन देने हेतु उपस्थित नहीं हुआ और न ही

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Motor Vehicles Act (59 of 1988), Sections 147, 166, Central Motor Vehicles Rules, 1989 **- Liability of Insurance Company - Violation of Insurance Policy - Learning License - There is nothing on record to show that the respondent No.1 was driving the vehicle in violation of the provisions relating to learner's license. [Uday Singh @ Udriya Vs. Lumsingh] ...179**

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Deceased was a child **- Accident took place in the year 2007 - Compensation of Rs. 1,54,000/- appears to be on lower side - Compensation enhanced by Rs. 75,000/-. [Uday Singh @ Udriya Vs. Lumsingh] ...179**

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Income - Income Tax Return **- Income Tax disclosing the income of deceased at Rs. 1,08,500/- per annum was filed during the life time of deceased - However, there is nothing on record that when PAN was issued and the Income Tax Returns of the previous years are also not available on record - Income of the deceased assessed at Rs. 7000/- per month - Multiplier of 17 would apply in view of the age of the appellant No. 1 - Award enhanced from Rs. 8,19,500/- to Rs. 9,82,000/ -. [Sunita Patidar Vs. Mohd. Ishaq Khan] ...176**

Motor Vehicles Act (59 of 1988), Section 166 - Income **- Tribunal after assessing the income of the deceased to the tune of Rs. 100/- per day, should not have taken the monthly income to the tune of Rs. 2,500/ - - Monthly income taken at Rs. 3,000/- - Award enhanced to Rs. 4,35,000/- instead of Rs. 3,52,500/-. [Ram Singh Vs. Dashrath]...184**

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उच्च न्यायालय के समक्ष उपस्थित है – अधिकरण को दोनों पक्षकारों को साक्ष्य प्रस्तुत करने का अवसर देने के पश्चात बीमाकर्ता कम्पनी का दायित्व पुनः निर्धारित करने हेतु मामला प्रतिप्रेषित। (उदय सिंह उर्फ उदरिया वि. लुमसिंह) ...179

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Municipalities Act, M.P. (37 of 1961), Section 5-A - Alteration of limits - Municipal Area of Lanji was constituted by notification including the Gram Panchayats Bisoni, Purva Tola, Tekri and Dulhapur - However, after receiving objections these areas were excluded from Municipal Area - Held - Govt. having notified the larger area by including the areas, has to follow the procedure prescribed under Section 5-A to exclude any such area - Subsequent notification excluding the areas without following the procedure as laid down under Section 5-A of the Act is quashed - Govt. may proceed in accordance with Section 5-A for the exclusion of areas. [Kishore Samriti Vs. State of M.P.] (DB)...138

Negotiable Instruments Act (26 of 1881), Section 138 - Cognizance - Public Servant - Every employee of Govt. Company is Public Servant entitled to exemption under Clause (a) of proviso to Section 200 of Cr.P.C. with regard to complaint relating to offence under Section 138 of Act, 1881. [Arjun Dev Nagpal Vs. M.P. State Industrial Development Corporation Ltd.] ...*1

Negotiable Instruments Act (26 of 1881), Section 138 - Cognizance - Public Servant - Every employee of Govt. Company is Public Servant entitled to exemption under Clause (a) of proviso to Section 200 of Cr.P.C. with regard to complaint relating to offence under Section 138 of Act, 1881. [Ramesh Babulal Baheti (Dr.) Vs. M.P. State Industrial Development Corporation Ltd.] ...249

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नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5ए – सीमाओं में परिवर्तन – अधिसूचना द्वारा बिसौनी, पूर्वाटोला, टेकरी और दुल्हापुर ग्राम पंचायतों का समावेश करके लांझी के नगरपालिका क्षेत्र का गठन किया गया – किन्तु, आक्षेपों को प्राप्त करने के पश्चात इन क्षेत्रों को नगरपालिका क्षेत्र से अपवर्जित किया गया – अभिनिर्धारित – सरकार ने क्षेत्रों के समावेश द्वारा वृहद क्षेत्र अधिसूचित किया, उक्त किसी क्षेत्र को अपवर्जित करने के लिए उसे धारा 5ए के अंतर्गत विहित प्रक्रिया का पालन करना चाहिए – अधिनियम की धारा 5ए के अंतर्गत प्रतिपादित प्रक्रिया का पालन किये बिना क्षेत्रों को अपवर्जित करने की पश्चातवर्ती अधिसूचना अभिखंडित – सरकार क्षेत्रों के अपवर्जन हेतु धारा 5ए के अनुसरण में कार्यवाही कर सकती है। (किशोर समरीति वि. म.प्र. राज्य) **(DB)...138**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – संज्ञान – लोक सेवक – सरकारी कम्पनी का प्रत्येक कर्मचारी लोक सेवक है जो अधिनियम 1881 की धारा 138 के अपराध से संबंधित शिकायत के संबंध में द.प्र.सं. की धारा 200 के खंड (ए) के परंतुक के अंतर्गत छूट का हकदार है। (अर्जुन देव नागपाल वि. म. प्र. स्टेट इंडस्ट्रियल डव्हेलपमेन्ट कारपोरेशन लि.) **...*1**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – संज्ञान – लोक सेवक – सरकारी कंपनी का प्रत्येक कर्मचारी लोक सेवक है जो अधिनियम 1881 की धारा 138 के अंतर्गत अपराध की शिकायत के संबंध में द.प्र.सं. की धारा 200 के परंतुक के.खंड (ए) के अधीन छूट का हकदार है। (रमेश बाबूलाल बाहेती (डॉ.) वि. म.प्र. स्टेट इंडस्ट्रियल डव्हेलपमेन्ट कारपोरेशन लि.) **...249**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – विलम्ब के लिए माफी – क्या अभियुक्त विलम्ब के लिए माफ किये जाने से पूर्व सुनवाई के अवसर का हकदार है – अधिनियम जो कि एक विशेष कानून है के अंतर्गत शिकायत प्रस्तुत करने में विलम्ब के लिए माफी की जांच में भाग लेने के लिए अभियुक्त को समर्थ बनाने वाले किसी उपबंध की अनुपस्थिति में मामला अनन्य रुप से शिकायतकर्ता और न्यायालय के बीच का रहेगा – केवल आदेशिका जारी करने के पश्चात ही, अभियुक्त विलम्ब के लिए माफी के आदेश की वैधता या अन्यथा का प्रश्न उठा सकता है, इस आधार पर कि कोई पर्याप्त कारण नहीं दर्शाया गया। (सी.के. चावला वि. शिशिर जैन) **...243**

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State Industrial Development Corporation Ltd.] ...*1

Negotiable Instruments Act (26 of 1881), Section 138 - Winding up of Company - A company cannot escape from penal liability on the premise that a petition for winding up of the Company was presented prior to the company being called upon by a notice to pay the amount. [Arjun Dev Nagpal Vs. M.P. State Industrial Development Corporation Ltd.] ...*1

Negotiable Instruments Act (26 of 1881), Sections 138 & 141 - Offence by Company - Arraigning of the Company as an accused is a condition precedent - Section 141 makes the Directors of the Company liable for the offence in a case where cheque in question is issued for and on its behalf - Complainant is under obligation to comply with the statutory requirement by impleading Company as an accused - Complaint dismissed. [Ramesh Babulal Baheti (Dr.) Vs. M.P. State Industrial Development Corporation Ltd.] ...249

Negotiable Instruments Act (26 of 1881), Section 141 - Vicarious Liability - It is not necessary to reproduce the language of Section 141 verbatim in complaint - If the substance of the allegations made in the complaint fulfills the requirements of Section 141, the complaint has to proceed and is required to be tried with - Hypertechnical approach should not be adopted so as to quash the same. [Arjun Dev Nagpal Vs. M.P. State Industrial Development Corporation Ltd.] ...*1

Negotiable Instruments Act (26 of 1881), Section 141 - Vicarious Liability - It is not necessary to reproduce the language of Section 141 verbatim in complaint - If the substance of the allegations made in the complaint fulfills the requirements of Section 141, the complaint has to proceed and is required to be tried with - Hypertechnical approach should not be adopted so as to quash the same. [Ramesh Babulal Baheti (Dr.) Vs. M.P. State Industrial Development Corporation Ltd.] ...249

Negotiable Instruments Act (26 of 1881), Section 141 - Vicarious Liability - Resignation - Merely because the resignation of the Director has been accepted would not assume importance as the complainant may still prove that change in the management of the Company was effected only to avoid constructive liability. [Arjun Dev Nagpal Vs. M.P. State Industrial Development Corporation Ltd.] ...*1

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लि.) ...*1

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – कम्पनी का परिसमापन – कोई कम्पनी इस आधार पर दाण्डिक दायित्व से बच नहीं सकती कि कम्पनी को, रकम अदा करने के नोटिस द्वारा निदेशित किये जाने से पूर्व कम्पनी के परिसमापन हेतु याचिका प्रस्तुत की गई थी। (अर्जुन देव नागपाल वि. म.प्र. स्टेट इंडस्ट्रियल डव्हेलपमेन्ट कारपोरेशन लि.) ...*1

परक्राम्य लिखत अधिनियम (1881 का 26), धाराएं 138 व 141 – कंपनी द्वारा अपराध – कंपनी को अभियुक्त के रूप में अभियोजित करना पूरोभावी शर्त है – धारा 141 कंपनी के निदेशकों को ऐसे प्रकरण में अपराध के लिए उत्तरदायी ठहराता है जिसमें प्रश्नगत चेक उनके लिए और उनकी ओर से जारी किया गया है – कंपनी को अभियुक्त के रूप में पक्षंकार बनाकर कानूनी अपेक्षा का अनुपालन करने के लिए शिकायतकर्ता बाध्यताधीन है – शिकायत खारिज। (रमेश बाबूलाल बाहेती (डॉ.) वि. म.प्र. स्टेट इंडस्ट्रियल डव्हेलपमेन्ट कारपोरेशन लि.) ...249

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 141 – प्रतिनिधिक दायित्व – शिकायत में धारा 141 की भाषा को शब्दशः उद्धृत किया जाना आवश्यक नहीं – यदि शिकायत में किये गये अभिकथनों का सार, धारा 141 की अपेक्षाओं की पूर्ति करता है तब शिकायत पर कार्यवाही होगी और उसका विचारण किया जाना अपेक्षित है – उसे अभिखंडित करने के उद्देश्य से अति तकनीकी दृष्टिकोण नहीं अपनाना चाहिए। (अर्जुन देव नागपाल वि. म.प्र. स्टेट इंडस्ट्रियल डव्हेलपमेन्ट कारपोरेशन लि) ...*1

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 141 – प्रतिनिधिक दायित्व – शिकायत में धारा 141 की भाषा को शब्दशः उद्धृत करने की आवश्यकता नही – यदि शिकायत में किये गये अभिकथनों का सार, धारा 141 की अपेक्षाओं को पूरा करता है, तब शिकायत पर कार्यवाही होगी और उसका विचारण किया जाना अपेक्षित है – उक्त को अभिखण्डित करने के लिए अति तकनीकी दृष्टिकोण नहीं अपनाना चाहिए। (रमेश बाबूलाल बाहेती (डॉ.) वि. म.प्र. स्टेट इंडस्ट्रियल डव्हेलपमेन्ट कारपोरेशन लि.) ...249

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Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 39(1)(a) - Suspension of Office Bearer - Appellant was suspended on account of framing of charge against him u/s 376 (2)(g) of IPC - On acquittal of the charge, his application for revocation of suspension was dismissed on the ground that the petitioner was acquitted on giving benefit of doubt and against the judgment of such acquittal appeal has been filed by State and Leave to appeal has been granted u/s 378(3), Cr.P.C. - Held - The rigour of Section 39(1)(a) of the Adhiniyam, 1993 will not come in petitioner's way merely because the appeal against acquittal has been admitted by the Court - Petition allowed. [Ramesh Vs. State of M.P.] (DB)...74

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85 - Appeal - Resolution - No appeal lies against the resolution appointing the petitioner as Panchayat Secretary - Appeal lies against the order of appointment - Prescribed authority may suspend the resolution which is required to be affirmed by next higher authority - The S.D.O. was not required to look into the claims made in the appeal - Order setting aside the Resolution is bad. [Raj Kumar Kushwaha Vs. State of M.P.] ... 53

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 3 - Eye witness - Delayed Statement - Dead body of the deceased was found on 12.03.2011 whereas the statement of solitary eye witness was recorded on 13.03.2011 - During this period he did not disclose the incident to the brother and family members of the deceased or to anybody else for a long period - Further more, it was just by chance that he went to the place of occurrence - It is quite unnatural that he kept on watching the incident for about 25-30 minutes and kept mum - It is also unnatural that the appellant No.1 did not react even after seeing him - Allegation of rape by eye witness is belied by medical evidence as the Doctor did not find any injury over vulva, vagina, inner thighs, perineum and pubic region of deceased - Recent signs of rape were also not present - In DNA report of vaginal smears of deceased, no male DNA profile was detected - Solitary eye witness in such circumstances cannot be held to be trustworthy witness - No reliance can be placed on the evidence of such witness - Reference dismissed - Appeal filed by accused persons allowed and they are acquitted. [In Reference Vs. Dilip @ Dipu] (DB)...*4

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पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 39 (1)(ए) – पदाधिकारी का निलंबन – अपीलार्थी को उसके विरुद्ध भा.द.सं. की धारा 376(2)(जी) के अंतर्गत आरोप विरचित किये जाने के कारण निलंबित किया गया – आरोप से दोषमुक्त किये जाने पर, निलंबन वापसी हेतु उसके आवेदन को इस आधार पर निरस्त किया गया कि याची को संदेह का लाभ देकर दोषमुक्त किया गया था और उक्त दोषमुक्ति के विरुद्ध राज्य द्वारा अपील प्रस्तुत की गई है और द.प्र.सं. की धारा 378(3) के अंतर्गत अपील की अनुमति प्रदान की गई है – अभिनिर्धारित – अधिनियम 1993 की धारा 39(1)(ए) की कठोरता, याची के रास्ते में मात्र इसलिए नहीं आयेगी कि न्यायालय द्वारा दोषमुक्ति के विरुद्ध अपील ग्रहण कर ली गई है – याचिका मंजूर। (रमेश वि. म.प्र. राज्य) **(DB)...74**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85 – अपील – संकल्प – याची को पंचायत सचिव के रुप में नियुक्त करने के संकल्प के विरुद्ध अपील नहीं हो सकती – नियुक्ति आदेश के विरुद्ध अपील पोषणीय है – विहित प्राधिकारी संकल्प को स्थगित कर सकता है जिसे आसन्न उच्चतर प्राधिकारी द्वारा अभिपुष्ट किया जाना आवश्यक है – एस.डी.ओ. को अपील के दावों का परीक्षण करना अपेक्षित नहीं था – संकल्प को अपास्त करने का आदेश अनुचित। (राजकुमार कुशवाहा वि. म.प्र. राज्य) **...53**

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 3 – प्रत्यक्षदर्शी साक्षी – विलंबित कथन – मृतिका का शव 12.03.2011 को मिला था जबकि एकमात्र प्रत्यक्षदर्शी साक्षी का कथन 13.03.2011 को दर्ज किया गया – इस अवधि के दौरान उसने मृतिका के भाई तथा परिवार वालों को या किसी अन्य व्यक्ति को लंबे समय तक घटना के बारे में प्रकट नहीं किया – इसके अतिरिक्त यह केवल संयोगवश था कि वह घटना स्थल पर गया था – यह पूर्णतया अस्वाभाविक है कि वह करीब 25–30 मिनट तक घटना देखता रहा और चुप रहा – यह भी अस्वाभाविक है कि अपीलार्थी क्रं. 1 ने उसे देखने के बाद भी कोई प्रतिक्रिया नहीं की – प्रत्यक्षदर्शी साक्षी द्वारा बलात्कार के आरोप को चिकित्सीय साक्ष्य झुठलाती है क्योंकि चिकित्सक ने मृतिका के भग, योनि, भीतरी जंघाओं पर, पेरिनियम एवं जननांग के आस–पास के भाग पर कोई चोट नहीं पाई – हाल के बलात्कार के चिन्ह भी उपस्थित नहीं थे – मृतिका के योनि स्त्राव की डी.एन.ए. रिपोर्ट में भी कोई पुरुष डी.एन.ए. रुपरेखा नहीं पाई गई – एक मात्र प्रत्यक्षदर्शी साक्षी को ऐसी परिस्थितियों में विश्वसनीय साक्षी नहीं ठहराया जा सकता – उक्त साक्षी के साक्ष्य पर कोई विश्वास नहीं किया जा सकता – निर्देश खारिज – अभियुक्तगण द्वारा प्रस्तुत अपील मंजूर की गई और उन्हें दोषमुक्त किया गया। (इन रेफ्रेन्स वि. दिलीप उर्फ दीपू) **(DB)...*4**

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा

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Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Dying Declaration - Deceased was brought to the hospital by appellant No.1 in burnt condition - The dying declarations were recorded by the Executive Magistrate and Police Constable after the arrival of the cousin and mother of the deceased - Statements of cousin and mother not recorded by police - Father of the deceased did not support prosecution case - False version was given by deceased that her husband ran away from the house after committing the offence - Whatever has been stated by deceased appears to be the result of tutoring, frustration and her helplessness - Such dying declarations can not be relied upon - Appellants acquitted. [Moved by Sessions Judge, Burhanpur Vs. Jitendra] (DB)...223

Penal Code (45 of 1860), Section 302 - See - Evidence Act, 1872, Section 32 [Ram Kripal Kahar Vs. State of M.P.] (DB)...205

Penal Code (45 of 1860) Section 302 or 304 Part I - Culpable Homicide not amounting to murder - Quarrel took place between two persons - When the deceased tried to intervene, then the appellant assaulted him - Appellant was not present at the scene of occurrence from the beginning - He had come at the place of occurrence only after hearing the call raised by co-accused - Act of the appellant comes within the purview of Section 304 Part I - Appeal partly allowed - Appellant convicted under Section 304 Part I and is sentenced to undergo R.I. for ten years. [Mangna @ Mahendra Vs. State of M.P.] (DB)...216

Penal Code (45 of 1860), Sections 302, 304 Part I - Murder or Culpable Homicide not amounting to murder - Deceased and injured witnesses were trying to take their bullock cart from the fields of appellants where gram crops were sown - How an occupant of field can keep mum- Act of deceased persons of taking bullock carts through the field was nothing but an invitation for quarrel on their part - Appellants assaulted without premeditation in a sudden fight and quarrel occurred on the spot between the members of two families - Appellants liable to be convicted under Section 304 part I - Appellants sentenced to undergo imprisonment of 10 years - Appeal partly allowed. [Pohap Singh Vs. State of M.P.] (DB)...194

Penal Code (45 of 1860), Sections 302, 304 Part-II - Murder or Culpable Homicide - Accused was not happy with his married life with

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32 – मृत्युकालिक कथन – मृतिका को अपीलार्थी क्रं. 1 द्वारा जली हुई स्थिति में चिकित्सालय लाया गया – मृतिका के कजिन व माताजी के पहुंचने के उपरांत, कार्यपालिक मजिस्ट्रेट व पुलिस आरक्षक द्वारा मृत्युकालिक कथन अभिलिखित किये गये थे – कजिन व माताजी के कथन पुलिस द्वारा अभिलिखित नहीं – मृतिका के पिता ने अभियोजन के मामले का समर्थन नहीं किया – मृतिका द्वारा मिथ्या कहानी बताई गई कि उसका पति अपराध कारित करने के पश्चात घर से भाग गया – मृतिका ने जो कुछ भी कहा, वह सिखाये जाने, हतोत्साहित होने एवं उसकी विवशता के परिणामस्वरुप होना प्रतीत होता है – उक्त मृत्युकालिक कथनों पर विश्वास नहीं किया जा सकता – अपीलार्थीगण को दोषमुक्त किया गया। (मूव्हड बाय सेशन्स जज, बुरहानपुर वि. जितेन्द्र) **(DB)...223**

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दण्ड संहिता (1860 का 45), धारा 302 या 304 भाग I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – दो व्यक्तियों के बीच झगड़ा हुआ – जब मृतक ने बीच–बचाव का प्रयत्न किया, तब अपीलार्थी ने उस पर हमला किया – अपीलार्थी शुरु से ही घटना स्थल पर उपस्थित नहीं था – वह घटना स्थल पर केवल सह अभियुक्त की पुकार सुनने के पश्चात आया था – अपीलार्थी का कृत्य धारा 304 भाग–I की परिधि में आता है – अपील अंशतः मंजूर – अपीलार्थी को धारा 304 भाग–I के अंतर्गत दोषसिद्ध किया गया और दस वर्ष के सश्रम कारावास से दण्डादिष्ट किया गया। (मंगना उर्फ महेन्द्र वि. म.प्र. राज्य) **(DB)...216**

दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग– I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक व आहत साक्षीगण अपनी बैलगाड़ी को अपीलार्थीगण के खेतों से ले जाने का प्रयास कर रहे थे जहां चने के पौधे बोए गये थे – खेत का अधिभोगी कैसे शांत रह सकता है – मृतकों का खेत से बैलगाड़ी ले जाने का कृत्य और कुछ नहीं बल्कि उनकी ओर से विवाद के लिये आमंत्रण था – अपीलार्थीगण ने अचानक हुए झगड़े में बिना पूर्व चिंतन के हमला किया और घटनास्थल पर दो परिवारों के सदस्यों के बीच झगड़ा हुआ – अपीलार्थीगण धारा 304 भाग–I के अंतर्गत दोषसिद्ध किये जाने योग्य – अपीलार्थीगण को 10 वर्ष के कारावास से दण्डादिष्ट किया गया – अपील अंशतः मंजूर। (पोहप सिंह वि. म.प्र. राज्य) **(DB)...194**

दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग II – हत्या या सदोष मानव वध – अभियुक्त, मृतिका के साथ अपने वैवाहिक जीवन से खुश नहीं था और

deceased and they had frequent quarrels - In dying declaration, the deceased stated that her husband abused her and compelled her to go away and when they were sleeping together, he poured kerosene oil on her and set fire - Accused was the only person inside the room at the time of the incident alongwith his wife - Merely because there was no sign of smell of kerosene oil from the bed sheet, quilt and pillow, the case of the prosecution can not be thrown out - Appellant can not be convicted only u/s 304 Part-II IPC - Even if it is accepted that in the course of said incident he sustained some burn injuries, it is not a ground for exonerating his guilt - Appeal dismissed. [Ram Viswas Vs. State of M.P.] (SC)...1

Penal Code (45 of 1860), Sections 302, 304 Part II - Murder or Culpable Homicide not amounting to murder - Disputed field where the incident took place fell in the share of the accused party and the complainant party was trying to use that field as way - Prosecution has suppressed the genesis of occurrence and it appears that the appellant had caused injury to the deceased in order to save the lives of others - However, he exceeded his right of private defence and therefore, is guilty under Section 304 Part II. [Shiv Pratap Singh Vs. State of M.P.] (DB)...188

Penal Code (45 of 1860) Section 376 - Proof of Rape - Prosecutrix giving a complete go-bye to the version, in material particulars, as recorded in the FIR in her evidence recorded in Court - Medical evidence of Doctor not at all supporting the allegations of prosecutrix - Version that the appellant gagged her mouth and forcibly committed rape on her is hardly convincing - Conviction for the offences cannot be sustained. [Ajju @ Afzal Vs. State of M.P.] ...212

Penal Code (45 of 1860), Section 376 - Rape - Age of Prosecutrix - As per the Radiologist report, the age of prosecutrix was above 16 but below 18 years - The report of Radiologist which remain unproved, though cannot be utilized by the prosecution to prove its story, but the defence can certainly use it to support its case - Held - Age of the prosecutrix in the absence of any other reliable evidence being tendered by the prosecution can be safely held to be above 16 years - Trial Court has committed error in holding that the prosecutrix is less than 16 years of age. [Ajju @ Afzal Vs. State of M.P.] ...212

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उनकी अक्सर लड़ाईयां होती थीं – मृत्युकालिक कथन में मृतिका ने कहा कि उसका पति उसे प्रताड़ित करता था और चले जाने के लिए विवश करता था और जब वे एक साथ सो रहे थे, तब उसने मिट्टी का तेल उस पर उड़ेलकर आग लगा दी – घटना के समय कमरे के भीतर अपनी पत्नी के साथ अभियुक्त के अलावा कोई नहीं था – मात्र इसलिए कि बेडशीट, गद्दा और तकिए से मिट्टी के तेल की गंध का कोई संकेत नहीं था, अभियोजन के प्रकरण को अस्वीकार नहीं किया जा सकता – अपीलार्थी को केवल भा.द.सं. की धारा 304 भाग–II के अंतर्गत दोषसिद्ध नहीं किया जा सकता – यदि यह स्वीकार भी किया जाए कि उक्त घटना के दौरान उसने कुछ जलने की क्षतियां सहन की, यह उसकी दोषिता से मुक्त किये जाने का आधार नहीं है – अपील खारिज। (राम विसवास वि. म.प्र. राज्य) (SC)...1

दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – विवादित खेत जहां घटना घटित हुई, अभियुक्त पक्षकार के हिस्से में आता है और शिकायतकर्ता पक्षकार उक्त खेत को रास्ते के रुप में उपयोग करने का प्रयास कर रहा था – अभियोजन ने घटना के प्रारंभ को छिपाया है और यह प्रतीत होता है कि अपीलार्थी ने मृतक को दूसरों की जान बचाने के उद्देश्य से चोट कारित की – अपितु, उसने अपने प्राईवेट प्रतिरक्षा के अधिकार की सीमा का अतिलंघन किया और इसलिए धारा 304 भाग–II के अंतर्गत दोषी है। (शिव प्रताप सिंह वि. म.प्र. राज्य) (DB)...188

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार का सबूत – अभियोक्त्री ने न्यायालय के समक्ष अभिलिखित की गई उसकी साक्ष्य में, प्रथम सूचना रिपोर्ट में अभिलिखित वर्णन से तात्विक विशिष्टियों में पूर्णतः अलग वर्णन दिया है – चिकित्सक का चिकित्सीय साक्ष्य, अभियोक्त्री के अभिकथनों का बिल्कुल समर्थन नहीं करता – यह वर्णन कि अपीलार्थी ने उसका मुंह जबर्दस्ती बंद किया और बलपूर्वक उसका बलात्कार किया, विश्वास उत्पन्न नहीं करता – अपराध के लिए दोषसिद्धि को कायम नहीं रखा जा सकता। (अज्जू उर्फ अफजल वि. म.प्र. राज्य) ...212

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री की आयु – विकिरण विज्ञानी की रिपोर्ट के अनुसार, अभियोक्त्री की आयु 16 वर्ष से अधिक थी परंतु 18 वर्ष से कम थी–विकिरण विज्ञानी की रिपोर्ट जो नासाबित रही है, उसे यद्यपि अभियोजन द्वारा अपनी कहानी साबित करने के लिए उपयोग में नहीं लाया जा सकता, परंतु बचाव निश्चित रुप से उसका उपयोग अपने मामले के समर्थन में कर सकता है – अभिनिर्धारित–अभियोजन द्वारा किसी अन्य विश्वसनीय साक्ष्य की अनुपस्थिति मे, अभियोक्त्री की आयु सुरक्षित रुप से 16 वर्ष से ऊपर होने की धारणा की जा सकती है–विचारण न्यायालय ने यह धारणा करने में त्रुटि की कि अभियोक्त्री 16 वर्ष से कम आयु की है। (अज्जू उर्फ अफजल वि. म.प्र. राज्य) ...212

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Penal Code (45 of 1860), Section 376 - Rape - Prosecutrix was preparing meal when she was uplifted from her house by appellants who were armed with weapons - She was kept in a house which was guarded by appellants and they were sleeping outside the house - Appellant No.1 committed sexual intercourse with her without her consent and wishes - After 20 days she could manage to flew away on the pretext to evacuate - Defence that as per custom prevailing in Bhil community, prosecutrix was purchased from her father but even then he was not permitting to go and live with first appellant cannot be accepted as the said custom cannot over ride the statute unless and until it is saved in the Statute - If a major girl is sexually intercoursed without her consent and willingness, offence under Section 376 of I.P.C. is made out - Appellants were rightly convicted - Appeal dismissed. [Kunwar Singh Vs. State of M.P.] ...*5

Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Disproportionate Assets - Income Tax Returns - Income Tax Returns being the public document do not require formal proof - Income Tax Returns filed prior to the date of raid without any anticipation that the appellant would be charged for the offences punishable under Section 13(1)(e) - Disclosure of income in income tax return is required to be accepted - Income Tax Return can be looked into even at the stage of appeal. [Mohan Lal Arya Vs. State of M.P.] (DB)...*6

Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Disproportionate Assets - Income Tax Returns - Known Sources of Income - Household expenses - 60% or 40% - Prosecution has failed to show any Rule which may decide as to what percentage towards the deduction of household expenses out of the salary/income of the appellant - Evidence on record show that the appellant belongs to agricultural family - Contribution of family members towards household expenses cannot be disputed - Household expenses taken to the tune of 40%. [Mohan Lal Arya Vs. State of M.P.] (DB)...*6

Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Disproportionate Assets - Income Tax Returns - Wife of the appellant had received a gift from her father to the tune of Rs. 3,80,000/- by demand draft much prior to check period - Such receipt was disclosed in the Income Tax Return - Relevant documents were supplied to the I.O. during the course of preliminary enquiry but were not annexed with charge sheet - Such amount liable to be included in the income of the appellant. [Mohan Lal Arya Vs. State of M.P.] (DB)...*6

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दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री खाना बना रही थी, जब उसे उसके घर से अपीलार्थीगण द्वारा उठा लिया गया, जो शस्त्रों से सुसज्जित थे – उसे एक मकान में रखा गया जिसकी अपीलार्थीगण द्वारा पहरेदारी की जा रही थी और वे मकान के बाहर सो रहे थे – अपीलार्थी क्रं. 1 ने उसके साथ उसकी सहमति और मर्जी के बिना मैथुन कारित किया – 20 दिन पश्चात वह शौच के बहाने भागने में सफल हो सकी – यह बचाव कि भील समुदाय में विद्यमान रुढ़ि के अनुसार अभियोक्त्री को उसके पिता से खरीदा गया किन्तु तब भी वह उसे ले जाने की और प्रथम अपीलार्थी के साथ रहने की अनुमति नहीं दे रहा था, स्वीकार नहीं किया जा सकता क्योंकि उक्त रुढ़ि कानून पर अध्यारोही नहीं हो सकती जब तक कि ऐसा कानून में उपबंधित नहीं किया गया हो – यदि वयस्क बालिका के साथ उसकी सहमति और रजामंदी के बिना मैथुन किया गया है, तब भा. द.सं. की धारा 376 के अंतर्गत अपराध गठित होता है – अपीलार्थीगण को उचित रुप से दोषसिद्ध किया गया – अपील खारिज। (कुवंर सिंह वि. म.प्र. राज्य)...*5

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(ई) – अननुपातित परिसंपत्तियां – आय कर विवरिणयां – आय कर विवरणियां, सार्वजनिक दस्तावेज होने के नाते औपचारिक सबूत की उसे आवश्यकता नही – आय कर विवरणियां छापे की तिथि से पूर्व प्रस्तुत की गई बिना किसी पूर्वानुमान के, कि अपीलार्थी को धारा 13(1)(ई) के अंतर्गत दण्डनीय अपराधों के लिये आरोपित किया जायेगा – आय कर विवरणी में प्रकट की गई आय को स्वीकार करना अपेक्षित है – आय कर विवरणी को अपील के प्रक्रम पर भी देखा जा सकता है। (मोहन लाल आर्य वि. म.प्र. राज्य) **(DB)...*6**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) – अननुपातित परिसंपत्तियां–आय कर विवरिणयां–आय का ज्ञात स्त्रोत–घरेलू खर्चे–60 प्रतिशत या 40 प्रतिशत – अभियोजन किसी नियम को दर्शाने में विफल रहा जिससे अपीलार्थी के वेतन/आय से घरेलू खर्चे की कटौती का प्रतिशत सुनिश्चित किया जा सके – अभिलेख पर उपलब्ध साक्ष्य दर्शाता है कि अपीलार्थी कृषक परिवार का है – घरेलू खर्चों में परिवार के सदस्यों का योगदान विवादित नहीं किया जा सकता – घरेलू खर्चे 40 प्रतिशत माना गया। (मोहन लाल आर्य वि. म.प्र. राज्य) **(DB)...*6**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(ई) – अननुपातित परिसंपत्तियां – आय कर विवरणियां – अपीलार्थी की पत्नी ने उसके पिता से चेक अवधि से काफी पहले डिमांड ड्राफ्ट के जरिए दान के रुप में रु. 3,80,000/– प्राप्त किये – उक्त स्वीकृति को आय कर विवरणी में प्रकट किया गया – प्रारंभिक जांच के दौरान आई.ओ. को सुसंगत दस्तावेज उपलब्ध कराये गये थे, परंतु उन्हें आरोप पत्र के साथ संलग्न नहीं किया गया था – उक्त रकम अपीलार्थी की आय में समाविष्ट किये जाने योग्य। (मोहन लाल आर्य वि. म.प्र. राज्य) **(DB)...*6**

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State Bank of India Employee's Pension Funds Rules - Rule 15 & 22 - Voluntary Retirement - Unless sanction is granted, an employee cannot claim to retire voluntarily even after completion of 20 years of service - There is no bar prescribed under Rule 22 that

के होंगे और न कि नियमित सेवा के 12 वर्ष पूर्ण करने से पूर्व के। (कमलापति द्विवेदी वि. यूनियन ऑफ इंडिया) **(DB)...62**

सेवा विधि – ज्येष्ठता – प्रभावित कर्मचारियों का असंयोजन – प्रभावित व्यक्तियों के असंयोजन से कोई परिणाम नहीं होगा क्योंकि गलती स्वयं प्रत्यर्थीगण द्वारा कारित की गई है क्योंकि उन्होंने नियमों के उपबंधोंनुसार ज्येष्ठता का निर्धारण नहीं किया। (सुषमा पाण्डे (श्रीमति) वि. म.प्र. राज्य) **...58**

सेवा विधि – ज्येष्ठता – एक जनपद पंचायत से दूसरे में स्थानांतरण – याची को एक जनपद पंचायत में शिक्षा कर्मी के रुप में नियुक्त किया गया था – उसे अन्य जनपद पंचायत में स्थानांतरित किया गया, क्योंकि उसका पति वहां कार्यरत था – स्थानांतरण उस नीति के अंतर्गत किया गया जिसमें यह उपबंध नहीं है कि कर्मचारी अपनी पूर्ववर्ती सेवा की ज्येष्ठता को खो देगा – पश्चातवर्ती नीति, सन् 2009 में जारी की गई, जो ऐसे स्थानांतरण की दशा में ज्येष्ठता की हानि के लिए उपबंध करती है, वह भी नियमों के विरुद्ध है – याची की ज्येष्ठता की संगणना उसकी प्रारंभिक नियुक्ति की तिथि से की जानी चाहिए और न कि स्थानांतरण की तिथि से। (सुषमा पाण्डे (श्रीमति) वि. म.प्र. राज्य) **...58**

सेवा विधि – सेवा समाप्ति – जाति प्रमाण पत्र का निरस्तीकरण – याची ने उस जाति प्रमाण पत्र के आधार पर सेवा अभिप्राप्त की जिसे उच्चाधिकार जाति छंटनी समिति द्वारा निरस्त किया गया था – याची की सेवा समाप्त की गई – जहां व्यक्ति मिथ्या जाति प्रमाण पत्र प्रस्तुत करके नियुक्ति प्राप्त करता है, उसकी सेवा का संरक्षण नहीं किया जा सकता और बहाली का आदेश पारित नहीं किया जा सकता – जहां व्यक्ति मिथ्या जाति प्रमाण पत्र के आधार पर नियुक्ति प्राप्त करता है, उसे उसके द्वारा कारित अनुचितता का लाभ रखे रहने की मंजूरी नहीं दी जा सकती और उसकी सेवा समाप्त किये जाने योग्य है – याचिका खारिज। (विलास कुमार भूगांवकर वि. म.प्र. राज्य) **...133**

भारतीय स्टेट बैंक कर्मचारी पेंशन निधि नियम – नियम 5 – स्वैच्छिक सेवानिवृत्ति – अस्वीकृति – विभागीय प्राधिकारी, याची के विरूद्ध अनुशासनिक कार्यवाही आरंभ करने वाले थे – स्वैच्छिक सेवानिवृत्ति हेतु मंजूरी प्रदान करने से इंकार करना, विधि अंतर्गत अनुचित नहीं कहा जा सकता। (बालकराम सिंह वि. स्टेट बैंक ऑफ इंडिया) **...*2**

भारतीय स्टेट बैंक कर्मचारी पेंशन निधि नियम – नियम 15 व 22 – स्वैच्छिक सेवानिवृत्ति – जब तक मंजूरी प्रदान नहीं की जाती, कर्मचारी सेवा के 20 वर्ष पूर्ण करने पर भी स्वैच्छिक सेवानिवृत्ति का दावा नहीं कर सकता – नियम 22 के अंतर्गत कोई वर्जन विहित नहीं कि नियम 15 के अंतर्गत विहित मंजूरी आवश्यक

sanction would not be necessary as is prescribed under Rule 15 - Both the rules are to be read harmoniously. [Balak Ram Singh Vs. State Bank of India] ...*2

Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, (M.P.) 1976, Schedule II, Entry 42 & 49 - Entry Tax on Glass Shell, Glass Panel, Glass Funnel & Neck Tube - Items in question are neither parts nor accessories of television but they are raw material for manufacturing parts of television - A raw material used for manufacturing a part or accessory can not itself held to be a part or accessory of the main item - Items in question are covered by Entry 42 of Schedule II of the Entry Tax. [Prakash Industries Ltd. Vs. Assistant Commissioner of Commercial Tax] (DB)...126

Tender - Conditions - One of the condition was to sign the RFP document on each page - Petitioner having accepted the conditions of tender and having submitted the tender document cannot subsequently come forward to say that signing of each page of RFP document was not an essential condition - RFP document was a document by which the bidder was supposed to provide all the information sought from him and if for such an important document, the respondents have put a condition that it is to be self attested on each page, the non-compliance of the same will certainly entail the rejection of the tender. [Kala Bai Jaiswal (Smt.) Vs. District Collector, Jhabua] (DB)...50

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नहीं होगी – दोनों नियमों को समन्वयपूर्ण अर्थान्वयन के साथ पढ़ा जाना चाहिए। (बालकराम सिंह वि. स्टेट बैंक ऑफ इंडिया) ...*2

स्थानीय क्षेत्र में माल के प्रवेश पर कर अधिनियम, (म.प्र.) 1976, अनुसूची II, प्रविष्टि 42 व 49 – ग्लास शेल, ग्लास पेनल, ग्लास फनल व नेक टयूब पर प्रवेश कर – प्रश्नगत वस्तुऐं न तो टेलीविजन के हिस्से हैं और न ही उपसाधन हैं परंतु वह टेलीविजन के पुर्जों का विनिर्माण करने हेतु कच्चा माल है – किसी पुर्जे का या उपसाधन का विनिर्माण करने के लिए उपयोग किये जाने वाले कच्चे माल को अपने आप में मुख्य वस्तु का हिस्सा या उपसाधन होने की धारणा नहीं की जा सकती – प्रश्नगत वस्तुऐं प्रवेश कर की अनुसची II की प्रविष्टि 42 के अंतर्गत आती है। (प्रकाश इंडस्ट्रीज लि. वि. असिस्टेंट कमिश्नर ऑफ कमर्शियल टैक्स) **(DB)...126**

निविदा – शर्तें – एक शर्त, आर.एफ.पी. दस्तावेज के प्रत्येक पृष्ठ पर हस्ताक्षर करने की थी – याची, निविदा की शर्तों को स्वीकार करके और निविदा दस्तावेज प्रस्तुत करके, बाद में, यह कहते हुए आगे नहीं आ सकता कि आर.एफ. पी दस्तावेज के प्रत्येक पृष्ठ पर हस्ताक्षर करना, आवश्यक शर्त नहीं थी – आर.एफ. पी. दस्तावेज, ऐसा दस्तावेज था जिसके द्वारा बोली लगाने वाले को उससे चाही गयी सभी जानकारी पेश करना अपेक्षित है, और यदि ऐसे महत्वपूर्ण दस्तावेज हेतु, प्रत्यर्थीगण ने शर्त रखी है कि उसे प्रत्येक पृष्ठ पर स्वप्रमाणित करना है, इसका अननुपालन, निश्चित रुप से निविदा नामंजूर करने को आवश्यक बना देगा। (कलाबाई जायसवाल (श्रीमति) वि. डिस्ट्रिक्ट कलेक्टर, झाबुआ) **(DB)...50**

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Short Note

****(1)***

Before Mr. Justice R.C. Mishra

M.Cr.C.No. 12847/2011 (Jabalpur) decided on 31 October, 2012

ARJUN DEV NAGPAL — Applicant

Vs.

MADHYA PRADESH STATE INDUSTRIAL DEVELOPMENT CORPORATION LIMITED — ...Non-applicant

A. ***Negotiable Instruments Act (26 of 1881), Section 138 - Cognizance - Public Servant*** **- Every employee of Govt. Company is Public Servant entitled to exemption under Clause (a) of proviso to Section 200 of Cr.P.C. with regard to complaint relating to offence under Section 138 of Act, 1881.**

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – संज्ञान – लोक सेवक – सरकारी कम्पनी का प्रत्येक कर्मचारी लोक सेवक है जो अधिनियम 1881 की धारा 138 के अपराध से संबंधित शिकायत के संबंध में द.प्र.सं. की धारा 200 के खंड (ए) के परंतुक के अंतर्गत छूट का हकदार है।

B. ***Negotiable Instruments Act (26 of 1881), Section 138 - Notice to Company*** **- Where demand notice under Section 138 is sent to the Director of the Company, who had signed the cheque on its behalf, amounts to notice to the Company itself.**

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – कम्पनी को नोटिस – जब धारा 138 के अंतर्गत, कम्पनी के निदेशक को मांग पत्र भेजा जाता है जिसने कम्पनी की ओर से चेक पर हस्ताक्षर किये हैं, कम्पनी को नोटिस होने की कोटि में आता है।

C. ***Negotiable Instruments Act (26 of 1881), Section 138 - Winding up of Company*** **- A company cannot escape from penal liability on the premise that a petition for winding up of the Company was presented prior to the company being called upon by a notice to pay the amount.**

ग. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – कम्पनी का परिसमापन – कोई कम्पनी इस आधार पर दाण्डिक दायित्व से बच नहीं सकती कि कम्पनी को, रकम अदा करने के नोटिस द्वारा निदेशित किये जाने से पूर्व कम्पनी

के परिसमापन हेतु याचिका प्रस्तुत की गई थी।

D. Negotiable Instruments Act (26 of 1881), Section 141 - Vicarious Liability - **It is not necessary to reproduce the language of Section 141 verbatim in complaint - If the substance of the allegations made in the complaint fulfills the requirements of Section 141, the complaint has to proceed and is required to be tried with - Hypertechnical approach should not be adopted so as to quash the same.**

घ. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 141 – प्रतिनिधिक दायित्व – शिकायत में धारा 141 की भाषा को शब्दशः उद्धृत किया जाना आवश्यक नहीं – यदि शिकायत में किये गये अभिकथनों का सार, धारा 141 की अपेक्षाओं की पूर्ति करता है तब शिकायत पर कार्यवाही होगी और उसका विचारण किया जाना अपेक्षित है – उसे अभिखंडित करने के उद्देश्य से अति तकनीकी दृष्टिकोण नहीं अपनाना चाहिए।

E. Negotiable Instruments Act (26 of 1881), Section 141 - Vicarious Liability - Resignation - **Merely because the resignation of the Director has been accepted would not assume importance as the complainant may still prove that change in the management of the Company was effected only to avoid constructive liability.**

ङ. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 141 – प्रतिनिधिक दायित्व – त्यागपत्र – मात्र इसलिए कि निदेशक के त्यागपत्र को स्वीकार किया गया है, कोई महत्व नहीं रखेगा क्योंकि शिकायतकर्ता तब भी साबित कर सकता है कि कम्पनी के निबंधन में बदलाव केवल आन्वयिक दायित्व के परिवर्जन हेतु लाया गया था।

Cases referred :

AIR 2009 SC 1284, AIR 1999 SC 2182, AIR 2001 SC 518, AIR 2001 SC 1315, AIR 2001 SC 1161, (2010) 11 SCC 441, AIR 2000 SC 145, AIR 2000 SC 1953, (2005) 8 SCC 89, (2006) 10 SCC 581, (2007) 3 SCC 693, (2007) 3 SCC (Cri) 203, (2009) 6 SCC 729, (2009) 10 SCC 48, (2010) 2 SCC (Cri) 1113, (2012) 1 SCC 520, (2004) 7 SCC 15, AIR 2007 SC 1682, (2007) 5 SCC 54, 1984 MPLJ 331, (2008) 8 SCC 1, (2011) 13 SCC 88, AIR 2008 SC 2357, (2004) 7 SCC 338, AIR 1999 SC 2245.

Ajay Mishra with *Mukesh Sahu,* for the applicant.

Sanjay K. Agrawal & Piyush Bhatnagar, for the non-applicant.

Short Note

****(2)***

Before Mr. Justice K.K.Trivedi

W.P.No. 1482/2011(S) (Jabalpur) decided on 13 July, 2012

BALAK RAM SINGH ...Petitioner

Vs.

STATE BANK OF INDIA & anr. ...Respondents

A. ***State Bank of India Employee's Pension Funds Rules - Rule 5 - Voluntary Retirement - Refusal -*** **Departmental Authorities were intending to initiate the process of disciplinary action against petitioner - Refusal to grant sanction for voluntary retirement cannot be said to be bad in law.**

क. *भारतीय स्टेट बैंक कर्मचारी पेंशन निधि नियम – नियम 5 – स्वैच्छिक सेवानिवृत्ति – अस्वीकृति* – विभागीय प्राधिकारी, याची के विरूद्ध अनुशासनिक कार्यवाही आरंभ करने वाले थे – स्वैच्छिक सेवानिवृत्ति हेतु मंजूरी प्रदान करने से इंकार करना, विधि अंतर्गत अनुचित नहीं कहा जा सकता।

B. ***State Bank of India Employee's Pension Funds Rules - Rule 15 & 22 - Voluntary Retirement -*** **Unless sanction is granted, an employee cannot claim to retire voluntarily even after completion of 20 years of service - There is no bar prescribed under Rule 22 that sanction would not be necessary as is prescribed under Rule 15 - Both the rules are to be read harmoniously.**

ख. *भारतीय स्टेट बैंक कर्मचारी पेंशन निधि नियम – नियम 15 व 22 – स्वैच्छिक सेवानिवृत्ति* – जब तक मंजूरी प्रदान नहीं की जाती, कर्मचारी सेवा के 20 वर्ष पूर्ण करने पर भी स्वैच्छिक सेवानिवृत्ति का दावा नहीं कर सकता – नियम 22 के अंतर्गत कोई वर्जन विहित नहीं कि नियम 15 के अंतर्गत विहित मंजूरी आवश्यक नहीं होगी – दोनों नियमों को समन्वयपूर्ण अर्थान्वयन के साथ पढ़ा जाना चाहिए।

Cases referred :

(1999) 4 SCC 293, (2001) 9 SCC 171, (2006) 3 SCC 708, AIR 1970 SC 214, (1996) 4 SCC 584, (1997) 1 SCC 754, (2001) 3 SCC 290, (2009) 10 SCC 514.

Akash Choudhary, for the petitioner.

Ashish Shroti, for the respondents.

NOTES OF CASES SECTION

Short Note

**(3)*

Before Mr. Justice U.C. Maheshwari

W.P.No. 2021/2008 (Jabalpur) decided on 6 November, 2012

DINESH KUMAR ...Petitioner

Vs.

SUNIL KUMAR ...Respondent

A. ***Civil Procedure Code (5 of 1908), Section 11 - Res Judicata*** **- 1st Claim Petition was dismissed as no evidence was led inspite of giving opportunities - Dismissal of claim petition does not operate as res judicata as the petition was neither substantially nor directly decided between the same parties and on same issues on merits.**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – प्रथम दावा याचिका खारिज की गई क्योंकि अवसर दिये जाने के बावजूद साक्ष्य पेश नहीं किया गया – दावे की खारिजी, पूर्व न्याय के रुप में प्रवर्तित नहीं होगी क्योंकि याचिका का गुणदोषों पर विनिश्चय न तो सारवान रुप से और न ही प्रत्यक्ष रुप से समान पक्षकारों के मध्य और समान विवाद्यकों पर किया गया था।

B. ***Motor Vehicles Act (59 of 1988), Section 166 - Subsequent Claim Petition - Maintainability*** **- No application for restoration of first claim petition was filed - No application for review of order was filed - No Regular appeal was filed - Second Claim Petition is maintainable subject to availability of period of limitation.**

ख. मोटर यान अधिनियम (1988 का 59), धारा 166 – पश्चातवर्ती दावा याचिका – पोषणीयता – प्रथम दावे के पुनःस्थापन हेतु कोई आवेदन प्रस्तुत नहीं किया गया – आदेश के पुनर्विलोकन हेतु कोई आवेदन प्रस्तुत नहीं किया गया – कोई नियमित अपील प्रस्तुत नहीं की गई – द्वितीय दावा याचिका परिसीमा की अवधि की उपलब्धता के अधीन पोषणीय है।

Case referred :

AIR 1996 SC 2155.

Sharad Gupta, for the petitioner.

None for the respondents No. 1 & 2.

Ajit Agarwal, for the respondent No.3.

NOTES OF CASES SECTION

Short Note (DB)

**(4)*

Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal

Cr. Ref. No. 1/2012 (Jabalpur) decided on 28 August, 2012

IN REFERENCE ...Applicant

Vs.

DILIP @ DIPU & ors. ...Non-applicants

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 3 - Eye witness - Delayed Statement - **Dead body of the deceased was found on 12.03.2011 whereas the statement of solitary eye witness was recorded on 13.03.2011 - During this period he did not disclose the incident to the brother and family members of the deceased or to anybody else for a long period - Further more, it was just by chance that he went to the place of occurrence - It is quite unnatural that he kept on watching the incident for about 25-30 minutes and kept mum - It is also unnatural that the appellant No.1 did not react even after seeing him - Allegation of rape by eye witness is belied by medical evidence as the Doctor did not find any injury over vulva, vagina, inner thighs, perineum and pubic region of deceased - Recent signs of rape were also not present - In DNA report of vaginal smears of deceased, no male DNA profile was detected - Solitary eye witness in such circumstances cannot be held to be trustworthy witness - No reliance can be placed on the evidence of such witness - Reference dismissed - Appeal filed by accused persons allowed and they are acquitted.**

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 3 – प्रत्यक्षदर्शी साक्षी – विलंबित कथन – मृतिका का शव 12.03.2011 को मिला था जबकि एकमात्र प्रत्यक्षदर्शी साक्षी का कथन 13.03.2011 को दर्ज किया गया – इस अवधि के दौरान उसने मृतिका के भाई तथा परिवार वालों को या किसी अन्य व्यक्ति को लंबे समय तक घटना के बारे में प्रकट नहीं किया – इसके अतिरिक्त यह केवल संयोगवश था कि वह घटना स्थल पर गया था – यह पूर्णतया अस्वाभाविक है कि वह करीब 25–30 मिनट तक घटना देखता रहा और चुप रहा – यह भी अस्वाभाविक है कि अपीलार्थी क्रं. 1 ने उसे देखने के बाद भी कोई प्रतिक्रिया नहीं की – प्रत्यक्षदर्शी साक्षी द्वारा बलात्कार के आरोप को चिकित्सीय साक्ष्य झुठलाती है क्योंकि चिकित्सक ने मृतिका के भग. योनि, भीतरी जंघाओं पर, पेरिनियम एवं जननांग के आस–पास के भाग पर कोई चोट नहीं पाई – हाल के बलात्कार के चिन्ह भी उपस्थित नहीं थे – मृतिका के योनि स्त्राव की डी.एन.ए. रिपोर्ट में भी कोई पुरुष डी.एन.ए. रुपरेखा नहीं पाई गई – एक मात्र प्रत्यक्षदर्शी साक्षी को ऐसी परिस्थितियों में विश्वसनीय साक्षी नहीं ठहराया जा सकता – उक्त साक्षी के साक्ष्य पर कोई विश्वास नहीं किया जा सकता – निर्देश खारिज –

अभियुक्तगण द्वारा प्रस्तुत अपील मंजूर की गई और उन्हें दोषमुक्त किया गया।

The judgment/order of the Court was delivered by : RAKESH SAKSENA, J.

Cases referred :

AIR 1976 SC 2488, AIR 1991 SC 1356, AIR 1957 SC 614, AIR 2004 SC 3559, AIR 1991 SC 1674.

Umesh Pandey, G.A. for the applicant.

Surendra Singh with *Mukesh Pandey & Jagat Sher Singh,* for the non-applicants.

Short Note

****(5)***

Before Mr. Justice A.K. Shrivastava

Cr. A. No. 217/1998 (Indore) decided on 31 August, 2012

KUNWAR SINGH & ors. ...Appellants

Vs.

STATE OF M.P. ...Respondent

A. ***Constitution - Article 21 & 23 - Right to Life*** **- Article 21 includes the right of women to live and to be treated with decency and proper dignity - Article 23 prohibits traffic in human beings and forced labour, selling and purchasing of woman is strictly prohibited.**

क. संविधान – अनुच्छेद 21 व 23 – जीवन का अधिकार – अनुच्छेद 21 में स्त्री को जीने का और उसके साथ शिष्टता एवं समुचित गरिमामय व्यवहार का अधिकार समाविष्ट है – अनुच्छेद 23 मानव का दुर्व्यापार और बलात्श्रम प्रतिषिद्ध करता है, स्त्री का क्रय विक्रय सर्वथा प्रतिषिद्ध किया गया है।

B. ***Penal Code (45 of 1860), Section 376 - Rape*** **- Prosecutrix was preparing meal when she was uplifted from her house by appellants who were armed with weapons - She was kept in a house which was guarded by appellants and they were sleeping outside the house - Appellant No.1 committed sexual intercourse with her without her consent and wishes - After 20 days she could manage to flew away on the pretext to evacuate - Defence that as per custom prevailing in Bhil community, prosecutrix was purchased from her father but even then he was not permitting to go and live with first appellant cannot be accepted as the said custom cannot over ride the statute unless and until it is saved in the Statute - If a major girl is sexually intercoursed**

without her consent and willingness, offence under Section 376 of I.P.C. is made out - Appellants were rightly convicted - Appeal dismissed.

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री खाना बना रही थी, जब उसे उसके घर से अपीलार्थीगण द्वारा उठा लिया गया, जो शस्त्रों से सुसज्जित थे – उसे एक मकान में रखा गया जिसकी अपीलार्थीगण द्वारा पहरेदारी की जा रही थी और वे मकान के बाहर सो रहे थे – अपीलार्थी क्रं. 1 ने उसके साथ उसकी सहमति और मर्जी के बिना मैथुन कारित किया – 20 दिन पश्चात वह शौच के बहाने भागने में सफल हो सकी – यह बचाव कि भील समुदाय में विद्यमान रुढ़ि के अनुसार अभियोक्त्री को उसके पिता से खरीदा गया किन्तु तब भी वह उसे ले जाने की और प्रथम अपीलार्थी के साथ रहने की अनुमति नहीं दे रहा था, स्वीकार नहीं किया जा सकता क्योंकि उक्त रुढ़ि कानून पर अध्यारोही नहीं हो सकती जब तक कि ऐसा कानून में उपबंधित नहीं किया गया हो – यदि वयस्क बालिका के साथ उसकी सहमति और रजामंदी के बिना मैथुन किया गया है, तब भा.द.सं. की धारा 376 के अंतर्गत अपराध गठित होता है – अपीलार्थीगण को उचित रुप से दोषसिद्ध किया गया – अपील खारिज।

S.S. Garg, for the appellants.
R.S. Parmar, P.P. for the respondent/State.

Short Note (DB)

****(6)***

Before Mr. Justice P.K. Jaiswal & Mr. Justice M.C. Garg

Cr. A. No. 890/2009 (Indore) decided on 29 November, 2012

MOHAN LAL ARYA ...Appellant

Vs.

STATE OF M.P. ...Respondent

A. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Disproportionate Assets - Income Tax Returns - **Wife of the appellant had received a gift from her father to the tune of Rs. 3,80,000/- by demand draft much prior to check period - Such receipt was disclosed in the Income Tax Return - Relevant documents were supplied to the I.O. during the course of preliminary enquiry but were not annexed with charge sheet - Such amount liable to be included in the income of the appellant.**

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(इ) – अननुपातित परिसंपत्तियां – आय कर विवरणियां – अपीलार्थी की पत्नी ने उसके पिता से चेक अवधि से काफी पहले डिमांड ड्राफ्ट के जरिए दान के रुप में रु. 3,80,000/– प्राप्त किये – उक्त स्वीकृति को आय कर विवरणी में प्रकट किया गया – प्रारंभिक जांच के दौरान आई.ओ. को सुसंगत दस्तावेज उपलब्ध कराये गये थे, परंतु उन्हें आरोप पत्र

के साथ संलग्न नहीं किया गया था – उक्त रकम अपीलार्थी की आय में समाविष्ट किये जाने योग्य।

***B. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Disproportionate Assets - Income Tax Returns* - Income Tax Returns being the public document do not require formal proof- Income Tax Returns filed prior to the date of raid without any anticipation that the appellant would be charged for the offences punishable under Section 13(1)(e) - Disclosure of income in income tax return is required to be accepted - Income Tax Return can be looked into even at the stage of appeal.**

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13 (1)(ई) – अननुपातित परिसंपत्तियां – आय कर विवरिणयां – आय कर विवरणियां, सार्वजनिक दस्तावेज होने के नाते औपचारिक सबूत की उसे आवश्यकता नही – आय कर विवरणियां छापे की तिथि से पूर्व प्रस्तुत की गई बिना किसी पूर्वानुमान के, कि अपीलार्थी को धारा 13(1)(ई) के अंतर्गत दण्डनीय अपराधों के लिये आरोपित किया जायेगा – आय कर विवरणी में प्रकट की गई आय को स्वीकार करना अपेक्षित है – आय कर विवरणी को अपील के प्रक्रम पर भी देखा जा सकता है।

***C. Prevention of Corruption Act (49 of 1988), Section 13(1)(e) - Disproportionate Assets - Income Tax Returns - Known Sources of Income - Household expenses* - 60% or 40% - Prosecution has failed to show any Rule which may decide as to what percentage towards the deduction of household expenses out of the salary/income of the appellant - Evidence on record show that the appellant belongs to agricultural family - Contribution of family members towards household expenses cannot be disputed - Household expenses taken to the tune of 40%.**

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(ई) – अननुपातित परिसंपत्तियां – आय कर विवरिणयां – आय का ज्ञात स्त्रोत – घरेलू खर्चे – 60 प्रतिशत या 40 प्रतिशत – अभियोजन किसी नियम को दर्शाने में विफल रहा जिससे अपीलार्थी के वेतन/आय से घरेलू खर्चे की कटौती का प्रतिशत सुनिश्चित किया जा सके – अभिलेख पर उपलब्ध साक्ष्य दर्शाता है कि अपीलार्थी कृषक परिवार का है – घरेलू खर्चों में परिवार के सदस्यों का योगदान विवादित नहीं किया जा सकता – घरेलू खर्चे 40 प्रतिशत माना गया।

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

Cases referred :

2000(6) SCC 338, (2006) 1 SCC 420, (1977) 2 SCC 816, 2000(1) MPLJ 360, 2009 Cr.L.J. 1767.

Anil Kharé with *Sachin Bhatnagar,* for the appellant.
Arvind Gokhale, for the respondent.

Short Note

**(7)*

Before Mr. Justice J.K. Maheshwari

S.A. No. 351/1995 (Jabalpur) decided on 28 September, 2012

SUBHASH JAISWAL ...Appellant

Vs.

TRILOKINATH KAKKAD ...Respondent

A. Accommodation Control Act, M.P. (41 of 1961), Section 13(6) - Non deposit of Rent - Striking off Defence - **Plaintiff had filed a suit for eviction on earlier occasion and a decree of arrears of rent was granted but decree of eviction was not granted - Defendant did not pay the arrears of rent within two months from the date of receipt of notice or within one month on filing the suit - Trial Court while deciding application under Section 13(6) of the Act, granted one month's time to deposit the arrears of rent - Defendant failed to do so - Trial Court rightly struck off the defence.**

क. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 13(6) – भाड़ा जमा न किया जाना – बचाव को अस्वीकार किया जाना – वादी ने बेदखली हेतु पूर्व अवसर पर वाद प्रस्तुत किया था और भाडे के बकाये की डिक्री प्रदान की गई, परंतु बेदखली की डिक्री प्रदान नहीं की गई–प्रतिवादी ने नोटिस प्राप्ति की तिथि से दो माह के भीतर या वाद प्रस्तुती के एक माह के भीतर भाड़े के बकाये का भुगतान नहीं किया–विचारण न्यायालय द्वारा अधिनियम की धारा 13(6) के अंतर्गत आवेदन का विनिश्चय करते हुए भाड़े का बकाया जमा करने के लिए एक माह का समय प्रदान किया गया–प्रतिवादी ऐसा करने में विफल रहा–विचारण न्यायालय ने उचित रुप से बचाव को अस्वीकार किया।

B. Accommodation Control Act, M.P. (41 of 1961), Section 12 - Suit for eviction - Nature of defences available to tenant - **Defences available to tenant are of twin in nature (i) the defence recognizes by common law and (ii) defences available under Act, 1961 - Defence of non-availability of landlord-tenant relationship and plaintiff is not the owner of the property is recognized by common law and on establishing the aforesaid his right cannot be taken away - However, in the case of second defence on raising the dispute under Section 13(3), the Court is required to decide it at an earlier stage and the tenant is bound to deposit the rent.**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 – बेदखली का वाद – किरायेदार को उपलब्ध बचावों का स्वरुप – किरायेदार को उपलब्ध बचाव दोहरे स्वरुप के हैं (i) सामान्य विधि द्वारा मान्य बचाव और (ii) अधिनियम 1961 के अंतर्गत उपलब्ध बचाव–भूमिस्वामी–किरायेदार के संबंधों की अननुपलब्धता का बचाव और वादी सम्पत्ति का स्वामी नहीं, सामान्य विधि द्वारा मान्य है तथा उपरोक्त स्थापित किये जाने पर उसका अधिकार समाप्त नहीं किया जा सकता–अपितु, द्वितीय बचाव की स्थिति में, धारा 13(3) के अंतर्गत विवाद पर उठाये जाने पर, न्यायालय से उसका निर्णय पूर्वतर प्रक्रम पर करना अपेक्षित है और किरायेदार भाड़ा जमा करने के लिए बाध्य है।

***C. Civil Procedure Code (5 of 1908), Order 17 Rule 3 - Failure to adduce evidence* - Opportunities were given to tenant to lead evidence but he did not do so therefore, Trial Court closed his right to lead evidence - Revisional Court granted him a week's time as prayed by him, to lead evidence - Said opportunity was not availed by tenant - Trial Court had rightly closed the right.**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 17 नियम 3 – साक्ष्य प्रस्तुत करने में असफल – किरायेदार को साक्ष्य प्रस्तुत करने के अवसर दिये गये परंतु उसने ऐसा नहीं किया इसलिए विचारण न्यायालय ने साक्ष्य प्रस्तुत करने का उसका अधिकार समाप्त कर दिया – पुनरीक्षण न्यायालय द्वारा उसके निवेदन पर साक्ष्य पेश करने हेतु समय प्रदान किया – उक्त अवसर को किरायेदार द्वारा उपभोग नहीं किया गया – विचारण न्यायालय ने उचित रुप से अधिकार समाप्त किया।

***D. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(c) - Denial of title* - In case of disclaimer merely denial of title by the defendant is not sufficient but the defendant ought to have set up title in other also - Grant of decree under Section 12(1)(c) of Act, 1961 cannot be upheld.**

घ. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12 (1)(सी) – हक से इंकार–स्वत्व त्याग की स्थिति में, प्रतिवादी द्वारा मात्र हक को अस्वीकार करना पर्याप्त नहीं किन्तु प्रतिवादी को हक किसी अन्य में भी स्थापित करना चाहिए था – अधिनियम 1961 की धारा 12(1)(सी) के अंतर्गत डिक्री के प्रदान को अभिपुष्ट नहीं किया जा सकता।

Cases referred :

AIR 1979 SC 1745, 1999(1) MPLJ 436, 1998(2) MPLJ 610, (2002) 3 SCC 375.

D.K. Dixit, for the appellant.

V.K. Shroti with *Siddharth Seth,* for the respondent.

I.L.R. [2013] M.P., 1
SUPREME COURT OF INDIA
Before Mr. Justice P.Sathasivam & Mr. Justice Ranjan Gogoi
Cr. A. No. 2048/2012, decided on 14 December, 2012

RAM VISWAS ..Appellant
Vs
STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 32 - Dying Declaration - Recorded by Naib Tahsildar - **Before recording the above statement, the doctor concerned certified that the deceased was fit for giving statement - The doctor also certified that the patient was conscious while giving the dying declaration - There is no reason to reject the same - Prosecution is fully justified in relying on the same.**
(Paras 8 & 9)

क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – नायब तहसीलदार द्वारा अभिलिखित – उपरोक्त कथन अभिलिखित किये जाने से पूर्व संबंधित चिकित्सक ने प्रमाणित किया कि मृतिका बयान देने के लिए सक्षम थी – चिकित्सक ने यह भी प्रमाणित किया कि मरीज मृत्युकालिक कथन देते समय चैतन्यावस्था में थी – उसे अस्वीकार करने का कोई कारण नहीं – अभियोजन के लिए उक्त पर विश्वास करना पूर्णतः न्यायोचित।

B. Penal Code (45 of 1860), Sections 302, 304 Part-II - Murder or Culpable Homicide - **Accused was not happy with his married life with deceased and they had frequent quarrels - In dying declaration, the deceased stated that her husband abused her and compelled her to go away and when they were sleeping together, he poured kerosene oil on her and set fire - Accused was the only person inside the room at the time of the incident alongwith his wife - Merely because there was no sign of smell of kerosene oil from the bed sheet, quilt and pillow, the case of the prosecution can not be thrown out - Appellant can not be convicted only u/s 304 Part-II IPC - Even if it is accepted that in the course of said incident he sustained some burn injuries, it is not a ground for exonerating his guilt - Appeal dismissed. (Paras 7, 8, 10 & 11)**

ख. दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग II – हत्या या सदोष मानव वध – अभियुक्त, मृतिका के साथ अपने वैवाहिक जीवन से खुश नहीं था और उनकी अक्सर लड़ाईयां होती थीं – मृत्युकालिक कथन में मृतिका ने कहा

कि उसका पति उसे प्रताड़ित करता था और चले जाने के लिए विवश करता था और जब वे एक साथ सो रहे थे, तब उसने मिट्टी का तेल उस पर उड़ेलकर आग लगा दी – घटना के समय कमरे के भीतर अपनी पत्नी के साथ अभियुक्त के अलावा कोई नहीं था – मात्र इसलिए कि बेडशीट, गद्दा और तकिए से मिट्टी के तेल की गंध का कोई संकेत नहीं था, अभियोजन के प्रकरण को अस्वीकार नहीं किया जा सकता – अपीलार्थी को केवल भा.द.सं. की धारा 304 भाग–II के अंतर्गत दोषसिद्ध नहीं किया जा सकता – यदि यह स्वीकार भी किया जाए कि उक्त घटना के दौरान उसने कुछ जलने की क्षतियां सहन की, यह उसकी दोषिता से मुक्त किये जाने का आधार नहीं है – अपील खारिज।

JUDGMENT

The Judgment of the Court was delivered by : **P. SATHASIVAM, J.** :- Leave granted.

2) This appeal is directed against the judgment and order dated 07.05.2009 passed by the High Court of Judicature at Jabalpur, Madhya Pradesh in Criminal Appeal No. 884 of 2000 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein.

3) **Brief facts:**

(a) This case relates to one Maladeep, resident of village Semaria, District Rewa, Madhya Pradesh, who was burnt to death by her husband-Ram Viswas, the appellant herein by pouring kerosene oil.

(b) Maladeep (the deceased) and Ram Viswas were married to each other but were not in good terms. The appellant herein was not happy with his married life and often used to quarrel with Maladeep. He was actually forcing his wife to leave her matrimonial home which was not agreeable to her.

(c) In order to get rid of her, on 03.02.1998, in the midnight, the appellant herein poured kerosene oil on Maladeep and set her on fire. On hearing her cries, a number of persons gathered on the spot and tried to extinguish the fire. The appellant herein also tried to douse the fire and got his hands burnt.

(d) Maladeep was taken to the G.M. Hospital, Rewa and a First Information Report (FIR) being No. 10/98 was registered against the appellant herein with the Police Station

Semaria. On 04.02.1998, the CMO, G.M. Hospital Rewa, opined that she had sustained 100% burn injuries and at about 03:05 p.m., the statement of Maladeep was recorded wherein while narrating the whole story, she named her husband-the appellant herein for the overt act. On 07.02.1998, she succumbed to her injuries.

(e) After filing of the charge sheet, the case was committed to the Court of Sessions Judge, Rewa, (M.P.) and numbered as Session Case No. 80/98. The trial Court, by order dated 22.04.1999, convicted the appellant under Section 302 of the Indian Penal Code, 1860 (in short 'the IPC') and sentenced him to suffer RI for life along with a fine of Rs. 100/-, in default, to further undergo RI for 1 month.

(f) Being aggrieved, the appellant herein preferred Criminal Appeal No. 884 of 2000 before the High Court. By judgment and order dated 07.05.2009, the High Court dismissed the appeal filed by the appellant herein. Questioning the same, the appellant has filed this appeal by way of special leave before this Court.

4) Heard Mr. S.C. Patel, learned counsel for the appellant-accused and Ms. Vibha Dutta Makhija, learned counsel for the respondent-State.

5) Learned counsel for the appellant, after taking us through the entire material relied on by the prosecution, reasoning of the trial Court and the High Court submitted that there are material omissions in the dying declaration – Exh. P-11 which also differ from the contents of the First Information Report (Exh. P-4), hence, the courts below ought not to have accepted the prosecution case. He further submitted that in the absence of smell of kerosene from the bed sheet, quilt and the pillow, the entire statement in the form of dying declaration is to be rejected. He finally submitted that even if the case of the prosecution is acceptable, in view of the fact that the appellant tried to extinguish the fire and by such conduct at the most, he would be punishable only under Section 304 Part II IPC and not under Section 302. On the other hand, Ms. Vibha Dutta Makhija, learned counsel for the State submitted that the very same contentions were raised by the accused before the trial Court and the High Court and taking note of the statement of the deceased in the form of dying declaration, all other relevant materials and compliance of all

the formalities, the said objections were rejected, hence, there is no valid and acceptable ground for interference with the concurrent findings of the courts below by exercising jurisdiction under Article 136 of the Constitution of India.

6) We have carefully considered the rival submissions and perused all the relevant materials.

7) As rightly pointed out by the counsel for the State, it is seen from the FIR (Exh.P-4) that the accused was not happy with his married life and they had frequent quarrels. A perusal of the FIR further shows that on 03.02.1998, in the midnight, when the accused and the deceased alone were in the house, the accused poured kerosene oil on the deceased and set her on fire. It is further seen that on hearing the cry of the deceased, a number of persons entered into the room when the accused himself opened the door from inside and a report was made to the police. No doubt, a perusal of the FIR shows that her husband, the present appellant also tried to extinguish the fire.

8) In the light of the contents of the FIR (Ex.P-4), now we have to consider the dying declaration which is Exh.P-11 made by the deceased recorded by Rajendra Tiwari, Naib Tahsildar, (PW-11) wherein it was stated that her husband abused her and compelled her to go away from his house. She further stated that on the fateful night, when they were sleeping together, he poured kerosene oil on her and set fire. She further narrated that when she shouted for help, neighbours came in and she was taken to G.M.Hospital, Rewa. The above statement was recorded at 3.25 p.m. on 04.02.1998.

9) Before recording the above statement, the doctor concerned certified that she was fit for giving a statement. The doctor also certified that the patient was conscious while giving the dying declaration. Inasmuch as the Tahsildar (PW- 11) recorded her statement after fulfilling all the formalities and her condition was also specified as seen from the certificate of the doctor, there is no reason to reject the same, on the other hand, as rightly accepted by the trial Court and the High Court, we are also of the view that the prosecution is fully justified in relying on the same. No doubt, in her statement as stated in the FIR (Exh. P-4) that her husband tried to save her was not stated in the dying declaration. Inasmuch as the dying declaration satisfied all the prescribed conditions and procedure, we are not inclined to accept the stand taken by learned counsel for the appellant.

10) As rightly observed by the trial Court and the High Court, merely

because there was no sign of smell of kerosene oil from the bed sheet, quilt and pillow, the case of the prosecution cannot be thrown out. Since the dying declaration (Exh.P-11) is proved beyond doubt, as discussed above, we reject the argument of the counsel for the appellant. For the same reasons, the appellant cannot be convicted only under Section 304 Part II IPC.

11) It is clear from the prosecution case that the accused was the only person inside the room at the time of the incident along with his wife. Even if it is accepted that in the course of the said incident he sustained some burn injuries, it is not a ground for exonerating his guilt. We have already observed that Dr. Manish Kaushal (PW-8) has stated that on 04.02.1998 he examined the injured – Maladeep and found her conscious and fit to make a statement. The said report has also been marked as Exh.P-11 and the statement of the deceased was recorded by the Executive Magistrate in his presence.

12) In the light of the above discussion and on going through the entire material relied on by the prosecution and the defence, we are unable to agree with the argument of the counsel for the appellant, on the other hand, we concur with the conclusion arrived at by the courts below. Consequently, the appeal fails and the same is dismissed.

13) Learned counsel for the appellant by pointing out the fact that the appellant had served more than 14 years in prison, prayed for appropriate direction for his release as per Jail Manual. Without expressing any opinion on the merits of his claim, inasmuch as we dispose of his appeal, the State is free to consider the same in accordance with the Rules/Instructions/Jail Manual applicable to the appellant. With the above observation, the appeal is dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 5
WRIT APPEAL

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

W.A. No. 454/2012 (Jabalpur) decided on 7 September, 2012

DHARMENDRA DOMLE ...Appellant
Vs.
STATE OF M.P. ...Respondent

Service Law - Dismissal from Service **- Petitioner working as Stenographer in Court - Manipulated the order sheet of the Court - Held - Order sheets of Court are sacrosanct in which if any interpolation**

made by appellant, it was a case of severe punishment - Three enquiries were initiated against the appellant - In one enquiry, punishment of dismissal from service was imposed therefore, in remaining two enquiries no separate punishment was imposed as major punishment has already been imposed - Order appears to be just and proper - In case the order of dismissal from service is set aside by any higher forum, then Disciplinary Authority shall be free to proceed with the enquiries in accordance with law. (Para 13)

सेवा विधि – सेवा से पदच्युती – याची स्टेनो के रुप में न्यायालय में कार्यरत – न्यायालय की आदेश पत्रिका में हेर–फेर किया – अभिनिर्धारित – न्यायालय की आदेश पत्रिकाऐं परम पवित्र होती हैं जिसमें अपीलार्थी द्वारा यदि कोई प्रक्षेप किया गया है, यह एक कठोर शास्ति का प्रकरण था – अपीलार्थी के विरुद्ध तीन जांच आरंभ की गई – एक जांच में सेवा से पदच्युती की शास्ति अधिरोपित की गई इसलिए शेष दो जांच में कोई पृथक शास्ति अधिरोपित नहीं की गई क्योंकि गुरुतर शास्ति पहले ही अधिरोपित की जा चुकी है – आदेश न्यायसंगत और उचित प्रतीत होता है – किसी उच्चतर न्यायालय द्वारा सेवा से पदच्युती का आदेश अपास्त किये जाने की दशा में, अनुशासनिक प्राधिकारी विधिनुसार जांच में कार्यवाही करने के लिए स्वतंत्र होगा।

Cases referred :

AIR 1970 SC 2086, AIR 2000 SC 277.

R.K. Verma, for the appellant.
Ashish Shroti, P.L. for the respondent/State.

O R D E R

The Order of the Court was delivered by : **KRISHN KUMAR LAHOTI, J.:** This order shall decide Writ Appeal 454/2012, Writ Appeal 456/2012 & Writ Appeal 457/2012. Firstly, we would like to decide Writ Appeal No.454/2012 in which a substantial punishment of dismissal from service has been awarded to the appellant.

2. This appeal is directed against an order dated 6.3.2012 passed by Single Bench in Writ Petition No.6675/2007(S) by which a writ petition preferred by the appellant against the order of punishment of dismissal from service dated 25.5.2006 by the District & Sessions Judge, Katni was dismissed. This order has been assailed by the appellant on following grounds:-

"(1) The learned Single Judge has not considered crucial issue in the matter that the star witness D.R.Rahul, the then 2nd Additional District Judge Murwara, Katni was not examined in the departmental proceedings.

(2) Two show cause notices were issued to the appellant; first for compulsory retirement and second for dismissal from service. There was no occasion for the disciplinary authority to change his mind after issuing first show cause notice for the punishment of compulsory retirement."

3. It is submitted by learned counsel for the appellants that on these grounds, these appeals may be admitted for hearing. He has relied upon two judgments of the Apex Court in support of his contention,namely, *State of Punjab Vs Dewan Chuni Lal* (AIR 1970 SC 2086) and *Hardwari Lal Vs State of UP and others* (AIR 2000 SC 277).

4. We have examined the case on merits. Appellant was a Stenographer in the Court of the 2nd Additional District Judge, Katni. He was issued with a charge-sheet on 20.4.2001 that he had interpolated an order-sheet of the Court by writing "order of status-quo is hereby vacated". The allegation against the appellant was that this line was inserted by the appellant unauthorizedly in the order-sheet dated 4.5.2000 in Civil Suit No.32-A/2000 (Anand Kumar Vs Alfred) of the 2nd Additional District Judge. A departmental enquiry was conducted against the appellant in which various witnesses were examined but D.R.Rahul, the then 2nd Additional District Judge Murwara, Katni could not be examined as at that time he was compulsorily retired from service by the High Court. The Inquiry Officer had recorded a finding that the aforesaid interpolation was made by the appellant and after serving an enquiry report, first show cause notice and thereafter second show cause notice, appellant was dismissed from service.

5. This order was assailed by the appellant before the High Court in Writ Petition No. 6675/2/007(S). The learned Single Judge considered the case elaborately by the impugned order dated 6.3.2012 but dismissed the writ petition and hence, present appeal.

6. So far as first contention of appellant that the star witness D.R.Rahul the then ADJ Murwara, Katni was not examined is concerned, there is finding

by the Inquiry Officer that such interpolation was made by the appellant, merely because D.R.Rahul at the relevant time was Presiding Officer of the Court of which order-sheet was interpolated was not examined, could not be a ground for discharge of the appellant from the charge if other evidence was available on record.

7. From perusal of the Enquiry Report, it is apparent that the aforesaid factum was proved by the other witnesses. There was cogent reason for non-examination of D.R.Rahul, the then Additional District Judge Murwara, Katni, who was compulsorily retired from service by the High Court at the relevant time.

8. Apart from this, appellant herein had made an application before the Inquiry Officer for summoning D.R.Rahul and for a period of two years, the proceedings were remained pending awaiting examination of D.R.Rahul and subsequently the appellant had withdrawn his request for examination of D.R.Rahul.

9. In view of the aforesaid fact, which has been specifically recorded by the Single Bench in Paragraph 18 of his order, the first contention has no force and is hereby rejected.

10. So far as second contention of appellant that initially a show cause notice proposing punishment of compulsory retirement was issued to the appellant but subsequently without any reason, another show cause notice was issued to him for dismissal from service is concerned, if the Disciplinary Authority considering the seriousness of the charge relating to interpolation of the Court order-sheet, issued a second show cause notice, no jurisdictional error is found in the aforesaid act. Act of appellant was very serious in nature. Order-sheets of the Courts are sacrosanct in which if any interpolation is made by the appellant then it was a case of severe punishment. In aforesaid circumstances, if after issuing of second show cause notice, appellant was awarded the aforesaid punishment then no fault is found.

11. So far as judgments relied on by learned counsel for appellant are concerned; in *Dewan Chuni Lal* (supra), it was a case of non-examination of a witness and because of this, it was held that a reasonable opportunity was denied to the delinquent officer but in the present case, the factual position is entirely different. D.R.Rahul though was a witness in the enquiry but because

of his compulsory retirement by the High Court, if the department had not examined him but thereafter the same opportunity was allowed to the appellant for a period of two years, the appellant thereafter made a request for closure of evidence and the aforesaid right was closed then appellant now cannot agitate that D.R.Rahul was not examined. Departmental proceedings are fact finding proceedings and are not criminal proceedings in which charge is required to be proved beyond doubt. In the departmental enquiry, the charge was proved so merely because of non-examination of such witness, appellant cannot be exonerated. In *Hardwari Lal* (supra) it was a case of non-examination of complainant.

12. As discussed hereinabove, non-examination of D.R.Rahul was not fatal in the matter. In view of the aforesaid, we do not find any merit in this appeal. Writ Appeal No.454/2012 is accordingly dismissed at admission stage.

13. Now we may consider Writ Appeal No.456/2012 and Writ Appeal No.457/2012. In these appeals, question involved is of non-consideration of writ petition on merits by the Single Bench because of passing of order in Writ Petition No.6675/2007 (S) is involved. It appears that three enquiries were initiated against the appellant. In one enquiry, appellant was awarded punishment of dismissal from service and in two other enquiries, no punishment was awarded because a major punishment of dismissal from service was awarded to the appellant in the first case. The Single Judge also considered this aspect and had found that once a major punishment of dismissal from service was already awarded to the appellant, there was no question of proceeding further in two other enquiries. The aforesaid order appears to be just and proper. However, it is observed that in case the order passed in Writ Appeal No.454/2012 in which appellant has been awarded a major punishment of dismissal from service is set aside by any higher forum, then Disciplinary Authority shall be free to proceed with the enquiries in accordance with law.

14. With the aforesaid liberty, Writ Appeal No.456/2012 and Writ Appeal No.457/2012 are also disposed of finally.

No order as to costs.

Appeal disposed of.

I.L.R. [2013] M.P., 10
WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.A. No. 84/2012 (Indore) decided on 11 September, 2012

MUKESH SHARMA ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

Prisoners' Release on Probation Rules, (M.P) 1964 - Rule 4 - Amendment - Pending Applications **- Pending applications for release on probation are to be decided on the basis of the Rule prevailing on the date of decision and not on the basis of the Rule prevailing on the date of conviction. (Para 12)**

बंदियों का परिवीक्षा पर छोड़ा जाना नियम, (म.प्र.) 1964 – नियम 4 – संशोधन – लंबित आवेदन – परिवीक्षा पर छोड़े जाने हेतु लंबित आवेदनों को निर्णय की तिथि को विद्यमान नियम के आधार पर निर्णित किया जाना चाहिए और न कि दोषसिद्धि की तिथि को विद्यमान नियम के आधार पर।

Cases referred :

2010(4) SCC 216, JT 2009 (1) SC 535, 2008 Cri.L.J. 444, AIR 1980 SC 2147, W.A. No. 214/2010 decided on 04.05.2010, 2009(3) MPLJ 648, 2010(4) MPHT 302, 1988 JLJ 407.

Ritu Bhargava & R.S. Soni, for the appellant.
M.S. Dwivedi, P.L. for the respondents.
Girish Desai, Amicus Curiae.

JUDGMENT

The Judgment of the Court was delivered by : **PRAKASH SHRIVASTAVA, J.** : This writ appeal under Section 2 of the M.P. Uchchya Nyayalaya (Nyay Khandpeeth Ko Appeal) Adhiniyam 2005 has been filed by the appellant aggrieved with the order of the learned Single Judge dated 4.11.2011 passed in W.P. No.6209/2011.

2/ The appellant has been convicted for offence under Section 302 and 381 of the IPC in S.T. No.529/99 and has been sentenced for life imprisonment on 22.5.2002. On 5.9.2007 the appellant had moved an application for releasing him on probation under the provisions of M.P. Prisoners Release on

Probation Act, 1954 (for short "the Act") and the Rules framed thereunder. The application was forwarded to the District Magistrate on 22.9.2007 and thereafter to the General Superintendent of Jail for placing before the Probation Board. Meanwhile the amendment was made in Rule 4 of the M.P. Prisoners Release on Probation Rules, 1964 (for short "the Rules") and certain conditions were imposed for life convicts under Section 302. Since the appellant did not fulfill those conditions, therefore, the headquarter (jails) Bhopal had rejected the appellant's case for release on probation, vide communication dated 3.5.2008. Aggrieved with the same, the appellant had filed the writ petition which has been dismissed by the learned Single Judge, vide order dated 4.11.2011, taking the view that in view of the amendment in the Rules, the appellant is not entitled for consideration of his case for release on probation.

3/ Learned counsel appearing for the appellant submits that the appellant had been convicted on 22.5.2002, therefore, the provisions which were prevailing on the date of his conviction will be applicable and any subsequent amendment will not take away his right to be released on probation. She submits that the application filed by the appellant needs consideration under the unamended provisions. In support of her contention she has relied upon the judgments of the Supreme Court in the matter of *State of Haryana and others Vs. Jagdish* reported in 2010(4) SCC216, in the matter of *State of Haryana Vs. Bhup Singh and others* reported in JT 2009(1) SC 535, in the matter of *State of Haryana Vs. Mahendra Singh and others* reported in2008 Cri.L.J. 444, in the matter of *Maru Ram Vs. Union of India* reported in AIR 1980 SC 2147and the Division Bench judgment of this Court in the matter of *Pradeep Dantre Vs.State of M.P. and another* (W.A. No.214/2010)decided on 4.5.2010.

4/ Learned counsel appearing for the respondents has supported the impugned action and submitted that since the relevant Rule itself has been amended, therefore, the amended Rule which was existing on the date of consideration of the application will apply and the appellant's case has rightly been rejected since he does not fulfill the requirement of the amended Rule.

5/ Shri Girish Desai, learned amicus curiae appointed by this Court, has submitted that since the Rule itself has been amended before consideration of the appellant's application, therefore, the amended Rule will be applicable. He further submitted that the issue raised by the appellant has been concluded by the Division Bench judgment of this Court in the matter of *Gori Shankar*

Vs. State of M.P. and others reported in 2009(3) MPLJ 648.

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

7/ Undisputedly the appellant was convicted for offence under Section 302 and 381 of the IPC and sentenced to life imprisonment on 22.5.2002. Till 30.9.2011 he had completed the actual term of imprisonment of 10 years, one month and 12 days. He had moved the application for release on probation under the Act and the Rules on 5.9.2007 and his application has been rejected finding him ineligible for probation, vide communication dated 3.5.2008.

8/ The State has framed the Act to provide for release of certain prisoners on conditions imposed by the State Government. Section 2 of the Act deals with the power of Government to release by licence on conditions imposed by it. Exercising the rule making powers contained in Section 9, the State Government has framed the Rules and the Rule 4 deals with the eligibility for release on probation. Unamended Rule 4 provides for release on probation of any prisoner other than prisoners specified in Rule 3, who had served 1/3rd of his sentence of imprisonment or total period of 5 years without remission, whichever is less. By way of notification dated 24.3.2008 proviso has been inserted in Rule 4 and the amended Rule 4 reads as under :-

> "4.Eligibility for release.- Save the prisoners specified in Rule 3 any other prisoner who has served one-third of his sentence of imprisonment or a total period of five years without remission, whichever is less, may be released by the Government on licence:
>
> Provided that in case of such prisoners who have been sentenced for life imprisonment, under Section 302 and 305 of the Indian Penal Code, 1860 (No.45 of 1860) or under the provisions of other penal laws in which death sentence is also one of the punishments subject to the conditions that such prisoners are not barred for such considerations under the provisions of such laws, will be considered for premature release from the prison. The eligibility for release shall be after undergoing the sentence of 14 years of actual imprisonment without remission of his sentence :
>
> Provided further that all other prisoners, undergoing

the sentence of life imprisonment, will be considered for premature release only after they have undergone at least 10 years of imprisonment with remission and after the completion of 7 years of actual imprisonment without remission in sentence:

Provided also that nothing in the above provisions shall apply to the prisoners whose cases are being sent to the Hon'ble Governor for consideration under Article 161 of the Constitution of India, on special reasons of humanitarian grounds."

9/ Under the amended Rule the prisoners who are sentenced to life imprisonment under Section 302 of the IPC, becomes eligible for release on probation after undergoing the sentence of 14 years of actual imprisonment without remission of sentence. The constitutional validity of the amendment made in the Rule 4 was challenged before this Court and the Full Bench of this Court in the matter of A*nni alias RameshVs. State of Madhya Pradesh and others* reported in 2010(4)M.P.H.T. 302 (FB)while upholding the constitutional validity of Rule 4, has noted the object of incorporation of Proviso to Rule 4 as under :-

"14.A Division Bench of this Court in Writ Petition No.1618/2006 (*Smt. Kusum Vs. State of Madhya Pradesh and others*) had noticed the abuse of the provisions of the Act where the prisoners sentenced to life imprisonment were released on mere completion of five years and six years despite the rejection of their bail applications and pendency of criminal appeals in the High Court. The State Government, therefore, having regard to the abuse of provisions and sweeping criminal activities, rate of heinous offences, mercenary killings as well as the path paved by some who have taken the killings to be profession and political murders amended the rules by introducing proviso to Rule 4.

15.We also find that the restrictions of periods of actual imprisonment introduced by the proviso for becoming a prisoner eligible to be considered for release under the Act is in consonance with Section 433-A of the Code of Criminal Procedure introduced by the Parliament which provides for restriction on powers of remission or communication (Sic :

commutation) in certain cases. According to Section 433-A a life convict, for an offence for which death is one of the punishments, cannot be released from prison unless he has served at least 14 years of imprisonment. The Constitutional validity of Section 433-A was challenged before the Supreme Court in *Maru Ram Vs. Union of India,* AIR 1980 SC 2147, but was upheld by the Constitution Bench. Otherwise also, merely because a life convict has undergone 14 years of imprisonment does not acquire a right to be released prematurely and he only becomes eligible for being considered to be released on probation.

16. For these reasons, the periods of actual imprisonment which have been provided by the impugned proviso to Rule 4 cannot be held as beyond the rule making power of the State Government and ultra vires."

10/ Thus the object of the amended Rule 4 is to prevent the release of prisoners sentenced to life imprisonment merely on completion of 5 to 6 years despite rejection of their bail application and also to prevent the sweeping criminal activities.

11/ Another Full Bench judgment of this Court in the matter of *Lalji Vs. State of M.P. and another* reported in 1988 JLJ 407 has taken the view that a prisoner who has been found guilty of a heinous offence, cannot claim as of right to be released on probation under the Probation Act merely because his conduct in prison had been good. Thus, a prisoner has no vested right to be released on probation under the Act.

12/ The issue which the appellant is raising in the present matter for his release on probation under the unamended Rules, has already been considered by the Division Bench of this Court in the matter of *Gori Shankar*(supra). In that case the petitioner was convicted under Section 302 and sentenced to life imprisonment by judgment dated 5/6/1994. After completion of 5 years of imprisonment he had applied for release on probation and in view of the amended Rule 4 his application was rejected on 8/8/2008 since he had not completed actual sentence of 14 years, therefore, similar contention was raised that unamended Rule 4 should be applied and the Division Bench of this Court in the matter of *Gori Shankar*(supra) had rejected such a contention by holding as under :-

"24.The next limb of submissions of Mr. Bhargava and Mr. Pateriya, learned Counsel, is that the cases of the petitioners should have been considered under the old rules as the amended provisions rule cannot be made applicable to them. To bolster the said submission, they have commended us to the decisions rendered in *Mahendra Singh* (supra) and *State of Haryana Vs. Bhup Singh and others,* JT 2009(1) SC 535. To appreciate the said submission, we have carefully perused both the decisions. It is perceivable that the decision in *Bhup Singh* (supra), is based on *Mahendra Singh* (supra). In the case of *Mahendra Singh* (supra), Their Lordships were dealing with the validity of the policy decision vis-a-vis Prison Rules and in that context, held that the Rules would prevail keeping in view that the right to ask for remission of sentence by a life convict would be under the law as was prevailing on the date on which the judgment of conviction and sentence was passed. In the case at hand, the Rules have been amended. Needless to emphasize, they are statutory in nature. They have been framed in exercise of powers vested under section 9 of the 1954 Act. They are not executive instructions. In view of the aforesaid, the decisions rendered in *Mahendra Singh* (supra) and *Bhup Singh* (supra) are distinguishable."

13/ The reliance placed by the learned counsel for the appellant on the judgment of the Supreme Court in the matter of *Mahendra Singh*(supra) and *Bhup Singh* (supra) is of no help since these judgments have already been considered and distinguished by the Division Bench of this Court in the matter of *Gori Shankar*(supra).

14/ Counsel for the appellant has also placed reliance upon the judgment of the Supreme Court in the matter of *Jagdish*(supra) but that also relates to the short sentencing policy framed in exercise of powers under Section 432 read with S. 433 of the Cr.P.C. Same is the position in respect of the judgment in the mater of *Maru Ram*(supra) relied upon by counsel for the appellant. These judgments are therefore distinguishable on the same analogy, on the basis of which the Division Bench in the matter of *Gori Shankar*(supra) has distinguished the judgments of *Mahendra Singh*(supra) and *Bhup Singh* (supra). These judgments relate to the executive policy, whereas in the present case the statutory rule is under consideration. In these judgments the short

sentencing policy was under consideration, whereas in the present matter the statutory provision relating to release on probation is in issue. The release on probation does not effect the period of sentence.

15/ Counsel for the appellant has also placed reliance upon the Division Bench judgment of this Court in the matter of *Pradeep Dantre*(supra) but that judgment is of no help since in that matter the case for release on probation was rejected prior to the amendment and the High Court had remanded the matter back to the State Government for fresh consideration under the unamended Rules.

16/ Keeping in view the aforesaid aspect of the matter, we find that no error has been committed by the respondents in rejecting the petitioner's application by the impugned communication dated 3.5.2008 keeping in view the amended Rule 4, and that the learned Single Judge has rightly dismissed the writ petition.

17/ Thus the writ appeal is devoid of any merit which is accordingly dismissed.

No costs.

Appeal dismissed.

I.L.R. [2013] M.P., 16
WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.A. No. 78/2006 (Indore) decided on 11 September, 2012

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

***Service Law - Kramonnati Scheme* - Circular dated 17.03.1999 /19.04.1999 - On granting the benefit of Karmonnati under the Scheme, the Kramonnat pay scale as mentioned in the Schedule enclosed with the Circular is to be granted and not the regular higher pay scale applicable to the next promotional post. (Paras 6 & 7)**

सेवा विधि – क्रमोन्नति योजना – परिपत्र दिनांकित 17.03.1999 / 19.04. 1999 – योजना के अंतर्गत क्रमोन्नति का लाभ प्रदान करने पर, परिपत्र के साथ संलग्न अनुसूची में यथा वर्णित क्रमोन्नत वेतनमान प्रदान किया जाएगा और न कि

अगले पदोन्नति पद को लागू होने वाला नियमित उच्चतर वेतनमान।

Cases referred :

(2006) 6 SCC 57, 2006 (1) MPJR 340, 2008(3) MPLJ 586.

M. Ravindran, Dy. G.A. for the appellants.
Amit Agrawal, for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **PRAKASH SHRIVASTAVA, J.** : This order will govern the disposal of WA No. 78/2006 and WA 566/2006.

2. Writ appeal No. 78/2006 has been filed under Section 2(1) of M.P. Uccha Nyalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005 challenging the order dated 21/2/2006 passed by the learned Single Judge in WP No. 1148/2003 holding that under the *Kramonnat* pay scale scheme dated 17.3.1999/19.4.1999 the respondent is entitled to the next higher regular pay scale of Rs. 8000-13500 instead of the next higher pay scale of Rs.5000-8000 provided in the *Kramonnati* Scheme whereas WA No.566/2006 is directed against the order of the learned Single Judge dated 7/10/2005 passed in WP No.7560/2003 where the learned Single Judge has taken the view that the petitioner employees are not entitled to the pay scale of Rs.8000-13500 applicable to the next higher post but are entitled to the pay scale of Rs.5000-8000 provided in the Kramonnati Scheme. The learned Single Judges in the order under appeal in these two Writ Appeals have taken diverg[illegible]tly opposite view in the matter.

3. For convenience the facts have been noted from WA No.78/2006.

4. The respondent was initially appointed as inspector in the Directorate of Industries. The post of Inspector was later re-designated as Assistant Manager. After revision of the pay scale with effect from 1/1/1996, during the relevant time in the year 1999 the pay scale of the Assistant Manager and the pay scale of next higher post of Assistant Director/Manager was as follows:

Inspector/Assistant Manager	...	Rs.4500-Rs.7000/-
Assistant Director/Manager	...	Rs.8000-Rs. 13500/-

5. The State Government had issued the circular dated 17th March 1999/

19.4.1999 providing for grant of two higher pay scales on the completion of 12 and 24 years of service. Accordingly the case of the respondent was considered and the order dated 7/2/2003 was passed granting the higher pay scale of Rs.5000-8000 in place of the pay scale of Rs.4500-7000 which the respondent was receiving. The respondent had filed the WP No.1148/2003 raising the grievance that under the Kramonnati Scheme he was entitled to receive the pay scale of next higher post i.e. the pay scale of Rs.8000-13500 and not the higher pay scale provided in the Karmonnati Scheme.

6. A reply was filed by the appellants before the Writ Court taking the stand that under the Kramonnati Scheme contained in the circular dated 17.3.1999/19.4.1999 the Kramonnat pay scale is to be granted in accordance with the Schedule attached with the Scheme and since the case of the respondent was covered by Item Number 7 of the Schedule which prescribes the corresponding higher pay scale of Rs.5000-8000 for the pay scale of Rs.4500-7000, therefore, accordingly the benefit was given to the respondent.

7. Learned Single Judge by the judgment dated 2 1/2/2006 has taken the view that upon Kramonnti the pay is to be fixed in pay scale as mentioned in column 3 of the Schedule enclosed with the circular or in the corresponding pay scale sanctioned for the post and has directed the appellants to give the respondent benefit of the sanctioned pay scale of Rs.8000- 13500 which is the pay scale of the next higher post of Assistant Director of Industries.

8. Learned counsel for appellants submits that the learned Single Judge has committed an error in holding that the respondent is entitled to the regular pay scale of the next higher post whereas in terms of the Kramonnati Scheme he is entitled to the next Kramonnat pay scale as provided in the Schedule annexed with the Scheme.

9. The learned counsel for respondent supporting the impugned judgment has submitted that no error has been committed by the learned Single Judge in directing payment of the next higher pay scale applicable to the promotional post since the Kramonnati Scheme itself mentions that the pay scale mentioned in column 3 of the Schedule annexed with the scheme will be given or "TATHSTHANI" pay scale whichever is applicable will be given, therefore, applicable pay scale of next higher post ought to have been granted.

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

11. The services of the petitioner is governed by the Madhya Pradesh

State Industries (Gazetted) Service Recruitment Rules 1985. As per the Rules, the next higher post for promotion from the post of Inspector/Assistant Manager is the post of Assistant Director/Manager. The respondent is working on the post of Assistant Manager.

12. The State had issued the circular dated 17th March 1999/19th April 1999 containing the Kramonnti Scheme and providing that every regular government employee/officer of the State in his entire tenure of service will be given atleast two higher pay scales in addition to the pay scale applicable at the time of entry into service. As per the Circular, the employees who have completed 12 years of service after their appointment in the same pay scale (including corresponding pay scale) can be granted Kramonnati on higher pay scale mentioned in the schedule annexed with the circular. The criteria for grant of Kramonnat pay scale has been provided in the circular. Along with the Circular, a Schedule has been enclosed providing for the existing pay scale and the corresponding Kramonnat pay scale payable under the circular. The respondent during the relevant time was in the pay scale of Rs.4500-7000 and in the schedule attached to the circular, for this pay scale the corresponding Kramonnat pay scale is Rs.5000-8000 which has been granted to the respondent by the order dated 7/2/2003.

13. We have minutely perused the circular dated 17th March, 1999. In para two of the circular, it has been specifically mentioned that the Kramonnat pay scale will be granted according to the schedule enclosed with the circular. Similarly in para 2(c) it has been stated that on grant of Kramonnati, the pay scale will be fixed on the next higher stage of the Kramonnat Vetanman and the Kramonnat Vetanman has been mentioned in the Schedule enclosed with the Circular. Para 2 and 2(ग) of the Circular read as under:-

> "2/ राज्य शासन की सेवा में नियुक्त ऐसे समस्त कर्मचारी जो संबंधित सेवा भरती नियमों के अंतर्गत नियमित रूप से नियुक्त किये गये हो तथा उसके पश्चात एक ही वेतनमान (तत्स्थानी वेतनमान सहित) में 12 वर्ष अथवा उससे अधिक की अवधि से, निरंतर कार्यरत हों, तो उन्हें निम्नांकित शर्तों के अधीन, *संलग्न सूची में दर्शाये गये अनुसार* उच्च वेतनमान में क्रमोन्नत किया जा सकता है।
>
> 2(ग) क्रमोन्नत होने पर वेतन का निर्धारण *क्रमोन्नति वेतनमान में अगली स्टेज पर* निर्धारित किया जावेगा।

14. Thus, a bare reading of the circular makes it clear that on granting the

Krarnonnat Vetanman under the Circular the employee concerned is to get the corresponding Kramonnat Vetanman which has been given in column 3 of the Schedule enclosed with the circular.

15. Learned counsel for respondent has laid emphasis on the word "TATHSTHANI" mentioned in para 4 of the circular. Para 4 of the Circular reads as under:

> 4/उपरोक्त कंडिका–2 में दर्शायी अनुसार क्रमोन्नत पश्चात प्राप्त होने वाले वेतनमान, संलग्न सूची के कालम नं.2 में दर्शाये गये वर्तमान वेतनमान से संबंधित कालम नं.3 का वेतनमान अथवा उसका तत्स्थानी वेतनमान, जो भी लागू हो, होगा।

16. As per the legal glossary "TATHSTHANI" means "corresponding". In para 4 of the circular it is mentioned that Kramonnat pay scale will be the pay scale mentioned in column 3 of the enclosed Schedule or its corresponding scale whichever is applicable. The language of the circular also does not suggest that on grant of Kramonnati, pay scale of next higher promotional post will be given. The circular apparently has been issued to give relief to the employees who are stagnating on the same pay scale. Proviso to para 2(ग) and para 2(घ) of the circular make it clear that on grant of Kramonnati there is no change in designation and benefit granted under the Scheme is purely temporary as stop gap till the regular promotion is granted and it has no effect on the pay fixation after the regular promotion.

17. Thus as per the Scheme of Kramonnati as contained in the Circular on granting the benefit of Krainonnati under the Scheme, the Kramonnat pay scale as mentioned in the Schedule enclosed with the Circular is to be granted and not the regular higher pay scale applicable to the next promotional post.

18. Learned counsel for respondent has placed reliance upon the judgment of the Supreme Court in the matter of *Union of India and others Vs. M.Mathivanan* reported in (2006)6 SCC 57 but the said judgment is distinguishable on its own facts since in that matter the time bound promotion scheme under consideration itself provide for placing the officials in the next higher grade. The said judgment makes it clear that the time bound promotion and regular promotions are two different concepts. Learned counsel for respondent has also placed reliance upon the Single Bench judgment of this Court in the matter of *Dinesh Kumar Khare Vs. State of MP and another* reported in 2006(1)MPJR 340 but in that case not only the next higher pay

scale of the promotional post was given but in fact literally and actually promotion to the next higher post was granted. He has also placed reliance upon the Division Bench judgment of this Court in the matter of *State of MP and others Vs. Subash Chandra Agrawal* reported in 2008(3)MPLJ 586 but the issue involved in that case was different from the issue involved in the present matter. In that case the issue was in respect of the manner of examination of the eligibility for promotion of time bound promotion pay scale which is not the issue in the present case.

19. Keeping in view the aforesaid aspect of the matter, we are of the considered opinion that the respondent in WA No.78/2006 and the petitioner in WA No.566/2006 were rightly granted the Kramonnat pay scale by the State as provided in the schedule annexed with the circular dated 17th March 1999/19th April, 1999. Accordingly, we set aside the order of the learned Single Judge dated 2 1/2/2006 passed in WP No.1148/2003 and affirm the order of the learned Single Judge dated 7/10/2005 passed in WP No.7560/2003. Thus, Writ Appeal No.78/2006 is allowed and Writ appeal No.566/2006 is dismissed.

20. Original judgment is kept in the record of WA No.78/2006 and a copy whereof be placed in the record of connected WA No.566/2006.

Appeal allowed.

I.L.R. [2013] M.P., 21
WRIT APPEAL

Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice T.K. Kaushal
W.A. No.968/2012 (Jabalpur) decided on 1 November, 2012

BOARD OF DIRECTOR M.P. STATE WARE HOUSING CORPORATION & ors. ...Appellants
Vs.
ANIL KUMAR SAXENA ...Respondent

A. Service Law - Departmental Enquiry - Charge-sheet - **Merely because the respondent had used a communication between Chairman and Managing Director for filing a writ petition, it cannot be said to be a ground for issuing a charge-sheet against him. (Para 2)**

क. सेवा विधि – विभागीय जांच – आरोप पत्र – मात्र इसलिए कि प्रत्यर्थी ने रिट याचिका प्रस्तुत करने हेतु अध्यक्ष और प्रबंध निदेशक के मध्य

संसूचना का उपयोग किया, यह उसके विरुद्ध आरोप पत्र जारी करने का आधार नहीं कहा जा सकता।

***B. Service Law - Permission to file a writ petition by an employee* - Normally permission ought to have been sought by the respondent from the authorities but when the action itself was intended to be taken by the appellants, there was no question of obtaining prior permission for filing a writ petition - An employee cannot expect a permission from the employer for grant of permission to an employee for filing a writ petition against the employer. (Para 8)**

ख. सेवा विधि – कर्मचारी द्वारा रिट याचिका प्रस्तुत करने की अनुमति – सामान्यतः प्रत्यर्थी द्वारा प्राधिकारियों से अनुमति चाही जाना चाहिए थी परंतु जब अपीलार्थीगण द्वारा ही कार्यवाही की जाना आशयित था, तब रिट याचिका प्रस्तुत करने हेतु पूर्वानुमति अभिप्राप्त करने का कोई प्रश्न ही नहीं था – एक कर्मचारी नियोक्ता से, नियोक्ता के ही विरुद्ध रिट याचिका प्रस्तुत करने हेतु अनुमति प्रदान करने के लिए अनुमति की अपेक्षा नहीं कर सकता।

Case referred :

2007(1) SCC 437.

P.K. Kaurav, for the appellants.
Shobha Menon with *Surabhi Ahirkar,* for the respondent.

ORDER

The Order of the Court was delivered by : **KRISHN KUMAR LAHOTI, J.:** This appeal is directed against an order dated 16.5.2012 in W.P.No.886/2003 by which learned Single Judge of this Court allowed the writ petition, quashed the order of punishment imposed upon the respondent, after departmental enquiry.

2. The appellants have assailed the aforesaid order on the following grounds:-

(i) That the learned Single Judge erred in quashing the punishment and exonerating the respondent from the charges.

(ii) That the respondent had used a communication between Chairman and Managing Director for filing a writ petition and in this regard a charge-sheet was duly issued to the respondent. It is also submitted that without obtaining any permission from

the department, the respondent visited Jabalpur for filing a writ petition before the High Court. It is submitted that it was sufficient against respondent for punishment, but the learned Single Judge erred in allowing the writ petition.

3. Smt.Shobha Menon, learned Senior Advocate supported the order. It was submitted that the Chairman of the appellants recommended cancellation of the transfer order by a communication addressed to the Managing Director. When no action was taken by the Managing Director even on the basis of the recommendation of the Chairman, respondent was constrained to file a writ petition before the High Court for his statutory right. It was submitted that for filing a writ petition, respondent was under an obligation to visit Jabalpur for invoking extraordinary jurisdiction of the High Court and without visiting Jabalpur, writ petition could not have been filed. It is also submitted by her that in the peculiar facts and circumstances, there was no necessity for obtaining permission of the appellants for visiting Jabalpur for filing a writ petition.

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

5. Facts of the case are that the respondent was working as Technical Assistant under the appellants at the Headquarters at Bhopal from where he was transferred on 12.9.2001 to Khotagara in the State of Chhattishgarh. The respondent after receiving the transfer order met personally to the Managing Director of the appellants but no action was taken for modification of the transfer. Again he had tried to seek an appointment with the Managing Director but it was refused. Thereafter on 14.9.2001, he had met with the Chairman of the appellants and submitted his grievance. It appears that on the basis of aforesaid, a letter was sent by the Chairman to the Managing Director for modification of the transfer order of the respondent. In the letter, it was recommended that respondent may be posted anywhere within the State of M.P. and not at Katghora which is in State of Chhattishgarh. Aforesaid letter was communicated to the Managing Director, but inspite of this, respondent was relieved by the Managing Director, so he had filed a Writ Petition bearing No.4985/2001 before the High Court in which an order was passed on 23.11.2001. Relevant portion of the order is referred thus:-

> " The petitioner has also placed on record endorsement made by the Chairman on representation filed by the petitioner which clearly mentions that as far as possible employees of the State of M.P. should be transferred within the State of M.P. The

endorsement made by the Chairman is also required to be taken into consideration by the Managing Director. Hence, in the circumstances, it is directed that the order of transfer of the petitioner shall be kept in abeyance till the matter is decided afresh in the light of the order of Chairman and also the fact that petitioner's wife is serving in State of M.P. and others problems pointed out by the petitioner. It is directed that the petitioner shall be allowed to work at Bhopal where he was posted on 12th September, 2001. The petitioner is further directed to file a detailed representation along with a certified copy of this order within ten days from today. The same may be considered and decided sympathetically by the competent authority/respondent No.2. Petitioner is at liberty to assail the order if passed in derogation of his interest afresh."

6. It appears that after the order passed by the High Court, respondent continued at Bhopal at the Headquarters of the appellants but suffered a charge-sheet which was issued on 29.12.2001. In nut-shell, the charges were that respondent without following the procedure had visited the Chairman, he had received the letter of the Chairman, though he was not authorised, with malafide intention he had not handed over the envelope on the same day to the Managing Director. Charges No.4 and 5 relate to visiting Jabalpur for filing of a writ petition without seeking prior permission. Charge No.6 relates to allegation that the original representation submitted by the respondent to the Chairman on 14.9.2001 was filed before the High Court which was appearing in the order dated 23.11.2001 of the High Court. A regular enquiry was conducted in which charges were found proved and the respondent was punished with the penalty by reversion to a lower grade as Junior Technical Assistant on 28.3.2002. Against this order, an appeal was preferred but it was dismissed by the Chairman on 31.7.2002. These orders were under challenge before the High Court. Learned Single Judge considered the matter and held in Paras 10 and 11 thus:-

"10. In view of forgoing, it is apparent that the recommendation of the Chairman made in favour of the petitioner, has been duly considered by this Court and the directions have been issued to the Managing Director to consider the representation in the light of the aforesaid recommendation and also the family circumstances of the petitioner and till then he has been allowed

to continue at Bhopal. After passing such an order by this Court, the act of the petitioner to meet with the Chairman was found to be unbecoming and showing it within the purview of indiscipline and the charge sheet was issued. Charge No.1, 2 and 6 relate to meeting with the Chairman on 14/9/2001 without following the procedure, for obtaining the recommendation from the Chairman on the representation submitted by the petitioner and to put it before this Court where upon the order was passed on 23/11/2001. Charge No.4 and 5 relates to leaving the headquarter without obtaining the permission from the competent authority and during the said period he was not on medical leave and went to Jabalpur from Bhopal for filing the writ petition. Charge No.3 has been dropped by the Managing Director. However, it is apparent that the entire controversy emerged on account of the order of transfer Annexure-P/1 whereby the petitioner was shifted from Headquarter Bhopal to the Branch Office, Katghora within the state of Chhittisgarh. The Managing Director has refused to meet him and on meeting the Chairman has recommended for modification of said order and posting the petitioner any where within the State of Madhya Pradesh looking to the fact that his wife is posted in the State of Madhya Pradesh, but after passing the order by this Court, charge sheet was issued to him.

11. On the anvil of the aforesaid facts, it is to be examined whether the order impugned reverting the petitioner is justified and up to what extent. After perusal of the record of the enquiry, it reveals that after issuance of the charge sheet and on receiving reply thereof, charge No.1, 2, 4 and 5 found as admitted, and on account of such admission enquiry was not conducted while charge No.3 was dropped and the enquiry was conducted only on charge No.6. Looking to the reply Annexure-P/10 filed by the petitioner, it is apparent that he has denied all the allegations as levelled in the charge sheet. While giving the explanation, it is stated by him that when the Managing Director has refused to meet him, then only he met the Chairman who recommended in his favour and such

recommendation was taken note by this court. Reply to the other charges also make it clear that it is an explanation of the allegation as given in the charges, however, in the opinion of this Court, there is no admission by the petitioner in regard to Charge No.1, 2, 4 and 5. It is to be further noted here that charge No.1 relates to meeting with the Chairman without following the procedure. Learned counsel for the respondents is unable to show what is the procedure prescribed to meet with the chairman. In absence of the said procedure, it cannot be presumed that the petitioner has met with the Chairman without following the procedure, however, the said charge cannot be found to be proved. The recommendation made by the Chairman on the representation submitted by the petitioner has been duly considered by this Court and thereafter direction has been issued to consider the representation by the Managing Director in view of the observations as quoted herein above. In such circumstances, it cannot be inferred that the petitioner has met with the Chairman to create differences between the Chairman and the Managing Director particularly when an employee wants to meet with his employer for making recommendation in his favour. The said act cannot be accepted to be an act of the petitioner unbecoming to the conduct of an employee and with a view to create differences between them particularly when the recommendation has been found genuine, therefore, relied upon by this Court and the directions have been issued to the Managing Director to consider the representation of the petitioner. In the said context, in the opinion of this Court, as per clause 21 which deals with the rule of conduct of the employees, the act of the petitioner cannot be said to be contrary to the norms of conduct and unbecoming. More so the procedure for imposition of the penalty which is adopted by the Managing Director himself in the context as aforementioned is not as per fair procedure."

7. Accordingly, relying on the judgment of the Apex Court in *Mathura Prasad Vs. Union of India and others* (2007) 1 SCC 437, the learned Single Judge allowed the writ petition and quashed the order of punishment. This order is under challenge in this appeal.

8. Though learned counsel appearing for the appellants assailed the aforesaid order but from the perusal of the averments, charges and findings recorded by the enquiry officer, we find that in fact no case was made out even for initiating a departmental enquiry. Merely, respondent had used the communication sent by the Chairman to the Managing Director for modification of the transfer order cannot be said to be a ground for issuing a charge-sheet. Apart from this for filing a writ petition before the High Court though normally permission ought to have been sought by the respondent from the authorities but when the action itself was intended to be taken against the appellants, there was no question of obtaining prior permission for filing a writ petition before the High Court. Normally an employee cannot expect a permission from the employer for grant of permission to an employee for filing a writ petition against the employer. Apart from this, for filing a writ petition, respondent was required to visit Jabalpur and could not have filed a writ petition from Bhopal. In aforesaid circumstances, learned Single Judge has rightly quashed the order of punishment in which no fault is found. This appeal is found without merit and is dismissed at admission stage with no order as to costs.

Appeal dismmised.

I.L.R. [2013] M.P., 27
WRIT PETITION
Before Mr. Justice G.D. Saxena & Mr. Justice Sheel Nagu
W.P. No. 3834/2012 (Gwalior) decided on 7 June, 2012

PURSHOTTAM MAHAVIDYALAYA (SHRI) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Constitution - Article 14 & 41 - Right to Education - Article 41 obliges the State to make effective provisions for securing right to education - It is supplement to the Article 14 and therefore, is enforceable under Article 32 of the Constitution of India. (Para 13)***

क. *संविधान – अनुच्छेद 14 व 41 – शिक्षा का अधिकार* – अनुच्छेद 41 राज्य को शिक्षा का अधिकार सुनिश्चित करने हेतु प्रभावी उपबंध करने के लिए बाध्यताधीन करता है – यह अनुच्छेद 14 का अनुपूरक है और इसलिए भारत के संविधान के अनुच्छेद 32 के अंतर्गत प्रवर्तनीय है।

B. ***Admission Rules and Guiding Principles for admission***

to Graduate and Undergraduate Courses - **Directions issued.(Para-17)**

ख. स्नातक एवं स्नातकोत्तर पाठ्यक्रमों में प्रवेश हेतु प्रवेश नियम व मार्गदर्शक सिद्धांत – निदेश जारी किये गये।

(1) That, all the petitioners, eligible candidates and other persons concerning the matter shall have the liberty to submit their objections regarding Admission Rules and Guiding Principles dated 27.03.2012 for the academic Session 2012-2013 issued by the Commissioner, Higher Education, Government of Madhya Pradesh, Satpuda Bhawan, Bhopal.

(2) That, all the documents shall be submitted in support of their objections before the Collector concerned in whose jurisdiction the educational institutions are situated.

(3) That, up to 16.06.2012 the Collector concerned in whose jurisdiction the educational institutions are situated shall acknowledge the receipts of their objections.

(4) All the Collectors in whose jurisdiction the educational institutions are situated shall forward forthwith all the objections alongwith the documents through Special Messenger to the Commissioner, Higher Education, Government of Madhya Pradesh, Satpuda Bhawan, Bhopal up to 18.06.2012 so as to reach there latest by 20.06.2012. The Collectors concerned shall be personally liable to comply with the part of the order positively.

(5) That, the Commissioner, Higher Education, shall himself decide all the objections received from the petitioners, eligible candidates and other persons interested in admission till 27.06.2012. The Commissioner shall decide all the objections by a speaking order meeting out all the grounds and the points raised by the concerned. After passing such order, the Commissioner shall pronounce the order through newspapers which have circulation in the State so that the orders may be complied with positively by the Institutions.

(6) Naturally, this procedure shall take time and there is every possibility of affecting the admission process, hence, it is directed that the admissions for graduate/post-graduate level courses in colleges shall be completed by 15.07.2012. Simultaneously, the Higher Education

Department/Concerning Universities/Concerning Colleges shall verify all the documents which have been mentioned in clause 2.11 of the Admission Rules and Guidelines as and when the candidates/students get themselves registered online so that academic session for the graduate/post-graduate level courses could not be affected and begin with by 20.07.2012. It be also ensured that the UGC guidelines at any cost shall be complied with by the Educational Institutions/Universities and all the concerning departments.

Case referred :

AIR 1992 SC 1858.

D.P. Singh, for the petitioner.
Vivek Khedkar, Dy. A.G. for the respondent/State.
Ami Prabal, on behalf of *I.B. Singh,* Addl. Director, Higher Education, Govt. of M.P. Satpuda Bhawan, Bhopal.

ORDER

The Order of the Court was delivered by :
G.D. Saxena, J.: This order shall govern the disposal of connected writ petitions No.3725/12, 3726/12, 3848/12, 3849/12, 3850/12, 3851/12, 3852/12, 3856/12, 3857/12, 3858/12, 3859/12, 3860/12, 3882/12, 3883/12, 3884/12, 3885/12, 3888/12, 3889/12, 3890/12, 3892/12, 3893/12,3894/12, 3895/12 and 3898/12 as common question of facts and law are involved in the matter.

(2) For facility of reference, facts are being taken from W.P.3834/2012.

(3) The petitioner of W.P.No.3834/2012 has presented the petition under Article 226 of the Constitution of India against the Admission Rules and Guiding Principles dated 27th March 2012 issued by the Commissioner, Higher Education, Government of Madhya Pradesh, Bhopal for academic Session 2012-2013 prescribing thereby procedure for admission to all undergraduate and post graduate courses in all government and private colleges in the State of Madhya Pradesh. It is prayed that by issuing the writ in the nature of Mandamus or suitable writ, order or directions, the impugned Admission Rules and guiding Principles dated 27th March 2012 issued by the Commissioner Higher Education, State of Madhya Pradesh, Bhopal be quashed awarding the cost against the respondents. It is also prayed that till disposal of the

present petition the operation of the impugned order Annexure P-1 may be kept in abeyance.

(4) An application for urgent hearing being W-IA No.3831/2012 has also been filed for hearing the main petition during summer vacation in the interest of the educational career of the students who after passing their secondary examination 2012, are aspirants to get admissions in various colleges under State.

(5) It is also submitted by the learned counsel appearing for the petitioner that the Division Bench at Indore in Writ Petition No. 4055/2012 [Renaissance Education Society through its President Shri. Ravi Kothari and others Versus State of Madhya Pradesh through Principal Secretary Higher Education & another] by order dated 14th May 2012 while allowing the interim relief of same nature directed in the following manner:

> "Having regard to the provisions contained in Ordinance No. 7 (Annexure P/8) prima facie we are of the view that the respondent cannot restrain the petitioners from giving admission to the student of the courses mentioned in the petition. In the circumstances we permit the petitioners to adopt the procedure prescribed in ordinance No. 7 (Annexure P/8) in the matter of admission of students and the petitioner shall not be forced by the respondents to comply the guidelines dated 27th March 2012 (Annexure P/14)."

(6) It is further submitted by the learned counsel that subsequent to the aforesaid order, the Division Bench at Gwalior also granted the same. relief to the petitioner in W.P. No.3726/2012 [GITM College Gwalior Vs. State of Madhya Pradesh and another] vide order dated 31.05.2012. It is, thus, prayed that by following the orders passed by the Division Benches of this Court the respondents be restrained from compelling the students to get admission under new policy as well as guidelines dated 27th March 2012 through online registration for graduation/post graduation studies at their own choice.

(7) Countering the submissions, the respondents by filing reply submitted that the new policy of Admission and Guidelines dated 27th March 2012 is issued by the Commissioner Higher Education, State of Madhya Pradesh, Bhopal, Respondent No. 2, maintaining uniformity of admission throughout the State and for the welfare of the students who are aspirants for regular

admission in their Graduate/Post-graduate Educational Courses. To support his submission, a copy of the order dated 31.05.2012 passed by the Division Bench of this Court at Principal Seat, at Jabalpur, in Writ petition No. 8124/2012 [Yuvak Quami Ekta Committee Through its Secretary Shri S.M. Datta Vs State of MP] has been placed on record. In the said order, it has been observed:

> "The online admission in question is not contrary to the Ordinance No. 7 of the University. The procedure prescribed by the State can be adopted for online admission provided the college in which the admission is sought has the website and the computers are made available to the students. The modern technique enforces transparency and avoids irregularities which are associated with the process of admission and thereby it benefits the students.
>
> No case for interim relief is made out.
>
> Prayer for same is, therefore, dismissed."

So, the respondents/State requested that in the light of the Division Bench order (supra), the interim prayer of the writ petitioner is liable to be dismissed.

(8) Having heard learned counsel appearing for the petitioner as well as learned Deputy Advocate General assisted by the Government Advocate and on perusal of the memo of the writ petition as well as conflicting views expressed vide orders by the different Division Benches of this court, we are of the view that neither the interim prayer made in the present petition can be allowed nor can the impugned order framing Admission Rules and Guidelines dated 27th March 2012 be stayed accepting the policy.

(9) At this juncture, learned counsel appearing for petitioner suggested that all writ petitions which are listed today involving the same issue may be heard finally as per their own merits on ground realities prevailing in villages and towns of the State. It is also requested that if this court finds it proper then looking to the problems which are being faced by the students who are meritorious and belong to the rural area and townships of the State, necessary instructions/directions for their successful timely admissions in the colleges may be issued to the Commissioner, Higher Education, State of Madhya

Pradesh Bhopal for clarification amendments/annulment of the provisions contained in Admission Policy/ Guidelines dated 27th March 2012.

(10) The learned Deputy Advocate General and the Government Advocate appearing for the State also agreed that an appropriate direction in consonance with the new admission policy in order to eradicate the hurdles which are being faced by the students belonging to the rural areas may be issued.

(11) Shri Anil Choubey, Officer on Special Duties, Department of Higher Education, Government of Madhya Pradesh, Bhopal who is also present in person before this Court, has no objection in issuance of such directions.

(12) Before adverting to the factual aspects of the case, we feel it necessary to discuss the mandate enshrined in our Constitution. Article 41 of the Constitution of India speaks as under:

> "Article 41 "Directive Principles Of State Policy.-"Right to work, to education and to public assistance in certain cases ,- The State shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

(13) Thus, Article 41 obliges the State, inter alia, to make effective provisions for securing right to education for citizens. This 'Directive Principle as mentioned is supplement to the Article 14 'Equality before law' hence can be enforceable under Article 32 of the Constitution of India. In *Mohini Jain Vs State of Karnakaka* [AIR 1992 SC 1858], the Hon'ble Apex Court held as under:

> '9. The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under Art. 41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is

illiterate.

10. This Court has interpreted Art. 21 of the Constitution of India to include the right to live with human dignity and all that goes along with it. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 2 SCR 516 : (AIR 1981 SC 746), this Court elaborating the right guaranteed under Art. 21 of the Constitution of India held as under (at p. 753 of AIR):

> "But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the humanself."

12. "Right to life" is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. It extends to the full range of conduct which the individual is free to pursue. The right to education flows directly from right to life. The right to life under Art. 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavour to provide educational facilities at all levels to its citizens.

13. The fundamental rights guaranteed under Part III of

the Constitution of India including the right to freedom of speech and expression and other rights under Art. 19 cannot be appreciated and fully enjoyed unless a citizen is educated and is conscious of his individualistic dignity.

14. The "right to education", therefore, is concomitant to the fundamental rights enshrined under Part III of the Constitution. The State is under a constitutional-mandate to provide educational institutions at all levels for the benefit of the citizens. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.....

17. We hold that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognised educational institutions. When the State Government grants recognition to the private educational institutions it creates an agency to fulfil its obligation under the Constitution. The students are given admission to the educational institutions whether State-owned or State-recognised in recognition of their 'right to education' under the Constitution. Charging capitation fee in consideration of admission to educational institutions, is a patent denial of a citizen's right to education under the Constitution.

18. Indian civilisation recognises education as one of the pious obligations of the human society. To establish and administer educational institutions is considered a religious and charitable object. Education in India has never been a commodity for sale. Looking at the economic-front, even forty five years after achieving independence, thirty per cent of the population is living below poverty-line and the bulk of the remaining population is struggling for existence under poverty-conditions. The preamble promises and the directive principles are a mandate to the State to eradicate poverty so that the poor of this country can enjoy the right to life guaranteed under the Constitution. The State action or inaction which defeats

the constitutional-mandate is per se arbitrary and cannot be sustained. Capitation fee makes the availability of education beyond the reach of the poor....."

(14) On going through the legal aspects of this case, we are also of the considered view that the State while framing the new policy for admission should bear in mind the welfare of the students, who have passed the secondary examination and are eligible for admission in higher education. They should not be deprived of only on the basis of technicalities mentioned in the Policy framed by the Commissioner, Higher Education, Government of Madhya Pradesh. Per contra, it is also true that looking to the educational career of the students appearing in graduate or post graduate courses education calender as declared by the Universities in State should be followed in Stricto Sensu but should not elasticized for an indefinite period.

(15) Now, on considering the procedure prescribed for the admission under 'Admission Rules-cum-Guiding Principles declared by the Commissioner, Higher Education, State of Madhya Pradesh on 27th March, 2012, it appears that by such procedure the registration online has been made compulsory on the portal of the Government website 'http://www.mp. gov.in/ highereducationmp' for the students who have passed successfully the Secondary Examination 2012 and are aspirants for admission at undergraduate level in the courses run by the State/Private but recognized Institutions in State between 20th May 2012 to 10th June 2012 and for registration online in the post-graduate courses on the portal of the Government website 'http:// www.mp. gov.in/highereducationmp by the students who have passed graduate courses from recognized Universities and who are aspirants for getting admission in post graduate courses run by the recognized Universities / Government Post-graduate Colleges or recognized Institutions in the State between 01St June 2012 to 24th June 2012. It is further mentioned in the guidelines that after completing the process of online registration, at nearest helpline centres established in/under the area of Government Colleges, all documents mentioned in clause 2.11 of the admission policy shall be verified and one set of photocopies of the documents shall be provided to the helpline centres upto 11th June 2012 by the aspirants seeking admission in undergraduate/post-graduate level courses and the process of verification shall be completed up to 25th June 2012. It is also mentioned in the policy that such students who remain unsuccessful in registering themselves online and in verifying the aforesaid documents before the helpline centres will be treated

to be ineligible and shall not be permitted to get admission in graduate/post graduate level courses.

(16) We do not hesitate to mention here and deny the difficulties faced by the aspirants living in village and townships of the State. For e.g., want of electricity; want of facility of internet; despite declaration of the result by the Board of Secondary Education of State, sometimes marksheets are not made available; and the students who appear in the entrance examination have to wait for their results of entrance examinations.

(17) Considering the aforesaid, we are of the view that the ground realities have not been taken into consideration in proper perspective at the time of finalization of the Admission policy-cum-guidelines for academic Session 2012-2013 by the Commissioner, Higher Education, State of Madhya Pradesh. Under such circumstances, we are constrained to issue the following directions to the Commissioner and all concerned to comply with the same after affording opportunity of hearing to the persons affected keeping in view the object of Article 41 of the Constitution of India as quoted above. Accordingly, the petition stands disposed of with the following directions:

> (1) That, all the petitioners, eligible candidates and other persons concerning the matter shall have the liberty to submit their objections regarding Admission Rules and Guiding Principles dated 27.03.2012 for the academic Session 2012-2013 issued by the Commissioner, Higher Education, Government of Madhya Pradesh, Satpuda Bhawan, Bhopal.
>
> (2) That, all the documents shall be submitted In support of their objections before the Collector concerned in whose jurisdiction the educational institutions are situated.
>
> (3) That, up to 16.06.2012 the Collector concerned in whose jurisdiction the educational institutions are situated shall acknowledge the receipts of their objections.
>
> (4) All the Collectors in whose jurisdiction the educational institutions are situated shall forward forthwith all the objections alongwith the documents through Special Messenger to the Commissioner, Higher Education,

Government of Madhya Pradesh, Satpuda Bhawan, Bhopal up to 18.06.2012 so as to reach there latest by 20.06.2012. The Collectors concerned shall be personally liable to comply with the part of the order positively.

(5) That, the Commissioner, Higher Education, shall himself decide all the objections received from the petitioners, eligible candidates and other persons interested in admission till 27.06.2012. The Commissioner shall decide all the objections by a speaking order meeting out all the grounds and the points raised by the concerned. After passing such order, the Commissioner shall pronounce the order through newspapers which have circulation in the State so that the orders may be complied with positively by the Institutions.

(6) Naturally, this procedure shall take time and there is every possibility of affecting the admission process, hence, it is directed that the admissions for graduate/post-graduate level courses in colleges shall be completed by 15.07.2012. Simultaneously, the Higher Education Department/Concerning Universities/Concerning Colleges shall verify all the documents which have been mentioned in clause 2.11 of the Admission Rules and Guidelines as and when the candidates/students get themselves registered online so that academic session for the graduate/post-graduate level courses could not be affected and begin with by 20.07.2012. It be also ensured that the UGC guidelines at any cost shall be complied with by the Educational Institutions/Universities and all the concerning departments.

(18) A copy of this order may be placed on record on each connected petition.

(19) The Registry is further directed to fax the copy of the order to the Commissioner, Higher Education, State of Madhya Pradesh, Satpuda Bhawan, Bhopal for compliance of the directions of this Court made above.

Order accordingly.

I.L.R. [2013] M.P., 38
WRIT PETITION
Before Mr. Justice A.K. Shrivastava
W.P.No. 1499/2001 (Jabalpur) decided on 9 August, 2012

BALA DUBEY (Smt.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Ceiling on Agricultural Holdings Act, M.P.(20 of 1960), Section 11(3) - Notice to Creditor - **Holder of land in her return had disclosed that the land in question has been mortgaged by her with the Bank - No Notice was issued to Bank - Bank auctioned the land for recovery of dues which was purchased by petitioner - Words Creditors and all other persons interested in the land used in Section 11(3) cannot be ignored and are mandatory - As competent authority was aware that land has been mortgaged, therefore, should have invited and adjudicated the objections and thereafter the order must have been passed by settling the dispute of the Bank and by discharging the charge over the land which was declared to be surplus - As no notice was issued, proceedings under the Act are vitiated. (Paras 13 to 15)**

कृषि जोत अधिकतम सीमा अधिनियम म.प्र. (1960 का 20), धारा 11(3) – लेनदार को नोटिस – भूमिधारक ने अपने परिलेख में प्रकट किया है कि प्रश्नगत भूमि उसके द्वारा बैंक के साथ बंधक की गई है – बैंक को कोई नोटिस जारी नहीं किया गया – बैंक ने देयकों की वसूली हेतु भूमि की नीलामी की, जिसे याची द्वारा क्रय किया गया – धारा 11(3) में प्रयुक्त शब्द "लेनदार और भूमि में हितबद्ध सभी अन्य व्यक्ति", की उपेक्षा नहीं की जा सकती और वह आज्ञापक है – चूंकि सक्षम प्राधिकारी को ज्ञात था कि भूमि बंधक की गई है, इसलिए आक्षेपों को प्राप्त कर न्यायनिर्णित करना चाहिए था और उसके बाद बैंक के विवाद का निपटारा करके एवं अधिशेष घोषित की गई भूमि से भार की प्रमुक्ति करके, आदेश पारित किया जाना चाहिए था – चूंकि कोई नोटिस जारी नहीं किया गया, अधिनियम के अंतर्गत कार्यवाही दूषित।

Cases referred :

2003(5) MPLJ 68, 1982 MPLJ.575.

Sanjay K. Agrawal, for the petitioner.
Divya Kirti Bohre, P.L. for the respondents No. 1 to 4/State.
Rajneesh Gupta & Vikas Mishra, for the respondent No.5.

Pranay Verma, for the interveners.

ORDER

A.K. SHRIVASTAVA, J :- By this petition under Articles 226 and 227 of the Constitution of India, the petitioner is challenging the legality and validity of the impugned order dated 6.5.1978 (annexure P/21) passed by the Competent Authority under the Ceiling on Agriculture Holdings Act, 1960 (in short, the Ceiling Act) whereby the land in question has been declared surplus and this order has been affirmed up to the Board of Revenue.

2. The facts necessary for the disposal of this case lie in a narrow compass. Suffice it to say that the holder of the land was one Girja Bai. In the year 1972 said Girja Bai obtained loan from 5th respondent M.P. State Cooperative Land Development Bank (hereinafter referred to as the Bank) and mortgaged the land in question to the Bank. On account of non payment of loan of Rs. 20,000/- which she took, the Bank took a decision to auction the land in question. Eventually, on 9.6.1985 sale notice (annexure P/8) was issued by the Bank; on 11.6.1985 (annexure P/9) the auction took place; on 24.9.1985 (annexure P/12) the sale was confirmed by Assistant Registrar, Cooperative Societies; and on 4.6.1988 (annexure P/13) the sale deed was executed in favour of the petitioner/auction purchaser.

3. On bare perusal of the averments made in the petition as well as the impugned order of the Competent Authority dated 6.5.1978 (annexure P/21) it is gathered that the draft statement was published and thereafter the return (annexure P/20) was submitted by the said holder Girji Bai stating therein in the requisite column that the land in question has been mortgaged by her with the Bank (respondent no.5). But, no notice under Section 11(3) of the Ceiling Act was issued to the Bank.

4. The Competent Authority on the basis of the material placed on record declared the land in question to be surplus and the said order has been affirmed up to the Board of Revenue. Thereafter, the surplus land has been allotted to the interveners also who are said to be landless persons.

5. In this manner the present petition has been filed by the auction purchaser/petitioner before this Court.

6. It has been put forth by Shri Sanjay K. Agrawal, learned counsel for the petitioner that once the holder of the land has fairly disclosed that the land

in question has been mortgaged with the Bank since she had obtained loan of Rs. 20,000/-, it was incumbent upon the Competent Authority to have issued notice to the Bank and having not done so, the proceedings stands vitiated and thus the right of auction purchaser/petitioner who bought the land in question in auction sale cannot be jeopardized. In support of his contention, learned counsel has placed heavy reliance on the Single Bench decision of this Court *Saadat Mohammad Khan and others Vs. State of M.P. and others* 2003(5) M.P.L.J. 68.

7. On the other hand Smt. Divya Kirti Bohre, learned Panel Lawyer argued in support of the impugned order and submitted that this petition has no merit and the same be dismissed.

8. Shri Pranay Verma, learned counsel appearing for the interveners submitted that the proceedings of auction took place in terms of M.P. Sahkari Bhoomi Vikas Bank Adhiniyam, 1966 and the rules framed thereunder but Section 49 of the Ceiling Act is having overriding effect upon all other enactments and, therefore, it has been submitted that if the land has been declared surplus under the Ceiling Act, the action of the competent authority cannot be said to be illegal and the petitioner is having no right. It has also been put forth by him that the property in question has already vested in the State Government in the year 1978 since final statement was already published in terms of Section 11(6) of the Ceiling Act and the auction took place thereafter in the year 1985. By inviting my attention to Chapter V of the Ceiling Act it has been put forth by learned counsel that the Bank was having only limited right as emphasized in different sections of this Chapter and the only right which the Bank owns is to realize the amount which was given to the holder of the land on loan and nothing more and thus according to the learned counsel the petitioner who is the auction purchaser is having no right in the land in question.

9. Having heard learned counsel for the parties I am of the view that this petition deserves to be allowed.

10. It would be condign to refer certain undisputed facts which reads thus:-

(i) Girji Bai was the holder of the land;

(ii) in the year 1972 she obtained loan from the Bank/ respondent no.5;

(iii) since she could not repay the loan amount, sale notice was issued on 9.6.1985 by the Bank (annexure P/8);

(iv) on 11.6.1985 (anneuxre P/ 9) the auction of the land in question took place;

(v) on 24.9.1985 (annexure P/12) the sale was confirmed in favour of the petitioner since she was the highest bidder; and

(vi) on 4.6.1988 sale deed (annexure P/13) was executed in favour of the petitioner.

11. Apart from the aforesaid admitted facts it is also no more in dispute that the return was submitted by the holder Girji Bai (annexure P/20) and in the specific column specifically it has been mentioned by her that the land in question has been mortgaged in the Bank since she obtained loan of Rs. 20,000/-.

12. It is curious to note that despite it was disclosed by the holder Girja Bai that the land has been mortgaged in the Bank, the Competent Authority, for the reason best known to him, did not issue any notice under Section 11(3) of the Ceiling Act to the Bank. Thus, the action of the competent authority runs dehors to the mandatory provisions of Section 11(3) of the Ceiling Act.

13. On close scrutiny of sub-section (3) of Section 11, it would reveal that the words "creditors and all other persons interested in the land" have been used by the Legislature while enacting the said Section and thus according to me, those words are having some meaning and they cannot be ignored. The very purpose of introducing these words in the aforesaid provision is that before declaring the land to be surplus, the interested persons should be heard and all the disputes must be redressed. Since no notice was served upon the Bank which was mandatory in terms of Section 11(3) of the Ceiling Act, according to me, the proceedings under the said Act are vitiated. In this context, the decision of Single Bench of *Saadat Mohammad Khan* (supra) has rightly been placed by learned counsel for the petitioner. The Single Bench decision of this Court *Jagatshingh Barelal Vs. State of M.P. through Collector, Vidisha* (presided over by Hon'ble Shri Justice G.L. Oza, as His Lordship then was) 1982 M.P.L.J. 575 has held that if no notice under Section 11(3) of the Ceiling Act was sent to the persons who are in possession of the property in question and they were interested persons, the action of the Competent

Authority was found to be bad in law. Similar is the position here also. Since admittedly no notice was served upon the Bank despite the Competent Authority was fully aware that the land in question has been mortgaged with the Bank, therefore, the order passed by the Competent Authority is illegal and is bad in law.

14. Under Section 11(3) of the Ceiling Act, no distinction is made to the person or Authority with whom the land which is to be declared surplus is mortgaged and there is a charge over the said land. Had been the said intention of the legislature, it would have been enacted in Section 11(3) itself that no notice is required to be served upon such a category of persons or Authority (like Bank).

15. I do not find any merit in the contention of learned counsel for the interveners that because Section 49 of the Ceiling Act is having overriding effect upon M.P. Sahkari Bhoomi Vikas Bank Adhiniyam, 1966, therefore, rights which have been accrued to the petitioner under the said Adhiniyam cannot be said to be jeopardized because the Ceiling Act is having overriding effect. Similarly, I do not find any merit in the next contention of learned counsel that under Section 11(6) of the Ceiling Act the final statement was published therefore, the petitioner or the Bank is having no right and further the Bank is having only right to realize the amount as envisaged under Chapter V of the Ceiling Act. The answer of all these arguments is simple that firstly the notice ought to have been issued under Section 11(3) to the Bank since it already came into knowledge of the Competent Authority that the land has been mortgaged and thereafter all those objections should have been adjudicated and thereafter the order must have been passed by settling the dispute of the Bank and by discharging the charge over the land which was declared to be surplus. At this juncture, it would be apt to quote Section 11(3) of the Ceiling Act which reads thus:-

> "11(3). The draft statement shall be published at such place and in such manner as may be prescribed and a copy thereof shall be served on the holder or holders concerned, the creditors and all other persons interested in the land to which it relates. Any objection to the draft statement received within thirty days of the publication thereof shall be duly considered by the competent authority who after giving the objector an opportunity of being heard shall pass such order as it deems

fit."

According to me, the words which are embodied in the aforesaid clause "the creditors and all other persons interested in the land" are having greater significance and it would mean that it was mandatory on the part of the Competent Authority to have issued notice to them. If the contention of learned counsel for the interveners is accepted then Section 11(3) of the Ceiling Act would become otiose hence such contention cannot be accepted.

16. For the reasons stated hereinabove, I find that there is merit in the petition and accordingly the same is hereby allowed. The impugned order dated 6.5.1978 (annexure P/21) passed by the competent authority is hereby set aside and in consequence thereof all other orders are quashed. However, this order shall be confined only up to the land which was mortgaged to the Bank i.e. 15 acres of Khasra No. 21/1 of Village Kajalkhedi, Tahsil Babai, District Hoshangabad.

16. The petition is accordingly allowed to the extent indicated above. No costs.

Petition allowed.

I.L.R. [2013] M.P., 43
WRIT PETITION
Before Mr. Justice A.K. Shrivastava
W.P.No. 11990/2012 (Jabalpur) decided on 22 August, 2012

ANEETA RAJPOOT (Smt.) ...Petitioner
Vs.
SMT. SARASWATI GUPTA ...Respondent

*A. **Evidence Act (1 of 1872), Section 65 - Photo copy of document** -* **Petitioner filed application for taking photo copy of the receipt on the ground that the original was taken away by the husband of the plaintiff/respondent on false pretext - In application for taking secondary evidence on record, it is nowhere mentioned that the photocopy was made from the original and it was compared with original - Name of person who has obtained the photocopy by mechanical process has also not been mentioned and further who compared the same with original is also not mentioned - Photo copy cannot be taken on record as secondary evidence. (Para 11)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 65 – दस्तावेज की छायाप्रति – याची ने रसीद की छायाप्रति लेने के लिए आवेदन इस आधार पर प्रस्तुत किया कि वादी/प्रत्यर्थी के पति द्वारा मिथ्या बहाने से मूल दस्तावेज ले जाया गया था – द्वितीयक साक्ष्य अभिलेख पर लेने के लिये किये गये आवेदन में यह कहीं उल्लिखित नहीं कि छायाप्रति को मूल से बनाया गया था और उसे मूल के साथ मिलान किया गया था – उस व्यक्ति का नाम भी उल्लिखित नहीं जिसने यांत्रिक प्रक्रिया से छायाप्रति अभिप्राप्त की और इसके अतिरिक्त किसने उक्त को मूल के साथ मिलान किया उसका भी उल्लेख नहीं – छायाप्रति को द्वितीयक साक्ष्य के रुप में अभिलेख पर नहीं लिया जा सकता।

B. Evidence Act (1 of 1872), Section 65 - Secondary Evidence **- Defendant/petitioner may file another application praying permission to adduce secondary evidence in the shape of oral evidence examining the witnesses in order to prove the contents of original receipt - Trial Court shall allow such an application and shall permit the petitioner/ defendant and her witnesses to adduce secondary evidence in regard to contents of said document and said evidence should not be side-lined or should be treated as an inferior evidence merely because the petitioner is unable to produce the original receipt as plaintiff by playing a trick has concealed the document in question. (Para 15)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 65 – द्वितीयक साक्ष्य – प्रतिवादी/याची मूल रसीद की अंतर्वस्तु साबित करने हेतु साक्षियों के परीक्षण द्वारा मौखिक साक्ष्य के रुप में द्वितीयक साक्ष्य जोड़ने की अनुमति की प्रार्थना का दूसरा आवेदन प्रस्तुत कर सकती है – विचारण न्यायालय उक्त आवेदन को मंजूर करेगा और याची/प्रतिवादी को तथा उसके साक्षियों को उक्त दस्तावेज की अंतर्वस्तु के संबंध में द्वितीयक साक्ष्य जोड़ने की अनुमति देगा और मात्र इसलिए कि याची मूल रसीद प्रस्तुत करने में अक्षम है, उक्त साक्ष्य को अलग नहीं करना चाहिए या निम्नतर साक्ष्य नहीं मानना चाहिए, क्योंकि वादी द्वारा चालबाजी से प्रश्नगत दस्तावेज का छिपाव किया गया है।

Cases referred :

AIR 1999 SC 1668, AIR 2007 SC 1721, AIR 1975 SC 1748, AIR 1997 Raj 75, 2000(10) SCC 523, AIR 2007 MP 157.

Amitab Gupta, for the petitioner.
Amod Gupta, for the respondent.

ORDER

A.K. Shrivastava, J :- By this petition under Article 227 of the Constitution of India, the petitioner is challenging that part of the impugned order dated 27.06.2012 by which the defendant's (petitioner's) application under Section 65 of the Indian Evidence Act, 1872 (in short "Evidence Act") has been rejected.

2. The facts necessary for disposal of this petition lie in a narrow compass. Suffice it to say that a suit for eviction on the relationship of landlord and tenant has been filed by plaintiff/respondent against defendant/petitioner. The defendant/petitioner submitted written-statement and also filed counter claim praying a decree of mandatory injunction directing plaintiff to execute a registered sale-deed in her favour; perpetual injunction restraining the plaintiff from interfering with the possession of the defendant and also from transferring, encumbering and creating any third party right; declaration that suit property be charged in respect of consideration money paid by the defendant in advance; and any other reliefs which the court deems fit. According to pleadings of counter claim earlier the parties were having very cordial and sweet relationship as a result of which they entered into an agreement of sale in regard to the disputed house on 28.09.2010 and it was agreed between the parties that said house will be sold for a consideration of Rs.8.70 lac. In advance a sum of Rs.30,000/- was paid and a sum of Rs.1.50 lac has been deposited in the account at State Bank of India Milauniganj, Gopal Bagh Branch Jabalpur of the plaintiff's husband Chhatradhari Gupta. Thus, a total sum of Rs.1.80 lac has already been paid to the plaintiff. A receipt of accepting Rs.1.80 lac has also been issued by the plaintiff in presence of witnesses.

3. Further it has been pleaded in the counter claim that on 05.12.2008 the plaintiff alongwith her son-in-law visited to the house of defendant and asked her husband to prepare the document regarding transfer between the parties. It was also demonstrated by the plaintiff that some other persons being interested to purchase the disputed house are pressurizing her to sell the same in their favour, therefore, written document in original be handed-over to her in order to show those persons that plaintiff has already obtain the substantial money from petitioner and under this pretext the original (primary evidence) document of receipt was handed-over by the defendant/petitioner

to plaintiff/respondent and a photocopy thereof was kept by her.

4. An application under Section 65 of the Evidence Act was submitted by the defendant/petitioner in the Trial Court praying that the photocopy of the receipt may be taken on record as secondary evidence. However, this prayer was vigorously opposed by the plaintiff by filing reply completely denying the fact that ever any such receipt was issued and the same was handed-over to her.

5. Learned Trial Court marked the aforesaid application of Section 65 as I.A. No.2 and by impugned order has rejected the same. In this manner this petition under Article 227 of the Constitution of India has been filed.

6. In his usual vehemence learned counsel for the petitioner Shri Amitab Gupta by inviting my attention to section 63 and also section 65 (a) and (b) of the Evidence Act has contended that since the original receipt was obtained by plaintiff's husband under the false pretext that the same is required by plaintiff to show to several other persons who are pressurizing the plaintiff to sell the suit property to them that the plaintiff has obtained a substantial amount from the defendant and thus she cannot sell the suit property to them. Thus, the original document is in power and possession of the plaintiff and therefore if the application under section 65 of the Evidence Act in terms of Clauses (a) and (b) of the said provision has been filed, the learned Trial Court ought to have admitted the photocopy of the said receipt in secondary evidence. Learned counsel has also invited my attention to the section 3 of the Evidence Act and submitted that as per the illustration given interpreting the term "document" has contended that a 'document' would also include words "printed, lithographed or photographed" and therefore impugned photocopy is a document and it can be proved in terms of Clauses (a) and (b) to section 65 of the Evidence Act. In support of his contention learned counsel has placed heavy reliance on the decision of Supreme Court *Nawab Singh v. Inderjit Kaur* AIR 1999 SC 1668 and also another decision *Smt. J. Yashoda v. Smt. K. Shobha Rani* AIR 2007 SC 1721 wherein the earlier decision of Supreme Court *Ashok Dalichand v. Madhavlal Dube and another,* AIR 1975 SC 1748 has been relied upon. Learned counsel has placed heavy reliance on the decision of Rajasthan High Court in *Smt. Ratan Sharma v. Ambesedar Drycleaners and others* AIR 1997 Rajasthan 75 wherein it has been held that photocopy is admissible in evidence.

7. It has also been put-forth by learned counsel for petitioner that primary

or best evidence is that which affords the greatest certainty to its contents and secondary evidence is that which is inferior to primary evidence and which upon its face shows that better evidence exists and evidence which shows upon its face that better remains behind is secondary. Hence according to learned counsel by keeping this principle in mind, the photocopy of the document should have been admitted in the evidence.

8. It has also been put-forth by learned counsel that the photocopy has been obtained by a mechanical process, therefore, it has been prayed that application to admit the photocopy in secondary evidence filed under Section 65 of the Evidence Act, which has been rejected by learned Trial Court, be allowed.

9. On the other hand Shri Amod Gupta argued in support of the impugned order.

10. I have considered the submissions of learned counsel for the parties.

11. Learned counsel for petitioner/defendant rightly submitted that secondary evidence would include categories mentioned in Clauses (1) to (5) to Section 63. Learned counsel further rightly submitted that if conditions embodied in Section 65(a) and (b) of the Evidence Act exist, secondary evidence relating to document can be given. In support of his forceful submissions, learned counsel has placed reliance on two decisions of Supreme Court *Nawab Singh* (supra) and *Smt. J. Yashoda* (supra) and also of learned Single Bench of Rajasthan High Court *Smt. Ratan Sharma* (supra). But, to me, even then in the facts and circumstances of the present case the photocopy of the document of receipt cannot be admitted in secondary evidence. On bare perusal of the application under Section 65 of the Evidence Act which has been rejected by the impugned order it is found that although it has been mentioned that under the false pretext the plaintiff and her husband obtained the original receipt from petitioner/defendant, but, nowhere it has been so stated in the application that the photocopy was made from the original and it was compared with original. The name of the person, who had obtained the photocopy by mechanical process has also not been mentioned in the application and further who compared the same with original his name is also not mentioned nor any affidavit in that regard has been filed.

12. So far as the applicability of Clause (2) of Section 63 Evidence Act placed reliance by the learned counsel for petitioner is concerned, according

to me, it can be said that by some mechanical process a photocopy of original receipt was obtained, but, there cannot be any surety of its correctness and accuracy in absence of supporting material on record . Again in this regard there is no averment in the application that the photocopy which has been obtained by mechanical process was never tempered and it ensures its accuracy. Even if accurate photocopy is obtained by a mechanical process, it is a matter of common parlance that after inserting some words on a document which is already a photocopy and by interpolating the same, another photocopy of the said interpolated photocopy may be obtained and thus the accuracy of photocopy is always surrounded by dark clouds of doubt. In the present case since there is no averment in the application under Section 65 that photocopy was compared with the original and it is an accurate photocopy of the original and further by not filing any affidavit of person who obtained the said photocopy is on record, it is difficult to hold the hallmark and authenticity and accuracy of the photocopy.

13. The decision of *Nawab Singh* (supra) placed reliance by the learned counsel for petitioner is not subject to context since it does not relate to admissibility of a photocopy of the document to be admitted in secondary evidence. Similarly another decision of *Smt. J. Yashoda* (supra) is also not applicable because the photocopy was not compared with the original and therefore photocopy was not admitted as secondary evidence in that case (see para 7 of the said decision). According to me, not only the satisfaction of Clause (a) to Section 65 is required, but simultaneously it is also required that the photocopy was compared with the original in terms of section 63(3) of the Evidence Act.

14. The Supreme Court in *United India Assurance Co. Lted. V. Anbari and other* 2000(10) SCC 523 while dealing with the photocopy of licence of a driver expressed the view as under :-

> 3. Learned counsel for the appellant submitted that the point regarding validity of the driver's licence was raised by the appellant before the Motor Accidents Claims Tribunal and the Tribunal in accepting photocopy of a document purporting to be the driver's licence and recording a finding that the driver had a valid licence, has committed a grave error of law. He also submitted that the High Court has not dealt with the said contentions of the appellant and without giving any reason has

> dismissed the appeal. The Tribunal and also the High Court have failed to appreciate that production of a photocopy was not sufficient to prove that the driver had a valid licence when the fact was challenged by the appellant and genuineness of the photocopy was not admitted by it.

Thus, the Apex Court has held that photocopy was not sufficient to prove that driver had a valid licence. By following the aforesaid decision of Supreme Court, Shri Justice Dipak Misra, J (as His Lordship then was) in *Haji Mohd. Islam and another v. Asgar Ali and Another* AIR 2007 MP 157 has held that when a photocopy without any reasonable source has been filed, it is not permissible as secondary evidence. Yet there is another decision of this Court in W.P. No.8224/2010 (*Sunil Kumar Sahu v. Smt. Awadharani*) decided on 31.08.2010 wherein it has been held that photocopy of a document is not admissible as secondary evidence under Section 65 of the Evidence Act.

15. However, this would never mean that if the plaintiff by taking undue advantage of having possession of original document of receipt with her, would be permitted to conceal the document in question and in order to prove her dishonesty and her act trying to deprive the defendant/petitioner from proving the contents of the document in question so as to prove her case, it is hereby directed that the petitioner/ defendant shall be absolutely free to file another application under Section 65 of the Evidence Act praying therein that the defendant may be permitted to adduce secondary evidence in the shape of oral evidence examining the witnesses in order to prove the contents of original receipt of Rs.1.80 lac which is said to be in power and possession of the plaintiff. If such an application is filed by the defendant-petitioner, learned Trial Court shall allow that application and permit the defendant and her witnesses to adduce secondary evidence in regard to contents of the said document and said evidence should not be side-lined nor should be treated as an inferior evidence merely because the petitioner/defendant is unable to produce the original receipt because the plaintiff by playing a trick had concealed the document in question.

16. With the aforesaid observations, without interfering in the impugned order, this petition is disposed of.

Petition disposed of.

I.L.R. [2013] M.P., 50
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 7209/2012 (Indore) decided on 28 August, 2012

KALA BAI JAISWAL (SMT.) ...Petitioner
Vs.
DISTRICT COLLECTOR, JHABUA & anr. ...Respondents

Tender - Conditions **- One of the condition was to sign the RFP document on each page - Petitioner having accepted the conditions of tender and having submitted the tender document cannot subsequently come forward to say that signing of each page of RFP document was not an essential condition - RFP document was a document by which the bidder was supposed to provide all the information sought from him and if for such an important document, the respondents have put a condition that it is to be self attested on each page, the non-compliance of the same will certainly entail the rejection of the tender. (Para 6)**

निविदा – शर्तें – एक शर्त, आर.एफ.पी. दस्तावेज के प्रत्येक पृष्ठ पर हस्ताक्षर करने की थी – याची, निविदा की शर्तों को स्वीकार करके और निविदा दस्तावेज प्रस्तुत करके, बाद में, यह कहते हुए आगे नहीं आ सकता कि आर.एफ. पी दस्तावेज के प्रत्येक पृष्ठ पर हस्ताक्षर करना, आवश्यक शर्त नहीं थी – आर.एफ. पी. दस्तावेज, ऐसा दस्तावेज था जिसके द्वारा बोली लगाने वाले को उससे चाही गयी सभी जानकारी पेश करना अपेक्षित है, और यदि ऐसे महत्वपूर्ण दस्तावेज हेतु, प्रत्यर्थीगण ने शर्त रखी है कि उसे प्रत्येक पृष्ठ पर स्वप्रमाणित करना है, इसका अननुपालन, निश्चित रुप से निविदा नामंजूर करने को आवश्यक बना देगा।

Case referred :

AIR 1991 SC 1579.

A.K. Sethi with *Harish Joshi*, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondents.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J.: With consent heard finally.

This order shall also govern disposal of Writ Petition No.7210/2012 as the facts and question of law involved are common in both the cases.

For the sake of convenience the facts are taken from Writ Petition No.7209/2012.

2. In pursuance to the N.I.T. dated 21.05.2012 issued by the respondent for establishment, operation and maintenance of Public Service Centre at various places in Jhabua District the petitioner submitted her tender for the said work. Her technical bid was not accepted on the ground that she did not file Power of Attorney along with the tender document and that the request for proposal (RFP) document was not signed on each page. Feeling aggrieved the petitioner has filed this petition.

3. During the course of the argument, learned Senior counsel for the petitioner did not dispute that neither the Power of Attorney was attached with the tender nor RFP document was signed on each page. He however contended that it was not necessary to have attached the Power of Attorney and to have signed the RFP document on each page. He has taken us to the tender conditions to show that filing of the Power of Attorney, could not have been insisted at that stage. He has argued that the non-signing of the RFP document would not vitiate the petitioner's tender as it was the document downloaded from the respondent's web site itself. He further argued that it was not an essential condition on the basis of non-compliance of which the tender was liable to be rejected. He placed reliance on the judgment of the Supreme Court in the case of *M/s Poddar Steel Corporation Vs. M/s Ganesh Engineering Works and others* (AIR 1991 SC 1579).

4. Ms. Mini Ravindran, learned Dy. Govt. Advocate on the other hand argued that Power of Attorney was necessary in view of Clause 2.3.2 (i) of the tender conditions. She argued that in view of Clause 2.3.2 (e) of the tender conditions it was also necessary for the petitioner to have signed on each page of RFP document. She submits that the petitioner having not complied with the requirement of Clause 2.3.2. (e), her tender was rightly rejected. She also pointed out that not only the petitioner's tender but all the tenders have been rejected on same or similar grounds. She also stated that after cancellation of all the tenders, the fresh tenders have already been invited. In the circumstances, the State Government having cancelled all the tenders and having invited fresh tenders nothing survive in this writ petition.

5. We find that in the tender document a condition of signing by tenderer on each page of the RFP document exists. The petitioner having accepted the conditions of the tender and having submitted the tender document cannot

subsequently come forward to say that signing of each page of RFP document was not an essential condition. The RFP document was a document through which the bidder was supposed to provide all the information sought from him and if for such an important document the respondents have put a condition that it is to be self attested on each page and the annexures duly certified, the non compliance of which can certainly entail the rejection of the tender and the tenderer cannot be allowed to say it was not an essential condition. Thus in view of the admitted position that the RFP document was not signed on each page, even assuming that filing of Power of Attorney was not necessary at that stage, we decline to interfere in the matter for non-compliance of Clause 2.3.2. (e).

6. The judgment of the Supreme Court in the case of *M/s Poddar Steel Corporation Vs. M/s Ganesh Engineering Works and others* (supra) is on different facts and has no application to the facts of the present case. The Supreme Court while interpreting Clause No. 6 of the N.I.T., which was the subject matter for consideration, requiring the tenderer to deposit the earnest money by cash or by demand draft drawn on State Bank of India has held that in submitting its tender accompanied by cheque of the Union Bank of India and not of the State Bank, Clause No.6 of the tender notice was not obeyed literally but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. In the circumstances, the Supreme Court said as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice, in meticulous detail and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In his case the authority issuing the tender may be required to enforce them rigidly. In the other case, it must be open for the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

7. However, in the present case it is clear that through RFP document the tenderer was required to provide all the information sought from her. If for such an important document a condition is imposed in the tender document to the effect that it should be self attested on each page and the annexures are required to be duly certified the petitioner tenderer cannot be allowed to flout the same and to contend that it is a condition which can be waived and no

literal compliance of it can be insisted.

8. Having regard to the aforesaid and also keeping in view the subsequent development that not only the petitioner's tender has been cancelled but tenders of all the tenderers were also cancelled by the respondents leading to a situation that even if this petition is allowed, the petitioner will remain a single tenderer in the field, as a result of which there would not be any fair competition, we are not inclined to exercise the discretionary jurisdiction under Article 226 of the Constitution of India.

9. In the circumstances, the petition deserves to be and is hereby dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 53
WRIT PETITION
Before Mr. Justice K.K.Trivedi
W.P.No. 5762/2006 (Jabalpur) decided on 3 September, 2012

RAJ KUMAR KUSHWAHA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 85 - Appeal - Resolution*** **- No appeal lies against the resolution appointing the petitioner as Panchayat Secretary - Appeal lies against the order of appointment - Prescribed authority may suspend the resolution which is required to be affirmed by next higher authority - The S.D.O. was not required to look into the claims made in the appeal - Order setting aside the Resolution is bad. (Para 5)**

क. पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 85 – अपील – संकल्प – याची को पंचायत सचिव के रुप में नियुक्त करने के संकल्प के विरुद्ध अपील नहीं हो सकती – नियुक्ति आदेश के विरुद्ध अपील पोषणीय है – विहित प्राधिकारी संकल्प को स्थगित कर सकता है जिसे आसन्न उच्चतर प्राधिकारी द्वारा अभिपुष्ट किया जाना आवश्यक है – एस.डी.ओ. को अपील के दावों का परीक्षण करना अपेक्षित नहीं था – संकल्प को अपास्त करने का आदेश अनुचित।

B. ***Constitution - Article 226 - Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 69,70 - Appointment***

***of Panchayat Karmi* - No advertisement was issued inviting applications for appointment of Panchayat Karmi - Secretary was not authorized to issue notice in this regard - Further no notice was placed on the notice board of the Janpad Panchayat - Public at large was not informed about such an intention of filling the post of Panchayat Karmi - Process was not initiated in appropriate manner and improperly the resolution was passed for making appointment of Panchayat Karmi - Resolution quashed in exercise of powers under Article 226 of Constitution of India. (Paras 6 &7)**

ख. संविधान – अनुच्छेद 226 – पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराऐं 69, 70 – पंचायत कर्मी की नियुक्ति – पंचायत कर्मी की नियुक्ति हेतु आवेदन बुलाने का कोई विज्ञापन जारी नहीं किया गया – इस संबंध में नोटिस जारी करने के लिए सचिव प्राधिकृत नहीं था – इसके अतिरिक्त जनपद पंचायत के नोटिस बोर्ड पर कोई नोटिस नहीं लगाया गया था – पंचायत कर्मी के पद भरे जाने के उक्त आशय के बारे में जन सामान्य को सूचित नहीं किया गया – कार्यवाही का प्रारंभ उचित ढंग से नहीं किया गया तथा अनुचित रुप से पंचायत कर्मी की नियुक्ति के लिये संकल्प पारित किया गया – भारत के संविधान के अनुच्छेद 226 के अंतर्गत शक्तियों का प्रयोग करते हुए संकल्प अभिखंडित।

A.D. Mishra, for the petitioner.
Samdarshi Tiwari, G.A. for the respondents No. 1 to 4.
Pradeep Naveria, for the respondent No.11.

ORDER

K.K. Trivedi , J :- Aggrieved by the order dated 13.04.2006 passed in Case No.23/Appeal/2005-2006 by the respondent No.6, the Sub Divisional Officer and Prescribed Authority, Niwadi, District Tikamgarh, this writ petition has been filed by the petitioner.

2. It is contended that a process of recruitment of Panchayat Karmi was initiated by the concerned Gram Panchayat by issuing the advertisement. The applications were made by the petitioner and five other persons. It was found that out of six in total, four candidates were related to the then Sarpanch of the Gram Panchayat and, therefore their applications were not to be considered. Out of the two candidates, the petitioner was selected and the order of his appointment as Panchayat Karmi was issued, pursuant to which he gave his joining and thereafter was declared as the Secretary of the said Gram

Panchayat by the Collector, Tikamgarh, in exercise of powers under Section 69(1) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (herein after referred to as 'Act'). The appeal was preferred by respondents No.8 to 11 against the said appointment of the petitioner before the Sub Divisional Officer and in fact instead of challenging the order of appointment of the petitioner, the resolution of the Gram Panchayat was sought to be challenged. The said resolution was not to be challenged in such a manner and, therefore, such an appeal was not maintainable. The appeal was liable to be dismissed but instead of dismissing the appeal, the same was allowed and the order of appointment of the petitioner was sought to be cancelled by setting aside the resolution of the Gram Panchayat. It is contended that such power was not conferred on the Sub Divisional Officer and as such the order was nonest in the eye of law. Only on the basis of such an order, the petitioner was not to be terminated and, therefore, the writ petition was required to be filed.

3. This Court has entertained the writ petition and has granted an interim stay to the petitioner on 10.05.2006 and notices were issued to the respondents. After service of the notice, the respondents have filed return. Specific return has been filed by the respondents No.1, 2, 3, 4 and 6 supporting the action of the Sub Divisional Officer. Respondent No.5 has also filed a return adopting the return of respondents No.1, 2, 3, 4 and 6. Respondent No.7 has also filed a reply contending that selection was not rightly done and the candidature of other candidates was not considered. It is contended that since fair selection was not done, therefore, it was rightly set aside.

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

5. True it is that a resolution of the Gram Panchayat is not to be challenged before the Appellate Authority as the same is not treated as an order. The Division Bench of this Court in various cases has held that only an order consequent upon the resolution of the Gram Panchayat, appointing any person as Panchayat Karmi, is appealable under Section 91 of the Act as also under the rules known as Madhya Pradesh Panchayats (Appeal and Revision) Rules, 1995 (herein after referred to as the 'Rules'). However, there is a power conferred on the Prescribed Authority, i.e. the Sub Divisional Officer under Section 85 of the Act to suspend the execution of the orders etc. and a resolution of the Gram Panchayat is also to be suspended by the competent

authority. The said suspension of the execution of the resolution is to be affirmed by the next higher authority as per the provisions of sub-section (2) of Section 85 of the Act. At any rate there is no power conferred on a Prescribed Authority or the affirming authority to set aside the resolution. If once the resolution is suspended and the said order of suspension of resolution is affirmed by the competent authority, the resolution is to be pocketed for all time to come and is not required to be implemented at all. No action whatsoever can be taken on the strength of such a resolution, if the same is suspended and such suspension order is affirmed in terms of the provisions of Section 85 of the Act. This was not done by the Prescribed Authority, i.e. the Sub Divisional Officer. He was not required to look into the claim made in the appeal filed by the private respondents, if the appeal was directed against the resolution of the Gram Panchayat. On the other hand, it was to be treated as a complaint under Section 85 of the Act or the concerned appellants were to be directed to file the appeal against the order of appointment and not against the resolution. Thus, as a whole the order passed by the appellate authority, the respondent No.6, cannot be said to be in terms of the provisions of the Act. Such an order cannot be affirmed by this Court by grant of stamp of approval.

6. However, this Court cannot shut its eyes to the gross irregularities committed in the matter of appointment in case the same is brought to the notice of this Court even in a writ petition filed against such an order passed by the Sub Divisional Officer. The record indicates that the advertisement was never issued. On the other hand, a public notice was given for initiation of the recruitment process of Panchayat Karmi. The State Government in exercise of powers under Section 70 and 69 of the Act has formulated a scheme commonly known as Panchayat Karmi Yojna. By issuing the circular on 12.09.1995 it is specifically prescribed by the State Government that every Gram Panchayat is required to make appointment of a Panchayat Karmi for the purpose of his notification as Secretary of the Gram Panchayat. In case such a recruitment is to be done, an advertisement is required to be issued not only indicating the vacancy but also indicating the qualification prescribed for such appointment. In case it is required by the Gram Panchayat that any other qualification be added in the advertisement, a resolution is required to be passed in that respect. Only when such a resolution is passed, the Sarpanch of the Gram Panchayat is required to issue the advertisement. The public notice as issued by the concerned Gram Panchayat in the present case, as available on record as Annexure P-4, indicates that the notice was issued on

01.05.2005 by the Secretary of the Gram Panchayat. He was not authorized to do so. Secondly, the same, as has been found by the Sub Divisional Officer, was never placed on the notice board of the Janpad Panchayat, Tahsil or District Collectorate. The public at large was not informed about such an intention of filling the post of Panchayat Karmi. Only few applications were received and most of the applicants were closely related to the then Sarpanch of the concerned Gram Panchayat. This further indicates that some sort of improper proceedings were done for making appointment as Panchayat Karmi. The scheme of the State Government specifically prescribes that Panchayat Karmi is to be appointed only for his notification as Secretary of the Gram Panchayat. Secretary of the Gram Panchayat is required to perform certain statutory duties. For the said purposes, specific rules have been made by the State Government. This being so, the recruitment process should have been done in appropriate manner.

7. From the entire perusal of the record, it is clear that such a process was not initiated by the concerned Gram Panchayat in appropriate manner and improperly the resolution was passed by the Gram Panchayat for making appointment of the Panchayat Karmi. Such an act of the Gram Panchayat cannot be approved. This Court in various cases has found that improper procedure has been adopted by the Gram Panchayats for making appointments of Panchayat Karmis so that such persons after their notification as Secretary of the Gram Panchayat, may act according to the choice of the concerned Sarpanch. This is not the object of making such a scheme and, therefore, this Court will not hesitate in quashing such proceedings, even though this Court is not approving the order of the Sub Divisional Officer. This Court has ample power under Article 226 of the Constitution of India to quash such a resolution of the Gram Panchayat.

8. Consequently, the resolution dated 12.05.2005 (Annexure P-6) passed by the Gram Panchayat, Devendrapura, Janpad Panchayat, Niwari, District Tikamgarh, is hereby quashed. The order of appointment of the petitioner is also quashed. The Gram Panchayat concerned is directed to initiate the fresh and proper procedure of appointment of Panchayat Karmi strictly in terms of the scheme made by the State Government on 12.09.1995 as also under the subsequent instructions issued by the State Government and to make selection and appointment of a Panchayat Karmi for the purposes of his notification as Secretary of the Gram Panchayat. The Collector, Tikamgarh and the Chief Executive Officer, Janpad Panchayat, Niwari, District Tikamgarh, are directed

to ensure proper compliance of this order and to see that proper selection of a person is done for appointment on the post of Panchayat Karmi. The aforesaid exercise be completed within a period of one month from the date of receipt of certified copy of the order passed today. Till the said exercise is completed, Collector, Tikamgarh, will make arrangement for giving current charge of the post of Secretary of the concerned Gram Panchayat to any suitable employee.

9. With the aforesaid, the writ petition is finally disposed of. There shall be no order as to cost.

Petition disposed of.

I.L.R. [2013] M.P., 58
WRIT PETITION
Before Mr. Justice K.K.Trivedi
W.P.No. 750/2011 (Jabalpur) decided on 4 September, 2012

SUSHMA PANDEY (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***A. Service Law - Seniority* - Transfer from one Janpad Panchayat to another - Petitioner was appointed as Shiksha Karmi in one Janpad Panchayat - She was transferred to another Janpad Panchayat as her husband was working there - Transfer took place under a policy which did not provide that the employee would loose the seniority of earlier service - Subsequent policy issued in 2009 which provides for loss of seniority in case of such transfer is also contrary to rules - Seniority of the petitioner is to be calculated from the date of her initial appointment and not from the date of transfer. (Para 5)**

क. सेवा विधि – ज्येष्ठता – एक जनपद पंचायत से दूसरे में स्थानांतरण – याची को एक जनपद पंचायत में शिक्षा कर्मी के रुप में नियुक्त किया गया था – उसे अन्य जनपद पंचायत में स्थानांतरित किया गया, क्योंकि उसका पति वहां कार्यरत था – स्थानांतरण उस नीति के अंतर्गत किया गया जिसमें यह उपबंध नहीं है कि कर्मचारी अपनी पूर्ववर्ती सेवा की ज्येष्ठता को खो देगा – पश्चातवर्ती नीति, सन् 2009 में जारी की गई, जो ऐसे स्थानांतरण की दशा में ज्येष्ठता की हानि के लिए उपबंध करती है, वह भी नियमों के विरुद्ध है – याची की ज्येष्ठता की संगणना उसकी प्रारंभिक नियुक्ति की तिथि से की जानी चाहिए और न कि स्थानांतरण की तिथि से।

B. Executive Instructions - **Executive Instructions cannot supersede the Statutory Rules. (Para 6)**

ख. कार्यपालिक अनुदेश – कार्यपालिक अनुदेश, कानूनी नियमों का अधिक्रमण नहीं कर सकते।

C. Service Law - Seniority - Non-joinder of affected employees - **Non-joinder of affected persons is of no consequence as the mistake was committed by respondents themselves as they had not fixed the seniority as per the provisions of Rules. (Para 7)**

ग. सेवा विधि – ज्येष्ठता – प्रभावित कर्मचारियों का असंयोजन – प्रभावित व्यक्तियों के असंयोजन से कोई परिणाम नहीं होगा क्योंकि गलती स्वयं प्रत्यर्थीगण द्वारा कारित की गई है क्योंकि उन्होंने नियमों के उपबंधोंनुसार ज्येष्ठता का निर्धारण नहीं किया।

A.P. Singh, for the petitioner.
Yogesh Dhande, Dy. G.A. for the respondent No.1.
Sanjay Singh, for the respondents No. 2 & 3.

ORDER

K.K. TRIVEDI , J :- This order will also govern the disposal of Writ Petition No.956/2011. The facts for the purposes of this order are taken from Writ Petition No.750/2011.

2. The only grievance of the petitioner is that on account of absorption of the petitioner, in terms of the policy dated 27/11/2009 her seniority has been tempered with and instead of giving seniority of the period of her initial appointment she has been given the seniority from the date of joining in Janpad Panchayat, Sidhi. It is contended that the petitioner was initially appointed as Siksha Karmi, Grade III vide order dated 06/07/1998 by Janpad Panchayat, Chitrangi District Sidhi. Thereafter, a policy was made by the State Government with respect to the transfer of lady teachers appointed under the Siksha Karmi Schemes from one District/Tehsil/Block to another in case of vacancies in certain circumstances. In this policy dated 19/03/2002 it was provided that in case lady Siksha Karmi is married and her husband is appointed in a separate local body, on the application of the lady concerned, she could be transferred to the place where her husband is posted. However, this policy nowhere prescribes that in case of such a choice transfer, the concerned employee will loss the seniority and will get the benefit of seniority from the date of joining in

the transferred place. It is contended that thereafter a decision was taken by the State Government to absorb all such Siksha Karmies as Adhyapak. Accordingly the case of the petitioner was considered and she was absorbed on the post of Sahayak Adhyapak on 14/08/2008. Thereafter, a gradation seniority list was issued on 05/06/2010 in which the seniority of the petitioner was fixed at serial no.306 only on account of her joining in the Janpad Panchayat school at Sidhi and the past services rendered by her was not taken into account. Since this was done in violation of the right of seniority of the petitioner, a representation was made. Since the representation was not considered this petition is required to be filed. It is claimed that the petitioner be granted benefit of past services rendered by her as Siksha Karmi for the purposes of fixation of her seniority.

3. On service of the notice of the writ petition the respondents have filed their return. The respondent no.1 has contended that policy was made by the State Government and according to the said policy, on absorption the persons if were transferred from one local body to another local body they were granted the benefit of seniority from the date of joining on the transferred place. It is contended that since the petitioner was transferred from one Janpad Panchayat to another, rightly her seniority was fixed from the date of her joining on the transferred place. It is contended that no wrong has been committed by the respondents. Similar stand is taken by respondent no.2 and 3 who have also filed the return and have contended that they have taken action only because of the policy made by the state Government.

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

5. Undisputedly the petitioner was appointed as Siksha Karmi in Janpad Panchayat, Chitrangi District Sidhi on 06/07/1998 where she joined the services on 11/07/1998. She worked on the said post till as per the policy made by the State Government, the petitioner was transferred from the said Janpad Panchayat to Janpad Panchayat, Sidhi vide order dated 19th August 2003 (Annexure-P-2). This order was issued pursuance to the policy dated 19/03/2002. In the policy it was nowhere provided that in case such a married women Siksha Karmi is transferred from one Janpad Panchayat to another she will loss seniority and will get the benefit of seniority only from the date of joining in the transferred place. It is also seen that the petitioner was absorbed on the post of Sahayak Adhyapak and when the rules were made, it was specifically prescribed that after merging the Siksha karmies in Adhyapak

Samvarg services rendered by them as Siksha Karmi shall be calculated for the purposes of promotion/kramonnati seniority only. This makes it clear that the period of appointment as Siksha Karmi was to be calculated for the purposes of fixation of seniority. However, when subsequently the policy was made on 27/11/2009, the clause was added that in case of transfer of Siksha Karmi from one local body to another, he/she will get the benefit of seniority from the date of joining on the post at transferred place. Such policy has been formulated after coming into force of the rules, which have been placed on record as Annexure-P-4. Said rules were notified on 11th September 2008. How such a condition could have been added in a policy, which was subsequently made, which runs dehors the specific provisions made in the rules. Specially this clause of policy was not to be read in the case of petitioner because she was transferred under a policy where there was no such condition prescribed for loss of seniority. In view of this, only because such a condition was mentioned in the policy dated 27/11/2009 since the seniority of the petitioner is tempered, seniority list cannot be affirmed.

6. It is contended by learned Deputy Government Advocate that the policy was further circulated on 08/11/2005 (Annexure-P-11) wherein it was specifically provided that in case a Siksha Karmis services are absorbed in the cadre of Adhyapak samvarg, who is transferred from one institution to another, his seniority will be put at the bottom of the employees working in the transferred institution. Thus, it is contended that if the seniority of the petitioner was fixed according to this guideline also, the same cannot be said to be bad. Such contention cannot be accepted as again by making the rules in 2008, it is deemed that such an instruction of the State Government is watered down in as much as the prescription of counting of seniority is already made in the rules. The rules have force of law and always supersede the administrative instructions .The administrative instruction cannot at any rate supersede the provisions of the rules. Thus, such contentions of the respondents cannot be accepted atall.

7. Consequently it has to be held that the petitioner was entitled to grant of seniority from the date of initial appointment. Now an objection is raised by the respondents that those who are going to be affected by fixation of seniority of the petitioner over and above them, have not been impleaded as party in the present petition. This objection is also to be turned down only because the mistake was committed by the respondents themselves. They have not fixed the seniority of the petitioner in terms of the provisions of the

rules and have acted on such instructions or the guidelines or circulars which are not attracted at all in the case of the petitioner.

8. Accordingly this petition is allowed. The respondents are directed to count the period of services rendered by the petitioner as Siksha Karmi grade III in Janpad Panchayat, Chitrangi also for the purposes of fixation of her seniority on the post of Sahayak Adhyapak. A modified seniority list be issued within a month from the date of receipt of certified copy of the order passed today. After making of the seniority list afresh as directed hereinabove in case it is found that any junior to the petitioner is promoted on the next cadre post, the review DPC be convened and the case of the petitioner be considered for such promotion. In case she is found fit for such promotion, the benefit of promotion be granted to her from the date the same was extended to her juniors with all consequential benefits. Let this exercise be also completed within a month from the date of preparation of fresh seniority list.

9. The petition is allowed to the extent indicated hereinabove. There shall be no order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 62
WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav
W.P. No. 122/2009 (S) (Jabalpur) decided on 8 October, 2012

KAMLA PATI DWIVEDI ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

***A. Service Law - Senior Grade* - Senior grade is to be granted from the date of completion of 12 years of service and not from the date of the recommendation of the DPC. (Para 11)**

क. सेवा विधि – ज्येष्ठ श्रेणी – ज्येष्ठ श्रेणी 12 वर्षों की सेवा पूर्ण करने की तिथि से प्रदान की जानी चाहिए और न कि डी.पी.सी. की अनुशंसा की तिथि से।

***B. Service Law - Senior Grade - 12 years of service* - Whether the A.C.R.s of three years preceding completion of 12 years of regular service is to be seen or preceding the date when DPC met - As the Senior grade and selection grade is to be granted only after**

screening regarding satisfactory performance by D.P.C. ,therefore, in absence of any circular contrary to it, three C.R.s which are required to be seen would be preceding the date when DPC convene its meeting and not preceding completion of 12 years of regular service. (Para 13)

ख. सेवा विधि – ज्येष्ठ श्रेणी – 12 वर्ष की सेवा – क्या नियमित सेवा के 12 वर्ष पूर्ण करने के तीन वर्ष पूर्व के ए.सी.आर. देखे जाने चाहिए या डी.पी.सी. की मीटिंग की तिथि से पूर्व के – चूंकि ज्येष्ठ श्रेणी और प्रवरण श्रेणी को केवल डी.पी.सी. द्वारा संतोषप्रद कार्य से संबंधित छानबीन करने के पश्चात प्रदान किया जाना चाहिए, इसलिए इसके विपरीत किसी परिपत्र की अनुपस्थिति में, तीन सी.आर. जिन्हें देखा जाना अपेक्षित है वह, डी.पी.सी. द्वारा अपनी मीटिंग बुलाने की तिथि से पूर्व के होंगे और न कि नियमित सेवा के 12 वर्ष पूर्ण करने से पूर्व के।

S.K. Rao with *S.K. Chaturvedi,* for the petitioner.
N.S. Ruprah, for the respondents.

ORDER

The Order of the Court was delivered by :

SANJAY YADAV, J.: Order dated 20.10.2008 passed in Original Application No. 229/2008 by the Central Administrative Tribunal, Jabalpur Bench, Jabalpur is being challenged vide this petition under Article 227 of the Constitution of India.

2. Vide impugned order Tribunal rejected the application whereby petitioner sought benefit of senior grade w.e.f. 7.10.1995 under Chattopadhyaya Pay Commission.

3. Appointed as Trained Graduate Teacher on 7.10.1983 petitioner was promoted Ad hoc Post Graduate Teacher (Sociology) w.e.f. 30.9.1992 in Grade Rs.1640-2900 (Revised Rs.6500-10500). While holding the post of Post Graduate Teacher petitioner was subjected to departmental enquiries and denial of senior grade as per Chattopadhyaya Commission Recommendations (which we will adverted to little later). The departmental enquiries culminating into punishment were subjected to challenge in Original Application No. 665/2001 and O.A. 773/2003. Whereas, former Original Application was disposed of with direction to the department to decide the appeal, the latter, which was directed against the punishment order and the appellate order, was allowed on 9.9.2004 and the punishment was set aside. In the interregnum, i.e., during pendency of departmental proceedings since the petitioner became entitled for consideration for senior grade, the respondent

vide order dated 21.8.2002 granted senior scale of Rs.6500-10500 w.e.f. 6.7.2002; however, with the penalty being set aside the benefit of senior scale was made effective from 24.9.1998 by order dated 14.1.2005.

4. Aggrieved, petitioner preferred an Original Application No. 704/2005 seeking quashment of communication dated 14.1.2005 and the direction for grant of senior scale w.e.f 7.10.1995 instead of 24.9.1998. The Tribunal vide order dated 25.1.2007, allowed the application holding:

> "9. We have also noticed that although most of the employees, who were considered for promotion by the DPC held on 10.10.1996 had completed their 12 years of service in 1995, the DPC considered their ACRs for 1994, 1995 and 1996. It is a well laid down principle in respect of promotions that promotion is decided on the basis of ACRs for the relevant period. It was, therefore, incumbent on the DPC to consider ACRs up to 1995 only for such employees and not beyond that. It is not known as to on what basis the DPC decided to look at the ACRs of three years beginning from 1994. It is surprising that although the DPC did meet again on 6.10.1997, it did not consider the case of the applicant. Further, the DPC held on 20.8.1998 does not mention the period for which the ACRs were considered. In view of these facts, we find that the case of the applicant suffers from material irregularities and lapses. Firstly, the DPC that met on 10.10.1996 should have considered sufficient number of ACRs, the last being of 1995 and should have made recommendations on the basis of these ACRs only. In the case of the applicant ACRs of only 1994 and 1995 were considered. Recommendations regarding his promotion or otherwise could not have been made on the basis of only these two ACRs as appears to have been done by the DPC. Secondly, if the applicant was not found fit for promotion by this DPC, his case should have been considered by the DPC held on 8.10.1997 by further taking into account the ACR of 1996. It is needless to mention that pendency of disciplinary proceedings or currency of penalty would have no relevance to the consideration by DPC as the disciplinary proceedings and the penalty had already been quashed by then by this Tribunal. In view of the above discussion, we find

considerable merit in the contention of the applicant that denial of promotion with effect from 7.10.1995 is not based on valid grounds.

10. In the result, the OA is allowed. We quash the impugned order annexure A1 so far as it relates to the date from which the promotion of the applicant is to be given in the senior grade. We also quash the impugned order dated 22.3.2005 (annexure A2) and direct the respondents to hold a review DPC to assess the case of the applicant for grant of senior grade on completion of 12 years of service on the basis of his ACRs up to 7.10.1995, keeping our observations in the preceding paragraph in view. If the applicant is not found suitable for promotion on completion of 12 years of service, his case should be considered on the basis of ACRs in successive years and promotion granted with all consequential benefits with effect from subsequent years, as the case may be after considering the recommendations of the DPC. The respondents are directed to comply with our directions within a period of two months from the date of communication of this order. No costs."

5. That, review DPC met on 28.3.2007 wherein while taking into consideration the ACRs of the petitioner for year 1994-95 (i.e., 1.4.1994 to 31.3.1995), 1995-96 (1.4.1995 to 31.3.1996) and 1996-97 (1.4.1996 to 31.3.1997), the petitioner was found suitable for grant of senior scale. However, because of the note appended with the recommendation by the Review DPC that "CRs of 1992-93 and 1993-94 of the candidate are both below average. Hence, his CRs from 1994-95 to 1996-97 have been considered for deciding suitability as per Hon'ble Tribunal CAT's direction." Though difficult to perceive, but the department construed the note being an impediment to extend the senior scale from 7.10.1995 when the petitioner completed 12 years regular service, deferred the same by effecting it from 1.4.1997. This was informed vide communication No. JBP/P/Dec/Sr. Grade dated 30.3.2007.

6. Aggrieved, petitioner preferred Original Application No. 229/2008 seeking direction for grant of senior scale w.e.f 7.10.1995. The Tribunal vide order dated 20.10.2008 declined to interfere. The Tribunal held:

> "7. In our considered view, on perusal of the reply as well as the facts noticed here, we are satisfied that the respondents have scrupulously and minutely complied with the directions of this Tribunal by holding review DPC of the original DPC dt. 2nd August, 2006 after considering his ACRs upto 7.10.1995, which admittedly included adverse ACRs ending 31st March 1994, which th Ld. Counsel very fairly stated has been maintained by the Tribunal when challenged. In the given circumstances, the respondents are fully justified in granting him the benefits only from 1.4.1997 instead of 7.10.95, as prayed for. There is no illegality or arbitrariness in respondents' action."

7. Contention of the petitioner is that, having been exonerated of the charges levelled against him in a departmental enquiry in the year 1992-93 and there being no adverse remarks in his ACRs of the year 1994-95, 1995-96 and 1996-97 and having been adjudged suitable by the review Departmental Promotion Committee convened on 28.3.2007 in pursuance to order passed by the Tribunal in O.A. No. 704/2005, the respondents are not justified in not granting the senior grade with effect from the date when the petitioner completed 12 years regular service, i.e., from 7.10.1995.

8. Respondents on their turn justified the decision taken of granting senior grade from 1.4.1997. The reasons assigned are that since the petitioner had earned adverse confidential report in the year 1992-93 and 1993-94, he was rightly not held entitled for senior scale w.e.f. 7.10.1995 but was found eligible w.e.f 1.4.1997.

9. The issue, therefore, which crops up for consideration is as to whether when 3 years ACRs preceding the date of holding of review Departmental Promotion Committee held on 7.10.1997 were found satisfactory, the respondents are justified in denying the benefit to the petitioner of the senior scale w.e.f the date when he completes 12 years of regular service in a grade and whether the Tribunal appreciated the policy and the facts in right perspective. For an answer the scheme whereunder senior grade has been conferred on the basis of Chattopadhyaya Recommendations may be looked into.

10. Ministry of Railways on the recommendations of the National Commission on Teachers under the Chairmanship of Professor D.K.

Chattopadhyaya decided that the revised (IV Pay Commission) Scales and Selection Grades for Teachers on Railways should further be revised. The acceptance of recommendations of Chattopadhyaya Commission was circulated vide Railway Board Establishment No. E (P&A) I 87/ PC-5/ PE-5 dated 11.1.1988. The allotment of revised scale vide aforesaid circular was delineated in clause 4 therein as under:

> "4. The allotment of the revised scales, as in the Annexure will be subject to the following conditions:
>
> (i) While senior grade to Primary School teachers, Trained Graduate teachers/Headmaster of Primary Schools and Post-Graduate teachers, Headmasters of Middle Schools with be granted after 12 years in the basic grade, the selection grade (nonfunctional) will be granted after 12 years of service in the senior grade and will be further subject to the attainment of the prescribed level of qualification, viz., Trained-Graduate teacher's qualification in respect of Primary School teachers and Post-Graduate teacher's qualification in respect of Trained Graduate teachers. Both the conditions, viz., completion of 12 years service in the senior grade and acquisition of the prescribed level of additional qualification, must be satisfied for becoming eligible to the selection grade in these cases. For the Vice-Principal/ Head masters of Secondary Schools, there will be only senior grade after 12 years and no selection grade.
>
> (ii) The number of posts in selection grade (non-functional) for Primary School teachers, Trained Graduate teachers/Headmasters of Primary School, Post Graduate teacher Headmaster of Middle School will be restricted to 20% of the number of posts in the senior grade of the respective cadre.
>
> (iii) The senior grade and selection grade (non-functional) shall be given only after screening regarding satisfactory performance by an appropriate Departmental Promotion Committee.

(iv) Every teacher would be required to participate in an in-service training programme of at least 3 weeks duration before he/she passes and efficiency bar or is promoted to senior grade or selection grade, i.e., once in every six years: provided that, where arrangements for such training cannot be made, the appointing authority may exempt a category of teachers for a specific period of time. The Ministry of Railways would like it to be ensured that suitable in-service training programmes of the prescribed duration are introduced so that the need for a special dispensation will arise in the rarest of the rare cases.

(v) Although for purposes of grant of selection grade, Primary School teachers and Trained Graduate teachers will be required to obtain higher qualifications, they will not be required to shift to an institution of higher level.

(vi) Appointment to the posts of Principals, Vice-Principals and Head-masters will be made iii all schools on the basis of merit."

11. In course of implementation of aforesaid recommendations some doubt arose as to whether the higher pay scale as per recommendation was to be granted immediately on completion of 12 years regular service or from the date of recommendation of departmental promotion committee. Clarification was accordingly issued by Railway Board Establishment No. I 56/89: No. E(P&A) I87/ PS-5/ PE-5 dated 22.6.1989, point No. 7 wherein raised the question as to: whether for a teacher who has completed 12 years of service in the basic grade as on 1.1.1986, the benefit of fixation of pay in senior grade will be given from 1.1.1986 after screening by DPC. The clarification sought for whether the benefit of fixation of pay in the senior grade will be given only from the date of departmental promotion committee approval." The same was clarified that "the benefit of fixation of pay in the senior grade will be given from the date following completion of 12 years of service in the basic grade, however, orders for the purpose would be issued only after DPC has approved the same." The said issue as apparent from circular was decided with concurrence of Finance Directorate of Ministry of Railways. The aforesaid clarification thus leads no doubt that in point of time whenever the DPC meets

the order for grant of senior pay scale would be from the date following completion of 12 years of service in the basic grade and not from the date of recommendation by DPC.

12. One more aspect needs a clarification at this stage. The question cropped up during course of argument as to whether three years ACRs which were required to be seen for adjudging the suitability of an employee for grant of senior scale would be preceding completion of 12 years of regular service or preceding the date when the DPC met.

13. It is already observed that vide clause 4 (iii) of circular dated 11.1.1988 it is provided that the senior grade and selection grade (non functional) shall be granted only after screening regarding satisfactory performance by an appropriate departmental promotion committee. The circular no where provides for as to the ACRs which are required to be seen would be preceding three years from the date of completion of 12 years of regular service. When inquired from the respondents as to whether any such circular or order passed by Railway Board is in vogue, no material is brought on record to demonstrate and establish that only C.Rs. preceding three years completion of 12 years of regular service would be taken into consideration by the DPC which is constituted to screen satisfactory performance of an employee for grant of senior grade and selection grade. In absence whereof we are inclined to observe that the three years C.Rs which are required to be seen would be preceding the date when DPC convene its meeting.

14. In the case at hand admittedly a D.P.C held its meeting on 7.10.1997 and it is in respect of said D.P.C that review D.P.C was ordered in O.A. No. 704/2005. In furtherance whereof D.P.C met on 28.3.2007 and rightly considered the A.C.R of years 1994-95 (i.e., 1.4.1994 to 31.3.1995), 1995-96 (1.4.1995 to 31.3.1996), and 1996-97, (1.4.1996 to 31.3.1997) and found petitioner suitable. The respondents, therefore, are not justified in taking into consideration the adverse C.Rs of years previous to 1994-95 and postponing the grant of senior grade w.e.f. 1.4.1997. The Tribunal also in our considered opinion has failed to appreciate the facts and rules in right perspective. Had there been any adverse C.R after 7.10.1995, the date when the petitioner completed 12 years of service, the respondents as well as the Tribunal would be justified in declining the claim of the petitioner for senior grade from 7.10.1995. The facts, however, as adverted to are not such.

15. In view of above analysis, we are inclined to allow the claim of the

petitioner for grant of selection grade w.e.f. 7.10.1995 on the basis of recommendation of the review DPC committee which convened its meeting on 28.3.2007 qua the DPC which met on 7.10.1997.

16. In view whereof we set aside the order passed by the Tribunal and direct the respondents to extend the benefit of senior grade as per recommendation of Chattopadhyaya Pay Commission and as per Railway Board Establishment No. E (P&A) I 87/ PC-5/ PE-5 dated 11.1.1988 w.e.f. 7.10.1995 with all consequential benefits within a period of 30 days from the date of communication of this order.

17. The petition is allowed to the extent above. However, there shall be no costs.

Petition allowed.

I.L.R. [2013] M.P., 70
WRIT PETITION
Before Mr. Justice K.K.Trivedi
W.P.No. 18268/2011(S) (Jabalpur) decided on 10 October, 2012

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

Service Law - Recovery of Excess payment **- Revision of pay was done erroneously and excess payment was made - Merely because an undertaking was obtained from the petitioner, no recovery could be made after his retirement - However, the State Govt. can recover the loss from the erring officers. (Paras 3 to 7)**

सेवा विधि – अधिक संदाय की वसूली – वेतन का पुनरीक्षण त्रुटिपूर्ण रूप से किया गया और अधिक संदाय किया गया – मात्र इसलिए कि याची से वचन लिया गया था; उसकी सेवानिवृत्ति पश्चात् कोई वसूली नहीं की जा सकती – अपितु, राज्य सरकार दोषी अधिकारियों से हानि वसूल सकती है।

Cases referred :

1995 Supp (1) SCC 18, W.P. NO. 14627/2007 decided on 25-1-2011, W.P.(S) No. 3075/2003, (1994) 2 SCC 521, W.A. NO. 1722/2007.

Ramnaresh Vishwakarma, for the petitioner.
Samdarshi Tiwari, G.A. for the respondent Nos. 1 to 5.

ORDER

K.K. TRIVEDI , J :- The petitioner has come before this Court ventilating his grievance against the order dated 06.07.2010 Annexure P-4, by which after his retirement, verifying the pay of the petitioner, it has been held that the petitioner was paid the amount in excess to the amount due to him as wrong fixation was done. It is contended that the petitioner was not responsible for such excess payment of salary as neither the salary was revised by him in the revised pay scale nor he made any representation in that respect. If at the time of retirement such an objection was raised, the same was not to be accepted in terms of the law laid down by the Apex Court in the case of *Sahib Ram Vs. State of Haryana and others,* 1995 Supp (1) SCC 18. It is contended that in similar circumstances, this Court in the case of *Bholaram Barmaiya Vs. State of M.P. and others,* W.P. No. 14627/2007 and in other analogous petitions has passed the order on 25.01.2011 quashing such order of recovery. It is contended that only because of such act, since the recovery is ordered against the petitioner, the same is liable to be quashed.

2. Per contra, it is contended by learned Government Advocate that the revision of pay Rules were made and the salary of the petitioner was fixed way back in the said revised pay scale. Such revision was done erroneously and excess payment of salary was made to the petitioner. At the time of retirement, it was found that the petitioner was paid an amount of Rs.53,727/- in excess to the amount payable tohim and, therefore, it was directed that the said amount be recovered in 297 instalments from the pension of the petitioner. The said return of the respondents was not found sufficient, therefore, on the orders of this Court, an additional return has been filed by the respondents categorically demonstrating that the petitioner was required to furnish an undertaking as prescribed under the relevant revision of pay Rules and such undertakings were given by the petitioner on 16.04.1983 and 31.05.1990. In the said undertaking, it was categorically said that the revision of pay of the petitioner was provisional and if after finalization of pay fixation, it is found that excess amount was paid to the petitioner, the same will be refunded by the petitioner or else it would be recovered from the salary of the petitioner or from the pension and gratuity. In case of death of the person concerned, it was further prescribed in the undertaking that the recovery would be made from the legal heirs and the said amount would be recovered treating it as arrears of land revenue. It is thus contended by the respondents that in view of the aforesaid clear undertaking, the petitioner was required to refund the

amount, but since the said amount was not refunded, ultimately the recovery was ordered from the retiral dues of the petitioner. It is contended that such a claim made by the petitioner in the writ petition is misconceived and as such the petition is liable to be dismissed.

3. After hearing learned counsel for the parties at length and after perusing the record, this Court is of the considered opinion that such a stand taken by the respondents cannot be accepted at all. Firstly, it was the duty on the part of the respondents-authorities to get the pay fixation of the petitioner finalized as soon as the same was made and the same was required to be pre-audited and post-audited by the competent authority of the respondents. These are the specific provisions made in the Financial Code issued by the State Government in exercise of its power under the Financial Act. It is nowhere indicated in the return that at any point of time the pay of the petitioner after its revision was finalized. The undertaking obtained from the petitioner was applicable upto the period the pay revision was not finalized. However, it was not the responsibility of the petitioner to get his pay revision finalized from the competent authority. Again it was the gross lapses on the part of respondents-authorities of not finalizing the pay revision of the petitioner timely. For any such act, only on the strength of such undertaking obtained from the petitioner, after his retirement nothing could be recovered from the petitioner.

4. The law in this respect is very clear. In the case of *Sahib Ram* (supra), the Apex Court has categorically prescribed that the recoveries from the employees can be affected only if it is found that the employee concerned was responsible for causing such loss to the State exchequer or that he has misrepresented the fact before the authorities for obtaining any benefit for himself. This particular aspect was again considered by this Court in the case of *Mahendra Kumar Dubey Vs. State of M.P. and others*, W.P. (s) No. 3075/2003, in which it was observed thus:-

> "With respect to recovery of amount due to wrong fixation of special pay/allowance, the Apex Court in *Sahib Ram V. State of Haryana and others,* 1995 Supp (1)SCC 18, has laid down that in the case pay-scale has been given without any misrepresentation and benefit of higher pay scale was given by wrong construction made by the principle, it would not be appropriate to recover the amount from the employee. The Apex Court has held thus :-

> "5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the principle for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. he principle of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs."

5. The Apex Court has also considered these aspects in earlier occasions and also in the case of *Shyam Babu Verma and others Vs. Union of India and others,* 1994 (2) SCC 521. The Apex Court has laid down thus:-

> " 11. Although we have held that the petitioners were entitled only to the pay scale of Rs.330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs.330-560 but as they have received the scale of Rs. 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."

6. The aforesaid decision and pronouncement of law have been considered by the Division Bench of this Court in the case of *Sukhram Madhekar Vs. State of M.P. and others* in W.A. No. 1722/2007 and taking into consideration the law laid down by the Apex Court in the case of *Sahib Ram* (supra), it has been categorically held that if the pay fixation was erroneously done and the same was not rectified at the relevant time, after the

retirement no recovery whatsoever could be made from the persons like petitioner. However, it is always open to the State Government to make recovery of any loss caused to the State exchequer on account of negligence or failure to discharge of duties by the responsible officers who were required to approve the revision of pay of the petitioner timely and who have not cared to do so at the relevant time. At the most, nothing can be recovered from the petitioner.

7. Consequently, this writ petition is allowed. The order impugned directing the recovery of any amount alleged to have been paid in excess to the petitioner is hereby quashed. If any amount is recovered from the pension of petitioner, the same be refunded back to him within a period of one month from the date of receipt of certified copy of the order passed today. The petition is allowed and disposed of. There shall be no order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 74
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 1247/2012 (Indore) decided on 30 October, 2012

RAMESH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 39(1)(a) - Suspension of Office Bearer* - Appellant was suspended on account of framing of charge against him u/s 376 (2)(g) of IPC - On acquittal of the charge, his application for revocation of suspension was dismissed on the ground that the petitioner was acquitted on giving benefit of doubt and against the judgment of such acquittal appeal has been filed by State and Leave to appeal has been granted u/s 378(3), Cr.P.C. - Held - The rigour of Section 39(1)(a) of the Adhiniyam, 1993 will not come in petitioner's way merely because the appeal against acquittal has been admitted by the Court - Petition allowed. (Para 16)**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 39 (1)(ए) – पदाधिकारी का निलंबन – अपीलार्थी को उसके विरुद्ध भा.द.सं. की धारा 376(2)(जी) के अंतर्गत आरोप विरचित किये जाने के कारण निलंबित किया गया –

आरोप से दोषमुक्त किये जाने पर, निलंबन वापसी हेतु उसके आवेदन को इस आधार पर निरस्त किया गया कि याची को संदेह का लाभ देकर दोषमुक्त किया गया था और उक्त दोषमुक्ति के विरुद्ध राज्य द्वारा अपील प्रस्तुत की गई है और द.प्र.सं. की धारा 378(3) के अंतर्गत अपील की अनुमति प्रदान की गई है – अभिनिर्धारित – अधिनियम 1993 की धारा 39(1)(ए) की कठोरता, याची के रास्ते में मात्र इसलिए नहीं आयेगी कि न्यायालय द्वारा दोषमुक्ति के विरुद्ध अपील ग्रहण कर ली गई है – याचिका मंजूर।

Cases referred :

1996 MPLJ 507, 2008 (4) MPLJ 235, AIR 1976 SC 1750.

A.K. Sethi with *Rahul Sethi*, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondents No. 1, 2, & 3.
Yashpal Rathore, for the respondent No.4.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J.: The petitioner was declared elected on the post of President District Panchayat Barwani. On account of framing of charges against him under Sections 376 (2) (g), along with other Sections of the Indian Penal Code, the Commissioner, Indore Division passed an order on 06.01.2011 suspending him from the office of President District Panchayat, Barwani by invoking powers under Section 39 (1) (a) of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (for short Adhiniyam, 1993). The said order of suspension dated 06.01.2011 was reported to the State Government as per the requirement of Section 39 (2) of the Adhiniyam, 1993 and the State Government vide order dated 07.02.2011 confirmed the said suspension order dated 06.01.2011.

2. Thereafter, the trial of the charges framed against the petitioner for the offences as aforesaid was conducted by the Special Judge, District Barwani in which the petitioner was acquitted vide judgment dated 28.02.2011 passed in Special Criminal Case No.15/2010.

3. On his acquittal the petitioner submitted a representation before the Commissioner, Indore Division seeking revocation of his suspension order dated 06.01.2011. However, before any decision could be taken by the Commissioner on the said representation, the petitioner filed a writ petition No.3193/2011 before this Court challenging the suspension order dated

06.01.2011. The learned Single Judge vide order dated 17.10.2011 allowed the said writ petition by observing that since the petitioner has been acquitted, vide judgment dated 28.02.2011 the impugned order of suspension dated 06.01.2011 stands revoked. The learned Single Judge, accordingly directed the respondents to reinstate the petitioner forthwith.

4. The said order dated 17.10.2011 passed by the learned Single Judge was challenged by the State Government as also by the private respondent in writ appeals No.592/2011 and 584/2011 respectively. On 10.11.2011 interim relief was granted by the Division Bench in Writ Appeal No.592/2011 staying the operation of the order passed by the learned Single Judge. Thereafter, both the writ appeals were disposed of by the Division Bench by common order dated 07.12.2011. The Division Bench set aside the order passed by the learned Single Judge with a direction to the Divisional Commissioner to examine the petitioner's prayer for revocation of his suspension order keeping in view the order of acquittal, the effect of admission of criminal appeal against the said judgment of acquittal and the provision of Adhiniyam, 1993. The Division Bench also directed that the interim order passed by it on 10.11.2011 shall remain operative till the matter is finally decided by the Commissioner.

5. In pursuance to the order passed by the Division Bench on 07.12.2011, the Commissioner considered the petitioner's prayer for revocation of the order of suspension dated 06.01.2011 and vide impugned order dated 10.01.2012 (Annexure P-11) rejected the said prayer for revocation of suspension on the ground that against the judgment of acquittal the criminal appeal filed by the State has been admitted. Feeling aggrieved by the order dated 10.01.2012 passed by the Commissioner the petitioner has filed this petition. The Hon'ble Chief Justice vide administrative order dated 17.08.2012 directed for listing the matter for hearing before the Division Bench.

6. Shri A.K.Sethi, learned Senior counsel for the petitioner argued that the petitioner having been acquitted for the charges levelled against him, the Commissioner should have revoked the suspension order which was issued in view of the provision contained in Section 39 (1) of the Adhiniyam, 1993. In support of his contention he placed reliance on the judgment of this Court in the case of *R.N.Gupta and another Vs. Jawaharlal Nehru Krishi Vishwavidyalaya, Jabalpur* 1996 MPLJ 507 and in the case of *M.P. State Civil Supplies Corporation Ltd. Vs. Vinod Kumar Save* 2008 (4) MPLJ 235. According to him, after acquittal of the petitioner for the alleged offences

merely because leave to appeal has been granted to the State and the criminal appeal has been admitted by this Court, the petitioner cannot be kept under suspension. He submitted that after passing of the judgment of acquittal by the Special Judge the petitioner an elected President of District Panchayat to continue as President of District Panchayat.

7. Ms. Mini Ravindran, learned Dy. Govt. Advocate on the other hand supported the order passed by the learned Commissioner. According to her, the judgment of acquittal was challenged by the State by filing leave to appeal which was granted in M.Cr.C.No.4153/2011 by the Division Bench on 26.09.2011 by admitting the criminal appeal. In the circumstances, the appeal against acquittal being admitted and is pending, the criminal proceedings against the petitioner stood revived and, therefore, his status cannot be said to be improved merely on account of his acquittal. In support, learned Dy. Govt. Advocate has placed reliance on the judgment of the Supreme Court in the case of *State of U.P. Vs. Poosu and another* (AIR 1976 SC 1750).

8. Shri Yashpal Rathore, learned counsel for the fourth respondent supporting the submissions made by the learned Deputy Government Advocate argued that the petitioner has been acquitted by giving him 'benefit of doubt' and now as the criminal appeal has been admitted by this Court against the judgment of acquittal the entire charges which were framed against the petitioner are subjudice before this Court.

9. In order to decide the controversy involved in the matter it would be appropriate to refer the relevant provisions of Adhiniyam, 1993. Section 39 (1) (a) and sub-clause (2) of the Adhiniyam, 1993 which are relevant reads thus :-

> **"39. Suspension of office-bearer of Panchayat :-** (1) The prescribed authority may suspend from office any office-bearer,-
>
> (a) against whom charges have been framed in any criminal proceedings under [Chapters V-A, VI, IX], IX-A, X, XII, Sections 302, 303, 304-B, 305, 306, 312 to 318, 366-A, 366-B, 373 to 377 of Chapter XVI, Sections 395 to 398, 408, 409, 458 to 460 of Chapter XVII and Chapter XVIII of the Indian Penal Code, 1860 (XLV of 1860) or under any Law for the time being in force for the prevention of

adulteration of food stuff and drugs, [suppression of immoral traffic in women and children,Protection of Civil Rights and Prevention of Corruption]; or

[(b) x x x]

(2) The order of suspension under sub-section (1) shall be reported to the State Government within a period of ten days and shall be subject to such orders as the State Government may deem fit to pass. If the order of suspension is not confirmed by the State Government within 90 days from the date of receipt of such report it shall be deemed to have vacated."

10. A bare reading of Section 39 (1) (a) and (2) of the Adhiniyam, 1993 makes it clear that the prescribed authority has power to suspend from office any office bearer against whom charges have been framed in any criminal proceedings for the offences as mentioned in sub-clause (a). The order of suspension passed under sub-clause (1) is required to be reported to the State Government within the prescribed period of 10 days and shall be subject to such orders as the State Government may deem fit to pass.

11. In the present case it is undisputed that the petitioner was suspended on account of framing of charges against him for offences which includes offence under Section 376 (2) (g) of the Indian Penal Code. It is also undisputed that within the prescribed period the State Government had approved the order of suspension. Thus the order of suspension dated 6.01.2011 was validly passed. Thereafter the Special Judge of Sessions Court has passed a judgment of acquittal in favour of the petitioner on 28.02.2011 giving him benefit of doubt. It is also correct that against the said judgment of acquittal the State had sought leave to appeal which has been granted by this Court under Section 378(3) of the Code of Criminal Procedure and while admitting the appeal the petitioner has been granted the bail.

12. In view of the aforesaid undisputed factual matrix, the question arises, as to whether even after a judgment of acquittal being passed in favour of the petitioner merely on account of leave to appeal being granted to the State and the criminal appeal has been admitted for hearing against the said judgment the order of petitioner's suspension has to be continued and it cannot be revoked.

13. In the case of *R.N. Gupta and another Vs. Jawaharlal Nehru Krishi Vishwavidyalaya, Jabalpur* (supra) the learned Single Judge of this Court has observed that it is well settled that on a judgment of conviction against which an appeal or revision is filed, an employer or Appropriate Government as the case may be need not wait for taking an action against convicted employee, till the appeal or revision is decided against the conviction. In the case of *M.P. State Civil Supplies Corporation Ltd. Vs. Vinod Kumar Save* (supra) the Division Bench has held that suspension of employee comes to an end on acquittal and merely because an appeal has been preferred against the order of acquittal the employee cannot be deemed to be under suspension.

14. In the case of *State of U.P. Vs. Poosu and another* (supra), on which strong reliance has been placed by learned Deputy Government Advocate, the Supreme Court has observed that as soon as the High Court on perusing a petition of appeal against an order of acquittal considers that there is sufficient ground for interfering and issuing process to the respondent, his status as an accused person and the proceedings against him revive. The question of judging his guilt or innocence in respect of the charge against him once more becomes sub judice. These observations were made by the Supreme Court while examining the question as to "whether the Supreme Court while granting Special Leave to appeal under Article 136 of the Constitution, against an order of acquittal on a capital charge, has the power to issue a non-bailable warrant for the arrest and committal to prison of the accused-respondent who had been acquitted by the High Court ?". The Supreme Court considering the provision of section 427 of Criminal Procedure Code 1898 which is para materia with section 390 of the Code of Criminal Procedure 1973 observed as above. Thus it is clear that the question before the Supreme Court was altogether different.

15. Having considered the language of Section 39(1)(a) of the Adhiniyam 1993, the judgments on which reliance has been placed by the learned counsel for the parties and the submissions made by them, we are of the view that the petition deserves to be allowed.

16. The petitioner having been acquitted by the competent criminal court, of the charges framed against him, the rigour of section 39(1)(a) of the Adhiniyam, 1993 will not come in his way merely because the appeal against acquittal has been admitted by this Court. True it is that on appeal being admitted for hearing while exercising the powers of appeal, the judgment of

acquittal can be reversed and the person acquitted can be convicted, but the fact remains that there exist a judgment of acquittal which is operative in his favour and therefore he cannot be deprived to enjoy the fruits of the same merely because appeal against the same has been admitted.

17. As a result, we allow this writ petition. The order dated 10.01.2012 (Annexure P-11) passed by the Commissioner is quashed, the petitioner's suspension is ordered to be revoked and as a consequence the declaration dated 19.01.2011 (Annexure P-7) in respect of the fourth respondent is also quashed.

18. Parties to bear their own costs.

Petition allowed.

I.L.R. [2013] M.P., 80
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P. No. 16824/2007(S) (Jabalpur) decided on 5 November, 2012

PRAMOD TIWARI ...Petitioner
Vs.
CHANCELLOR, JNKVV & ors. ...Respondents

A. ***Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 19(ii), Constitution - Article 309 - Dispensation of Departmental Enquiry - Reasonably Practical*** - **Decision that it is not reasonably practical to hold departmental enquiry should be based on material which goes that an actual threat or situation is existing which contemplates holding of departmental inquiry impracticable.(Para 18)**

क. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966, नियम 19 (ii), संविधान – अनुच्छेद 309 – विभागीय जांच से अभिमुक्ति – युक्तियुक्त रुप से व्यवहारिक – ऐसे निर्णय कि विभागीय जांच करना युक्तियुक्त रुप से व्यवहारिक नहीं, को ऐसी सामग्री पर आधारित होना चाहिए कि कोई वास्तविक आशंका या स्थिति विद्यमान है जो विभागीय जांच कराये जाने को अव्यवहारिक अनुध्यात करती है।

B. ***Civil Services (Classification, Control and Appeal) Rules, M.P. 1966 - Rule 19(ii) - Dispensation of Departmental Enquiry*** - **The allegation that the witnesses are not coming forward and enquiry officers are hesitant in conducting enquiry cannot be relied as in the preliminary enquiry the witnesses were examined and the Petitioners**

had not caused any hindrance in the matter- The allegation that during the process of strike the petitioners created a situation resulting in breach of law and order cannot be relied as there is no report to the police or local authorities in this regard - There is no complaint or communication made by any other officer or employee of University that the work of the University has been hampered or adversely affected due to the so-called agitation and strike by petitioners and employees Union - Communications by enquiry officers regarding threat appears to be procured documents as there is no other document which shows that any of the witnesses or Enquiry Officers have made any complaint to the University authorities giving the particulars of the threat extended, the period when the threat was extended and the manner in which it was extended - Merely on the basis of the letters given by three enquiry officers indicating that they cannot conduct enquiry, the inquiry cannot be dispensed with - Petitioners have put in more than 20 years of service and there is no material available on record against them to show that they have acted in a manner which can be termed as unbecoming of any employee - Order of termination quashed - Petitioners are directed to be re-instated with all consequential benefits - However, the respondents are free to proceed in the matter by conducting proper departmental enquiry.

(Paras19 to 40)

ख. सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – नियम 19 (ii) – विभागीय जांच से अभिमुक्ति – अभिकथन कि साक्षीगण सामने नहीं आ रहे हैं और जांचकर्ता अधिकारी को जांच संचालन में संकोच है, पर विश्वास नहीं किया जा सकता क्योंकि प्रारंभिक जांच में साक्षीगण का परीक्षण किया गया और याचीगण ने मामले में कोई बाधा कारित नहीं की – अभिकथन कि हड़ताल की कार्यवाही के दौरान, याचीगण ने ऐसी स्थिति निर्मित की जिसके परिणामस्वरुप विधि और व्यवस्था भंग हुई, पर विश्वास नहीं किया जा सकता क्योंकि इस संबंध में पुलिस या स्थानीय प्राधिकारियों को कोई रिपोर्ट नहीं की गई है – विश्वविद्यालय के किसी अन्य अधिकारी या कर्मचारी द्वारा कोई शिकायत या संसूचना नहीं दी गई कि याचीगण एवं कर्मचारी संघ द्वारा कथित आंदोलन एवं हड़ताल के कारण विश्वविद्यालय का कार्य बाधित हुआ या उस पर प्रतिकूल प्रभाव पड़ा – धमकी से संबंधित जांचकर्ता अधिकारियों की संसूचनाऐं उपाप्त दस्तावेज प्रतीत होते हैं क्योंकि कोई अन्य दस्तावेज नहीं जो दर्शाते हों कि किसी साक्षी ने या जांचकर्ता अधिकारी ने, दी गई धमकी की विशिष्टियां देते समय धमकी कब दी गई तथा धमकी दिये जाने का ढंग बताते हुए कोई शिकायत, विश्वविद्यालय के प्राधिकारियों को की

– तीन जांचकर्ता अधिकारियों द्वारा यह दर्शाते हुए कि वे जांच संचालित नहीं कर सकते, दिये गये पत्रों के आधार मात्र पर जांच से अभिमुक्त नहीं किया जा सकता – याचीगण ने 20 वर्षों से अधिक सेवा दी है और उनके विरुद्ध यह दर्शाने के लिए कोई सामग्री अभिलेख पर उपलब्ध नहीं कि उन्होंने किसी ढंग से कर्मचारी के लिए अशोभनीय कहे जा सकने वाला कार्य किया – सेवा समाप्ति का आदेश अभिखंडित – याचीगण को संपूर्ण परिणामिक लाभों के साथ बहाल करने के लिए निदेशित किया गया – अपितु, प्रत्यर्थीगण समुचित विभागीय जांच संचालित कर मामले में कार्यवाही करने के लिए स्वतंत्र हैं।

Cases referred :

2003 AIR SCW 940, AIR 1991 SC 385, AIR 1985 SC 1410, 2003(4) SCC 579, AIR 1985 SC 251, AIR 1991 SC 1043.

Arvind Shrivastava, for the petitioner.
P.N. Dubey, for the respondents.

ORDER

RAJENDRA MENON , J :- As common questions of law and facts are involved in both these petitions and as challenge is made to the orders identical in nature, both these petitions are being decided by this common order.

2- For the sake of convenience documents available and pleadings in the record of Writ Petition No.16824/2007(s) is being referred to in the order.

3- Petitioner Shri Pramod Tiwari, in W.P. No.16824/2007, was working as a Sub Engineer in the Jawaharlal Nehru Krishi Vishwavidyalaya, Jabalpur (herein after referred to as "the University"). He has completed more than 20 years of service and it is put forth by him that in his entire period of service no action was taken against him and he has an unblemished service record. According to him he was elected as President of the Vishwa Vidyalaya Karmchari Sangh, the sole recognized association of the employees, for two consecutive terms i.e. 2000-2002 and 2002-2004.

4- Similarly, petitioner Rasool Shah, in W.P. No. 16825/2007, was also working in the said University and was posted as Field Extension Officer. He has also completed more than 20 years of service and was elected as Treasurer of the Vishwa Vidyalaya Karmchari Sangh for the same term for which Shri Pramod Tiwari was elected. It is a case of the petitioners that certain officers of the University including the Vice Chancellor had been committed various irregularities. As far as Vice Chancellor of the University is concerned it is

stated that due to irregularities committed by him, the Union through its President Shri Pramod Tiwari has filed complaint before the Lokayukta of Madhya Pradesh and due to the aforesaid act it is stated that the University and in particular the Vice Chancellor were having bias and prejudice against the petitioners. It is stated that in view of rampant corruption in the university the office bearers and the petitioners were agitating and on 22.5.2003 to discuss certain problems of the employees with regard to irregularities in the Provident Fund account of the employees, it is stated that a meeting of office bearers of the University was to be held along with Shri G. S. Marko Controller of the Finance, it is alleged against the petitioners that on 22.5.2003 while discussing with Shri Marko they behaved in an unbecoming manner, threatened Shri Marko as a result a F.I.R. was lodged by Shri Marko for offences under Section 506 read with Section 34 of IPC. In the FIR lodged specific allegations were made with regard to activities of the petitioners herein. It is stated that on the basis of complaint submitted by Shri Marko to the University, a Committee was constituted consisting of Dr. V.P. Singh, the then Dean of Veterinary Science, Dr. R.A. Khan, Incharge Registrar of the University, Shri C.K. Tekchandani, Dean College of Agricultural Engineering, Shri S.S. Tomar, Dean Students Welfare; and, one Shri L.N. Verma. The said Committee conducted an enquiry into the matter and submitted its report. However, in the meanwhile, the Union submitted a notice of agitation and thereafter certain agitation started in the University pointing out the highhandedness and irregularities of the Management. According to the petitioners the Committee which was constituted to inquire into the allegations with regard to the incident that took place in the chamber of Shri G. S. Marko on 22.5.2003 so also with regard to certain other incident between the petitioners and one Shri S. K. Tiwari, Deputy Registrar; conducted the enquiry, examined more than 9 witnesses, took the statement of petitioners also and submitted their report vide Annexure P/4 on 12th June 2003. On the basis of report so submitted by this Committee both the petitioners were suspended vide order dated 18.6.2003. Thereafter charge sheets were issued to them under Rule 14 of the M.P. Civil Services (Classification, Control and Appeal) Rules of 1966 (herein after referred to as "the Rules of 1966). The charge-sheet issued to the petitioners have been filed by the respondents as Annexure R/10 dated 8th July 2003. In the charge sheet the imputation of allegations pertains to the act of the petitioners in misbehaving with Shri G. S. Marko so also with Shri S. K. Tiwari, Deputy Registrar. After the charge sheet was issued, it is the grievance of the petitioners that all of a sudden without conducting any

departmental enquiry on the ground that conduct of departmental enquiry is not possible in view of the atmosphere created by the petitioners in the University premises powers were exercised under Rule 19 (ii) of the Rules of 1966 and the services of the petitioners were terminated without conducting any enquiry. Accordingly challenging the aforesaid termination order passed under Rule 19(ii) of the Rules of 1966 as contained in Annexure P/3 dated 5.8.2003 petitioners have filed these writ petitions. Appeals filed before the Board of Management under Rule 23 of the Rules, 1966 is also dismissed vide Annexure P/2 and a review petition filed before the Chancellor of the University namely the Governor having also been dismissed on 12.11.2007, therefore, petitioners have approached this Court challenging all the three orders as indicated herein above, which are filed as Annexure P/1, P/2 and P/3.

5- Shri Arvind Shrivastava, learned counsel appearing for the petitioner took me through the material available on record and the reasons given by the Vice Chancellor for dispensing with the enquiry, argued that the reasons given for dispensing with the enquiry is that threats were extended by the petitioners to the officers who were to conduct departmental enquiry and to the witnesses. Shri Arvind Shrivastava, learned counsel emphasized that three reasons have been given in the order Annexure P/3 dated 5.8.2003 for dispensing with the enquiry. They are: that the enquiry officers who are appointed in the matter have refused to conduct an enquiry due to the threat extended to them by the petitioners. The second ground was that petitioners are threatening and intimidating the witnesses and therefore the witnesses are not coming forward to give their statements in the departmental enquiry, and finally it is said that due to the agitation undertaken by the petitioners' and the employees Union after the petitioners were suspended a tense and violent situation has been created in the University, due to which conduct of the departmental enquiry is not practicable and therefore, the power is exercised under Rule 19(ii) of the Rules of 1966. Shri Arvind Shrivastava emphasized that the aforesaid reason given are not at all proper. It is only an excuse for somehow dismissing the petitioners without conducting an enquiry. Shri Arvind Shrivastava took me through the proceedings held in the preliminary enquiry conducted by five Senior Officers of the University and argued that when the preliminary enquiry was conducted, more than 9 witnesses were examined and based on the report submitted by the preliminary enquiry Committee as contained in Annexure P/4, charge sheet was issued to the petitioners after suspending them. In the

charge sheet the main allegations against the petitioners were with regard to two incidents that have taken place. The first incident took place on 20th of May, 2003 in the chamber of Shri G.S. Marko and the second incident took place on 22.5.2003 involving Shri G. S. Marko and Shri S. K. Tiwari, Deputy Registrar. With regard to both these incidents preliminary enquiry was conducted and it is based on the preliminary enquiry report that the charge sheet was issued. Petitioners denied the allegations leveled in the charge sheet and thereafter no orders were passed appointing an Enquiry Officer. Surprisingly three persons, who are said to have been appointed as enquiry officers, are alleged to have expressed their inability to conduct the enquiry. Shri Shrivastava invites my attention to Annexure R/16 dated 30th July, 2003 submitted by Dr. M. C. Agrawal, the communication Annexure R/17 dated 29.7.2003 by Dr. V. K. Agrawal and the communication dated 30th July, 2003 by Shri R. P. S. Baghel Annexure R/18 and argued that all the three persons have indicated that they are appointed as Enquiry Officer and they are unable to conduct the enquiry. Referring to the communications made by them as contained in Annexure R/16, R/17 and R/18, Shri Arvind Shrivastava emphasized that the order of appointment of Enquiry Officer as referred to in these three letters is dated 29th July, 2003, all the three persons have been appointed on the same date and all of them refused to conduct the enquiry on the ground that they are received threat from the petitioners. It is submitted by Shri Arvind Shrivastava that the orders appointing the enquiry Officer are not available and after the appointment of three persons on the same date or the next day i.e. 30.7.2003, they expressed their inability to conduct the enquiry, it is argued that the aforesaid plea of the enquiry officers submitting their letter is nothing but an act of procuring of these letters by the University authorities with a way to create an excuse for not conducting the enquiry and invoking the extra ordinary power under Rule 19(ii) of the Rules of 1966 on such circumstances which are extraneous in nature and which are not established, action taken is unsustainable.

6- That apart, Shri Arvind Shrivastava, learned counsel for the petitioner invites my attention to the communications made by the so called witnesses vide Annexure R/11 to R/15 and submits that all these letters are issued between 20th July, 2003 to 30th July, 2003 and by obtaining these letters between the period 20.7.2003 to 30.7.2003 an excuse is created for dispensing with the enquiry. Interalia contending that the letters have been procured by the University's authority only as an excuse for dispensing with

the enquiry. Shri Arvind Shrivastava emphasized that the grounds for dispensing with the enquiry are not available, action is taken in violation of principles of natural justice and the same is unsustainable. Shri Arvind Shrivastava thereafter submitted that after the action was taken against the petitioners, they approached the Chancellor of the University namely, the Governor of the State seeking exercise of the powers conferred on him under Rule 14 of J.N.K.V.V. Act, it is stated that on the basis of material submitted by the University and the memorandum submitted by the petitioners under Section 14 Annexure P/ 8, the Secretariat of the Chancellor, conducted a fact finding enquiry as is evident from note sheets collectively filed as Annexure P/8 and P/9; in this fact finding enquiry, prima facie finding recorded is that the departmental enquiry has been dispensed with on extraneous consideration and without there being enough material to do so. Shri Shrivastava invites my attention to the note sheet available vide Annexure P/8 and submits that in all these note sheets the findings recorded are that the enquiry has been dispensed with in an illegal manner and therefore, finding the action taken against the petitioner to be contrary to requirement of law a show cause notice was issued to the University vide Annexure P/10 on 31st August 2005 by the office of the Chancellor and it was indicated in this show cause notice that the action taken against the petitioners are illegal and therefore, why the orders of dismissal dated 5.3.2003 be not annulled and set aside. However, after having done so, surprisingly the Secretariat of the Governor's office indicated that it is not a fit case where power under Section 14 of the Adhiniyam should be exercised, and the petitioners were directed to file an appeal. Thereafter petitioners filed an appeal before the Board of Management. Appeal filed by the petitioners having been rejected it is stated that petitioners have filed this writ petition, after the review was alsc dismissed by the Chancellor. Shri Arvind Shrivastava took me through various findings recorded in the fact finding enquiry conducted in the office of Chancellor, the reasons given by the Vice Chancellor in the note sheet and emphasized that reasons given for dispensing with the enquiry are based on the ipse dixit and assumption of the Vice Chancellor and as the action is taken inconsistent to law, the same be interfered with. Shri Arvind Shrivastava submitted that once a charge sheet was issued and as the allegations in the charge sheet were serious in nature, proper departmental enquiry should have been conducted and on the grounds as has been put forth the decision for dispensing with the enquiry is not sustainable. in support of his contention he invites my attention to the law laid down by the Supreme Court in the case of *Sachdev Singh Vs. Union of India and others* - 2003 AIR SCW Page 940,

and argues that the powers conferred under Rule 19(ii) of the Rules of 1966 which is akin to powers available under Article 311(2) of the Constitution of India cannot be exercised without any cogent and justifiable reason being available for dispensing with the enquiry. It is stated that merely on the assumption or ipse dixit of the authority that the atmosphere created is not congenial for conducting an enquiry action cannot be taken. He further invites my attention in this regard to the judgment of the Supreme Court in the case of *Jaswant Singh Vs. State of Punjab* - AIR 1991 SC Page 385, in support of his contention. It is in sum and substance the contention of the petitioner that on the grounds indicated in the order of dismissal and the reasons given therein a case for dispensing with the departmental enquiry is not made out and therefore, the entire action which is tainted with malafide is nothing but an arbitrary and illegal action of the Vice Chancellor, therefore, orders impugned be held to be unsustainable and quashed.

7- Shri P. N. Dubey, learned counsel appearing for the University refuted the aforesaid and took me through the documents available on record, note sheet prepared by the office of Vice Chancellor, advise given by the legal advisor of the University and emphasized that initially the petitioners committed misconduct by entering into the chamber of Shri Marko and thereafter Shri S. K. Tiwari and acted in a manner which was unbecoming of an employee and on a prima facie case being made on the basis of preliminary enquiry conducted both the petitioners were suspended vide Annexure R/4 on 18th June, 2003. After they were suspended it is stated that petitioners became violent, started harassing and intimidating all the officers of the University and ultimately the District Administration had to declare the University area as a prohibited area, inspite thereof petitioners and office bearers of the Union started picketing before the residence of the Vice Chancellor, created an atmosphere of tension, threatened and intimidated the officers of the University, particularly the officers who had conducted the departmental enquiry and who were witnesses in the departmental enquiry, they entered the chamber of Shri C. K. Tekchandani on 15th of July 2003 and threatened him with dire consequence if he tried to interfere with the activities of the petitioners. It is stated that the atmosphere created by the petitioners were so tense and serious that no employee of the University or officer was willing to conduct an enquiry. As a result it is stated that the action has been taken. Shri P. N. Dubey emphasized that even the police authorities were not cooperating with the University in the matter and taking action against the petitioners, on the FIR lodged, no case was registered

and as no action was taken by the police authorities, the University had no option but to proceed with dispensing with the enquiry. It is emphasized by Shri P. N. Dubey that the reasons given by the Vice Chancellor in his impugned order particularly the note sheets filed by the petitioners as Annexure P/16, the disciplinary authority namely the Vice Chancellor has referred to the atmosphere created and as under the said atmosphere and tense situation it was not possible to conduct an enquiry, the act of dispensing with the enquiry is proper and does not call for any interference. It is argued by Shri P. N. Dubey that the petitioners were terrorizing and intimidating not only the enquiry officer and witnesses but all who were functioning for the administration of the University and as the situation created was beyond the control of the University the action taken is proper. Referring to the Constitution Bench judgment of Supreme Court in the case of AIR 1985 SC 1416 - *Union of India Vs. Tulsiram Patel,* and the mandate of Article 311(2) of the Constitution which is considered by the Supreme Court in the aforesaid judgment and analyzing it in the backdrop of the situation created by the petitioners it is argued that in the circumstances it was not reasonably practicable for the University to hold the enquiry and therefore, the enquiry has been dispensed with. It is stated that when the employees and their association were indulging in terrorizing, threatening the witnesses, departmental enquiry into the matter was not practicably possible and therefore, if the principle laid down in the case of *Tulsiram Patel* (supra) is applied in the facts and circumstances of the present case, act of the respondents has to be upheld. Further reliance in this regard is placed on another judgment of the Supreme Court in the case of *Indian Railway Constructions Co. Ltd. Vs. Ajay Kumar-* 2003(4) SCC 579. Placing reliance on both these judgments Shri P. N. Dubey emphasized that law permits for dispensing with an enquiry and take action not only by virtue of provisions contained in Article 311(2) but also in view of the statutory provisions as is contained in Rule 19(ii) of the Rules of 1966. As the material available in the present case makes out a case for dispensing with an enquiry, no case is made out for interference. It is stated by Shri P.N. Dubey, that once the disciplinary authority has satisfactorily analyzed the factual situation and has arrived at a decision, the same cannot be subjected to further judicial review by this Court on the ground that it is malafide or that it is not based on the facts which are made out from the record. It is stated that material available on record overwhelmingly shows that petitioners were responsible for having created a tense situation and the atmosphere in the University premises was such that conduct of a departmental enquiry was not possible and in such

circumstances powers exercised under Rule 19(ii) of the Rules of 1966 cannot be termed as illegal or arbitrary warranting interference by this Court in a petition under Article 226 of the Constitution. Accordingly, it was argued by Shri P. N. Dubey that it is not a fit case for interference and therefore, he prays for dismissal of this writ petition.

8- In rebuttal, Shri Arvind Shrivastava took me again through the material available on record and indicated that in the charge sheet seven charges were levelled with regard to misbehaviour of the petitioners with Shri G. S. Marko and Shri S. K. Tiwari. Thereafter when the dismissal orders were issued two more incidents pertaining to the agitation and misbehavior with Shri C. K. Tekchandani have been added for dispensing with the enquiry, however with regard to these two subsequent incidents there is no police report, no complaint by the University to any authority, no FIR, no criminal case is registered and therefore, merely on the basis of certain documents procured or manufactured by the University, action taken is nothing but a false and fabricated case made against the petitioners only on paper for dispensing with the enquiry as contemplated under Rule 19(ii). It is argued by Shri Arvind Shrivastava that based on the documents produced by the University the allegations against the petitioner about intimidating the witnesses or the enquiry officer is not established and therefore, it is not a fit case where the documents can be taken cognizance of and the action upheld. Accordingly, he emphasized that documents adduced is not sufficient enough to make out a case and therefore, he seeks for interference into the matter.

9- I have heard learned counsel for the parties at length and have gone through the record. It is a case where services of the petitioners who have put more than 20 years of service and against whom there is no previous record of misconduct or punishment, brought to the notice of this Court, have been removed for the reasons as indicated herein above and while doing so, the normal rule of conducting a departmental enquiry after issuance of charge sheet as contemplated under Rule 14 of the Rules of 1966 is dispensed with and action is taken by following the extra ordinary procedure contemplated under Rule 19(ii) of the Rules of 1966 i.e. by dispensing with the departmental enquiry. That being so, before proceeding to assess the rival contentions based on the material available on record, it is thought appropriate to take note of the law with regard to taking action by invoking the procedure available to the authorities under Article 311(2) of the Constitution or Rule 19(ii) of the Rules of 1966, and the scope of judicial review in such matters.

10- Article 311 of the Constitution gives protection to an employee and the mandate of the Constitution is that no person can be dismissed, removed or reduced in rank until and unless he is convicted in a criminal case or he is proceeded against by conducting an inquiry into the charges levelled against him and action is taken after giving him a reasonable opportunity of being heard and after conducting such inquiry as may be required. However, an exception to this normal rule is carved out and Article 311(2), which contemplates a provision wherein a person can be dismissed, removed or reduced in rank even without conducting a departmental inquiry, but before doing so, the competent authority is required to record reasons as to why it is not "reasonably practicable" to conduct an inquiry.

11- In accordance to the powers conferred to various authorities under Article 309 of the Constitution, departmental rules have been framed and the MP Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as 'CCA Rules') have been enacted by the State of MP by virtue of the powers conferred under Article 309. Rule 19(ii) is akin to the provisions of Article 311(2) of the Constitution, and it contemplates a special procedure to be followed in certain cases for taking disciplinary action against a government servant. Normally when disciplinary action is to be taken against a government servant for misconduct and when punishment is to be imposed, a detailed procedure is contemplated under Rule 14 to Rule 18, which has to be followed. Rule 19 is an exception to the normal rule and by this a special procedure to be followed in certain cases are laid down. Sub-rule (ii) of this Rule contemplates that where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry then he may proceed in the matter without conducting any inquiry. The provisions of Article 311(2) and the Rules akin i.e.... Rule 19 of the CCA Rules, have been subject matter of deliberation, consideration by various Courts, including the Supreme Court.

12- In the case of *Tulsiram Patel* (supra), the provisions of Article 311(2), second proviso has been taken note of and the principle for taking action has been laid down in detail by the Supreme Court. It is held by the Supreme Court that for taking action under Article 311(2) of the Constitution, no inquiry is to be conducted, but only recording of reasons by the competent authority indicating as to why it is not reasonably practicable to hold the inquiry is to be indicated. It has been held that the condition precedent for invoking this power is the satisfaction of the disciplinary authority with regard to the practicability

of holding the inquiry. It is said that the words used are not "impossible" but only "not reasonably practicable". After taking note of the meaning of the word "reasonably practicable" and difference between this word and the word "impossible", Supreme Court has held that if a situation is created where holding of an inquiry is not "reasonably practicable" the same can be dispensed with. But, while doing so, care has to be taken that the Rule is applied cautiously and is not applied in a manner so as to dispense with the inquiry and punish an employee bypassing the normal rule. It has been held that when a government servant is dismissed or reduced in rank by invoking the said provision or analogous provision in the service rule and the aggrieved government servant approaches the High Court under Article 226 of the Constitution or the Supreme Court under Article 32 of the Constitution, the Court will interfere into the matter if well established principles governing Rules of judicial review are made out. It has been held that the ground of judicial review into such matter is that the disciplinary authority has acted on irrelevant considerations. The satisfaction recorded for dispensing with the inquiry is an abuse of the powers conferred upon it and the action is taken on consideration of irrelevant or matters which are not germane to the question involved. It has been held by the Supreme Court that if the decision taken by the disciplinary authority is found to be such which a reasonable person would not take under the given set of circumstances, interference can be made by the High Court or the Supreme Court as the case may be.

13- The question is again considered by the Supreme Court in the case of *Ajay Kumar* (supra) relied upon by Shri P.N. Dubey and after reiterating the same principle, it has been held that the power to dismiss an employee by dispensing with an inquiry is not be to be exercised so as to circumvent the prescribed rule. The satisfaction for dispensing with the inquiry should be based on facts which exist and which justify dispensation of the inquiry. The High Court in such cases has to focus and see as to whether judicial review is called for. It has been found that judicial review in such cases is permissible if the action is found to be based on reasons which are tainted with illegality or irrationality and if there are procedural impropriety. It is held by the Supreme Court in the aforesaid case that for examining as to whether the reasonableness for dispensing with the inquiry has been properly arrived at by the administrative authorities or not, it has to be seen whether relevant factors have been taken note of and if it is found that on irrelevant consideration an arbitrary decision has been taken, the decision would fall in the category of illegality or irrationality

and, therefore, on such consideration interference can be made.

14- Similar is the principle of law as laid down by the Supreme Court in the case of *Sahadeo Singh* (supra) relied upon by Shri Arvind Shrivastava. After taking note of an earlier judgment of the Supreme Court in the case of *Jaswant Singh* (supra), it has been held by the Supreme Court in the case of *Sahadeo Singh* (supra) that the administrative authorities should support its order for dispensation of inquiry and has to show to the Court that the satisfaction arrived at for dispensation of the inquiry is not based on ipsi dixit of the authorities concerned, but is based on certain objective facts and is not at the whims and caprice of the concerned authorities. In paragraph 8 of the said judgment, the following principle is laid down:

> "8. The next case relied upon by the learned counsel for the appellants is of *Jaswant Singh* (supra) wherein this Court while considering dispensation of an inquiry in departmental proceedings against a Police Officer held that on the facts of that case the departmental inquiry was sought to be dispensed with solely on the ipse dixit of the authority concerned, therefore, this Court held that when such satisfaction of the concerned authority is questioned to be proved in a Court of law, it is incumbent on those who support the order of dispensation to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer. On the basis of the said principles, on the facts of that case, this Court came to the conclusion that the respondent-State was not able to satisfy the Court as to the existence of material facts from which satisfaction as to the dispensation of enquiry could be arrived at."

15- In the case of *Jaswant Singh* (supra), it has been held by the Supreme Court that in a proceeding held before a competent Court the department is required to disclose to the Court the material on the basis of which action is taken and existence of the material in support of the action taken should show that the subjective satisfaction has been arrived at after taking note of relevant factors and not merely on the basis of whims and caprice of the authorities concerned.

16- Apart from the aforesaid judgments, the question has been considered by the Supreme Court in the case of *Workmen of Hindustan Steel Limited*

and other Vs. Hindustan Steel Limited and others, AIR 1985 SC 251. In this case also dispensation of inquiry was undertaken and a Class IV employee was dismissed from service. After taking note of the principles applicable, it has been held by the Supreme Court that for arriving at a satisfaction for holding that the inquiry was not reasonably practicable, the reason given must be germane to the issue and it is subjected to limited judicial review. The Court would examine whether the action is based on existing facts or whether it is a cloak or device or an excuse to dispense with the inquiry and to impose a punishment. In the said case the Supreme Court has held that if the Court is satisfied that the action and the reason given for dispensing with the inquiry is prompted by extraneous consideration or is based on material which are not relevant and is a device to circumvent holding of a regular departmental inquiry and to somehow punish the employee concerned, matter should be interfered with and action taken.

17- Similar is the principle laid down by the Supreme Court in the case of *Chief Security Officer and others Vs. Singasan Rabi Das,* AIR 1991 SC 1043.

18- If the legal principle as is detailed hereinabove is taken note of, it would be seen that the decision taken to say that it is not reasonably practicable to hold the departmental inquiry should be based on material which goes to show that an actual threat or situation is existing which contemplates holding of a departmental inquiry impracticable.

19- That being so, this Court is now required to examine as to what was the reason for dispensing with the inquiry and whether the reasons given for dispensing with the inquiry are borne out from the material available on record or the material adduced and available on record are of such a nature that the reasons given are not properly established or is based on ipse dixit of the authorities and is only a device to somehow circumvent the due process of holding a departmental inquiry?

20- In this regard, apart from the fact that the reason is given in the impugned order-dated 5.3.2003, the decision is taken on the basis of a note-sheet and reasons indicated therein which is filed as Annexure P/16. The Registrar of the University initiated the proceedings against both the petitioners namely Shri Pramod Tiwari and Shri Rasool Shah, on 30.7.2003, and submitted to the Vice Chancellor that petitioners Shri Pramod Tiwari and Shri Rasool Shah have misbehaved with Shri G.S. Marko, Comptroller; and,

Shri S.K. Tiwari, Deputy Registrar in the month of May. A fact finding committee was constituted to inquire into the misconduct, the Committee has submitted its report on 12.6.2003 and based on the prima facie findings recorded by the Committee, the employees/petitioners have been suspended on 18.6.2003. Thereafter, it is stated that after the suspension order was issued, behaviour of the employees of the University have become very wild and offensive, they have raised a 20 point Charter of Demands. The said Charter was discussed with SDM, Gohalpur Division, Jabalpur on 25.6.2003. The stand of the University was explained, the Members of the Association also participated and the SDM requested them to maintain law and order in the University. Inspite thereof it is stated that Shri Pramod Tiwari and Shri Rasool Shah have given a call for indefinite relay strike in the University premises with effect from 26.6.2003, and as they are continuing with the relay strike, shouting of slogans and preventing employees from discharging their duties, an atmosphere has been created where the functioning of the University is being adversely affected. Thereafter, the ground taken is that on 15.7.2003 when Dr. C.K. Teckchandani was conducting a meeting in his chamber, at 11.00 AM, both the petitioner entered his chamber and threatened him by using the following words:

> "तुम हड़ताल को हिटलर साही से दवा रहे हो, हम तुम्हें घर में घुसकर मारेंगे। तुम्हें मार–मार कर तुम्हारा कीमा बना देंगें"।

It was stated that after the aforesaid incident, eight letters have been received, which goes to show that Enquiry Officer's have indicated their reluctance to conduct the inquiry, witnesses have stated that they are being threatened and intimidated by the petitioners and, therefore, they will not give witness against the petitioner and in view of the above the Registrar recommends that a situation is created which has spoiled the peace of the campus, smooth functioning of the Vishwa Vidyalaya is being hampered and, therefore, he has sought for intervention of the Vice Chancellor and his opinion in the matter. It seems that the Vice Chancellor directed for getting legal advice into the matter and, therefore, the matter was forwarded to the Legal Advisor of the University on 4.8.2003, and the Legal Advisor gave an opinion that the atmosphere created in the University as indicated in the note-sheet prepared by the Registrar on 4.8.2003, shows that the conduct of the departmental inquiry is not possible and, therefore, he gave an opinion that the University can proceed under Rule 19(ii) of the CCA Rules if the Hon'ble Vice Chancellor so feels. Based on the aforesaid opinion of the Legal Advisor

and the note-sheet of the Registrar dated 4.8.2003, the Vice Chancellor directed for dismissal of the petitioners on 5.8.2003. Therefore, it would be seen that the reason for dispensing with the inquiry is the fact that after suspension of the petitioners an atmosphere of terror has been created in the light of an indefinite strike called by the petitioner; the incident involving Dr. C.K. Teckchandani; and, the eight communications received in the matter of conducting the inquiry or giving evidence by the witnesses.

21- If the aforesaid reasons given are analysed in the backdrop of the material available, it would be seen that for the allegations levelled in the charge-sheet against the petitioners with regard to the misconduct committed in the matter of dealing with Shri G.S. Marko and Shri S.K. Tiwari, a Five Member enquiry committee consisting of senior officers of the University was ordered. The inquiry report is Annexure P/4 dated 12.6.2003 and it shows that in the said inquiry which was conducted from 4.6.2003 upto 9.6.2003, nine witnesses were examined. These witnesses are Shri Gulab Singh Marko; Shri Ramesh Chourasia; Shri R.C. Choubey; Shri J.P. Dubey; Shri G.K. Chawla; Shri K.M. Pillai; Shri R.K. Pyasi; Shri Ram Singh Thakur; and, Shri Babulal Tiwari. Therefore, the petitioners were also examined and the enquiry report is submitted. Till conduct of the inquiry and submission of the report on 12.6.2003 and even during the conduct of the preliminary inquiry between 4.6.2003 to 9.6.2003 there is nothing against the petitioners to show that they have threatened or intimidated any of the witnesses or the persons conducting the inquiry. Dr. C.K. Teckchandani was one of the Members conducting the preliminary inquiry. Thereafter, when the petitioners were suspended, the allegation against them is that they called for strike and during the process of strike they created a situation resulting in breach of law and order, as a result the entire atmosphere in the University got vitiated. However, with regard to this aspect of the matter except for the note-sheet prepared by the Registrar of the University and the communications made in various letters made by the Registrar to the Vice Chancellor and by the University to the State Government and the Governor, there is no complaint made by the University authorities to the police authorities of the area or the District Administration, no criminal case is registered and no action is taken against the petitioners for breach of law and order during this period by the police authorities. On the contrary, the records indicate that for discussing the 20 point demands and Charter submitted by the petitioners, a Meeting of the University representatives alongwith SDM, Gohalpur was held on 25.6.2003

in the University and the minutes of the meeting – Annexure R/5 dated 25.6.2003 does not show that there is any indication in this to show that the employees or the petitioners are indulging in an act which is alleged against them in the note-sheet.

22- It is surprising that the University complains of petitioners' acting in a manner by taking law into their own hands and creating a tense atmosphere in the University and for the same there is no report, complaint or communication made by the University authorities either to the Superintendent of the Police of the area concerned or to the Collector of the District, pointing out these activities of the petitioners nor is there any other material available on record to show that for these illegal activities any criminal case was registered against the petitioners or that they are creating a law and order situation which has resulted in total breakdown of the administration of the University. That apart, there is no complaint or communication made by any other employee or officer of the University showing that work in the University has been hampered or adversely affected due to the so-called agitation and strike by the petitioners and the employees Union. The only singular document in this regard is a complaint of Dr. C.K. Teckchandani dated 15.5.2003. That being so, apart from the complaint of Dr. C.K. Teckchandani, there is no material available on record to show that on their suspension, the petitioners created an atmosphere in the University, which can be termed as creating a law and order situation or a situation in which conduct of a departmental inquiry is not possible. Such a situation is created by the University on paper, which is not borne out from the actual position as was existing. If that be so, as submitted by Shri Arvind Shrivastava, the University would have made reports to the District Administration, sought for their assistance in maintaining law and order and if such an assistance was sought for the police would have registered criminal acts against the petitioners and proceeded against them. There is no material on record to show any such incident took place or any such proceedings were initiated except for declaration of the University as a prohibited area and no other action is taken against the petitioners..

23- That apart, the final material produced for holding that the departmental inquiry is not practicable are the eight communications which are referred to in the note-sheet of the Registrar dated 4.8.2003 and which are filed by the respondents from Annexure R/11 onwards. If these documents are scrutinized it would be seen that out of these eight documents, three letters are written by three Enquiry Officers, who have expressed their unwillingness to conduct

inquiry and because of this it is stated that conduct of departmental inquiry is not possible. The first communication is Annexure R/16 dated 30.7.2003. This is a letter written by Dr. M.C. Agrawal, Professor and HOD, Parasitology, it is addressed to the Registrar of the University and it refers to a communication made by the Registrar a day before i.e..... 29.7.2003. It is indicated by Dr. M.C. Agrawal that with reference to the above letter, he says that he is not interested to act as Enquiry Officer for conducting departmental inquiry against Shri Pramod Tiwari and Shri Rasool Shah, as he has received threatening calls. It is not known as to how the petitioners can give the threatening calls to Dr. M.C. Agrawal when he is only appointed as an Enquiry Officer on 29.7.2003, and he has already given his unwillingness to conduct the inquiry on the next date 30.7.2003.

24- Similarly, the next letter is Annexure R/17. This letter is dated 29.7.2003 and in this letter also one Dr. V.K. Agrawal, Professor and HOD, Plant Physiology, refers to a communication made to him on 29.7.2003 and says that he cannot conduct the inquiry because of the threat given by Shri Pramod Tiwari and Shri Rasool Shah. It is surprising that this Dr. V.K. Agrawal is appointed as an Enquiry Officer on 29.7.2003 and on 29.7.2003 itself he received the threat and refuses to conduct the inquiry.

25- Similar is the position with the third Enquiry Officer, one Shri R.P.S. Baghel, HOD, Department of Animal Nutrition and Food Technology, who again on 30.7.2003 submits a letter – Annexure R/18 saying that he is unable to conduct the inquiry and he is also appointed as Enquiry Officer on 29.7.2003.

26- It may be taken note of that except for referring to appointment of Enquiry Officer on 29.7.2003, no order is produced appointing the persons as Enquiry Officer and during the course of hearing of the writ petition, Shri P.N. Dubey simply stated that in a meeting conducted of all the Officers, these persons gave the letters. When, how, under whose instructions the meeting is conducted; what was the necessity for holding such a meeting is not clear; no minutes of such meeting is produced; and, there is no averment with regard to conduct of any such meeting. Under such circumstances, an assumption can be made that the letters with regard to the Enquiry Officers, expressing their inability to conduct the inquiry can be a procured document only to create an excuse for not conducting the inquiry.

27- Similarly, the other five letters may be taken note of. Annexure R/11 is

a communication made by Shri V.P. Singh, Dean of the College, who informed the Registrar on 28.7.2003 that he is receiving threatening calls from Shri Pramod Tiwari and Shri Rasool Shah. Shri V.P. Singh, it is stated is a witness in the inquiry. However, in the charge-sheet issued to the petitioners and in the list of witnesses as indicated hereinabove and in Annexure III, to the charge-sheet, Shri V.P. Singh is not shown as a witness. It is, therefore, not known as to how he is being threatened when he is not even a witness in the departmental inquiry.

28- The next letter – Annexure R/12 is again dated 28.7.2003 and in this letter of Dr. C.K. Teckchandani, he refers to the incident that took place on 15.7.2003. The letter of Dr. C.K. Teckchandani is nothing but a repetition of his complaint dated 15.7.2003.

29- Thereafter, Annexures R/13, R/14 and R/15 are three letters written by Shri G.S. Marko, Shri Ramesh Chourasia and Shri G.K. Chawla. These three persons are witnesses in the departmental inquiry, whose name appear in the list of witnesses and they say that they are receiving threats, therefore, they cannot give evidence in the inquiry. All these letters are issued by them on 28.7.2003, 30.7.2003 and 26.7.2003. It may be taken note of that in the list of witnesses enclosed with the charge-sheet, name of nine witnesses have been indicated and it is only in the case of three persons that it is stated that a threat has been received. It is on the basis of these eight letters received in the University within three days on 28.7.2003, 29.7.2003 and 30.7.2003, that a decision is taken to dispense with the inquiry, whereas there is no other supporting material to show that any of these witnesses or the Enquiry Officers have made any complaint to the University authorities giving the particulars of the threat extended, the period when the threat was extended and the manner in which the threat is extended. It is, therefore, a case where the documents produced by the respondents in support of their contention seems to have been procured only for the purpose of creating a reason for dispensing with the inquiry and there is no supporting material available to show that these threats were actually in existence at the relevant time.

30- During the course of hearing of this writ petition Shri P.N. Dubey, learned counsel, has emphasized that these material cannot be reappreciated by this Court by discharging the duties of appellate authority and, therefore, he wants this Court to accept these documents as it is and record a finding to hold that the reason for dispensing with the inquiry is based on the subjective

satisfaction of the Vice Chancellor.

31- This Court cannot accept this proposition put forth by Shri P.N. Dubey, for **two** reasons:

The **first** reason is that when a constitutional right available to an employee is being taken away and when he is being dismissed from service without conducting a departmental inquiry, which is a constitutional protection available to him, cogent evidence and material should be available to show that dispensation with the inquiry or removal without following the rules of natural justice or the procedure contemplated under Rule 19 is undertaken, considerations which are in existence and the action impugned not based on the ipse dixit or assumptions of the authorities or based on material which have been created even though they are actually not in existence. If the documents and material available are analysed in the backdrop of these requirements, it would be seen that a conclusion can be drawn that these documents seem to have been created for taking action against the petitioner, as supporting material to show actual existence of a situation as is indicated by these documents are not available. If that be the position, then it is a case where action is taken on extraneous consideration in an arbitrary manner, based on irrelevant consideration therefore, is nothing but an irrational decision, which cannot be upheld by this Court.

32- Apart from the aforesaid, there is a **second** reason and which is more convincing and strong to support the aforesaid conclusion of this Court. It may be taken note of that after the impugned action was taken against the petitioners, they approached the Governor of the State, who was Chancellor of the University, and requested him to invoke the powers conferred upon him under Rule 14 of the Jawaharlal Nehru Krishi Vishwa Vidyalaya Act, 1963. Annexure P/8 is the memorandum in this regard submitted by the petitioners to the Chancellor and from page 52 onwards of this document, are note-sheets received by the petitioners under the Right to Information Act, from the Secretariat of the Chancellor namely the Governor of MP. If these note-sheets are meticulously scanned, it would be seen that the entire material as has been produced before this Court were placed for consideration even before the Governor and in page 55 of the aforesaid note-sheet, in paragraph 4, observations are made with regard to dispensation with the departmental inquiry and finally it is observed that dispensation with the inquiry has been done in a manner which cannot be approved and in page 66, in

paragraph 10, the Secretary submits a report to the Governor, indicating that even though the Vice Chancellor of the University under Rule 19 of the CCA Rules can invoke the powers, but the power can be exercised only if situation so exists. It is indicated in this paragraph that the Hon'ble Vice Chancellor has exercised this power in a manner which has the effect of depriving the employees of their constitutional and legal right and the power has been exercised in a unilateral manner and with a biased attitude. Infact, if the entire note-sheets and the material available on record is meticulously scanned, it would be seen that the Chancellor of the University prima facie came to the conclusion in the inquiry conducted in his office that dispensation with the inquiry in the present case for the reasons given are not proper. These are the findings recorded by the Secretary of the Governor and the Chancellor, as is evidenced from the aforesaid note-sheet running into more than 50 pages.

33- Finally, after taking note of all these factors, a show-cause notice was issued to the University vide Annexure P/10 on 31.8.2005 and in this show-cause notice the prima facie finding recorded has been reproduced and from paragraph 4 onwards, particularly in paragraph 4.5, it is indicated that the reasons given for exercising the powers under Rule 19 is not established and merely on the basis of letters given by three persons indicating that they cannot conduct the inquiry, the inquiry could not be dispensed with. Even the office of the Chancellor had taken note of the aforesaid three letters for dispensing with the inquiry and the explanation given by the University to the effect that the petitioners somehow came to know from the Confidential Department about the proposal to appoint these persons as Enquiry Officers. The office of the Chancellor has found the same to not correct. It is because of these reasons that in the show-cause notice issued under section 14 of the Rules of 1963, the University was directed to show-cause as to why on the aforesaid ground the order of termination dated 5.8.2003 be not annulled and quashed. The University in reply vide Annexure R/11 simply repeated the same story as has been repeated before this Court and surprisingly when the matter went back to the office of the Chancellor, the note-sheet further indicates that the office of the Chancellor referred to some discussion that the Vice Chancellor of the University had with the Chief Secretary Shri A.V. Singh; the Secretary to the Governor Shri I.S. Dani; the then Agriculture Minister; and, the Hon'ble Chief Minister before dismissal and held that as the dismissal order has been issued after consultation with all these authorities and as the power is exercised under Rule 19 after consultation with all these authorities, it is finally held that

the Chancellor cannot interfere into the matter under Rule 14 and the matter was closed directing the petitioners to take recourse to the remedy of appeal.

34- It is, therefore, clear from a meticulous scanning of these note-sheets also that the decision to dispense with the inquiry was taken in a manner which was not even approved by the Chancellor, but for reasons which remain unexplained the Chancellor refused to interfere into the matter because it seems that the Secretary of the Governor was of the opinion that before taking action, consultation have taken place with various authorities including the Chief Secretary, Chief Minister and the Minister of the Department concerned and, therefore, the Chancellor should not interfere. This itself shows that the disciplinary authority namely the Vice Chancellor has not acted independently in the matter. The entire action is based on the advice given by the Legal Advisor and the consultation with the Officers as indicated hereinabove in page 83, of the note-sheet – Annexure P/8, and if that be the position this Court has to hold that the decision taken for dispensing with the inquiry is based on irrelevant considerations and cannot be approved by this Court.

35- Taking note of the totality of the facts and circumstances as are indicated hereinabove and applying the principle of law as laid down by the Supreme Court in various cases, it has to be held by this Court that in this case action has been taken by the authorities concerned on their ipse dixit, without objectively analyzing the matter, is based on irrational considerations and on improper analysis of the legal principle the action is taken. The satisfaction arrived at for dispensation with the inquiry is based on the whims and caprice of the concerned authorities and the material available on record does not support taking of such an action.

36- That being so, it is a fit case where action the action taken should be interfered with and benefit granted to the petitioners as the proposed action cannot be said to be taken in a manner which can be approved by this Court.

37- That apart, when the petitioners submitted appeals and revisions to the Board of Management and the Governor, the same has been rejected by repeating the same comments given by the University without taking note of the totality of the circumstances as has been indicated hereinabove.

38- Petitioners, as indicated hereinabove, have put in more than 20 years of service. There is no material available on record to show that during this period of service the petitioners have committed any misconduct or have acted

in a manner which can be termed as unbecoming of an employee. They are proceeded against and the extreme punishment of dismissal from service is imposed upon them by invoking the extra-ordinary procedure contemplated under Rule 19(ii) of the CCA Rules and for doing so, the reasons recorded are not germane to the issue in question, are based on irrelevant material and based on facts which are not established from the material available on record.

39- If the contention of the respondents with regard to existence of a law and order situation was correct, then as indicated hereinabove the district administration would have taken some action in the matter. All this goes to show that only on paper a situation has been created to justify taking of the action whereas infact the existence of such a situation is doubtful or is rather not established and, therefore, this Court is not in a position or rather unable to uphold the act of the respondents.

40- Accordingly, both the petitions are allowed. Impugned order-dated 5.8.2003 – Annexure P/3 dismissing the petitioners from service and the consequential orders dismissing the appeals and revisions are all quashed. Respondents are directed to reinstate the petitioners in service and grant them all consequential benefits. However, if so advised, respondents are free to proceed in the matter for taking action against the petitioners for the alleged misconduct by conducting a proper departmental inquiry.

41- With the aforesaid, both the petitions stand allowed and disposed of.

Petition allowed.

I.L.R. [2013] M.P.,102
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P.No. 2642/2007 (Jabalpur) decided on 6 November, 2012

H.P. SINGH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Penal Rent - Deduction of **- Petitioner retired from service in the year 1990 and occupied the official accommodation till 1996 - If the quarter is not vacated by the employee within the prescribed period, the sum of penal rent could not be directed to be recovered from the terminal benefits which were payable to the**

employee on the date of retirement. **(Para 8)**

सेवा विधि – दाण्डिक भाड़ा – की कटौती – याची सन् 1990 में सेवा से निवृत्त हो गया और सन् 1996 तक शासकीय निवास स्थान का अधिभोगी था – यदि कर्मचारी ने विहित अवधि के भीतर शासकीय निवास स्थान खाली नहीं किया, तब कर्मचारी को सेवा निवृत्ति की तिथि को देय अंतिम लाभों से, दाण्डिक भाड़े की रकम वसूलने के लिए निदेशित नहीं किया जा सकता।

Cases referred :

AIR 2001 SC 2433, 2003(4) MPHT 217.

K.P. Singh, for the petitioner.
Lalit Joglekar, P.L. for the respondents.

ORDER

U.C. MAHESHWARI , J :- Heard.

2. The petitioner has filed this petition under Article 226/227 of the Constitution of India for quashment of the order dated 9.11.06 (Annex.P/6) passed by respondent No.4 Civil Surgeon cum Superintendent, District Hospital Katni whereby the direction to deduct the sum of penal rent, with respect of the Govt. quarter allotted to the petitioner when he was in service, from the sum of his retiral benefits, has been given.

3. After taking me through the averments of the petition as well as the papers placed on record including the impugned order Annex.P/6, petitioner's counsel by referring the decision of the Apex Court in the matter of *Gorakhpur University Vs. Shitla Prasad Nagendra*-AIR 2001 SC 2433 as also of this Court in the matter of *Dr. H.K.Saxena Vs. Dr. Harisingh Gaur Vishwavidyalaya, Sagar and another*- 2003(4) MPHT -217 argued that even after retirement if the quarter is not vacated by the employee within the prescribed period, the sum of the penal rent could not be directed to be recovered from the terminal benefits which were payable to the employee on the date of retirement and in the background of such principle he pointed-out that the present petitioner was retired in the year 1990 and vacated the premises in the year 1996 in view of the aforesaid legal position the impugned order directing recovery of penal rent from his terminal benefits, is not sustainable and prayed for admission and allowing this petition.

4. On the other hand, the State counsel has opposed the aforesaid submission saying that in the available factual matrix, the petitioner is not

entitled to get any relief from this court as prayed because the prayer is contrary to some notification of the State of M.P.

5. Having heard, keeping in view the arguments advanced, I have gone through the papers placed on the record so also the aforesaid cited decisions.

6. In the matter of *Gorakhpur University* (supra) the Apex Court has held as under :-

> "6. Pension and gratuity are no longer matters of any bounty to be distributed by Government but are valuable rights acquired and property in their hands and any delay in settlement and disbursement whereof should be viewed seriously and dealt with severely by imposing penalty in the form of payment of interest. Withholding of quarters allotted, while in service, even after retirement without vacating the same is not a valid ground to withhold the disbursement of the terminal benefits. Such is the position with reference to amounts due towards Provident Fund, which is rendered immune from attachment and deduction or adjustment as against any other dues from the employee."

7. On arising the occasion such principle was also followed by this Court in the matter of *Dr. H.K.Saxena Vs. Dr. Harisingh Gaur Vishwavidyalaya, Sagar and another* (supra) and pursuant to that the amount which was deducted from the retiral benefits of the concerning employee as penal rent with respect of govt. quarter, has been directed to be refunded along with interest @ 9% from the date of vacating the quarter.

8. In view of the aforesaid principle laid down by the Apex Court as well as by this Court, on examining the case at hand, then in the available scenario, the same are applicable to the present case. Pursuant to it, it is held that the respondents authorities are not entitled to deduct the sum of penal rent of the quarter in dispute from the retiral benefits of the petitioner. In such premises, the impugned order Annex.P/6, directing recovery of the sum of penal rent of the quarter from the retiral benefits of the petitioner, is quashed. Pursuant to it, respondents authorities are directed to refund such sum of penal rent, if the same is found to be deducted from the aforesaid retiral benefits of the petitioner, along with interest @ 9% per annum from the date of vacating the quarter i.e 15.7.2006. This

direction be complied with by the respondents authorities as early as possible probably within six months from today.

9. Petition is allowed as indicated above. There shall be no order as to the cost.

C.C as per rules.

Petition allowed.

I.L.R. [2013] M.P., 105
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P.No. 1934/2008 (Jabalpur) decided on 6 November, 2012

ORIENT VINDYAAS (M/S) ...Petitioner
Vs.
SAZZI KUTTPPAN ...Respondent

***Civil Procedure Code (5 of 1908), Section 10 - Stay of Suit - Pendency of criminal case* - A civil suit for recovery of loss sustained due to fraud played by respondent in respect of which criminal case is pending cannot be stayed. (Paras 5 & 6)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 – वाद पर रोक – आपराधिक प्रकरण का लंबित रहना – प्रत्यर्थी द्वारा किया गया कपट, जिसके संबंध में आपराधिक प्रकरण लंबित है, उस कपट के कारण हुई हानि की वसूली हेतु सिविल वाद को रोका नहीं जा सकता।

Cases referred :

2000(3) MPHT 194, 1996(II) MPWN 61.

Pushpendra Yadav, for the petitioner.

O R D E R

U.C. MAHESHWARI , J :- He is heard on the question of admission.

1. The petitioner has filed this petition under Article 227 of the Constitution of India, for quashment of order dated 21.09.07 (Annexure P-4) passed by 5th Additional District Judge, Bhopal, in Civil Original Suit No.110-B/06, whereby allowing the application of the respondent defendant filed under Section 10 of the C.P.C., on account of pendency

of the some criminal case, at the instance of and on the report of the present petitioner against the respondent, the further proceedings of the impugned civil suit has been stayed.

2. The petitioner's counsel after taking me through the averments of the 'petition as well as the paper placed on the record along with the impugned order by referring the decided case of this court in the matter of *Nemichand Gangwal and another Vs. Harish Kumar .Jhanwar, reported* in 2000(3) M.P.H.T. 194, argued that the civil suit cannot be stayed till disposal of the criminal case instituted with respect of the incident out of which the cause of action of the civil suit had came into existence. In continuation he said that the aforesaid cited case of this court has been decided taking into consideration the decision of the Apex Court in the matter of *State of Rajasthan Vs. M/s. Kalyan Sundaram Cement Industries Ltd.*, 1996 (II) MPWN 61 and prayed to admit and allow this petition.

3. Having heard, keeping in view the arguments, I have carefully gone through the papers placed on the record and the aforesaid cited cases, it is undisputed fact in the matter that the impugned suit has been filed by the present petitioner against the respondent for recovery of the sum of Rs. 7,07,573/- which has been mis-appropriated by practicing the fraud by the respondent with the petitioner and thereby the offence of breach of trust was also committed by him, in such premises before filling the civil suit FIR was also lodged by the petitioner, on which criminal offence of Sections 408, 420 and 506/34 of the I.P.C. was registered and after investigation the chargesheet was filed before the competent criminal court to prosecute the respondent under such offences. After filing the suit on behalf of the respondent, the impugned application under Section 10 of the C.P.C. was filed for staying the further trial of the civil suit till disposal of the aforesaid criminal case and on consideration by allowing such application further trial of the civil suit has been stayed.

4. In the matter of *State of Rajasthan Vs. Kalyan Sundaram Cement Industries* (Supra), the Apex Court has held as under:

> " It is settled law that pendency of the criminal matters would not be an impediment to proceed with the civil suits. The criminal Court would deal with offence punishable under the Act. On the other hand, the Courts rarely stay the criminal cases and

only when the compelling circumstances require the exercise of power. We have never come across stay of any civil suits by the Courts so far. The High Court of Rajasthan is only an exception to pass such orders. The High Court proceeded on wrong premise that the accused would be expected to disclose their defence in the criminal case by asking them to proceed with the trial of the suit. It is not a correct principle of law. Even otherwise it no longer subsists, since many of them have filed their defences in the civil suit. On principle of law, we hold that the approach adopted by the High Court is not correct. But since the defence has already been filed nothing survives in this matter."

5. Subsequent to the aforesaid decision on arising the occasion this court has also followed the aforesaid principle in the aforesaid cited case in the matter of *Nemichand Gangwal and another Vs. Harish Kumar Jhanwar* (Supra) in which it was held as under:

" In view of the aforesaid enunciation of law it is well settled that a suit filed for recovery of amount covered under the dishonoured cheques should not be stayed under Section 10 of the Code of Civil Procedure solely on the ground that Criminal proceedings under Section 138 of the Negotiable Instruments Act has been instituted."

6. In the light of the aforesaid on examining the case at hand, I have found that the impugned order has been passed contrary to the aforesaid settled principle and pursuant to the same is not sustainable under the law. Consequently by allowing this petition, the impugned order Annexure P-4, is hereby set aside and case is remitted back to the trial court with a direction to proceed with the civil suit in accordance with the procedure prescribed under the law. There shall be no order as to costs.

7. Before parting with the matter, the respondent defendant is extended a liberty to approach this court with appropriate application or proceedings, if he is aggrieved by this order or any part of it.

C.C. as per rules.

Petition allowed.

I.L.R. [2013] M.P., 108
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P.No. 3049/2010 (Jabalpur) decided on 9 November, 2012

BAIJ NATH RAJAK ...Petitioner
Vs.
DISTRICT MAGISTRATE/COLLECTOR, SIDHI & anr. ...Respondents

Arms Act (54 of 1959), Section 17 - Revocation of license **- Minor son of the licensee fired at a minor girl causing her death - Minor son of the petitioner was held guilty by the Juvenile Magistrate - License of the petitioner was revoked - Held - Petitioner was grossly negligent in keeping the firm arm - A person who could not keep such arms according to the terms and conditions of the license are not entitled to keep the arm - Order revoking arm license cannot be said to be contrary to law - Petition dismissed. (Para 7)**

आयुध अधिनियम (1959 का 54), धारा 17 – अनुज्ञप्ति का प्रतिसंहरण – अनुज्ञप्तिधारी के अप्राप्तवय पुत्र ने अप्राप्तवय बालिका पर गोली चलायी जिससे उसकी मृत्यु हो गई – किशोर न्यायाधीश द्वारा याची के अप्राप्तवय पुत्र को दोषी ठहराया गया – याची की अनुज्ञप्ति प्रतिसंहरित की गई – अभिनिर्धारित – याची ने अग्नेयायुध रखने में घोर उपेक्षा की – व्यक्ति जो उक्त आयुध को अनुज्ञप्ति की शर्तों नुसार नहीं रख सकता, वह आयुध रखने का हकदार नहीं – आयुध अनुज्ञप्ति के प्रतिसंहरण का आदेश विधि विरुद्ध नहीं कहा जा सकता – याचिका खारिज।

A.K. Gupta, for the petitioner.
Lalit Joglekar, P.L. for the respondents/State.

ORDER

U.C. MAHESHWARI , J :- The petitioner license holder of alleged arm has filed this petition under Article 227 of the Constitution of India, for quashment of order dated 27.10.09 (Annexure P-5) passed by Commissioner Rewa Division, Rewa, in Case No.109/Appeal/2002-03, affirming the order dated 12.12.02 passed by District Magistrate, Sidhi, in Case No.752/R.D.M./02, whereby by virtue of Section 18 of Arms Act (In short "the Act") his license of rifle has been cancelled and revoked.

(2) The fact giving rise in this petition in short are that considering the application of the petitioner long before in the year 2000 for the purpose of self security a license of 12 bore rifle bearing no.9/MP/S.D.D.-1/2000 was

issued to him, pursuant to such license the petitioner had purchased the rifle. On dated 28.06.02 the minor son of the petitioner namely Sunny Kumar aged about 14 years by such rifle caused the fire on a minor girl of Smt. Kemala Rajak, namely Billu alias Renu Bai aged about 13 years, resultantly she died on sustaining the bullet injury. In this regard a crime was registered in concerning Police Station. Investigation was held, on completion of the same, the son of the petitioner Sunny Kumar was charge sheeted before the court of Juvenile Magistrate. After holding the trial on appreciation said Sunny Kumar was held guilty but taking into consideration that on the date of the incident he was juvenile that's why he was directed to be released on some terms and conditions by the Juvenile Court. In such situation Superintendent of Police, Sidhi, had send the communication memorandum made to the licensing authority the District Magistrate of Sidhi, to cancel the aforesaid arms license of the petitioner stating that he is incompetent to keep and maintain the fire arm and the possibility to misuse of the same could not be ruled out.

(3) Considering the aforesaid memo of the superintendent of police a show cause notice for revoking and cancelling the arm license was given to the petitioner, in response of it, the reply was filed but on consideration the same was not found satisfactory. Pursuant to it, the aforesaid license of the petitioner has been revoked and cancelled by the licensing authority, the District Magistrate. Being dissatisfied of such order the petitioner filed the appeal in the court of Commissioner Rewa Division, on consideration by affirming the order of the district magistrate, the same was dismissed, on which the petitioner has come to this court with this petition.

(4) The petitioner's counsel after taking me through the averments of the petition as well as the papers placed on the record including the impugned order of the Commissioner said that on the date of the aforesaid alleged incident when the fire was made by his minor son Sunny Kumar on the above mentioned girl Billu alias Renu Bai, the petitioner was not at the residence as he accompanied with his wife by locking the house had gone to the Police Hospital, Sidhi, in connection of "Tika of Hypotytis" for his wife and during such period in his absence by breaking the lock of the house the rifle was taken away by his son and caused the alleged incident. In continuation he said that in such situation it could not be deemed or assumed that at any point of time the petitioner was remained negligent either in keeping or in maintaining the aforesaid fire arm. In support of his contention he has also referred some papers placed on the record and the depositions of the eyewitnesses recorded

in the criminal trial of the aforesaid case, and said that such evidence has not been considered either by the licensing authority and the appellate authority while passing order for revoking his license and on affirming the same by the appellate authority and prayed for setting aside the impugned order of the licensing authority as well as the appellate authority with a direction for restoration his armed license by allowing this petition.

(5) On the other hand responding the aforesaid arguments State counsel justified the impugned orders and said that same being based on proper appreciation of the evidence and inconfirmity with the law, does not require any interference under the writ jurisdiction enumerated under Article 227 of the Constitution of India and prayed for dismissal of this petition.

(6) Having heard the petitioner's counsel at length, keeping in view their arguments, I have carefully gone through the papers placed on the record along with the impugned order Annexure P-5. It is apparent fact on record that Sunny Kumar the minor son of the petitioner aged about 14 years after taking over the rifle of the petitioner caused fire on the aforesaid minor girl Billu alias Renu Bai aged about 13 years, on sustaining the bullet injury she died. Accordingly the son of the petitioner has murdered a innocent minor girl, if the rifle was kept with due diligence by the petitioner: then the same could not be taken away by his minor son and in such situation his son could not cause the fire on minor girl. Accordingly due to gross negligence of the petitioner in non keeping the fire arm in accordance with the terms and conditions of the fire arm license his minor son had got his rifle and committed a murder of the human being. It is also apparent on record that after holding the prosecution of the aforesaid son of the petitioner he has been held guilty for causing the murder of aforesaid girl but taking into consideration that he was juvenile on the date of the incident has been released on certain terms and conditions.

(7) A person like petitioner, who could not keep the licensee fire arm i.e. rifle according to terms and conditions of the license is not entitled to keep such arms otherwise on account of the negligence of the petitioner against some unhappy incident may be happened by such rifle. In such premises, the licensing authority and the appellate authority had not committed any mistake in passing the impugned orders. Besides this from the papers placed, I have found sufficient circumstances to draw the interference that the petitioner has failed to keep the licensee rifle in accordance with the terms and conditions, as such the same was kept by him in a very negligent manner and that's why the same had come in the hand of his son who misused the same as stated

above so in such premises, the approach of the appellate authority or licensing authority revoking and cancelling the armed license of the petitioner could not be said to be contrary to law.

(8) In view of the aforesaid, I have not found any illegality, infirmity, perversity or anything against the propriety of law in the orders impugned requiring any interference at this stage under Article 227 of the Constitution of India. Consequently, this petition being devoid of any merits, by affirming the impugned order of the appellate authority, the same is hereby dismissed. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 111
WRIT PETITION

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

W.P. No. 21897/2011(Jabalpur) decided on 23 November, 2012

RAVI SHANKAR NAIK ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Constitution - Article 226 - Quarry Lease - Non-operation of - **Petitioner who was granted quarry lease was not permitted to operate in view of the interim order passed by High Court - Writ Petition was dismissed later on, however, during this period the quarry lease granted in favour of petitioner expired - Petitioner was deprived without his fault to operate the sand quarry for full period - When the Petitioner was wrongfully disallowed to operate the mining lease for full lease period and the lease has remained un-operated and no third party right is created, he must be allowed to operate the mining for the full period of lease subject to adjustment for the period for which he has already operated - Petition allowed.** **(Para 3)**

संविधान – अनुच्छेद 226 – खदान पट्टा – का प्रचालन नहीं होना – याची जिसे खदान पट्टा प्रदान किया गया था उसे उच्च न्यायालय द्वारा पारित अंतरिम आदेश को दृष्टिगत रखते हुए प्रचालन की अनुमति नहीं दी गई – बाद में, रिट याचिका खारिज की गई, किन्तु इस दौरान याची को प्रदत्त खदान पट्टा की अवधि समाप्त हो गई – संपूर्ण अवधि के लिए याची को रेत खदान के प्रचालन से, बिना उसके दोष के, वंचित किया गया – जब याची को संपूर्ण पट्टा अवधि के लिए खनन पट्टे का प्रचालन करने से अनुचित रुप से निषिद्ध किया गया और पट्टे का प्रचालन नहीं हुआ तथा कोई तृतीय पक्षकार का अधिकार निर्मित नहीं, तब उसे

उसके द्वारा पहले ही किये गये प्रचालन की अवधि के समायोजन के अधीन, पट्टे की संपूर्ण अवधि के लिए खनन के प्रचालन की मंजूरी देनी चाहिए – याचिका मंजूर।

Cases referred :

(2001) 7 SCC 318, (2003) 1 SCC 726.

K.C. Ghildiyal, for the petitioner.
A.M. Lal, G.A. for the respondents.

ORDER

The Order of the Court was delivered by : **AJIT SINGH, J.:** By this petition, the petitioner has prayed for quashing of order dated 12.12.2011, Annexure P11, passed by respondent no.2 Collector, District Chhatarpur.

2. In short, the facts are these. The petitioner was granted quarry lease by the Collector, Chhatarpur, vide order dated 15.2.2008 for a period of two years (2008-09 and 2009-10) in respect of sand over land bearing Khasra no.561, area 14.500 hectare, situated at village Parei, Tahsil Gaurihar, Cane River, District Chhatarpur. The petitioner thereafter deposited the required security amount of Rs.10.53 lac with the Collector and also paid the installments without any default. The quarry for sand was, however, stopped by the Collector after about one year vide order dated 28.2.2009 in compliance of interim order dated 19.2.2009 passed by this High Court in Writ Petition (PIL) No.1574/2008. The petitioner states that he could not operate the quarry with effect from 19.3.2009. The High Court ultimately dismissed Writ Petition (PIL) No.1574/2008 vide order dated 29.9.2010 but in the meantime the period of two years of quarry lease granted to petitioner expired. He, therefore, made a representation dated 12.10.2010 to the Collector for allowing him to operate the sand quarry for a full period of two years. Since no order was being passed on the representation, the petitioner filed Writ Petition No.15338/2010 for a direction to the Collector to decide the same. We, by our order dated 15.11.2010, finally disposed of Writ Petition No.15338/2010 and directed the Collector to decide the representation by a speaking order within a period of one month. But the Collector has rejected the representation by order dated 12.12.2011 on the ground that there is no provision for extension of quarry lease in the Madhya Pradesh Minor Mineral Rules, 1996. The Collector has also held that the extension clause available in the agreement is not applicable in this case as the same is applicable only in respect of cases

where the execution of the agreement is to be made. It is in this background the petitioner has filed the present petition for quashing of order dated 12.12.2011 and also for a direction to the Collector to allow him to operate the sand quarry for a full period of two years.

3. Admittedly, there was no fault on the part of petitioner due to which he was stopped from operating the sand quarry. As already stated above, quarry lease granted to him was for a period of two years and he operated the same without any complaint till the passing of order dated 28.2.2009 by the Collector. The Collector had passed the order stopping the petitioner to operate the sand quarry in compliance of the interim order dated 19.2.2009 of the High Court in Writ Petition (PIL) No.1574/2008 which was finally dismissed on 29.9.2010. But, in the meantime, the remaining period of petitioner's quarry lease of two years expired. It is well settled that "any procedure or course of action which does not ensure a reasonable quick adjudication has been termed to be unjust. Such a course is stated to be contrary to the maxim `*actus curiae neminem gravabit*', that an act of the court shall prejudice none", (*See Anil Rai v. State of Bihar* (2001) 7 SCC 318, para 2). Admittedly, no third party interest has been created on the land of which quarry lease was granted to the petitioner. The sand quarry has remained unoperated for the period for which the period of operation falls short of two years. The petitioner was deprived without his fault to operate the sand quarry for full period of the quarry lease. In *Beg Raj Singh v. State of U. P.* (2003) 1 SCC 726 the Supreme Court has held that where petitioner was wrongfully disallowed to operate the mining lease for the full lease period and the lease has remained unoperated and no third-party right is created, he must be allowed to operate the mining for the full period of lease subject to adjustment for the period for which he has already operated. The present case is identical to the case of *Beg Raj Singh.*

4. For these reasons, we quash the order dated 12.12.2011 passed by the Collector, Chhatarpur. We also direct that the petitioner shall be allowed to operate the sand quarry for a full period of two years subject to adjustment for the period for which he has already operated. Needless to mention that the petitioner shall remain liable to pay royalty and make other payments to the State Government in accordance with the terms of the quarry lease.

5. The petition is allowed subject to above terms.

Petition allowed.

I.L.R. [2013] M.P., 114
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P. No. 21358/2012 (Jabalpur) decided on 19 December, 2012

SAMIR BANERJI ...Petitioner
Vs.
STATE BANK OF INDIA & anr. ...Respondents

A. Service Law - Departmental Enquiry - Quashment of Charge-sheet - **Allegations of mis-behaviour, shouting slogans and disrupting bank's operation are alleged against the petitioners and it stated that this act lowers the image of the Bank amongst the customers and public at large and, therefore, the business of the bank was adversely affected and is also a misconduct under the Service Rules - Petitioners challenging the issuance of charge-sheet on the ground that demonstration or peaceful protest during lunch hours cannot be curtailed by the Bank and if the employees indulge in such a peaceful demonstration during lunch hours, it does not amount to any misconduct - As per petitioners, it amounts to infringement of their fundamental rights guaranteed under Article 19 of the Constitution, and for the same no disciplinary action can be initiated - Held - It is not a case where on the face of it, it can be said that the petitioners have demonstrated peacefully and were only exercising their fundamental right - Act of the petitioners may fall in the category of misconduct and can be termed as an act unbecoming of an officer of the Bank, for which under the service rules departmental action can be taken - Issuance of a charge-sheet does not amount to infringement of the right of an employee.**
(Paras 7, 8, 22 & 25)

क. सेवा विधि – विभागीय जांच – आरोप पत्र को अभिखण्डित किया जाना – याचीगण के विरुद्ध दुर्व्यवहार, नारेबाजी व बैंक का कार्य विछिन्न करने के अभिकथन और यह कहा गया कि यह कृत्य, ग्राहकों और जन सामान्य में बैंक की साख को नीचे गिराता है और इसलिए बैंक का कामकाज प्रतिकूल रुप से प्रभावित हुआ है तथा सेवा नियमों के अंतर्गत अवचार है – याचीगण ने आरोप पत्र जारी किये जाने को इस आधार पर चुनौती दी कि भोजनावकाश के दौरान निदर्शन और शांतिपूर्ण प्रदर्शन को बैंक द्वारा रोका नहीं जा सकता और यदि कर्मचारीगण भोजनावकाश के दौरान उक्त शांतिपूर्ण निदर्शन करते हैं, यह किसी अवचार की कोटि में नहीं आता – याचीगण के अनुसार, यह संविधान के अनुच्छेद 19 के अंतर्गत

प्रत्यामूत मौलिक अधिकारों के उल्लंघन की कोटि में आता है और इसके लिए कोई अनुशासनिक कार्यवाही आरंभ नहीं की जा सकती – अभिनिर्धारित – यह ऐसा प्रकरण नहीं जहां प्रत्यक्ष रुप से यह कहा जा सके कि याचीगण ने निदर्शन शांतिपूर्ण रुप से किया और वे केवल अपने मूलमूत अधिकार का प्रयोग कर रहे थे – याचीगण का कृत्य, अवचार की श्रेणी में आ सकता है और बैंक के अधिकारी के लिये अशोभनीय कृत्य कहा जा सकता है, जिसके लिये सेवा नियमों के अंतर्गत विभागीय कार्यवाही की जा सकती है – आरोप पत्र जारी करना, कर्मचारी के अधिकार के उल्लंघन की कोटि में नहीं आता।

***B. Constitution - Article 226 - Jurisdiction* - A writ court exercising limited jurisdiction in a petition under Article 226 of the Constitution cannot enter into the allegations levelled against the petitioners on merits and exonerate them by holding that the petitioners were only exercising their right to freedom available to them.(Para 23)**

क. संविधान – अनुच्छेद 226 – अधिकारिता – संविधान के अनुच्छेद 226 के अंतर्गत याचिका में सीमित अधिकारिता का प्रयोग करते हुए रिट न्यायालय याचीगण के विरुद्ध लगाये गये आरोपों के गुणदोषों पर विचार नहीं कर सकता और उन्हें दोषमुक्त नहीं कर सकता, यह धारणा करते हुए कि याचीगण केवल उनको उपलब्ध स्वतंत्रता के अधिकारों का प्रयोग कर रहे थे।

Cases referred :

AIR 1962 SC 1166, AIR 1963 SC 812, (1979) II LLJ 401 (MP), AIR 1987 SC 943, (2004) 6 SCC 431, (2005) 6 SCC 451, AIR 2007 SC 906.

Shobha Menon with *C.A. Thomas*, for the petitioner.
R.N. Singh, Rohit Arya, & Ashish Shroti for the respondents.

ORDER

RAJENDRA MENON , J :- As common questions of fact and law are involved in both these petitions, they are being heard and disposed of analogously by this order.

2- For the sake of convenience, the documents and material available in the record of Writ Petition No. *21358/2012* (*Samir Banerjee Vs. State Bank of India and another*) is referred to in this order.

3- Petitioner Samir Banerji, in Writ Petition No. 21358/2012, has already attained the age of superannuation and even though he was to retire with

effect from 30.11.2012, in view of a departmental proceeding pending against him, his services have been extended by invoking the provisions of Clause 19 of the State Bank of India Officers Service Rules, 1992 (hereinafter referred to as 'Rules of 1992') – Annexure P/28. This petitioner was posted as Chief Manager and OSD, in the State Bank of India, and is also the President of State Bank of India Officers' Association, Bhopal Circle, Bhopal.

4- Similarly, Sanjeev Kumar Mishra, in Writ Petition No.21359/2012, is posted as Manager System in the Bank's Local Head Office at Bhopal, and is the General Secretary of the State Bank of India Officers' Association, Bhopal Circle, Bhopal.

5- The petitioners are aggrieved by issuance of a charge-sheet to them dated 27.9.2012 – Annexure P/1, and initiation of departmental proceedings against them in accordance to the Rules of 1992. Prayer made in both the writ petitions is to quash the charge-sheet and the departmental proceedings initiated.

6- Brief background, which led to issuance of the impugned action, are that All India State Bank Officers Federation gave a call for strike action on 8.9.2011 and 9.9.2011. The call for strike was given as a bilateral negotiation between the Federation and the Management of the Bank did not materialize and it was the contention of the Federation that their grievance and various issues are not being heard and addressed to. For the present, it is not relevant in these writ-petitions to go into these questions except to say that in the light of the call given, it is stated that a demonstration was organized throughout the country on 28.8.2012, during the lunch hours of the Bank and both the petitioners herein, in their capacity as President and General Secretary of the Association, participated in a peaceful demonstration. It is stated that for this act, charge-sheet has been issued to the petitioner and the departmental inquiry initiated.

7- Interalia contending that the charge-sheet issued for the aforesaid acts of peaceful demonstration during lunch hours is nothing but infringing the fundamental rights to freedom and demonstration available to the petitioners and the rights guaranteed to them under Article 19(1)(a), 19(1)(b) and 19(1)(c) of the Constitution, is being followed by issuance of charge-sheet and initiation of departmental proceedings. It is argued by Learned Senior Advocate that the act of the petitioners in conducting and participating in a peaceful demonstration will not constitute a misconduct, for which departmental action

can be taken. It is stated by learned Senior Advocate by referring to Rule 54(1) of the Rules of 1992, that except for the category of prohibited demonstrations as indicated therein, which affects the sovereignty and integrity of the country and other serious infringement to peace of the country as indicated therein, any other demonstration or peaceful protest during lunch hours cannot be curtailed by the Bank and if the employees indulge in such a peaceful demonstration during lunch hours, it does not amount to any misconduct tantamount to violation of Rules 50(4), 50(5) and 50(6) of the Rules of 1992.

8- Smt. Shobha Menon, learned Senior Advocate, took me through the allegations levelled against both the petitioners in the charge-sheet – Annexure P/1 and the imputations contained in Annexure II to the said charge-sheet, and argued that in the present case the petitioners have only participated in a peaceful demonstration during lunch hours, in protest against the illegal activities of the Management, and for this they are victimized and punished by conducting a departmental inquiry. Interalia contending that the act does not amount to misconduct and for this no departmental inquiry can be conducted, learned Senior Counsel prays for interference into the matter. Taking me through the provisions of the Rules of 1992; the acts complained of; and, the reasons which compelled the office bearers of various association to indulge in the so-called peaceful demonstration, learned Senior Advocate argued that to punish the employees for having participated in the peaceful demonstration, the Chairman of the Bank is victimizing them and the impugned act amounts to infringement of their fundamental rights guaranteed under Article 19 of the Constitution, and for the same no disciplinary action can be initiated.

9- In support of her contentions, Learned Senior Advocate placed reliance on the following judgments of the Supreme Court and this Court to show that prohibition against peaceful demonstration is not permissible, a constitutional right is available to the employees to make demonstrations and protest against the illegal attitude of the Management and this fundamental right cannot be curtailed in the manner as is being done by the respondent Bank.

10- The judgments relied upon are:

(a) *Kameshwar Prasad and others Vs. State of Bihar and another*, AIR 1962 SC 1166 – to say that any Rule or Regulation which prohibits any form of demonstration is violative of Article 19(1)(a) and

19(1)(b) of the Constitution and, therefore, no departmental action can be taken for such an Act.

(b) The second judgment relied upon is *O.K. Ghosh and another Vs. E.X. Joseph*, AIR 1963 SC 812, wherein also the proposition laid down in the case of *Kameshwar Prasad* (supra) has been reiterated.

(c) The third judgment relied upon is by a Division Bench of this Court in the case of *Bank of India Officers Association and others Vs. Bank of India and Another*, (1979) II LLJ 401 (MP), wherein relying upon the judgments rendered by the Supreme Court in the cases of *Kameshwar Prasad* (supra) and *O.K. Ghosh* (supra), a Division Bench of this Court has also held that an employee has a fundamental right of freedom of speech, assembly and association and the same cannot be restricted on the mere ground of efficiency and discipline.

Accordingly, contending that in the present case, departmental action is being initiated against the petitioners for having participated in a peaceful demonstration, which is the fundamental right of the petitioners, learned Senior Advocate prays for interference into the matter.

11- As far as Writ Petition. 21358/2012, relating to petitioner Samir Banerji is concerned, it is stated that only to harass him and to victimize him even after his retirement, the provision of Rule 19 is invoked and he is continued in service for the purpose of conducting departmental inquiry. Emphasizing that the purpose of incorporating Rule 19 is not to conduct and continue with a departmental inquiry in cases like the present one and, therefore, this power is being misused by the Bank only to harass and punish the office bearers of the Association like the petitioner Samir Banerji for having participated in the demonstration, learned Senior Advocate argued that the departmental proceedings initiated and the inquiry proposed to be conducted into the charge-sheet be quashed, as the same is nothing but an act of victimization for a peaceful demonstration undertaken by the office bearers of the Association.

12- Refuting the aforesaid contentions Shri R.N. Singh, learned Senior Advocate; and, Shri Rohit Arya, learned Senior Advocate, alongwith Shri

Ashish Shroti emphasized that for the present only a charge-sheet has been issued to the petitioners and the allegations levelled against them in the charge-sheet is to the effect that in the bank premises and in the compound of the Bank at around 2.00 PM, when bank business was in progress the petitioners instigated other officers of the Bank to participate in the demonstration, they indulged in shouting of unwanted slogans, behaved in a manner which was unbecoming of a bank officer, disturbed the peace in the bank's premises, caused hindrance and disturbance to the regular business activities of the bank, thereby causing inconvenience to the bank customers and disrupted their right to carry out the banking transaction. It was pointed out that the act of the petitioners falls in the category of misconduct and as the same amounts to act of misconduct contemplated under Rule 50 sub-rule (4), (5) and (6), it is emphasized that the departmental inquiry can be conducted and at this stage when only a charge-sheet is issued, interference should not be made. Emphasizing that the question as to whether the demonstration was peaceful or it adversely affected the working of the bank and the conduct of the petitioners in so acting is subject matter of inquiry, therefore, at this stage, interference is not called for, learned Senior Advocates appearing for the Bank sought for dismissal of the writ petition and submitted that at the stage of issuance of a charge-sheet when a departmental inquiry is pending, the writ jurisdiction of this Court under Article 226 of the Constitution should not be invoked and this Court should not interfere into the matter at this stage.

13- In support of the aforesaid contentions, learned Senior Advocate invited my attention to the law laid down by the Supreme Court in the following cases: *State of UP Vs. Shri Brahm Datt Sharma and another,* AIR 1987 SC 943; *Mahanagar Telephone Nigam Limited Vs. Chairman, Central Board, Direct Taxes and Another,* (2004) 6 SCC 431; *State of UP and Another Vs. Anil Kumar Ramesh Chandra Glass Works & Another,* (2005) 6 SCC 451; and, *Union of India and Another Vs. Kunisetty Satynarayana,* AIR 2007 SC 906.

14- In reply to the aforesaid contention, Smt. Shobha Menon, learned Senior Advocate, argued that as the very basis for issuance of charge-sheet is unlawful and unsustainable, therefore, interference can be made and she points out that the High Court of Karnataka at Bangalore, under similar circumstances, has stayed the departmental proceedings. It is emphasized by her that office bearers throughout the country have been proceeded against and in the case of an employee working in Gauhati, one Shri S. Mukherjee, after issuing similar

chargesheet, his explanation was considered and the proceedings against him dropped.

15- The same was replied to by Shri R.N. Singh, learned Senior Advocate, by contending that the proceedings have been dropped in the case at Gauhati on the Bank being satisfied with the explanation of the employee concerned and in the present case the petitioners without even submitting their explanation have rushed to this Court for stalling the departmental proceedings.

16- I have heard learned counsel for the parties at length and perused the records.

17- The Rules of 1992 contemplate various provisions, which include a provision for conduct, discipline and appeal, which is contained in Chapter 11. The general observations of good conduct, discipline etc to be maintained by an employee is provided under Rule 50 and Rules 50(4), 50(5) and 50(6), read as under:

> "50(4) Every officer, shall, at all times, take all possible steps to ensure and protect the interests of the bank and discharge his duties with utmost integrity, honesty, devotion and diligence and do nothing which is unbecoming of an officer.
>
> 50(5) Every officer shall maintain good conduct and discipline and show courtesy and attention to all persons in all transactions and negotiations.
>
> 50(6) Every officer shall take all possible steps to ensure the integrity and devotion to duty of all persons for the time being under his control and authority."

Similarly, rule 54 relied upon by learned Senior Advocate for the petitioners, sub-clause (1) and (2) read as under:

> "54(1) No officer shall engage himself or participate in any demonstration which is prejudicial to the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign state, public order, decency or morality, or which involves contempt of the court, defamation or incitement to an offence.

54(2) No officer shall join, or continue to be a member of an association, the objects or activities of which are prejudicial to the interest of the sovereignty and integrity of India or public order or morality."

18- The question involved in this writ petition is two folded. The first question is as to whether the departmental proceedings initiated against the petitioners fall in the category of an act which amounts to prohibiting the petitioners from carrying out demonstrations and thereby infringing their fundamental rights available under Article 19(1)(a) and 19(1)(b) of the Constitution and, therefore, initiation of the departmental proceedings itself is unsustainable. The second question is as to whether interference in the matter by a writ court at this stage when only a charge-sheet is issued is called for in the facts and circumstances of the present case.

19- In the cases of *Kameshwar Prasad* (supra), *O.K. Ghosh* (supra) and *Bank of India Officers' Association* (supra) relied upon by Smt. Shobha Menon, learned Senior Advocate, it has been laid down that an employee has a fundamental right to freedom of speech, assembly and association and any statutory rule framed, which prohibits an employee from carrying out such a demonstration or forming an association is violative of Article 19 of the Constitution and unsustainable. In the cases of *Kameshwar Prasad* (supra) and *O.K. Ghosh* (supra), the constitutional validity of Rule 4-A of the Bihar Government Servants Conduct Rules and the Central Civil Services Conduct Rules, 1955, which prohibited formation of association or demonstration, was struck down as illegal. In the cases of *Kameshwar Prasad* (supra) and *O.K. Ghosh* (supra), it has been held that even though resorting to strike is not a fundamental right and, therefore, the statutory rule which prohibits strike cannot be struck down, but a statutory rule which prohibits any form of demonstration is violative of the fundamental rights to speech and protest and, therefore, is illegal and invalid. However, a compete reading of all these judgments would show that the Supreme Court and the Division Bench of this Court has held that fundamental right of freedom of speech, assembly and association guaranteed under Article 19(1)(a), (b) and (c) of the Constitution cannot be completely prohibited, but reasonable restrictions which come within the purview of Clause (2), (3) and (4) of Article 19 is permissible. It has been held that the restrictions imposed must be reasonable and must have proximity in connection with the matter of maintaining public order and discipline.

20- It is, therefore, clear that what is prohibited by the judgments relied

upon by Smt. Shobha Menon, is a restriction on carrying out any other form of demonstration. Even though the petitioners have a fundamental right to demonstrate against the highhandedness or illegality against the Bank, but the Bank at the same time has got a right to impose reasonable restriction for the purpose of maintaining public order and discipline in the banking premises. That being so, as a thumb rule it cannot be said that merely because petitioners have participated in a demonstration and, therefore, the act of the Bank in taking disciplinary action amounts to infringement of their fundamental rights and the action is unsustainable.

21- The question would be as to whether the demonstration undertaken by the petitioners and alleged in the memorandum of chargesheet, amounts to breach of discipline or comes in the category of a conduct which can be termed as one which is unbecoming of an officer of the Bank and further the act has resulted in disturbing the peace and public order in the Bank premises, created harassment to the customers, who have a right to carry out their banking transactions and the act has also adversely affected the image of the Bank's establishment at large, as banking is a commercial establishment.

22- If Rules 50(4), 50(5) and 50(6), as reproduced hereinabove, are taken note of, it would be seen that the restrictions imposed, with regard to various activities of an employee are such that they fall in the category of reasonable restriction. Even otherwise, the said question is not before this Court. Accordingly, I am of the considered view that merely because the petitioners are alleged to have participated in a demonstration, it cannot be said that no disciplinary action can be initiated against them. If the allegations levelled against the petitioners in the charge-sheet are taken note of, it would be seen that the allegations are to the effect that on the day in question i.e.... 28.8.2012, at about 2.00 PM, in the Bank's premises they instigated other officers of the Bank to hold demonstration, shouted slogans, behaved in a manner which disturbed the peace with the Bank's premises, caused harassment to the working of the bank and disturbed the regular business activity of the Bank. Allegations of mis-behaviour, shouting slogans and disrupting bank's operation are alleged against the petitioners and it stated that this act lowers the image of the Bank amongst the customers and public at large and, therefore, the business of the bank was adversely affected and is also a misconduct under the Service Rules. The question, therefore, in the backdrop of these allegations is as to whether the demonstration undertaken by the petitioners can be said to be so peaceful that they were exercising their fundamental right of freedom

of demonstration or their act went beyond this freedom and fell in the category of misbehaviour or misconduct by interfering with the normal activities of the Bank. This is a question of disputed facts and can only be resolved if an inquiry is conducted. It is not a case where on the face of it, it can be said that the petitioners have demonstrated peacefully and were only exercising their fundamental right and, therefore, no departmental action can be taken against them. On the contrary, the allegations levelled against them as indicated hereinabove does show that certain acts of the petitioners may have caused some disturbance of peace in the premises of the Bank and may have adversely affected the right of some customers and working of the Bank. If that be so, the act of the petitioners may fall in the category of misconduct and can be termed as an act unbecoming of an officer of the Bank, for which under the service rules departmental action can be taken.

23- It is, therefore, a case where a writ court exercising limited jurisdiction in a petition under Article 226 of the Constitution cannot enter into the allegations levelled against the petitioners on merits and exonerate them by holding that the petitioners were only exercising their right to freedom available to them under Article 19 of the Constitution and the initiation of departmental proceedings is illegal. On the contrary, it is a case where the allegation levelled against the petitioners does warrant an inquiry and if it is found that the petitioners have only exercised their right to freedom in a peaceful manner and have not committed any act, which amounts to exceeding their right to freedom so as to be termed as a misconduct, they are to be exonerated. But this is a question of fact, which is in dispute between the parties and, therefore, an inquiry is necessary.

24- The judgments relied upon by Smt. Shobha Menon, learned Senior Counsel for the petitioners, can be made applicable only if based on the material available on record, this Court can record a categoric and specific finding that the petitioners have exercised their right to freedom in a proper manner and, therefore, the action cannot be taken. If this Court comes to the conclusion that even for recording such a finding an inquiry is needed then exercise of jurisdiction under Article 226 of the Constitution is prohibited.

25- In the cases relied upon by Shri R.N. Singh, learned Senior Advocate, the Supreme Court has clearly laid down that a writ petition against a charge-sheet or a show-cause notice is not maintainable, because it is not only pre-mature, but if disputed questions of fact are involved interference by a writ

court under Article 226 of the Constitution is not called for. The judgments relied upon by Shri R.N. Singh, learned Senior Advocate, lays down the proposition that issuance of a charge-sheet does not give rise to any cause of action, it does not amount to any adverse order and it is quite possible that after considering the reply and the explanation, the proceedings may be dropped. It is held that issuance of a charge-sheet does not amount to infringement of the right of an employee.

26- On the contrary, it has been held that only in very rare and exceptional cases the High Court should quash a charge-sheet or a showcause notice, when it is found to be wholly without jurisdiction or otherwise illegal under service jurisprudence. The case in hand and the allegations levelled in the charge-sheet does not fall in the category of a charge-sheet issued without jurisdiction and is wholly unsustainable. On the contrary there are allegations against the petitioners which do prima facie indicate that an inquiry into the matter is required to be undertaken and as only a departmental inquiry is to be conducted, I see no reason to interfere into the matter. It is for the departmental authorities before whom the inquiry is pending to take note of the explanation of the petitioners, examine the material available and then record a finding as to whether the demonstration in question and the agitation undertaken by the petitioners was peaceful and that it did not amount to any act of misconduct.

27- The proposition put forth by Smt. Shobha Menon, learned Senior Advocate, to the effect that the petitioners have an unfettered right to undertake demonstration and the fundamental right available to them cannot be curtailed by holding a departmental inquiry cannot be accepted. The right of demonstration available to the petitioner is restricted by the provisions of law itself and as indicated hereinabove if it is found that the demonstration undertaken by the petitioners has resulted in breach of discipline, public order, the respondent Bank can take action in the matter. After relying upon the judgments rendered in the cases of *Kameshwar Prasad* (supra) and *O.K. Ghosh* (supra), the Division Bench of this Court in the case of *Bank of India Officers Association* (supra), in paragraph 16 has laid down the following proposition:

> "16. ... However, in so far as political activities may be covered by the fundamental rights of freedom of speech, assembly and association guaranteed under Articles 19(1)(a), (b) and (c), restrictions on such activities can be saved only if they are within the scope of Clauses (2), (3) and (4) of Article 19. As

earlier pointed out by us, the cases of *Kameshwar Prasad* (supra) and *O.K. Ghosh* (supra) are direct authorities for the proposition that fundamental rights of an employee of freedom of speech, assembly and association cannot be restricted on the mere ground of efficiency and discipline. To be valid, the restriction imposed must be reasonable and must have a proximate connection with public order or with other matters referred to in Clauses (2), (3) and (4) of Article 19. If *Rangaswamy's* case intended to decide anything contrary to this, it cannot be accepted as an authority. Further though it may be reasonable to ban in general political speeches and activities by Government servants, different considerations may prevail in respect of employees in commercial undertakings of the Government when in private undertakings of similar nature there can be no such general restrictions."

28- The aforesaid proposition by the Division Bench does show that a valid restriction reasonable in nature, which has a proximate connection with maintenance of public order and discipline can be imposed and if that be the position, I am of the considered view that holding of the departmental inquiry on the face of it, cannot be said to be wholly illegal warranting interference into the matter by this Court.

29- On the contrary, it is a case where the allegations levelled against the petitioner are with regard to exceeding the rights available to them, which has resulted in acts of misconduct and for the same if a departmental inquiry is being conducted, it is not proper for this Court to interfere into the matter at this stage.

30- Accordingly, I find no merit in the writ petitions. However, it is made clear that the observations made and the expression of opinion in this order is only a prima facie assessment of the material to consider as to whether the jurisdiction under Article 226 of the Constitution should be exercised or not. This Court has not at all gone into the merits of the allegations levelled against the petitioners and it is for the authorities concerned before whom the proceedings are pending to deal with them in accordance with law and take a decision without being influenced by this Court.

31- With the aforesaid observations, finding no case for interference both these petitions are dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 126
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
W.P. No. 364/2004 (Indore) decided on 20 December, 2012

PRAKASH INDUSTRIES LTD. ...Petitioner
Vs.
ASSISTANT COMMISSIONER OF COMMERCIAL TAX & ors. ...Respondents

Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, (M.P.) 1976, Schedule II, Entry 42 & 49 **- Entry Tax on Glass Shell, Glass Panel, Glass Funnel & Neck Tube - Items in question are neither parts nor accessories of television but they are raw material for manufacturing parts of television - A raw material used for manufacturing a part or accessory can not itself held to be a part or accessory of the main item - Items in question are covered by Entry 42 of Schedule II of the Entry Tax. (Paras 12 & 15)**

स्थानीय क्षेत्र में माल के प्रवेश पर कर अधिनियम, (म.प्र.) 1976, अनुसूची II, प्रविष्टि 42 व 49 – ग्लास शेल, ग्लास पेनल, ग्लास फनल व नेक ट्यूब पर प्रवेश कर – प्रश्नगत वस्तुऐं न तो टेलीविजन के हिस्से हैं और न ही उपसाधन हैं परंतु वह टेलीविजन के पुर्जों का विनिर्माण करने हेतु कच्चा माल है – किसी पुर्जे का या उपसाधन का विनिर्माण करने के लिए उपयोग किये जाने वाले कच्चे माल को अपने आप में मुख्य वस्तु का हिस्सा या उपसाधन होने की धारणा नहीं की जा सकती – प्रश्नगत वस्तुऐं प्रवेश कर की अनुसची II की प्रविष्टि 42 के अंतर्गत आती है।

Cases referred :

(1985) 3 SCC 284, (2006) 9 STJ 292 (SC).

P.M. Choudhary, for the petitioner.
M. Ravindran, Dy. G.A. for the respondents.

O R D E R

The Order of the Court was delivered by :
Prakash Srivastava, J.: This order will also govern the disposal of W.P. No. 3223/2006. which also involve the same issue on the same fact situation.

2. For convenience facts have been noted from W.P. No. 364/2004.

3. This writ petition has been filed by the petitioner challenging the order

dated 3.11.2003 passed by the Revisional Authority dismissing the revision and affirming the order of assessment dated 22.12.2002, by which the entry tax has been levied on raw material i.e. Glass Shell, Glass Panel, Glass Funnel and Neck Tube at the rate of 1% treating them to be covered by Entry 49 of Schedule II of M.P. Sthaniya Kshetra Me Mal Ke Pravsh Par Kar Adhiniyam, 1976 (for short "Entry Tax Act").

4. The matter relates to the assessment year 1999-2000.The petitioner during the relevant time, was running an undertaking at Pithampur, District Dhar for manufacture of black & white television picture tubes and computer monitor tubes. The petitioner had affected entry of the Glass Shell, Glass Panel, Glass Funnel and Neck Tube into the local area for the said manufacturing activity and claimed the items in question to be covered under Entry 42 of Schedule II of the Entry Tax Act and taxable @0.5%. The Assessing Authority had passed the order of assessment dated 22.12.2002 levying entry tax @1% on the said item and also charging interest under Section 13 read with Section 26(4)(a) of the M.P. Commercial Tax Act, 1994. The revision petition preferred by the petitioner against the assessment order has been rejected by the Revisional Authority vide order dated 3.11 .2003.

5. Learned counsel appearing for the petitioner has submitted that the items in question are the goods made of glass and glassware, therefore, they are covered under Entry 42 of Schedule II of the Entry Tax Act @0.5%.

6. As against this, learned counsel for the respondents has submitted that the items in question are parts and accessories of television, therefore, they are covered under Entry 49 of Schedule II and taxable @1%.

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

8. In the present case petitioner had affected the entry of the items in question for the purpose of manufacturing the black & white picture tubes used in T.V. and Computer monitors. The manufacturing process disclosed by the petitioner indicates that these glass parts are used in the manufacture of picture tubes. The Panel, Funnel and Neck are joined together by neck sealing and panel sealing machine and then baked at 500 degree centigrade for 3 hours. The neck tube is cut into small lengths from the neck. The sealing of neck, panel and funnel are done in the bulb sealing plant to form a glass shell which is the basic input to the tube plant. The washing of the glass shell

is done chemically; thereafter the coating of phosphor, lacquer and aluminum is done one after the other to form the screen of the picture tube. These coated shells are then baked at 400 degree centigrade for 3 hours to provide strength to the coating. The baked and coated shells are fitted with electron gun and valuated. While evaluation the thermal cycle treatment is also given to the shells. The shells are heated up to 450 degree centigrade and evacuated for 1.5 hours. After evaluation the glass envelop is mechanically sealed for the lifetime. The getter flashing, sparking and aging are done for making the picture tubes operational.

9. The petitioner is placing reliance upon Entry 42 of Schedule II of the Entry Tax Act, which reads as under

SCHEDULE II

S.No.	Description of goods	Rate of Tax (Per cent)
42	All types of crockery, goods made of china and tamchina, goods made of glass and glass ware, but excluding glass chimneys of hurrican lanterns and kerosene lamps.	0.5

10. As against this, learned counsel appearing for the respondents has placed reliance upon Entry 49 of Schedule II which reads as under :-

SCHEDULE II

S.No.	Description of goods	Rate of Tax (Per cent)
49	Wireless reception instruments and apparatus, radios and radio gramophones, television, V.C.R., V.C.P., taperecorers, transistors and parts and accessories thereof.	1

11. In the present case it is not in dispute that the items in question are glass parts which are used by the petitioner for manufacture of Television tube. The Entry 42 covers "goods made of glass and glass ware". Undisputedly the Glass Panel, Glass Funnel, Neck Tube and Glass Shell are goods made of glass. Entry 42 is much wider which includes all goods made of glass and glass ware excluding only glass chimneys of hurrican lanterns and kerosene

lamps. The items in question are not covered by the exclusion clause.

12. Learned counsel appearing for the respondents has placed reliance upon Entry 49 by submitting that the items in question are covered within the meaning of parts and accessories of television. Such a submission cannot be accepted since Glass Panel, Glass Funnel, Neck Tubing and Glass Shells are not directly used in the television as its parts or accessories but they are used as a raw material for manufacturing picture tube, which is a part of television. The items in question are neither parts nor accessories of television but they are raw material for manufacturing parts of television. A raw material used for manufacturing a part or accessory can not itself held to be a part or accessory of the main item

13. It is the settled position in law that the process of manufacture of a product and the end use to which it is put. cannot necessarily be determinative of the classification of that product under the fiscal schedule but more important is whether the broad description of the article fits in with the expression used in the Tariff. For purpose of classification of a product the relevant factors, inter alia, are statutory fiscal entry and the basic character, function and use of the goods. When a commodity falls within a tariff entry by virtue of the purpose for which it is put to, the end use to which the product is put to, can not determine the classification of that product. [See: (1985) 3 SCC 284 *Indian Aluminum Cables Ltd. Vs. Union of India and_others* & (2006) 9 STJ 292(SC) *Commissioner of Central Excise, Delhi Vs. Carrier Aircon Ltd.]*

14. In the present matter, the Revisional Authority has proceeded on the erroneous premises that the items in question are covered under Entry 49 since they are manufactured for being finally used in Television and generally these items are not used for any purpose other than in the manufacture of television. The Revisional Authority has also committed an error in construing Entry 42 by holding that only crockery and chinaware are covered under this entry, ignoring that it is a much wider entry which includes all the goods made of glass and glass ware not expressly excluded.

15. Keeping in view the language employed in the respective entry and the undisputed fact that the items in question are made of glass and that they are not parts or accessories of television but are used as raw material for manufacturing of parts and accessories of television, we are of the view that the items in question are covered by Entry 42 of Schedule II of the Entry Tax Act.

16. The next question is about levy of interest under Section 13 of the Entry Tax Act read with Section 26(4)(a) of the Vanijya Kar Adhiniyam, 1994. Under the said provision. the interest has been levied on,delay in payment of tax. Since a submission has been made that the said interest is relatable to the difference on the rate of tax claimed by the petitioner under Entry 42 of the Entry Tax Act and rate of tax levied by the Assessing Authority under Entry 49 of the Entry Tax Act, and since this Court has held that Entry 42 is applicable, therefore, the interest levied by the Assessing Authority to that extent cannot be upheld.

17. Keeping in view the aforesaid aspect of the matter, the order of assessment dated 20.12.2002 and the revisional order dated 3.11.2003 are set aside and the matter is remitted back to the Assessing Authority for fresh assessment and calculation of liability in accoradance with law, keeping in view the observations made above.

18. The writ petitions are allowed to the extent indicated above.

Petition allowed.

I.L.R. [2013] M.P., 130
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 11651/2012 (S) (Jabalpur) decided on 2 January, 2013

RUPENDRA KUMAR BHATT ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. Constitution - Article 14 - Right to equality - **Article 14 guarantees to every citizen the right of equality before the law but it does not forbid different treatment of unequals. (Para 4)**

क. संविधान – अनुच्छेद 14 – समानता का अधिकार – अनुच्छेद 14 प्रत्येक नागरिक को विधि के समक्ष समानता के अधिकार की गारंटी देता है परंतु वह असमान के साथ भिन्न व्यवहार निषिद्ध नहीं करता।

B. Service Law - Selection Process - Criterial of Eligibility - **Fixation of norms of eligibility for recruitment is within the realm of employer and the scope of judicial review in such a case is extremely limited. (Para 5)**

ख. *सेवा विधि – चयन प्रक्रिया – पात्रता का मानदण्ड* – भर्ती हेतु पात्रता के सन्नियम निश्चित करना, नियोक्ता के अधिकार क्षेत्र में आता है और ऐसे मामले में न्यायिक पुनर्विलोकन की परिधि आत्यंतिक रुप से सीमित है।

C. ***Service Law - Selection Process - Criteria*** **- Upper age limit of 28 years as one of the eligibility criteria for recruitment to the posts of Sub-Inspector and Constable in the Police Department as well as Special Armed Force - Petitioner challenging the criteria being arbitrary and unreasonable, as in other Departments of State Government like Transport, Excise, Jail and Home Guards, where the employees also perform the duties of Police, the upper age limit has been fixed as 35 years - Held - It cannot be said that nature of duties performed by the Sub-Inspectors and Constables of Police Department and Special Armed Force are similar to that of the employees of Department of Transportation, Excise, Home Guards and Jail - There is no infringement of right guaranteed to the petitioner under Article 14 of the Constitution of India. (Paras 1, 3 & 5)**

ग. *सेवा विधि – चयन प्रक्रिया – मानदण्ड* – पुलिस विभाग और साथ ही विशेष सशस्त्र बल में उप निरीक्षक एवं आरक्षक के पदों पर भर्ती हेतु पात्रता मानदण्डों में से एक, 28 वर्ष की उच्चतर आयु सीमा – याची ने मानदण्ड को मनमाना एवं अयुक्तियुक्त होने के आधार पर चुनौती दी क्योंकि राज्य सरकार के अन्य विभागों में जैसे कि परिवहन, उत्पाद–शुल्क, जेल व होम गार्ड में जहां कर्मचारीगण, पुलिस के कर्तव्यों का भी निर्वहन करते हैं, उच्चतर आयु सीमा 35 वर्ष निर्धारित कर दी गई है – अभिनिर्धारित – यह नहीं कहा जा सकता कि पुलिस विभाग के तथा विशेष सशस्त्र बल के उप निरीक्षकों और आरक्षकों द्वारा निष्पादित किये जाने वाले कर्तव्य, परिवहन, उत्पाद–शुल्क, होम गार्ड व जेल विभागों के कर्मचारियों के समान है – याची को भारत के संविधान के अनुच्छेद 14 के अंतर्गत प्रत्याभूत अधिकार का उल्लंघन नहीं हुआ है।

Cases referred :

(1997) 6 SCC 614, (2008) 14 SCC 702, (2008) 4 SCC 720, (2010) 12 SCC 576, (2009) 3 SCC 227.

Dr. Anuvad Shrivastava, for the petitioner.
Piyush Dharmadhikari, G.A. for the respondents.

ORDER

ALOK ARADHE, J :- Heard on the question of admission.

1. In this writ petition, the petitioner has challenged the action of the respondents in fixing the upper age limit of 28 years as one of the eligibility criteria for recruitment to the posts of Sub-Inspector and Constable in the Police Department as well as Special Armed Force.

2. Facts giving rise to filing of the writ petition briefly stated are that the petitioner is a member of Other Backward Class community. The Inspector General of Police issued advertisements dated 25.12.2011 and 01.1.2012 respectively, inviting applications for recruitment to the posts of Sub-Inspectors and General Constables. Paragraph 4.1 of the advertisement provides that the age of the candidate as on 1.1.2012 should not be less than 18 years and should not be more than 28 years. The petitioner in the aforesaid factual backdrop has approached this Court.

3. Learned counsel for the petitioner submitted that fixing of upper age limit as 28 years is arbitrary and unreasonable. It is further submitted that there is no nexus between fixing of upper age limit of 28 years with the object sought to be achieved. It is also urged that in other Departments of State Government like Transport, Excise, Jail and Home Guards, where the employees also perform the duties of Police, the upper age limit has been fixed as 35 years. Therefore, there is no justification to fix the upper age limit as 28 years. It is fairly submitted that petitioner had appeared in the examination, however, his candidature was rejected on the ground that he does not meet the eligibility criteria with regard to upper age limit.

4. I have considered the respective submissions made by learned counsel for the parties. Article 14 of the Constitution of India guarantees to every citizen the right to equality before the law. It does not forbid different treatment of unequals. In *Dr. Ami Lal Bhat Vs. State of Rajasthan and other,* (1997) 6 SCC 614, it has been held that basically, the fixing of a cut-off date for determining the maximum or minimum age required for a post, is in the discretion of the rule-making authority or the employer as the case may be. One must accept that such a cut-off date cannot be fixed with any mathematical precision and in such a manner as would avoid hardship in all conceivable cases. As soon as a cut-off date is fixed there will be some persons who fall on the right side of the cut-off date and some persons who will fall on the wrong side of the cut-off date. That cannot make the cut-off date, per se, arbitrary unless the cut-off date is so wide off the mark as to make it wholly unreasonable. Similar view has been taken in *Government of Andhra Pradesh and others*

Vs. N.Subbarayudu and others, (2008) 14 SCC 702, wherein it has been held that the Court must not declare the choice of the employer to fix the cut-off date to be arbitrary and violative of Article 14 unless the said cut-off date leads some blatantly capricious or outrageous result:

5. In the instant case, by no stretch of imagination, it can not be said that nature of duties performed by the Sub Inspectors and Constables of Police Department and Special Armed Force are similar to that of the employees of Department of Transportation, Excise, Home Guards and Jail. Therefore, in the facts of the case, there is no infringement of right guaranteed to the petitioner under Article 14 of the Constitution of India. The fixation of norms of eligibility for recruitment is within the realm of employer and the scope of judicial review in such a case is extremely limited. The fixation of cut-off date cannot be said to be blatantly capricious and the Court has to exercise judicial restraint in such a case. See: *Government of Andhra Pradesh Vs. P. Laxml Devi,* (2008) 4 SCC 720. For yet another reason, the petitioner is not entitled to any relief, as the petitioner had participated in the process of selection and thereafter has challenged the criteria of selection. The aforesaid conduct of the petitioner dis-entitles him from questioning the criteria for selection. *Manish Kumar Shahi Vs. State of Bihar and others,* (2010) 12 SCC 576 and *Amlan Jyoti Borooah Vs. State of Assam,* (2009) 3 SCC 227.

6. For the aforementioned reasons, I do not find any merit in the writ petition. The same fails and is hereby dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 133
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 10502/2011(S) (Jabalpur) decided on 8 January, 2013

VILAS KUMAR BHUGAONKAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Service Law - Termination of service - Cancellation of caste certificate* - Petitioner obtained service on the strength of caste certificate which was cancelled by High Power Caste Scrutiny Committee - Services of petitioner were terminated - Where a person secures an appointment by producing a false caste certificate, his**

services cannot be protected and an order of reinstatement cannot be passed - Where a person secures an appointment on the basis of false caste certificate he cannot be allowed to retain the benefit of wrong committed by him and his services are liable to be terminated - Petition dismissed. (Para 7)

सेवा विधि – सेवा समाप्ति – जाति प्रमाण पत्र का निरस्तीकरण – याची ने उस जाति प्रमाण पत्र के आधार पर सेवा अभिप्राप्त की जिसे उच्चाधिकार जाति छंटनी समिति द्वारा निरस्त किया गया था – याची की सेवा समाप्त की गई – जहां व्यक्ति मिथ्या जाति प्रमाण पत्र प्रस्तुत करके नियुक्ति प्राप्त करता है, उसकी सेवा का संरक्षण नहीं किया जा सकता और बहाली का आदेश पारित नहीं किया जा सकता – जहां व्यक्ति मिथ्या जाति प्रमाण पत्र के आधार पर नियुक्ति प्राप्त करता है, उसे उसके द्वारा कारित अनुचितता का लाभ रखे रहने की मंजूरी नहीं दी जा सकती और उसकी सेवा समाप्त किये जाने योग्य है – याचिका खारिज।

Cases referred :

AIR 2001 SC 393, 2005(4) MPLJ 303, 2007(7) 3 MPLJ, AIR 2008 SC 1678, (2011) 12 SCC 94.

Ajay Mishra with *Pratyush Tripathi,* for the appellant.
Prashant Singh, Addl. A.G. for the respondents.

ORDER

ALOK ARADHE, J :- In this petition, the petitioner has inter-alia challenged the validity of the order dated 3.8.2010 by which services of the petitioner have been terminated in the light of the recommendation made by High Power Scrutiny Committee that the petitioner has illegally obtained the caste certificate. The petitioner has also challenged the validity of the order dated 2.9.2011 passed by the appellate authority by which the appeal preferred by the petitioner has been dismissed. The petitioner also seeks a direction to the respondents to reinstate him in service with all consequential benefits.

2. Background facts leading to the controversy involved in the writ petition briefly stated are that as per version of the petitioner, his ancestors belonged to "Halba" Tribe and were originally habitants of Baster District in the erstwhile State of Madhya Pradesh. In search of employment, they migrated to Bhugaon in District Nagpur. The father of the petitioner was appointed in M.P. Civil Secretariat Services in the year 1946 and was posted in Nagpur and served in the erstwhile State of Madhya Pradesh till 16.12.1957. On re-organisation

of the State of Madhya Pradesh, the services of the father of the petitioner were allocated to the State of Madhya Pradesh and he was posted at Bhopal. A caste certificate dated 30.6.1979 was issued to the petitioner by the District Organiser, Tribal Welfare Department, Bhopal, certifying that the petitioner is a Scheduled Tribe being member of Halba community.

3. The petitioner was appointed as Assistant Engineer in Public Health Engineering Department on 12.11.1984. Thereafter, the petitioner was appointed on probation period of two years. The petitioner was promoted on the post of Executive Engineer in the year 2001 and subsequently on the post of Superintending Engineer vide order dated 27.6.2005. The petitioner was given the officiating charge of the post of Chief Engineer, P.W.D. (Bridge), Bhopal vide order dated 1.4.2008. A complaint was made to the Chairman of the M.P. Scheduled Tribe Commission on 20.12.2007 in which it was alleged that caste certificate issued in favour of the petitioner is false. Thereupon, the matter was referred to the High Power Caste Scrutiny Committee. The High Power Caste Scrutiny Committee vide its report dated 21.6.2010 found that the caste certificate has illegally been issued to the petitioner and the petitioner belongs to Other Backward Class and is not a member belonging to the Scheduled Tribe. Accordingly, the caste certificate issued in favour of the petitioner was cancelled. On the basis of the report submitted by the High Power Scrutiny Committee, the services of the petitioner were terminated vide order dated 3.8.2010. The aforesaid order was affirmed in appeal by the appellate authority vide order dated 2.9.2011. In the aforesaid factual background, the petitioner has approached this Court.

4. Learned senior counsel for the petitioner submitted that in pursuance of the order of the Supreme Court in the case of *State of Maharashtra Vs. Milind and others*, AIR 2001 SC 393, the Central Government has issued a circular dated 10.8.2010 by which protection has been afforded to the admissions and the appointments which have become final on or before 28.11.2000. It is further submitted that State Government has also issued a circular dated 7.3.2011 in pursuance of the circular issued by the State Government and in the light of decision of the Supreme Court in the case of *Milind* (supra) wherein it is provided that admissions and appointments which have attained finality prior to 28.11.2000 shall not be disturbed. However, such person shall not be entitled to benefit of reservation after 28.11.2000. While inviting the attention of this Court to the opinion which has been given by the Advocate General as well as the Law Department, it is submitted that

the circular issued by the State Government dated 7.3.2011 has retrospective operation and therefore the order of termination is liable to be quashed.

5. On the other hand, while opposing the submissions made on behalf of the petitioner, it is submitted that the case of *Milind* (supra) does not lay down any such principle of law that where a person secures an appointment by producing false certificate, his services can be protected and an order of reinstatement has to be passed. In support of his submissions, learned Additional Advocate General has placed reliance on the decision of the Supreme Court reported in *Bank of India and another Vs. Avinash D.Mandivikar,* 2005(4) MPLJ 303, *Additional General Manager, Human Resource, BHEL, Ltd., Vs. Suresh Ramkrishna Burde,* 2007(7) 3 MPLJ and *Union of India Vs. Dattaray Namdeo Mendhekar and others*, AIR 2008 SC 1678.

6. I have considered the submissions made by learned counsel for the parties. In the case of *Milind* (supra), the Supreme Court was dealing with a matter pertaining to admission to Medical College. The question which arose for consideration in the aforesaid case was whether it was open for the State Government or the Courts or any other authority to modify, amend or alter the list of Scheduled Tribe and in particular whether Halba/Koshti was a sub-division of Halba Tribe. It was held that it was not permissible to amend or alter the list of Scheduled Tribes by including any sub-divisions or otherwise. Paragraph 37 of the judgment which is penultimate paragraph reads as under:-

> "37. Respondent No.1 joined the medical course for the year 1985-86. Almost 15 years have passed by now. We are told he has already completed the course and may be he is practising as doctor. In this view and at this length of time it is for nobody's benefit to annul his Admission. Huge amount is spent on each candidate for completion of medical course. No doubt, one Scheduled Tribe candidate was deprived of joining medical course by the admission given to respondent No.1. If any action is taken against respondent No.1, it may lead depriving the service of a doctor to the society on whom public money has already been spent. In these circumstances, this judgment shall not affect the degree obtained by him and his practising as a doctor. But we make it clear that he cannot claim to belong to the Scheduled Tribe covered by the Scheduled Tribes

> Order. In other words, he cannot take advantage of the Scheduled Tribes Order any further or for any other constitutional purpose. Having regard to the passage of time, in the given circumstances, including interim orders passed by this Court in SLP © No.16372/85 and other related affairs, we make it clear that the admissions and appointments that have become final, shall remain unaffected by this judgment."

7. The aforesaid judgment was considered by the Supreme Court in the case of *Bank of India* (supra) wherein the respondent who was an employee of Bank of India and had obtained the appointment on the pretext that he belongs to a member of Scheduled Tribe, claimed the benefit of the judgment of the Supreme Court in the case of *Milind* (supra). It was held that benefit of protection given in *Milind's* case cannot be extended to the employee, as the protection was given under the peculiar factual background of the case. Similar view was taken by the Supreme Court in the case of *Additional General Manager, Human Resource, BHEL, Ltd.*, (supra) wherein the Supreme Court held that the judgment in the case of *Milind* (supra) does not lay down any such principle of law that where a person secures an appointment by producing a false caste certificate, his services can be protected and an order of reinstatement can be passed. It was further held that where a person secures an appointment on the basis of false caste certificate, he cannot be allowed to retain the benefit of the wrong committed by him and his services are liable to be terminated. Similarly, in *Union of India* (supra), it was held that when a person secures employment by making a false claim regarding caste/tribe, he deprives a legitimate candidate belonging to scheduled caste/ tribe, of employment. In such a situation, the proper course is to cancel the employment obtained on the basis of the false certificate so that the post may be filled up by a candidate who is entitled to the benefit of reservation. At this stage, it would be appropriate to advert to the circular dated 7.3.2011 issued by the State Government. The aforesaid circular, even if the same is treated to be a policy decision, has been issued on 7.3.2011. The aforesaid policy decision taken by the State Government is contrary to law as interpreted by the Supreme Court from time to time in the case of *Milind* supra and, therefore, in the considered opinion of this Court, no writ of mandamus can be issued to enforce the same. See: *Jaipur Development Authority and others Vs. Vijay Kumar Data and another,* (2011) 12 SCC 94. Therefore, it is not necessary to go into the question of prospectivity or retrospectivity of the aforesaid

circular/policy decision which has been taken by the State Government.

8. It is pertinent to mention here that petitioner has challenged the report which has been submitted by the High Power Caste Scrutiny Committee in a writ petition namely W.P. No.10230/11, which was listed today. However, the same has been adjourned in view of the prayer made by learned counsel for the parties. Needless to state that in case the aforesaid writ petition is allowed, the petitioner would be at liberty to seek recall of this order.

9. In view of preceding analysis, I do not find any merit in the writ petition. The same is dismissed with liberty as aforesaid.

Petition dismissed.

I.L.R. [2013] M.P., 138
WRIT PETITION

Before Mr. S.A. Bobde, Chief Justice & Mr. Justice K.K. Trivedi
W.P. No. 12109/2009 (Jabalpur) decided on 23 January, 2013

KISHORE SAMRITI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Municipalities Act, M.P. (37 of 1961), Section 5-A - Alteration of limits **- Municipal Area of Lanji was constituted by notification including the Gram Panchayats Bisoni, Purva Tola, Tekri and Dulhapur - However, after receiving objections these areas were excluded from Municipal Area - Held - Govt. having notified the larger area by including the areas, has to follow the procedure prescribed under Section 5-A to exclude any such area - Subsequent notification excluding the areas without following the procedure as laid down under Section 5-A of the Act is quashed - Govt. may proceed in accordance with Section 5-A for the exclusion of areas. (Paras 5 & 6)**

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 5ए – सीमाओं में परिवर्तन – अधिसूचना द्वारा बिसौनी, पूर्वाटोला, टेकरी और दुल्हापुर ग्राम पंचायतों का समावेश करके लांझी के नगरपालिका क्षेत्र का गठन किया गया – किन्तु, आक्षेपों को प्राप्त करने के पश्चात इन क्षेत्रों को नगरपालिका क्षेत्र से अपवर्जित किया गया – अभिनिर्धारित – सरकार ने क्षेत्रों के समावेश द्वारा वृहद क्षेत्र अधिसूचित किया, उक्त किसी क्षेत्र को अपवर्जित करने के लिए उसे धारा 5ए के अंतर्गत विहित प्रक्रिया का पालन करना चाहिए – अधिनियम की धारा 5ए के अंतर्गत प्रतिपादित प्रक्रिया का

पालन किये बिना क्षेत्रों को अपवर्जित करने की पश्चातवर्ती अधिसूचना अभिखंडित – सरकार क्षेत्रों के अपवर्जन हेतु धारा 5ए के अनुसरण में कार्यवाही कर सकती है।

Shobha Menon with *C.A. Thomas* for the petitioner.
Kumaresh Pathak, Dy. A.G. for the respondents No. 1 to 3.

ORDER

The Order of the Court was delivered by :

S.A. Bobde, C.J.: The petitioner, by way of filing this petition under Article 226 of the Constitution of India, has called in question the constitutional validity of the M.P. Gazette Notification dated 25.8.2009, whereby the Gram Panchayats, Bisoni, Purva Tola, Tekri and Dulhapur were excluded from the area of Nagar Panchayat Lanji.

2 : In the M.P. Municipalities Act, 1961 (hereinafter referred to as the Act for brevity), there is a power conferred on the Governor to include or exclude certain area from the limits of Municipal areas under Section 5-A of the Act, which reads as follows :-

> **"5-A. Power of Governor to include or exclude certain area** - (1) The Governor may by notification in the Gazette, declare the intention to include within or exclude from the limits of a municipal area, any specified area.
>
> (2) If the local authority having jurisdiction in the said area or any person resident therein, objects to such declaration, such authority or person may submit an objection in writing to the Collector within a specified period and the Governor shall take such objection into consideration.
>
> (3) When the said period has expired and the Governor has considered the objection under sub-section (2), the Governor may by notification include within or exclude from the limits of a municipal area, any specified area:
>
> Provided that when an area is excluded from the limits of any municipal area, such area notwithstanding such exclusion shall continue to be within the limits of the municipal area until the area so excluded is included in a duly constituted Panchayat area."

3 : In the present case, the Municipal area of Lanji was constituted by

Notification dated 12.8.2008. In this Municipal area, the Gram Panchayats Bisoni, Purva Tola, Tekri and Dulhapur along with the Gram Panchayat Lanji, were included. Apparently, objections were received by the State that the areas of Gram Panchayats Bisoni, Purva Tola, Tekri and Dulhapur into the larger area of Nagar Panchayat Lanji, were illegally included without following procedure laid down in Section 5-A of the Act. Since the intention to include such areas as required by Section 5-A of the Act was not declared nor objections were invited before the inclusion of these areas, these objections found favour with the Government, which decided to exclude these area of Bisoni, Purva Tola, Tekri and Dulhapur from the larger area of Nagar Panchayat Lanji. This has been done by the Notification dated 25.8.2009. The petitioner has approached this Court for a declaration that the exclusion of the aforesaid areas from the larger area of Nagar Panchayat Lanji, is illegal, because prior to the exclusion of these areas, the procedure prescribed by Section 5-A of the Act has not been followed. That is to say a Notification declaring the intention to exclude such areas from the limits of Municipal area was not published and objections in writing were not considered before such exclusion.

4 : We have given the anxious consideration to the matter and we are of the view that the action of exclusion of the areas from the larger area of Nagar Panchayat Lanji, is not illegal since the exclusion was done purely by way of rectification upon considering without calling for any objections. Thus, in the first place if the inclusion of these areas was itself found to be illegal and the Government decided to exclude those areas after considering the objections in that regard to be valid, it is necessary for the Government to resort the procedure prescribed by Section 5-A of the Act i.e. again declaring their intention to exclude the aforesaid areas and then again inviting objections.

5 : After giving anxious consideration to the matter, we find that though the second Notification for excluding the areas of Bisoni, Purva Tola, Tekri and Dulhapur from the larger area of Nagar Panchayat Lanji has been done because of the upholding of objections received in regard to the first Notification of inclusion, it was nevertheless the duty of the Government prescribed under Section 21 of the M.P. General Clauses Act, 1957, to exercise the power of exclusion "in like manner and subject to like sanction and conditions". Section 21 of the General Clauses Act reads as follows :-

> **"21. Power to make, to include, power to add to, amend, vary or rescind orders, etc.,** - Where, by any Madhya

Pradesh Act, a power to issue notification, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanctions and conditions, if any, to add to, amend, vary or rescind any notifications, orders, rules or bye laws, so issued."

6 : The requirement of law is, thus, clear. The Government having notified the larger area by including the areas in question, if of the view that the any area must now be excluded for any reason, it must again follow the procedure prescribed by Section 5-A of the Act. We find that there is no Notification declaring the intention of the Governor to exclude the areas of Bisoni, Purva Tola, Tekri and Dulhapur from the larger area of Nagar Panchayat Lanji. Indeed it has been the contention of the learned Dy. Advocate General appearing on behalf of respondents No 1 to 3 that the subsequent exclusion is purely due to the upholding of objections of the earlier inclusion. Admittedly, the entire procedure contemplated by Section 5-A of the Act have not been followed, even again.

7 : In the circumstances, the subsequent Notification dated 25.8.2009 excluding the areas of Bisoni, Purva Tola, Tekri and Dulhapur from the larger area of Nagar Panchayat Lanji, is illegal and is hereby quashed and set aside. The Government may proceed in accordance with Section 5-A for the aforesaid purpose.

8 : The writ petition stands disposed of to the extent indicated herein above. There shall be no order as to costs.

Petition disposed of.

I.L.R. [2013] M.P., 141

CONTEMPT PETITION

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

Contempt Pet. No. 42/2012 (Gwalior) decided on 5 July, 2012

GUNMALA SHANTI FOUNDATION TRUST'S (SMT.) ...Petitioner

Vs.

V.S. NIRANJAN ...Respondent

Constitution - Article 215 - Contempt of Court **- Directions were issued to allot students against vacant seats in the respective institutions for admission in B.Ed. course - Review petition filed by State dismissed - S.L.P. filed before Supreme Court also dismissed -**

After dismissal of review petitions time was sought for compliance of the order - Non-allotment of seats on the ground of another order passed by Principal bench - Principal bench had not decided the matter on merits but had directed to decide the representations - It is crystal clear that directions issued have not been complied with - Contempt is made out - Respondent is directed to remain present for hearing on the question of punishment. (Paras 10 to 16)

संविधान – अनुच्छेद 215 – न्यायालय की अवमानना – बी.एड. पाठ्यक्रम में प्रवेश हेतु संबंधित संस्थाओं में रिक्त सीटें विद्यार्थियों को आवंटित करने के निदेश जारी किये गये – राज्य द्वारा प्रस्तुत पुनर्विलोकन याचिका खारिज – उच्चतम न्यायालय के समक्ष प्रस्तुत एस.एल.पी. भी खारिज – पुनर्विलोकन याचिकाओं की खारिजी के पश्चात आदेश के अनुपालन हेतु समय चाहा गया – मुख्य न्यायपीठ द्वारा पारित अन्य आदेश के आधार पर सीटों को आवंटित नहीं किया जाना – मुख्य न्यायपीठ ने मामले को गुणदोषों पर निर्णित नहीं किया किन्तु, प्रत्यावेदनों का विनिश्चय करने के लिये निदेशित किया – यह सुस्पष्ट है कि जारी किये गये निदेशों का अनुपालन नहीं किया गया – अवमानना गठित होती है – प्रत्यर्थी को दण्ड के प्रश्न पर सुनवाई हेतु उपस्थित रहने के लिये निदेशित किया गया।

R.B.S. Tomar, for the petitioner.
Raghvendra Dixit, for the respondent.

ORDER

The Order of the Court was delivered by :
J.K. MAHESHWARI, J.: This order shall govern the disposal of contempt case No. 42/2012 filed for non-compliance of order dated 15.11.2011 passed on W.P. No. 7239/2011, Contempt Case No. 53/2012 filed for non-compliance of order dated 15.11.2011 passed in W.P. No. 7404/2011; and Contempt Case No. 60/2012 filed for non-compliance of order dated 15.11.2011 passed in W.P. No. 7105/2011.

2. In the aforesaid three writ petitions the issue for non-allotment of the seats for the academic session 2010-2011 to the students in B.Ed. course was in question. It was pleaded that the students could not get admission because it was specified by respondents that the admission in the petitioner's institution shall be "at the risk of the student" in view of the pending litigation, thereby the complete seats of the B.Ed. course could not be filled up. In S.P.S. Academy, Shivpuri 19 seats, in Smt Gunmala Shanti Foundation Trust's 25 seats and in H.I.C.T. Shiksha Mahavidyalaya 36 seats were remained vacant, however on

perusing the reply filed by the respondents/ State and after hearing, directions were issued to allot 19, 25 and 36 students against the vacant seats in the respective institutions for admission in the B.Ed. Course in accordance with the prescribed limit of All India quota and State quota. The order was passed on 15.11.2011 in all three writ petitions bearing Nos. 7239/2011, 7105/2011 and 7404/2011. The directions so issued in all the writ petitions are similar except indicating the number of the seats, however the directions issued in one of the writ petition i.e. *Smt Gunmala Shanti Foundation Trust's vs. The State of M.P. and another* is reproduced as thus:

> "In this view of the matter, the petition of the petitioner is allowed. The respondents are directed to allot 25 students against vacant seats to the petitioner institution for admission in the B.Ed. Course in accordance with the prescribed limit of All India quota and State quota. The order be complied with within a period of two weeks from the date of receipt of a copy of the order."

3. The respondent-State has filed the first review petition in all the three cases. The description of the writ petition and the number of the first review petition and the date of the order is given below as thus:-

S.No.	Description of Writ Petition	Description of First Review Petition	Date of order passed in First Review Petition
1.	W.P.No7239/2011	R.P.No.309/2011	09.12.2011
2.	W.P.No7404/2011	R.P.No.307/2011	09.12.2011
3.	WP No 7105/2011	R.P No 308/2011	09.12.2011

4. This Court while dismissing the aforesaid review petitions has considered the argument so advanced by the State Government that if permission to admit the students is allowed then they may not be in a position to complete the teaching of 180 days which can be relaxed on the event that institution shall arrange extra classes. It is considered by the Court that the State Government vide its letter bearing No.2026/22 1 dated 4.10.2011 issued the direction to fill up the remaining seats of the B.Ed. course by holding the counselling in between the period 4th October, 2011 to 15th October, 2011, however there is no reason why the order of the Court can not be complied,

therefore dismissed the review petitions as no error apparent was found on record. The order of dismissal dated 09.12.2011 passed in one of the review petition i.e. R.P. No.309/2011 is reproduced as thus which is similar in other review petitions.

9/12/2011

Shri Raghvendra Dixit, Government Advocate for the petitioners/State.

Shri R.B.S. Tomar, Advocate for respondent.

Heard on the question of admission.

This review petition has been filed for review of the order dated 15/11/2011 passed by this Court in W.P. No.7239/2011.

Learned Government Advocate for petitioners/State has submitted that the counselling had already been over, hence, it is not possible to grant permission for admission of the students because the students did not complete 180 days of teaching.

Learned counsel for respondent has produced a letter dated 04/10/2011, by which, certain institutions have been granted permission to admit students because the counselling was continued upto 04th October, 2011 to 15th October, 2011. It has been mentioned in the letter that the condition of 180 days of teaching can be relaxed on the event that institution shall arrange extra classes. Apart from this in the present case, the Department was at fault in not permitting the respondent institution to admit students of outside, although, the seats were vacant and students were available.

In this view of the matter, we do not find any merit in this review petition. It is hereby dismissed.

However, this order will not be treated as a precedent.

Two weeks' time is granted as prayed by learned Government Advocate to comply the order.

We hope and trust that the order be complied with within the aforesaid period."

5. In view of the foregoing, it is apparent that on the request so made by the learned Government Advocate, two weeks time was granted to comply the order dated 15.11.2011 passed in various writ petitions. But, the compliance has nct been made and the second review petitions have been filed by the State Government on 17.2.2012. The decription of the second review petition is reproduced in the tabular form as under :-

S.No.	Description of Writ Petition	Description of Second Review Petition	Date of order passed in Second Review Petition
1.	W.P. No.7239/2011	R.P.No70/2012	05.03.2012
2.	W.P. No.7404/2011	R.P.No.69/2012	05.03.2012
3.	WP No 7105/2011	R.P.No. 68/2012	05.03.2012

6. All these three review petitions were dismissed on 5.3.2012 as not maintainable. Thereafter, the State has preferred the Special Leave Petition before Hon'ble the Apex Court. The details of special leave petitions and the date of dismissal order is reproduced in tabular form which is as under :-

S. No.	Description of Writ Petition	Description of SLP (C)	Date of Order passed in SLP (C)
1.	W.P.No.7239/2011	6453/2012	24.04.2012
2	W.P. No.7404/2011	6188/2012	16.04.2012
3.	W.P.No.7105/2011	6515/2012	16.04.2012

7. In view of the foregoing, it is apparent that the orders. passed on 15.11.2011 were affirmed up to the Apex Court and there was no stay either in the review petitions or before the Apex Court to comply the aforesaid directions. Thus looking to the nature of the issue which relates to allotment

of seats for the academic Session 2010-2011 the compliance ought to be made then and there by the State authorities as directed by this Court or within the period of request made for compliance on behalf of State Government.

8. On dismissal of the special leave petitions, statement has heen made by learned Additional Advocate General on 30.4.2012 in contempt cases that the process of compliance of the order is underway, thereafter case was listed on 14.5.2012. On the said date the State Government along with the list of document has filed two documents one is letter dated 11.5.2012 written by Officer on Special Duty referring one order passed by the Principal Seat, Jabalpur in W.P. No.3502/2012. It is stated in the said letter that the order passed by the Gwalior Bench and the Principal Seat at Jabalpur are different, however to have an uniformity in the compliance the guidance may be taken. Thereafter, the case was listed on 2.7.2012.On the same date the compliance report has been submitted along with letter dated 15.5.2012, 30.5.2012 and 19.6.2012, however looking to the documents filed along with compliance report direction was issued to produce the record indicating the fact, whether similar instructions were issued by the Commissioner, Higher Education while admitting students in regular course holding the counselling of the academic session 2010-2011. In this regard, it is urged that following the procedure under the rules applicable for B.Ed. admission academic Session 2010-2011, letter dated 15.5.2012 has been passed thus the direction of this Court has been complied with.

9. Per contra learned counsel appearing on behalf of the applicant referring the document so filed on behalf of the contemnor and some other document filed on 29.6.2012 along with an application for taking documents on record, it is urged that the compliance of the directions so issued has not been done, however it is a case of non-compliance of the directions issued by this Court, therefore the non-applicant may be held guilty for non-compliance of the directions of this Court.

10. After hearing Shri Raghvendra Dixit, learned Government Advocate and the counsel appearing for the applicants up to a considerable length, the fact remains that as per the orders passed on 15.11.2011 in three different writ petitions, the directions were issued that 19, 25 and 36 seats which have remained vacant in the respective institutions shall be allotted from the All India quota and the State quota and the order be complied with within a

period of two weeks from the date of receipt of the copy of the order. The aforesaid order has come to the knowledge of the State Government which is apparent from the fact that they themselves filed first review petition bearing nos.309/2011, 307/2011 and 308/2011 on 1.12.2011. In those review petitions the arguments were advanced that at this stage the allotment of the seats would not be in the fair administration of justice because such students would not be in a position to complete the teaching of 180 days. This Court rejected the aforesaid arguments in the light of the letter dated 4.10.2011 issued by the Government for counselling to the vacant seats and admitted them in various institutions in B.Ed. 2011 in October 2011, however it was observed that if those students may be admitted to complete the teaching of 180 days, there would be no impediment to the students admitted on the basis of direction of the Court, however review petitions were dismissed. Thus, on the request made by the learned Government Advocate two weeks time to comply the order was passed. It is not explained what steps have been taken thereafter till filing the second review petitions i.e. on 17.2.2012 up to a period of about one month and 25 days, though it is undertaken that the order shall be complied with within a period of two weeks. The said three second review petitions bearing Nos. 70/2012, 69/2012 and 68/2012 were dismissed on 5.3.2012 as not maintainable. Thereafter the State Government has filed three special leave petitions bearing Nos. 6453/2012, 6188/2012 and 6515/2012, that too were dismissed after condoning the delay on 16.4.2012 and 24.4.2012. Thus it is clear that the order passed by this Court has been affirmed up to the Apex Court. It is further clear that during the period i.e. from the date on which the direction was issued on 15.11.2011 till dismissal of the SLP there was no stay from any of the Court. More so, at the time of dismissal of the review petition, request was made on behalf of the State Government to grant two weeks time for compliance of the order. On perusal of the record, it further reveals that after dismissal of the SLP when the contempt cases have come up for hearing on 30.4.2012 it was reported that the process of compliance of the order is underway, however some time may be allowed. Thereupon the case was listed on 14.5.2012. On the said date along with the list of documents, two documents were filed, one is the letter dated 11.5.2012 written by the Officer on Special Duty, Higher Education Department, Bhopal with the approval of the Commissioner wherein the reference of the order passed by the Principal Seat Jabalpur in W.P. No.3502/2012 has been made. The said writ petition also relates to allotment of the seats in B.Ed. course wherein the Court without going into the merits of

the case issued a direction to consider the representation of the petitioner and to decide expeditiously within a period of two weeks. In the said context, it can safely be observed that the Principal Seat has not decided the controversy on merits while in the present three writ petitions the controversy was decided on merits by passing the order dated 15.11.2011 and those orders have been upheld up to the Apex Court. Thus there was no occasion for the Commissioner, Higher Education to issue instructions in this regard to the Additional Director by writing such letter.

11. Now, along with compliance report dated 2.7.2012 the Commissioner by a letter dated 15.5.2012 intended for fresh registration of students adopting procedure for admission. Learned counsel representing the contemnor contends that the aforesaid procedure has been specified to the rules of admission therefore, the letter dated 15.5.2012 has rightly been issued. To advert the aforesaid contention, rule 3 of the Admission Rules of B.Ed. Course for the academic sessions 2010-11 is relevant which is reproduced as under-

3.0 **प्रवेश प्रक्रिया की संक्षिप्त रूपरेखाः**

3.1 ***प्रवेश हेतु विज्ञापनः*** राष्ट्रीय एवं प्रदेश स्तर के हिन्दी एवं अंग्रेजी के दैनिक समाचार पत्रों, एम.पी. ऑनलाइन एवं विभाग की वेबसाइट पर विज्ञापन जारी करना।

3.2 एम.पी. ऑनलाइन के माध्यम से प्रवेश हेतु पंजीयन :

- पंजीयन के लिये अवधिः विज्ञापन प्रकाशित होने की तिथि से 15 दिन
- पंजीयन शुल्कः सभी श्रेणी के लिये रू. 5200/– (यह राशि शिक्षण शुल्क में समायोजित होगी)
- पंजीयन का प्रारूप एम.पी. ऑनलाइन की वेबसाइट पर उपलब्ध होगा।
- ऑनलाइन पंजीयन के उपरांत आवेदक को अभिस्वीकृति–पत्र जारी (Acknowledgement-Slip) जारी किया जावेगा, जिसमें आवेदक का फोटो एवं हस्ताक्षर मुद्रित होंगे। इस प्रपत्र को हेल्प सेंटर पर अभिप्रमाणीकरण के समय आवेदक स्वयं उपस्थित होकर प्रस्तुत करेगा। जानकारियों का मूल प्रमाणपत्रों से अभिप्रमाणीकरण हेल्प सेंटर के अधिकारियों से करवाना होगा। किसी भी प्रकार के परिवर्तन को हेल्प सेंटर के अधिकारी Acknowledgement-Slip पर अंकित कर अपने हस्ताक्षर के साथ सील लगायेंगे।
- पंजीयन के पश्चात् आवेदकों को शासकीय अग्रणी महाविद्यालय अथवा निर्दिष्ट सहायता केन्द्रों (प्रदेश के अन्य शासकीय महाविद्यालय)

पर जाकर अपने समस्त दस्तावेजों का सत्यापन करवाना अनिवार्य है। दस्तावेजों का सत्यापन नहीं कराये जाने पर आवेदक बी.एड. महाविद्यालयों में प्रवेश हेतु अपनी वरीयताओं को लॉक नहीं कर पायेंगे एवं उनके आवेदन प्रवेश हेतु मान्य नहीं होंगे। अन्य राज्यों के आवेदक अपने दस्तावेजों का सत्यापन मध्यप्रदेश राज्य के नजदीकी सहायता केन्द्रों/अग्रणी महाविद्यालयों में उपस्थित होकर करवा सकेंगे।

- अन्य चरणों में वरीयता व्यक्त करते समय रूपये 50/– शुल्क देय होगा।

12. On going through the said rules and the material so brought on record and also it is admitted by the counsel for the contemnor that advertisement for admission allotting the seats to the students in the newspaper Hindi and English of National or State level has not been issued. Merely on the online web site the department has offered for admission for registration of the students to the academic session 2010-11 in furtherance to the order of the Court. Thus the compliance of rule (3) as contended by the non-applicant has not been made.

13. In addition thereto on perusal of the letter dated 15.05.2012 which has been filed showing the compliance is required to be seen. In the said letter, it is stated that there are no registrations available in the higher education department and the students were required to deposit Rs. 5200/- again in between the period 01.06.2012 to 10.06.2012 to get the admission for the academic year 2010-2011. Along with contempt case the document Annexure A-4 filed by the applicant by which it is clear that after issuing the direction by this Court on 15.11.2011, without complying it, the State Government refunded the registration fee to the student. Learned counsel for contemnor referring the said document Annexure A-4 has argued that the said refund is only for those students who want to take admission for the academic year 2011-12 but the aforesaid fact is incorrect in view of the document dated 15.5.2012 filed along with the compliance report by them. If the argument so advanced by the learned counsel is accepted then the necessity to mention that there is no registration of students available was not required, it indicates that the contemnor by his own refunded the registration fee to all the students, and when they lost up to Hon'ble Apex Court it is only to weed out the things and to put the cloth on the face showing the compliance of the Court, the letter dated 15.05.2012 has been issued. By filing a document today, it has been brought to the notice that 7 students have been allotted to Smt Gunmala Shanti Foundation Trust's for admission; 8 students to S.P.S. Academy and none of

the student has been allotted to H.I.C.T. Shiksha Mahavidyalaya, however it would amounting to compliance of the direction of the Court. In view of the foregoing discussion, neither by issuance of the letter dated 15.5.2012 the compliance has been made nor by allotment of the aforementioned seats because rule (3) of the Admission Rules as relied upon by contemnor was not complied with. More so, even after issuance of directions, the registration fees of the students which were with the Higher Education Department has been refunded back by issuing the document on web site Annexure A/4.

14. Thus as per the foregoing discussions and observations made herein above, it is crystal clear that the directions issued by this Court on 15.11.2011 have not been complied, within the time so specified in the order. Even on dismissal of first review and asking time to comply the same within two weeks, the compliance has not been reported. It is further apparent that without taking any step, the State Government has filed the second review by a lapse of one month and 25 days which was dismissed by the Court as not maintainable, thereafter special leave petition was filed which was also dismissed by Hon'ble the Apex Court. Till that time the academic session has become over while the Government by its own issuing the letter on 4.10.2011 filled up the vacant seats, arranging special counselling in October, 2011 but the direction issued 15th November, 2011 has not been complied with for the one reason or another without giving any plausible explanation. Though the order passed by this Court has been affirmed up to the Apex Court and there was no stay of any of the Court since 15.11.2011 till issuing the letter dated 15.5.2012 referred hereinabove. It may be observed that the compliance of admission rule (3.1) for allotment of the seats issuing advertisement in the newspaper has not been done, however mere publication of notice on web site as per letter dated 15.5.2012 for registration of the student is not sufficient. On the basis of said registration, if some allotment of the seat has been made as shown today, it would not amount to compliance of the direction within the time so specified by this Court in letter and spirit. In the aforesaid circumstances, the irresistible conclusion which can be arrived is that the contemnor is guilty for non-compliance of the orders of this Court dated 15.11.2011 passed in W.P. No.7239/2011, W.P. No.7404/2011 and W.P. No.7105/2011 within the time so specified, or till now. Thus in our considered opinion, it is a case of deliberate and willful non-compliance of the directions of the Court, accordingly we hold that the contemnor is guilty for such noncompliance.

15. In the present case, we have seen that the contemnor has not filed any

reply along with an affidavit and the case has been defended by the subordinate officers present in the Court. In a contempt case where the contemnor is a party by name, he is bound to file the reply along with his own affidavit, however either by filing documents along with the list of documents, or submitting compliance report without any affidavit, compliance has been reported to the court. This itself indicates that the contemnor is not having much concern and giving no weightage to the orders/directions of this Court. In such circumstances, the Registry of this court is directed to send the copy of this order through fax to the Chief Secretary of the State of Madhya Pradesh for the information so as to visualize the working of the officers of the State and also to know how the officers are showing concern to the directions/orders of this court and are defending in contempt cases. It is an issue of thought of the Chief Secretary whether such functioning of the officers in contempt cases is appropriate and reasonable. We trust and hope that the necessary guiding instructions shall be issued with respect to compliance of the orders/directions of this court well within time and also to know as to how officers of the State should defend themselves in contempt cases.

16. List this case for presence of contemnor to afford an opportunity of hearing on the point of punishment on 13th July, 2012.

Order accordingly.

I.L.R. [2013] M.P., 151
APPELLATE CIVIL
Before Mr. Justice R.C. Mishra
F.A. No. 265/2010 (Jabalpur) decided on 14 May, 2012

GURU NANAK TIMBER MART (M/S) ...Appellant
Vs.
ANIL KUMAR GULATEE & ors. ...Respondents

Civil Procedure Code (5 of 1908), Section 96, O. 41 Rule 5 - Stay of Execution of Eviction Decree - Payment of mesne profits - **Landlords are entitled for mesne profits from the date of eviction till the judgment in the appeal - The respondents themselves in application under Section 10 of the M.P. Accommodation Act, filed before RCA had claimed for fixation of standard rent @ Rs. 20,000 per month - Appellant is directed to pay mesne profits at the rate of Rs. 20,000 per month in addition to the contractual rent w.e.f. date of decree.**

(Paras 11 to 20)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 96, आदेश 41 नियम 5 – बेदखली की डिक्री के निष्पादन पर रोक – अंतःकालीन लाभ का भुगतान – भूमिस्वामी, बेदखली की तिथि से अपील में निर्णय तक अंतःकालीन लाभ के हकदार हैं – प्रत्यर्थीगण ने स्वयं, म.प्र. स्थान अधिनियम की धारा 10 के अंतर्गत आर.सी. ए. के समक्ष प्रस्तुत आवेदन में, रुपये 20,000/– प्रति माह मानक भाड़ा तय करने हेतु दावा किया – अपीलार्थी को डिक्री की तिथि से रुपये 20,000/– प्रति माह की दर से अंतःकालीन लाभ, संविदात्मक भाड़े के अतिरिक्त अदा करने के लिए निदेशित किया गया।

Cases referred:

(2005) 1 SCC 705, (2009) 9 SCC 772, AIR 1957 SC 540, AIR 1969 SC 430, (1879) 12 Ch D 438, AIR 1981 SC 1711, AIR 1979 SC 1745, 2010(2) MPHT 462, 2011(1) MPWN 58, AIR 1953 Nagpur 186, AIR 1977 SC 2262, AIR 1977 SC 2270, (1984) 2 SCC 402, AIR 2002 SC 1598, 3 LR.P.C. 475.

A.D. Deoras with *R.K. Sanghi,* for the appellant.
Ravish Agrawal with *Abhishek Gulati,* for the respondents.

ORDER

R.C. Mishra, J :- This order shall govern the disposal of -

(i) I.A.No.4212/10, which is appellant's application, under Order 41 Rule 5(1) of the Civil Procedure Code (for short the 'Code') for staying execution of the impugned judgment and decree.

(ii) I.A.No.9186/11, which is in the form of reply to the aforesaid I.A. and appropriate directions to pay mesne profits @ Rs.2,67,300/- p.m.

2. The present appeal has been preferred against judgment dated 26.2.2010 passed by Second ADJ, Jabalpur in Civil Suit No.17-A/05, whereby the suit filed by the respondents for eviction of the appellant, a partnership Firm, from the suit accommodation, though based on other grounds also, was decreed on the ground of *bona fide* requirement, envisaged under Section 12(1)(f) of the M.P. Accommodation Control Act, 1961 (hereinafter referred to as the 'M.P. Act') and other consequential and incidental reliefs, including directions to appellant to pay a sum of Rs.1 lac as compensation and arrears of rent @ Rs.1,000/- p.m. were also granted. Being aggrieved, the respondents

have also preferred a counter objection.

3. Upon I.A.No.4212/10 (above), as an interim measure, vide order-dated 29.6.2010, execution of the decree was stayed, subject to conditions that the appellant shall deposit within a period of 30 days -

(i) entire cost of the litigation.

(ii) arrears of rent, if any.

(iii) a sum of Rs.25,000/- towards compensation as awarded by the trial Court

and also that it shall deposit rent @ Rs.1,000/- p.m. till decision of this appeal. It was further directed that the amount deposited towards the compensation and costs shall not be disbursed to the respondents and shall be kept deposited with a nationalized bank for a fixed period.

4. As indicated already, while opposing the stay application, so far as it relates to execution of the eviction part of the decree, the respondents have also prayed for modification of the order-dated 29.6.2010 in the light of the decision of the Supreme Court in *Atma Ram Properties v. Federal Motors* (2005) 1 SCC 705, that has been re-affirmed in *State of Maharashtra v. Super Max International Pvt. Ltd.* (2009) 9 SCC 772). According to respondents, with the passing of the eviction decree, the appellant-Firm has ceased to be their tenant and, therefore, an instant right to execute it and to recover, in addition to the contractual rent, *mesne profits* to be determined after taking into account the prevailing market rental value, has accrued to them contemporaneously. In this context, they have assessed the minimum rent of the suit accommodation as per.-

(i) Stamp Duty Ready Reckoner 2010-11 to be Rs.85,427/- and

(ii) prevailing rate of market rent in the surrounding area as Rs.2,67,300/-.

5. The prayer for modification of the interim stay order has been vehemently opposed by the appellant *inter alia* on the ground that the decisions in *Atma Ram Properties'* case and *Super Max's* case cannot be considered as binding precedents in a case governed by the provisions of the Act. It has also been urged that in absence of an application, under Order 41 Rule 27 of

the Code, the documents filed by the respondents in support of their claim for *mesne profits* should be kept out of consideration. In support of the reply, written arguments, running in as many as 14 typed pages, and providing subject matter for philosophical dissertation and digression, have also been submitted.

6. For the sake of convenience, the well-settled position of law on the right of appeal and nature/scope of the appellate Court's power to grant stay, as highlighted in the written arguments, may be summed up as under -

(i) Right of appeal is a substantive right. For this, reference has been made to *Garikapati Veeraya v. N. Subbiah Choudhry* AIR 1957 SC 540, wherein the Supreme Court laid down the following propositions -

> *(i) That the legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.*
>
> *(ii) The right of appeal is not a mere matter of procedure but is a substantive right.*
>
> *(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.*
>
> *(iv) The right of appeal is a vetted right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.*
>
> *(iv) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.*

(ii) Power to grant stay, being inherent, need not be expressly conferred on the appellate Court as an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective (*Income Tax Officer, Cannanore v. M. K.*

Mohamad Kunhi AIR 1969 SC 430 referred to). In that case, it was held that when Section 254 of the Income Tax Act confers appellate jurisdiction, it impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory. The following observations made in *Polini v. Gray,* (1879) 12 Ch D 438 were also quoted with approval -

> *"It appears to me on principle that the Court ought to possess that jurisdiction, because the principle which underlies all orders for the preservation of property pending litigation is this, that the successful party is to reap the fruits of that litigation, and not obtain merely a barren success. That principle, as it appears to me, applies as much to the Court of first instance before the first trial, and to the Court of Appeal before the second trial, as to the Court of last instance before the hearing of the final appeal."*

7. Adverting to the main contention, endeavour of the Senior Counsel for the appellant has been to demonstrate, by reference to various provisions of the Act and the earlier judgments touching the facets of the issue (which, according to him, were not brought to the notice of the Court), that the decision in *Atma Ram Properties'* case would not be applicable to a case, like the present one, regulated exclusively by the provisions of the Act, whereunder, -

> (a) by virtue of Section 13(1) thereof, a tenant, in order to secure protection against eviction under a decree appealed against by him or striking out of the defence, is obliged to deposit only the monthly rent as determined by the trial Court.
>
> (b) A tenant against whom a decree for eviction is passed by trial Court does not lose protection if he files the appeal because, as pointed out by the Supreme Court in *Hasmat Rai v. Raghunath Prasad* AIR 1981 SC 1711, if appeal is allowed the umbrella of statutory protection shields him.
>
> (c) In view of Section 6 of the Act, a landlord cannot claim or receive any rent in excess of the standard rent, as referred to in Section 7 thereof.

(d) Section 17 of the Act creates a bar to re-letting of the accommodation within two years from the date on which a landlord recovers possession thereof in pursuance of an order made under Clause (f) of sub-section (1) of Section 12.

(e) Inclusion of 'any person continuing possession after the termination of his tenancy' in the definition of tenant given in Section 2(i) of the Act does not assume any significance as for seeking eviction under Section 12 of the Act, notice under Section 106 of the Transfer of Property Act is not required in the wake of the pronouncement of the Constitution Bench in *V. Dhanapal Chettiar v. Yesodai Ammal* AIR 1979 SC 1745.

8. He is further of the view that the decisions in *Amta Ram Properties'* case and *Super Max's* case are not applicable to a case under the Act as, *firstly* they respectively relate to provisions of Delhi Rent Control Act, 1958 and Bombay Rent Act, 1947 and *secondly*, the source of statutory power to grant stay, under Order 41 Rule 5 of the Code, subject to payment of *mesne profits* at a rate higher than the contractual rate of rent was not considered in both the cases, despite the fact that the rule is merely a rule of procedure and regulatory in nature.

9. *Per contra,* learned Senior Counsel appearing for the respondents has submitted that *Atma Ram Properties'* case provides an affirmative answer to the core question as to whether the appellate Court, while staying execution of a decree for eviction, has jurisdiction to put the appellant on such reasonable terms as would, in its opinion, reasonably compensate for loss occasioned by delaying in execution of the decree or by the grant of stay order in the event of the appeal being dismissed. According to him, the aforesaid ratio of law has already been followed by a co-ordinate Bench of this Court in *M/s National Garage v. Rajvardhan Singhai* 2010 (2) MPHT 462 as well as by a *Division Bench in Shabbar Hussain v. Ram Dayal* 2011 (1) MPWN 58 and there is no compelling reason to take a different view. Reference has also been made to the decision, rendered by the then Chief Justice of Nagpur High Court, in *Bhagwandas Lakhamsi v. Kesheoram* AIR 1953 Nagpur 186, holding that-

> *"the Rent Control Order governs, for the limited purpose of that Order, relationship of landlord and tenant. It has absolutely no relevance to the question of what should be the measure of damages which a successful plaintiff should*

get for being kept out of his or her property. After the termination of the tenancy the position of the tenant is that of a trespasser, and a trespasser cannot invoke in aid the provisions of that order".

10. At the outset, it may be observed that the contention that order 41 Rule 5 of the Code does not correspond to any substantive right is self contradictory inasmuch as the proposition that the power to hear appeal (which, in the instant case, has been conferred by Section 96 of the Code) does include the power to stay execution of the order in question was propounded in *M. K. Mohamad Kunhi's* case (above), cited on behalf of the appellant only.

11. The judgment in *Hasmat Rai v. Raghunath Prasad* AIR 1981 SC 1711 does not contain reference to an earlier decision rendered in *Chander Kali Bai v. Jagdish Singh Thakur* AIR 1977 SC 2262 and re-affirmed in *Shyam Charans v. Sheoji Bhai* AIR 1977 SC 2270, explaining that -

"A tenant even after the termination of his contractual tenancy does not become an unauthorised occupant of the accommodation but remains a tenant. Such a tenant is conveniently called a statutory tenant. Whether the expression aforesaid borrowed from the English Law is quite apposite or not but, what is certain is that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the Act and on such termination his possession does not become wrongful, until and unless a decree for eviction is made. If he continues to be in possession even after the passing of the decree, he does so as a wrongful occupant of the accommodation".

.....

In absence of a decree of eviction the person in occupation of the accommodation continues to be a tenant and is not liable to pay any damages as his occupation is not unauthorised or wrongful even after the termination of the contractual tenancy.

12. In other words, liability of the tenant to pay *mesne profits* arises only upon the passing of the decree for eviction against him. The view taken in *Chander Kali's* case was followed in *Atma Ram* Properties' case. Relevant observations may be reproduced as under -

> *"17. In the Delhi Rent Control Act, 1958, the definition of a "tenant" is contained in clause (l) of Section 2. Tenant includes "any person continuing in possession after the termination of his tenancy" [Section 2(l)(ii)] and does not include "any person against whom an order or decree for eviction has been made" [Section 2(l)(A)]. This definition is identical with the definition of tenant dealt with by this Court in Chander Kali's case. The respondent tenant herein having suffered an order for eviction on 19-3-2001, his tenancy would be deemed to have come to an end with effect from that date and he shall become an unauthorised occupant. It would not make any difference if the order of eviction has been put in issue in appeal or revision and is confirmed by the superior forum at a latter date. The date of termination of tenancy would not be postponed by reference to the doctrine of merger.*
>
> *18. That apart, it is to be noted that the appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd. this*

Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property."

13. Moreover, as explained in *Super Max's* case, the definition of 'tenant' in Section 2(i) of the M.P. Act and Section 2(l) of the Delhi Act contains a similarly worded exclusionary clause to the effect that a tenant does not include any person against whom an order or decree for eviction has been made under the Act. Although, the definition of 'tenant' as given in Section 5(11) of the Bombay Act does not have such an exclusionary clause yet, in that case, a three-Judge, speaking through Aftab Alam, J., proceeded to dismiss the contention raised against the applicability of the dictum of *Atma Ram Properties'* case to a proceeding under the Bombay Act, while holding that -

"in an appeal or revision preferred by a tenant against an order or decree of an eviction passed under the Rent Act it is open to the appellate or the Revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent".

14. There is yet another aspect of the matter. Article 141 of the Constitution of India unequivocally indicates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But, what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence. To determine whether a decision has 'declared law' it cannot be said to be a law when a point is disposed of on concession and what is binding is the principle underlying a decision. A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered.

An 'obiter dictum' as distinguished from a ratio decidendi is an observation by Court on a legal question suggested in a case before it but not arising in such manner as to require a decision. Such an obiter may not have a binding precedent as the observation was unnecessary for the decision pronounced, but even though an obiter may not have a binding effect as a precedent, but it cannot be denied that it is of considerable weight. The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case. .... The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain aspects were not considered or the relevant provisions were not brought to the notice of the Court. When Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court to follow the decision of the Supreme Court. A judgment of the High Court which refuses to follow the decision and directions of the Supreme Court or seeks to revive a decision of the High Court which had been set aside by the Supreme Court is a nullity (See. *Narinder Singh v. Surjit Singh,* (1984) 2 SCC 402).

[Quoted from D*irector of Settlements, A. P. v. M. R. Apparao* AIR 2002 SUPREME COURT 1598]

15. Thus, viewed from any angle, the decision in *Atma Ram Properties'* case applies with full force to a case under the Act and, accordingly, the appellant is liable to pay mesne profits from the date of the eviction decree appealed against.

16. Coming to the quantum of *mesne profits*, it may be observed that the accommodation, having an area 13506 Square Feet (1254.56 Sq. Meters), is situated in the city of Jabalpur on the Main Road from Madan Mahal Chowk to Amanpur Gangasagar Garha Road and the respondents have claimed *mesne profits* at a monthly rate varying between minimum of Rs.85,247/- and maximum of Rs.2,67,320/- per month. However, fact of the matter is that, admittedly, in their application, under Section 10 of the Act (registered as Case No.4A-90(1)/2006), before the Rent Controlling Authority, Jabalpur, they have prayed for fixation of standard rent in relation to the suit accommodation @ Rs.20,000/- per month only and the prayer has remained un-amended as yet.

17. Question of stay of execution of decree by an appellate Court is a matter of discretion to be exercised after taking into consideration the facts and circumstances of each individual case. The stay of execution is granted with a view to prompting the disruption of rights vested in the appellant subject to suitable compensation to the respondents who have succeeded in the lower Courts. For this, attention has been invited to the following observations made by the Privy Council in the case of *Roger v. Comptoir D.S. Escompte De Paris* 3LR P.C. Page 475 -

> *"One of the first and highest duty of all the Courts is to take care that the act of Court does no injury to any one of the suitors and when the act of Court is used it does not mean merely the act of primary court or any intermediate court of appeal but the act of Court as a whole from first court which entertains the jurisdiction over the matter up to the highest court which finally disposes of the cases"*

18. The decision in *Super Max's* case also lays down guideline in the following terms -

> *"Needless to say that in fixing the amount subject to payment of which the execution of the order/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount"*

19. Taking into consideration all these legal as well as factual aspects of the matter, I am of the view that the respondents are entitled to get additional sum as mesne profits, equivalent to the amount claimed as the standard rent of the accommodation.

20. In the result, I.A.No.9186/11 stands allowed in part. The interim stay order-dated 29.6.2010, passed upon I.A.No.4212/10, is hereby modified and it is directed that execution of the impugned decree shall remain stayed till decision of the appeal subject to an additional condition that the appellant shall also deposit a monthly sum of Rs.20,000/- as *mesne profits* in addition to the contractual rent w.e.f. the date of decree. For depositing the arrears of *mesne profits* payable under this order, two months' time is granted to the appellant.

Order accordingly.

I.L.R. [2013] M.P., 162
APPELLATE CIVIL
Before Mr. Justice J.K. Maheshwari
M.A.No. 617/2008 (Jabalpur) decided on 24 July, 2012

SHANTI (SMT.) & ors. ...Appellants
Vs.
UNION OF INDIA ...Respondent

A. ***Railways Act (24 of 1989), Section 124A - Untoward event*** **- Deceased died due to fall down from the train - Case of the deceased does not fall in any of the specified exceptions - The case would fall under 'Untoward event'. (Para 14)**

क. *रेल अधिनियम (1989 का 24), धारा 124ए – दुर्भाग्यपूर्ण घटना* – मृतक की मृत्यु रेलगाड़ी से नीचे गिरने से हुई – मृतक का प्रकरण किसी भी विनिर्दिष्टित अपवाद में नहीं आता – प्रकरण 'दुर्भाग्यपूर्ण घटना' के अंतर्गत आयेगा।

B. ***Railways Act (24 of 1989), Section 124A - Burden of Proof*** **- In a case of railways accident or of untoward incident, the burden to prove that the deceased was not having valid ticket or pass and was not a bona fide passenger lies on the railway administration. (Para 15)**

ख. *रेल अधिनियम (1989 का 24), धारा 124ए – सबूत का भार* – रेलगाड़ी की दुर्घटना या दुर्भाग्यपूर्ण घटना के प्रकरण में यह साबित करने का भार कि मृतक के पास वैध टिकट या पास नहीं था और वास्तविक यात्री नहीं था, रेल प्रशासन पर होता है।

Cases referred :

1993 ACJ 846, 1998 (2) TAC 688, AIR 1984 SC 1737, AIR 2001 SC 1333, AIR 2007 RAJ. 38, AIR 2006 MP 201, F.A.O. No. 255/2006 decided on 03.03.2012, AIR 2000 Orissa 147, A.A.O. No. 977/1997 decided on 22.08.2002, (1987) 1 SCC 395, (2009) 9 SCC 527.

Abhishek Arjaria, for the appellants.
Sameer Beohar, for the respondent/Insurance Company.

ORDER

J.K. MAHESHWARI, J :- Claimants have filed this appeal under Section 23 of the Railway Claims Tribunal Act, 1987 being aggrieved by the judgment

dated 24/10/2007 passed by Railway Claims Tribunal, Ghaziabad Bench, Bhopal in Original Application No.168/2004, dismissing the claim application filed by the claimants.

2. The claimants i.e. wife, three daughters and one son have filed claim petition under Section 125 of the Railways Act, 1989 (hereinafter referred to as 'the Railways Act') seeking compensation for death of Rajesh aged 27 years doing job of labourer. It is averred that on 20/2/2001 deceased-Rajesh was travelling in Itarsi-Nagpur Passenger Train from Betul to Amla having the second class journey ticket. Due to heavy rush in the train, he could not find the seat and was standing near gate of the boggy. The deceased received some jerks of the train and push of by the co-passengers, however, fell down from the running train in between Km.863/20-22 and received grievous injuries on various parts of body to which ultimately succumbed to death. It is stated that the journey ticket was lost in the incident, however, the compensation as prescribed under the law was prayed for.

3. The Railways by filing written statement have denied the averments of the claim application and contended that the deceased was not the bona fide passenger. It is said that on receiving message from Keyman Hari Ram Subedar laying a dead body of unknown person on the Down Track of Malkapur road and Barsili, the Panchnama of the spot was prepared, but, it is said that the deceased was not the bona fide passenger, therefore, compensation may not be awarded and the Claims Tribunal has rightly dismissed the application.

4. Learned Railway Claims Tribunal considering the Marg intimation Ex.A/7, inquest report Ex.A/8 and post-mortem report Ex.A/9, observed that body was found lying between down main line in a mutilated condition wearing underwear only. If a passenger falling down from a moving train, it cannot be presumed that he shall come between two rails of the same track. It can further not be presumed that he shall have a journey without wearing the cloth. It is further observed that Sub Inspector found that semen was discharged and mark of injuries was below the penis, however, in such circumstances, it cannot be held that the deceased died due to fall down from the running train. The Railway Claims Tribunal further recorded a finding that the claimants fall within the purview of definition of Section 123(b)(i) of the Railways Act and under the said Act, he would not be entitled to receive the compensation as prescribed therein because the accident has not been proved and the deceased was not a bona fide passenger and the he was not died due

to an untoward incident, therefore, the claimants are not entitled to receive any compensation.

5. Shri Arjaria, learned counsel for the appellants, has strenuously urged that the finding recorded by the Railway Claims Tribunal holding that the deceased was not a bona fide passenger is illegal because the burden lays on railways who has failed to discharge such burden, by producing the material evidence before the Tribunal. On the contrary, as per the statement of Smt. Shanti Bai, it is apparent that the deceased was bearing valid ticket which may have lost in the incident. In support of such contention reliance has been placed on the Division Bench judgment of this Court in the case of *Raj Kumari and another Vs. Union of India*, 1993 ACJ 846, whereby it is held that the burden lies on the railway administration to prove that the deceased was not possessing the valid ticket and such burden cannot be shifted on the claimants. In addition thereto, it is further contended that looking to the nature of the incident, it falls within the purview of an untoward incident specified under Section 123(c) of the Railways Act, however, compensation ought to be awarded. To buttress his submission, reliance has further been placed on the judgment of the Rajasthan High Court in the case of *Union of India Vs. Soram Bai and others*, 1998 (2) TAC 688.

6. Per contra, Shri Sameer Beohar, learned counsel for the respondent, placing reliance on the judgment of the Apex Court in the case of *Union of India and others Vs. Sunil Kumar Ghosh,* AIR 1984 SC 1737, contended that when the passenger fall down from the boggy of the train in which he is travelling, while shunting, it cannot be said that an accident occurred to the train or a part of the train. In such circumstances, looking to the facts of the case, the Claims Tribunal has not committed any error in dismissing the claim application filed by the appellants.

7. After hearing learned counsel for the parties, the moot questions for consideration arises in this case are; whether the burden to prove that deceased was a bona fide passenger lies with the claimants or with the railway administration ? Whether the principle of the strict liability is applicable to the statutory authority like railway administration? Whether in the facts of the case the incident which has taken place, would fall within the purview of an untoward incident as specified in Section 123 (c) of the Railways Act?

8. After perusal of the impugned order and the judgments relied upon by the parties, in order to appreciate the controversy involved in the present case

and to answer the said questions, it is imperative to refer the basic provisions of the Railways Act. The passenger has been defined under Section 2 (29) of the Act thereby a person travelling with a valid pass or ticket would be called as passenger. Section 54 makes it clear that every passenger shall have to exhibit or present his pass or ticket on demand made by the railway servant authorised in this behalf for examination during the journey or at the end. Section 55 of the Act prohibits any person to enter or remain in any carriage on a railway for the purpose of travelling therein as a passenger unless possess a valid pass or ticket or obtained permission of a railway servant authorised in this behalf for such travel. If permission has been obtained under sub-section (1), it shall be in the form of a certificate issued by a authorised person subject to condition that he has been permitted to travel in such carriage on condition that he subsequently pays the fare payable for he distance to be travelled. As per Chapter-XV of the Railways Act, on found fraudulently travelling or attempting to travel without proper pass or ticket shall have penal consequence and fall within the purview of offence. Under Section 137, the Court has been empowered to imprison such person for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. The proviso makes it clear that such punishment shall not be less than a fine of five hundred rupees thereby it is clear that on found ticketless or without proper pass, a passenger may be imposed with a minimum penalty of Rs.500/-. Section 138 of the Act, empowers the railway administration to levy excess charges and fare on those passengers who travel without ticket. Section 139 of the Act, further empowers the railway administration to remove the person in case found him travelling without ticket. As per Section 179 (2), is clear that if any person commits any offence mentioned in Section 137 to 139 may be arrested without warrant or without written authority, by an officer authorised and notified by the Central Government. In view of aforesaid provisions, it is clear that a passenger can undergo journey by a train with a valid ticket or pass and without such ticket the said journey is prohibited and it is the duty of the railway administration to punish the passenger travelling ticketless or without valid pass or levy excess charges or fare or to remove them.

9. As per Section 124 of the Railways Act, in a case when an accident has taken place, then for injuries or death compensation may be claimed which shall be the liability of the railway administration subject to condition as specified therein. Section 1 24A of the Railways Act, has been inserted by

Act No.28 of 1994 w.e.f. 1/9/1994 specifying that compensation shall be payable by the railway administration on account of untoward incident happened. Section 124 and 124A is relevant, however, it is reproduced as under:

> **"124. Extent of liability** When in the course of working a railway, an accident occurs, being either a collision between trains of which one is a train of a train carrying passengers, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or has suffered a loss to maintain an notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of a passenger dying as a result of such accident, and for personal injury and loss, destruction, damage or deterioration of goods owned by the passenger and accompanying him in his compartment or on the train, sustained as a result of such accident.
>
> Explanation.- For the purpose of this section "passenger" includes a railway servant on duty.
>
> **124A. Compensation on account of untoward incident.-** When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:
>
> provided that no compensation shall be payable under this Section by the railway administration if the passenger dies or suffers injury due to -

(a) suicide or attempted suicide by him;

(b) self-inflected injury;

(c) his own criminal act;

(d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

Explanation.-For the purpose of this section, "passenger" includes

(i) a railway servant on duty; and

(ii) a person who has purchased a valid ticket for travelling by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident."

10. Bare reading of the aforesaid, it is apparent that in the course of working a railway if accident occurs either a collusion between trains of which one is passenger train or the derailment or other accident to a train or in part of a train carrying passengers, whether it is by any wrongful act, neglect or default on the part of the railway administration, it would entitle a passenger injured or legal heirs of the deceased to claim compensation and also for property damages due to accident as prescribed. Simultaneously, when in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger who has been injured or the dependant of the deceased passenger to maintain an action and recover damages in respect thereof. In case of untoward incident, five exceptions have been carved out thereby a death of passenger on account of suicide or attempt to commit suicide, self-inflicted injury, his own criminal act, any act committed by him in a state of intoxication or insanity or any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident. Explanation of the word "passenger" includes railway servant on duty and person purchased a valid ticket or travelling by train carrying passenger on any date or a valid

platform ticket and becomes a victim of an untoward incident.

11. In the said context, it is to be examined that the case of deceased passenger carrying in train and died due to accident and fall in any of the exception; or with the ticket to establish that he was a bona fide passenger, the burden lies on whom. As per Section 101 of the Evidence Act, the burden of proof places on a person whoever desires in any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, whether the said principle may be made applicable in the case of a railway accident, where passenger has died and the claimants have come to know about his death from the horses mouth and on receiving intimation, after enquiry should have reached on spot and found the dead body. In such a case it cannot be presumed from the claimants to search the ticket from the clothes of the deceased, and its belongings in place of going to fulfil the legal formalities to find out the dead body. It may be observed that the family members or the dependents would first identify the body and shall go for ritual or cremation of dead body without searching the ticket except making such averments. In such circumstances, it can safely be observed that it would be extremely difficult or impossible to the family members to prove that the deceased was possessing a valid ticket because it is beyond to their reach and control. It can safely be understood that the claimants may not be in a position to prove that the deceased had purchased a valid ticket and was a bona fide passenger. Since the railway administration appoints a ticket collector and also having a vigilance team to search the ticketless passenger and can take recourse of the penal provisions as specified under Sections 137, 138, 139 and 179 of the Railways Act. In such circumstances since the railway administration having a mechanism to find out the passengers travelling without valid ticket or pass adopting the recourse as permissible. In such circumstances, presumption can be drawn in favour of the citizen of abiding the law while having journey through train with valid ticket being bona fide passenger. At this juncture the principle of common law can be noted that "every man is innocent till proved guilty". In the said sequel of facts it can safely be presumed that the ticket collector would have examined whether the deceased possess a valid ticket or not, however, the railway administration can easily prove that the deceased was not a bona fide passenger as the proof lies with them. At this stage, looking to the facts of the present case, it is apparent that the deceased was going from Betul to Amla which is a journey by passenger train of approximately 45 minutes. During such period, if a person has travelled without ticket the ticket collector checking

the train must have checked the ticket of the deceased and if he was found without ticket must have collected the fare as specified under Section 138 or penalized as per Section 137 of the Railways Act. In such circumstances, the burden of proof shifts on the railway administration to lead evidence for proving that the deceased was not a bona fide passenger. The said material may be available with the railway administration which is not produced in this case. In the said context, it can safely be held that the burden of proof shifts on the railway administration in the railway accident claim cases.

12. The Apex Court in the case of *Rathi Memon V. Union of India*, AIR 2001 SC 1333, has observed that the Railways Act has been enacted as a beneficial piece of legislation to grant compensation took place in an accident and its interpretation ought to be done in favour of needy persons looking to the preamble and object of the said Act. In the said context, relying upon the Division Bench Judgment of this Court in the case of *Raj Kumari* (supra), it is to be held that the burden to prove that the deceased was a ticketless traveller is on the railway administration and not on the claimants. The said judgment in the case of *Raj Kumari* (supra), is based on the provisions of Railways Act, 1890 thereafter the Railways Act, 1989 has been enacted where under the peri materia provisions has been enumerated in Section 50, 54, 55, 137, 138, 139 179 as aforementioned. The Rajasthan High Court in the case of *Soram Bai and others* (supra) and further in the case of *Union of India V. Hari Narayan Gupta and another,* AIR 2007 Rajasthan 38 has considered the Division Bench judgment of *Raj Kumari* (supra) of this Court and further followed by the Single Bench of this Court in the case of *Devkabai and others V. Union of India*, AIR 2006 MP 201. The Orissa High Court in the case of *Union of India Vs. Smt. Namita Padni and others*, decided in F.A.O. No.255 of 2006 on 03/03/2012 and also in the case of *Union of India Vs. Smt. Jshna Kanhar,* AIR 2000 Orissa 147 has relied upon the same judgment. It has also been relied upon by the Andhra Pradesh High Court in the case of *Agam Shanthamma Vs. Union of India,* decided on 22/8/2002 in A.A.O. No.977 of 1997. In view of forgoing, it is to be held that the burden of proof lies on the railway administration in a case of death where passenger died in rail accident or due to untoward incident, however, whether he was having valid ticket or not, such burden is on the railway administration. In the facts of the present case, railway administration has not adduced any evidence to disprove the evidence of the claimants discharging their burden of not having valid ticket with the deceased. On facts of this

case, the testimony of the claimant can be relied upon that the deceased was possessing valid ticket at the time of journey when he died in untoward incident. Thus, the findings of the Claims Tribunal is unsustainable in law.

13. Now to consider the issue of strict liability, this Court can profitably refer the provisions of Article 38 of the Constitution of India thereby it is the responsibility of the State to look after the welfare of its citizens in various social welfare statutes to which the principle of strict liability has been provided to give insurance to the people against death, injuries irrespective of fault. The judgment of the Constitution Bench of the Apex Court in the case of *M.C.Mehta and another Vs. Union of India and others*, (1987) 1 SCC 395, it is observed that strict liability is not subject to any of the exceptions to the rule in *Rylands* case, (1868) LR 3 HL 330. In the said context, if the provisions of Section 124A of the Railways Act, quoted herein above, if looked into, then thereby it is clear that for untoward incident the State Government has taken liability to pay compensation to the members of the deceased family without having any wrongful act, neglect or default on the part of the railway administration. In this context, the judgment of the Apex Court in the case of *Union of India V. Prabhakaran Vijaya Kumar and others*, (2009)9 SCC 527, can safely be relied upon. In such circumstances, it can, safely be held that in a case of accident or for untoward act, the principle of strict liability having its application, in case of statutory body like railway administration.

14. Now coming to the finding recorded by the Railway Claims Tribunal on issue No.1 and 2 observing that in the circumstances where a person found only in undergarment on down main line in a mutilated condition, it cannot be presumed that he fell down from train while travelling. In the said context, the document Ex.A/8 is the inquest report is of much relevance, which was prepared in presence of various persons, out of them two are the Gangmen of Railway Department. As per their opinion recorded therein, deceased was died due to fall while travelling in a train, thus, clouds have been removed. In addition thereto the autopsy report is also relevant, by which the injuries so received on the body of deceased apparently indicates various contusions found over the chest, buttocks, ear, abdomen and leg along with other injuries and due to haemorrhage and shock, he died. In view of forgoing facts, if any accident has taken place to a train or any part of a train carrying passenger then whether or not there has been any wrongful act, neglect or default on the part of the railway administration, the said passenger would be entitled to receive

compensation and it is the liability of the railway administration to pay it. In any case if it is treated to be as untoward incident and the railway administration has not discharged their burden to prove that the deceased was not possessing a valid ticket and as per the inquest report as well as the autopsy report, it is apparent that the deceased was died due to fall down from the train, however, the case would fall under Section 124A i.e. untoward even. On the basis of the material brought and the evidence so available, it is not reflected that the case of the deceased falls in any of the exceptions specified under Section 124A of the Railways Act. Thus, from the aforesaid, it cannot be presumed that the deceased had made the attempt of suicide or to commit suicide. The said injuries cannot be inflicted by himself or by his own criminal act. As per the autopsy report, it was not shown that the deceased was in a state of intoxication or insanity. It is also not the case of the railways that deceased was died due to natural cause or disease. In such circumstances, in the considered opinion of this Court, the finding so recorded by the Railway Claims Tribunal that the deceased was not having a valid ticket and not died due to untoward incident is palpably wrong in view of forgoing discussions, however, it is set aside.

15. in view of forgoing discussion, it is to be held that burden to prove that the deceased was not having valid ticket or pass and was not a bona fide passenger lies on the railway administration in a case of railways accident as well as also of untoward incident The Claims Tribunal committed an error to shift the such burden on the claimants, therefore, the finding recorded by the Claims Tribunal on issue No. 1 and 2 is hereby set aside. As per the finding recorded on issue No.3 and 4, it is held by the Tribunal that as per the prevalent rules at the time of deciding the claim petition, the claimants are entitled to receive compensation of Rs.4,00,000/-under the law.

16. Accordingly, the appeal filed by the claimants/appellants is hereby allowed. It is held that the deceased was died due to untoward events while having journey in train, however, the legal heirs of the deceased would be entitled to receive compensation from railway administration and is quantified Rs. 4,00,000/- along with interest at the rate of 12% from the date of order passed by the Claims Tribunal i.e. 24/10/2007. In the facts and circumstances of the case, the parties shall bear their own cost.

Appeal allowed.

I.L.R. [2013] M.P., 172
APPELLATE CIVIL
Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava
F.A. No. 390/1999 (Indore) decided on 11 September, 2012

UMA (SMT.) & anr. ...Appellants
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Medical Negligence - Proof*** **- Delivery of the child took place about seven months after the sterilization operation - It cannot be held that the sterilization operation had failed. (Para 9)**

क. *चिकित्सीय उपेक्षा – सबूत* – बन्ध्यकरण शल्यक्रिया के करीब सात माह पश्चात बालक का जन्म हुआ – यह धारणा नहीं की जा सकती कि बन्ध्यकरण शल्यक्रिया निष्फल रही।

B. ***Medical Negligence - Proof*** **- Plaintiff's witnesses do not disclose any negligence on the part of the respondent in performing the sterilization operation - No such evidence on record that reasonable standard of care was not taken in the operation - No material on record to establish the negligence on the part of the respondent in performing the sterilization operation - Appeal dismissed. (Paras 10 & 12)**

ख. *चिकित्सीय उपेक्षा – सबूत* – वादी के साक्षीगण ने, प्रत्यर्थी की ओर से बन्ध्यकरण शल्यक्रिया करने में कोई उपेक्षा प्रकट नहीं की – ऐसा कोई साक्ष्य अभिलेख पर नहीं कि शल्यक्रिया में युक्तियुक्त मानक की सावधानी नहीं बरती गई – प्रत्यर्थी की ओर से बन्ध्यकरण शल्यक्रिया करने में उपेक्षा स्थापित करने हेतु अभिलेख पर कोई सामग्री नहीं – अपील खारिज।

Cases referred :

AIR 2005 SC 3279, 2008 (4) MPLJ 126.

R.C. Chandrawade, for the appellants.
G.S. Yadav, for the respondents.

JUDGMENT

The Judgment of the Court was delivered by : **PRAKASH SHRIVASTAVA, J.** :-This First Appeal under Section 90 of the CPC has been filed by the plaintiff against the judgment dated 7/5/1999 passed by

the XIII Addl. Sessions Judge, Indore dismissing the Civil Suit No. 12A/94.

[2] The appellants had filed the suit for damages pleading that the sterilization operation of the appellant No.1 was done by the respondent No.4 on 3/9/1992. Thereafter the appellant No.1 on 7/12/1992 came to know that she had five months pregnancy. On 21/4/1993 the appellant No.1 gave birth to appellant No.2. Therefore, in the plaint, an allegation was made that the respondent No.4 was negligent in performing the sterilization operation resulting into the pregnancy and birth of the appellant No.2 . Consequently, the appellants claimed damages to the tune of Rs.4,55,500/- along with the interest. The respondents had remained ex-parte in the matter.

[3] The trial Court by the impugned judgment dated 7/5/1999 had dismissed the suit on reaching to the conclusion that the appellants had failed to prove the negligence on the part of the respondent No.4. On appreciation of the evidence, the trial Court found that the sterilization operation was performed on 3/9/1992 and seven months thereafter the appellant No.1 gave birth to appellant No.2 on 21/4/1993 meaning thereby at the time of sterilization operation the appellant No.1 was pregnant. Prior to the operation the respondent No.4 had got the pregnancy test done vide Ex.P.6-C. In this back ground the trial court found that the negligence of the respondent No.4 was not proved.

[4] Learned counsel for appellants submits that the trial Court has committed an error in appreciating the evidence on record and that the negligence of the respondent No.4 has duly been proved. As against this, learned counsel for respondents has supported the judgment under appeal and submitted that though the respondents were ex-parte but the appellant from their own evidence could not establish their plea raised in the suit.

[5] We have heard the learned counsel for parties and minutely perused the record of the case.

[6] The sole issue involved in the present appeal is as to whether the appellants have been able to establish that the respondent No.4 was negligent in performing the sterilization operation of the appellant No.1.

[7] PW.1 Umabai, the plaintiff has stated that she was operated by respondent No.4 and after the operation there was complaint about pain in the stomach, therefore, the same Doctor who had operated had advised her to go to MY Hospital. In the MY Hospital she was informed about her pregnancy and the appellant No.2 was born on 21/4/1993. The same facts

have been reiterated by PW.2 Kailash, husband of appellant No.1. PW.3 Kurshid Ahmed Khan, compounder of Nanda Nagar Hospital has stated that the sterlilization operation of appellant No.1 was done on 3/9/1992. PW.4 Rajkumar Pandey, Record Keeper of MY Hospital has stated that the appellant No.1 was admitted in MY Hospital and the delivery had taken place on 21/4/1993. PW.5 Dr(Smt) K. Bhagwat, Professor and HOD of the Gynic Department of MY Hospital has stated that on 21/4/1993 Umabai had given birth to a daughter and the delivery was normal. The relevant documents relating to the sterilisation operation as well as the subsequent pregnancy and delivery of the appellants have been exhibited in the suit.

[8] From the evidence on record, it has been established that the appellant No.1 was operated for sterilization by respondent No.4 in the Nanda Nagar Hospital on 3/9/1992. Thereafter it was detected that the appellant No.1 was pregnant. She was admitted in the MY Hospital where she had given birth to appellant No.2 on 21/4/1993. Before the sterlilisation operation of the appellant the respondent No.4 had got her pregnancy test done, the report of which is Ex.P.6-C showing the result "negative".

[9] PW.5 Dr.(Smt) K.Bhagwat has stated that the appellant No.1 had given birth to the child after 8 or 9 months pregnancy, The sterilization operation was done by the respondent No.4 on 3/9/1992 whereas the delivery of the child had taken place on 21/4/1993 ie. about seven months after the sterilization operation, therefore, in view of the statement of PW5 about 8-9 months pregnancy, it can be held that the appellant No.1 was pregnant at the time of the operation itself but in the pregnancy test Ex.P.6-C the report was negative, hence the respondent No.4 acting on that report had performed the operation. Thus, it cannot be held that the sterilization operation performed by the respondent No.4 had failed.

[10] Even otherwise the statement of PW.1 to PW.5 do not disclose any negligence on the part of the respondent No.4 in performing the sterilization operation. The Supreme Court in the matter of *State of Haryana and others V. Raj Rani reported* in AIR 2005 SC 3279 has held that unwanted pregnancy despite sterilization operation can occur dishors negligence by Doctor and the Doctor cannot be made to pay compensation without proof of negligence. The Supreme Court has held thus:-

> "3. A 3-Judge Bench of this Court has held in *State of Punjab v. Shiv Ram and others* (C.A. 5128 of 2002, decided on

August 25, 2005) that child birth inspite of a sterilization operation can occur due to negligence of the doctor in performance of the operation, or due to certain natural causes such as spontaneous recanalisation. The doctor can be held liable only in cases where the failure of the operation is attributable to his negligence and not otherwise. Several textbooks on medical negligence have recognized the percentage of failure of the sterilization operation due to natural causes to be varying between 0.3% to 7% depending on the techniques or method chosen for performing the surgery out of the several prevalent and acceptable ones in medical science. The fallopian tubes which are cut and sealed may reunite and the woman may conceive though the surgery was performed by a proficient doctor successfully by adopting a technique recognized by medical science. Thus, the pregnancy can be for reasons dehors and negligence of the surgeon. In the absence of proof of negligence, the surgeon cannot be held liable to pay compensation. Then the question of the State being held vicariously liable also would not arise. The decrees cannot, therefore, be upheld".

[11] The Division Bench of this Court in the matter of *Radha Ujjainkar Vs. State of MP and others* reported in 2008(4) MPLJ 126 has also taken the same view and has affirmed the judgment of the trial Court in similar situation where suit for recovery of damages alleging negligence by the Doctor in performing LTT and MTP operation was dismissed since the negligence on the part of the Doctor was not proved. The Division Bench has taken the view that failure may occur in such cases even without negligence of the Doctor and to claim compensation it has to be proved that a reasonable standard of care was not taken in operation.

[12] In the present case, there is no such evidence on record that reasonable standard of care was not taken in the operation. There is also no material on record to establish the negligence on the part of the respondent No.4 in performing the sterilization operation of appellant No.1.

[13] Keeping in view the aforesaid analysis, we do not find any force in the present appeal which is accordingly dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 176
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A.No.2258/2010 (Indore) decided on 6 November, 2012

SUNITA PATIDAR & ors. ...Appellants
Vs.
MOHD. ISHAQ KHAN & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 166 - Compensation - Income - Income Tax Return **- Income Tax disclosing the income of deceased at Rs. 1,08,500/- per annum was filed during the life time of deceased - However, there is nothing on record that when PAN was issued and the Income Tax Returns of the previous years are also not available on record - Income of the deceased assessed at Rs. 7000/- per month - Multiplier of 17 would apply in view of the age of the appellant No. 1-Award enhanced from Rs. 8,19,500/- to Rs. 9,82,000/-. (Para 6)**

मोटर यान अधिनियम (1988 का 59), धारा 166 – प्रतिकर – आय – आय कर विवरणी – मृतक की आय 1,08,500/– प्रतिवर्ष होना प्रकट करते हुए आय कर को मृतक के जीवित रहने के दौरान प्रस्तुत किया गया – किन्तु अभिलेख पर कुछ नहीं कि स्थाई खाता संख्या कब जारी किया गया और पिछले वर्षों की आय कर विवरणियां भी अभिलेख पर उपलब्ध नहीं – मृतक की आय रु. 7,000/– प्रति माह निर्धारित की गई – अपीलार्थी क्रं. 1 की आयु को दृष्टिगत रखते हुए 17 का गुणक लागू होगा – अवार्ड 8,19,500/– से बढ़ाकर रु. 9,82,000/– किया गया।

Case referred :

2012 ACJ 1428.

G.K. Neema, for the appellants.
Pradeep Gupta with *Bhaskar Agrawal*, for the respondent/Insurance Company.

ORDER

N.K. Mody, J :- This is an appeal filed by the claimants under Section 173 of the Motor Vehicles Act against an award dated 06/05/10 passed by I AMACT, Shajapur in claim case No.27/10. By impugned award, the Claims Tribunal has awarded a total sum of Rs.8,19,500/- with interest to the claimants for the death of one Rajkumar, who died in vehicle accident. According to

claimants, the compensation awarded is on lower side and hence, need to be enhanced. It is for the enhancement in the compensation awarded by the Tribunal, the claimant has filed this appeal. So the question that arises for consideration is whether any case for enhancement in compensation awarded by the Tribunal on facts / evidence adduced is made out in the compensation awarded and if so to what extent?

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

3. As observed supra, it is a death case. On 12/10/08 Rajkumar aged 28 years, met with a motor accident and died, giving rise to filing of claim petition by legal representatives (appellants herein) out of which this appeal arises seeking compensation for his death. The case was contested by the respondents. Parties adduced evidence. The Claims Tribunal by impugned award partly allowed the claim petition filed by claimants and as stated supra, awarded a sum of Rs.8,19,500/-, breakup of which is as under :-

Rs.8,10,000/-	Towards loss of dependency.
Rs.2,000/-	Towards funeral expenses.
Rs.5,000/-	Towards loss of consortium.
Rs.2,500/-	Towards loss of estate.

4. Learned counsel for the appellants submit that the learned tribunal assessed the income of the deceased @ Rs.5,000/- per month and after deducting 1/4th towards personal expenses applied the multiplier of 18. It is submitted that the income of the deceased is assessed on lower side as the deceased was in trade. it. is submitted that income tax return for the financial year 2007-08 is on record as Ex.P/14, according to which income of the deceased was Rs.1,08,500/-. It is submitted that return was filed by the deceased in his life time on 30/03/08. It is submitted that return was proved

by the appellants by examining the Officer from Income Tax Department. It is submitted that the learned Tribunal committed error in not assessing the income on the basis of return filed by the deceased. It is submitted that learned Tribunal committed error in not taking into consideration the future prospects of the deceased. For this contention reliance is placed on a decision in the matter of *Santosh Devi Vs. National Insurance Co. Ltd.*. 2012 ACJ 1428. It is submitted that on other heads also amount awarded is on lower side. It is submitted that the appeal filed by the appellants he allowed and the amount of compensation be enhanced.

5. Learned counsel for Insurance Company submits that the amount awarded by the learned Tribunal is just. and proper and no case for enhancement, is made out.. It is submitted that the appeal be dismissed.

6. I have gone through the evidence adduced by the claimants. From perusal of the record it is evident that the return was flied on 30/09/08, which is for Rs.1,08,500/-. Return is also bearing inward number and is duly proved by the concerned officer, who came alongwith record of the department, therefore, it can not be said that the income tax return was filed after the death to achieve higher amount of compensation. At the same time there is nothing on record to show that when Permanent Account Number was issued to the deceased. Similarly return of previous years has not been filed. Age of the deceased was 28 years. Keeping in view the facts and circumstances of the case this Court is of the view that income of the deceased ought to have been assessed @ Rs.7,000/- per month. Similarly 1/3rd ought to have been deducted instead of 1/4th as dependents are two in number. It appears that application of multiplier of 18 is on higher side, which ought to have been 17 keeping in view the age of appellant No.1. On other heads also amount awarded appears to be on lower side, which deserves to be enhanced. So far as future prospects are concerned, there is no evidence in that regard. No income tax return of previous years are on record, on the basis of which future prospects can be taken into consideration. No future prospects were claimed before the learned Tribunal as the same does not reflect in the impugned order. In my opinion it will be proper to enhance the compensation. The appellants are entitle for the following amount:

Rs.9,52,000/-	Towards loss of dependency.
Rs.5,000/-	Towards funeral expenses.

Rs.5,000/-	Towards loss of consortium.
Rs.15,000/-	Towards loss of love and affection
Rs.5,000/-	Towards loss of estate.
Rs.9,82,000/-	Total

7. Thus, the appellants are entitle for a total sum of Rs.9,80,000/- instead of Rs.8,19,500/-. The enhanced amount of Rs.1,62,500/- shall carry interest @ 8% p.a. from the date of application. The amount awarded shall be deposited by the Insurance Company with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appeliant No.1 in the nearest Nationalized Bank, in the area where the appellant No.1 is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant No.1, which shall be opened by the appellant No.1 from where appellant No.1 can withdraw the amount as per her needs. However, on an application by the appellant No.1 this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant No.1.

8. With the aforesaid modification the appeal stands disposed of with cost.

Appeal disposed of.

I.L.R. [2013] M.P., 179
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A.No.2658/2009 (Indore) decided on 6 November, 2012

UDAY SINGH @ UDRIYA & anr. ...Appellants
Vs.
LUM SINGH & anr. ...Respondents

A. ***Motor Vehicles Act (59 of 1988), Sections 147, 166, Central Motor Vehicles Rules, 1989 - Liability of Insurance Company - Violation of Insurance Policy - Learning License - There is nothing on record to show that the respondent No.1 was driving the vehicle in violation of the provisions relating to learner's license.*** **(Para 9)**

क. मोटर यान अधिनियम (1988 का 59), धाराऐं 147, 166, केन्द्रीय मोटर यान नियम 1989 – बीमा कंपनी का दायित्व – बीमा पॉलिसी का उल्लंघन – लर्निंग लाईसेंस – यह दर्शाने के लिए अभिलेख पर कुछ नहीं कि प्रत्यर्थी क्रं. 1 लर्नर लाईसेंस से संबंधित उपबंधों का उल्लंघन कर वाहन चला रहा था।

***B. Motor Vehicles Act (59 of 1988), Section 166 - Compensation* - Deceased was a child - Accident took place in the year 2007 - Compensation of Rs. 1,54,000/- appears to be on lower side - Compensation enhanced by Rs. 75,000/-. (Para 10)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 166 – प्रतिकर – मृतक एक बालक था – दुर्घटना सन् 2007 में घटी – रु. 1,54,000/– का प्रतिकर कमतर प्रतीत होता है – प्रतिकर रु. 75,000/– से बढ़ाया गया।

***C. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company* - Owner did not turn up to give his statement before Tribunal nor is present before the High Court - Matter remanded back to Tribunal to re-decide the liability of Insurance Company after giving an opportunity to adduce evidence to both parties (Para 11)**

ग. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का दायित्व – स्वामी अधिकरण के समक्ष अपना कथन देने हेतु उपस्थित नहीं हुआ और न ही उच्च न्यायालय के समक्ष उपस्थित है – अधिकरण को दोनों पक्षकारों को साक्ष्य प्रस्तुत करने का अवसर देने के पश्चात बीमाकर्ता कम्पनी का दायित्व पुनः निर्धारित करने हेतु मामला प्रतिप्रेषित।

Sameer Verma, for the appellants.
T.C. Jain with *Siddharth Jain,* for the respondent No.1.
Manoj Jain, for the respondent No.2.

ORDER

N.K. Mody, J :- This is an appeal filed by the claimants under Section 173 of the Motor Vehicles Act against an award dated 13/05/2009 passed by 2nd Additional Motor Accident Claims Tribunal, Alirajpur in claim Case No.123/2009. By the impugned award, the Claims tribunal has awarded a total sum of Rs.1,54,000/- with interest to the claimants for the death of one Revla who died in vehicle accident and Respondent No.2/Insurance Company was exonerated.

2. Short facts of the case are that the appellants filed a claim petition before the learned tribunal alleging that on 23/06/2007 Revla, aged 14 years

was going on a motor bike bearing registration No. MP-46-M-8865 which was being owned and driven by respondent.No.1 and deceased Revla was pillion rider and carrying metal stone in a gunny beg. It was alleged that because of rash and negligent driving of respondent No.1 deceased Revla fell down and passed away. It was alleged that claim petition be allowed and Compensation be awarded.

3. Respondent No.1 filed written statement wherein the allegations made in claim petition were denied. However, it was alleged that in case the claim petition is allowed then the respondent No.2 is liable for payment of compensation. Claim petition was also contested by respondent No. 2 on various ground including on the ground that respondent No. 1 was not possessing driving licence at the relevant time and goods was being carried on motor bike which was strictly prohibited and the risk of pillion rider was not covered under the policy. It was prayed that the claim petition filed by the appellants be dismissed.

4. After framing of issues and recording of evidence, learned tribunal allowed the claim filed by the appellants by awarding a sum of Rs. 1,54,000/- Break-up of the amount awarded is as under :-

towards loss of dependency	Rs. 1,50,000/-
towards funeral expenses	Rs. 2,000/-
towards loss of love	Rs .2.000/-
Total	Rs 1.54.000/-

5. Learned tribunal exonerated respondent No. 2 on account of violation of the terms of policy. Hence this appeal.

6. Learned counsel for the appellants argued at length and submits that the amount awarded is inadequate. Income assessed on notional basis and on the other heads also the amount awarded is on lower side. Learned counsel further submits that since the offending vehicle was insured with respondent No.2 and the deceased was minor, therefore, the learned tribunal committed error in exonerating respondent No. 2. It is submitted that amount of compensation be enhanced and the respondent No.2 be also held liable for the compensation.

7. Learned counsel for respondent No.1 submits that the amount awarded by the learned tribunal is just and proper and no case of further enhancement

is made out. So far as liability is concerned, since offending vehicle was insured, therefore, learned tribunal committed error in exonerating respondent No.2. It is submitted that appeal be allowed in part and findings regarding exoneration of respondent No.2 be set aside. Learned counsel for respondent No.2 supports the contention of the counsel for the respondent No.1 so far as it relates to amount of compensation. So far as findings relating to exoneration of respondent No.2 is concerned, it is submitted that the exoneration of respondent No. 2 is based on due appreciation of evidence on record which is just and proper and needs no interference, hence the appeal be dismissed.

8. From perusal of the record it is evident that learned tribunal has exonerated the respondent No.2 on three grounds. Firstly, on the ground that the deceased was pillion rider and risk of pillion rider is not covered under the policy. Secondly on the ground that offending vehicle was carrying goods at the relevant time which was strictly prohibited under the policy. Thirdly that respondent No.1 was possessing learner's licence and did not follow the procedure laid down under the law for driving a vehicle by learner. So far as findings of learned tribunal relating to the risk of pillion rider is concerned, since the policy was comprehensive and as per circular dated 16/11/2009 issued by IRDA the risk of pillion rider is also covered in a package policy, therefore, on that ground respondent No.2 cannot be exonerated. So far as the fact that respondent No.1 was possessing the learner's licence is concerned Section 8 of the Motor Vehicles Act deals with grant of learner's license. Rule 3 of the Central Motor Vehicles Rules, 1989 deals with the learners licence which reads as under:-

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

the letter "L" in red on a white background as under:

***Note.**- The painting on the vehicle or on the plate or card shall not be less than 18 centimetres squares and the letter "L" shall not be less than 10 centimetres high, 2 centimetres thick and 9 centimetres wide at the bottom;*

Provided that a person, while receiving instructions or gaining experience in driving a motorcycle (with or without a side-car attached), shall not carry any other person on the motorcycle except for the purpose and in the manner referred to in clause (b)."

9. In this regard in the evidence which has adduced by respondent No.2 nothing has been stated by the respondent No.2. No effort was made by the respondent No.2 to call the respondent No.1 for the purposes of cross-examination to prove that the respondent No.1 was driving the offending vehicle in violation of the provisions relating to learner's licence. Similarly nothing has been stated by the respondent No.2 in evidence that which term of the policy was violated which restrains the insurer to carry the goods. In the circumstances on these grounds the learned tribunal was not justified in exonerating respondent No.2.

10. So far as the amount of award is concerned since it was a case of child death and the accident is of the year 2007, it appears that the amount awarded is inadequate and the same is further enhanced by Rs.75,000/-. Since the respondent No.1 was present before the learned tribunal and did not turn-up to give his statement and is also duly represent before this court, therefore; in the opinion of this court at the first instance respondent No.2 shall deposit the amount awarded by the learned tribunal and enhanced by this court. The enhanced amount of Rs.75000/- shall carry 8% per annum from the date of application. The amount awarded shall be deposited by the Insurance Company with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant No.2 in the nearest Nationalized Bank, in the area where the appellant No.2 is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant No.2

which shall be opened by the appellant No.2 from where appellant No.2 can withdraw the amount as per needs. However, on an application by the appellant No.2 this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant No.2.

11. So far as liability of respondent No.2 is concerned the case is remanded back to the learned tribunal to re-decide the liability after giving an opportunity to adduce the evidence to both the parties i.e. respondent No.1 &. 2. Parties are directed to remain present before the learned tribunal on 06/1/2013.

12. With the aforesaid observations, the appeal stands disposed of.

Appeal disposed of.

I.L.R. [2013] M.P., 184
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A.No.185/2012 (Indore) decided on 8 November, 2012

RAM SINGH & ors. ...Appellants
Vs.
DASHRATH & ors. ...Respondents

A. Motor Vehicles Act (59 of 1988), Section 166 - Income - **Tribunal after assessing the income of the deceased to the tune of Rs. 100/- per day, should not have taken the monthly income to the tune of Rs. 2,500/- - Monthly income taken at Rs. 3,000/- - Award enhanced to Rs. 4,35,000/- instead of Rs. 3,52,500/-. (Paras 4 & 5)**

क. मोटर यान अधिनियम (1988 का 59), धारा 166 – आय – अधिकरण ने मृतक की आय का निर्धारण रु. 100/– प्रति दिन करने के पश्चात, प्रति माह आय रु. 2,500/– नहीं समझना चाहिए था – प्रति माह आय रु. 3,000/– माना गया – अवार्ड बढाकर रु. 3,52,500/– की बजाये रु. 4,35,000/– किया गया।

Cases referred :

2011 ACJ 196, 2008 ACJ 1140, 2008(3) ACCD 1574, 1999 ACJ 1499.

S. Patwa, for the appellants.
None for the respondents No. 1 & 2 though served.
C.P. Singh, for the respondent No.3.

ORDER

N.K. MODY, J :- This order shall also govern the disposal of M.A.No.102/2012 which is the appeal filed by respondent No.3/Insurance company as in both the appeals the award under challenge is dated 11/10/2011 passed by MACT, Fast Track Court, Kukshi in claim case No.270/2010 whereby the claim petition filed by the appellants was allowed and compensation of Rs.3,52,500/- was awarded on account of death of Sakribai who died in the motor accident which took place on 17/12/2009.

2. Learned counsel for appellants submits that learned tribunal assessed the income @Rs.100/- per day but calculated the compensation @Rs.2,500/- per month, out of which 1/4th was deducted towards personal expenses and after applying the multiplier of 15, compensation was calculated. It is submitted that since accident is of the year 2009, therefore income assessed is on lower side. It is submitted that if the income was taken as Rs.100 per day, there was no justification to assess the income @ Rs.2,500/- per month and in all the heads the amount awarded is on tower side, hence prayed that appeal be allowed and amount be enhanced.

3. Learned counsel for respondent No.3 submits that amount awarded is on higher side. It is submitted that since the offending vehicle was being used in violation of terms of policy, therefore respondent No.3 ought to have been exonerated. It is further submitted that even if it is assumed that offending vehicle was being used for the purpose for which it was insured, then too, liability of respondent No.3 is limited to the extent of Rs.1 Lac per passenger. For this contention, reliance is placed on a decision in the matter of *Divisional Manager. Oriental Insurance Co.Ltd. Vs. Arati Mishra.* 2011 ACJ 196 wherein private jeep was insured under Act Only Policy carrying gratuitous passengers, met with accident due to rash and negligent driving resulting in death of passengers, Orissa High Court held that Insurance company is not liable. *United India Insurance Co.Ltd. Vs. C.Govardhan,* 2008 ACJ 1140, wherein passengers travelling in a jeep which dashed against a truck and a passenger in jeep sustained injuries, insurance company sought to avoid its liability on the ground that jeep was insured voering third party risk and risk of injured who was a fare paying passenger was not covered, the jeep was not a public service vehicle and insurance of passengers travelling in it was optional and not compulsory, the jeep was insured under Act only policy and did not cover the risk of passengers, Andhra Pradesh High Court held that passenger is not a third party and Insurance company is not liable." It is

submitted that appeal filed by the respondent No.3 be allowed and appeal filed by the appellant be dismissed.

4. Since the accident is of the year 2009 and income as assessed by the learned tribunal as Rs.100/- per day, therefore there was no justification in assessing the income of deceased @ Rs.2,500/- per month. In the facts and circumstances of the case, this court is of the view that income ought to have been taken as Rs.3,000/- per month. In view of this, appellants are entitled for the following amount :-

towards loss of dependency	Rs.4,05,000/-
towards funeral expenses	Rs.5,000/-
towards loss of estate	Rs.5,000/-
towards loss of consortium	Rs.5,000/-
towards loss of love & affection	Rs.15,000/-
Total	**Rs. 4,35,000/-**

5. Thus, appellants are entitled for a sum of Rs.4,35,000/-instead of Rs.3,52,500/-. The enhanced amount of Rs.82,500/-shall carry interest @ 8% per annum from the date of application.

6. So far as liability of respondent No.3 is concerned, respondent NO.3 has examined Gajanand, Field Officer, who has stated that liability of Insurance company is to the extent of Rs.1 Lac. He has also admitted that extra premium was charged @ Rs.50/- per passenger. In the matter of *United India Insurance Co.Ltd. Vs. C. Govardhan,* 2008 ACJ 1140 which is relied by the respondent No.3 itself, it is observed after placing reliance on a decision in the matter of *New India Vs.V.R.Anand,* 2006 ACJ 1659 that an insurer is vested with a discretion to cover the risk of persons by a contract as envisaged under the tariff regulations, by collecting additional premium and has an option to cover the risk of a pillion rider of the two-wheeler and passengers of a private vehicle, to cover their risk, by a contract on the payment of additional premium and the risk of pedestrians is covered by Act policy and so beneficiaries, whose risk can be optionally covered under the contract by collecting additional premium would not be covered by the Act policy. In the matter of *National Insurance Co, Ltd. Vs. Brijlata.* 2008(3) ACCD 1574 wherein the death of

a occupant of jeep in accident, the jeep was insured by comprehensive "B" policy, the policy including, risk of death or bodily injury of any person including an occupant provided he is not carried for hire or reward, in the definition of third party risk, no extra premium required for covering risk of passengers in a private car, deceased was not shown to be carried for hire or reward, a Division Bench of this court held that insurance company is liable for payment of compensation." In the matter of *Oriental Insurance Co.Ltd. Vs. Ajay Kumar.* 1999 ACJ 1499 wherein Full Bench of Kerala High Court held that "risk of passengers travelling in private vehicle gratuitously is covered by an Act policy, it was held that Insurance company is liable.

7. In the present case, the proposal form submitted by the owner is not filed. Respondent No.3 has not stated anything that offending vehicle was being used for carrying passengers on hire or reward. Since respondent Nos.1 and 2 are not before this court inspite of service in the appeal filed by respondent No.3, therefore the findings regarding the liability is modified to the extent that respondent No.3 shall pay and shall have a right to recover the same from respondent Nos.1 and 2. In case right is exercised by respondent No.3, then respondent Nos.1 and 2 shall be at liberty to demonstrate that as per proposal form submitted by respondent No.2, the full risk of all occupants was covered.

8. The amount awarded shall be deposited by the Insurance Company with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant in the Nationalized Bank and interest thereon shall be credited on monthly basis in S.B. Account of appellant. However, on an application by the appellant, this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant.

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

10. With the aforesaid observation, both the appeals are disposed of. Let a copy of this order be placed in the connected file.

Appeal disposed of.

I.L.R. [2013] M.P., 188
APPELLATE CRIMINAL

Before Mr. Justice A.K. Shrivastava & Mr. Justice Brij Kishore Dube
Cr. A. No. 536/1998 (Gwalior) decided on 24 July, 2012

SHIV PRATAP SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 302, 304 Part II - Murder or Culpable Homicide not amounting to murder **- Disputed field where the incident took place fell in the share of the accused party and the complainant party was trying to use that field as way - Prosecution has suppressed the genesis of occurrence and it appears that the appellant had caused injury to the deceased in order to save the lives of others - However, he exceeded his right of private defence and therefore, is guilty under Section 304 Part II. (Paras 18 & 19)**

दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – विवादित खेत जहां घटना घटित हुई, अभियुक्त पक्षकार के हिस्से में आता है और शिकायतकर्ता पक्षकार उक्त खेत को रास्ते के रुप में उपयोग करने का प्रयास कर रहा था – अभियोजन ने घटना के प्रारंभ को छिपाया है और यह प्रतीत होता है कि अपीलार्थी ने मृतक को दूसरों की जान बचाने के उद्देश्य से चोट कारित की – अपितु, उसने अपने प्राईवेट प्रतिरक्षा के अधिकार की सीमा का अतिलंघन किया और इसलिए धारा 304 भाग–II के अंतर्गत दोषी है।

T.C. Bansal, for the appellant.
Sudha Shrivastava, P.L. for the respondent/State.

J U D G M E N T

The Judgment of the Court was delivered by :
A.K.Shrivastava, J. :-Feeling aggrieved by the judgment of conviction and order of sentence dated 29.09.1990 passed by learned First Additional Sessions Judge, Bhind in Sessions Trial No. 93/1997 convicting appellant for the offecnce punishable under Section 302 of IPC and thereby sentencing him

to suffer life imprisonment, this appeal has been preferred by the appellant under Section 374(2) of the Code of Criminal Procedure, 1973.

2. Indeed four persons including present appellant Shivpratap were tried before the learned Trial Court. Except appellant Shivpratap, other acquitted accused persons namely Ran Singh, Sushila Bai and Seema alias Bitto were tried for offence punishable under Sections 302/34, 323/34 (two counts) of IPC while appellant Shivpratap was charged for offence punishable under Sections 302, 323/34 and 325/34 of IPC. Learned Trial Court acquitted the accused persons Ran Singh, Sushila Bai and Seema from all the charges by the impugned judgment. No State appeal has been filed against judgment of their acquittal.

3. The facts necessary for the disposal of this appeal lie in a narrow compass. Suffice it to say that as per case of the prosecution on 25.08.1996 at 6.30 p.m. the author of FIR Ummed Singh was in his house, at that juncture, he heard some hue and cry, which was coming from his field behind his house, as a result of which he rushed towards the field and saw that appellant was carrying *ballam* while other accused persons were carrying *lathi* and *farsa* and were causing injuries to his brother Parwat Singh (deceased). On seeing the incident, author of FIR Ummed Singh, his father Harchand and uncle Jagram rushed to intervene but by that time appellant already inflicted *ballam* blow on abdominal region of deceased, as a result of which he fell down and thereafter all the accused persons dealt lathi blows upon him. It is said that acquitted accused Sushila dealt farsa blow to the deceased and when Ummed Singh and Jagram tried to intervene they also sustained injuries which were caused by accused persons. Ummed Singh sustained injury on his head, back and leg while Jagram received injuries on his legs. During the course of incident, mother of Ummed Singh namely Phool Kunwar, sister Guddi and younger brother Indrapal Singh also arrived at the spot. The accused persons after causing injuries to deceased and injured, fled from the place of occurrence. The matter was reported by Ummed Singh in the police station on the same day on 25.08.1996 at 11.15 p.m.

4. On lodging of the FIR, the criminal law was triggered and set in motion. The investigating agency prepared the spot map; recorded the statement of witnesses; sent the dead body of deceased for postmortem and also sent injured persons for their treatment as well as for obtaining their MLC report.

5. After the investigation was over, a charge sheet was submitted in the

committal court which committed the case to the Court of Session from where it was received by the trial Court for trial.

6. The learned Trial Judge on the basis of allegations made in the charge sheet, framed charges punishable under 302, 323/34 and 325/34 IPC against the appellant while other co-accused persons were charged under Section 302, 323/34 (two counts) of IPC. Needless to say that accused persons abjured their guilt and pleaded complete innocence.

7. In order to bring home the charges against the appellant, the prosecution examined as many as 15 witnesses and placed Ex.P/1 to P/17 the documents on record. The defence of the appellant is that complainant party was aggressor and as a matter of fact members of complainant party attacked upon the accused persons as a result of which they sustained serious injuries. According to the defence, acquitted co-accused Ran Singh sustained five injuries including fracture of meta carpal bone. According to learned counsel, genesis of occurrence has been suppressed by the prosecution and therefore looking to the injuries sustained by acquitted co-accused Ran Singh including fracture of his meta carpal bone at the most case would rest within the purview of Section 304 (Part-II) IPC because there was no intention of the appellant to kill the deceased. In support of his defence, appellant examined Parsuram as DW1, Dr.Vinod Bajpai as DW2 and Dr. D.C. Dixit as DW3.

8. The learned Trial Judge after scanning the evidence, came to hold that charges against other accused persons were not proved and hence acquitted them. Learned Trial Court further came to hold that charges under Section 323/34 and 325/34 of IPC are also not proved against appellant and acquitted him from those charges but learned Trial Court found the charge under 302 of IPC proved against the appellant. Eventually, he has been convicted to suffer the sentence as mentioned in para 1 of this judgment.

9. In this manner, this appeal has been filed by the appellant assailing his judgment of conviction and order of sentence.

10. It has been contended by Shri T.C. Bansal, learned counsel for appellant that genesis of occurrence has been deliberately suppressed by the prosecution by hiding the fact that the accused persons also sustained injuries in the same incident and in this context learned counsel has invited our attention to the testimony of autopsy surgeon Dr.J.P.S. Kushwaha (PW11) who on 26.08.1996 (one day after the incident) examined one of acquitted accused

Ran Singh who sustained as many as five injuries. Learned counsel submits that indeed complainant party was aggressor and they were armed with deadly weapons and in this regard learned counsel has invited our attention to the testimony of Parsuram (DW1) Assistant Sub Inspector who has proved the FIR lodged on behalf of accused side and on that basis case under Sections 324, 325, 323, 147, 148, 149 IPC registered at Crime No.50/97 against the complainant party this witness was the investigating officer. Learned counsel has also invited our attention to Ex.D/5(c) and submitted that accused persons were in custody and from the jail they sent a written report, on the basis of which, on 12.02.1997 upon the incident dated 25.08.1996 case was registered against the complainant party under Sections 324, 325, 323, 147, 148, 149 IPC. Hence, it has been submitted by learned counsel that if in exercise of right of their private defence, the appellant inflicted injury upon the person of deceased, at the most it can be said that right has been exceeded and the case would rest within the purview of Section 304(Part-II) IPC.

11. By inviting our attention to the testimony of author of FIR Ummed Singh (PW4) particularly para 8 it has been contended that even otherwise incident has occurred all of a sudden because there was a dispute between the complainant party and accused persons in respect of way which was going across the field of accused persons. Hence, it has been submitted by learned counsel that conviction of appellant be altered from Section 302 of IPC to Section 304 (part-II) of IPC.

12. Further it has been contended by learned counsel that aforesaid argument is an alternative argument, although his main argument is that looking to the evidence placed on record, offence is not at all proved against the appellant and therefore he is liable to be acquitted

13. On the other hand, Sushri Sudha Shrivastava, learned counsel for State argued in support of the impugned judgment and submitted that cogent reasons have been assigned by learned Trial Court convicting the appellant and therefore the appeal be dismissed.

14. Having heard learned counsel for the parties, we are of the view that this appeal deserves to be allowed in part.

15. In the present case, the prosecution has examined Jagram (PW1), Phoolkunwar Bai (PW3), Ummed Singh (PW4), Indrapal Singh (PW5) and Guddi (PW13) as eyewitnesses. Ummed Singh is also author of FIR Ex.P/5

which was lodged by him on 25.08.1996 I.e. the date of incident at 11.15 p.m.

16. On bare perusal of the testimony of author of FIR Ummed Singh it is gathered that on hearing hue and cry which was coming from his field which is behind his home, he and his other family members arrived at spot and found that appellant was giving blow of ballam on the abdomen region of the deceased, as a result of which he died. The suggestion in regard to aforesaid defence taken by accused persons was also put to him in para 13 of his cross-examination bat the suggestion has been denied. The testimony of author of FIR has been corroborated by the evidence of Phoolkunwar (PW3), Indrapal (PW6) and Guddi (PW13). Although on bare perusal of testimony of Phoolkunwar and Guddi as well as on going through the findings of Trial Court who after marshalling the prosecution witnesses vis-a-vis to each other came to hold that Phoolkunwar and Guddi came little later on spot and therefore although they cannot be said to be eyewitnesses but certainly they are witnesses of *res gestae.* At this juncture we would like to scan the testimony of Dr.J.P.S. Kushwaha (PW11) who in para 4 of his cross-examination found following injuries on the person of acquitted accused person Ran Singh, which reads thus;

(i) lacerated wound of 3x0.5x0.5" over right side of head.
(ii) lacerated wound lxl/2x1/2" over middle of left parietal bone of head.
(iii) Contusion 2x1/2" over right side of parietal bone of head.
(iv) Lacerated wound 2x1/2x1/2" on right shoulder.
(v) Contusion on left hand thumb.

The MLC report of acquitted co-accused Ran Singh is Ex.D/2(C).

17. On x-raying the testimony of autopsy surgeon of Dr. Kushwaha we find two injuries on the person of deceased and they are:

(i) Contusion swelling I red colour over right upper arm area 3"x½".

(ii) Punctured wound of 1"xl/2" wide on Rt. Iliac fossa, oblique in direction with blood oozing It. Depth of the wound is deep upto Asd cavity.

The postmortem report of deceased is Ex.P/13 and this doctor has proved the postmortem report. According to autopsy surgeon the injury No.1 was simple in nature while deceased had died on account of second injury sustained by him, which is a punctured wound. There is overwhelming evidence of the witnesses that appellant was carrying a ballam and he inflicted its injury upon the abdominal region of deceased. Thus, oral testimony of eyewitnesses is corroborated by medical evidence. According to us, learned Trial Court rightly came to hold that on account of receiving injury No.2 deceased had died.

18. The question now would rest what offence appellant has committed. On bare perusal of the evidence placed on record and by paying heed to Ex.D/5(C) which is a written report sent by the accused persons it is found that when the accused persons were in jail, upon their report, a case under the aforesaid sections was registered against complainant party. The FIR Ex.D/5(C) cannot be said to be afterthought idea of the accused persons for the simple reason that the date when deceased was examined by autopsy surgeon Dr. Kushwaha (PW11) on the same day I.e. 26.08.1996 he also examined acquitted co-accused Ran Singh who sustained five injuries which we have quoted hereinabove. On bare perusal of the testimony of defence witness Dr.D.C. Dixit (DW3) it is gathered that x-ray of Ran Singh were taken out and there was fracture on meta carpal of left hand of Ran Singh, which was caused within 72 hours. Needless to say, the incident had occurred on 25.08.1996. The defence was also put to all eyewitnesses who were examined by the prosecution although suggestions were denied. Thus, it is gathered that prosecution tried to suppress the genesis of occurrence and it appears that in order to save the lives of the accused persons, appellant inflicted ballam blow upon the abdomen region of the deceased, but, looking to his act we are of the view that he exceeded his right and therefore offence is altered to Section 304(Part-II) IPC.

19. Apart from what we have held hereinabove, on bare perusal of the cross-examination para 8 of the testimony of eyewitness Ummed Singh (PW4) we find that the complainant side were trying to use the field where incident had taken place, as way of their access which was being resisted and objected by accused persons, as a result of which, on this ground the altercation took place between the complainant side and accused persons. On scanning the testimony of PW4 and other eyewitnesses it is gathered that parties belong to same family and there was a land dispute between the parties. According to

accused persons the disputed field where incident took place fell in their share and the complainant side was trying to use that field as way. Therefore, according to us, for this another reason also, the offence which has been committed by the appellant would fall within the ambit and sweep of Section 304(Part-II) IPC.

20. Resultantly, this appeal succeeds in part and judgment of conviction of the appellant is altered from Section 302 IPC to Section 304(Part-II) IPC and he is hereby directed to suffer sentence of 8 years RI. Appellant is on bail. His bail bonds shall stand cancelled after he surrenders before learned Trial Court on or before 31.08.2012 failing which learned Trial Court shall issue perpetual arrest warrant against him and would also take action against his surety and pass necessary order in accordance with law. If appellant surrenders on or before 31.08.2012, his bail bonds shall stand cancelled and in that case appellant shall be sent to jail to carry out his remaining part of sentence. The Principal Registrar of this Court is hereby directed to send the record to learned Trial Court so as to reach to that Court much prior to date fixed.

21. Appeal is partly allowed and disposed of to the extent indicated hereinabove.

Appeal partly allowed.

I.L.R. [2013] M.P., 194
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal
Cr. A. No. 1146/2004 (Jabalpur) decided on 27 August, 2012

FOHAP SINGH & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 302, 304 Part I - Murder or Culpable Homicide not amounting to murder **- Deceased and injured witnesses were trying to take their bullock cart from the fields of appellants where gram crops were sown - How an occupant of field can keep mum- Act of deceased persons of taking bullock carts through the field was nothing but an invitation for quarrel on their part - Appellants assaulted without premeditation in a sudden fight and quarrel occurred on the spot between the members of two families - Appellants liable to be convicted**

under Section 304 part I - Appellants sentenced to undergo imprisonment of 10 years - Appeal partly allowed. (Paras 21 to 23)

दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग– I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – मृतक व आहत साक्षीगण अपनी बैलगाड़ी को अपीलार्थीगण के खेतों से ले जाने का प्रयास कर रहे थे जहां चने के पौधे बोए गये थे – खेत का अधिभोगी कैसे शांत रह सकता है – मृतकों का खेत से बैलगाड़ी ले जाने का कृत्य और कुछ नहीं बल्कि उनकी ओर से विवाद के लिये आमंत्रण था – अपीलार्थीगण ने अचानक हुए झगड़े में बिना पूर्व चिंतन के हमला किया और घटनास्थल पर दो परिवारों के सदस्यों के बीच झगड़ा हुआ – अपीलार्थीगण धारा 304 भाग–I के अंतर्गत दोषसिद्ध किये जाने योग्य – अपीलार्थीगण को 10 वर्ष के कारावास से दण्डादिष्ट किया गया – अपील अंशतः मंजूर।

Case referred :

(2011) 9 SCC 257.

H.S. Dubey, for the appellants No. 1 to 5.
Sanjay Gupta, for the appellant No. 6.
S.C. Datt with *Siddharth Datt,* for the appellant No.7.
Umesh Pandey, G.A. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **T.K. KAUSHAL, J.** :-This appeal has been preferred against judgment dated 25.6.2004 passed by Additional Sessions Judge, Gadarwara, District Narsinghpur in S.T. No.90/2003 convicting and sentencing appellants as follows:

Conviction	**Sentence**
U/s 148 IPC	R.I. for one year and fine of Rs.500/- each.
U/s 302/149 IPC for committing murders of Tejram S/o Mansaram, aged 50 years and Mahendra S/o Ajab Singh, aged 20 years	Rigorous Imprisonment for life on two counts and with fine of Rs.1,000/- each.
U/s 323/149 IPC for causing injuries to Phool Singh S/o Tejram (PW/2) & Durjan Singh S/o Ramratan (PW/3).	Sentence of 300/- fine on two counts.

2. Facts of the case, in short, are that on 1.12.2002 at about 7:00 a.m. Mahendra (hereinafter referred to as '**deceased No.1**') and Tejram (hereinafter referred to as '**deceased No.2**') alongwith Phool Singh (PW/2) and Durjan Singh (PW/3) who were carrying husk in two bullock carts from the field of one Kubbada Maharaj reached near the feild of the appellants. Appellants objected saying that they will not allow them to take bullock carts from their field. Deceased No.2 insisted to let them go as there was a passage. Appellant no.2 abused and started assaulting deceased No.2 with Gadasi, as a result of which, deceased No.2 fell on the ground and got unconscious. While deceased No.1 and PW/2 and PW/3 tried to intervene, appellants caused injuries to them also. Appellant No.3 was armed with farsa and appellant No.4 was armed with Bhala and remaining appellants were armed with lathis; they jointly assaulted the deceased No.1, deceased No.2 and caused injuries to PW/2 and PW/3 also.

3. On hearing shrieks, Ajab Singh (PW/1), Shankar (PW/4) and Lokman and Paras reached at the spot. Appellants fled away from the place. Deceased No.1 died at the spot and deceased No.2 died on way to hospital. Ajab Singh (PW/1) reached at the Police Station, Gadarwara and lodged FIR Ex. P/1 pursuant to which a case at Crime No.0/2002 was registered against the appellants. On the basis of it, at Police Station, Jaikheda, a case at Crime No.238/2002 was registered against the appellants.

4. On 01/12/2002 dead body of deceased no.1 was sent to Government Hospital Gadarwara, District- Narsinghpur for postmortem. Dr. V.P. Patel (PW-6) found following injuries:-

1. Contusion 1cmX 1/2cm on left side of forehead near hair margin;
2. Contusion 1/2cmX1/2 cm on left side of forehead 3 cm below to the injury no.1;
3. Contusion 1/2cmX1 cm on writ joint of right hand on dorsal side;
4. Contusion 9cmX 4cm on right hand dorsal side;
5. Lacerated wound ½cm X 1/4cm X bone deep on middle finger of right hand having fracture of lower phalange;

6. Contusion 13cmX3cm on right forearm having fracture of both bones on right forearm;

7. Lacerated wound 1.5cm X1/2cm X1/2cm on thumb of right hand;

8. Contusion 1cmX1/2cm on left shoulder;

9. Contusion 5cmX1.5cm on back side of left shoulder;

10. Bruise 6cmX2cm on left side of the back;

11. Bruise 12cmX2cm on left side of the back, 2 cm below to the injury no.10;

12. Bruise 12cmX2cm just below to the injury no.11;

13. Bruise 6cmX2cm, 1.5 cm below to the injury no.12;

14. Bruise 8cmX2cm on right side of the back;

15. Bruise 8cmX2cm just below injury no. 14;

16. Bruise 12cmX2cm on right side of the back;

17. Bruise 17cmX15cm multiple injuries on middle of the back;

18. Bruise 10cmX2cm on left side of the back;

19. Bruise 19cmX2cm on left side of the back of dorcel side;

20. 'Abrasion 1/4cm1/4cmX8cm multiple in number;

21. Bruise 11cmX2cm on left buttock;

22. Bruise 6cmX2cm just below injury no.21 on left buttock;

23. Bruise 8cmX10cm on right buttock;

24. Bruise 16cmX2cm on right thigh of parietal region;

25. Bruise 5cmX2cm just below injury no.24;

26. Abrasions 3cmX1cm on right leg;

27. Bruise 8cmX2cm on left buttock;

28. Bruise 7cmX2cm on left thigh of posterial region;

29. Contusion 1.5cmX1/2cm on left buttock;

Dr. V.K.Patel (PW-6) prepared postmortem report Ex.P-11 and found cause of death shock due to excessive bleeding and also fractures of 4th,5th,6th and 7th ribs causing corresponding rupture of lungs.

5. Dr. V.K. Patel (PW-6) conducted postmortem of dead body of deceased no.2 and found following injuries on his person:-

1. Lacerated wound 3cmX1cmXskin deep on left side of skull of parietoccipital region;

2. Bruise 2cmX1.5cm on right fronto parietal bone;

3. Bruise 1.5cm1.5cm on right side of face anterior to right ear;

4. Bruise 1cmX1.5cm on right side of face near chin;

5. Bruise 4 cmX1/2cm on right side of chin;

6. Bruise 9cmX3cm on lower part of chest (right hypocondrium)

7. Bruise 8 cmX2cm below the injury no.6;

8. Contusion 4cmX1cm on left hand of dorsal side;

9. Contusion 5cmX2cm on dorsal side of left hand;

10. Incised wound 2cmX1/2cm X muscle deep on right forearm;

11. Contusion 6cmX3cm on the right forearm;

12. Contusion 12cmX1cm on the left thigh;

13. Incised wound 3cmX1.5cmXmuscle deep on the left leg 11cm below knee;

14. Contusion 2cmX1cm just below knee on left leg;

15. Incised wound 2.5X1cmX muscle deep on the left leg lower part;

16. Contusion 2cmX1/2cmXskin deep on the right leg

17. Bruise 8cmX3cm on the right thigh

18. Bruise 12cmX3cm on the right thigh above injury no.17;

19. Bruise 12cmX2cm on the right buttock;

20. Bruise 12cmX2cm on the below injury no.19

21. Bruise 9cmX2cm on the right thigh below buttock

22. Bruise 13cmX3cm on the left buttock

23. Bruise 6cmX2cm on left buttock;

24. Bruise 14cmX3cm on the right side of back dorsal side;

25. Bruise 12cmX2cm on the right side of back beside injury no.24

26. Bruise 12cmX2cm on the right side of back beside injury no.25

5. Dr. V.K. Patel (PW/6) prepared postmortem report of deceased No.2 Ex. P/13 in which his cause of death was found shock due to fracture in ribs causing damage to the corresponding vital organs of the body. Dr. K. Uikey (PW/8) examined injuries of Phul Singh (PW/2) and found following injuries on his person:

(i) Contusion 4 c.m. x 1 1/2 c.m. on right hand.

(ii) Contusion four in numbers measuring 15 c.m. x 1 1/2 c.m., 14 1/2 c.m. x 1 1/2 c.m. parallel to each other on the back.

(iii) Incised wound 1 c.m. x 1/2 x 1/2 c.m. on the left leg.

(iv) Contusion 4 c.m. x 1 1/2 c.m. on right shoulder.

(v) Contusion 12 c.m. x 1 1/2 c.m. wrest.

Dr. K. Uikey (PW/9) prepared MLC report Ex. P/32 and found injuries No.1, 2, 4 and 5 simple and advised X-Ray for injury No.3.

6. Dr. K. Uikey (PW/9) examined injuries of Durjan (PW/3) as follows:

(i) One lacerated wound 1 1/2 c.m. x 1 c.m. on left hand dorsal side.

(ii) Contusion 11 c.m. x 1/2 c.m. on right thigh on medial aspect.

(iii) Contusion 22 c.m. x 2 1/2 c.m. on backside from right to left.

(iv) Contusion 20 c.m. x 1 1/2 c.m. paraliel to injury No.3 on the back.

(v) Contusion 4 c.m. x 4 c.m. on right hand.

Dr. Uikey (PW/9) advised for X-Ray of PW/1 and found injuries no.2, 3, 4 and 5 are simple in nature. He prepared MLC report Ex. P/41.

7. During investigation on 8.12.2002, appellant No.1, 2, 3, 4, 5 and 6 were arrested and at the instance of appellant No.2 Gadasi, at the instance of appellant No.3 axe, at the instance of appellant No.3 spear ballam were recovered and at the instance of remaining appellants lathies were recovered. After completing investigation, police Saikheda submitted a charge-sheet against the appellants under Section 147, 148, 149, 323, 324, 307, 302, 341, 294, 506B IPC in the Court of concerned Magistrate. Case was committed to the trial court. Trial court framed charges under Sections 148, 302/149 on two counts, 302, 307/149 on two counts and 307 IPC, respectively. Appellants abjurd guilt. Defence of the appellants in the trial court was that of false implication on account of enmity and also claim right of self defence of person and the property.

8. To substantiate the case of the prosecution, statements of Ajab Singh (PW/1), Phool Singh (PW/2), Durjan Singh (PW/3), Shankar (PW/4), Bhaiyalal (PW/5), Dr. V.K. Patel (PW/6), Rasraj Singh (PW/7), medhhav Prasad Jaroliya (PW/8), Dr. K. Uikey (PW/9), P.D. Pandey, A.S.I. (PW/10), Kamta Prasad, Head Constable (PW/11), S.K. Sharma, A.S.I. (PW/12) and Virendra Birthare, Sub Inspector (PW/13) were recorded. In respect of the defence of the appellants, statements of Patiram Gujar (DW/1), Ramdayal (DW/2), Gourishankar Gujar (DW/3) and Bhaiji Gujar (DW/4) were recorded.

9. After appreciating the aforesaid evidence, trial court convicted the

appellants of the charges under Section 307/149 IPC and also convicted them under Section 148 and 302/149 IPC on two counts and 302/149 IPC on two counts and sentenced them as above.

10. Conviction and sentence have been challenged by the appellants in this appeal on the ground that appreciation of evidence is not proper, evidence of injured witnesses and eye-witnesses are suffering from contradictions and omissions. Trial court failed to appreciate that complainant persons were aggressor as they tried to take their carts through the field of the appellants causing damage to standing crops. Trial Court further failed to appreciate that complainant party could not control the bullock cart and injuries have been sustained by accidental fall. Evidence of defence witnesses has been disbelieved in wrong manner. Conviction is bad in law.

11. On the other hand, learned Government Advocate supported the findings of conviction and sentence both.

12. In view of the evidence of Dr. V.K. Patel (PW/6) and postmortem reports Ex. P/11 and P/13, respectively, it remains no longer disputed that the death of the deceased No.1 and deceased No.2 was the cumulative effect of large number of injuries sustained by them and was homicidal in nature.

13. From amongst the five eye-witnesses Shankar (PW/4) did not support the prosecution and was declared hostile. He disowned his previous statement Ex. P/10 in to-to. PW/4, a caste fellow of the appellants as well as complainant party, admitted that he took the injured persons to the hospital.

14. Phool Singh (PW/2) and Durjan Singh (PW/3) sustained injuries on their person in the incident. Their presence on the spot cannot be, therefore, doubted. Ajab Singh (PW/1) did not receive any injury in the incident. He lodged FIR Ex. P/1 at Police Station, Gadarwara. It is submitted by learned counsel for the appellants that his son Mahendra, deceased No.1 lost his life in this incident but he chose to remain away from the crowd and did not make any attempt to save him which is not a natural conduct and questions even his presence on the spot.

15. Per contra, it is submitted by learned Government Advocate that there cannot be a set pattern of responses of all the persons. It may differ from person to person how one reacts in a given situation. PW/3 in para 11 has stated that PW/1 was standing just 25 steps away. Though appellants chased him, but PW/1 managed to escape by moving away a little but saw the incident.

PW/1 has denied the suggestion of over turning of the bullock cart through the ridge between the field medh and also denied the suggestion of having disputes and enmity with the appellants. Similarly Bhaiyalal (PW/5) also witnessed the incident from about a distance of 100 yards. Merely in view of the fact that defence gave suggestions of enmity of witnesses with them on the ground that he is a relative and is an interested witness, their testimony cannot be brushed aside. Their presence on the spot is natural and has been rightly believed by the trial court. On careful perusal of testimonies of PW/1 and PW/5, we are of the opinion that they witnessed the incident and then have been rightly relied upon by the trial court.

16. In so far as evidence of injured witnesses PW/2 and PW/3 is concerned, they have categorically denied the fact of overturning of the bullock cart and of having received the injuries by dragging of the bullock cart. Rather they have given a clear account of their injuries by the appellants.

17. It is submitted by learned counsel for the appellants that the complainant party entered in the fields of the appellants in which gram crops was sown by them. According to Ajab Singh (PW/1), deceased No.2 wanted to take the bullock cart from the adjoining way. Infact, they entered the bullock cart through a medh having about 6 inches height. Bullock cart was stopped by appellant No.2. According to Phool Singh (PW/2), they alongwith bullock cart reached near the field of appellant No.1. The bullock cart was seized by the police from the way not from the field. Durjan Singh (PW/3) also stated that police seized the bullock cart and blood stained soil from the spot but he denied the fact that bullock cart was lying in the field of appellant No.1. According to him, police prepared seizure of only one bullock cart and allowed them to take away another bullock cart without formality. Bhaiyalal (PW/5) stated that near the house of appellant No.1 quarrel was going on and house of the Pohap Singh is constructed in his field only. In para 10 of his statement, he stated that from the filed of the appellant No.1 there was a way also.

18. In spot map Ex. P/7, two bullock carts have been shown in the filed of the appellant No.1. Similarly blood staines have also been shown lying in the field. Virendra (PW/13) prepared the spot map Ex. P/7. It appears probable that complainant party insisted the entry of the bullock cart through the field of appellants where the gram crop was sown. According to prosecution, deceased tried to pressurise the appellants that there was a way also from the field and to let them pass but appellant No.2 took initiative and assaulted a

gadasa blow on the person of deceased No.2 and then they all started assaulting both the deceased persons, PW/2 and PW/3 also.

19. From the aforesaid evidence atleast two things are clear which need a careful and conscious consideration. One, incident took place in the field, not on the way/medh, where the gram crop of the appellants was sown and two, vague allegations against the appellants regarding their presence with intention to cause death of deceased persons. In para 27 of (2011) 9 SCC 257 (*Ramachandran and others v. State of Kerala*) following observation made by the Apex Court would be useful to be referred:

> *"Thus, this court has been very cautious in a catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. The number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident."*

20. It is noteworthy that in present incident one deceased sustained 29 injuries, another deceased sustained 26 injuries and two injured persons sustained 5-5 injuries each, respectively. For causing aforesaid injuries at the stage of FIR, 9 appellants were named. Eight accused persons faced trial. One accused Baijnath was acquitted by the trial court by extending benefit of doubt. Seven appellants all belonging to one family i.e. appellant No.1 is father of appellants No.2, 3, 4 and 5 and brother-in-law of appellant No.6 and father-in-law of appellant No.7, were held liable to cause aforesaid number of injuries. Appellant No.4 was said to have been armed with spear (Bhala-ballam), but, it is strange that no injury sustained by any of the deceased, or the injured which could have been caused by ballam like weapon. None of the witnesses stated anything specific about any overt act by appellant No.4.

In such a situation, even if his presence on the spot be presumed, there is no evidence to show his presence as a member of unlawful assembly for holding him liable for sharing the common object of the remaining appellants. He therefore deserves to be acquitted.

21. As against six appellants viz. No.1, 2, 3, 5, 6 and 7, it has come in the evidence of PW/1 & PW/5 eye-witnesses, PW/2 & PW/3 injured witnesses and in the evidence of Investigating Officer Virendra Birthare PW/13 that when both the deceased and injured witnesses entered in the field alongwith the bullock carts asserting that to be a passage, after heated exchange, they started assaulting them. Initially they assaulted deceased No.2. While deceased No.1 came forward to rescue him, he was also assaulted by the appellants. How an occupant of field who had ploughed the field and sown the gram crops can keep mum, seeing such intervention on it. Act of the deceased persons in such a situation, of taking the bullock carts through the field was nothing but simply an invitation for quarrel on their part. Appellants assaulted without premeditation in a sudden fight and quarrel occurred on the spot between the members of two families. Ultimately two members of complainant family lost their lives.

22. Nothing has come on record to show appellants acted in an unusual manner. In our considered opinion, act of the appellants is covered under exception 4 of Section 300 IPC. As discussed above, Conviction and sentence of the appellants under Section 302 IPC, hence, deserves to be and is hereby set aside instead appellants No.1, 2, 3, 5, 6 and 7 are liable to be convicted under Section 304 Part-I/149 IPC on two counts. It is true that in this unfortunate incident, two family members of prosecution witnesses have lost their lives but it is also true that six members of the family including one father and four sons are suffering incarceration since the incident. Conviction of appellant No.4, on all the charges is set aside.

23. For offence under Section 304 Part I/149 IPC, aforesaid appellants are sentenced to 10 years rigorous imprisonment on each count. Conviction and sentence of appellants under Sections 148 and 323 IPC are hereby affirmed. Sentences shall run concurrently.

24. In respect of appellant No.4 Brajesh, appeal is allowed. His conviction and sentence is set aside; he is acquitted. In respect of appellants No.1, 2, 3, 5, 6 and 7, appeal is allowed in part as indicated above.

Appeal allowed.

I.L.R. [2013] M.P., 205
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal
Cr. A. No. 1821/2004 (Jabalpur) decided on 9 October, 2012

RAM KRIPAL KAHAR ...Appellant
Vs.
STATE OF M.P. ...Respondent

Evidence Act (1 of 1872), Section 32, Penal Code (45 of 1860), Section 302 - Dying Declaration **- Deceased was kept as a mistress - She demanded money for the marriage of her daughter which was denied by the appellant - Dying Declaration and statement of deceased were recorded - On careful perusal of dying declaration along with statement, the dying declaration is not beyond doubt as the deceased was in a state of helplessness and frustration on account of refusal of appellant for giving marriage expenses to her - Conviction of appellant not sustainable - Appeal allowed. (Para 18)**

साक्ष्य अधिनियम (1872 का 1), धारा 32, दण्ड संहिता (1860 का 45), धारा 302 – मृत्युकालिक कथन – मृतिका को उपपत्नी के रुप में रखा गया था – उसने अपनी पुत्री के विवाह हेतु रुपयों की मांग की, जिसे अपीलार्थी द्वारा अस्वीकार किया गया – मृतिका का मृत्युकालिक कथन एवं बयान दर्ज किये गये – बयान के साथ मृत्युकालिक कथन का सावधानीपूर्वक अवलोकन करने पर मृत्युकालिक कथन संदेह से परे नहीं क्योंकि अपीलार्थी द्वारा उसे विवाह के खर्चे देने से इंकार के कारण मृतिका असहाय एवं निराशा की स्थिति में थी – अपीलार्थी की दोषसिद्धि कायम रखने योग्य नहीं – अपील मंजूर।

Cases referred :

(2012) 6 SCC 606, AIR 2009 SC 1059.

V.K. Lakhera, for the appellant.
Amit Pandey, P.L. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by :
T.K. KAUSHAL, J. :-This appeal has been preferred against the judgment dated 23/09/2004 passed by Sessions Judge, Shahdol in Sessions Trial No. 135/2004 convicting the appellant under section 302 IPC for committing murder of Gulabia bai (since deceased) and sentencing him to life imprisonment

with fine of Rs.500/-.

2. Facts of the case, in short, are that deceased, having left alone by her husband Mangal Singh, lived in a house near GM Office of Jamuna colliery with her daughter Anjali (PW-1) and sons Sanjay (PW-2) and Ashok Kumar (PW-3). Brothers of the deceased i.e Munnilal (PW-4) and Parmeshwar (PW-5) also lived in the same locality in different house. Appellant had developed intimacy with the deceased and had been treating her as a mistress. On 29/02/2004 at about 8.00 am, while appellant visited house of the deceased, she reminded her for provisions of money for marriage of her daughter (PW-1). Appellant declined the demand. Deceased asserted her demand saying that she was maintaining such relations for last about 4-5 years under assurance of her full maintenance including marriage of daughter also. Appellant continued to say no to the demand of money. Appellant asked her to do whatever she could. She may opt to die also if she liked and then told to her that he will kill her. Appellant poured kerosene on her and put a match stick. Deceased started ablazing. She cried. Her children came to her from inside of the house. By pouring water they tried to extinguish fire.

3. Deceased was taken to police station-Bhanumadha, District-Anuppur where she lodged FIR Ex.P-15 against the appellant. A.K.Pandey, ASI (PW-12) registered case at Crime No. 32/2004 under section 307 IPC against the appellant. Deceased was sent to Community Health Centre, Kotma for treatment. Dr. O.P. Choudhary (PW-7) examined her injuries and prepared MLC Report Ex.P-9. In view of the critical condition of the deceased, PW-7 further recorded dying declaration Ex.P-20 in the hospital. A.K. Pandey, ASI (PW-12) recorded statement of deceased under section 161 Cr.P.C also. In the evening, the deceased succumbed to her burn injuries and died. Ward Boy of District Hospital Shahdol sent Marg intimation Ex.P-14 to police station. Police- Bhanumadha, initiated inquest proceedings. Naksha Panchayatnama of dead body of deceased Ex.P-5 was prepared. On 01/03/2004 Dr.R.P. Singh (PW-9) in District Hospital Shahdol conducted postmortem of deceased and prepared Postmortem Report Ex.P-12. During investigation, police prepared spot map and recorded statements of witnesses. On 02/03/2004 appellant was arrested.

4. After completing investigation, police submitted charge sheet against the appellant in the court of concerned Judicial Magistrate First Class. Case was committed to sessions court for trial. Trial Court framed charge under

section 302 IPC against the appellant. Appellant pleaded innocence and abjured guilt.

5. To substantiate case of the prosecution, statements of daughter of deceased Anjali (PW-1), son of deceased Sanjay (PW-2), son of deceased Ashok (PW-3), brother of deceased Munnilal (PW-4), brother of deceased Parmeshwar (PW-5), Sister-in-law of deceased Shyamwati (PW-6), Dr. O.P. Choudhary (PW-7), Rajendra Das, Patwari (PW-8), Dr. R.P. Singh (PW-9), son of deceased Rahul (PW-10), Triveni Prasad Mishra, Constable (PW-11), A.K. Pandey, ASI (PW-12), M.K. Upadhyaya, ASI (PW-13), Ramlal Tripathi, Head Constable (PW-14), Ramsujan Tiwari, Head Constable (PW-15), and Virendra Singh, SI (PW-16) were recorded. After appreciating aforesaid evidence, trial court found the appellant guilty and convicted and sentenced him as above.

6. Assailing the impugned judgment, this appeal has been preferred on the grounds that trial court has wrongly relied upon the testimony of dying declaration Ex.P-20 recorded by doctor. Similarly, FIR Ex.P-15 and case diary statement of deceased Ex.P-17, subsequently treated as dying declarations, have also been wrongly believed by the trial court. These dying declarations are suffering from discrepancies. After sustaining 90% burn injuries on her body, it was not possible for the deceased even to speak. FIR Ex.P-15, case diary statement of deceased Ex.P-17 and dying declaration Ex.P-20 are concocted documents. Despite the fact that none of the family members supported the prosecution case and no independent witness has been adduced by the prosecution, trial court convicted the appellant on the basis of insufficient and doubtful evidence. Conviction is bad in law. On the other hand, learned Panel Lawyer supported the findings of conviction and sentence and submitted that evidence of dying declaration has rightly been relied upon by the trial court.

7. On 29/02/2004 at about 11.00 am, Dr. O.P. Choudhary (PW-7) examined injuries of the deceased at Community Health Centre, Kotma. PW-7 found burn injuries over head, face, neck, chest, stomach, abdominal portion, both upper limbs, thigh, buttock, both legs, anterior and posterior regions of the deceased. The deceased was conscious and was able to speak. There had been smell of kerosene in her body. Burns were caused by flames within 12 hours of the examination. Burn injuries had been dangerous to life. PW-7 found 90% burn on the body of the deceased and forwarded the deceased

for further treatment to District Hospital Shahdol.

8. On 01/03/2004 at District Hospital Shahdol, Dr. R.P. Singh (PW-9) conducted postmortem of the deceased and found 80 to 85% burn of 3rd degree on the body of deceased. Cause of death was the shock due to excessive burning caused within 12 hours of the postmortem examination. PW-9 prepared postmortem report Ex.P-12. In view of the aforesaid injuries, it remains no longer disputed that death of deceased was homicidal caused by burn injuries.

9. Daughter of deceased PW-1, sons of deceased PW-2, PW- 3 and PW-10, and brothers of the deceased PW-4 and PW-5 and sister-in-law of the deceased PW-6, did not support the story of the prosecution. On the contrary, they came forward with a story that at the time of making tea on a "bhatti", sari of the deceased caught fire and she got burnt. All aforesaid witnesses have been declared hostile in the trial court and they have disowned their previous statements.

10. On 29/02/2004 at about 10.15 am, PW-12 recorded FIR Ex.P-15 as told by the deceased. According to Ex.P-15 at about 7-8 am in the house of the deceased there had been a discussion between appellant and deceased in respect of provisions to meet the expenditure of marriage of her daughter PW-1 to be incurred by the appellant. Appellant poured kerosene, lit match stick and set deceased on fire. PW-12 recorded her police statement Ex.P-17 also. In respect of narration of the incident, text of Ex.P-15 and Ex.P-17 are verbatim same and identical. Deceased was brought to police station by her family members in a jeep. FIR and Case Diary statement were recorded at police station. Dr. O.P. Choudhary (PW-7) at 12.10 pm recorded dying declaration Ex.P-20 in hospital. Though it was not recorded in the form of questions and answers and date had not been mentioned on it, but it gave a brief account of the incident given by deceased.

11. Shri V.K. Lakhera learned counsel for appellant submitted that no date of recording has been mentioned in Ex.P-20. It has been proved in the trial court at the stage of statement of witness by way of re-examination of PW-7. Ex.P-20, in these circumstances cannot be deemed to be a genuine document and cannot be relied upon. Per contra, Shri Amit Pandey, learned Panel Lawyer submitted that in charge sheet there had been clear mention of this document and due to inadvertence prosecution could not get it proved on earlier occasion and made a request to the trial court to recall and re-examine

the doctor.

12. On careful perusal of the statement of PW-7 and further on perusal of Ex.P-20 dying declaration we find nothing to suspect the bonafidees of doctor for its recording. PW-7 had taken down in writing the version given by the deceased to him in Ex.P-20. Absence of remark regarding fitness of the deceased, is not material because doctor himself has recorded it. Statement of PW-7 is convincing and reliable. Accordingly there appears no technical flaw in Ex.P-20. In para 18 of (2012)6 SCC 606 (*Salim Gulab Pathan Vs. State of Maharashtra*), the Apex Court observed that ..

> "18. *In Atbir Vs. Government* (NCT of Delhi),2010 (9) SCC 1 after an elaborate consideration of several decisions of this Court, the following propositions have been laid down with regard to the admissibility of a dying declaration:
>
> "22. The analysis of the above decisions clearly shows that:
> (i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
>
> (ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
>
> (iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
>
> (iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.
>
> (v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.
>
> (vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.
>
> (vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

13. A comparison of Ex.P-15 FIR, Ex.P-17 police statement and Ex.P-20 dying declaration reveals that before doctor, deceased did not say that appellant told to her that she need not die of her own rather he will kill her and further with intent to kill her poured kerosene. In both Ex.P-15 and Ex. P- 17 "तू क्या मरेगी मैं तुझे आज मार देता हूँ व ऐसा कह कर, एक दम जान से मारने की नियत से घर रखा ....." are mentioned but these facts are missing in Ex.P-20. It is submitted by learned counsel for appellant that FIR and police statement are the creations of Police Inspector PW-12 and are indicative of mind set of a police official. According to learned Panel Lawyer these discrepancies are not very material.

14. Version of the deceased narrated by her in Ex.P-20, in view of the aforesaid inconsistencies in dying declarations, requires a critical examination. During the course of heated discussion between deceased and appellant regarding need and demand of money for marriage of PW-1, at one point of time appellant told to her that he would not incur any expenditure, even if she preferred to die but in next breath, she stated that appellant poured the kerosene and set fire to her. It does not sound logical and probable and cannot be accepted as normal conduct of a prudent man in given circumstances. According to Ex.P-15 and Ex.P-17, appellant a step ahead told to the deceased that why to die herself rather he will kill her and poured kerosene on her, with intent to kill. These variations in dying declarations are material and make them vulnerable. The Apex Court in AIR 2009 SC 1059 (*Samadhan Dhudaka Koli Vs. State of Maharashtra*) has observed in para 16 that

"16. Consistency in the dying declaration therefore, is a very relevant factor. Such relevant factor cannot be ignored. When a contradictory and inconsistent stand is taken by the deceased herself in different dying declarations, they should not be

accepted on their face value. In any event, as a rule of prudence, corroboration must be sought from other evidence brought on record."

15. On hearing shocking words of refusal "मैं पैसा वैसा नहीं देता, जो तुझे करना हो कर, मरना हो मर" inspite of having 4-5 years of conjugal relationship, frustration of the mind of the deceased can be obvious. It could have provoked deceased to end her life and at the same time it might have lead her to implicate the appellant, who declined to share burden of expenditure of marriage of her daughter.

16. Version of the deceased narrated in dying declaration Ex.P-20 did not find corroboration from statements of her own children, brothers and bhabhi. Though their version of accidental burn from bhatti at the time of making tea too did not find corroboration from medical evidence, but they did not at all support theory of murder by the appellant.

17. Discrepancies in medical evidence in this regard are also material. Dr. O.P. Choudhary (PW-7) found presence of kerosene on the body of deceased at the time of medico legal examination and Dr. R.P. Singh (PW-9) did not find presence and smell of kerosene at the time of postmortem, within 24 hours these two contradictory versions of doctors create doubt regarding manner and mode of the death. At the time of incident, only deceased and appellant were present in the room alone. Even the witnesses entered the room after hearing the cries. However, they did not support the story of prosecution. PW-12 recorded version of the deceased given to him at about 10.15 am at police station by way of FIR and case diary statement. At about 12.10 pm, PW-7 recorded dying declaration Ex.P-20. Discrepancies in the text of the aforesaid dying declarations regarding intention of the appellant for committing murder is also relevant and is a material lapse.

18. Dying declaration Ex.P-20 by itself indicates two different shades of the incident. In first part of the dying declaration, appellant had stated to deceased that he will not bear expenses. She is free to end her life. In second part of dying declaration Ex.P-20 appellant got ready to kill her and poured kerosene and set her ablaze. It does not sound convincing. Appellant had no reason to kill the deceased at that time. In fact helplessness and frustration of the deceased has been reflected in dying declarations. On careful perusal of dying declaration Ex.P-20 along with statement of PW-7 and considering the facts and circumstances of the case, it emerges out that though there appears

no technical flaw in the dying declaration in so far as admissibility is concerned. However, in respect of truthfulness of the contents of dying declaration Ex.P-20 is not beyond doubt. At the time of deposing the dying declaration, the deceased was in the state of helplessness and frustration on account of refusal of the appellant for giving marriage expenses of PW-1 her daughter. Probability of false implication of appellant cannot be ruled out.

19. Declaration of the deceased can be relied upon only when it is true and voluntary. It should be free from suspicions. Truthfulness of the content must be proved beyond doubt. Ex.P-20 is the dying declaration, which is not coherent and consistent, hence, it alone cannot be made basis of conviction. It is contradicted by medical evidence and is not supported by oral evidence. In our opinion, it will not be safe to sustain the conviction of the appellant on the basis of Ex.P-20 only.

20. As discussed above, conviction and sentence of appellant under Section 302 IPC remains unsustainable. This appeal deserves to be and is hereby allowed. Appellant is acquitted of the charge under Section 302 IPC. Judgment of conviction of trial court is set aside. Appellant be released if not required in any other case.

Appeal allowed.

I.L.R. [2013] M.P., 212
APPELLATE CRIMINAL
Before Mr. Justice Shantanu Kemkar
Cr. A. No.127/1998 (Indore) decided on 30 October, 2012

AJJU @ AFZAL ...Appellant

Vs.

STATE OF M.P. ...Respondent

*A. **Penal Code (45 of 1860), Section 376 - Rape - Age of Prosecutrix** -* **As per the Radiologist report, the age of prosecutrix was above 16 but below 18 years - The report of Radiologist which remain unproved, though cannot be utilized by the prosecution to prove its story, but the defence can certainly use it to support its case - Held - Age of the prosecutrix in the absence of any other reliable evidence being tendered by the prosecution can be safely held to be above 16 years - Trial Court has committed error in holding that the prosecutrix is less than 16 years of age.** **(Para 7)**

क. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – अभियोक्त्री की आयु – विकिरण विज्ञानी की रिपोर्ट के अनुसार, अभियोक्त्री की आयु 16 वर्ष से अधिक थी परंतु 18 वर्ष से कम थी – विकिरण विज्ञानी की रिपोर्ट जो नासाबित रही है, उसे यद्यपि अभियोजन द्वारा अपनी कहानी साबित करने के लिए उपयोग में नहीं लाया जा सकता, परंतु बचाव निश्चित रुप से उसका उपयोग अपने मामले के समर्थन में कर सकता है – अभिनिर्धारित – अभियोजन द्वारा किसी अन्य विश्वसनीय साक्ष्य की अनुपस्थिति मे, अभियोक्त्री की आयु सुरक्षित रुप से 16 वर्ष से ऊपर होने की धारणा की जा सकती है – विचारण न्यायालय ने यह धारणा करने में त्रुटि की कि अभियोक्त्री 16 वर्ष से कम आयु की है।

***B. Penal Code (45 of 1860) Section 376 - Proof of Rape* - Prosecutrix giving a complete go-bye to the version, in material particulars, as recorded in the FIR in her evidence recorded in Court - Medical evidence of Doctor not at all supporting the allegations of prosecutrix - Version that the appellant gagged her mouth and forcibly committed rape on her is hardly convincing - Conviction for the offences cannot be sustained. (Paras 9 & 10)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार का सबूत – अभियोक्त्री ने न्यायालय के समक्ष अभिलिखित की गई उसकी साक्ष्य में, प्रथम सूचना रिपोर्ट में अभिलिखित वर्णन से तात्विक विशिष्टियों में पूर्णतः अलग वर्णन दिया है – चिकित्सक का चिकित्सीय साक्ष्य, अभियोक्त्री के अभिकथनों का बिल्कुल समर्थन नहीं करता – यह वर्णन कि अपीलार्थी ने उसका मुंह जबर्दस्ती बंद किया और बलपूर्वक उसका बलात्कार किया, विश्वास उत्पन्न नहीं करता – अपराध के लिए दोषसिद्धि को कायम नहीं रखा जा सकता।

Cases referred :

AIR 1938 Nagpur 394, 1969 JLJ S.N. 54, 1962 CR.L.J. 3218.

Kantesh Gupta, for the appellant.
Rahul Vijayvargiya, P.L. for the respondent/State.

JUDGMENT

SHANTANU KEMKAR, J :- This appeal under Section 374 of the Criminal Procedure Code is against the judgment dated 17.01.1998 passed by the Sessions Judge, Dewas in Sessions Trial No.160/1995 convicting the appellant for offence punishable under Sections 376 and 506- part II of the Indian Penal Code and sentencing him for 7 years and 1 year rigorous imprisonment, respectively.

2. The prosecution case in brief is that on first day of Ramjan (2.2.1995) in the early morning at about 4 AM the appellant who was residing across the road in front of the house of the prosecutrix called the prosecutrix in his house and committed rape on her. The prosecutrix could not make a cry as her mouth was gagged by him. The appellant then threatened her that if she informs anyone he will kill her and her father. After the said incident also the appellant used to call the prosecutrix at his house daily and use to commit sexual intercourse with her. Again on 18.02.1995 the appellant forcibly tried to take her to his house but the prosecutrix fled away and narrated the incident to her Aunt Naseem (PW-3).

3. On 25.02.1995 the incident was reported at Police Station Kotwali, Dewas. The police recorded the First Information Report Ex.P-1 and referred the prosecutrix to medical examination at Government District Hospital, Dewas where Dr. Indu Agrawal (PW-4) Assistant Surgeon examined the prosecutrix. The report of Dr. Indu Agrawal is Ex.P/2-A. She referred the prosecutrix to the Radiologist for Osification test as would be clear from Ex.P/2-A. It is also revealed from the record that Dr. Nashikkar, Radiologist after examining the prosecutrix submitted his report stating the Radiological report of prosecutrix to be above 16 years but below 18 years. The said report was filed by the prosecution with challan papers. After investigation the charge-sheet was submitted.

4. The trial Court recorded the evidence and held that the appellant guilty of the offences as aforesaid. It held that the prosecutrix was below 16 years of age and, therefore, the defence about she being consenting party cannot be accepted and as a result convicted the appellant. Aggrieved the appellant has filed this appeal.

5. Shri Kantesh Gupta, learned counsel for the appellant has strenuously urged that the trial Court was in error in holding that the age of the prosecutrix was below 16 years. According to him there was no material evidence to prove that the age of the prosecutrix was below 16 years. On the other hand from the evidence of the prosecution itself it is clear that the prosecutrix was above 16 years of age and was a consenting party. He further argued that the evidence of the prosecutrix is not reliable and her version is not supported by the medical evidence.

6. Shri Rahul Vijayvargiya, learned panel lawyer for the respondent/State supported the impugned judgment of conviction and contended that the

evidence about the age of the prosecutrix to be below 16 years and about the commission of rape by the appellant is fully trustworthy.

7. In order to prove the age of the prosecutrix no evidence was led by the prosecution. The prosecutrix in her statement stated that she is aged 15 to 16 years. Dr. Indu Agrawal in her report Ex.P/2- A stated that the age of the prosecutrix was 15 to 16 years. As per the said medical report Ex.P/2-A the sexual characters of the prosecutrix were well developed. No injury was found on the body of the prosecutrix. She was used to of intercourse. Dr. Indu Agrawal referred the prosecutrix for determination of age. As per the Radiologist report available on record, the age of prosecutrix was above 16 but below 18 years. True it is that the report of the Radiologist has not been proved but with respect to a prosecution document which remains unproved, though the prosecution cannot utilize the same to prove its story but the defence can certainly use it to support its case. [See *Sheoprasad vs. Empror* (AIR 1938 Nagpur 394), *Samedas vs. State of M.P.* (1969 Jab. L. J. SN 54) and *Bharat Vs. State of M.P.* (1962 Cr.L.J. 3218)]. In view of such legal position the X-ray report obtained vide Exhibit P-2A and filed by the prosecution alongwith the Challan papers showing age of the prosecutrix to be more than 16 years can certainly be used by the defence. Thus, the age of the prosecutrix in the absence of any other reliable evidence being tendered by the prosecution can be safely held to be above 16 years. In the circumstances in my considered view the trial Court has committed error in holding that the prosecutrix is less than 16 years of age.

8. In order to find out whether the prosecution has been able to prove the charge of rape against the appellant the evidence led by the prosecution to prove the offence is being scanned hereinafter. The prosecutrix (PW-2) in her evidence had testified that on the first day of Ramjan at about 4 A.M. the appellant committed rape on her at his house. When she tried to cry, he threatened her that he will kill his father and also threatened her that not to tell about the incident to anyone else he will kill her. Thereafter on Saturday when the appellant tried to forcibly take her to his house, she made a cry and fled away and narrated the incident to her Aunt. As per her version on the day when rape was committed on her she was washing her face at the courtyard of her house at about 4:00 A.M. At that time the appellant came and forcibly took her to his house. He gagged her mouth and committed rape. Naseem (PW-3) Aunt of the prosecutrix stated that the prosecutrix had narrated her the incident of rape on her by the appellant and also that he forcibly tried to

take her to his house on Saturday.

9. On going through the evidence led by the prosecution it is clear that the prosecutrix has given a complete go-bye to the version, in material particulars, as recorded in the FIR in her evidence recorded in court. The medical evidence of Dr. Indu Agrawal does not at all support the allegations of prosecutrix. As per the medical report Ex.P/2-A there was no external injury on any part of the body of the prosecutrix and no injury was even found over her private part. The opinion expressed by Dr. Indu Agrawal that the prosecutrix was used to intercourse indicates that she was a consenting party. Her version that the appellant gagged her mouth and forcibly committed rape on her is hardly convincing as it cannot be believed that she could be forcibly taken from the courtyard of her house to the house of the appellant situated across the road and then raped by him.

10. In the circumstances, it can be safely held that the prosecutrix who was aged above 16 years was a consenting party and no rape was committed on her and in such circumstances the appellant's conviction for the offences as above cannot be sustained.

11. The appeal is allowed. The judgment of conviction passed against the appellant is set aside.

Appeal allowed.

I.L.R. [2013] M.P., 216
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal
Cr. A. No. 2607/2005 (Jabalpur) decided on 11 December, 2012

MANGNA @ MAHENDRA ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Evidence Act (1 of 1872), Section 3 - Related witnesses - **Evidence of witnesses cannot be discarded merely on the ground of their close relationship - However, their evidence should be examined with caution and circumspection. (Para 11)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – संबंधित साक्षी – साक्षियों के साक्ष्य को मात्र उनके नजदीकी संबंधों के आधार पर अस्वीकार नहीं किया जा सकता – अपितु, उनके साक्ष्य का परीक्षण सावधानी एवं सतर्कता से किया जाना

चाहिए।

***B. Penal Code (45 of 1860) Section 302 or 304 Part I - Culpable Homicide not amounting to murder* - Quarrel took place between two persons - When the deceased tried to intervene, then the appellant assaulted him - Appellant was not present at the scene of occurrence from the beginning - He had come at the place of occurrence only after hearing the call raised by co-accused - Act of the appellant comes within the purview of Section 304 Part I - Appeal partly allowed - Appellant convicted under Section 304 Part I and is sentenced to undergo R.I. for ten years. (Paras 17 &18)**

ख. दण्ड संहिता (1860 का 45), धारा 302 या 304 भाग I – हत्या की कोटि में न आने वाला आपराधिक मानव वध – दो व्यक्तियों के बीच झगड़ा हुआ – जब मृतक ने बीच–बचाव का प्रयत्न किया, तब अपीलार्थी ने उस पर हमला किया – अपीलार्थी शुरु से ही घटना स्थल पर उपस्थित नहीं था – वह घटना स्थल पर केवल सह अभियुक्त की पुकार सुनने के पश्चात आया था – अपीलार्थी का कृत्य धारा 304 भाग–I की परिधि में आता है – अपील अंशतः मंजूर – अपीलार्थी को धारा 304 भाग–I के अंतर्गत दोषसिद्ध किया गया और दस वर्ष के सश्रम कारावास से दण्डादिष्ट किया गया।

V.K. Lakhera, for the appellant.
Umesh Pandey, G.A. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **RAKESH SAKSENA, J.** :- Appellant has filed this appeal against the judgment dated 11.11.2005 passed by IV Additional Sessions Judge, Sagar in Sessions Trial No.57/2003 convicting the appellant under section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.100/. In default of payment of fine, further rigorous imprisonment for one year.

2. In short, the prosecution case is that on 12.7.2002 in village Chapri near the well of Choudhary, there had been a Daal-bati feast. Along with other persons of village, Babulal (PW-1) and his son Sukhdev had also participated in the feast. In the evening at about 6:00 p.m. when they were going back, they happened to pass from front of the tea shop of accused Devi Singh. Sukhdev (PW-2) stopped at the shop of Devi Singh and admonished him for not intimating the sale of haystack by Narad Singh. Devi Singh getting annoyed, abused him and told that he was not anybody's servant. When Babulal

(PW-1) intervened and asked Devi Singh not to abuse, there occurred a hot altercation. Hearing commotion, Babulal's son Charli @ Rajendra Singh reached there and asked Sukhdev to go from there. In the meanwhile, Devi Singh raised a call hearing which four other accused persons viz. Kalyan, Narayan Singh, Dharmendra and Arvind also reached there armed with Katarna, tabbal, sword and lathi. Devi Singh picked up Katarna from a shop and dealt its blow on the head of Charli. Appellant shouting that he will deal with him, dealt one blow of tabbal on the neck of Charli which hit him in the left side of neck under the left ear. Blood oozed out and Charli fell on the ground. Indraj Singh (PW-3), Ramgopal (PW-4), Meghraj @ Paltu (PW-5) and Veer Singh (PW-6) reached there and intervened whereupon accused persons ran away. In the tractor of Indraj, Charli Singh was taken to district hospital, Sagar where in the night at about 2:05 o'clock he died. Babulal (PW-1) after leaving the dead body in Sagar hospital, went to police station Banda and lodged first information report Ex.P/1 on 13.7.2002 at 10:20 a.m.

3. The intimation about the death of Charli was sent by Dr.R.K.Dixit (PW-9) to police station, Gopalganj whereupon marg intimation Ex.P/39 was recorded. Dead body of Charli was referred for postmortem examination. Dr.Ganesh Prasad Nema (PW-8) of district hospital, Sagar conducted postmortem and found one stitched injury on the neck of deceased vide his report Ex.P/31.

4. During investigation, accused were arrested and weapons were seized on their information. After completion of investigation, charge sheet was filed against six accused persons in the Court of Judicial Magistrate First Class, Banda who in his turn committed the case to the Court of Sessions. When charges were framed under sections 148, 302/149 and 302 of the Indian Penal Code, all the accused abjured their guilt and pleaded that deceased and his family members had entered their house and assaulted them. When they tried to kill accused Mangna by pressing his neck, stones were pelted from both the sides. Deceased attempted to assault Mangna with tabbal but in an attempt to snatch it, tabbal hit deceased.

5. After appreciation of evidence and upon trial, learned trial Judge found the prosecution evidence insufficient against accused Kalyan, Narayan, Dharmendra and Arvind to establish any charge and acquitted them. He convicted accused Devi Singh under section 324 read with section 110 of the Indian Penal Code, and holding the appellant guilty under section 302 of the Indian Penal Code, convicted and sentenced him as mentioned above.

6. Learned counsel for the appellant submitted that the evidence of eyewitnesses adduced by the prosecution was unreliable. Learned trial Judge misappreciated the evidence on record though most of the eyewitnesses were closely related to deceased. Injuries were found on the body of accused Devi Singh and Dharmendra, but learned trial Judge erred in holding that deceased and his brother were aggressors. In the alternative, learned counsel for the appellant submitted that it was not established from the record that appellant intended to commit murder of deceased since the incident had occurred suddenly when deceased's brother viz. Sukhdev indulged in quarrel with accused Devi Singh. It was a case of sudden quarrel in which deceased received only one injury which proved fatal. According to him, in these circumstances, the conviction of appellant under section 302 I.P.C. was not justified, at the most, he could have been held liable under section 304 Part I or Part II of Indian Penal Code. Appellant was continuously in jail since 23.7.2002. On the other hand, learned counsel for the State supported the impugned judgment of conviction of appellant and submitted that from the evidence adduced by the prosecution, it was established that appellant assaulted deceased with a sharp edged weapon on his neck, therefore, his conviction under section 302 I.P.C. was just and proper.

7. We have heard the learned counsel for the parties, perused the impugned judgment and the evidence on record carefully.

8. It is not disputed that deceased died a homicidal death. Babulal (PW-1) and Sukhdev (PW-2), respectively the father and brother of deceased, stated that on 12.7.2002, accused Devi Singh and Mangna assaulted deceased with Katarna and tabbal. Deceased suffered an injury on his neck below the ear. They carried deceased to Tili hospital, Sagar but in the night at about 2:00 o'clock he died. Babulal (PW-1) then went to police station Banda and lodged first information report Ex.P/1.

9. Dr.R.K.Dixit (PW-9), Medical Officer of district hospital, Sagar examined the injuries of deceased and found one incised wound 15cm x 4cm x muscle deep on the left side of his neck. It was bleeding. He admitted deceased in the hospital and referred him to surgical specialist of ENT department. He recorded the injuries of deceased on bed-head ticket Ex.P/34. When deceased expired he recorded his death in Ex.P/34 and sent intimation Ex.P/36 to station officer of police station Gopalganj.Head Constable Ravi Shankar Sen (PW-13) recorded marg Ex.P/38 at police station Banda. Dr.Ganesh Prasad Nema (PW-8) of district hospital, Sagar conducted autopsy

of the body of deceased and found:-

> Stitched wound on the left side of neck on postero lateral part behind the left ear measuring 9cm x 3.5cm x 5cm. On opening the wound, he found muscle tissues and blood vessels including left jugular and carotid artery cut. No other injury was found on the body.

In the opinion of doctor, the aforesaid injury was caused by heavy sharp edged weapon within 24 hours. The death of deceased was caused by haemorrhagic shock due to excessive bleeding. The injury was sufficient to cause death in the ordinary course of nature. He also deposed that on a query Ex.P/32 he opined that the said injury could have been caused by tabbal sent to him for examination. From the above evidence, in our opinion, it has been established beyond doubt that deceased died a homicidal death.

10. Now the question before us is whether appellant caused fatal injury to deceased ?

11. It is true that eyewitnesses Babulal (PW-1) and Sukhdev (PW-2) are father and brother of deceased, but their evidence cannot be discarded merely on the ground of their close relationship with the deceased. It is, however, essential that their evidence should be examined with caution and circumspection.

12. Babulal (PW1) deposed that after the feast at about 5:30 o'clock in the evening while he was going back along with his son Sukhdev, he happened to pass from front of the hotel of accused Devi, Sukhdev asked Devi as to why he did not give information about the sale of haystack by Narad Singh. Devi got enraged and after abusing Sukhdev retorted that he was not his servant. When he intervened and tried to pacify both of them, Devi hurled abuses. At that time, his younger son Charli Singh also reached there and asked Sukhdev to go home, but Devi shouted to call his family members. All the accused persons including appellant reached there armed with sword, tabbal, Katarna and lathi. Devi dealt a blow of Katarna on the head of Charli and appellant assaulted him with tabbal on his neck. After receiving injury by tabbal, Charli Singh fell down. When other people of village reached there, accused persons ran away. Charli was taken to hospital at Sagar where he died in the night. He lodged first information report of the occurrence (Ex.P/1) at police station, Banda. Similar statement was given by Sukhdev (PW-2),

Indraj Singh (PW-3), Ramgopal (PW-4), Meghraj @ Paltu (PW-5) and Veer Singh (PW-6). Despite a lengthy cross-examination, all the aforesaid eyewitnesses remained firm on the fact that appellant dealt a blow of tabbal on the neck of deceased as a result of which he fell down. It was suggested to the witnesses that Babulal, Sukhdev and other persons attacked Devi Singh, Kalyan and Dharmendra, but they denied. They also denied that accused persons received any injury in the said incident.

13. It is true that Dr.R.S.Bhojak (PW-7), Medical Officer stated that accused Devi Singh and Dharmendra were brought to Community Health Centre, Banda for examination of their injuries, but he found no external injury on the body of Devi Singh. Devi Singh merely complained about pain in his knee. He further found an old healed abrasion mark on the chest of accused Dharmendra which was simple in nature. Medical reports of Devi Singh and Dharmendra were recorded by him in Ex.P/29 and Ex.P/30. It is important to note that the injuries of aforesaid accused persons were examined by doctor on 25.7.2002 whereas the incident had occurred on 12.7.2002. Though abrasion found on the body of Dharmendra was about two weeks old but looking to the nature of his injury, it cannot be held that he received the said injury at the hand of deceased or members of the complainant party. Non-explanation of such injury by the prosecution witnesses cannot render their testimony suspicious or doubtful. It is further important to note that no report was lodged by anybody from the side of accused persons to indicate that deceased and the members of his family were aggressors.

14. Evidence of Babulal (PW-1) finds support from the first information report Ex.P/1 lodged by him on 13.7.2002 at police station Banda wherein he clearly mentioned appellant assaulted deceased on his neck with a tabbal. The fact that deceased received injury by sharp edged weapon on the neck was further proved by the evidence of Dr.R.K.Dixit and Dr.Ganesh Prasad Mishra (PW-8), who respectively conducted medical examination and postmortem examination of the body of deceased.

15. After a careful scrutiny of the evidence of eyewitnesses viz. Babulal, Sukhdev, Indraj, Ramgopal, Meghraj and Veer Singh, we find that they are reliable witnesses and by their evidence, it has been established beyond doubt that appellant assaulted deceased with a tabbal and caused an injury on his neck as a result of which he died. The finding recorded by the trial Court in this regard is just and proper and calls for no interference.

16. Now the next question before us is whether the conviction of appellant under section 302 I.P.C., in the circumstances of the case, is justified ?

17. Learned counsel for the appellant contended that there is no evidence on record to indicate that there was any motive on the part of appellant to commit murder of deceased. There was no past enmity between them. It was just a spur of the moment affair under which a sudden quarrel occurred in which appellant dealt only one blow of tabbal to deceased which by chance landed on his neck. Babulal (PW-1) and Sukhdev (PW-2) admitted that there was no past enmity or illwill between them and the accused persons. Admittedly, the quarrel had begun between Sukhdev and accused Devi Singh when Sukhdev remonstrated Devi Singh for not informing him about the sale of haystack by Narad Singh. Deceased by chance reached there and tried to intervene in the quarrel whereupon he was assaulted by the appellant. Though it has been stated by the eyewitnesses that accused Devi Singh dealt a blow with Katarna on the head of deceased, but no such injury was found on the head of deceased. Appellant was not present at the scene of occurrence from the beginning. He had come at the place of occurrence hearing the call raised by Devi Singh. Veer Singh (PW-6) stated that appellant picked up tabbal and assaulted deceased in the quarrel.

18. On a close scrutiny of the evidence in respect of the above circumstances, it seems that the incident had occurred in a sudden quarrel when deceased came and intervened, and appellant who was not present at the beginning of the dispute suddenly reached and assaulted deceased with tabbal. In these circumstances, it can only be held established with certainty that he caused injury to deceased with the intention of causing his death or of causing such bodily injury to him as was likely to cause his death, punishable under section 304 Part I of the Indian Penal Code.

19. In view of the above discussion, conviction of appellant under section 302 I.P.C. is modified to one under section 304 Part I of the Indian Penal Code and he is sentenced to rigorous imprisonment for ten years. Appellant is said to be in jail since 23.7.2002. If he has served out the sentence awarded to him, he shall be released forthwith, if not required in any other case.

20. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2013] M.P., 223
CRIMINAL REFERENCE
Before Mr. Justice Rakesh Saksena & Mr. Justice T.K. Kaushal
Cr. Ref. No. 2/2012 (Jabalpur) decided on 11 December, 2012

MOVED BY SESSIONS JUDGE, BURHANPUR ...Applicant
Vs.
JITENDRA & anr. ...Non-applicants

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Dying Declaration **- Deceased was brought to the hospital by appellant No.1 in burnt condition - The dying declarations were recorded by the Executive Magistrate and Police Constable after the arrival of the cousin and mother of the deceased - Statements of cousin and mother not recorded by police - Father of the deceased did not support prosecution case - False version was given by deceased that her husband ran away from the house after committing the offence - Whatever has been stated by deceased appears to be the result of tutoring, frustration and her helplessness - Such dying declarations can not be relied upon - Appellants acquitted. (Para 28)**

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृतिका को अपीलार्थी क्रं. 1 द्वारा जली हुई स्थिति में चिकित्सालय लाया गया – मृतिका के कजिन व माताजी के पहुंचने के उपरांत, कार्यपालिक मजिस्ट्रेट व पुलिस आरक्षक द्वारा मृत्युकालिक कथन अभिलिखित किये गये थे – कजिन व माताजी के कथन पुलिस द्वारा अभिलिखित नहीं – मृतिका के पिता ने अभियोजन के मामले का समर्थन नहीं किया – मृतिका द्वारा मिथ्या कहानी बताई गई कि उसका पति अपराध कारित करने के पश्चात घर से भाग गया – मृतिका ने जो कुछ भी कहा, वह सिखाये जाने, हतात्साहित होने एवं उसकी विवशता के परिणामस्वरुप होना प्रतीत होता है – उक्त मृत्युकालिक कथनों पर विश्वास नहीं किया जा सकता – अपीलार्थीगण को दोषमुक्त किया गया।

Umesh Pandey, G.A. for the applicant/State.
Siddarth Datt, for the non-applicants.

JUDGMENT

The Judgment of the Court was delivered by :
T.K. KAUSHAL, J. :- In respect of Death Sentence awarded to the accused persons by the Sessions Court Burhanpur in S.T No. 82/2011, vide judgment dated 10th July, 2012, wherein accused/appellant Jitendra has been convicted

under section 302/34 IPC and accused/appellant Arti under section 302 IPC for committing murder of Reena (since deceased), Trial court has made reference dated 10th July, 2012 under section 366 (1) of Code of Criminal Procedure, 1973 (in short Cr.P.C) for confirmation. At the same time appeal has been preferred by the accused persons/appellants challenging their conviction and sentence. This judgment shall accordingly, gover disposal of both the aforesaid cases.

2. Facts of the case, in short, are that after about six months of marriage on 11/10/2011 at about 4.00 pm Reena (the Deceased), wife of Appellant no.1 died of burn injuries during treatment in District Hospital Burhanpur. It is alleged that with a view to get rid of the opposition and objection of the Deceased for illicit extra marital relations between the Appellants, they intended to kill the deceased. Same day at about 9.00 am, Appellant no.2 came to the house of the Deceased, Appellant no.1 (husband) caught hold of the deceased and Appellant no.2 poured kerosene from a wick stove on the deceased and threw a burning match stick on her and set her ablaze. Deceased raised noise. Attracted by shrieks, from neighbouring house Savitri (PW-2) rushed to the spot and tried to extinguish fire by putting a bed sheet on the deceased. Deceased was brought to hospital in a tempo by some neighbouring persons. Appellants fled away from the scene of occurrence.

3. At about 9.30 am the deceased was examined by Dr. Dilip Patidar (PW-9) in District Hospital Burhanpur. She was admitted in hospital with a history of burn by stove kerosene. Dr. Dilip Patidar (PW-9) prepared MLC note Ex.P-9 and admitted the patient for further treatment. At about 10.30 am, sent its information to police Lalbag (Burhanpur). Reva Ram, ASI (PW-11) from police station rushed to the hospital. He sent a letter of request to Executive Magistrate for recording dying declaration of the deceased. Rajendra Gupta, Superintendent, Land Records-cum-Tehsildar (PW-12) reached to hospital. Dr. Dilip Patidar (PW-9) examined fitness of the patient. Then Executive Magistrate (PW-12) recorded her dying declaration Ex.P-11 between 12.15 pm to 12.30 pm in hospital.

4. Reva Ram, ASI (PW-11) at 12.30 pm recorded Dehati Nalishi Ex.P-13 as narrated by the deceased to him in hospital itself. In dying declaration Ex.P-11 and Dehati Nalishi Ex.P-13 deceased named the appellants and narrated the incident. On the basis of Dehati Nalishi Ex.P-13 at police station Lalbag, Leeladhar Chouhan, S.I (PW-13) registered FIR (Ex.P/14) under section 307 IPC against the appellants. In hospital, PW-13 recorded

statement of the deceased under section 161 Cr.P.C. Reaching at the residence of the deceased, vide Ex.P-4 Seizure Memo, he seized stove, kerosene smeared soil, half burnt clothes, chair etc. In the meantime, Sheela, aunt of the deceased (PW-3), Kailash, father of the deceased (PW-4), Gulab Salve, cousin of the deceased (PW-8), and Bachchala Bai, mother of the deceased (PW-14) also reached hospital and met deceased. At about 4.00 pm deceased succumb to the burn injuries and died. At about 4.30 pm police registered a marg Ex.P-5. Police prepared Naksha Panchayatnama of dead body of the deceased Ex.P-8 in presence of the witnesses. At about 6.00 pm Dr. Dilip Patidar (PW-9) and Dr. Rehana Bohra conducted postmortem of dead body of the deceased and prepared postmortem report Ex.P-10, opining the cause of death to be excessive burn injuries and also preserved viscera of the deceased for further examination. On 12/10/2011 vide arrest memo Ex.P/20, appellant Jitendra and on 14/10/2011 vide arrest memo Ex.P/19 appellant Arti was arrested by police.

5. During investigation, police recorded statements of eight witnesses. Police sent seized articles for chemical examination to Forensic Science Laboratory, Sagar. After completing investigation, police submitted a charge sheet in the court of concerned Judicial Magistrate First Class. Case was committed to the Sessions Court for trial. Trial court framed charges under section 302 IPC and in alternative under section 302/34 IPC against the appellants. Appellants abjured guilt and pleaded innocence.

6. To substantiate the case of prosecution statements of Girja Bai, neighbour (PW-1), Savitri Bai, another neighbour (PW-2), Sheela Bai, aunt of the deceased (PW-3), Kailash, father of the deceased (PW-4), Virendra, witness of seizure (PW-5), Santosh, another witness of seizure (PW-6), Chain Singh Chouhan, Head Constable, who recorded marg (PW-7), Gulab Salve, cousin of the deceased (PW-8), Dr. Dilip Patidar, who conducted MLC and prepared postmortem of the deceased (PW-9), Ramesh Taiyde, Patwari, who prepared spot map (PW-10), Reva Ram, ASI (PW-11), Rajendra Kumar Gupta, Executive Magistrate (PW-12), Leeladhar Chouhan, SI (PW-13), and Bachchala Bai, mother of the deceased (PW-14) were recorded. After appreciating the aforesaid evidence, trial court placing reliance on the dying declarations and on other evidence, convicted and sentenced the appellants as above.

7. Sessions Judge vide order dated 10.7.2011 referred the proceedings of trial as required under Section 366 Cr. P.C. to this Court for confirmation

of death sentence. On perusal of entire record there appears no need of any further inquiry or additional evidence for ascertaining the fact of guilt or innocence of the accused persons. Record of .the trial court has been perused carefully by us in this regard.

8. Challenging the impugned judgment, an appeal has been preferred by accused persons on the grounds that trial court failed to appreciate prosecution evidence in right perspective. From amongst dying declarations Ex.P/11 recorded by Tehsildar, Ex.P/13 recorded by ASI as Dehati Nalishi and Oral Dying Declarations made by the deceased to her mother and cousin, none is worth reliance. They are inconsistent, untrustworthy, and incredible. Such dying declarations cannot be made the basis of conviction. Evidence of mother and cousin of deceased being biased and motivated, cannot be relied upon. Conviction is bad in law. Death Sentence awarded by the trial court is harsh and uncalled for. Trial court has erred in holding it to be one of the "rare of the rarest" case. On the other hand, learned Government Advocate supported the impugned judgment and opposed the appeal. Learned Government Advocate further prayed for confirmation of the death sentence in response to the reference made by the trial court.

9. According to Dr. Dilip Patidar (PW-9), deceased was brought by her husband, appellant No.1 to the hospital at 9:30 a.m. in burnt condition with a history of burn by kerosene stove. PW/9 found about 96% burn on her body and also found smell of kerosene. PW/9 referred the patient to Female Surgical Ward for further treatment. On the same day at about 6:00 p.m., he, and one more doctor performed postmortem of the deceased and found cause of death to be anti-mortem burn injury sustained by deceased. Postmortem report Ex. P/10 was prepared by team of two doctors viz. Dr. Dilip Patidar (PW/9) and Rehana Bohra. In view of the aforesaid, it remains no longer disputed that deceased died of anti-mortem burn injuries sustained by her within 24 hours. However, there is no specific evidence regarding proof of mode of death either to be homicidal or otherwise.

10. In respect of dying declaration Ex. P/11 Dr. Dilip Patidar stated that on being summoned by executive magistrate in female surgical ward he examined the deceased and found her to be in fit condition for recording dying declaration. After completion of dying declaration, he again examined the deceased about her fitness and certified these facts on dying declaration Ex. P/11. This suggestion has been denied by the witness that deceased being under the influence of the sedative drugs and due to excessive burn injuries

was not able to speak. On the other hand, PW/9 categorically stated that deceased remained in fit condition during process of recording of dying declaration. Rajendra Gupta, Tehsildar (PW/12) was working as Superintendent, Land Record but also holding the charge of Office of Tehsildar at Burhanpur. On being informed by Police he reached in hospital and after receiving certificate of fitness from doctor he recorded dying declaration Ex. P/11. He recorded it in the form of question answer. According to him the deceased was in a fit condition and was speaking properly. PW/12 obtained thumb impression of the deceased on the dying declaration Ex. P/11.

11. On careful perusal of dying declaration Ex. P/11 and statements of doctor PW/9, and Executive Magistrate (PW/12), there appears no lapse in mode of recording the aforesaid dying declaration. Due and sufficient precautions has been taken by executive magistrate. He has properly recorded version of the deceased as given by her.

12. R.R. Chouhan, ASI (PW/11) recorded Dehati Nalishi Ex. P/13, according to version given by the deceased to him. ASI PW/1 2 also consulted treating doctor and after ensuring fitness of the deceased took down Dehati Nalishi (Ex.P/13) in the hospital. Thumb impression of the deceased was taken on it. Suggestion, that the deceased due to excessive burn injuries and being under influence of sedative drugs was not able to speak is clearly denied by ASI (PW/11). Rather he has specifically stated that deceased was speaking clearly. Hence, both Dying Declarations appear to be free from technical flaws.

13. It is submitted by learned counsel for the appellants that there are discrepancies in both dying declarations regarding the fact that who brought the deceased to hospital. In Ex.P/11, in reply to the question no.5 deceased stated that her husband/appellant and family members brought her to hospital. In Ex.P/13 deceased stated that appellant fled away from the spot and neighbouring persons of the locality brought her to hospital in a tempo. Contention of the learned counsel was that both these dying declarations have been recorded almost simultaneously i.e. at about 12.15 pm Ex.P/11 was recorded by Executive Magistrate and at 12.30 pm Dehati Nalishi was recorded by ASI in hospital itself. These discrepancies being of important nature cannot be ignored because it shows mind set of the deceased. Our attention has been drawn to MLC Report Ex.P/9 recorded by Dr. Dilip Patidar (PW/9) at 9.30 am, in which it has been mentioned that patient was brought to hospital by her husband i.e. appellant no.1. PW/9 stated this fact in his court statement also.

14. At Police Station Lalbag, Burhanpur at 10:30 a.m. information regarding admission of patient in hospital was taken down at Sana No.504. Compounder Suresh Chourey telephonically informed to police that deceased sustained burn injuries at her house by stove and was admitted in hospital brought by her husband Jitendra. This Rojnamcha was submitted with charge-sheet.

15. It appears that there is a material discrepancy in both the dying declarations regarding the fact whether the deceased was brought to hospital by appellant/husband or appellant/husband fled away from the spot and was brought by neighbours. In addition to these two written dying declarations Ex. P/11 and Ex. P/13 trial court relied upon evidence of oral dying declarations made by the deceased in hospital to her relatives and family members. It is not out of place to mention that doctor being an independent person can be relied upon safely in this regard. Meaning thereby fact that appellant No.1 brought the deceased to the hospital for treatment stands proved by prosecution evidence.

16. Learned Government Advocate, per contra, submitted that sudden disappearance of appellant No.1 from the hospital thereafter shows his guilty mind and written dying declarations do not contain any material discrepancies in so far as acts of appellants in the incident is concerned. Deceased gave a consistent version in both the dying declarations to both the authorities i.e. Doctor and ASI, respectively.

17. Prosecution cited as many as five witnesses to whom deceased told the incident in hospital implicating the appellants i.e. Savitri (PW/2), Sheela Bai (PW/3), Kailash (PW/4), Gulab (PW/8) and Bachchala Bai (PW/14). Savitri (PW/2) is an immediate neighbour reached on the spot first in time and extinguished the flames. She accompanied the deceased upto hospital also. She denied the fact that deceased told to her names of the appellants and admitted the fact that appellant No.1 brought the deceased to hospital. PW/2 did not support the prosecution and was declared hostile. PW/2 in para 6 of her cross-examination stated that she found door of the house closed from inside and managed to get it opened with the help of a boy who entered in the house from backside. It is not out of place to mention that R.R. Chouhan, ASI (PW/11) who reached to hospital at about 11:00 a.m, saw PW-2 sitting nearby the deceased in hospital.

18. Sheela Bai (PW/3) met the deceased in hospital. She saw all her

relatives including PW-14, mother of deceased sitting there. Deceased narrated her the incident holding the appellants responsible for these burn injuries.

19. Kailash, father of the deceased (PW/4) stated nothing against the appellants, saying deceased did not narrate anything to him in hospital. PW/4 was declared hostile. He disowned his previous statement Ex. P/3. He remained present in hospital alongwith her relatives till deceasçd died.

20. Gulab Salve, cousin of the deceased (PW/8) reached to hospital after receiving message. According to him, deceased stated that appellant No.1 caught hold of her and appellant No.2 poured kerosene. Door of her house after the incident was opened by some woman relative. After about two hours of conversation deceased died. PW/8 received information at about 10:00 a.m. and reached hospital within 30 minutes. He informed his other family members by mobile about the incident. Within 30 minutes, they all reached the hospital. It is pertinent to note that PW/8 did not tell anybody that deceased told to her that appellants killed her. Baçhchala Bai, mother of the deceased (PW/14) was also informed by the deceased against the appellants. PW/14 also did not tell it any body that her daughter named the appellants as author of the incident.

21. It is apparent from the evidences of aforesaid five witnesses that Savitri Bai (PW/2) and Kailash, father of the deceased (PW/4) did not support the prosecution. They did not say anything against the appellants. Sheela Bai, Aunt of the deceased (PW/3), Gulab Salve, cousin of the deceased (PW/8) and Bachchala Bai, mother of the deceased (PW/14) stated that deceased told to them that appellant No.1 caught hold of her and appellant No.2 poured kerosene and ignited her. PW/8 reached hospital at about 11:00 a.m. After 30 minutes thereof PW/14 reached there and after sometime PW/8 also reached in the hospital. Officers who recorded dying declaration also reached at about 12.00 pm and after removing all persons from the room they recorded dying declarations Ex. P/11 and Ex. P/13.

22. In this case it has come on record that appellant no.1 Jitendra accompanied the deceased from house to hospital and at about 9.30 am in his presence the deceased was examined by doctor and admitted in hospital for further treatment. Savitri Bai(PW-2) was also there till Reva Ram, ASI(PW-11) reached there. Deceased was admitted in hospital with history of burn injuries of kerosene stove. At about 11.00 am, Gulab Salve, cousin of the deceased (PW-8) reached to hospital and informed his relative about the

incident. After about 30 minutes, Bachchala Bai, mother of the deqeased(PW-14) also reached to hospital though she stated that father of appellant informed her on telephone about the incident. Sheel Bai, aunt of the deceased (PW-3) also reached hospital thereafter. They met the deceased then deceased told to them against the appellants. Thereafter at about 12.00 pm Executive Magistrate came and recorded dying declaration and then police officer recorded another dying declaration by way of Dehati Nalishi.

23. It is further pertinent to note that police did not record statements of cousin Gulab Salve (PW/8) and mother Bachchala Bai (PW/14). Alongwith charge-sheet, police statements of eight witnesses namely (1) Girja Bai, neighbour (PW-1), (2) Savitri Bai, another neighbour (PW-2), (3) Sheela Bai, aunt of the deceased (PW-3), (4) Kailash, father of the deceased (PW-4), (5) Reena Bai, W/o Jitendra (6) Godu, S/o Kadu, (7) Aruna, W/o Madhukar Mahar and (8) Rohidas have been submitted. Meaning thereby cousin PW/8 and mother of deceased PW/14 have not been interrogated by police during investigation. In view of the above facts and circumstances, statements of cousin PW/8 and mother PW/14 in respect of the oral dying declaration made by deceased to them appear suspicious and cannot be relied upon.

24. Naming of appellants by deceased to Executive Magistrate and ASI at the time of recording of dying declarations, appears to be a result of helplessness, frustration and anger of the deceased because of extra marital relation of her husband with girl Arti after having consultation or suggestion from her cousin and mother. Whatever has been stated by PW/4, PW/8 and PW/14 reproducing as a version of the deceased told to them in hospital, prior to recording of Ex. P/11 and Ex. P/13 (written dying declarations), appear more to be a perception and suggestion of their own. Expression of the deceased to Doctor in hospital at first instance and to PW/2, PW/3, PW/4, PW/8, PW/ 9 and PW/14 is suggestive of something else. Evidence of PW/2, PW/4 and PW/9 leads us to the theory of accidental burn or suicide.

25. Evidence of dying-declaration is to be normally respected, accepted and believed by the courts at their face value. It is presumed that a person, about to die, does not tell lie. Dying Declarations can be doubted or disbelieved if some lapses or defects in mode of recording occur or there has been some occasion or probability of prompting and tutoring of the deceased. In present case, Executive Magistrate and Police Officer both have recorded respective dying declarations with utmost care and caution. But it would be essential to examine that whatever was stated by the deceased to them was a true version

of occurrence or was actuated or motivated untrue version. Conduct of the appellants and deceased is of most vital considerations. There is sufficient evidence on record to show that appellant no.1 had extra marital affair with appellant no.2 which was not acceptable to the deceased. Appellant no.2 was a divorcee lady living alone in neighborhood. According to dying declaration Ex.P/11 there had been a quarrel between husband and wife about his relationship with deceased two days prior to the incident.

26. In view of the fact that whatever had been narrated by the deceased to officers in Ex.P/11 and Ex.P/13 was not a completely true version because she added false facts regarding fleeing of the appellants from the spot in Ex.P/13, whereas she was brought by her husband/appellant no.1 at 9.30 am in hospital after the aforesaid incident. These statements have been recorded after about 2 hours of the hospitalization, when the deceased had an opportunity to meet her cousin, mother and aunt and after that dying declarations were recorded by Executive Magistrate and ASI. It is submitted by learned counsel for the appellants that possibility of prompting and tutoring cannot be ruled out. Dying declaration needs critical examination. In the back drop that cousin (PW/8) and mother (PW/14) deposed the fact of oral dying declaration in trial court for the first time, their evidence appear unworthy of credit.

27. For ascertaining sanctity and reliability of the dying declarations mind set of the deceased at the time of deposing the declarations has to be taken into consideration. Dying declarations Ex. P./11 and Ex. P/13 are suffering from material discrepancy. It shows the inclination of the deceased to implicate appellants in this incident occurred in the house at 9.00 am. In Dying Declarations, it has been stated by the deceased that appellant no.1/husband caught hold of her and appellant no.2 poured kerosene and set her abalaze. While a part of the dying declaration has been found not to be true then remaining part of the dying declaration can be relied upon or not, has to be examined. These are the important circumstances which emerge out from the record:

(1) After incident of burning at 9.00 am in the house, Deceased was brought to hospital for treatment by appellant no.1.

(2) Deceased was admitted in hospital with a history of burn by kerosene stove without implicating any person responsible for burning her.

(3) At about 11.00 am cousin of the deceased (PW-8) reached hospital and within half an hour her aunt (PW-4) and mother (PW-14) also reached the hospital. They met the deceased. Though Deceased told to them against the appellants, but cousin PW/8 and mother PW/14 did not disclose the version of deceased to anybody during entire process of investigation. It is pertinent to note that father of deceased P/4 did not say anything against the appellants and disowned his previous statement made to police during investigation.

(4) Possibility of tutoring, of deceased in hospital by PW/4, PW/8 and PW/14 also cannot be ruled out because initially appellant husband took the deceased to\hospital for treatment but after arrival of PW/8 and PW/14 in the hospital he disappeared from the scene.

(5) Appellant no.1 is said to have caught hold of the deceased, and appellant no.2 poured kerosene and set her ablaze. Risk of falling of kerosene and catching fire of appellant no.1 was also there. Person with such conduct, in next breath, cannot be expected to take the deceased to hospital, it is against common sense of a prudent man.

(6) Presence of appellant no.2 in the incident was not stated by any of the prosecution witnesses, rather she was arrested after three days of the incident from the same locality. Woman of such courage who can come to somebody elses' house to burn a woman alive in her own house, could not have remained so passive and silent at the time of marriage of the appellant and the deceased.

(7) Extra marital illegal relations between the appellants *was a cause of differences, quarrel and frustration to the deceased with appellant no.1. Theory of suicide in present situation therefore appeared to be more probable.*

28. As discussed above, it seems established from evidence that deceased was unhappy and frustrated with extra marital relations between the two appellants. On the day of the incident, at about 9:00 a.m. from her matrimonial house, the deceased, having sustained burn injuries was brought to hospital

by her husband/appellant No.1 and a neighbour Savitri Bai (PW/2). It was informed in the hospital that deceased caught fire by kerosene stove. After about two hours, family members of deceased gathered in the hospital. They had discussion with the deceased. At 12:15 p.m. Executive Magistrate recorded dying declaration Ex. P/11. At 12:30 p.m., R.R. Chouhan, ASI (PW/11) recorded dehati nalishi/dying declaration Ex.P/13 in which it was stated by the deceased that appellant No.1 caught hold of her and appellant No.2 poured kerosene and set her on fire. Deceased, however, gave a false version in subsequent dying declaration that husband ran away from the house after committing the incident. Cousin (PW/8) and mother of the deceased PW/14 did not disclose the fact to police or to anybody that deceased was blaming the appellants for this incident. They appeared in the trial court for the first time to depose aforesaid facts. Father of the deceased (PW/4) did not support the prosecution. In these circumstances, oral dying declaration, in our opinion, lost credibility. Similarly, dying declarations P/ll and P/13 also cannot be relied upon. Whatever has been stated by the deceased in dying declarations against the appellants seems to be a result of tutoring, frustration and her helplessness. Such dying declarations, in our opinion, cannot be made the basis of conviction.

29. Trial court has based the conviction on the evidence of dying declarations. Evidence of dying declarations in the present case, in our opinion, is not reliable though these do not suffer from any technical flaw in so far as its mode of recording is concerned but the deceased seems to have not stated the truth in these dying declarations. Contentions of dying declarations did not find corroboration from surrounding circumstances. Helping attitude of husband/appellant has been admitted by deceased in one of the dying declarations. Such conduct of appellant also belies truthfulness of the dying declaration. In the facts and circumstances of the case, it seems not safe to rely upon these dying declarations in absence of corroboration. In our considered opinion, no conviction can be based on the evidence of these dying declarations.

30. In our opinion, conviction and sentence of appellants is unsustainable, hence set aside. They are acquitted of the charges under Sections 302 and 302/34 IPC. Accordingly, reference made by Sessions Court is rejected. Appeal is allowed. Appellants be released forthwith, if not required in any other case.

Appeal allowed.

I.L.R. [2013] M.P., 234
INCOME TAX APPEAL

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

I.T.A. No.202/2010 (Jabalpur) decided on 4 December, 2012

AARTECH SOLONICS LTD. (M/S) ...Appellant

Vs.

THE COMMISSIONER OF INCOME TAX ...Respondent

Income Tax Act (43 of 1961), Section 80-IC - Deduction under **- Appellant manufacturing advanced microprocessor based Fast Bus Transfer Scheme for Power Generation segment - Contention of appellant that it is a manufacturing process - The CIT (Appeal) considered the matter in a different aspect while the Tribunal had looked into the expenditure aspect and also in respect of the employment of certain persons - None of the authorities had considered how product namely Fast Bus Transfer Scheme Panel is manufactured or assembled - Held - Unless and until some technical expert person examines this aspect, the nature of the product cannot be ascertained whether this is a manufacturing process or is an assembling process. (Para 5)**

आयकर अधिनियम (1961 का 43), धारा 80.IC – के अंतर्गत कटौती – अपीलार्थी बिजली उत्पादन खंड हेतु फास्ट बस ट्रान्सफर योजना पर आधारित आधुनिकतम माइक्रोप्रोसेसर बनाता था – अपीलार्थी का तर्क कि यह एक विनिर्माण प्रक्रिया है – सीआईटी (अपील) ने मामले पर भिन्न पहलू से विचार किया जबकि अधिकरण ने खर्चे के पहलू को देखा और साथ ही कतिपय व्यक्तियों के नियोजन के संबंध में भी देखा – प्राधिकारियों में से किसी ने भी विचार में नहीं लिया कि फास्ट बस ट्रान्सफर योजना पेनल नाम के उत्पाद का विनिर्माण एवं संयोजन कैसे किया जाता है – अभिनिर्धारित – जब तक कि कोई तकनीकी विशेषज्ञ इस पहलू का परीक्षण नहीं करता, उत्पाद का स्वरुप सुनिश्चित नहीं किया जा सकता कि क्या यह एक विनिर्माण प्रक्रिया है अथवा एक संयोजन प्रक्रिया है।

Cases referred :

(2010) 320 ITR 546, (2010) 320 ITR 665, (2012) 210 Taxman 237.

Sumit Nema, for the appellant.
Sanjay Lal, for the respondent.

ORDER

The Order of the Court was delivered by : **KRISHN KUMAR LAHOTI, J.:** This writ appeal was admitted on 1.12.2010 on the following substantial question of law:-

> "Whether, the Tribunal, in arriving at a conclusion that the assessee has not assembled any product at all, exceeded its jurisdiction and scope of the proceedings before it by coming to a different factual finding totaling beyond the issue arising out of the first appellate order?"

2. Facts of the case are that the appellant is engaged in the business of manufacturing electrical goods. It is having its one unit at Mandideep, District Raisen and another at Parwanoo, District Sonal (H.P.). The appellant's unit at Mandideep is manufacturing electrical goods which are used in the distribution/ transmission of power, while its Parwanoo unit is manufacturing electrical goods which are used in generation of the power. The dispute is in respect of nature of product of Parwanoo unit of the appellant which is manufacturing Advanced Microprocessor based Fast Bus Transfer Scheme for power generation segment. The contention of the appellant is that it is a manufacturing process while the Tribunal has found that it was an assembling process, while the Commissioner of Income Tax (Appeal) had found that it was a product manufactured by the appellant. Learned counsel appearing for the appellant at the outset submitted that none of the authorities had examined the matter in proper perspective. Looking to the complex of the product, the authorities ought to have obtained an expert's opinion in this regard or the matter ought to have been referred to a panel of the experts to examine the nature of the product manufactured by the appellant at Parwanoo unit. Reliance is placed by the appellant to three judgments of the Apex Court in *Commissioner of Income Tax Vs. Oracle Software India Ltd.* (2010) 320 ITR 546, *Commissioner of Income Tax Vs. Emptee Poly-Yarn P.Ltd* (2010) 320 ITR 665 and recently in *Morinda Co-operative Sugar Mills Ltd. Vs. Commissioner of Income-tax, Chandigarh* (2012) 210 Taxman 237 and submitted that this matter may be remitted back to the assessing officer for a fresh decision after obtaining an opinion of the expert in respect of the nature of the product or to refer the matter to a panel of experts of department who would examine the nature of product.

3. Shri Sanjay Lal, learned counsel appearing for the department has opposed the aforesaid contention and submitted that in view of the findings recorded by the Tribunal, there is no need to remand the matter and this appeal may be dismissed. He has placed reliance to the order passed by the Tribunal in this regard.

4. To appreciate the rival contention of the parties, we have gone through the record. Relevant paragraphs of the order Annexure A/4 dated 23.3.2009 passed by the CIT (Appeal) deserves to be referred, which read as under:-

> "4. .....In my considered view, the appellant is engaged in manufacturing activity, which entitles it to the statutory relief contemplated under the provisions of section 80IC. I am fortified in my belief by the letter No.SWCA/PWN/Regn/1272 dated 29.12.2008 addressed to the Assessing Officer by Member Secretary, SWCA, Parwanoo, District Solan, H.P. which is reproduced below for ready reference; Pl. see Annexure.
>
> 4.1 Even so, I consider it imperative to dwell on the issue, if only for the satisfaction of the Assessing Officer. The word "manufacture" has not been defined anywhere in the Act. The "manufacture" has originated from the latin word "manus" which means "hand" and the word "facere" which means "to make". In origin, therefore, the word "manufacture" implied making of anything by hand, but with the passage of time and in the context of industrial development the word has acquired a number of shades of meanings. In connection with industry or an industrial undertaking, two shades of meaning as are given in the Oxford Dictionary Vol.6 are important. The first is "the action or process of making articles on a large scale by the application of physical labour or mechanical power. The second is transforming of raw materials into a commercial commodity or a finished product which has a separate identity. The second shade of meaning is more appropriately used in the past participle" manufactured.
>
> 4.2. The words "make", "manufacture" and "produce" envisage turning out of finished products by the shaping or

combination of raw materials or parts. What is manufactured or produced in the undertaking should be a marketable, new and distinct commercial commodity. According to Corpus Juris Secundum, "manufacturing" is the activity in which the original material undergoes a transformation so that a new and different article or product emerges; but what constitutes a new and different article is a question which has caused considerable difficulty to the Courts. The word "manufacture" as a verb has been defined in Black's Law Dictionary as making of goods or wares by manual labour or by machinery especially on large scale." The word "manufacture" as a noun has been defined therein to mean "the process or operation of making goods or any material produced by hand, by machinery or by other agency; anything made from raw materials by hand, by machinery or by art; the production of articles for use from raw or prepared materials by giving such materials new forms, qualities, properties or combinations whether by hand, labour or machine." In the same book, again, the words "manufacturer" has been described as one who by labour or for skill transforms raw materials into some kind of finished product or article of trade.

4.3. It has to be borne in mind that no person manufactures all the various parts that go into the making the new product, by himself. It is imperative that the manufacture of some components is outsourced. Thus in automobile industry, the manufacturing of the electrical equipment is outsourced to more than one suppliers, tyers are sourced from others, paint is obtained from elsewhere so much so the filters and batteries are also gotten from outside. Viewed strictly, it may look like assembling things, but that is not correct for the simple reason that all these items go into making of a car, a scooter or even a truck, which is an entirely different endproduct. Taking the case of a comparatively simpler product like a refrigerator or ever an air conditioner, the main component like the compressor is generally obtained from other manufacturers. Viewed narrowly, one may regard the manufacturing of refrigerators and air conditioners as mere assembling of parts. Obviously,

one should not be guided by narrow considerations in deciding whether an activity amounts to manufacturing or merely assembling. Nor should the facts like the value of machinery or power-driven machines owned by the assessee or the total area of space occupied by the assessee be considered as material factors in deciding the issue as to whether the assessee is a manufactureror not.

4.4. In the matter under consideration, the Assessing Officer seems to have been influenced by the considerations like low power bills, low number of employees, lesser expenses under other heads. The fact, none the less, remains that the appellant is engaged in producing customized sophisticated equipment for its buyers, which is totally different from the parts used in making the same. In my considered opinion, this activity can be very safely regarded as manufacturing that entitles the appellant to the incentive provided under the provisions of section 80IC. In the premise, the impugned disallowance is deleted."

The Income Tax Appellate Tribunal considered this aspect in paras 6 & 7 of the order Annexure A/7 dated 31.8.2010, which reads thus:-

"6. We have carefully considered the issue in view of the orders of the lower authorities, rival submissions and material placed on record. In our considered opinion, the submission of the Id. CIT DR that the Ld. CIT(A) has discussed the issue only with reference to the legal aspect as to what constitutes manufacturing, is correct. It is seen from the copies of the balance sheet and profit and loss account placed in the paper book that the assessee had incurred nominal manufacturing expenses of Rs.34,820/- only at Parwanoo Unit, of which Rs.13,955/- is on cartage and loading, the electrical consumption is only Rs.8360/- and the labour charges are shown at Rs.11,705/- only. It is seen from the certificate date 29.12.2008 given by the Member Secretary, S.W.C.A. Parwanoo of the Department of Industries that on the date of inspection on 29th December, 2008, three technical persons and one office staff were present at the factory site in Parwanoo

Unit of the assessee. It has also been stated in the aforestated certificate dated 29th December, 2008, that on enquiry, the three technical persons and one office staff present at the site, informed the Member Secretary, S.W.C.A., Parwanoo that the equipments being assembled were to be supplied to Thermal/Hydro Plants to be used as protective system in the power generation system and the equipment was a big panel (Almirah Type), fitted with electronic circuit inside.

7. It is very clear that as on 29th December, 2008, i.e. nearly 21 months after the end of the financial year 2005-06, relevant to assessment year 2006-07 i.e. the year under consideration, the only staff available at Parwanoo Unit during the course of inspection were only three technical persons and one office staff. It is also very clear that wages of Rs.11,705/- debited to the accounts for assessment year 2006-07 was not even sufficient to make payment to even one person and obviously the three technicians qualified to carry out the highly skilled and sophisticated jobs could not have been employed at Parwanoo with meager cost of less than Rs.1,000/- per month. It can be very well understood that complicated manufacturing or assembling could not have been done by the three technical persons and one office staff even in financial year 2008-09 r.t. 29.12.2008 i.e. the date of inspection and the only equipment seen during inspection was a big almirah type panel with electronic circuit. Thus, it is very clear that the certificate given by the authority in any way does not prove that the manufacturing activity of a large scale giving rise to huge turnover and substantial profit in financial year 2005-06 r.t. Assessment year 2006-07 was carried out, or it was going on at Parwanoo Unit even on 29th Dec., 2008. The manufacturing expenses and the wages claimed at Parwanoo Unit as per the balance sheet and profit and loss account as on 31st March, 2006, as discussed earlier, were too meager to justify any complicated and highly skilled manufacturing or technical process during financial year 2005-06, r.t. in assessment year 2006-07. It is very clear that the claim of the assessee that the Parwanoo Unit had gone into operation at a

large scale and was in a position to manufacture or assemble equipment giving rise to sales of Rs.1,54,53,000/- and a net profit of Rs.96,47,831/-, which is more than 60% of the total turnover claimed for Parwanoo Unit, is not justified. We are, therefore, of the considered opinion that the claim of the assessee for deduction u/s 80IC is not justified, in view of the foregoing discussion. In our considered opinion, the equipment shown in the balance sheet, the certificate of the Industry Authorities, discussion at page 2 of the assessment order, the machinery shown in the certificate and the manufacturing expenses clearly show that the assessee had made a wrong claim of its turnover and its profit of Parwanoo Unit and it was not possible to run the unit by incurring labour expenses of Rs.11,705/- and to manufacture or assemble the sophisticated equipment as per description given by the assess itself in its written submission. The submission of the Learned Counsel that the Directors were technically qualified and they had guided the process of assembling and manufacturing is also not considered correct, because the total traveling of the Director for the Parwanoo Unit is shown at Rs.1,21,957/- only and it has been admitted that the Directors were stationed at Bhopal and not at Parwanoo. Even if the technically qualified Directors would have been supervising and guiding the work, the technical staff was not available at the Parwanoo Unit to carry out the manufacturing and assembling by incurring Rs.11,705/- on labour charges and even with the help of three technicians and one office staff as per the Inspection Report dated 29th December, 2008, it was impossible to carry out manufacturing and assembling of very sophisticated equipment and machinery, which was being produced in collaboration of the U.S. concern and was being supplied to very big technological giants like BHEL, SIEMENS etc. The decision of the Ld. CIT(A) cannot, therefore, be sustained. Since the assessee has not carried out any manufacturing or assembling at Parwanoo Unit, we do not consider it necessary to go into the legal aspect as to what constitutes manufacturing for the purpose of deduction u/s 80IC of the Income tax Act, 1961. The order of the Ld. CIT(A) is, therefore, reversed and the action of the AO in rejecting the

claim of the assessee for deduction u/s 80IC is sustained in view of the foregoing discussion."

5. It appears that both authorities have not considered the process for manufacture of the product. The CIT (Appeal) had considered the matter in a different aspect while the Tribunal had looked into the expenditure aspect and also in respect of the employment of certain persons. The Tribunal was of the opinion that without assistance of the technical persons, no such product could have been manufactured, while finding of the CIT (Appeal) was based entirely on a different footing but the fact remains that none of the authorities had considered how product namely Fast Bus Transfer Scheme Panel is manufactured or assembled. Until and unless some technical expert person examines this aspect, the nature of the product cannot be ascertained whether this is a manufacturing process or is an assembling process. The Apex Cout in *Oracle Software India Ltd.* (supra) considering similar questions held that in each case when a issue of this nature arises for determination, the Department has to study the actual process undertaken by the assessee. If an operation/ process rendered a commodity fit for use for which it would otherwise not be fit, the operation/process fell within the meaning of the word "manufacture".. Therefore, in each case, where a issue of this nature arises for determination, the department should study the actual process undertaken by the assessee. In *Emptee Poly-Yarn P. Ltd* (supra), the Apex Court considering the similar issue held that repeatedly the Apex Court have recommended to the Department, be it under Excise Act, Customs Act or the Income-tax Act, to examine the process applicable to the product in question and not to go only by dictionary meanings. This recommendation is not being followed over the years. Even when the assessee gives an opinion on a given process, the Department does not submit any counter opinion wherever such counter opinion is possible. The Apex Court considering the issue in *Morinda Co-operative Sugar Mills Ltd.* (supra) reiterated the law, held in para 9 thus:-

> "This Court has repeatedly told the Department that, in all such cases, they should have a panel of experts who may be engaged in appropriate cases so that the cases need not be remitted. We do not express any opinion on the merits of the case. We give liberty to the advocates on both sides to cite appropriate judgments of this Court which have laid down the test as to when an operation becomes 'manufacture'. We have

laid down the test in one of the cases, namely, *Oracle Software India Ltd.*, (supra)."

6. In the light of the aforesaid judgments, if we look into factual aspects in the present matter, we find that as per case of the appellant, it was a hyper technical process of manufacturing which was placed before the CIT (Appeal). The CIT (Appeal) in para 3.3 of the order referred the process for manufacturing but had not evaluated/got examined aforesaid process through a technical person. Before it, when the matter was before the Assessing Officer, such process was not followed. Even before the Tribunal, though such issue was raised but the Tribunal had considered the matter in a different perspective and turned down the case of the assessee merely on the grounds that there was no adequate expenditure in the process of manufacturing of the aforesaid product and the persons who were employed were not technical. The Tribunal had only considered that on perusal of the receipts, the expenditure was very low and the profit was high. On these grounds, the order of CIT (Appeal) was turned down by the Tribunal. In our considered opinion, in view of the law laid down by the Apex Court in aforesaid three judgments, we find it appropriate that the matter ought to have been examined by the Assessing Officer through the assistance of technical person or a committee of technical persons, if available in the department, but it appears that such process was not followed and the product of the appellant was not found to be manufactured. Though the CIT (Appeal) had found that it was a manufacturing process, but the Tribunal has turned it down. In view of aforesaid, we find it appropriate to remand the matter to the Assessing Officer to call an opinion of the expert in the subject or if panel of experts is available in the department, to take assistance of such panel and after getting an opinion of the experts, to decide that the product namely "Microprocessor based Fast Bus Transfer Scheme Panel" is a product by manufacturing or only an assembled item and thereafter, to decide the matter in accordance with law.

7. In view of aforesaid, this appeal is allowed and the matter is remanded to the Assessing Officer. The Assessing Officer on receipt of this order shall issue a notice to the appellant and thereafter shall proceed in the matter in accordance with law, as directed hereinabove.

Considering facts of the case, there shall be no order as to costs of the appeal.

Appeal allowed.

I.L.R. [2013] M.P., 243
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
M.Cr.C. No.982/2012 (Jabalpur) decided on 7 May, 2012

C.K. CHAWLA ...Applicant
Vs.
SHISHIR JAIN. ...Non-applicant

Negotiable Instruments Act (26 of 1881), Section 138 - Condonation of delay **- Whether the accused is entitled for opportunity of hearing before condoning the delay - In absence of any provision enabling the accused to participate in the inquiry into condonation of delay in filing the complaint under the Act, which is a special Statute, the matter lies exclusively between the complainant and the Court - It is only after the process is issued, the accused can question legality or otherwise of the order condoning delay on the ground that no sufficient cause was shown. (Para 13)**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – विलम्ब के लिए माफी – क्या अभियुक्त विलम्ब के लिए माफ किये जाने से पूर्व सुनवाई के अवसर का हकदार है – अधिनियम जो कि एक विशेष कानून है के अंतर्गत शिकायत प्रस्तुत करने में विलम्ब के लिए माफी की जांच में भाग लेने के लिए अभियुक्त को समर्थ बनाने वाले किसी उपबंध की अनुपस्थिति में मामला अनन्य रुप से शिकायतकर्ता और न्यायालय के बीच का रहेगा – केवल आदेशिका जारी करने के पश्चात ही, अभियुक्त विलम्ब के लिए माफी के आदेश की वैधता या अन्यथा का प्रश्न उठा सकता है, इस आधार पर कि कोई पर्याप्त कारण नहीं दर्शाया गया।

Cases referred :

AIR 2004 SC 4674, 1977 Cri.L.J. 90, 2009(3) Crime 524, 2011 (1) CC 380, AIR 2010 SC 1402, (2001) 3 SCC 609, AIR 2008 SC 3086.

Arpan Shrivastava, for the applicant.
Rahul Diwaker, for the non-applicant.

ORDER

R.C. Mishra, J :- This order shall govern disposal of both the petitions, under S.482 of the Code of Criminal Procedure (for short 'the Code') as they raise a common question of law, formulated as under –

> "Whether a Magistrate is required to afford opportunity of hearing to the accused before condoning delay in filing

complaint relating to dishonour of cheque, under proviso to Clause (b) of Section 142 of the Negotiable Instruments Act, 1881 (for brevity the 'Act')"

2. The petitioner is aggrieved by the following orders passed in each one of the cases, registered as Complaint Case Nos.13364/10 & 13365/10 –

(i) Order-dated 2.11.2010 authored by Shri Nitin Kumre, JMFC, Jabalpur whereby cognizance of the offence was taken, while condoning delay of 25 days in filing the complaint.

(ii) Order-dated 15.12.2011 authored by Shri Nisar Ahmad, JMFC, Jabalpur, whereby application moved by the petitioner for reviewing the order dated 2.11.2010, was rejected as not maintainable.

3. At the outset, it may be observed that the orders passed on 15.12.2011 are to be upheld simply because the offence, under Section 138 of the Act, is triable by summon procedure that does not contemplate any stage of discharge after taking the cognizance thereof. Accordingly, the only course available to challenge the issuance of process is by invoking Section 482 of the Code (*Adalat Prasad v. Rooplal Jindal* AIR 2004 SC 4674 referred to).

4. For a ready reference, Section 142 of the Act may be reproduced thus -

"142. Cognizance of offences. *- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138:

"Provided that the cognizance of a complaint may be taken by the court after the prescribed period, if the complainant satisfies the court that he had sufficient cause for not making a complaint within such period.".

(c) no court inferior to that of a Metropolitan Magistrate

or a Judicial Magistrate of the first class shall try any offence punishable under Section 138"

(Emphasis supplied)

5. Assailing legality and propriety of the orders passed on 2.11.2010, learned counsel of the petitioner has submitted that even in absence of specific provision in the Act, requiring the Magistrate to give an opportunity of being heard to the accused before condoning delay in presenting the complaint, such an opportunity ought to have been granted in accordance with the principles of natural justice as the condonation affects a valuable right accrued to the accused with expiry of prescribed period of limitation. To buttress the contention, implicit reliance has been placed on the decision of this Court in *Krishna v. State of M.P.* 1977 CRI.L.J. 90, that has been followed by the *Calcutta High Court in Gautam Kumar De v. M/s Prime Movers Auto Associates (P) Ltd.* 2009 (3) Crimes 524 as well as by the Chhattisgarh High Court in *Gyan Chand Jain v. Anand Bafane* 2011 (1) CC 380).

6. In reply, learned counsel for the respondent has pointed out that the proviso clearly suggests that condonation of delay is a matter between the complainant and the Court and therefore, the accused is not entitled to participate in the corresponding inquiry.

7. To appreciate the merits of rival contentions in a proper perspective, it would be necessary to advert to the legislative history, object, basic scheme and other provisions of the Act relevant for the purpose of present discussion.

8. The proviso was inserted by Section 9 of Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 w.e.f. 6-2-2003. The relevant extracts of statement of objects and reasons read -

"The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourge the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act,1881, namely, sections 138 to 142 in Chapter XVII have been found deficient in dealing with dishonour of

cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the Courts to deal with such matters has been found to be cumbersome. The Courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act.

2. .... Keeping in view the large number of complaints under the said Act pending in various courts, a Working Group was constituted to review section 138 of the Negotiable Instruments Act, 1881 and make recommendations as to what changes were needed to effectively achieve the purpose of that section.

3 .....

4. Keeping in view the recommendations of the Standing Committee on Finance and other representations, it has been decided to bring out, inter alia, the following amendments in the Negotiable Instruments Act,1881, namely:—

(i) .....

(ii) .....

(iii) to provide discretion to the Court to waive the period of one month, which has been prescribed for taking cognizance of the case under the Act;

.....

(xi) .....

5. The proposed amendments in the Act are aimed at early disposal of cases relating to dishonour of cheques, ..., ... and .....

9. Relying on statement of objects and reasons as well as speech of Finance Minister in course of debate on the Bill in Lok Sabha, the Supreme Court in *Mandvi Co-op. Bank Ltd., M/s. v. Nimesh B. Thakore* AIR 2010 SC 1402 has pointed out that –

"If the legislature in their wisdom did not think it proper to incorporate a word 'accused' with the word 'complainant'

in S. 145(1) of the Act, it was not open to the High Court to fill up the self-perceived blank".

10. The ratio which emerges from the decision is that it is the duty of the Court to adopt construction of any provision of the Act, which advances object of the legislation. Further, as emphasized in *Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.*, (2001) 3 SCC 609 -

'The main object of the Act is to legalise the system by which instruments contemplated by it could pass from hand to hand by negotiation like any other goods. The purpose of the Act was to present an orderly and authoritative statement of the leading rules of law relating to the negotiable instruments. The Act intends to legalise the system under which claims upon mercantile instruments could be equated with ordinary goods passing from hand to hand. To achieve the objective of the Act, the legislature in its wisdom thought it proper to make provision in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special procedure in case the obligation under the instrument was not discharged. It has always to be kept in mind that Section 138 of the Act creates an offence and the law relating to the penal provisions has to be interpreted strictly so that no-one can ingeniously or insidiously or guilefully or strategically be prosecuted"

11. The Apex Court had the occasion to deal with the proviso to Clause (b) of Section 142 of the Act in *Subodh S. Salaskar v. Jayprakash M. Shah* AIR 2008 SC 3086. It was pointed out that -

"The provisions of the Act being special in nature, in terms thereof the jurisdiction of the court to take cognizance of an offence under Section 138 of the Act was limited to the period of thirty days in terms of the proviso appended thereto. The Parliament only with a view to obviate the aforementioned difficulties on the part of the complainant inserted proviso to Clause (b) of Section 142 of the Act in 2002. It confers a jurisdiction upon the court to condone the delay. It is, therefore, a substantive provision and not

a procedural one. The matter might have been different if the Magistrate could have exercised its jurisdiction either under Section 5 of the Limitation Act, 1963 or Section 473 of the Code of Criminal Procedure, 1976. The provisions of the said Acts are not applicable.

(Emphasis added)

12. In this view of the matter, the ruling in *Krishna's case* (supra), that related to provisions of Sections 468 and 473 of the Code, is of no relevance to a prosecution for the offence under Section 138 of the Act. Needless to say that construction of the proviso, by drawing analogy from the decision in *Krishna's* case, as has been done in other cases cited by learned counsel for the petitioner, also deserves to be ignored as being in conflict with the guideline laid down by the Supreme Court for interpreting the provisions of the Act, in the aforesaid cases.

13. To sum up, in absence of any provision enabling the accused to participate in the inquiry into condonation of delay in filing of the complaint for the offence under the Act, which is a special statute, the matter lies exclusively between the complainant and the Court. It is only after the process is issued that an accused can question legality or otherwise of the order condoning delay on the ground that no sufficient cause was shown for not making a complaint within the period prescribed by Clause (b) of Section 142 of theAct.

14. The question posed above is, therefore, answered in the negative.

15. A bare of the record would reveal that in each case, an affidavit sworn in by the respondent was filed in support of his application for condonation of delay on the ground that while undergoing treatment for jaundice with typhoid, he had to remain bedridden for 30 days.

16. It is well settled that while considering the question of condonation of delay, the words 'sufficient cause' should receive a liberal construction so as to advance substantial justice.

17. For these reasons, no interference with the impugned orders is called for under the inherent powers.

18. In the result, the petitions are dismissed. As an obvious consequence, interim stay orders-dated 8.2.2012 stand vacated.

A copy of this order be retained in the connected MCrC.

Petition dismissed.

I.L.R. [2013] M.P., 249

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice R.C. Mishra

M.Cr.C.No. 10703/2011 (Jabalpur) decided on 31 October, 2012

RAMESH BABULAL BAHETI (Dr.) ...Applicant

Vs.

M.P. STATE INDUSTRIAL DEVELOPMENT CORP. LTD. ...Non-applicant

A. ***Negotiable Instruments Act (26 of 1881), Section 138 - Cognizance - Public Servant*** **- Every employee of Govt. Company is Public Servant entitled to exemption under Clause (a) of proviso to Section 200 of Cr.P.C. with regard to complaint relating to offence under Section 138 of Act, 1881.** **(Para 6)**

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – संज्ञान – लोक सेवक – सरकारी कंपनी का प्रत्येक कर्मचारी लोक सेवक है जो अधिनियम 1881 की धारा 138 के अंतर्गत अपराध की शिकायत के संबंध में द.प्र.सं. की धारा 200 के परंतुक के खंड (ए) के अधीन छूट का हकदार है।

B. ***Negotiable Instruments Act (26 of 1881), Section 141 - Vicarious Liability*** **- It is not necessary to reproduce the language of Section 141 verbatim in complaint - If the substance of the allegations made in the complaint fulfills the requirements of Section 141, the complaint has to proceed and is required to be tried with - Hypertechnical approach should not be adopted so as to quash the same.** **(Para 12)**

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 141 – प्रतिनिधिक दायित्व – शिकायत में धारा 141 की भाषा को शब्दशः उद्धृत करने की आवश्यकता नही – यदि शिकायत में किये गये अभिकथनों का सार, धारा 141 की अपेक्षाओं को पूरा करता है, तब शिकायत पर कार्यवाही होगी और उसका विचारण किया जाना अपेक्षित है – उक्त को अभिखण्डित करने के लिए अति तकनीकी दृष्टिकोण नहीं अपनाना चाहिए।

C. ***Negotiable Instruments Act (26 of 1881), Sections 138 & 141 - Offence by Company*** **- Arraigning of the Company as an accused is a condition precedent - Section 141 makes the Directors of the Company liable for the offence in a case where cheque in question is issued for and on its behalf - Complainant is under obligation to comply with the statutory requirement by impleading Company as an accused**

- Complaint dismissed. (Paras 19 to 22 & 24)

ग. परक्राम्य लिखत अधिनियम (1881 का 26), धाराएं 138 व 141 – कंपनी द्वारा अपराध – कंपनी को अभियुक्त के रूप में अभियोजित करना पूरोभावी शर्त है – धारा 141 कंपनी के निदेशकों को ऐसे प्रकरण में अपराध के लिए उत्तरदायी ठहराता है जिसमें प्रश्नगत चेक उनके लिए और उनकी ओर से जारी किया गया है – कंपनी को अभियुक्त के रूप में पक्षकार बनाकर कानूनी अपेक्षा का अनुपालन करने के लिए शिकायतकर्ता बाध्यताधीन है – शिकायत खारिज।

Cases referred :

AIR 2009 SC 1284, 2010 AIR SCW 1508, (2005) 8 SCC 89, (2004) 7 SCC 15, AIR 2007 SC 1682, (2007) 5 SCC 54, AIR 2008 SC 2357, (2011) 13 SCC 88, (2010) 11 SCC 441, 2012 AIR SCW 2693, AIR 1999 SC 2182, AIR 2001 SC 518, AIR 1984 SC 1824, AIR 2005 SC 4135, AIR 1999 SC 2245.

Brian D'Silva with *Ishan Soni,* for the applicant.
Sanjay K. Agrawal & Piyush Bhatnagar, for the non-applicant.

O R D E R

R.C. Mishra, J :- This common order shall govern disposal of both the petitions preferred, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the 'Code'), for quashing of the proceedings pending before ACJM-cum-Special Magistrate (for MPSIDC cases), Bhopal, details of which may be summarized as under –

MCrC	Complaint Case No.	Complaint pertaining to dishonour of cheque dated	For an amount of Rs.	Demand notice issued on
10703/11	983/05	9.5.2001 9.5.2001	3523522 80000000	30.8.2001
10832/11	2056/04	9.8.2000 9.11.2000	3642293 3642293	20.12.2000

2. In these cases, cognizance of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act") was taken against the petitioner, the then Executive Chairman

of STI Products India Limited, Bangalore, a company registered under the Companies Act, 1956 and its two Directors viz. Dr. P.N. Mehra and K.N. Garg, upon complaints made on behalf of the respondent viz. Madhya Pradesh State Industrial Development Corporation (for brevity "MPSIDC"), a Government Company registered under the Companies Act.

3. Common averments made in the complaints may be summarized as under –

> The petitioner, being the Executive Chairman, was the in-charge of and responsible for the conduct of the business of the company that has taken financial assistance to the tune of Rs.8 crores in the name of Inter-Corporate Deposits (ICDs), to be matured on 9.5.2011. As per the undertaking given for or on behalf of the borrower company, 12 post-dated cheques were issued for repayment of the loan together with interest as per terms of the agreement. However, the cheques were dishonoured by the Bank on the ground of 'Exceed Arrangement'. Thereafter, despite service of respective demand notice, the amount covered by the corresponding cheques/cheque was not paid by the company.

4. Learned Senior Counsel appearing on behalf of the petitioner has strenuously contended that his prosecution is liable to be quashed as an abuse of the process of the Court on the following grounds -

> (i) The order taking cognizance without examining the officer authorized by the complainant was bad in law as the exemption under clause (a) of the proviso to Section 200 of the Code of Criminal Procedure was applicable to the complaint concerning any offence under the General Law and not an offence under a special statute like the N.I. Act.
>
> (ii) In absence of specific averments explaining as to

how the petitioner was in-charge of day-to-day business of the company and responsible for conduct of its business, the requirements of Section 141 of the Act were not satisfied.

(iii) No legally enforceable debt or liability was in existence as the cheques in question were issued against the ICDs, which had already been repudiated in the year 1999.

(iv) The company was not arraigned as one of the accused in the complaint, bearing no.2056/04 and called in question in MCrC No.10832/11.

5. In response, learned counsel for the complainant/ respondent has submitted that being the Executive Chairman, the petitioner was prima facie in-charge of and responsible for the conduct of the business of the company. Inviting attention to the fact that in complaint case no.2056/ 04, an application to implead the Company as an additional accused has already been moved before the trial Magistrate, he has further urged that no interference with a legitimate prosecution is called for under the inherent powers on any other grounds raised by the petitioner.

6. Ground no.(i) *[supra]* is apparently misconceived in view of the decision of the Apex Court in *National Small Industries Corporation Ltd. v. State (NCT of Delhi)* AIR 2009 SC 1284, holding that every employee of Government Company is 'Public Servant' entitled to exemption under clause (a) of the proviso to Section 200 of the Code with regard to a complaint relating to the offence under Section 138 of the Act also.

7. Adverting to ground no.(ii) [above], learned Senior Counsel has contended that mere averment that the petitioner had the knowledge about functioning of the company was inadequate in the eyes of law to make him vicariously liable for the offence. To buttress the contention, he has placed reliance on the following observations made by the Supreme Court in *National Small Industries Corporation Ltd. v. Harmeet Singh*

Paintal 2010 AIR SCW 1508 -

> *"But if the accused is not one of the persons who falls under the category of "persons who are responsible to the company for the conduct of the business of the company" then merely by stating that "he was in-charge of the business of the company" or by stating that "he was in-charge of the day-to-day management of the company" or by stating that "he was in-charge of, and was responsible to the company for the conduct of the business of the company", he cannot be made vicariously liable under Section 141(1) of the Act. To put it clear that for making a person liable under Section 141(2), the mechanical repetition of the requirements under Section 141(1) will be of no assistance, but there should be necessary averments in the complaint as to how and in what manner the accused was guilty of consent and connivance or negligence and therefore, responsible under sub-section (2) of Section 141 of the Act.*

8. A bare perusal of the precedent would reveal that it is based on a three-judge Bench decision in *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla* (2005) 8 SCC 89 wherein the nature and extent of the liability under Section 141 of the Act was explained in the following terms –

> *"The liability under S. 141 arises from being in charge of and responsible for conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a Company may be liable if he satisfies the main requirement of being in charge of and responsible for conduct of business of a Company at the relevant time. Liability depends on the role one plays in the affairs of*

a Company and not on designation or status. If being a Director or Manager or Secretary was enough to cast criminal liability, the Section would have said so. Instead of 'every person' the Section would have said 'every Director, Manager or Secretary in a Company is liable'... etc. The legislature is aware that it is a case of criminal liability, which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action"

9. On a conspectus of the subsequent decisions on the subject, the Supreme Court in *National Small Industries Corporation Ltd's* case culled out the following principles -

(i) The primary responsibility is on the complainant to make specific averments as are required under the law in the complaint so as to make the accused vicariously liable. For fastening the criminal liability, there is no presumption that every Director knows about the transaction.

(ii) Section 141 does not make all the Directors liable for the offence. The criminal liability can be fastened only on those who, at the time of the commission of the offence, were in charge of and were responsible for the conduct of the business of the company.

(iii) Vicarious liability can be inferred against a company registered or incorporated under the Companies Act, 1956 only if the requisite statements, which are required to be averred in the complaint/petition, are made so as to make the accused therein vicariously liable for offence committed by the company along with averments in the petition containing that the accused were in charge of and

responsible for the business of the company and by virtue of their position they are liable to be proceeded with.

(iv) Vicarious liability on the part of a person must be pleaded and proved and not inferred.

(v) If the accused is a Managing Director or a Joint Managing Director then it is not necessary to make specific averment in the complaint and by virtue of their position they are liable to be proceeded with.

(vi) If the accused is a Director or an officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in the complaint.

(vii) The person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a Director in such cases."

10. Coming to the facts of the case, it may be observed that the petitioner has been prosecuted in the capacity of the then Executive Chairman of the Company.

11. A conjoint reading of Sections 5 and 291 of the Companies Act, 1956 with the definitions in clauses (24), (26), (30), (31), (45) of Section 2 of that Act would show that the following persons are considered to be the persons who are responsible to the company for the conduct of the business of the company:

(a) the Managing Director(s);

(b) the whole-time Director(s);

(c) the manager;

(d) the secretary;

(e) any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act;

(f) any person charged by the Board with the responsibility of complying with that provision (and who has given his consent in that behalf to the Board); and

(g) where any company does not have any of the officers specified in clauses (a) to (c), any Director or Directors who may be specified by the Board in this behalf or where no Director is so specified, all the Directors.

(Emphasis supplied)

12. By reason of the legal fiction introduced by Section 141 of the Act, a person, though, not personally liable for commission of an offence under Section 138 would be vicariously liable therefor. However, it is not necessary to reproduce the language of Section 141 verbatim in the complaint since the complaint is required to be read as a whole. If the substance of the allegations made in the complaint fulfills the requirements of Section 141 of the Act, the complaint has to proceed and is required to be tried with. In construing a complaint a hypertechnical approach should not be adopted so as to quash the same. The laudable object of preventing bouncing of cheques and sustaining the credibility of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind. These provisions create a statutory presumption of dishonesty, exposing a person to criminal liability if payment is not made within the statutory period even after issue of notice. It is also true that the power of quashing is required to be exercised very sparingly and where, read as a whole, factual foundation for the offence has been laid in the complaint, it should not be quashed (*Monaben Ketanbhai Shah v. State of Gujarat* (2004) 7 SCC 15 relied on). Incidentally, these

observations were quoted with approval in paragraph 17 of the judgment in *S.M.S.Pharmaceuticals's* case.

13. Re-affirming the ratio in *Monaben's* case, the Apex Court in *N. Rangachari v. Bharat Sanchar Nigam Limited* AIR 2007 SC 1682 has laid down the following guidelines : -

> *"It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegations as a whole are 'not sufficient to show' that at the relevant point of time the appellant and the other are not alleged to be persons in-charge of the affairs of the company".*

14. In *Rangachari's* case, rejecting the contention that being a nominated Chairman and holding an honorary post in the Company, the appellant was never assigned with any of the Company's financial or other business activities, the Court observed as under -

> *"A person normally having business or commercial dealings with a company, would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its memorandum or articles of association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are in charge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So, all that a payee of a cheque that is dishonoured*

can be expected to allege is that the persons named in the complaint are in charge of its affairs".

15. A bare perusal of the complaints would reveal that in paragraph (2) thereof, it was specifically pleaded that being the Chairman of the Company, the petitioner was aware of every act as well as of the transaction of the company. As pointed already, cheques for a total sum of Rs.8 crores were issued in favour of the Government Company for and on behalf of STI Products India Limited, for repayment of the outstanding amounts against the Inter Company Loan termed as ICDs and therefore, the petitioner as the Executive Chairman could not plead ignorance of entire transaction (*Everest Advertising (P) Ltd. v. State Govt. of NCT of Delhi,* (2007) 5 SCC 54 referred to). Under these circumstances, as opined in *Paresh P. Rajda v. State of Maharashtra* AIR 2008 SC 2357, it would be inappropriate to quash proceedings against the petitioner.

16. While pointing out that proviso to Section 141 of the Act clearly provides that if the accused is able to prove to the satisfaction of the court that the offence was committed without his knowledge or he had exercised due diligence to prevent the commission of such offence, he will not be liable to punishment, the Supreme Court in a recent decision rendered in *Rallis India Limited v. Poduru Vidya Bhushan,* (2011) 13 SCC 88, has proceeded to struck a note of caution: "..., we also take this opportunity to strike a cautionary note with regard to the manner in which the High Courts ought to exercise their power to quash criminal proceedings when such proceeding is related to offences committed by companies. The world of commercial transactions contains numerous unique intricacies, many of which are yet to be statutorily regulated. More particularly, the principle laid down in Section 141 of the Act (which is in pari materia with identical sections in other Acts like the Food Safety and Standards Act, the erstwhile Prevention of Food Adulteration Act, etc. etc.) is susceptible to abuse by unscrupulous companies to the detriment of unsuspecting third parties".

17. Accordingly, the ground no.(ii) has no merit or substance.

18. Turning to the ground no.(iii), it may be observed that the offence is a strict liability offence, which excludes the defence other than permissible as the conditions set out in Section 138 of the Act. Moreover, Section 139 of the Act creates a presumption, in favour of the holder of the dishonoured cheque that it was issued in discharge of a 'legally recoverable debt' or 'liability' (*Rangappa v. Sri Mohan* (2010) 11 SCC 441 referred to). In this view of the matter, the plea that the cheques were issued against the ICDs, which had already been repudiated in the year 1999, is not of much relevance for the relief sought for as the question whether a person is in charge of and responsible for the conduct of the business of the Company, is to be adjudged during the trial on the basis of the materials to be placed on record by the parties.

19. This brings me to the last ground that relates to MCrC No.10832/11. According to learned Senior Counsel, the petition deserves to be allowed in the light of a recent decision rendered by a three-Judge Bench of the Supreme Court in *Aneeta Hada v. Godfather Travels & Tours Pvt. Ltd.* 2012 AIR SCW 2693, holding that for launching a prosecution against the Directors of a Company under Section 138 read with Section 141 of the Act, arraigning of the company as an accused is a condition precedent.

20. Per contra, learned counsel for the respondent has pointed out that the application for joining the company as one of the accused would still be maintainable in view of the well settled position of law, as propounded in *Bilakchand Gyanchand Co., M/s. v. A. Chinnaswami* AIR 1999 SC 2182 and reaffirmed in *Rajneesh Aggarwal v. Amit J. Bhalla* AIR 2001 SC 518 that demand notice under S.138 sent to the director of the Company, who had signed the cheque on its behalf, amounts to notice to the Company itself.

21. However, as explained in *Aneeta Hada's* case, Section 141 of the Act makes directors of the Company vicariously liable for the offence under Section 138, in a case where cheque in question is issued for and

on its behalf. Accordingly, it was obligatory on the part of the complainant to comply with the statutory requirement by impleading the Company as an accused.

22. Faced with such a situation, learned counsel for the complainant/ respondent states that liberty may be granted to file another complaint on the same set of allegations against the Company, its Chairman viz. the petitioner and the Directors, in the light of the decision in *Aneeta Hada's* case (supra), whereby a contrary view taken in *Sheoratan Agarwal v. State of M.P.* AIR 1984 SC 1824 and followed in *State of Punjab v. Kasturi Lal* AIR 2005 SC 4135 was overruled. However, it would not be desirable to make any observation in respect thereof.

23. Subject-matter of MCrC No.10703/11 is the complaint that, in turn, relates to cheques covering a huge amount of public money. Section 143(3) of the Act contains legislative mandate to expedite the trial for cheque dishonour and to conclude the same within 6 months from the date of filing of complaint. In the light of the petitioner's strategy to cause unnecessary delay, the petition is liable to be dismissed with exemplary costs in view of the mandate contained in Section 143(3) of the Act and guidelines laid down in *Mary Angel v. State of T.N.* AIR 1999 SC 2245.

24. In the result, -

(i) The petition, registered as MCrC No.10703/11, is dismissed with a cost quantified at Rs.2,000/-. As an obvious consequence, the interim stay order-dated 1.10.2011 stands vacated.

(ii) The petition, numbered as MCrC No.10832/11, is allowed and the proceedings pending as Criminal (Complaint) Case No.2056/04 (above) are hereby quashed.

25. A copy of this order be retained in the connected MCrC.

Petition dismissed.

I.L.R. [2013] M.P., 261

MISCELLANEOUS CRIMINAL CASE

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

M.Cr.C. No. 7426/2011 (Jabalpur) decided on 29 November, 2012

SANJEEV SAXENA ...Applicant

Vs.

STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of F.I.R. **- No cogent material collected against the applicant although three years have passed - I.O. has merely stated that the applicant in collaboration with the Revenue Officials is trying to evade the Stamp Duty and got the sale deed executed - This statement of I.O. is without any cogent material on record - I.O. is merely prolonging the investigation - F.I.R. and investigation quashed so far as it relates to applicant. (Paras 12 &13)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – प्रथम सूचना रिपोर्ट का अभिखंडित किया जाना – आवेदक के विरुद्ध कोई तर्कपूर्ण तात्विक सामग्री एकत्रित नहीं, यद्यपि तीन वर्ष बीत गए हैं – अन्वेषण अधिकारी ने मात्र कहा है कि आवेदक, राजस्व कर्मचारियों से मिलकर स्टाम्प शुल्क से बचने का प्रयास कर रहा है और विक्रय विलेख निष्पादित कराया – अन्वेषण अधिकारी का यह कथन, अभिलेख पर किसी तर्कपूर्ण सामग्री के बिना है – अन्वेषण अधिकारी मात्र अन्वेषण को विलंबित कर रहा है – प्रथम सूचना रिपोर्ट एवं अन्वेषण, जहां तक आवेदक से संबंधित है, अभिखण्डित।

Cases referred :

(2005) 13 SCC 540, (2006) 7 SCC 296, (2008) 5 SCC 791, AIR 2010 SC 201.

Shamim Ahmed Khan, for the applicant.

Pankaj Dubey, for the non-applicant.

O R D E R

The Order of the Court was delivered by:

SANJAY YADAV, J.: Quashment of First Information Report leading to

registration of Crime No. 20/2009 at Economic Offence Wing Bureau, Bhopal dated 24.7.2009 is being sought vide this petition under Section 482 of the Criminal Procedure Code, 1973. The F.I.R in turn relates to registration of offence punishable under Sections 420, 120 B, Indian Penal Code and Sections 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988 against the petitioner and four other persons, viz., Mohd. Abid Khan, the then President Betwa Grih Nirman Sahkari Sanstha, Bhopal, R.B.S. Yadav, Recovery Officer & Additional Tahsildar, Cooperative Societies, Bhopal, the then Joint Registrar, Cooperative Societies, Bhopal and the then Deputy Registrar, Cooperative Societies, Bhopal. The F.I.R is in the following term:

> "मैं थाना राज्य आर्थिक अपराध अन्वेषण ब्यूरो म0प्र0 भोपाल में निरिक्षक थाना प्रभारी के पद पर पदस्थ हूँ । ब्यूरो में पंजीबद्ध शिकायत क्रमांक 70/06 का सत्यापन करने पर पाया गया कि बेतवा गृह निर्माण सहकारी संस्था मर्यादित भोपाल जो कि पंजीकृत सहकारी संस्था है जिसका पंजीयन क्रमांक डी0आर0बी0/336 दिनांक 16.4.83 है । बेतवा गृह निर्माण सहकारी संस्था के तत्समय अध्यक्ष श्री मो. आबिद खान आत्मज मोहम्मद इस्माईल निवासी म0न0 53 जहांगीराबाद भोपाल द्वारा चंदनपुरा गांव की खसरा क्रमांक 78/1 की 54 एकड़ भूमि संस्था के सदस्यों को भू–खण्ड उपलब्ध कराने हेतु क्रय की जाने हेतु भूमि स्वामी मोहम्मद आजम कुरैशी आत्मज मो. हाशिम कुरैशी नि. आशियाना बंगला नं0 2 अहमदाबाद पैलेस रोड भोपाल से दिनांक 16.8.88 को अनुबंध होना व अनुबंध के समय 25000/– रूपये भूमि स्वामी मोह0 हाशिम कुरैशी द्वारा प्राप्त करना, संस्था का आदेश क्रमांक परिसमापन/385 दिनांक 4.2.89 से परिसमापन मे भूमि नगर निगम सीमा से बाहर की होने से करना जिसे परिसमापन पृ0आदेश क्रमांक परिसमापन/99/759 दिनांक1.4.99 से मुक्त करना तथा बेतवा गृह निर्माण सहकारी संस्था के अध्यक्ष मो0 आबिद खान द्वारा मो0 आजम कुरैशी के विरूद्ध म0प्र0सहकारिता अधिनियम 1960 की धारा 64 के अर्न्तगत एक वाद आवेदन उप पंजीयक सहकारी समितियां भोपाल के न्यायालय में प्रस्तुत किया गया, जिसे प्रकरण क्रमांक एम–4/2000 पर पंजीबद्ध कर दिनांक 8.6.2001 को निर्णय पारित किया गया कि प्रतिवादी मो0 आजम कुरैशी (भूमि स्वामी) बेतवा गृह निर्माण सहकारी संस्था के पक्ष में शेष राशि प्राप्त कर भूमि की रजिस्ट्री करा देवे।

प्रतिवादी द्वारा इसमें चूक करने पर वादी निष्पादन के माध्यम से कार्यवाही पूर्ण करावे । उप पंजीयक के उक्त निर्णय से असंतुष्ट होकर भूमि स्वामी मो0 आजम कुरैशी द्वारा न्यायालय संयुक्त पंजीयक सहकारी संस्थाएं भोपाल में अपील प्रस्तुत की जो प्रकरण क्रमांक 78/62/2001 पर पंजीबद्ध हुई जिसमें दिनांक 9.1.02 को उप पंजीयक सहकारी संस्था के निर्णय दिनांक 8.6.2000 को सही पाते हुये अवशेष विकय मूलय राशि 15,95,000/– रूपये रेस्पाडेंट प्राप्त कर संस्था के पक्ष में विकय पत्र संपादित करावे अथवा रेस्पाडेंट अवशेष विकय प्रतिफल राशि 15,95,000/– रूपये वसूली अधिकारी एवं अतिरिक्त तहसीलदार सहकारी समितियां भोपाल के खाते में जमा करावे तो उक्त की संतष्टि होने पर वसूली अधिकारी रेस्पाडेंट संस्था के पक्ष में भूमि का विकय पत्र पंजीयन कराने हेतु अधिकृत होंगे । इस निर्णय के पालन में संस्था द्वारा 15,95,000/– रूपये जमा करने पर संस्था के पक्ष में वसूली अधिकारी एवं अतिरिक्त तहसीलदार सहकारी संस्थाएं भोपाल द्वारा विकय पत्र संपादित कराया । संयुक्त पंजीयक सहकारी संस्थाएं भोपाल के उक्त निर्णय से व्यथित होकर भूमि स्वामी द्वारा माननीय को–आपरेटिव ट्रिमिनल भोपाल में अपील की जो एस0ए0न0 85/2002 पर पंजीवद्ध होकर दिनांक 24.2.07 को निर्णय पारित किया कि The order passed by the Courts below are set-aside. The case is recommended to the Court of Dy. Registrar for adjudicating it afresh as observed above म0प्र0 को–आपरेटिव प्राधिकरण भोपाल के निर्णय से असंतुष्ट होकर बेतवा गृह निर्माण सहकारी संस्था की ओर से अपील माननीय उच्च न्यायालय जबलपुर में प्रस्तुत की जो प्रकरण क्रमांक डब्ल्यू0पी0न0 3597/07 पर पंजीबद्ध हुई जिसमें माननीय उच्च न्यायालय द्वारा दिनांक 5.8.08 को अपील अस्वीकृत की । माननीय उच्च न्यायालय जबलपुर के उक्त आदेश/निर्णय से असंतुष्ट होकर बेतवा गृह निर्माण सहकारी संस्था द्वारा माननीय सर्वोच्च न्यायालय नई दिल्ली में अपील प्रस्तुत की जो प्र0क0 सीसी 1319/2009 पर पंजीबद्ध होकर अपील योग्य न पाये जाने से दिनांक 9.2.09 को अमान्य की गई ।

इस प्रकार बेतवा गृह निर्माण सहकारी संस्था भोपाल के तत्समय पदस्थ अध्यक्ष मो0 आबिद खान एवं वर्तमान अध्यक्ष संजीव सक्सेना एवं तत्समय पदस्थ उप पंजीयक सहकारी संस्थाएं, संयुक्त पंजीयक तथा वसूली अधिकारी सहकारी संस्थाएं भोपाल द्वारा षडयंत्र पूर्वक संस्था के सदस्यों के साथ धोखाधड़ी करते आदर्श उपविधि का पालन न करते हुये नगर

निगम सीमा से बाहर ग्राम चंदनपुरा की खसरा क्रमांक 78/1 रकबा 54 एकड़ भूमि कय करने का ढोंग करना एवं न्यायालय उप पंजीयक सहकारी संस्थाएं तथा संयुक्त पंजीयक सहकारी संस्थाएं भोपाल द्वारा म0प्र0 सहकारिता अधिनियम 1960 की सही व्याख्या न करते हुये प्रकरण पंजीबद्ध कर विधि की मंसा के विपरीत निर्णय लेकर संस्था के पक्ष में भूमि का विकय पत्र संपादित करना जिससे शासन को राजस्व शुल्क के रूप में अनुमानित प्राप्त होने वाले राजस्व राशि 1,20,000/– रूपये की क्षति कारित करना पाया जाता है जो अपराध धारा 120 बी 420 भादवि एंवं 13(1) डी, 13(2) भ्रनिअ 1988 का कायम कर विवेचना में लिया गया ।"

2. The petitioner, President of the Society, viz., Betwa Grih Nirman Sahkari Sanstha, Bhopal since 2006 (21.1.2006) (it is stated that in fresh elections held on 5.12.2012 some other person has been elected as President), challenges the registration of offence on the ground that he has been falsely implicated in the matter and that he has no role to play in respect of the transactions in respect of the land bearing Khasra No.78/1 admeasuring 54 acres situated at Village Chandanpura, Tahsil Huzur, district Bhopal. It is contended that in respect of land in question an agreement was entered into between Betwa Grih Nirman Sahkari Sanstha, Bhopal through its President Mohd. Abid with one Mohd. Azam Qureshi in respect of land in question on 16.8.1988 for the consideration for Rs.30,000/per acre and out of total amount of Rs.16,20,000 (30,000 x 54 = 16,20,000) Rs.25,000 was paid as initial payment. The remaining amount was agreed to be paid after necessary permission from the competent authority. It is contended that some controversy arose between Mohd Azam Qureshi and the Society; wherefor, Society preferred a dispute before the Dy. Registrar Cooperative Societies, Bhopal under Section 64 of the M.P. Cooperative Societies Act, 1960 (referred to as Act), forming subject matter of Case No. E7/2000.

3. That, Deputy Registrar vide order dated 8.6.2001 answered the dispute in favour of Cooperative Societies and directed Mohd. Azam to execute the sale-deed in favour of Cooperative Society. In an appeal preferred against said order by Mohd. Azam Qureshi the order passed by Deputy Registrar was confirmed by the Joint Registrar vide order dated

9.1.2002. That, in furtherance to these orders, sale-deed was executed by Mohd. Azam Qureshi in favour of Betwa Grih Nirman Sahkari Sanstha, Bhopal on 10th January 2002. It is contended that the order dated 9.1.2002 passed by Joint Registrar, Cooperative Societies, Bhopal was simultaneously subjected to challenge before the M.P. State Cooperative Tribunal, Bhopal vide Second Appeal No. 58/2002. The Tribunal vide its order dated 24.2.2007 set aside the orders passed by the authorities, viz., Deputy Registrar and the Joint Registrar and remitted the matter to the Court of Deputy Registrar for adjudicating afresh. Whereagainst Writ Petition was filed vide W.P. No. 3597/2007 by the Betwa Grih Nirman Sahkari Sanstha, Bhopal.

4. It is contended that at the time when Second Appeal was decided by the Tribunal on 24.2.2007 the petitioner was elected as President of the Society and having suffered an order the Society through petitioner decided to challenge the same vide W.P. No. 3597/2007. The petition was dismissed on 5.9.2008 but a liberty was granted to the petitioner Society to move an application for interim relief before Deputy Registrar who was directed to deal with the matter expeditiously. That, Deputy Registrar Cooperative Societies, Bhopal on remand readjudicated the matter and while entertaining an application under Order 7 Rule 11, Code of Civil Procedure, 1908 dismissed the dispute raised under Section 64 of the Act. Thereagainst Society preferred an appeal before the Joint Registrar by his order dated 13.3.2009 set aside the order passed by the Deputy Registrar and remitted the matter for its adjudication on merit. It is contended that despite of setting aside of the order dated 14.1.2009 passed by Deputy Registrar, few persons, viz., Smt. Mayalal Chandani, Shri Ratanlal Chandani and Shri Nitinlal Chandani were attempting to sell part of the land in question. It is contended that to prevent these persons as well as the legal heirs of Mohd. Azam Qureshi the Society through petitioner filed a Civil Suit No. 120A/ 2009 in the Court of VIII Addl. District Judge, Bhopal for declaration of title and permanent injunction; wherein, by order dated 16.4.2009 the parties were directed to maintain status quo in respect of property in question. It is contended that the Civil Suit is still pending adjudication.

5. On the bedrock of aforesaid facts it is contended on behalf of the petitioner that, there is no cogent material on record as would suggest complicity of the petitioner in the offences registered. It is further contended that despite of offences having been registered on 24.7.2009 the prosecution has not been able to collect any cogent evidence suggesting involvement of the petitioner in the offences. It is urged that merely because the petitioner has been prosecuting the legal remedy available to the society during the tenure of Presidentship the same does not suggest in any manner the involvement of the petitioner in the alleged offences.

6. In order to ascertain as to what are the material available with the prosecuting agency to rope in the petitioner, we called upon the respondent on 21.11.2012 to produce the same. We further noticed that despite of issuance of notice to respondent as back as 1.8.2011 no reply was filed, therefore, we directed the investigating officer of the case to remain present along with case diary, as we were informed by learned counsel for respondent that the case diary has been taken back. We also required the investigating officer to state on affidavit as to what material has been collected till date against the petitioner.

7. When the matter is taken up today, as directed, the Investigating Officer is present in person along with the case-diary. He also filed an affidavit wherein besides narrating the factual aspects, in paragraph 8 of the affidavit states that "वर्तमान अध्यक्ष एवं पिटीशनर श्री संजीव सक्सेना द्वारा सहकारी संस्थायें भोपाल से सांठगांठ कर ग्राम चंदनपुरा तहसील हुजूर की उक्त भूमि को अवैधरूप से हथियाना एवं स्टाम्प शुल्क की चोरी करने के संबंध में सहयोग किया जा रहा है" When called upon to substantiate the aforesaid contentions putforth on affidavit the Investigating Officer except placing reliance on communication No. 548/तह./टी.टी. नगर/12 by Additional Tahsildar, T.T. Nagar has no other material on record. The said communication as borne therefrom is in response to letter dated 9.10.2012 by the Investigating Officer in respect of making available the relevant documents regarding the land in question. The communication stipulates:

"विषयान्तर्गत आपके द्वारा संदर्भित पत्र के माध्यम से बेतवा गृह निर्माण सहकारी संस्था मर्यादित भोपाल की भूमि के संबंध में जानकारी चाही गई है । इस संबंध में क्षेत्रीय

राजस्व निरीक्षक से प्रतिवेदन लिया गया । राजस्व निरीक्षक से प्राप्त प्रतिवेदन के अनुसार चाही गई जानकारी बिन्दुवार निम्नानुसार है –

1– ग्राम चंदनपुरा स्थित भूमि खसरा कमांक 78/1 रकबा 54 एकड़ भूमि की वर्तमान स्थिति – **स्थल पर उक्त भूमि जंगल के रूप में विद्यमान है ।**

2– भूमि का डायवर्सन हुआ या नहीं हुआ– उक्त भूमि का डायवर्सन नहीं हुआ है ।

3– संस्था द्वारा भूमि पर काटे गये प्लाट्स की जानकारी – उक्त भूमि पर प्लाट नहीं काटे गये हैं ।

4– मौके पर भूमि पर किसका कब्जा है – उक्त भूमि पर जंगल है। कब्जा किसका है, यह स्पष्ट नहीं है ।

5– भूमि से संबंधित अन्य जानकारी – ग्राम चंदनपुरा की भूमि खसरा नम्बर 78/1 रकबा 54.00 एकड़ वर्ष 2009–10 में बेतवा गृह निर्माण सहकारी संस्था मर्यादित भोपाल के नाम थी । वर्तमान अभिलेख में उक्त भूमि निम्नलिखित तीन खातेदारों के नाम दर्ज है ।

	खसरा कमांक	रकबा	खातेदार का नाम
1–	78/1क	18.00एकड़	नितिनलाल चंदानी पिता चंदरलाल चंदानी
2–	78/1ख	18.00एकड़	मायालाल चंदानी पत्नी चंदरलाल चंदानी
3–	78/1ग	18.00एकड़	रतनलाल चंदानी पिता चंदरलाल चंदानी

स्थल पर बटान नहीं है अतः उपरोक्तानुसार जानकारी प्रषित है ।

Thus, on the face of communication it nowhere substantiates the statement made by the Investigating Officer in paragraph 8 of his affidavit. We further called upon the learned counsel for respondent as also the Investigating Officer to show from record any material as would suggest the petitioner's involvement in the matter, no material has been shown to us.

8. We are not oblivious of the proposition as propounded by Supreme Court in the *State of Orissa and another v. Saroj Kumar Sahoo* [(2005) 13 SCC 540] that Section 482 Cr.P.C "only saves the inherent power which the Court possessed before the enactment of the Cr.P.C." that

"The Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself." However, to meet the ends of justice – ex debito justitiae there is no clog in exercise of inherent jurisdiction.

9. In *Popular Muthiah v. State* represented by Inspector of Police [(2006) 7 SCC 296], it is held that:

> "24. It is also significant to note that whereas inherent power of a court or a tribunal is generally reocgnised, such power has been recognized under the Code of Criminal Procedure only in the High Court and not in any other court. The High Court apart from exercising its revisional or inherent power indisputably may also exercise its supervisory jurisdiction in terms of Article 227 of the Constitution of India and in some matters in terms of Section 483 thereof. The High Court, therefore, has a prominent place in the Code of Criminal Procedure vis` vis the court of Sessions which is also possessed of a revisional power."
>
> 28. In certain situations, the court exercises a wider jurisdiction, e.g., it may pass adverse remarks against an investigator or a prosecutor or a judicial officer, although they are not before it. Expunction of such remarks may

also be directed by the High Court at a later stage even suo motu or at the instance of the person aggrieved.

29. The High Court while, thus, exercising its revisional or appellate power, may exercise its inherent powers. Inherent power of the High Court can be exercised, it is trite, both in relation to substantive as also procedural matters.

30. In respect of the incidental or supplemental power,evidently, the High Court can exercise its inherent jurisdiction irrespective of the nature of the proceedings. It is not trammeled by procedural restrictions in that

(i) power can be exercised suo motu in the interest of justice. If such a power is not conceded, it may even lead to injustice to an accused.

(ii) Such a power can be exercised concurrently with the appellate or revisional jurisdiction and no formal application is required to be filed therefor.

(iii) It is, however, beyond any doubt that the power under Section 482 of the Code of Criminal Procedure is not unlimited. It can inter alia be exercised where the Code is silent where the power of the court is not treated as exhaustive, or there is a specific provision in the Code; or the statute does not fall within the purview of the Code because it involves application of a special law. It acts ex debito justitiae. It can, thus, do real and substantial justice for which alone it exists."

10. In *Reshma Bano v. State of Uttar Pradesh and others* [(2008) 5 SCC 791] it is held that:

6. The parameters where exercise of inherent power under Section 482 of the Code can be exercised either on proof of abuse of process of any Court or otherwise to secure the ends of justice have been highlighted in several cases. In

State of Haryana v. Bhajan Lal (1992 Supp. (1) SCC 335), it was held that though it will not be possible to lay down any precise, clearly defined sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised, certain illustrative cases were indicated. They are as follows: (SCC pp.378-79, para 102

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizabe offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in

any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a 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.

11. In *M.N. Ojha v. Alok Kumar Srivastav* (AIR 2010 SC 201) it has been held:

"15 .... It is well settled and needs no restatement that the saving of inherent power of the High Court in criminal matters is intended to achieve a salutary public purpose "which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. If such power is not conceded, it may even lead to injustice". [See: *State of Karnataka Vs. L. Muniswamy* (AIR 1977 SC 1489). We are conscious that inherent powers do not confer an arbitrary jurisdiction on the High Court to "act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases". [See: *Kurukshetra University Vs. State of Haryana* AIR 1977 SC 2229]." [Please also see *Baijnath Jha v. Sita Ram* (AIR 2008 SC 2778)]

12. Thus, in case of a legitimate prosecution exercise of inherent power would be an exception. However, in the case as the present one where despite of the fact that more than three years have elapsed from the date an FIR is registered naming the petitioner as an accomplish for an offence

under Sections 420, 120 B, Indian Penal Code and Sections 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988 no cogent material has been collected by the prosecuting agency to bring home the complicity of the petitioner in respect of alleged offences. To prevent any miscarriage of justice, in absence of reply by respondents, we called upon the Investigating Officer along with the case diary and also directed him to furnish an affidavit indicating therein as to whether in the course of investigation in three years (we are informed that the investigation was initiated even prior to two years from the date of lodging F.I.R), any cogent material has been collected by the prosecution indicating the involvement of petitioner for which he has been prosecuted, the Investigating Officer except giving the details in respect how the prosecution has been launched has only stated (in paragraph 8 of the affidavit) that, the petitioner in collaboration with the Revenue Officials is trying to evade the stamp duty and got the sale-deed executed, this statement of the Investigating Officer is without any cogent material on record, as despite of his being called upon to substantiate the same he is unable to do. It, therefore, leaves no iota of doubt that the Investigating Officer is prolonging the investigation so far as the petitioner is concerned for the reasons best known to him as till now he is not able to fetch any cogent material as would bring home the offence registered against the petitioner. In such a case the non-exercise of inherent juirisdiction conferred by Section 482 Cr.P.C would tantamount to travesty of justice.

13. Before parting with the case we incline to record dissatisfaction in respect of discharge of duty by the Investigating Officer. Be that as it may. Since no material is brought on record to substantiate the allegation levelled against the petitioner, we are inclined to quash the F.I.R. against the petitioner.

14. In view whereof, we hereby quash the F.I.R dated 24.7.2009 in so far as it relates to the petitioner for an offence under Sections 420, 120 B, Indian Penal Code and Sections 13 (1) (d) and 13 (2) of the Prevention of Corruption Act, 1988.

15. Petition is allowed to the extent above. No order as to costs.

Petition allowed.