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(Note An asterisk (*) denotes Note number)

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property and also failed to prove that the defendants were attempting to dispossess him - First appellate court proceeded to decide the case on the assumption that the suit was for declaration of ownership of plaintiff/appellant based upon adverse possession - Held - The first appellate court has misdirected itself by rejecting the appeal of the plaintiff on the ground not germane to the issue involved in the case - Second appeal allowed with direction to the first appellate court to decide the appeal afresh on merits. [Kailash Vs. Babulal] ...1669

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Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2, Designs Act (2 of 1911), Section 22, Trade Marks Act (47 of 1999), Sections 134, 135 - Requirements of granting injunction - Prima facie case - **Plaintiff by an interim injunction undoubtedly seeks to interfere with the rights of the defendants before the plaintiff's right is finally established, therefore very strong prima facie case in respect of his rights should be asserted and it should so exist in favour of the plaintiff. [SKOL Breweries Ltd. Vs. Som Distilleries Ltd. & Breweries Ltd.] ...1589**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2, डिजाइन अधिनियम (1911 का 2), धारा 22, व्यापार चिन्ह अधिनियम (1999 का 47), धाराऐं 134, 135 – व्यादेश प्रदान करने की अपेक्षाऐं – प्रथम दृष्ट्या प्रकरण – वादी, अंतरिम व्यादेश द्वारा निःसंदेह रुप से वादी का अधिकार अंतिमतः स्थापित होने से पहले, प्रतिवादियों के अधिकारों में हस्तक्षेप चाहता है, इसलिए, उसे अपने अधिकारों के संबंध में अधिक प्रबल प्रथम दृष्ट्या प्रकरण का प्राख्यान करना चाहिए

और वह इस प्रकार वादी के पक्ष में विद्यमान होना चाहिए। (स्कोल ब्रूअरीज लि. वि. सोम डिस्टीलरीज लि. एण्ड ब्रूअरीज लि.) ...1589

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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – अपूर्णीय क्षति – नुकसानी द्वारा वादीगण की क्षतिपूर्ति की जा सकती है और इस महत्वपूर्ण पहलू को ध्यान में रखकर विधायिका के डिजाईन अधिनियम की धारा 22 (2) की अधिनियमिती की है, जिसमें यह अधिनियमित किया गया है कि नुकसानी प्रदान किये जाने के लिए वाद प्रस्तुत किया जा सकता है और इसलिए यह नहीं कहा जा सकता कि वादी अपूर्णीय क्षति सहन करेगा। (स्कोल ब्रूअरीज लि. वि. सोम डिस्टीलरीज लि. एण्ड ब्रूअरीज लि.) ...1589

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction - **The grant of temporary injunction is discretionary relief and discretion is to be exercised in favour of plaintiff, if he comes with clean hands and with fair conduct. [SKOL Breweries Ltd. Vs. Som Distilleries Ltd. & Breweries Ltd.]** ...1589

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – अस्थाई व्यादेश वैवेकिक अनुतोष है और विवेकाधिकार को वादी के पक्ष में प्रयोग करना होगा, यदि वह निष्कपटता से एवं सदाचरण से आता है। (स्कोल ब्रूअरीज लि. वि. सोम डिस्टीलरीज लि. एण्ड ब्रूअरीज लि.) ...1589

Civil Procedure Code (5 of 1908), Order 39 Rule 1,2,3 & Order 43, Rule (1)(r) - Ex parte Injunction - Appeal - **Order 39 Rule 3 is a method and prescribes a methodology and procedure for granting exparte Injunction - It is not an independent provision - It is part and parcel of Order 39 - It can't be divorced from the nature of power given under Rule 1 and 2 - Therefore such an order is appealable under Order 43 Rule (1)(r) - Hence petition under Art.227 is not maintainable. [Radheshyam Rathi Vs. Rotary Club]** ...1569

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1,2,3 व आदेश 43,

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संविधान – अनुच्छेद 21 – प्रतिष्ठा के साथ जीवन का अधिकार – याची के बैंक खाते पर रोक लगा दी गई क्योंकि उसके माता–पिता द्वारा ऋण का भुगतान नहीं किया गया – याची न तो ऋणी है और न ही गारंटीकर्ता है और ऋण दस्तावेजों का हस्ताक्षरकर्ता तक भी नहीं – अभिनिर्धारित – बैंक की कार्यवाही बिना किसी विधिक प्राधिकारिता के है एवं जीवन के अधिकार का उल्लंघन है। (ठाकुर लाल धाकड़ वि. स्टेट बैंक ऑफ इंडिया) ...1574

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Constitution - Article 227 - Power of Superintendence - When to be exercised - Held, if the order suffers from any jurisdictional error or manifest procedural irregularity or impropriety or it is pregnant with any palpable perversity - Interference can be made sparingly in rare cases when such ingredients are fulfilled - It cannot be made as a matter of routine on a drop of hat. [Gwalior Development Authority Vs. Dushyant Sharma] ...1582

संविधान – अनुच्छेद 227 – अधीक्षण की शक्ति – का प्रयोग कब किया जाना चाहिए – अभिनिर्धारित – यदि आदेश किसी अधिकारिता की त्रुटि या प्रकट प्रक्रियात्मक अनियमितता या अनौचित्य या प्रत्यक्ष रुप से विपर्यस्तता से ग्रसित है – विरल प्रकरणों में कृशता पूर्वक हस्तक्षेप किया जा सकता है जब उक्त संघटकों की पूर्ति होती है – ऐसा नैमित्यिक रुप से साधारणत नहीं किया जा सकता। (ग्वालियर डिवैलपमैंट आथॉरिटी वि. दुष्यंत शर्मा) ...1582

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न्यायालय शुल्क (म.प्र. संशोधन) अधिनियम, 2012 (2013 का 3), धारा 3 – मोटर दुर्घटना दावे से उत्पन्न अपील में न्यायालय शुल्क – 2 अप्रैल 2008 के पश्चात प्रस्तुत मोटर दुर्घटना दावे से उत्पन्न मोटर दुर्घटना अपील पर न्यायालय शुल्क, बढ़ाई गई रकम पर केवल 2.5 प्रतिशत की दर से देय होगा। (राम गोपाल वि. हनीफ खान) ...1645

Criminal Procedure Code, 1973 (2 of 1974), Section 91 - Locus Standi - One of the witness filed an application for production of

statements of witnesses recorded during investigation but not filed along with charge sheet - As witness was not a complainant therefore, he has no right to participate independently in criminal trial - However, when the investigating agency itself while submitting charge sheet keeps mum and adopts method of pick and choose, Court is bound to consider the relevancy of the documents - Courts exist for dispensation of justice and not for its denial for technical reasons. [Babburaja Vs. State of M.P.] **...1770**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 – सुने जाने का अधिकार – एक साक्षी ने ऐसे साक्षियों के कथन प्रस्तुत किये जाने हेतु आवेदन प्रस्तुत किया, जिन्हें अन्वेषण के दौरान अभिलिखित किया गया था, परन्तु आरोप पत्र के साथ पेश नहीं किया गया – चूंकि साक्षी शिकायतकर्ता नहीं है, इसलिए उसे आपराधिक विचारण में स्वतंत्र रुप से सहभाग लेने का कोई अधिकार नहीं – अपितु, जब अन्वेषण एजेंसी स्वयं आरोप पत्र प्रस्तुत करते समय खामोश है और सोच समझकर सावधानी से चुनने का ढंग अपनाती है, न्यायालय ऐसे दस्तावेजों की सुसंगतता पर विचार करने के लिए बाध्य है – न्यायालयों का अस्तित्व, न्याय करने के लिए और न कि तकनीकी कारणों पर उससे वंचित करने के लिए। (बब्बूराजा वि. म.प्र. राज्य) **...1770**

***Criminal Procedure Code, 1973 (2 of 1974), Section 91* - Summons to produce documents - Statements of some of the witnesses recorded during investigation were not filed along with charge sheet - Prosecutors are expected to act independently without affecting the investigation - If some evidence is collected during investigation and is relevant for the purposes of trial, enquiry or other proceedings before Court, and if investigating agency purposefully does not like to disclose the same, it is the duty of prosecution to make a request to bring all other evidence collected but not produced before Court for fair justice. [Babburaja Vs. State of M.P.]** **...1770**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 –दस्तावेज प्रस्तुत करने के लिए समन–अन्वेषण के दौरान अभिलिखित किये गये कुछ साक्षियों के कथन, आरोप पत्र के साथ प्रस्तुत नहीं किये गये–अन्वेषण को प्रभावित किये बिना स्वतंत्र रुप से कार्यवाही करना, अभियोजकों से अपेक्षित है–यदि अन्वेषण के दौरान कोई साक्ष्य एकत्रित किया गया है और विचारण जांच या न्यायालय के समक्ष अन्य कार्यवाहियों के प्रयोजन हेतु सुसंगत है, और यदि अन्वेषण एजेंसी उद्देश्य सहित उसे प्रकट नहीं करना चाहती, तब अभियोजन का कर्तव्य है कि समुचित न्याय के लिये, ऐसे सभी अन्य साक्ष्य बुलाने का निवेदन करे, जिन्हें एकत्रित किया गया है परंतु न्यायालय के समक्ष प्रस्तुत नहीं किया गया है। (बब्बूराजा वि. म.प्र. राज्य) **...1770**

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Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - Investigation **- Power conferred under Section 156(3) of Cr.P.C. on Judicial Magistrate is to be exercised with due caution - Before doing so he has to apply his mind to know whether allegations in complaint, prima facie, make out a case - Dispute between the complainant and petitioner is regarding settlement of account which is a civil dispute - Magistrate was not justified in referring the matter without assigning any reason and without considering the complaint - Order passed by JMFC and F.I.R. registered in pursuance of order of Magistrate quashed. [Ajay Goenka (Dr.) Vs. State of M.P.] ...1759**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण – द.प्र. सं. की धारा 156(3) के अंतर्गत, न्यायिक मजिस्ट्रेट को प्रदत्त की गई शक्ति का प्रयोग सम्यक् सावधानी के साथ किया जाना चाहिए – ऐसा करने से पूर्व उसे अपने मस्तिष्क का प्रयोग करना चाहिए यह जानने के लिये कि क्या शिकायत के अभिकथन प्रथम दृष्ट्या प्रकरण गठित करते हैं – शिकायतकर्ता एवं याची के बीच लेखा के निर्धारण से संबंधित विवाद सिविल विवाद है – कोई कारण दिये बिना और शिकायत पर विचार किये बिना मजिस्ट्रेट द्वारा मामला निर्देशित किया जाना न्यायोचित नहीं – न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा पारित किया गया आदेश और मजिस्ट्रेट के आदेश के अनुसरण में पंजीबद्ध की गयी प्रथम सूचना रिपोर्ट अभिखंडित। (अजय गोयंका (डॉ.) वि. म.प्र. राज्य) ...1759

Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3) & 482 **- On date of incident a F.I.R. was lodged by respondent No.2 in police station and the same was registered under section 294, 324, 506-B/34 I.P.C. - Later on respondents No.1 & 2 filed a complaint under Sections 307, 326, 294, 506(B) of I.P.C. and Section 3(1)(x) of Scheduled Case and Scheduled Tribe (Prevention of Atrocities) Act regarding same incident - Complaint/application (filed by the respondents No.1 & 2) was ordered to be sent to the concerned Police Station for lodging of the FIR on the basis of the complaint and submit a report after conducting the investigation in the matter - Held - Impugned order to register the alleged second FIR on the basis of complaint application is contrary to law - Petition allowed. [Surendra Sharma Vs. Ramcharan Lal Jatav] ...1787**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 156(3) व 482 – घटना दिनांक को प्रत्यर्थी क्र. 2 द्वारा पुलिस थाना में एक प्रथम सूचना रिपोर्ट दर्ज करायी गयी और उसे धारा 294, 324, 506–बी/34 भा.द.सं. के अंतर्गत पंजीबद्ध किया गया

– बाद में, प्रत्यर्थी क्र. 1 व 2 ने भा.द.सं. की धाराऐं 307, 326, 294, 506(बी) तथा अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम की धारा 3(1)(x) के अंतर्गत शिकायत उसी घटना के संबंध में प्रस्तुत की गई – (प्रत्यर्थी क्र. 1 व 2 द्वारा प्रस्तुत) शिकायत/आवेदन संबंधित थाना में शिकायत के आधार पर प्रथम सूचना रिपोर्ट दर्ज करने हेतु भेजे जाने के लिये और मामले में जांच करने के उपरांत रिपोर्ट पेश करने के लिए आदेशित किया गया – अभिनिर्धारित – शिकायत आवेदन के आधार पर अभिकथित द्वितीय प्रथम सूचना रिपोर्ट दर्ज करने का आक्षेपित आदेश, विधि विरुद्ध है – याचिका मंजूर। (सुरेन्द्र शर्मा वि. रामचरण लाल जाटव) ...1787

Criminal Procedure Code, 1973 (2 of 1974), Sections 391 & 401 - **Judicial Magistrate First Class, convicted the accused u/s 138 of the Negotiable Instruments Act and sentenced to suffer imprisonment with fine - Petitioner/accused preferred an appeal against the judgment of conviction and sentence - During pendency of the appeal, an application u/s 391 of Cr.P.C. was filed by the petitioner for taking two documents as additional evidence - The application was allowed and by keeping the appeal pending for decision by the impugned order, the matter was remanded back to the Trail Court for recording the additional evidence of the parties - Held - No infirmity and illegality in the impugned order that may call for any interference in exercise of the revisional jurisdiction. [Sharif Kha Vs. Gajanand]** ...1755

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 391 व 401 – न्यायिक मजिस्ट्रेट प्रथम श्रेणी ने अभियुक्त को परक्राम्य लिखत अधिनियम की धारा 138 के अंतर्गत दोषसिद्ध किया और कारावास के साथ अर्थदण्ड से दण्डादिष्ट किया – याची/अभियुक्त ने दोषसिद्धि एवं दण्डादेश के निर्णय के विरुद्ध अपील की – अपील लंबित रहने के दौरान, द.प्र.सं. की धारा 391 के अंतर्गत दो दस्तावेजों को अतिरिक्त साक्ष्य के रुप में लिये जाने हेतु याची द्वारा आवेदन प्रस्तुत किया गया – आवेदन मंजूर किया गया और आक्षेपित आदेश द्वारा अपील को निर्णय के लिए लंबित रखकर, प्रकरण विचारण न्यायालय को पक्षकार के अतिरिक्त साक्ष्य अभिलिखित करने हेतु प्रतिप्रेषित किया गया – अभिनिर्धारित – आक्षेपित आदेश में कोई कमी या अवैधता नहीं कि पुनरीक्षण अधिकारिता का प्रयोग करते हुए किसी हस्तक्षेप की आवश्यकता हो। (शरीफ खां वि. गजानन्द) ...1755

***Designs Act (2 of 1911), Section 22 - See - Civil Procedure Code, 1908, Order 39 Rule 1 & 2* [SKOL Breweries Ltd. Vs. Som Distilleries Ltd. & Breweries Ltd.]** ...1589

डिजाइन अधिनियम (1911 का 2), धारा 22 – देखें – सिविल प्रक्रिया

संहिता, 1908, आदेश 39 नियम 1 व 2 (स्कोल ब्रूअरीज लि. वि. सोम डिस्टीलरीज लि. एण्ड ब्रूअरीज लि.) ...1589

Evidence Act (1 of 1872), Section 3 - Evidence of Eye Witnesses - Reliability - **Appellant caught hold the infant child, push on his chest, inflicted injury over the stomach by knife thereby his intestine has come out - Eye witnesses version supported by doctor - Held - Testimony of witnesses remained in ocular which is apparent from the autopsy report - Prosecution has proved the charge beyond reasonable doubt by cogent evidence. [Thavriya @ Thavar Singh Vs. State of M.P.] (DB)...1722**

साक्ष्य अधिनियम (1872 का 1), धारा 3 – प्रत्यक्षदर्शी साक्षियों का साक्ष्य – विश्वसनीयता – अपीलार्थी ने नन्हें शिशु को पकड़ा, उसके सीने पर धक्का दिया, पेट पर चाकू से चोट पहुंचाई जिससे उसकी आतें बाहर आई गईं – प्रत्यक्षदर्शी साक्षी का वर्णन, चिकित्सक द्वारा समर्थित – अभिनिर्धारित – साक्षियों की परिसाक्ष्य चाक्षुष बनी रही है, जो शव प्रतिवेदन से स्पष्ट है – अभियोजन ने आरोप को प्रबल साक्ष्य से युक्तियुक्त संदेह से परे साबित किया। (थावरिया उर्फ थावर सिंह वि. म. प्र. राज्य) **(DB)...1722**

Evidence Act (1 of 1872), Section 9 - Delayed Test Identification Parade - **After a lapse of considerable time identification by strangers cannot be relied on - Identification by a witness for the first time in court, should not form basis of conviction - Such evidence is a weak type of evidence unless corroborated by the previous parade or other evidence - Previous Identification is a check valve to the evidence of Identification in the court. [Jagmohan Vs. State of M.P.] ...1728**

साक्ष्य अधिनियम (1872 का 1), धारा 9 – विलंब से की गई पहचान परेड – अधिक समय बीत जाने के पश्चात, अपरिचित द्वारा की गई पहचान पर विश्वास नहीं किया जा सकता – साक्षी द्वारा न्यायालय में प्रथम बार पहचान करना, दोषसिद्धि का आधार नहीं बनना चाहिए – ऐसा साक्ष्य कमजोर प्रकार का साक्ष्य है जब तक कि पूर्वतर परेड या अन्य साक्ष्य द्वारा अभिपुष्ट न हो – पूर्वतर पहचान, न्यायालय में पहचान के साक्ष्य का चेक वाल्व है। (जगमोहन वि. म.प्र. राज्य) ...1728

Evidence Act (1 of 1872), Section 18-See - Civil Procedure Code, 1908, Order 8 Rules 3 & 5 **[Hari Singh Vs. Vikram Singh] ...1654**

साक्ष्य अधिनियम (1872 का 1), धारा 18 – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 8 नियम 3 व 5 (हरि सिंह वि. विक्रम सिंह) ...1654

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Evidence Act (1 of 1872), Section 32 - See - Penal Code, 1860, Section 302 [Sanju Vs. State of M.P.] (DB)...1712

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धारा 302 (संजू वि. म.प्र. राज्य) (DB)...1712

Evidence Act (1 of 1872), Section 35 - Date of Birth - Entries in School Register - **An entry relating to date of birth made in school register is relevant and admissible however, such entry is of not much evidentiary value to prove the age of the person in absence of material on which the age was recorded - As there is no evidence that at whose instance and on what material the date of birth was recorded in school admission register, such entry loses its evidentiary value. [Dilip Singh Gurjar Vs. State of M.P.]** (DB)...1521

साक्ष्य अधिनियम (1872 का 1), धारा 35 – जन्मतिथि – शाला पंजी में प्रविष्टियां – शाला पंजी में जन्मतिथि से संबंधित की गई प्रविष्टि, सुसंगत एवं ग्राह्य है किन्तु व्यक्ति की आयु साबित करने के लिए, उक्त प्रविष्टि का साक्ष्यिक मूल्य अधिक नहीं, जब कोई सामग्री उपस्थित नहीं जिस पर से आयु अभिलिखित की गई – चूंकि कोई साक्ष्य नहीं कि किसके कहने पर और किस सामग्री के आधार पर शाला प्रवेश पंजी में जन्मतिथि अभिलिखित की गई थी, उक्त प्रविष्टि अपना साक्ष्यिक मूल्य खो देती है। (दिलीप सिंह गुर्जर वि. म.प्र. राज्य) (DB)...1521

Evidence Act (1 of 1872), Section 45 - See - Penal Code, 1860, Section 376 [Chhote alias Surendra Vs. State of M.P.] ...1705

साक्ष्य अधिनियम (1872 का 1), धारा 45 – देखें – दण्ड संहिता, 1860, धारा 376 (छोटे उर्फ सुरेन्द्र वि. म.प्र. राज्य) ...1705

Evidence Act (1 of 1872), Sections 63 & 65 - Secondary evidence - **Both the sections are to be read conjointly - If one fulfills the test of secondary evidence, the document can be treated as secondary evidence. [Gwalior Development Authority Vs. Dushyant Sharma]** ...1582

साक्ष्य अधिनियम (1872 का 1), धाराऐं 63 व 65 – द्वितीयक साक्ष्य – दोनों धाराओं को एक साथ पढ़ा जाना चाहिए – यदि कोई द्वितीयक साक्ष्य के जांच पर खरा उतरता है, उस दस्तावेज को द्वितीयक साक्ष्य माना जा सकता है। (ग्वालियर डिवैलपमैंट आथॉरिटी वि. दुष्यंत शर्मा) ...1582

Excise Act, M.P. (2 of 1915), Section 47-A to 47-D - Revision - Jurisdiction - **Liquor with vehicle was seized within the District Shivpuri**

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- Application for release of liquor was rejected by Collector (Excise), Shivpuri and order of confiscation was passed - Appeal was dismissed by Excise Commissioner, Gwalior - As the offence was committed in District Shivpuri, Order of confiscation was passed by Collector (Excise), Shivpuri and merely because the appeal was dismissed by Excise Commissioner, Gwalior, it cannot be said that Sessions Judge, Shivpuri has no jurisdiction to hear revision against appellate order. [Shashwat M. Sharma Vs. State of M.P.] ...*30

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 47ए से 47डी – पुनरीक्षण – अधिकारिता – मदिरा के साथ वाहन को शिवपुरी जिले के भीतर जब्त किया गया – कलेक्टर (आबकारी), शिवपुरी द्वारा मदिरा को मुक्त करने हेतु आवेदन अस्वीकार किया गया और अधिहरण का आदेश पारित किया गया – आबकारी आयुक्त, ग्वालियर द्वारा अपील खारिज – चूंकि अपराध, शिवपुरी जिले में कारित किया गया, कलेक्टर (आबकारी), शिवपुरी द्वारा अधिहरण का आदेश पारित किया गया और मात्र इसलिए कि अपील को आबकारी आयुक्त, ग्वालियर द्वारा खारिज किया गया था, यह नहीं कहा जा सकता कि अपीली आदेश के विरुद्ध पुनरीक्षण सुनने की अधिकारिता सत्र न्यायाधीश, शिवपुरी को नहीं है। (शाश्वत एम. शर्मा वि. म.प्र. राज्य)...*30

***Family Court Act (66 of 1984), Sections 3, 7 & 8(c)* - Suit for recovery of 'Stridhan' was filed on 01.05.2000 at Gwalior Court - On 04.03.2002 the Family Court was established under Family Courts Act to the area of Municipal Corporation, Gwalior - Held - All the proceedings after 08.03.2002 by Civil/District Court cannot be held to be legal and decree passed by trial Court (ADJ) is found to be without jurisdiction - Suit is transferred as per Section 8(c) of the Act to the Family Court, Gwalior. [Balram Shivhare Vs. Suneeta Shivhare (Smt.)] ...1656**

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धाराएं 3, 7 व 8(सी) – स्त्रीधन की वसूली हेतु वाद ग्वालियर न्यायालय से 01.05.2000 को प्रस्तुत किया – 04.03.2002 को, कुटुम्ब न्यायालय अधिनियम के अंतर्गत नगर पालिका निगम, ग्वालियर क्षेत्र के लिये कुटुम्ब न्यायालय स्थापित किया गया था – अभिनिर्धारित – 08.03.2002 के पश्चात सिविल/जिला न्यायालय द्वारा की गई सभी कार्यवाहियों को वैध नहीं ठहराया जा सकता और विचारण न्यायालय (एडीजे) द्वारा पारित की गई डिक्री बिना अधिकारिता के होना पाया गया – वाद को अधिनियम की धारा 8(सी) के अनुसार कुटुम्ब न्यायालय, ग्वालियर को अंतरित किया गया। (बलराम शिवहरे वि. सुनीता शिवहरे (श्रीमति) ...1656

Hindu Marriage Act (25 of 1955), Section 13 - Condonation of

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Cruelty - Meaning of - **Held - It is forgiveness and reinstatement with knowledge - It consists of a factum of animus-remittendi - The sexual intercourse is a strong inference of condonation with its dual requirement i.e. forgiveness and restoration. [Sanjay Agrawal Vs. Jyoti Agrawal (Smt.)]** **(DB)...*29**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 – क्रूरता के लिए माफी – का अर्थ – अभिनिर्धारित – यह ज्ञानपूर्वक क्षमा एवं पुनः स्थापना है – इसमें प्रत्यागमन का आशय समाविष्ट है – लैंगिक समागम माफी का प्रबल निष्कर्ष है, उसकी दोनों अपेक्षाओं के साथ अर्थात क्षमा एवं पुनः स्थापना। (संजय अग्रवाल वि. ज्योति अग्रवाल (श्रीमति)) **(DB)...*29**

Industrial Disputes Act (14 of 1947), Section 25-N & 25-O - Closure of Establishment - **A harmonious reading of these provisions would make it clear that in case, sanction is granted u/s 25-O for closure of the establishment, there would not be any applicability of Section 25-N - The petitioners have received compensation on account of closure of the establishment - Consequently, there was no occasion for the petitioners to claim any relief against retrenchment - That being so, the Labour Court was not right in entertaining their application for retrenchment compensation - The Industrial Court was right in allowing appeal from the award of Labour Court - Writ Petition under Article 227 of the Constitution of India challenging the order of Industrial Court dismissed. [J.P. Gupta Vs. Eveready Industries India Ltd.]** **...1526**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एन व 25ओ – स्थापना को बंद करना – इन उपबंधों को समन्वयपूर्वक पढ़ने पर यह स्पष्ट हो जायेगा कि यदि धारा 25–ओ के अंतर्गत स्थापना बंद किये जाने हेतु मंजूरी प्रदान की जाती है, तब धारा 25–एन की कोई प्रयोज्यता नहीं होगी – याची ने स्थापना बंद हो जाने के कारण प्रतिकर प्राप्त किया है – परिणामतः याचीगण के पास छंटनी के विरुद्ध किसी अनुतोष का दावा करने के लिए कोई कारण नहीं था – ऐसा होते हुए श्रम न्यायालय द्वारा छंटनी प्रतिकर हेतु उनका आवेदन ग्रहण करना उचित नहीं था – औद्योगिक न्यायालय द्वारा श्रम न्यायालय के अवार्ड की अपील मंजूर करना उचित था – औद्योगिक न्यायालय के आदेश को चुनौती देते हुए, भारत के संविधान के अनुच्छेद 227 के अंतर्गत रिट याचिका खारिज। (जे.पी. गुप्ता वि. एवरेडी इंडस्ट्रीज इंडिया लि.) **...1526**

Interpretation of Statutes - Exclusion of Jurisdiction - **Clauses which purports to exclude the jurisdiction of the Courts must be read strictly. [Ravindra Nath Tripathi Vs. Union of India]** **(DB)...1553**

कानूनों का निर्वचन – अधिकारिता का अपवर्जन – खंड जो न्यायालयों की अधिकारिता का अपवर्जन तात्पर्यित करते हैं उन्हें यथावत रुप से पढ़ा जाना चाहिए। (रवीन्द्रनाथ त्रिपाठी वि. यूनियन ऑफ इंडिया) (DB)...1553

Law of Torts - Strict Liability - Negligence of Servant or employee **- Respondent or company can not escape from the liability on any count. [Ramdevi (Smt.) Vs. Madhya Pradesh Vidyut Mandal] ...1639**

अपकृत्य विधि – कठोर उत्तरदायित्व – सेवक या कर्मचारी द्वारा उपेक्षा – प्रत्यर्थी या कंपनी किसी भी स्थिति में उत्तरदायित्व से नहीं बच सकता। (रामदेवी (श्रीमति) वि. म.प्र. विद्युत मंडल) ...1639

Limitation Act (36 of 1963), Section 5 - Condonation of delay **- Delay of 1128 days - Delay by State - A liberal view should be taken as in the matter of State where nobody is personally affected, but it is people at large affected and the machinery employed by the State is impersonal machinery, however, the explanation furnished must be bonafide - Long term delay must be appreciated in the light of submissions made and circumstances brought on record - It should be seen that State is serious enough in having taken action against erring officers - In the present case although show cause notice was issued to guilty officers in the year 2003 but nothing has been brought on record as to what are the consequences of such show cause issued to them - Explanation of 1128 days also not found sufficient rather reflects lethargy and negligence on the part of State - Application for condonation of delay rejected - Consequently appeal is also dismissed. [State of M.P. Vs. Virendra Shankar] (DB)...1489**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिए माफी – 1128 दिनों का विलम्ब – राज्य द्वारा विलम्ब – राज्य के मामले में उदार दृष्टिकोण अपनाना चाहिए, जहां कोई व्यक्तिगत रुप से प्रभावित नहीं होता है बल्कि, आम लोग प्रभावित होते हैं और राज्य द्वारा नियोजित व्यवस्था, अवैयक्तिक व्यवस्था होती है, अपितु, प्रस्तुत किया गया स्पष्टीकरण सद्भाविक होना चाहिए – लंबी अवधि के विलम्ब का अधिमूल्यन, अभिलेख पर किये गये प्रस्तुतीकरण एवं लायी गई परिस्थितियों के आलोक में किया जाना चाहिए – यह देखा जाना चाहिए कि राज्य, दोषी अधिकारियों के विरुद्ध कार्यवाही किये जाने के लिए पर्याप्त रुप से गंभीर है – वर्तमान प्रकरण मे, यद्यपि दोषी अधिकारियों को सन् 2003 में कारण बताओं नोटिस जारी किये गये थे, किन्तु इस बारे में, अभिलेख पर कुछ नहीं लाया गया कि उन्हें जारी किये गये उक्त कारण बताओ का क्या परिणाम हुआ है – 1128 दिनों का

स्पष्टीकरण भी पर्याप्त नहीं पाया गया बल्कि राज्य की ओर से आलस्य एवं उपेक्षा प्रतिबिंबित करता है – विलंम्ब की माफी का आवेदन अस्वीकार किया गया – परिणामतः अपील भी खारिज। (म.प्र. राज्य वि. वीरेन्द्र शंकर) (DB)...1489

Motor Vehicle Act (59 of 1988), Sections 147 & 149 - Liability of Insurance Company - **When there is no statutory liability to pay compensation by the Insurance Company to the deceased who had travelled as an unauthorised passenger in the vehicle, the Insurance Company cannot be directed to pay the compensation amount and recover the same from the owner of the vehicle. [United India Insurance Co. Ltd. Vs. Jagannath]** ...1671

मोटर यान अधिनियम (1988 का 59), धाराऐं 147 व 149 – बीमा कम्पनी का उत्तरदायित्व–जब बीमा कम्पनी द्वारा ऐसे मृतक को प्रतिकर अदा करने का कोई कानूनी दायित्व नहीं जिसने वाहन में अनाधिकृत यात्री के रुप में यात्रा की थी, बीमा कम्पनी को प्रतिकर राशि अदा करने एवं उसे वाहन के स्वामी से वसूलने के लिए निदेशित नहीं किया जा सकता। (यूनाईटेड इंडिया इंश्योरेन्स कं. लि. वि. जंगन्नाथ) ...1671

Motor Vehicle Act (59 of 1988), Section 166 - Accident Claim - **Driver in reversing the tractor back, as a result, deceased fell down into quarry and was pressed under huge quantity of muram collapsed from the quarry - He was seriously injured and died after sometimes during treatment in the hospital - It is a case where the death occurred on account of use of the vehicle at the time of accident - There was proximate connection between the use of the vehicle and the actual cause of death - Claims tribunal has not committed any error in holding the driver as well as the owner of the offending vehicle responsible to satisfy the award. [Bhura @ Gopal Vs. Shankutala Bai]** ...*26

मोटर यान अधिनियम (1988 का 59), धारा 166 – दुर्घटना दावा – चालक द्वारा ट्रेक्टर पीछे (रिवर्स) करने के परिणामस्वरुप मृतक नीचे खदान में गिरा और खदान धसकने से मुरम की बड़ी मात्रा के नीचे दब गया – वह गंभीर रुप से घायल हुआ और अस्पताल में उपचार के दौरान कुछ समय पश्चात उसकी मृत्यु हो गई – यह ऐसा प्रकरण है जहां दुर्घटना के समय वाहन के उपयोग के कारण मृत्यु कारित हुई – वाहन के उपयोग और मृत्यु के वास्तविक कारण के बीच निकटवर्ती संबंध है – दावा अधिकरण ने उल्लंघन करने वाले वाहन के चालक और साथ ही स्वामी को अवार्ड की तुष्टि के लिए उत्तरदायी ठहराकर कोई त्रुटि कारित नहीं की है। (भूरा उर्फ गोपाल वि. शंकुतला बाई) ...*26

Motor Vehicles Act (59 of 1988), Sections 166 & 173 -

Compensation - Multiplier **- Multiplier on the age of claimants would be applicable if their age is more than the age of deceased - In a case of bachelor's death one half deduction towards personal expenses may be made from the earning of deceased to capitalize the loss of dependency applying the multiplier either at the age of deceased or as per the age of the claimant whichever is higher. [Jakir Hussain Vs. Dinesh] ...1604**

मोटर यान अधिनियम (1988 का 59), धाराऐं 166 व 173 – प्रतिकर – गुणक – दावाकर्ताओं की आयु का गुणक लागू होगा यदि उनकी आयु मृतक की आयु से अधिक है – अविवाहित की मृत्यू के प्रकरण में या तो मृतक की आयु का गुणक लागू करके या दावाकर्ताओं की आयु के अनुसार, जो भी अधिक हो आश्रितता की हानि को पंजीकृत करने के लिए मृतक की आय सें आधे की कटौती व्यक्तिगत खर्चे के अंतर्गत की जा सकती है। (जाकिर हुसैन वि. दिनेश) ...1604

Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Re-testing of Samples **- Heroine was seized from the possession of Petitioner - However, the F.S.L. report shows the contraband as Opium - Prosecution filed application for re-testing of sample from Hyderabad - Any request for re-testing of sample may be permitted in exceptional circumstances for cogent reasons to be recorded - Application must be made within 15 days from the date of receipt of test report - Cogent reasons have been assigned by Trial Court - Revision dismissed. [Dinesh Kumar Yadav Vs. Union of India] ...1779**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61) – नमूनों की पुनः जांच – याची के कब्जे से हैरोईन जब्त की गई – किन्तु एफ.एस.एल. की रिपोर्ट, विनिषिद्ध पदार्थ को गांजा दर्शाती है – अभियोजन ने नमूने की पुनः जांच हैदराबाद से कराने का आवेदन प्रस्तुत किया – नमूने की पुनः जांच का कोई निवेदन अपवादिक परिस्थितियों में मंजूर किया जा सकता है, जिसके प्रबल कारण अभिलिखित किये गये हो – जांच प्रतिवेदन प्राप्ति की तिथि से 15 दिनों के भीतर आवेदन करना चाहिए – विचारण न्यायालय द्वारा प्रबल कारण दिये गये हैं – पुनरीक्षण खारिज। (दिनेश कुमार यादव वि. यूनियन ऑफ इंडिया) ...1779

National Security Act (65 of 1980), Section 3(2) - Preventive Detention **- Object of - Objective of preventive detention is to prevent a person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order. [Deepak Purohit Vs. State of M.P.] (DB)...1561**

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राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – निवारक निरोध – का उद्देश्य – निवारक निरोध का उद्देश्य व्यक्ति को राज्य की सुरक्षा के लिए प्रतिकूल किसी प्रकार की कार्यवाही करने से अथवा लोक व्यवस्था के अनुरक्षण के लिए प्रतिकूल किसी प्रकार की कार्यवाही करने से रोकना है। (दीपक पुरोहित वि. म.प्र. राज्य) **(DB)...1561**

***National Security Act (65 of 1980), Section 3(2) & Constitution, Articles 22(5) & 19* - Order of Preventive detention passed on the ground pertaining to Public Order - Act of detenu was merely individual i.e. it affected only two injured persons, but did not affect the peace or tranquillity of rest of the community in any manner - Therefore, it could not be held to be a breach of Public Order constituting the basis of detention of the petitioner. [Deepak Purohit Vs. State of M.P.] (DB)...1561**

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) व संविधान, अनुच्छेद 22(5) व 19 – लोक व्यवस्था से संबंधित आधार पर निवारक निरोध का आदेश पारित किया गया – बंदी का कृत्य मात्र व्यक्तिगत था अर्थात उससे केवल दो आहत व्यक्ति प्रभावित हुए परंतु शेष समुदाय की शांति एवं प्रशांति को किसी प्रकार से प्रभावित नहीं किया – अतः उसे लोक व्यवस्था का भंग नहीं माना जा सकता, जिससे याची के निरोध का आधार गठित हो सके। (दीपक पुरोहित वि. म.प्र. राज्य) **(DB)...1561**

***National Security Act (65 of 1980), Section 3(2) & Constitution, Articles 22(5) & 19 - Preventive Detention -Not punitive* - Detenu can claim no right of peremptory hearing or a show cause notice before the detention order is passed by the authority. [Deepak Purohit Vs. State of M.P.] (DB)...1561**

राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) व संविधान, अनुच्छेद 22(5) व 19 – निवारक निरोध–दण्डात्मक नहीं–बंदी, प्राधिकारी द्वारा निरोध आदेश पारित किये जाने से पूर्व अनिवार्य सुनवाई के अधिकार का या कारण बताओ नोटिस का दावा नहीं कर सकता। (दीपक पुरोहित वि. म.प्र. राज्य) **(DB)...1561**

***National Security Act (65 of 1980), Section 3(2) & Constitution, Articles 22(5) & 19 - Preventive detention* - Order of detention against the detenu passed on 08.06.2012 - Activities of detenu which could have been prejudicial to the maintenance of Public Order in the year 2010, cannot be held to be proximate and relevant for forming subjective satisfaction of the detaining authority. [Deepak Purohit Vs. State of M.P.] (DB)...1561**

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राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) व संविधान, अनुच्छेद 22(5) व 19 – निवारक निरोध – बंदी के विरुद्ध दिनांक 08.06.2012 को निरोध आदेश पारित किया गया – बंदी के कार्यकलाप जो सन् 2010 में लोक व्यवस्था के अनुरक्षण के लिये प्रतिकूल हो सकते थे, उन्हें निरोध प्राधिकारी की व्यक्तिनिष्ठ संतुष्टि बनाने हेतु आसन्न एवं सुसंगत होने की धारणा नहीं की जा सकती। (दीपक पुरोहित वि. म.प्र. राज्य) **(DB)...1561**

Negotiable Instruments Act (26 of 1881), Section 138 - Amendment in the complaint **- Complainant wrongly mentioned the cheque No.332534 in place of 332554 in the complaint as well as in the notice - After completion of cross-examination of complainant an application for amendment in complaint regarding cheque number filed, which was allowed by the trial court - Revision against the order was also dismissed by the A.S.J. observing that the case is at defence stage and petitioner/accused has an opportunity to defend his case - Held - Courts below have committed illegality in allowing such amendment. [Lekhraj Singh Kushwah Vs. Brahmanand Tiwari] ...1783**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – शिकायत में संशोधन–शिकायतकर्ता ने शिकायत मे तथा नोटिस में चेक नं. 332554 के स्थान पर चेक नं. 332534 गलत रुप से उल्लिखित किया – शिकायतकर्ता के प्रतिपरीक्षण पूर्ण होने के उपरांत चेक नम्बर के संबंध में शिकायत में संशोधन हेतु आवेदन प्रस्तुत किया गया, जिसे विचारण न्यायालय द्वारा मंजूर किया गया–आदेश के विरुद्ध पुनरीक्षण भी अति. सत्र न्यायाधीश द्वारा इस टिप्पणी के साथ खारिज किया गया कि प्रकरण बचाव के प्रक्रम पर है और याची/अभियुक्त को मामले में अपने बचाव का अवसर उपलब्ध है–अभिनिर्धारित–उक्त संशोधन मंजूर करने में निचले न्यायालयों ने अवैधता कारित की है। (लेखराज सिंह कुशवाह वि. ब्रम्हानन्द तिवारी) ...1783

Negotiable Instruments Act (26 of 1881), Sections 138 & 139 - Burden of Proof **- In cases of Section 138 of N.I. Act, presumption u/s 139 of N.I. Act may not lead to injustice or mistaken conviction - Doctrine of reverse burden introduced by Section 139 of N.I. Act should be delicately balanced. [Anirudh Saini Vs. Piyush Agrawal] ...1747**

परक्राम्य लिखत अधिनियम (1881 का 26), धाराऐं 138 व 139 – सबूत का भार – परक्राम्य लिखत अधिनियम की धारा 138 के प्रकरणों में, परक्राम्य लिखत अधिनियम की धारा 139 के अंतर्गत उपधारणा, अन्याय या भूलवश दोषसिद्धि की ओर नहीं ले जा सकती – परक्राम्य लिखत अधिनियम की धारां 139 द्वारा प्रस्तावित विपरीत भार का सिद्धांत सूक्ष्मता से संतुलित होना चाहिए। (अनिरुद्ध सैनी वि. पियूष अग्रवाल) ...1747

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Negotiable Instruments Act (26 of 1881), Sections 138 & 139 - Burden of Proof-Initially the burden of proof is on accused to rebut the presumptions u/s 139 of N.I. Act by raising a probable defence-If he discharges the said burden, the onus thereafter shifts on the complainant to prove his case. [Anirudh Saini Vs. Piyush Agrawal] ...1747

परक्राम्य लिखत अधिनियम (1881 का 26), धाराऐं 138 व 139 – सबूत का भार – संभाव्य बचाव पेश करके परक्राम्य लिखत अधिनियम की धारा 139 के अंतर्गत उपधारणाओं का खंडन करने के लिए, सबूत का भार प्रारंभिक रुप से अभियुक्त पर होता है – यदि वह अपने उक्त भार का निर्वहन करता है, तब उसके पश्चात शिकायतकर्ता पर अपने प्रकरण को साबित करने का भार आता है। (अनिरूद्ध सैनी वि. पियूष अग्रवाल) ...1747

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(1)(a), Constitution, Article 226 - Setting aside of election - Respondent No. 7 contested the election of Member of Janpad Panchayat by suppressing the fact that he has already been convicted u/s 302 of I.P.C. and has been sentenced to undergo life imprisonment - Respondent No. 7 was apparently disqualified u/s 36(1)(a) of Adhiniyam, 1993 - High Court in suitable cases is not prevented from declaring under Article 226 that a person elected to Janpad Panchayat was not qualified to be chosen as a Member and in restraining him to function as a Member - Election of respondent No. 7 quashed. [Ram Kumar Vs. State of M.P.] ...1578

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(1)(ए), संविधान, अनुच्छेद 226 – निर्वाचन को अपास्त किया जाना – प्रत्यर्थी क्र. 7 ने जनपद पंचायत के सदस्य का चुनाव लड़ा, इस तथ्य को छिपाकर कि उसे पहले ही भा.द.सं. की धारा 302 के अंतर्गत दोषसिद्ध किया गया है और आजीवन कारावास भुगतने के लिए दण्डादिष्ट किया गया है – प्रत्यर्थी क्र. 7 प्रकट रुप से, अधिनियम 1993 की धारा 36(1)(ए) के अंतर्गत निरर्हित – उच्च न्यायालय, उचित प्रकरणों में अनुच्छेद 226 के अंतर्गत घोषणा करने के लिये निवारित नहीं कि जनपद पंचायत पर निर्वाचित कोई व्यक्ति, सदस्य के रुप में चुने जाने की अर्हता नहीं रखता और उसे सदस्य के रुप में कार्य करने से रोके – प्रत्यर्थी क्र. 7 का निर्वाचन अभिखंडित। (राम कुमार वि. म.प्र. राज्य) ...1578

Penal Code (45 of 1860), Section 302 - Circumstantial Evidence - Appellant was sleeping with his wife in his room - In the morning he lodged a complaint that in the night his wife has committed suicide by

hanging herself-In postmortem the cause of death was strangulation and was homicidal in nature-As the appellant was alone in the room and the explanation given by him appears blatantly false and unreliable-Appellant is guilty of committing murder. [Rakesh Tiwari Vs. State of M.P.] (DB)...1737

दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – अपीलार्थी अपने कमरे में अपनी पत्नी के साथ सो रहा था – सुबह उसने शिकायत दर्ज की, कि उसकी पत्नी ने रात्रि में स्वयं को फंदे पर लटकाकर आत्महत्या कारित की – शव परीक्षण में मृत्यु का कारण गला घोंटना एवं मानव वध स्वरुप का बताया गया – चूंकि अपीलार्थी कमरे में अकेला था और उसके द्वारा दिया गया स्पष्टीकरण पूर्णतः मिथ्या एवं अविश्वसनीय प्रतीत होता है – अपीलार्थी हत्या का दोषी। (राकेश तिवारी वि. म.प्र. राज्य) **(DB)...1737**

***Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Murder* - Appellant No. 2 who was having a katar in his hand had caught hold the deceased and appellant No. 1 inflicted injuries by knife - 10 injuries of sharp and pointed weapon found by doctor on the person of deceased - Evidence of eye witnesses, oral dying declaration and dying declaration found to be cogent, consistent and reliable - It stood established that both the appellants assaulted deceased with knife/katar with the intention of committing his murder - Sentence of life impriosnment held proper. [Sanju Vs. State of M.P.] (DB)...1712**

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 32 – हत्या – अपीलार्थी क्रं. 2 अपने हाथ में कटार लिये, मृतक को पकड़े रखा और अपीलार्थी क्रं. 1 ने चाकू से क्षतियां पहुंचाई – चिकित्सक ने मृतक के शरीर पर धारदार एवं नुकीले शस्त्र की 10 चोटें पाई – प्रत्यक्षदर्शी साक्षियों का साक्ष्य, मौखिक मृत्युकालिक कथन एवं मृत्युकालिक कथन, प्रबल, सुसंगत एवं विश्वसनीय होना पाये गये – यह स्थापित होता है कि दोनों अपीलार्थियों ने मृतक पर उसकी हत्या कारित करने के आशय से चाकू/कटार से हमला किया – आजीवन कारावास का दण्डादेश उचित ठहराया गया। (संजू वि. म.प्र. राज्य) **(DB)...1712**

***Penal Code (45 of 1860), Section 302 - Medical Evidence - Authoritative text books* - Portion of any other authoritative text books be put to the Doctor with a view to give him an opportunity to explain his stand. [Rakesh Tiwari Vs. State of M.P.] (DB)...1737**

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दण्ड संहिता (1860 का 45), धारा 302 – चिकित्सीय साक्ष्य – पाठ्य पुस्तकें – चिकित्सक को अपने कहे को स्पष्ट करने का अवसर दिये जाने को दृष्टिगत रखते हुए चिकित्सक का सामना किसी दूसरी मान्य पुस्तक के भाग से कराना होगा। (राकेश तिवारी वि. म.प्र. राज्य) **(DB)...1737**

Penal Code (45 of 1860), Section 302 - Suicidal or Homicidal - Medical Evidence **- Ligatures marks were found to be transverse on the neck however, in the case of suicide they would have gone upwards - When the team of doctors have opined with certainty that it was a case of strangulation, then it would be difficult for the Court to substitute its opinion and hold that the death was suicidal. [Rakesh Tiwari Vs. State of M.P.] (DB)...1737**

दण्ड संहिता (1860 का 45), धारा 302 –आत्महत्या या मानववध – चिकित्सीय साक्ष्य – गर्दन पर तिरछा बंध का निशान पाया गया किन्तु, आत्महत्या की स्थिति में वह ऊपर की ओर चला जाता – जब चिकित्सकों की टीम ने निश्चितता के साथ राय दी है कि यह गला घोंटने का प्रकरण था, तब न्यायालय के लिए उनके अभिमत को प्रतिस्थापित करना और मृत्यु को आत्महत्या होने की धारणा करना कठिन होगा। (राकेश तिवारी वि. म.प्र. राज्य) **(DB)...1737**

Penal Code (45 of 1860), Sections 302 or 304-II - Murder or Culpable Homicide not amounting to murder **- Appellant created a scene when he was stopped, he caused injury to his infant son using knife, which he was having - Held - He was having motive - Offence u/s 302 IPC cannot be converted into Section 304 Part II, IPC. [Thavriya @ Thavar Singh Vs. State of M.P.] (DB)...1722**

दण्ड संहिता (1860 का 45), धाराऐं 302 या 304 II– हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अपीलार्थी ने तमाशा किया और जब उसे रोका गया, उसने अपने शिशु पुत्र को चाकू से चोट कारित की जो उसके पास था – अभिनिर्धारित – उसके पास हेतुक था – धारा 302 भा.द.सं. का अपराध, धारा 304 भाग II भा.द.सं. में संपरिवर्तित नहीं किया जा सकता। (थावरिया उर्फ थावर सिंह वि. म.प्र. राज्य) **(DB)...1722**

Penal Code (45 of 1860), Sections 302, 352, 84, 304-II - Unsoundness of mind **- Various questions put by trial Court to accused answered satisfactorily - Trial Court observed that he understand that the act done by him is wrong - Held - Defence of unsoundness of mind or incapable of knowing the nature of the act committed by him is to be**

established by the accused by cogent defence - Otherwise the common man is presumed to know the nature of the consequence of the act done. [Thavriya @ Thavar Singh Vs. State of M.P.] (DB)...1722

दण्ड संहिता (1860 का 45), धाराऐं 302, 352, 84 व 304 II– चित्त विकृति – विचारण न्यायालय द्वारा पूछे गये विभिन्न प्रश्नों का अभियुक्त ने संतोषजनक रुप से उत्तर दिया – विचारण न्यायालय ने प्रेक्षण किया कि उसे समझ है कि उसके द्वारा किया गया कृत्य गलत है – अभिनिर्धारित – चित्त विकृत्ति या उसके द्वारा किये गये कृत्य के स्वरुप को जानने में अक्षम होने का बचाव, अभियुक्त द्वारा प्रबल बचाव से स्थापित होना चाहिए – अन्यथा सामान्य मनुष्य को किये गये कृत्य के परिणामों का स्वरुप ज्ञात होने की उपधारणा होती है। (थावरिया उर्फ थावर सिंह वि. म.प्र. राज्य) (DB)...1722

Penal Code (45 of 1860), Sections 307, 323/34 - Attempt to Murder **- According to x-ray report no bony injury was found - Neither the Radiologist was examined nor x-ray report was proved - Held - The only act which could fall within the perview of Section 307, I.P.C. is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events and accused's criminal liability must be limited to the act which he in fact did, and can not be extended so as to embrace the consequence of another act which he might have done but he did not do - Conviction u/s 307 converted into Section 323/ 34 of I.P.C. [Ram Sanehi Vs. State of M.P.] ...1699**

दण्ड संहिता (1860 का 45), धाराऐं 307, 323/34 – हत्या का प्रयत्न – एक्स–रे रिपोर्ट के अनुसार कोई अस्थि चोट नहीं पाई गई – न तो विकिरण विशेषज्ञ का परीक्षण किया गया और न ही एक्स–रे रिपोर्ट साबित की गई – अभिनिर्धारित – धारा 307 भा.द.सं. की परिधि में आने वाला एकमात्र कृत्य वह कृत्य है जो अपने आप में घटना के प्राकृतिक एवं सामान्य क्रम में मृत्यु कारित करने में सामान्यतः सक्षम है और अभियुक्त का आपराधिक दायित्व उस कृत्य तक सीमित होना चाहिए जिसे उसने वास्तव में किया हो और उसे विस्तारित नहीं किया जा सकता जिससे कि किसी अन्य कृत्य का परिणाम जो वह कर सकता था परंतु उसने नहीं किया समाविष्ट हो – धारा 307 के अंतर्गत दोषसिद्धि को धारा 323/34 भा. द.सं. में संपरिवर्तित। (राम सनेही वि. म.प्र. राज्य) ...1699

Penal Code (45 of 1860), Section 352 - Use of Criminal Force **- Held - Said charge has been fully established from the evidence of P.W.1 - No argument to disprove has been made - Same has rightly been found proved - Appeal dismissed. [Thavriya @ Thavar Singh Vs.**

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State of M.P.] (DB)...1722

दण्ड संहिता (1860 का 45), धारा 352 – आपराधिक बल का प्रयोग – अभिनिर्धारित–उक्त आरोप अ.सा. 1 के साक्ष्य से पूर्णतः स्थापित किया गया – नासाबित करने के लिए कोई तर्क नहीं किया गया–उक्त को उचित रुप से साबित पाया गया–अपील खारिज। (थावरिया उर्फ थावर सिंह वि. म.प्र. राज्य) (DB)...1722

Penal Code (45 of 1860), Section 376 - Rape - Lack of injury - **It is well settled propostition of law that mere lack of injury or sign of struggle on the person of the prosecutrix or absence of any injury on her private parts are not sufficient circumstance to disbelieve the version of the prosecutrix - Where the ocular evidence as well as expert evidence (medical evidence) are available and both are conflicting to each other then in such a situation, the ocular evidence would prevail over the expert evidence. [Chhote alias Surendra Vs. State of M.P.] ...1705**

दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – चोट का अभाव – यह विधि का भलिभांति स्थापित प्रतिपादन है कि मात्र अभियोक्त्री के शरीर पर किसी चोट या गुत्थमगुत्था के चिन्ह का अभाव या उसके गुप्तांगों पर किसी चोट की अनुपस्थिति, अभियोक्त्री के कथन पर अविश्वास करने के लिये पर्याप्त परिस्थिति नहीं है – जहां चाक्षुष साक्ष्य के साथ–साथ विशेषज्ञ साक्ष्य (चिकित्सीय साक्ष्य) उपलब्ध है और दोनों एक दूसरे से विरोधाभाषी है, तब ऐसी स्थिति में, चाक्षुष साक्ष्य, विशेषज्ञ साक्ष्य पर अभिभावी होगी। (छोटे उर्फ सुरेन्द्र वि. म.प्र. राज्य) ...1705

Penal Code (45 of 1860), Section 376, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi), Evidence Act (1 of 1872), Section 45 - Caste of Prosecutrix - Any documentary evidence - Whether produced or proved on record - **No inference could have been drawn by the trial court to hold the caste of prosecutrix covered under the Act - To hold conviction under the Act the prosecution is bound to prove the caste of the victim covered under the Act as well as of the accused like appellant to invoke the provision of the Act - Convition and sentence of the appellant set aside. [Chhote alias Surendra Vs. State of M.P.] ...1705**

दण्ड संहिता (1860 का 45), धारा 376, अनुसूचित जाति और अनुसूचित

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जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi), साक्ष्य अधिनियम (1872 का 1), धारा 45 – अभियोक्त्री की जाति – कोई दस्तावेजी साक्ष्य – क्या अभिलेख पर प्रस्तुत अथवा साबित किया गया – अधिनियम के अंतर्गत अभियोक्त्री की जाति आने की धारणा करने के लिए विचारण न्यायालय द्वारा कोई निष्कर्ष नहीं निकला जा सकता था – अधिनियम के अंतर्गत दोषसिद्धि अभिनिर्धारित करने के लिए अभियोजन अधिनियम के उपबंध का अवलंब लेने हेतु पीड़ित और साथ ही अभियुक्त की जाति अधिनियम के अंतर्गत होना साबित करने के लिए बाध्य है – अपीलार्थी की दोषसिद्धि और दण्डादेश अपास्त। (छोटे उर्फ सुरेन्द्र वि. म.प्र. राज्य) ...1705

Penal Code (45 of 1860), Section 420, Stamp Act (2 of 1899), Section 35 - Partnership deed - Insufficiently Stamped **- In a complaint for offence punishable under Section 420 of I.P.C., the Trial Court has no authority to refuse to take such documents in evidence by holding the same to be inadmissible on the ground of lack of requisite stamp duty as per the provisions of Stamp Act. [Dharmendra Bhura Vs. State of M.P.]** ...*27

दण्ड संहिता (1860 का 45), धारा 420, स्टाम्प अधिनियम (1899 का 2), धारा 35 – भागीदारी विलेख – अपर्याप्त रुप से स्टाम्पित – भा.द.सं. की धारा 420 के अंतर्गत अपराध की शिकायत में, विचारण न्यायालय को यह धारणा करते हुए ऐसे किसी दस्तावेज को साक्ष्य में लेने से इंकार करने का कोई प्राधिकार नहीं कि वह स्टाम्प अधिनियम के उपबंधों के अनुसार अपेक्षित स्टाम्प शुल्क के अभाव के आधार पर अग्राह्य है। (धर्मेन्द्र भूरा वि. म.प्र. राज्य) ...*27

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi) - See - Penal Code, 1860, Section 376 **[Chhote alias Surendra Vs. State of M.P.]** ...1705

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi) – देखें – दण्ड संहिता, 1860, धारा 376 (छोटे उर्फ सुरेन्द्र वि. म.प्र. राज्य) ...1705

Service Law - Appointment - Qualification **- Crucial date on which a candidate must possess the requisite qualification would be the last date on which the applications are to be submitted - It was necessary for the Petitioner to submit the proof of passing of eligibility examination atleast on the date when selection was made - Rejection of the candidature for want of requisite documents**

cannot be said to be unjustified. [Draupati Tiwari (Smt.) Vs. State of M.P.]
(DB)...1512

सेवा विधि – नियुक्ति – अर्हता – महत्वपूर्ण तिथि, जिस तिथि को अभ्यर्थी के पास आवश्यक अर्हता होनी चाहिए वह, आवेदन प्रस्तुत करने की अंतिम तिथि होगी – याची को कम से कम उस तिथि पर अर्हता परीक्षा उत्तीर्ण करने का सबूत पेश करना आवश्यक था, जब चयन किया गया था – अपेक्षित दस्तावेजों के अभाव के कारण अभ्यर्थिता अस्वीकार किया जाना अनुचित नहीं कहा जा सकता। (द्रोपती तिवारी (श्रीमति) वि. म.प्र. राज्य)
(DB)...1512

Service Law - Date of Birth - Correction - Matriculation Certificate **- In the letter of offer of appointment, it was mentioned that in case the person fails to produce certificate in proof of age, the same shall be assessed by Medical Board - However, there is nothing that the date of birth was recorded on the basis of the certificate produced by Petitioner or on the basis of medical report - Matriculation certificate subsequently filed by Petitioner shows different date of birth - Other school certificates also tally with the date of birth mentioned in Matriculation Certificate - As per Implementation Instruction No. 76, Date of Birth is required to be treated as has been mentioned in Matriculation certificate - Respondents are directed to treat the date of birth of the petitioner as has been mentioned in Matriculation Certificate and to permit him to continue in service till he attains the age of superannuation according to said date of birth. [Chandra Bhusan Vs. South Estern Coal Field Ltd.]**
...1546

सेवा विधि – जन्मतिथि – सुधार – हाईस्कूल प्रमाण पत्र – नियुक्ति के प्रस्ताव पत्र में यह उल्लिखित था कि यदि वह व्यक्ति आयु के सबूत का प्रमाण पत्र प्रस्तुत करने में असफल होता है, तब उसे चिकित्सकीय बोर्ड द्वारा निर्धारित किया जायेगा – किन्तु, ऐसा कुछ नहीं कि जन्म तिथि को, याची द्वारा प्रस्तुत प्रमाण पत्र के आधार पर अभिलिखित किया गया या चिकित्सीय रिपोर्ट के आधार पर – याची द्वारा पश्चातवर्ती रुप से प्रस्तुत किया गया हाईस्कूल प्रमाण पत्र, भिन्न जन्म तिथि दर्शित करता है – अन्य शाला प्रमाण पत्र भी हाईस्कूल प्रमाण पत्र में उल्लिखित जन्म तिथि के साथ मेल खाते हैं – कार्यान्वयन अनुदेश क्र. 76 के अनुसार, जन्म तिथि को हाईस्कूल प्रमाण पत्र में उल्लिखित के अनुसार माना जाना अपेक्षित है – प्रत्यर्थीगण को याची की जन्म तिथि हाईस्कूल प्रमाण पत्र में उल्लिखित के अनुसार मानने के लिए और उक्त जन्म तिथि अधिवार्षिकी आयु प्राप्त करने तक सेवा में बने रहने की अनुमति देने के लिए निदेशित किया गया। (चन्द्रभूषण वि. साउथ ईस्टर्न कोल फील्ड लि.)
...1546

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Service Law - Doctrine of Relation Back - Appointment - Qualification **- Appellant had appeared in supplementary examination of Class XII - Taking part in examination is not the complete exercise of obtaining educational qualification - Passing of examination would be only when the result is declared - Subsequent declaration of result would not mean that the candidate must be treated to have passed the examination with retrospective effect. [Draupati Tiwari (Smt.) Vs. State of M.P.]** **(DB)...1512**

सेवा विधि – रिलेशन बैक का सिद्धांत – नियुक्ति – अर्हता – अपीलार्थी कक्षा XII की अनुपूरक परीक्षा में बैठा – परीक्षा में बैठना शैक्षणिक अर्हता अभिप्राप्त करने की संपूर्ण प्रक्रिया नहीं है – परीक्षा उत्तीर्ण करना केवल तब होगा जब परिणाम घोषित होगा – परिणाम की पश्चातवर्ती घोषणा का यह अर्थ नहीं होगा कि अभ्यर्थी को भूतलक्षी प्रभाव से परीक्षा उत्तीर्ण करना समझा जाये। (द्रोपती तिवारी (श्रीमति) वि. म.प्र. राज्य) **(DB)...1512**

Service law - Place of Posting - Revocation of Suspension **- Whether employee can claim as a matter of right the place of posting from where he was placed under suspension ? - Held - A Government servant has a statutory right of lien to hold a substantive post and not a place - Govt. servant has no statutory, legal or constitutional right to get reinstated on the same place after revocation of suspension. [Dheer Singh Yadav Vs. State of M.P.]** **...*28**

सेवा विधि – पदस्थापना का स्थान – निलंबन वापस लेना – क्या कर्मचारी अधिकार के रुप में उसी पदस्थापना के स्थान का दावा कर सकता है जहां से उसे निलंबन में रखा गया था ? – अभिनिर्धारित – किसी सरकारी कर्मचारी को मूल पद धारण करने के लियन का कानूनी अधिकार है और न कि स्थान का – सरकारी कर्मचारी का निलंबन वापस लेने पर, उसी स्थान पर बहाल किये जाने का कोई कानूनी, विधिक, या संवैधानिक अधिकार नहीं है। (धीरसिंह यादव वि. म.प्र. राज्य) **...*28**

Specific Relief Act, 1963 (47 of 1963), Section 16(c) - Readiness & Willingness **- Plaintiff compelling defendant for closing of windows and ventilators and making partition wall, which was not a part of the contract - Held - The plaintiff was not ready & willing for getting sale deed executed in his favour and he himself was avoiding to perform the agreement by imposing arbitrary conditions. [Kaluram Agarwal Vs. Dinesh Kumar]** **...1689**

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विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 (सी) – तैयार व रजामंद – वादी, प्रतिवादी को खिड़कियां और रोशनदानों को बंद करने के लिए विवश कर रहा है तथा विभाजित करने वाली दीवार का निर्माण कर रहा है, जो कि संविदा का भाग नहीं था – अभिनिर्धारित – वादी अपने पक्ष में विक्रय विलेख का निष्पादन कराये जाने हेतु तैयार व रजामंद नहीं था और वह स्वयं, मनमानी शर्तें अधिरोपित कर करार का पालन करने से बच रहा है। (कालूराम अग्रवाल वि. दिनेश कुमार) ...1689

Specific Relief Act (47 of 1963), Section 20 - Specific Performance of Contract **- Decree of specific performance is a discretionary relief and Court is not bound to grant such relief on its asking - Although discretion is to be exercised on the basis of sound and reasonable grounds but the Court should take care to see that it is not used as an instrument of oppression to have unfair advantage to the plaintiff - Value of the house at the time of agreement was more than Rs. 2 lacs and would never fetch the value of Rs. 25,000/- on the date of agreement - Appeal is partly allowed - Decree of Specific Performance of Contract set aside - Plaintiff is entitled to a decree of refund of advance amount of Rs. 22,984/- with interest @ 6% per annum. [Dulari Bai (Smt.) (Dead) Vs. Rameshwar Dayal Shrivastava]** ...1619

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – संविदा का विनिर्दिष्ट पालन – विनिर्दिष्ट पालन की डिक्री वैवेकिक अनुतोष है और उसे मांगे जाने पर उक्त अनुतोष प्रदान करने के लिए न्यायालय बाध्य नहीं – यद्यपि विवेकाधिकार का प्रयोग तर्कसंगत एवं युक्तियुक्त आधारों पर किया जाना चाहिए, किन्तु न्यायालय को यह देखने का ध्यान रखना चाहिए कि उसका उपयोग दमन के साधन के रुप में वादी को अनुचित लाभ देकर नहीं किया जायेगा – करार के समय मकान का मूल्य रु. 2 लाख से अधिक था और करार की तिथि को रु. 25,000/– के मूल्य पर कभी नहीं बिक सकता – अपील अंशतः मंजूर – संविदा के विनिर्दिष्ट पालन की डिक्री अपास्त – वादी, 6 प्रतिशत प्रतिवर्ष की दर से ब्याज के साथ अग्रिम रकम रु. 22,984/– की वापसी की डिक्री का हकदार। (दुलारी बाई (श्रीमति)(मृतक) वि. रामेश्वर दयाल श्रीवास्तव) ...1619

Specific Relief Act, 1963 (47 of 1963), Section 20 - Specific performance of contract **- The plaintiff himself was avoiding the performance of the contract - He unnecessarily burdened the defendant with conditions, not a part of the contract before execution of sale deed - The trial court committed no mistake in**

refusing the decree for performance of contract. [Kaluram Agarwal Vs. Dinesh Kumar] ...1689

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – संविदा का विनिर्दिष्ट पालन – वादी स्वयं संविदा के पालन से बच रहा था – उसने अनावश्यक रुप से प्रतिवादी पर शर्तें लादीं जो विक्रय विलेख के निष्पादन से पूर्व संविदा का भाग नहीं था – विचारण न्यायालय ने संविदा के पालन हेतु डिक्री नामंजूर करने में कोई भूल नहीं कारित की। (कालूराम अग्रवाल वि. दिनेश कुमार) ...1689

Specific Relief Act (47 of 1963), Section 20 - Suit for specific performance **- Agreement to sell or loan transaction - More than 90% of the sale consideration and that too in odd figures of Rs. 22,984/- is alleged to have been paid at the time of agreement - In agreement it was mentioned that one gentleman is residing in the suit property and the sale deed will be executed after getting it vacated from him - In plaint it was mentioned that as the defendants are not getting the suitable alternative accommodation therefore, time for the execution of sale deed was extended thrice - Plaintiff also admitted that he does not know about the measurements of the house - Conduct of plaintiff in agreeing to purchase a house without inspecting it is highly unnatural - It can be inferred that real intention was not to purchase the house in question and the defendant never intended to sell the house to plaintiff. [Dulari Bai (Smt.) (Dead) Vs. Rameshwar Dayal Shrivastava] ...1619**

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – विनिर्दिष्ट पालन हेतु वाद – विक्रय का करार अथवा ऋण संव्यवहार – विक्रय प्रतिफल का 90 प्रतिशत से अधिक और वह भी रु. 22,984/– की विषम संख्या में अभिकथित रुप से करार के समय अदा किया गया – करार में यह उल्लिखित था कि एक सज्जन, वाद सम्पत्ति में निवासरत है और उसे उससे रिक्त कराये जाने के पश्चात विक्रय विलेख निष्पादित किया जायेगा – वाद पत्र में यह उल्लिखित था कि क्योंकि प्रतिवादीगण को योग्य वैकल्पिक स्थान नहीं मिल पा रहा है, इसलिए विक्रय विलेख के निष्पादन का समय तीन बार बढ़ाया गया था – वादी ने यह भी स्वीकार किया कि वह मकान के नाप के बारे में नहीं जानता था – मकान का मुआयना किये बिना उसे क्रय करने के लिए करार करने का वादी का आचरण अत्याधिक अस्वभाविक है – यह निष्कर्ष निकाला जा सकता है कि वास्तविक आशय प्रश्नगत मकान का क्रय करना नहीं था और प्रतिवादी का आशय, वादी को मकान विक्रय करना कभी नहीं था। (दुलारी बाई (श्रीमति)(मृतक) वि. रामेश्वर दयाल श्रीवास्तव) ...1619

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FAREWELL

JUSTICE M.A. SIDDIQUI

Born on July 1, 1951. Joined legal practice as an Advocate in the year 1974. Also worked as part-time law lecturer in Saifia College from 1975 to 1976. Was Head of the Department, Faculty of law Ravindra College, Bhopal for two years before joining the Judicial services. Joined Judicial Service as Civil Judge, Class-Il on August 7, 1978, promoted as Civil Judge, Class-I on August 24, 1984, as C.J.M. on June 29, 1989 and as officiating District Judge on August 09, 1991. Was granted Selection grade on May 8, 1999 and Super time scale on April 1, 2005. Worked as Special Judge, Chhatarpur for trial of cases under SC/ST (Prevention of Atrocities' Act) in the year 2002. Worked as District and Session Judge at Tikamgarh, Sehore and Mandla. Was Posted as Director, Public Prosecution, Bhopal from June 28, 2010 till elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh on September 13, 2010, appointed as permanent Judge on September 11, 2012 and demitted office on June 30, 2013.

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

Hon'ble Mr. Justice Krishn Kumar Lahoti, Acting Chief Justice, bids farewell to the demitting Judge :-

We have assembled here to bid a warm and affectionate farewell to Hon'ble Shri Justice Mohammad Anwar Siddiqui, who will be demitting office on 30th June, 2013. after a successful tenure as a judge of this Court.

Justice Mohammad Anwar Siddiqui, was born on 1st July, 1951 at Bhopal. After graduating in law from Barkatulla University Bhopal, he had joined the bar at District Court, Bhopal as an Advocate in year 1974 and started practice under the able guidance of Justice Faizanuddin, Former Judge of Supreme Court. After some time, Justice Siddiqui had joined the office of Mr. Aziz Ahmed Siddiqui, a leading Lawyer of Criminal side at Bhopal. Having deep academic inclination, he had also rendered his services as part time Law Lecturer in Saifia College, Bhopal, from 1975 to 1976. He, thereafter had worked as Head of the Department, Faculty of Law at Ravindra College, Bhopal for two years before joining the judicial services.

Justice Siddiqui joined Judicial Services as Civil Judge, Class II on 7th August, 1978 he was promoted as Civil Judge, Class I on 24th August, 1984, and as C.J.M. on 29th June, 1989. On August 9, 1991 he was promoted to the post of officiating District Judge. He was granted selection grade on 8th May, 1999 and super time scale on 1st April, 2005. During his long career as member of the district judiciary he had worked in different capacities at various places, including Sehore, Bilaspur, Shujalpur, Jagdalpur, Betul, Shajapur, Alirajpur, Gwalior, Chhatarpur, Tikamgarh, Mandla and Bhopal. He had worked as Special Judge, Chhatarpur for trial of cases under SC/ST (Prevention of Atrocities) Act, in the year 2002. Thereafter, he had worked as District and Sessions Judge at Tikamgarh, Sehore and Mandla. He was also appointed as Director, Public Prosecution, Bhopal from 28th of June, 2010, which post was held by him till his elevation as Judge of Madhya Pradesh High Court.

Recognizing his merit and juristic talent, he was elevated as Additional Judge of M.P. High Court on 13th Sept., 2010 and was appointed as permanent Judge on 11th Sept., 2012.

During his tenure as a Judge of the Madhya Pradesh High Court, Justice Siddiqui has disposed of 3509 cases which includes First Appeals, Miscellaneous Appeal, Writ Petitions, Writ Appeals, Miscellaneous Civil Cases, Miscellaneous Criminal Cases, Criminal Appeals and Criminal Revisions etc. Justice Siddiqui had made significant contribution both on Judicial and Administrative sides of the High Court. During his tenure, Justice Siddiqui has delivered several land mark

judgments which adorn the Law Journals. It may not be possible for me to make a reference to all those judgments.

A former Judge of the Supreme Court has said; I quote-"A judge ought to be bestowed with the sense of complete detachment and humility. He ought to remember that he is not himself an author of his deeds. He is only an actor who has to play his role conforming to the script which represents the Will of the Author playwright and thus surrendering himself to the will of God. According to Islam, such surrender is the supreme act of religion." I find all these qualities in Justice Siddiqui.

Justice Siddiqui has also shared Bench with me and with other senior judges and we have found him to be well prepared and well versed with latest provisions of Law. He followed the ideals of judicial administration; to hear patiently, to consider diligently, to understand rightly and to decide judiciously. It was a matter of great pleasure to sit with him.

Justice Mohammad Anwar Siddiqui has throughout been soft spoken, courteous to all and respected by the Bar and the Bench alike. I am sure that vast experience of Justice Siddiqui for more than 35 years in the field of dispensation of justice will be useful in future also and he will continue to render his valuable services to the legal fraternity and the society.

I wish Justice Mohammad Anwar Siddiqui and Mrs. Rashida Siddiqui best of health, happiness, prosperity and peaceful life.

Shri R.D Jain, Advocate General, Madhya Pradesh bids farewell :-

We have assembled here to bid farewell to Mr. Justice Mohammad Anwar Siddiqui who is demitting the office on 30th of June 2013 after a distinguished career as a judge of the MP High Court.

Your Lordship assumed, the office as a judge of the High Court on 13.9.2010. Your Lordship's elevation as a judge of the MP High Court brought an era of sincerity, devotion to work and dedication. Today is a parting moment as far as the office as a judge is concerned. Though all of us know the date of retirement of a judge on the day of appointment but when it arrives we feel that it would never have come and in relation to some of the judges it is not relished lightly.

Born on 1.7.1951 and after having obtained higher education of B.A. LL.M, your Lordship joined the judicial services on 7.8.1978 and was confirmed as Civil Judge on 1.5.1982.

You were then appointed as CJM/ACJM w.e.f. 29.6.1989 and thereafter promoted/posted as Officiating District Judge in Higher Judicial

service w.e.f. 9.8.1991. You were granted the selection grade w.e.f. 8.5.1999 and were confirmed as District Judge in Higher Judicial Services w.e.f. 20.1.1996 and worked as such in district Tikamgarh, Sehore and Mandla district. You were posted as Director Public Prosecution at Bhopal on 28.6.2010 and again on 13.9.2010.

In the matter of appointment of a Judge whether from the Bar or from the services care is taken to include persons with character, merit and integrity. The abundance of these qualities has led to the appointment of Your Lordship as a judge of this Court.

On account of the vast experience possessed by Your Lordship as a judge and having worked in different capacities Your Lordship had privilege to assess the pulse of the system and the decisions rendered by Your Lordship reflected this quality very eloquently. Though My Lord's period as a judge was very short but during this short period My Lord delivered hundreds of judgments and out of these judgments about 100 judgments have also been published in various journals and these judgments will surely throw light on various aspects of law which will guide the newcomers in the field.

I personally feel that Your Lordship's tenure as a judge will always be remembered. I also think that a person in legal profession never retires. He only changes the vocation and Your Lordship will also continue to provide guidance to the legal fraternity which may result in bringing up a perfect judicial system.

Your lordship were quick in understanding and in my estimation the atmosphere of your Court has always been smiling. Your Lordships' fairness as a judge was deeply impressive. Our High Court will be deprived of the services of a brilliant judge after Your Lordships' retirement.

I am sure that you will be enjoying very best of health throughout your rest of life. Though My Lord is retiring today from the Office of High Court Judge but Your Lordship has still to serve the legal world and I hope that you will provide services in this direction in the years to come and by the great treasure of knowledge My Lord will be a guide and philosopher for newcomers.

On behalf of the Government of Madhya Pradesh and Law officers of the State and on my own behalf I wish My Lord illustrious, healthy and long life.

Shri Adarsh Muni Trivedi, President, M.P. High Court Bar Association, bids farewell:-

We all have assembled here to bid a cordial farewell to your Lordship Hon'ble Shri Justice M.A. Siddiqui on your demitting the office of a Judge of this Hon'ble High Court on 30th of June, 2013.

Today, when we are bidding a farewell to your lordship; the clouds are leaning over the earth. The nature is writing the poetry of farewell. The earth and the heavens seem to caress each other with rolling tears of parting and dreaming of clouds, waves, woods and rocks passing away into a golden future.

Born on 1st July 1951, Your Lordship obtained degrees of B.A. and L.L.M. and joined your long journey on the chariot of Judiciary on 7th August 1978. Your life as a Judge of Sub-ordinate Courts exposed you to the wonderful natural beauty of erst-while Madhya Pradesh from one corner of Jagdalpur to other corner of Alirajpur, wherefrom you gathered valuable insights and varied life-spans of people, which moulded your distinct philosophy of law and justice, you with your excellence were promoted to Higher Judicial Service with, effect from 9th August 1991 ; were granted Selection Grade Scale w.e.f. 8th May 1999 and Super Time Scale w.e.f. 1st April 2005. Your Lordship adorned the seats of District and Sessions Judge at Tikamgarh, Sehore and Mandla and prior to elevation were posted as Director of Public Prosecution at Bhopal. Your Lordship have been elevated as a Judge of this Hon'ble High Court on 13th September, 2010.

The constellations of high ideals and values, Your Lordship have cherished, practiced and propounded in your life and Judgments, are thought provoking and enduring. Your Lordship have been an eminent scholar, a jurist par excellence and a Judge of high repute and kind heart, who enriched the law through incessant efforts and complete dedication. Oliver Wendell Holmes Jr. has said in his "Common-Law" :-

"The life of the law has not been logic; it has been experience."

Your Lordship have secured and served the larger cause of humanity and kept your resolutions with due diligence, honesty and your vivid experience of human life and nature, with a relief-oriented attitude and anyone who knocked your door, gets substantial Justice, with your true commitment to human values. Your Lordship have always been sympathetic to the human sufferings. Cicero says in 'De legibus' - "The people's good is the highest law."

Robert Frost says :-

"Two roads diverged in a
Wood and I,
Itook the one less
Travelled by,
And that has made all
The difference."

And it was how Your Lordship delivered Judgments with a difference. Who can give law to love. Love towards humanity is a greater law to itself. Your Lordship have played a different role that of a master-functionary of Constitutional powers with sublime humanism, which has assured excellence and freedom from prejudice. It is humanity not blue-nose legality, which serves the cause of Justice.

India's tryst with destiny inaugurated a new dawn 66 years ago with vibrant values wiping out colonial denial of human rights for the masses. I am afraid to say that the exotic Pre-Independence Bench-Bar theory and elitist system of Britishers still existing in Bar, and we still feel proud of this elitist system. Imperial injustice became obsolete with Independence of India long ago and substantial Justice has become the birth-right of the least and lost. Then why there should not be a departure from the "status-quo." This macro-challenge demands now radical humanitarian changes both in Bench and the Bar. The Justice Delivery System ought not to be untouchable and unapproachable for those humans standing on marginal lines since hundreds and hundreds of years and are still being denied their human-rights for cause of so-called race of Development, which has now become blindfolded. The Fundamental Rights are not mercy of the sovereign on the citizens of India. We have these rights because we born as human-beings. We have no written Fundamental Right of Dignity of Individuals, but still have a birth-right to live with dignity, which is being brutally crushed even after 66 years of independence, each day and everywhere and we have to think over the change in entire system of the country. What prevailing over the country in words of Oliver Goldsmith is :-

"Law grind the poor, and rich men rule the law"

It is the truth which always prevailed in Your Lordship's Judgments, particularly the Judgments delievered in the petitions under Section 482 Cr.P.C., which have revealed the face of System in many cases, where innocents had been found framed freakishly. These Judgments have glimmered the rays of hopes in the eyes of victimized people, and which has given a humanitarian face to Justice Delivery System, we dreamt of which since long,

Your Lordship possess the wealth of the soul which is the only true wealth.

"कुछ कहा तो अंधेरा सहेगा कैसे।
चुप रहा तो शमादान क्या कहेंगे।।"

Your Lordship will always be remembered for your ever smiling face, pleasing Court manners, mutual respect and deep knowledge. The word 'Anwar' in Your Lordship's name is an Arabic word which means in English' 'luminous' and in Hindi' 'ज्योर्तिमय–प्रकाशमय' .Your Lordship within your-self are a light-house, illuminated with the light of your own soul,

Akbar Illahabi says :-

"हर जर्रा चमकता है, अनवर–ए–इलाही से।
हर सांस ये कहती है, कि हम हैं तो खुदा भी है।।"

We all the members of M.P. High Court Bar Association wish you great fame like a song of bird and the luminous success. The Kingdom of Almighty Allah rests within you. The progress is the law of the life. Each coming day will provide you its own gifts. The omnipresent shall shower His all blessings upon you to keep your promises and commitments towards the society. We pray to God :-

जीवेद् शरदः शतम्।।
[LONG LIVE FOR A HUNDRED YEARS]
"तुम जियो हजारों साल, साल के दिन हों पचास हजार।"

In a verse dedicated to you
"जिन्दगी सिर्फ तराना ही तराना तो नहीं, ।
कुछ हकीकत भी है, महज फसाना तो नहीं ।।
यूं जमीं के इशारों को भी तो कुछ कहने दो।
शम्मा की मानिद पिघलते हुए भी जीने दो।।
हम तेरी याद में खुद अपने से गाफिल हो गये।
अश्क इतने पुरजोर थे कि दामन भर गये।।
हम अँधेरो को सहन करते रहे कुछ इतना भी।
तुम करीब आये तुम्हें छूकर ही अनवर हो गये।।"

Shri D.K. Dixit, President, M.P. High Court Advocates' Bar Association, bid's farewell ;-

Today we are bidding farewell to Hon'ble Shri Justice M.A. Siddiqui who is demiting the office on 30/06/2013 and because of the Holidays on 29-30 June we have assembled today in this ovation.

My lord Hon'ble Shri Justice M.A. Siddiqui performed his duties of Judge very well and must be remembered in the annuals of the history of this

Hon'ble Court Shri Justice Siddiqui possessed all the qualities of a good judge and to appear before him was always an experience of learning and knowledge.

Hon'ble Justice Siddiqui born on 01/07/1951 at Bhopal, obtained the degrees of B.A. and LL.M. and joined the services on 07/08/1978. He got timely promotion and became the District and Sessions Judge on 05/08/1991. Also received the selection grade and Super time scale on 08/05/1999 and 01/04/2005 respectively, served at so many places in the state and elevated to the Bench on 13/09/2010 and contributed immensely in this period which is very short.

We all have seen him very closely and found in him a very gentle soul and a good human being, always ready, to help the right litigant. Nobody has ever suffered any adverse treatment in his court.

My lord Hon'ble Shri Justice M.A. Siddiqui as a Judge delivered several landmark judgments which are published in the law journal in golden words, quite helpfull for the lawyers and it is sure that Hon'ble Shri Justice Siddiqui will always be remembered for his contribution in the legal field specifically in the field of Criminal law.

I on behalf of the members of High Court Advocates' Bar Association and on my own behalf convey our good wishes to Hon'ble Justice Siddiqui and his family and pray to god to give him good health and prosperity in future life. I also request him to make himself available for us whenever we remember him and keep himself busy in catering the need of society at large.

Shri Shivendra Upadhyaya, Chairman, State Bar Council of M.P. bids farewell:-

आज हम अपने न्यायाधिपति माननीय श्री मोहम्मद अनवर सिद्दीकी जी के विदाई के उपलक्ष्य में आयोजित समारोह में उपस्थित हुए हैं। हम अपने आपको गौरवान्वित महसूस करते हैं।

आपने एक साधारण परिवार में जन्म लिया एवं आपकी शिक्षा साधारण स्कूल में हुई उसके बाद भी आप इतने महान पद पर पहुंचे। हमें विशेषकर इस बात का गर्व है कि आपकी शिक्षणकाल का कुछ हिस्सा विंध्य क्षेत्र के मैहर एवं अमरपाटन में व्यतीत हुआ।

आप वर्ष 1978 से न्यायिक सेवा में आये एवं विभिन्न पदों सफल न्यायिक सफर आज तक तय किया। जीवन और पद प्राप्त करने के बाद जो मनुष्य उसका सद्उपयोग करता है उसे कर्म से ही याद किया जाता है। चाणक्य ने कहा है कि–

फलासिधि कर्म अधीन है, बुद्धि कर्म अनुसार।
तौहू सुमति महान जन, करम करहिं सुविचार।।

अर्थात् यद्यपि प्रत्येक मनुष्य को कर्मानुसार फल प्राप्त होता है और बुद्धि भी कर्मानुसार ही

बनती है। फिर भी बुद्धिमान लोग अच्छी तरह समझ बूझकर ही कोई काम करते हैं।

आपने इस लम्बे न्यायिक सफर में कर्मठता, संजीदगी व संयम से जो न्यायदान दिया है वह आने वाली पीढ़ियों के लिये एक मार्गदर्शक होगी। आप एक लगनशील, मृदुभाषी संयमित न्यायाधीश के रूप में हमेशा याद किये जावेंगे। न्यायाधिपति के रूप में इतने वर्ष तक मध्यप्रदेश में सफल न्यायदान दिया है इसके लिये मैं अपनी ओर से म.प्र. राज्य अधिवक्ता परिषद के सभी सदस्यों की ओर से एवं प्रदेश के समस्त अधिवक्ता समुदाय की ओर से आपको साधुवाद देता हूं व ईश्वर से यह कामना करता हूं कि आप तीसरी पारी में आप सफलतापूर्वक समाज को व अधिवक्ता समुदाय को एक सफल मार्गदर्शक के रूप कार्य करेंगे।

Shri Rashid Suhal Siddiqui, Asstt. Solicitor General, bids farewell :-

We have assembled here today to bid farewell to one of our eminent Judge Sri. M.A.Siddiqui on his last working day at Jabalpur High Court.

Shri M.A. Siddiqui was born on 1st July 1951 at Bhopal, on 7th Aug. 1978 he joined State Judiciary as Civil Judge Class II and then he was promoted as Chief Judicial Magistrate on 29.6.1989. He was appointed as officiating District Judge on 9.8.1991. In the year 2002 he was appointed as Special Judge for trial of cases under SC/ST Prevention of Atrocities Act. Thereafter he was appointed as Director Public Prosecution Bhopal and in the year 2010 he was elevated as Judge of this Court.

Hon'ble Justice Siddiqui is a courteous, multilingual judge with a great sense of humor. He is known for his intelligent, hard working and punctuality. He is a thorough gentleman both in and outside the court. He treated all with the same standard without bias or favour. Justice Siddiqui was a simple and moderate person with sincerely and devotion to duty due to which he rose from lowest to the highest echelon of justice delivery system in the state. Known for his integrity, hard work and judicial reticence, a man full of wisdom, self imposed discipline and loved by many people as he stood what he has decided. He is known for his ruthless honesty and candour.

He had a way of making everyone comfortable with his wit and compassion, I saw some of his uniqueness while he was dispensing justice. His larger than life, personality touches so many people and he will be sadly missed. I wish him all the best for his post retirement life.

I on behalf of Government of India, all the Law Officers of Central Government and on my own behalf, express our best wishes for good health, happiness and peace for the days ahead.

Shri T.S. Ruprah, General Secretary, Senior Advocates' Council, bids farewell :-

My Lords, this assembly bids farewell to Hon'ble Shri Justice Mohammad Anwar Siddiqui who is demitting the office of the Judge of the High Court of Madhya Pradesh.

My Lord in your short span as a Judge of the High Court you have depicted qualities of a most balanced Judge. Your Lordship realised the difficulties and miseries of the poor and the down trodden and dispensed justice compassionately.

Your Lordship always gave patient hearing even to the young lawyers and the atmosphere in the Court has been very congenial. Your Lordship has always been very humorous within and outside the court and has won the hearts of the members of the Bar. Your Lordship would be remembered in all times to come.

I, on behalf of the Senior Advocates Council and on my own behalf extend good wishes to Your Lordship and hope that you will be engaging yourself in other. activities, which will be beneficial to the society. We are sure that Your Lordship's legal knowledge, experience gained during all these years and a brilliant academic career shall be utilized for the betterment of the poor and the needy; I extend my good wishes to you and to your family members for a healthy, peaceful and happy active long life.

Farewell Speech delivered by Hon'ble Mr. Justice M.A.Siddiqui:-

My Lord, Hon'ble the Acting Chief Justice, Shri K.K. Lahoti ji, Hon'ble Administrative Judge Shri Ajit Singh ji, and all Hon'ble Senior, Sister and Brother Judges, Shri R.D. Jain, Advocate General of Madhya Pradesh, Shri A.M. Trivedi, President, High Court Bar Association. Shri D.K. Dixit, President, High Court Advocates' Bar Association. Shri Shivendra Upadhyay, Chairman, State Bar Council of Madhya Pradesh, Shri R.S. Siddiqui, Assistant Solicitor General for Union of India, Shri T.S. Ruprah, General Secretary of the Senior Advocates Council, family members of Hon'ble Lordships, members of Bar, officers of Registry, Judicial Officers, Distinguished Guests, Ladies and Gentlemen.

At the very outset, I express deep gratitude to the Almighty God, who is omnipotent, the most benevolent and merciful, for showering blessings on me and who has given this life and opportunity to me.

I express my gratitude and regards to Hon'ble the Acting Chief Justice Shri K.K. Lahoti, for his worthy words and all dearest speakers and I thank each one of you for your generous comments about me. I know that I am not

worthy for the same words, but as there is tradition of our culture that when a person goes permanently or temporarily, he is adored and all his shortcomings and mistakes which he has done in the past all ignored.

I also pay regards to my father Late Mohd. Ismail, who always guided me to join legal fraternity since the very beginning of my school days. I am also deeply indebted to my late mother Mrs. I.Q. Begum, who taught me the moral values, I tried my level best to adopt them in my life.

When I was in LLB first year, in the year 1969, my father Mohd. Ismail passed away, who was an honest Circle Police Inspector, who, could not afford more than a bicycle throughout his service career. On his death, I, my mother, brothers and sisters were dependent only on the family pension. When I was studying LLB, I started doing tuition work. I passed LLB degree with the 7th position in merit list. I took admission in LLM Course in the year 1972 and was awarded National Scholarship. In the year 1974, I started practice as an Advocate under the able guidance of Mr. Faizanuddin Saheb who later became Judge of this High Court and Judge of the Supreme Court.

After some months, I joined the office of Mr. Aziz Ahmed Siddiqui, a leading Criminal Lawyer at Bhopal. So, I struggled up to this time.

After doing LLM in the year 1975, I worked as part time Law Lecturer in Saifia College, Bhopal in the year 1975 to 1976. In the year 1976, I was the head of the Department of Law, at Ravindra College, Bhopal for last two years before joining the judicial services.

I joined Judicial Services on 7.8.1978 and I was elevated as Judge of this esteemed High Court in September 2010 and now I am going to retire from the 35 years of Judicial services.

As far as retirement is concerned the date of retirement is fixed with the joining of initial service any how I am lucky that my retirement extended for two years due to elevation to the High Court.

Somebody has sent this message to me and I am sharing it with you and the message says:

समय, सत्ता, सम्पत्ति और शरीर, साथ सदा नहीं देते पर,
स्वभाव, समझदारी सत्संग और सच्चे संबंध सदा साथ देते हैं।

I am grateful to my wife Mrs. Rasheda Siddiqui for her support in every part of my life. I am grateful to my son Yusuf Siddiqui, and daughters Nuhrul-huda Siddiqui, Amarah Khan and Huma Khan, who have always co-operated with me during my long strenuous journey as a Judge of Subordinate Court.

I shall be failing in my duties, if I will not remember my Senior Judges Shri K.K. Lahoti, Shri Ajit Singh, Shri Rajendra Menon and specially Shri Rakesh Saksena and all my senior Judges, who constantly guided me. As it is well known that this Court is very much over burdened by work and despite sincere and hard work by all the Judges, Advocates & staff, pendency of cases is increasing day by day and people are not getting justice in time. In this regard much work is to be done. In the present scenario one poetry may be quoted;

ऐ जुगनुओं तुम्हें नये चांद उगाने होंगे,
इससे पहले कि अंधेरों की हुकुमत हो जाए।

I am very much satisfied with my life and I have fully enjoyed it. At this stage there is no shortage of anything in my life. In this view it can be said;

दुआ बहार की मांगी तो इतने फूल खिले,
कहीं चमन में जगह नहीं मिली आशियाने को।

I am also grateful to all my well-wishers and all the guests who have assembled here to witness the occasion.

I am also thankful to the learned Advocates, friends and my relatives for their guidance and support.

I am also thankful to Dr. Ved Prakash Sharma, Registrar General and his team of registry officers for their kind cooperation. I am also grateful to Shri Dr. A.C. Sonkar for his kind help & co-operation for the health of mine & my family.

I am also thankful to my staff members Shri Dinesh Roy Reader, Shri Jitin Chourasia, Private Secretary, Shri K.K. Agrawal, Shri Mahendra Kumar Dixit, Personal Assistants, Mrs. Sheeba Biju, Steno, Shri Gangoli, Asstt. Protocol Officer, P.S.Os. Shri Rajendra Upadhyay and Shri Mohan Singh, Shri Janardan Shukla and Shri Prakash Londe, Driver, as well as the bungalow staff, who have worked very sincerely with me.

Before parting, I want share this thought that being a firm believer, I once again pay my regards and gratitude to Almighty God. I believe that whatsoever good or bad happens it comes from Almighty God and it is not arbitrary but it depends upon the good or bad deeds (Karm) of us. I have lived a satisfactory life and except one wish, all wishes are fulfilled and my last wish is to get salvation (Moksha), this is the aim of every believer mankind.

चिरागों की लौं से सितारों की जो तक।
तुम्हें मैं मिलूंगा जहां राह होगी।।

Lastly, I pay heartily condolence to victims of Kedarnath floods.

Short Note

****(26)***

Before Mr. Justice G.D. Saxena

M.A. No. 1302/2005 (Gwalior) decided on 17 July, 2013

BHURA @ GOPAL ...Appellant

Vs.

SHANKUTALA BAI & ors. ... Respondents

Motor Vehicle Act (59 of 1988), Section 166 - Accident Claim **- Driver in reversing the tractor back, as a result, deceased fell down into quarry and was pressed under huge quantity of muram collapsed from the quarry - He was seriously injured and died after sometimes during treatment in the hospital - It is a case where the death occurred on account of use of the vehicle at the time of accident - There was proximate connection between the use of the vehicle and the actual cause of death - Claims tribunal has not committed any error in holding the driver as well as the owner of the offending vehicle responsible to satisfy the award.**

मोटर यान अधिनियम (1988 का 59), धारा 166 – दुर्घटना दावा – चालक द्वारा ट्रेक्टर पीछे (रिवर्स) करने के परिणामस्वरुप मृतक नीचे खदान में गिरा और खदान धसकने से मुरम की बड़ी मात्रा के नीचे दब गया – वह गंभीर रुप से घायल हुआ और अस्पताल में उपचार के दौरान कुछ समय पश्चात उसकी मृत्यु हो गई – यह ऐसा प्रकरण है जहां दुर्घटना के समय वाहन के उपयोग के कारण मृत्यु कारित हुई – वाहन के उपयोग और मृत्यु के वास्तविक कारण के बीच निकटवर्ती संबंध है – दावा अधिकरण ने उल्लंघन करने वाले वाहन के चालक और साथ ही स्वामी को अवार्ड की तुष्टि के लिए उत्तरदायी ठहराकर कोई त्रुटि कारित नहीं की है।

Case referred :

AIR 1982 AP 436.

O.P. Singhal, for the appellant.

Prakhar Dhengula, for the respondents No.1, 3, 4 & 5.

O.P. Mathur, for the respondent No.8.

Short Note

****(27)***

Before Mr. Justice U.C. Maheshwari

M.Cr.C. No. 262/2013 (Jabalpur) decided on 21 March, 2013

DHARMENDRA BHURA ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

Penal Code (45 of 1860), Section 420, Stamp Act (2 of 1899), Section 35 - Partnership deed **- Insufficiently Stamped - In a complaint for offence punishable under Section 420 of I.P.C., the Trial Court has no authority to refuse to take such documents in evidence by holding the same to be inadmissible on the ground of lack of requisite stamp duty as per the provisions of Stamp Act.**

दण्ड संहिता (1860 का 45), धारा 420, स्टाम्प अधिनियम (1899 का 2), धारा 35 – भागीदारी विलेख – अपर्याप्त रुप से स्टाम्पित – भा.द.सं. की धारा 420 के अंतर्गत अपराध की शिकायत में, विचारण न्यायालय को यह धारणा करते हुए ऐसे किसी दस्तावेज को साक्ष्य में लेने से इंकार करने का कोई प्राधिकार नहीं कि वह स्टाम्प अधिनियम के उपबंधों के अनुसार अपेक्षित स्टाम्प शुल्क के अभाव के आधार पर अग्राह्य है।

Ishan Soni, for the applicant.

R.P. Tiwari, G.A. for the non-applicant No. 1/State.

Sunil Jain, for the non-applicant No.2.

Short Note

****(28)***

Before Mr. Justice Sujoy Paul

W.P. No. 1673/2013 (Gwalior) decided on 15 April, 2013

DHEER SINGH YADAV ...Petitioner

Vs.

STATE OF M.P. & anr. ...Respondents

Service law - Place of Posting - Revocation of Suspension **- Whether employee can claim as a matter of right the place of posting from where he was placed under suspension ? - Held - A Government servant has a statutory right of lien to hold a substantive post and not a place - Govt. servant has no statutory, legal or constitutional right to get reinstated on the same place after revocation of suspension.**

सेवा विधि – पदस्थापना का स्थान – निलंबन वापस लेना – क्या कर्मचारी अधिकार के रुप में उसी पदस्थापना के स्थान का दावा कर सकता है जहां से उसे निलंबन में रखा गया था ? – अभिनिर्धारित – किसी सरकारी कर्मचारी को मूल पद धारण करने के लियन का कानूनी अधिकार है और न कि स्थान का – सरकारी कर्मचारी का निलंबन वापस लेने पर, उसी स्थान पर बहाल किये जाने का कोई कानूनी, विधिक, या संवैधानिक अधिकार नहीं है।

Cases referred :

2005(4) MPHT 352, ILR (2003) MP 491, (2003) 3 SCC 485, (2003) 2 SCC 111, (2006) 1 SCC 368, (2007) 5 SCC 371. (1989) 2 SCC 84, (1989) 4 SCC 99, (1997) 9 SCC 248.

Prashant Sharma, for the petitioner.
M.P.S. Raghuvanshi, Addl. A.G. for the State.

Short Note
****(29)(DB)***

Before Mr. Justice A.K. Shrivastava & Mr. Justice B.D. Rathi
F.A. No. 39/2009 (Gwalior) decided on 25 June, 2013

SANJAY AGRAWAL ...Appellant
Vs.
JYOTI AGRAWAL (SMT.) ...Respondent

Hindu Marriage Act (25 of 1955), Section 13 - Condonation of Cruelty - Meaning of - **Held - It is forgiveness and reinstatement with knowledge - It consists of a factum of animus-remittendi - The sexual intercourse is a strong inference of condonation with its dual requirement i.e. forgiveness and restoration.**

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13 – क्रूरता के लिए माफी – का अर्थ – अभिनिर्धारित – यह ज्ञानपूर्वक क्षमा एवं पुनः स्थापना है – इसमें प्रत्यागमन का आशय समाविष्ट है – लैंगिक समागम माफी का प्रबल निष्कर्ष है, उसकी दोनों अपेक्षाओं के साथ अर्थात क्षमा एवं पुनः स्थापना।

The judgment of the Court was delivered by : **A.K. Shrivastava, J.**

Cases referred :

AIR 1975 SC 1534, 2004(I) MPWN 110, AIR 2006 SC 1662.

V.K. Bharadwaj with *Vinod Jain,* for the appellant.
Rishikesh Bohre, for the respondent.

Short Note

****(30)***

Before Mr. Justice Brij Kishore Dube

M.Cr.C. No. 5148/2013 (Gwalior) decided on 3 July, 2013

SHASHWAT M. SHARMA ...Applicant

Vs.

STATE OF M.P. & anr. ...Non-applicants

Excise Act, M.P. (2 of 1915), Section 47-A to 47-D - Revision - Jurisdiction **- Liquor with vehicle was seized within the District Shivpuri - Application for release of liquor was rejected by Collector (Excise), Shivpuri and order of confiscation was passed - Appeal was dismissed by Excise Commissioner, Gwalior - As the offence was committed in District Shivpuri, Order of confiscation was passed by Collector (Excise), Shivpuri and merely because the appeal was dismissed by Excise Commissioner, Gwalior, it cannot be said that Sessions Judge, Shivpuri has no jurisdiction to hear revision against appellate order.**

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 47ए से 47डी – पुनरीक्षण – अधिकारिता – मदिरा के साथ वाहन को शिवपुरी जिले के भीतर जब्त किया गया – कलेक्टर (आबकारी), शिवपुरी द्वारा मदिरा को मुक्त करने हेतु आवेदन अस्वीकार किया गया और अधिहरण का आदेश पारित किया गया – आबकारी आयुक्त, ग्वालियर द्वारा अपील खारिज – चूंकि अपराध, शिवपुरी जिले में कारित किया गया, कलेक्टर (आबकारी), शिवपुरी द्वारा अधिहरण का आदेश पारित किया गया और मात्र इसलिए कि अपील को आबकारी आयुक्त, ग्वालियर द्वारा खारिज किया गया था, यह नहीं कहा जा सकता कि अपीली आदेश के विरुद्ध पुनरीक्षण सुनने की अधिकारिता सत्र न्यायाधीश, शिवपुरी को नहीं है।

Case referred :

2009 RN 226.(HC).

R.K. Upadhyay, for the applicant.

Pramod Pachauri, P.P. for the non-applicant/State.

I.L.R. [2013] M.P., 1489
WRIT APPEAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg

W.A. No. 285/2011 (Indore) decided on 29 January, 2013

STATE OF M.P. & ors. ...Appellants
Vs.
VIRENDRA SHANKAR & anr. ... Respondents

Limitation Act (36 of 1963), Section 5 - Condonation of delay - Delay of 1128 days - Delay by State **- A liberal view should be taken as in the matter of State where nobody is personally affected, but it is people at large affected and the machinery employed by the State is impersonal machinery, however, the explanation furnished must be bonafide - Long term delay must be appreciated in the light of submissions made and circumstances brought on record - It should be seen that State is serious enough in having taken action against erring officers - In the present case although show cause notice was issued to guilty officers in the year 2003 but nothing has been brought on record as to what are the consequences of such show cause issued to them - Explanation of 1128 days also not found sufficient rather reflects lethargy and negligence on the part of State - Application for condonation of delay rejected - Consequently appeal is also dismissed. (Paras 30 to 33)**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिए माफी – 1128 दिनों का विलम्ब – राज्य द्वारा विलम्ब – राज्य के मामले में उदार दृष्टिकोण अपनाना चाहिए, जहां कोई व्यक्तिगत रुप से प्रभावित नहीं होता है बल्कि, आम लोग प्रभावित होते हैं और राज्य द्वारा नियोजित व्यवस्था, अवैयक्तिक व्यवस्था होती है, अपितु, प्रस्तुत किया गया स्पष्टीकरण सद्भाविक होना चाहिए – लंबी अवधि के विलम्ब का अधिमूल्यन, अभिलेख पर किये गये प्रस्तुतीकरण एवं लायी गई परिस्थितियों के आलोक में किया जाना चाहिए – यह देखा जाना चाहिए कि राज्य, दोषी अधिकारियों के विरुद्ध कार्यवाही किये जाने के लिए पर्याप्त रुप से गंभीर है – वर्तमान प्रकरण मे, यद्यपि दोषी अधिकारियों को सन् 2003 में कारण बताओं नोटिस जारी किये गये थे, किन्तु इस बारे में, अभिलेख पर कुछ नहीं लाया गया कि उन्हें जारी किये गये उक्त कारण बताओ का क्या परिणाम हुआ है – 1128 दिनों का स्पष्टीकरण भी पर्याप्त नहीं पाया गया बल्कि राज्य की ओर से आलस्य एवं उपेक्षा प्रतिबिंबित करता है – विलम्ब की माफी का आवेदन अस्वीकार किया गया – परिणामतः अपील भी खारिज।

Cases referred :

(2000) 9 SCC 292, (1995) 10 SCC 634, (2009) 13 SCC 192, AIR 1987 SC 1353, AIR 1996 SC 1623, (2012) 5 SCC 157, (2012) 3 SCC 563, (2010) 5 SCC 459.

Mini Ravindran, Dy. G.A. for the appellants.
Ramesh Chhazed, for the respondents.

JUDGMENT

The Judgment of the Court was delivered by :

M.C. GARG, J. :- This writ appeal has been filed with application for condonation of delay in filing of the appeal which is barred by 1128 days. To support the original application, fresh application for condonation of delay has been filed as I.A. no. 4886/12. It is on this application, arguments were heard.

2. In this application, the ground which has been taken to explain the delay are as follows :

> (i) That on 28/02/2008, a letter has been sent by the Govt. Advocate, Indore to the SDO Neemuch informing the judgment passed in Writ Petition no. 9006/2003 on 13/02/2008 and thereafter in the matter an opinion of the Govt. Advocate, District Court Parisar, Neemuch dated 27/05/2009 was sent to the Collector, Neemuch stating the grounds for filing the writ appeal in the matter. Thereafter, the Collector District Neemuch had written a letter dated 08/06/2009 to the Secretary, Law and Legislative Affairs Department, Bhopal for getting permission to file writ appeal stating the grounds of appeal. Thereafter, the Sub Divisional Officer, Sub-Division Neemuch also wrote a letter dated 12/06/2009 to the Secretary, Law and Legislative Affairs Department, Bhopal for getting permission to file writ appeal in the matter.
>
> (This clearly shows that for more than a year, matter remained pending with the Government Advocate for giving opinion)
>
> (ii) Thereafter, a letter dated 17/07/2009of Under Secretary was received in the Office of Collector District Neemuch which was addressed to the Colector stating that

for getting permission to file writ appeal it is necessary that letter for getting permission should be sent through appropriate / proper Govt. Revenue Department then permission will be granted. After receiving this letter the Collector District Neemuch had written a letter dated 29/07/2009 bearing Number 947/2009 Neemuch to the Secretary, State of M.P., Revenue Department, Mantralaya, Vallabh Bhawan, Bhopal for obtaining permission from the Law Department and again vide reminder letter no. 1275/2009 Neemuch dated 24/10/2009 for obtaining permission from the Law Department.

(iii) Thereafter, the Collector, Neemuch after receiving the permission from the Law Department wrote a letter No. 1565/2009 dated 22/12/2009 along with permission letter dated 27/11/2009 of Law Department to the OLC (SDO) Revenue, Neemuch for taking necessary steps to file writ appeal in the matter.

3. The appellants also made the averments that the officials responsible with the file of the present case did not look into the matter or rather with ulterior motive did not take any action in the matter. They did not even inform the higher officials regarding the orders passed by the Hon'ble High Court in the Writ Petition. Thereafter, contempt petition no. 427/2009 was filed and same was decided vide order dated 10/11/2010 and after the decision in contempt petition the matter was traced, then for the first time it came to be known that Law Department vide its memo dated 27/11/2009 has granted permission to file writ appeal in the matter.

(This shows that even though an opinion for filing of the appeal was granted by the Law Department somewhere in November, 2009, second exercise has been done for obtaining permission from the Law Department which clearly shows that there is utter negligence on the part of the department)

4. List of dates on which reliance has been placed by the learned counsel for the appellant seeking condonation of delay shows that after 28th of February, 2008, legal opinion was received on 27th of May, 2009 i.e. after more than one year, thereafter, even though letter was written by the Collector, District-Neemuch to the Secretary on 8th of June, 2009 for the permission to file an appeal, permission was granted on 27th of November, 2009 i.e. after five months. It is also surprising that despite receiving notice of contempt in

the year 2009 of which notices were issued to the concerned officials and an order was passed by this Court in the contempt petition on 10th of November, 2010, appeal has been filed on 02nd of May, 2011, which again reflects on the lethargy and utter negligence on the part of the government machinery.

5. The appellants also submitted that after filing the writ appeal, the Collector, Neemuch immediately issued various show cause notices dated 02/04/2011, 08/04/2011, 29/04/2011 to the OIC and the concerning Dealing Clerk by name Shri Dilip Kumar Jangde, (2) Shri Kailash Chandra Upadhyaya (3) Shir Jmna Das Bairagi (4) Shri Vijay Kumar Jain (5) Shri Ajay Shukla (6) Shri Narendra Gangwal and OIC of the case Shri. N.S. Rajawat for explaining delay caused in filing the writ appeal as to why appeal could not be traced in time and presented before the court. It is further submitted that against these persons, enquiry was initiated and still is going on. When the matter came to the knowledge of Shri Radheshyam Sharma, SDO (Revenue) OIC he immediately took necessary steps and collected the record of the case for filing the writ appeal.

6. It is also pertinent to mention here that at the time of filing of writ petition bearing no. 9006/2003 the show cause notices have also been issued against the then OIC of the Case (1) Shri L.P. Borasi, (2) Shri Virendra Singh Rawat (3) Shri Dipak Saxena for concealing the actual facts of judgment dated 01st October, 2002 passed in S.A. no. 401/2000. It is further submitted for this negligence and for concealing the actual facts of the case and the delay caused in the filing of this writ appeal, the enquiry was initiated against these persons and is still going on. It is also surprising that issuance of show cause started in April, 2011 which again shows the state of affairs of the Government. [Nothing has been done so far on any of the show cause notice. It is only stated that the inquiries are pending. Thus, it is apparent that no action has been taken against anyone responsible for the delay.]

7. Application though has been supported with an affidavit, but the averments made in the affidavit are similar to what has been stated in the application. It may be observed here that nothing has been brought on record as to whether any final order has been passed against any defaulting officer against whom show cause notice has been issued. It is apparent that despite initiation of action against the officials in the year 2003, even after nine years, nothing material has been done.

8. A reply has been filed to the aforesaid application by the respondents who have submitted that the story to condone the delay is concocted story to cover total lethargy and total negligence on the part of each of the appellant. It has been submitted that the averments made by the appellant for condoning the delay are of without any merit. Lists of dates have been filed by the respondent to explain that how the delay has taken place on the part of appellant.

13/02/2008	W.P. no. 9006/2003 *State of M.P. and three others Vs. Virendra Shankar* decided by this Hon'ble Court. This Hon'ble Court while affirming the order dated 26/11/2002 of Board of Revenues set aside the earlier order passed by subordinate revenue authorities.
	Proceeding before appellant no. 3 Case no. A 74/08-09
29/01/2009	Respondent submitted an application before Tehsildar , Neemuch with zerox copies of order passed inj W.P. no. 9006/ 2003 and other relevant documents with a request to record his name on the disputed land illegally removed from revenue records (Zerox copy of application and affidavit were submitted with earlier reply)
29/01/2009	Appellant no. 3 on the above application registered a case and directed publication.
17/02/2009	Respondent in person filed documents. Appellant no. 3 directed to seek instruction from appellant no. 1 in view of the order passed on 13/02/2008 by Hon'ble High Court as also invited objection by an advertisement.
17/03/2009	No one objected in response to advertisement again guidance sought by appellant no. 3 from appellant no. 1
24/03/2009	Instructions not received from appellant no. 1 Issue reminder.
31/03/2009	Case adjourned
24/04/2009	Case adjourned
18/05/2009	On respondents application, opinion of Govt. Advocate sought.

12/06/2009	On the opinion of Govt Advocate it was decided to file writ appeal in view of letter dated 08/06/2009 written by appellant no. 3 to Govt. of M.P. Zerox copies of certified copy of proceeding of case no. A-74/08-09 have been submitted with the earlier reply
	First Contempt Petition no. 427/2009
10/11/2010	Direction to appellant no. 1 to look into the matter and needful be done within 8 weeks. It was made clear by the Hon'ble Court that if for the same relief petitioners are required to approach this Court then the same shall be taken seriously. (xerox copy of certified copy with earlier reply)
	Second Contempt Petition no. 417/2011
18/05/2011	Direction to comply with the order passed in W.P. no. 9006/ 2003 within eight weeks positively. (Zerox copy of certified copy submitted with earlier reply)

9. The respondents also submitted that for enforcing the order , contempt petition was filed on 10th November, 2010. Not only that, second contempt petition being Contempt Petition no. 417/2011 was also filed on 18th of May, 2011. It is also submitted that there had been constant correspondence between the appellant and the relevant government officers. A letter was written by Tehsildar. Some details of the correspondence between Tehsildar Collector and SDO and Nayab Tehsildar has been detailed as under :

	Correspondence between appellants interse
02/02/2009	Letter by Tehsildar Apellant no. 4 to appellant no. 1 collector, Neemuch
05/05/2009	Letter by Collector Appellant no. 1 to Tehsildar Appellant no. 4.
08/05/2009	Letter by SDO appellant no. 3 to Collector appellant no. 1
12/05/2009	Letter by Naib Tehsildar to Collector Appellant no. 1
08/06/2009	Letter by appellant no. 1 to Secretary, Law and Legislative Deptt.(Zerox Copies of certified copies are submitted)
23/03/2011	Caveat filed by respondent before the Hon'ble Court.

10. It is thus submitted that even though the appellants were aware of the

total proceedings and the order passed by the learned single Judge and were also aware of the contempt proceedings which were taken, they still did not file any writ appeal within time. This shows that the appellants were having callous approach even though they were disobeying the order dated 13/02/2008 of the writ Court as is apparent from the proceedings initiated by the Tehsildar, Neemuch and precipitated by other appellants. It is submitted that the appellants have deliberately disobeyed the order passed by this Court in Contempt Petition and delay is of more than three years which does not call for any indulgence of this Court as the appellants did not deserve any sympathy from this Court. The delay is not bonafide in the facts of the case. The affidavit filed is also not specific and do not explain inordinate delay in filing the writ appeal, hence it is prayed that the application be dismissed.

11. We have heard the submissions from both the sides and also considered the facts of this case. It would be appropriate to take note of the order passed by the learned Single Judge of this Court. Writ petition was filed against the order dated 26th November, 2012 passed by the Board of Revenue, in Revision no. 1411/2000. By this order, revision filed by the respondent was allowed and in consequence thereof, order passed by the authority was set aside. Some relevant facts are :

(i) One Laxman Prasad was allotted 0.281 hectares of land on patta basis by Naib Tehsildar Neemuch vide order dated 31st July, 1991. The possession of the land in question was handed over to the pattedar under the provision of M.P. Gramoki Dakhalrahit Bhumi (Vishesh Upabandh) Adhiniyam, 1979 (hereinafter referred to as ' Adhiniyam').

(ii) After taking over the land, he made the land cultivable by spending a huge amount thereupon.

(iii) An application was moved by Tehsildar, Neemuch before the Sub-Divisinal Officer, Neemuch seeking review of the order dated 31st July, 1991, **but without issuing any notice of the said application to the pattedar,** vide order dated 07th December, 1994, Sub-Divisional Officer granted the requisite permission to Tehsildar, Neemuch to review the order dated 31st July, 1991. On this, Tehsildar passed the order dated 16th of May, 1995 whereby the patta originally granted in favour of Laxman Prasad on 31st July, 1991 was cancelled on the ground that the said patta had been granted in violation of the provisions of the Adhiniyam. The aforesaid order

was challenged by the Pattedar by filing an appeal before the Sub-Divisional Officer, but the said appeal was dismissed vide order dated 14th July, 1995.

(iv) Second appeal filed by the pattedar also met with the same fate, when it was dismissed vide order dated 19th of June, 2000.

(v) After the pattedar died, a revision petition was filed before the Board of Revenue by his legal representatives. Board of Revenue on consideration of the matter allowed the revision petition vide order dated 26th of November, 2002 and consequently, set aside of the order passed by the authority.

12. It will be appropriate to take note of the following observations made by the learned Single Judge in the impugned judgment which reflects upon the conduct of the petitioner and also goes to show that there was no hearing given to the writ petitioner before SDO and that authority which passed the impugned order had no right to to do so.

> "A perusal of the impugned order AnnexureP/1 passed by the Board of Revenue (para 6 thereof) depicts that the Board of Revenue has noticed that at the time of grant of lease (patta), the pattedar Laxman Prasad, who was aged 95 years, did not know that Naib Tehsildar was not the competent authority to grant patta, but it was the Tehsildar. It has also been noticed that the land in question had been made cultivable by the pattedar and after expiry of few years the patta in question could not cancelled. Another ground noticed by the Board of Revenue is that there was no power of review available under the Adhiniyam and the order passed by the authorities could only be appealed against .
>
> ***On a specific querry put by the Court to the learned Government Counsel, it has not been disputed by Shri Gajankush that there is no power of review in the Adhiniyam".***

13. It was in these circumstances, the order passed by the Board of Revenue was upheld by the learned Single Judge of this Court. One of the observations which is relevant in this case is that **Annexure-P/3 had been passed by the SDO behind the back of pattedar without affording any opportunity of hearing given to him.** Learned counsel for the appellant

submitted that in this case, a suit was filed by pattedar with respect to the aforesaid land seeking declaration , but the said suit was dismissed, even an appeal filed by him was also dismissed.

14. Despite that, the appellants have neither filed any suit for recovery of the land. They have also not taken any stand before either of the authority i.e. Tehsildar or the Board of Revenue to grant any opportunity of hearing to the legal heirs of pattedar, even though it is conceded by the learned counsel that the order canceling the allotment of the pattedar was passed on the back of the pattedar. Neither at any stage prior to coming to Board of Revenue nor before the Board of Revenue, the appellant took a stand that they would give an opportunity of hearing to pattedar / representatives of pattedar. Such course has not even been sought before us to seek condonation of delay and to support their application . The appellants have relied upon the following judgments.

State of Bihar and another Vs. Abhay Chand Bothra reported in (2000) 9 SCC 292; *Special Tehsildar Land Acquisition, Kerala* reported in (1995) 10 SCC 634; *State of Karnataka Vs. Y. Moideen Kunhi (dead by lrs and others* reported (2009) 13 SCC 192; *Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji* and others reported in AIR 1987 SC 1353; *State of Haryana Vs. Chandra Mani* and others reported AIR 1996 SC 1623 ; *Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai* reported in (2012) 5 SCC 157

15. On the other hand, learned counsel for the respondent, while questioning the right of condonation of delay, has supported the order on merit, but even on the point of condonation, has submitted that the lethargy which has been shown on the part of the appellant shows that they have not been able to explain any sufficient cause for the purpose of seeking indulgence of this Court for conconding delay in filling of the appeal. The judgment cited on behalf of the respondents are produced hereunder.

Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai reported in (2012) 5 SCC 157; *Postmaster General and others Vs. Living Media India Limited* and another reported in (2012) 3 SCC 563; *Oriental Aroma Chemical Industriesd Limited Vs. Gujarat Industrial Development Corporation* and another reported in (2010) 5 SCC 459;

16. We have gone through the judgments cited by the parties.

17. In the case of *State of Haryana Vs. Chandra Mani* and others(supra), it has been observed by the Apex Court that:

> "It is notorious and common knowledge that delay in more than 60 per cent of the cases filed in this Court - be it by private party or the state - are barred by limitation and this Court generally adopts liberal approach in condonation of delay finding somewhat sufficient cause to decide the appeal on merits. It is equally common knowledge that litigants including the State are accorded the same treatment and the law is administered in an even handed manner. When the State is an applicant, praying for condonation of delay, it is common knowledge that on account of impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the- buck ethos, delay on the part of the State is less difficult to understand though more difficult to approve, but the State represents collective cause of the community. It is axiomatic that decisions are taken by officer/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay - intentional or otherwise - is a routine. Considerable delay of procedural red tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest.
>
> The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining everyday's delay. The factors which are peculiar to and characteristic of the functioning of the Governmental conditions would be cognizant to and require adoption of pragmatic approach in justice-oriented process. The Court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate

level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the Courts or whether cases require adjustment and should authorise the officers take a decision or give appropriate permission for settlement. In the event of decision to file appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any.

Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants. Considered from the perspective, it must be held that the delay of 109 days in this case has been explained and that it is a fit case for condonation of the delay.

18. Learned counsel appearing for the appellant relied emphatically on the observations made by the Hon'ble Supreme Court that when an application is filed by the State, it must be considered that State is an impersonal machinery working through his officers or servants. In that case, considering that the delay was of only 109 days, the delay was condoned.

19. In the case of *Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others* (supra) , considering that there was a delay of only four days, the delay was condoned. However, in the matter the following principles were led down for interpreting words ' sufficient cause' as finds place in section 5 of the Limitation Act. It has been observed that

3. The legislature has conferred the power to condone delay by enacting S. 51 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters, instituted in this Court. But the message

does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that :- "Any appeal or any application, other than an application under any of the provisions of 0. XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay. every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the 'State', which was seeking condonation and not a private party was

altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a stepmotherly treatment when the 'State' is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant non grata status. The Courts therefore have to informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause". So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits. Turning to the facts of the matter giving rise to the present appeal, we are satisfied that sufficient cause exists for the delay. The order of the High Court dismissing the appeal before it as time barred, is therefore, set aside. Delay is condoned. And the matter is remitted to the High Court. The High Court will now dispose of the appeal on merits after affording reasonable opportunity of hearing to both the sides.

20. The next judgment relied upon is the judgment delivered by the Apex Court in the case of *State of Bihar and another Vs. Abhay Chand Bothra* (supra). In the said case, taking into consideration the steps taken by the State including lodging of FIR against guilty officials, after two years, the delay in filing SLP was condoned. Relevant paragraphs are reproduced hereunder:

> 4. On 14th December, 1998, this Court, while issuing notice for final disposal of the SLP and directing an ad-interim stay of the impugned order, condoned the delay in filing of the SLP in view of "special facts and circumstances and, in particular, the statements made in the affidavit filed before the

High Court." Subsequently, on 4th January, 2000, this Court made the following order :-

> The Letters Patent Appeal has been dismissed by the Division Bench of the High Court as barred by time. We have perused the application filed in the High Court under Section 5 of the Limitation Act seeking condonation of delay. It appears that the departmental authorities were deliberately trying to work against the interest of the Revenue. Mr. B.B. Singh, learned Counsel appearing for the State submits that against the Deputy Collector, Land Reforms, Birpur who had committed other irregularities also, proceedings were instituted. He refers to Page E of the list of dates and events in that behalf. He, however, is unable to tell us as to the nature of the proceedings or action, if any, has been taken against the Deputy Collector, Land Reforms, Birpur. Mr. B.B. Singh seeks six weeks' time to furnish the information.
>
> We have pointed to Mr. Singh that if no action has been taken against the Deputy Collector, Land Reforms, Birpur till date, an adverse inference may have to be drawn against the State.
>
> We are informed by Mr. B.B. Singh, learned Counsel appearing for the State that action has since been initiated against, the concerned official and even a First Information Report has been filed and investigation is in progress.

21. Another judgment relied upon by the appellants is the judgment delivered by the two judges bench of the Apex Court in the matter of *State of Karnataka Vs. Y. Moideen Kunhi (dead by LRs) and others* (supra). In this case, while dealing with the delay in appeal filed by the State and considering the word ' sufficient cause', the Apex Court condoned the delay by imposing heavy costs of Rs. 10 lacs on the exchequer. Some paragraphs relevant arising out of the aforesaid judgment are para nos. 19 to 23. These paragraphs are reproduced hereunder

> " On perusal of the explanation offered it is clear that the officials who were dealing with the matter have either deliberately or without understanding the implications dealt with

the matter in a very casual and lethargic manner. It is a matter of concern that in very serious matters action is not taken as required under law and the appeals/petitions are filed after long lapse of time. It is a common grievance that it is so done to protect unscrupulous litigants at the cost of public interest or public exchequer. This stand is more noticeable where vast tracts of lands or large sums of revenue are involved.

Even though the courts are liberal in dealing with the belated presentation of appeals/applications, yet there is a limit upto which such liberal attitude can be extended. Many matters concerning the State Government and the Central Government are delayed either by the nature of bureaucratic process or by deliberate manipulation of the same by taking advantage of loopholes in the conduct of litigation. Several instances have come to the notice of this Court where as noted above appeals have been filed where the revenue involved runs to several crores of rupees. It is true that occasionally delay occurs which is inexplicable in normal circumstances.

The case at hand is a classic example where the circumstances are the same. More than 4000 acres of land are involved out of which, according to the State, nearly 3500 acres constitute forest land. Ultimately, the Court has to protect the public justice. The same cannot be rendered ineffective by skillful management of delay in the process of making challenge to the order which prima facie does not appear to be legally sustainable.

The expression `sufficient cause' as appearing in Section 5 of the Indian Limitation Act, 1963 (in short the `Limitation Act') must receive a liberal construction so as to advance substantial justice as was noted by this Court in *G. Ramegowda, Major etc. v. The Special Land Acquisition Officer, Bangalore* (AIR 1988 SC 897). Para 8 of the judgment reads as follows:

The law of limitation is, no doubt, the same for a private citizen as for governmental authorities. Government, like any other litigant must take

responsibility for the acts or omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it.

Therefore, in assessing what, in a particular case, constitutes sufficient cause" for purposes of Section 5, it might, perhaps, be somewhat unrealistic to exclude from the considerations that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the government. Governmental decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural red tape in the process of their making. A certain amount of latitude is, therefore, not impermissible. It is rightly said that those who bear responsibility of Government must have "a little play at the joints" . Due recognition of these limitations on governmental functioning -- of course, within reasonable limits -- is necessary if the judicial approach is not to be rendered unrealistic. It would, perhaps, be unfair and unrealistic to put government and private parties on the same footing in all respects in such matters. Implicit in the very nature of governmental functioning is procedural delay incidental to the decision-making process. In the opinion of the High Court, the conduct of the law officers of the Government placed the Government in a predicament and that it was one of those cases where the mala fides of the officers should not be imputed to Government. It relied upon and trusted its law officers. Lindley, M.R., in the In re *National Bank of Wales Ltd.* (1899) 2 Ch. 629 at p.673 observed, though in a different context:

"Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them".

Keeping in view the importance of questions of law which are involved we are inclined to condone the delay subject

> to payment of exemplary costs which we fix at rupees ten lakhs to be paid within a period of 8 weeks to the respondents. The delay is condoned subject to the payment of the aforesaid amount as costs. After making the payment the receipt thereof shall be filed before this Court alongwith an affidavit. Only after the payment is made the special leave petitions shall be listed for admission. We make it clear that we have not expressed any opinion on the merits of the case.

22. In that case, the land involved in question was more than 4000 acres and there was delay of 14 years. It was a case of playing a fraud relating to non-surrender of the land. Other judgments referred to above was also discussed in this case.

23. Other judgments cited by the appellants which has also been relied upon by the respondents and does not support the case of the appellant is the judgment delivered in the case of *Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai* (supra).

24. In this judgment, all the previous judgments have been considered. Relevant observations which show the mind of the Apex Court in having discussed the various submissions made are as follows :

> Shri A.S. Bhasme, learned counsel for the appellants argued that the reasons assigned by the learned Single Judge for condoning more than 7 years and 3 months delay in filing the appeals are legally unsustainable and the impugned order is liable to be set aside because the explanation given by the Corporation lacked bonafides and was wholly unsatisfactory. Learned counsel emphasized that in the absence of any denial by the Corporation that it has a battery of advocates to deal with thelitigation, the transfer of Shri Ranindra Y. Sirsikar in January, 2004 to Miscellaneous Court and, thereafter, to other Courts has no bearing on the issue of delay because the suits filed by the appellants had been decided in May, 2003 and no explanation has been given as to why applications for certified copies could not be filed for 7 years and 5 months. Shri Bhasme submitted that even if one advocate / law officer was transferred from one department / division to another, nothing prevented the Corporation from taking steps to apply for

certified copies of the judgment. Shri Bhasme further submitted that the story of misplacement of papers was concocted by the Corporation and the same ought to have been rejected by the High Court because the assertion made in that regard was vague to the core and no indication was given as to when the papers were traced and by whom. In support of his argument, Shri Bhasme relied upon the judgments of this Court in *Oriental Aroma Chemical Industries Limited v. Gujarat Industrial Development Corporation* (2010) 5 SCC 459.

The expression "sufficient cause" used in Section 5 of the Limitation Act, 1963 and other statutes is elastic enough to enable the Courts to apply the law in a meaningful manner which serve the ends of justice. No hard and fast rule has been or can be laid down for deciding the applications for condonation of delay but over the years this Court has advocated that a liberal approach should be adopted in such matters so that substantive rights of the parties are not defeated merely because of delay.

The applications filed for condonation of delay and the affidavits of Shri Sirsikar are conspicuously silent on the following important points:

a) The name of the person who was having custody of the record has not been disclosed.

b) The date, month and year when the papers required for filing the first appeals are said to have been misplaced have not been disclosed.

c) The date on which the papers were traced out or recovered and name of the person who found the same have not been disclosed.

d) No explanation whatsoever has been given as to why the applications for certified copies of the judgments of the trial Court were not filed till 23.8.2010 despite the fact that Shri Sirsikar had given intimation on 12.5.2003 about the judgments of the trial Court.

e) Even though the Corporation has engaged battery of lawyers to conduct cases on its behalf, nothing has been said as to how the transfer of Shri Ranindra Y. Sirsikar operated as an impediment in the making of applications for certified copies of the judgments sought to be appealed against.

22. Unfortunately, the learned SingleJudge of the High Court altogether ignored the gapping holes in the story concocted by the Corporation about misplacement of the papers and total absence of any explanation as to why nobody even bothered to file applications for issue of certified copies of judgment for more than 7 years. In our considered view, the cause shown by the Corporation for delayed filing of the appeals was, to say the least, wholly unsatisfactory and the reasons assigned by the learned Single Judge for condoning more than 7 years delay cannot but be treated as poor apology for the exercise of discretion by the Court under Section 5 of the Limitation Act.

25. Thus as per the aforesaid judgments, if explanation furnished by the appellants seeking condonation of delay is not proper, then the Court will be well within its right to refuse the application for condonation of delay.

26. Now coming to the judgment cited on behalf of the respondent, we find that the respondent in addition to relying upon the judgment delivered in the case of *Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai* (supra) is also relying upon the judgment delivered in the case of *Postmaster General and others Vs. Living Media India Limited and another* Relevant discussions which appears in this case stands incorporated in paragraphs no. 25-30 which have been reproduced hereunder :

25. We have already extracted the reasons as mentioned in the "better affidavit" sworn by Mr. Aparajeet Pattanayak, SSRM, Air Mail Sorting Division, New Delhi. It is relevant to note that in the said affidavit, the Department has itself mentioned and is aware of the date of the judgment of the Division Bench of the High Court in LPA Nos. 418 and 1006 of 2007 as 11.09.2009. Even according to the deponent, their counsel had applied for the certified copy of the said judgment only on 08.01.2010 and the same

was received by the Department on the very same day. There is no explanation for not applying for certified copy of the impugned judgment on 11.09.2009 or at least within a reasonable time. The fact remains that the certified copy was applied only on 08.01.2010, i.e. after a period of nearly four months.

26. In spite of affording another opportunity to file better affidavit by placing adequate material, neither the Department nor the person in-charge has filed any explanation for not applying the certified copy within the prescribed period. The other dates mentioned in the affidavit which we have already extracted, clearly show that there was delay at every stage and except mentioning the dates of receipt of the file and the decision taken, there is no explanation as to why such delay had occasioned. Though it was stated by the Department that the delay was due to unavoidable circumstances and genuine difficulties, the fact remains that from day one the Department or the person/persons concerned have not evinced diligence in prosecuting the matter to this Court by taking appropriate steps.

27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on

account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay.

30. In view of our conclusion on issue (a), there is no need to go into the merits of the issues (b) and (c). The question of law raised is left open to be decided in an appropriate case. In the light of the above discussion, the appeals fail and are dismissed on the ground of delay. No order as to costs

In this case also, since proper explanation was not furnished, the Court did not decree to condone the delay

27. In the judgment delivered in case of *Oriental Aroma Chemical Industriesd Limited Vs. Gujarat Industrial Development Corporation and another* (supra), paragraphs no 14 to 16 are relevant which are reproduced hereunder

14. We have considered the respective

submissions. The law of limitation is founded on public policy. The legislature does not prescribe limitation with the object of destroying the rights of the parties but to ensure that they do not resort to dilatory tactics and seek remedy without delay. The idea is that every legal remedy must be kept alive for a period fixed by the legislature. To put it differently, the law of limitation prescribes a period within which legal remedy can be availed for redress of the legal injury. At the same time, the courts are bestowed with the power to condone the delay, if sufficient cause is shown for not availing the remedy within the stipulated time.

15. The expression "sufficient cause" employed in Section 5 of the Indian Limitation Act, 1963 and similar other statutes is elastic enough to enable the courts to apply the law in a meaningful manner which sub serves the ends of justice. Although, no hard and fast rule can be laid down in dealing with the applications for condonation of delay, this Court has justifiably advocated adoption of a liberal approach in condoning the delay of short duration and a stricter approach where the delay is inordinate - *Collector, Land Acquisition, Anantnag v. Mst. Katiji* (1987) 2 SCC 107, *N. Balakrishnan v. M. Krishnamurthy* (1998) 7 SCC 123 and *Vedabai v. Shantaram Baburao Patil* (2001) 9 SCC 106.

16. In dealing with the applications for condonation of delay filed on behalf of the State and its agencies/ instrumentalities this Court has, while emphasizing that same yardstick should be applied for deciding the applications for condonation of delay filed by private individuals and the State, observed that certain amount of latitude is not impermissible in the latter case because the State represents collective cause of the community and the decisions are taken by the officers/agencies at a slow pace and encumbered process of pushing the files from table to table consumes considerable time causing delay - *G. Ramegowda v. Spl. Land Acquisition Officer* (1988) 2 SCC 142, *State of Haryana v. Chandra Mani* (1996) 3 SCC 132, *State of U.P. v. Harish Chandra* (1996) 9 SCC 309, *State of Bihar v. Ratan Lal Sahu* (1996) 10 SCC 635, *State of Nagaland*

v. Lipok Ao (2005) 3 SCC 752, and *State (NCT of Delhi) v. Ahmed Jaan* (2008) 14 SCC 582.

28. In the light of the facts of this case and in the light of the principles which can be deduced and considering the delay which was of 1061 days in this case and explanation given by the State having not been found satisfactory, the court refused to condone the delay.

29. Thus, the principles which have been laid down by the Apex Court right from the year 1996 are very specific and gives guidelines about exercise of discretion for the purpose of considering sufficient cause, on the basis of which, condonation of delay is sought to be condoned.

30. [Right from 1996, while there has been consistent stand that in the matter pertaining to the State where nobody is personally affected, but it is people at large affected and the machinery employed by the State is impersonal machinery, a liberal view should be taken, the Courts have clarified the position of the law by stating that the explanation furnished must be bonafide. The difference between short term delay and long term delay must be appreciated in the light of the submissions made and the circumstances brought on record in the form of explanation furnished by way of an affidavit. It should be also seen that the State was serious enough in having taken action against erring officers and in appropriate cases even heavy costs has been imposed even to the extend of Rs.10 lacs. In this case, show cause to guilty officials were allegedly issued. Soon after filing of writ petition in the year 2003, nothing has been brought on record to show this Court as to what are the consequence of such show cause issued and if any particular officials has been punished on account of negligence.]

31. Applying the aforesaid principles, when condonation of delay is sought of more than 1100 days and the explanation furnished is also not found to be sufficient and rather reflect lethargy and negligence on the part of the State as also considering the merit of this case which shows that the appellants have taken action against the respondents on their back, we find that this is not the case where indulgence should be granted in favour of the appellants.

32. Even otherwise, even on merit, the appellants are not entitled to have indulgence of this Court, in as much as before Tehsildar, they have tried to take advantage on the back of the respondents. They have not cared to serve

them. The authority who passed the order cancelling the Patta was admittedly not authorized to do so. Moreover even after, the suit filed by the respondents was dismissed and appeal was also dismissed, no action has been taken to seek possession of the suit property by filing a suit for possession or by granting fair opportunity of hearing to the respondents by taking his stand before the authority who proceeded ex-parte.

33. In view of the aforesaid observations, we find no merit in the application for condonation of delay and consequently, dismiss the same. Needless to say that this would also result in dismissal of this writ appeal. While doing so, we are not prohibiting the State to take appropriate action as may be available on the basis of the order passed by the Civil Court.

Appeal dismissed.

I.L.R. [2013] M.P., 1512
WRIT APPEAL
Before Mr. S.A. Bobde, Chief Justice & Mr. Justice K.K. Trivedi
W.A. No. 900/2011 (Jabalpur) decided on 25 February, 2013

DRAUPATI TIWARI (SMT.) ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Service Law - Appointment - Qualification*** **- Crucial date on which a candidate must possess the requisite qualification would be the last date on which the applications are to be submitted - It was necessary for the Petitioner to submit the proof of passing of eligibility examination atleast on the date when selection was made - Rejection of the candidature for want of requisite documents cannot be said to be unjustified. (Para 8)**

क. सेवा विधि – नियुक्ति – अर्हता – महत्वपूर्ण तिथि, जिस तिथि को अभ्यर्थी के पास आवश्यक अर्हता होनी चाहिए वह, आवेदन प्रस्तुत करने की अंतिम तिथि होगी – याची को कम से कम उस तिथि पर अर्हता परीक्षा उत्तीर्ण करने का सबूत पेश करना आवश्यक था, जब चयन किया गया था – अपेक्षित दस्तावेजों के अभाव के कारण अभ्यर्थिता अस्वीकार किया जाना अनुचित नहीं कहा जा सकता।

B. Service Law - Doctrine of Relation Back - Appointment - Qualification **- Appellant had appeared in supplementary examination of Class XII - Taking part in examination is not the complete exercise of obtaining educational qualification - Passing of examination would**

be only when the result is declared - Subsequent declaration of result would not mean that the candidate must be treated to have passed the examination with retrospective effect. (Para 10)

ख. सेवा विधि – रिलेशन बैक का सिद्धांत – नियुक्ति – अर्हता – अपीलार्थी कक्षा **XII** की अनुपूरक परीक्षा में बैठा – परीक्षा में बैठना शैक्षणिक अर्हता अभिप्राप्त करने की संपूर्ण प्रक्रिया नहीं है – परीक्षा उत्तीर्ण करना केवल तब होगा जब परिणाम घोषित होगा – परिणाम की पश्चातवर्ती घोषणा का यह अर्थ नहीं होगा कि अभ्यर्थी को भूतलक्षी प्रभाव से परीक्षा उत्तीर्ण करना समझा जाये।

Cases referred :

(1993) Supp. (3) SCC 168, (2007) 4 SCC 54, (2008) 7 SCC 153, AIR 1994 SC 1761.

Udyan Tiwari, for the appellant.
Sanjay Dwivedi, G.A. for the respondents No. 1 to 4.
P.N. Dubey, for the respondent No.5.

ORDER

The Order of the court was delivered by : **K.K. TRIVEDI, J:** This writ appeal under Section 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, has been filed calling in question the order dated 12.8.2011 passed in Writ Petition No.11983/08(S), by which the writ petition filed by the appellant against the order of the Additional Commissioner, has been dismissed.

2: Facts giving rise to filing of this appeal in brief are that an advertisement was issued by the Gram Panchayat concerned for appointment of Anganwadi Worker in the centre in question. The appellant and the respondent No.5 submitted their candidature for appointment to the aforesaid post. The appellant claimed the preference being a polio affected person with 45% disability and having passed Higher Secondary School Certificate Examination. It was stated by the appellant that she was the local resident of the ward and was entitled for appointment as Anganwadi Worker. The respondent No.5 also submitted her candidature and claimed the preference being the widow, having passed the Higher Secondary School Certificate Examination. The process of selection was done, the candidature of respondent No.5 was excluded, the appellant was selected and appointed by the Selection Committee vide order dated 29.9.2007. The appellant joined on the post on 5.10.2007, after tendering

resignation from the post of Asha Karyakarta. According to the appellant, she underwent the training and was working on the post.

3: The selection and appointment of appellant was challenged before the Collector by the respondent No.5. The allegations were made that the appellant was already working as Asha Karyakarta, her brother-in-law was a Panchayat Secretary/Panchayat Karmi of Gram Panchayat and, therefore, she was ineligible to be appointed on the post of Anganwadi Worker. The contention was raised that the candidature of respondent No.5 was wrongly rejected though she has passed the qualifying examination. The Additional Collector, however, after hearing all the sides dismissed the appeal of the respondent No.5 on 27.12.2007. Being aggrieved by the dismissal of the appeal by the Additional Collector, the respondent No.5 filed a second appeal before the Additional Commissioner Sagar Division, Sagar. After hearing the appeal, the Additional Commissioner reached to the conclusion that candidature of respondent No.5 was wrongly rejected as she, too, was qualified to be considered for selection. The appeal filed by the respondent No.5 was allowed by the impugned order dated 18.9.2008, which was sought to be challenged in the writ petition before this Court by the appellant. Since the writ petition has been dismissed by the order under challenge in this appeal, the present intra court appeal has been filed.

4: Learned counsel for the appellant Shri Udyan Tiwari, vehemently contended that the learned Single Judge has not carefully examined the findings recorded by the Additional Collector and has reached to the conclusion that the Additional Commissioner, Sagar Division Sagar has rightly interfered with the findings of the Additional Collector and has rightly set aside the order of the Additional Collector. It is contended that there was a period prescribed for making of an application for selection for appointment on the post of Anganwadi Worker. The respondent No.5 was ineligible on the date of making of the application for her appointment on the post and even when the selection process was completed and the order of appointment was issued in respect of the appellant, the result of the examination of respondent No.5 was not notified. As she has failed in the qualifying examination in one subject and the result of supplementary examination was declared much after the selection process was over, the respondent No.5 was not to be considered at all for selection on the post of Anganwadi Worker. This materially important aspect was overlooked by the Additional Commissioner even when he interfered with the categorical findings recorded by the Additional Collector of the district.

This particular aspect was not looked into by the learned Single Judge and wrongly the writ petition of the appellant was dismissed.

5: *Per contra,* it is submitted by Shri P.N. Dubey, learned counsel appearing on behalf of the respondent No.5, that the supplementary examination of the respondent No.5 for the qualifying examination had taken place in the month of July 2007. The result was not notified though she came to know about passing of the said examination through some information put in the internet by the concerned Board and, therefore, she filed an affidavit before the Selection Committee that she has qualified the examination, but the mark sheet of the same has not been received by her. It is, thus, contended that on the date when the selection was conducted, the respondent No.5 had already acquired the qualification prescribed for appointment on the post and, thus, her candidature was not to be excluded. It is contended that the fact relating to receipt of the mark sheet subsequently was not disputed, but the result was already notified and the same will be co-related to the date of examination, therefore, the candidature of the respondent No.5 was not to be rejected only on the ground that the respondent No.5 had not passed the qualifying examination. Secondly, the aspect that the brother-in-law of the appellant was in the employment as Panchayat Secretary of the Gram Pancayat and the process of selection was also for the purposes of making appointment of an Anganwadi Worker within the same Gram Panchayat, the appellant was not entitled to take part in such selection. Thus, it is contended that if these aspects were considered by the Additional Commissioner and the order of the Additional Collector of the district was set aside with a direction to appoint more meritorious candidate, no wrong was committed by the Additional Commissioner. Since these aspects have rightly been appreciated by the learned Single Judge, it is submitted by Shri P.N. Dubey, learned counsel for the respondent No.5, that no interference in the order passed by the learned Single judge is called for and the writ appeal deserves to be dismissed.

6: We have heard learned counsel for the parties at length and minutely perused the record as well as relevant Scheme of making appointment.

7: The Scheme was made by the State Government for appointment of Anganwadi Worker and circulated on 10.7.2007 which is available on record of writ petition as Annx.P/7. The Scheme specifically prescribes that a candidate seeking appointment on the post of Anganwadi Worker must have educational qualification of Higher secondary (10+2) from a recognized Board,

if the appointment was to be made in urban or rural areas. Only in tribal areas, if the candidates are to be appointed, the minimum educational qualification prescribed was VIIIclass pass. The advertisement was issued pursuance to the said Scheme by the concerned authorities in the month of August 2007 prescribing the last date for receipt of the application form in the office of the Project Officer between 4.8.2007 to 13.8.2007. It is not in dispute that the application was submitted by the respondent No.5 on 9.8.2007 before the Project Officer. In the application itself, the respondent No.5 has mentioned that she has been declared failed in the Higher Secondary School Certificate Examination of 2006 in one subject in which she has taken part in the supplementary examination and as soon as the result is declared the mark sheet would be produced. The respondent No.5 also gave an affidavit to this effect. It is, thus, contended that in fact the result of the examination was declared sometime in the month of September 2007 and subsequently a mark sheet was made available. With the return, the respondent No.5 has filed the document to show that the result was declared for the examination held in the month of July 2007 and the respondent No.5 was declared successful in M.P. State Open School Higher Secondary Certificate Examination. However, the date of declaring the result was not mentioned in the mark sheet produced as Annx.R/2 filed along with the return of the respondent No.5. The appellant has filed an application for taking additional documents on record in this appeal and along with the said application, a certificate of the centre Incharge, the Principal of the Government Excellent Higher Secondary School No.1, Chhatarpur, has been produced in which it is categorically said that the respondent No.5 had taken part in the supplementary examination held in the month of July 2007 in English subject for the Higher Secondary School Certificate Examination and the result of the said examination was declared on 12.10.2007.Though an additional affidavit has been filed by the respondent No.5 and she has controverted that the result was not declared in the month of October 2007 as claimed, but was declared sometime much before the date of selection, but nothing has been placed on record to indicate that the result of the examination of the respondent No.5 was declared before 29.9.2007 i.e. the date on which the selection process was completed and the appellant was appointed.

8: The law in respect of the specific dates, as also the eligibility conditions with respect to the educational qualification has been well settled by the Apex Court in the case of *Rekha Chaturvedi (Smt.) Vs. University of Rajasthan*

and others [(1993) Supp(3) SCC 168] and in the case of *Ashok Kumar Sonkar Vs. Union of India and others* [(2007) 4 SCC 54], wherein it has been categorically held that the crucial date on which a candidate must possess the requisite qualification would be the last date on which the applications are to be submitted. In case a specific date is prescribed for filling the forms, that will be the date on which the candidate must possess the essential qualification. If on that day educational eligibility was not available to the respondent No.5, as her result of supplementary examination was not declared by that time, she was not eligible to make an application nor the same was to be considered. Even if with the permission she has made the application, it was more so necessary for her to submit a proof of passing of the eligibility examination at least on the date the selection was made. The document produced by the appellant before this Court, the certificate issued by the Centre Incharge and the Principal of the Higher Secondary School is not controverted in its true sense. It was not proved by the respondent No.5 that the result of her examination was declared much before the date the process of selection was over. In case of *Pramod Kumar Vs. UP.Secondary Education Services Commission and others* [(2008) 7 SCC 153], the Apex Court has laid down that all eligibility conditions are to be verified before permitting any candidate to take part in selection. If the application of respondent No.5 was scrutinised and her candidature was rejected because she had failed to produce the proof of passing the qualifying examination, again no wrong was committed by the selection Committee. Though it is stated at bar that the result of examination was seen by the respondent No.5 in internet, no attempt whatsoever was made to produce a proof of such declaration of result either before the selection committee or writ Court or before the writ appellate Court. The respondent No.5 could have obtained a certificate in that respect from the competent authority of the M.P. state open School Board under Right to Information Act. The writ petition itself was filed in the year 2008, such were the allegations made by the appellant in the writ petition, but nothing was placed on record by the respondent No.5 to show that she has in fact passed the examination on the date when the selection process was completed or prior to the said date. Rejection of her candidature was thus cannot be said to be unjustified.

9: Facing with such a situation, learned counsel for the respondent No.5 has contended that since the result of examination of respondent No.5 was subsequently declared and she has passed the qualifying examination, therefore, relating back the date of taking part in the qualifying examination, it was to be

held that the respondent No.5 has passed the Higher Secondary School Certificate Examination in the month of July 2007, when she has taken part in the said examination. It is, thus, contended that even otherwise if the mark sheet was not supplied to the respondent No.5 timely and the same could not be produced before the concerning committee for consideration of the candidature of respondent No.5 for appointment on the post of Anganwadi Worker, the rejection of her application only on this count was not justified. This aspect was not considered by the Additional Collector while deciding the first appeal of the respondent No.5, but has been rightly taken into consideration by the Additional Commissioner in second appeal and it has been held that the rejection of the candidature of respondent No.5 was unjustified. Since it was found that otherwise the respondent No.5 was more meritorious than the appellant, it is contended by the learned counsel for the respondent No.5 that rightful directions were given for cancellation of improper appointment of appellant and a further direction was given for appointment of respondent No.5. It is contended that pursuance to such cancellation of appointment of appellant, the order of appointment was already issued in respect of respondent No.5, therefore, the learned Single Judge was right in appreciating all these aspect and rejecting the claim made by the appellant in the writ petition. It is contended that the writ petition was, thus, rightly dismissed.

10: We are unable to agree with the submissions made by learned counsel for the respondent no.5. To us the respondent No.5 could not be said to be qualified to take part in the selection for appointment on the post of Anganwadi Worker on the last date of submission of the application form. Firstly, as per the law laid down by the Apex Court in the case of *Rekha and Ashok Sonkar* (supra) once the cut off date is prescribed, every candidate must fulfil the eligibility conditions on the cut off date prescribed. Secondly, logically it is not possible to accept that the respondent No.5 would be deemed to have passed the qualifying examination in which she has taken part in the month of July 2007, in July 2007 itself, since the result of which was declared only in the month of October 2007. Taking part in the examination is not the complete exercise of obtaining an educational qualification as prescribed. The passing of examination would be only when the result of the examination is declared. Only on the basis of declaration of the result subsequently, it could not be said that a candidate must be treated to have passed the examination with retrospective effect, from the date he or she has taken part in the said examination. We get support in holding so from the decision of the Apex Court in case of *Council of Homeopathic system of Medicinn, Punjab and others Vs.*

Suchintan and others (AIR 1994 SC 1761) wherein while dealing with almost same submission, the Apex Court refused to make applicable the "doctrine of relation back" in para 33 of report which reads thus :-

> "33. Supposing he passes in that subject or subjects in the supplementary examination he is declared to have passed at the examination as a whole. This should obviously be so; because once he completes all the subjects, he has to necessarily be declared to have passed. Merely on this language, "declared to have passed at the examination as a whole", we are unable to understand as to how the "doctrine of relation back" could ever be invoked. The invocation of such a doctrine leads to strange results. When a candidate completes the subjects only in the supplementary examination, then alsone, he passes the examination. It is that pass which is declared. If the "doctrine of relation back" is applied, it would have the effect of deeming to have passed in the annual examination, held at the end of 12 months, which on the face of it is untrue."

11: If this analogy as propounded by the learned counsel for the respondent No.5 is accepted, then it will create such anomalies in the matter of recruitment as all those who were not qualified on the cut off date of making of application, would start claiming that subsequently they became qualified after declaration of result of their examination and, therefore, they should have been given an opportunity to take part in the selection. In that eventualities, the process of selection will never be completed nor any selection would be finalised. The other aspect is that the test has been laid down by the Apex Court that eligibilities are to be examined only on the date of occurrence of certain events such as creation of post or availability of vacancies. This being so, if the date of passing of the examination is to relate back to the date of taking part in the examination, such a pronouncement of law by the Apex Court would render meaning less. Even otherwise, there would be no justification for prescribing a last date for submission of the form. We are of the considered opinion that the eligibility conditions are to be examined only and only on the last date of submission of the form and not otherwise as has been laid down by the Apex Court in the case of *Rekha and Ashok Kumar* (supra). In view of this, the submissions made by learned counsel for the respondent No.5 are liable to be rejected outrightly. Accordingly, there is no hesitation in our mind to hold that the respondent No.5 was not qualified or

eligible to take part in the selection held for the appointment on the post of Anganwadi Worker in the concerned area in the year 2007 as she has not passed the qualifying examination upto the last date of submission of the application form for appointment on the said post at the relevant time.

12: The other aspect is that the allegations were made that the appellant was related to a Panchayat Karmi/Secretary of the Gram Panchayat and, therefore, she could not have been selected for appointment. The Scheme made by the State Government itself contemplates the prohibited degrees of relations who may not be applicant for seeking appointment on the post of 'Anganwadi Worker. The explanation given in this respect in paragraph 4 of the Scheme makes it clear that only the father, mother, brother; sister, husband, wife, son, daughter and the daughter-in-law are the relations in prohibited degrees of a candidate if any such relative is holding a post in the Panchayat or other offices within the project in the same area, and if such persons are directly related, the candidate concerned will not be eligible to take part in selection for appointment on the post of Anganwadi worker. The allegations made against the appellant was that her husband's brother was the Panchayat Karmi/Secretary of Panchayat. Firstly the said relation is not under the prohibited degree and secondly a Panchayat Karmi or a Secretary of the Gram Panchayat had nothing to do with the selection of Anganwadi Worker. The process of selection as prescribed makes it clear that the Committee is to be constituted under the chairmanship of Sub Divisional Officer of which the Child Development Project Officer is the Secretary. The Chief Executive Officer of a Janpad Panchayat, the President of the Health and Women Child Development Committee and one of the member nominated by the Janpad Panchayat are the member of such a Committee. If selection is made, another Committee is constituted to decide the objections with respect to the preliminary Selection which consist of Chief Executive Officer of Zila Panchayat as President and District Programme Officer, Child Development Officer, President of the Health and Women and Child Development Committee of Zila Panchayat and one of the Woman member nominated by the Zila Panchayat as member of the said Committee.

13: The objection was raised with respect to the selection of appellant by the respondent No.5, which was decided by the said Committee and thereafter the appointment of appellant was made. In all such proceedings, a Secretary of the Gram Panchayat had no role to play and, therefore, such an objection raised by the respondent No. 5 with respect to the selection of the appellant

on the post was rightly rejected. If these aspects are taken into consideration, in fact, the learned Additional Collector has given the reasoned findings in his order passed on 27.12.2007 and has rejected such contention of the respondent No.5 in appropriate manner. However, while interfering in such findings recorded by the learned Additional Collector, the Additional Commissioner passed the impugned order dated 18.9.2008 without appreciating all these facts. No reasons were assigned as to how the findings recorded by the additional Collector were not justified. These aspects were not rightly considered by the learned Single Judge and findings were given that the order passed by the Additional Commissioner was not to be interfered.

14: In our considered opinion, if these aspects are taken into consideration, it was to be held that there was no occasion for the Additional Commissioner to interfere in a reasoned order of Additional Collector and the second appeal of respondent No.5 was not to be allowed. However, since these aspects have not been taken into consideration by the learned Single Judge and the writ petition of the appellant has been dismissed, we are afraid, we are not in a position to affirm the order of the learned Single Judge. Consequently, this writ appeal is allowed. The order passed in Writ Petition No.11983/2008(S) on 12.8.2011 is hereby set aside. The order passed by the Additional Commissioner in Case No.679/Appeal/89/07-08 dated 18.92008 is hereby quashed and the order passed by the additional Collector in Appeal No.04/ Appeal/B 121/2007-2008 dated 27.12.2007 is affirmed. The appellant be continued on the post of Anganwadi Worker at the present place of posting.

15: The writ appeal is allowed to the extent indicated herein above. There shall be no order as to costs.

Appeal allowed.

I.L.R. [2013] M.P., 1521
WRIT APPEAL
Before Mr. Justice S.K. Gangele & Mr. Justice D.K. Paliwal
W.A. No. 137/2013 (Gwalior) decided on 3 May, 2013

DILIP SINGH GURJAR ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Evidence Act (1 of 1872), Section 35 - Date of Birth - Entries in School Register **- An entry relating to date of birth made in**

school register is relevant and admissible however, such entry is of not much evidentiary value to prove the age of the person in absence of material on which the age was recorded - As there is no evidence that at whose instance and on what material the date of birth was recorded in school admission register, such entry loses its evidentiary value.
(Para 7 and 9)

क. साक्ष्य अधिनियम (1872 का 1), धारा 35 – जन्मतिथि – शाला पंजी में प्रविष्टियां – शाला पंजी में जन्मतिथि से संबंधित की गई प्रविष्टि, सुसंगत एवं ग्राह्य है किन्तु व्यक्ति की आयु साबित करने के लिए, उक्त प्रविष्टि का साक्ष्यिक मूल्य अधिक नहीं, जब कोई सामग्री उपस्थित नहीं जिस पर से आयु अभिलिखित की गई – चूंकि कोई साक्ष्य नहीं कि किसके कहने पर और किस सामग्री के आधार पर शाला प्रवेश पंजी में जन्मतिथि अभिलिखित की गई थी, उक्त प्रविष्टि अपना साक्ष्यिक मूल्य खो देती है।

B. Constitution - Article 226 - Habeaus Corpus - Date of Birth **- Date of birth recorded in school register cannot be relied upon in absence of any material that on what basis such entry was recorded - Ossification test shows that the corpus is major - She is free to decide that with whom she wants to live.** **(Paras 12 & 13)**

ख. संविधान – अनुच्छेद 226 – बंदी प्रत्यक्षीकरण – जन्मतिथि – शाला पंजी में अभिलिखित जन्मतिथि पर विश्वास नहीं किया जा सकता, जहां कोई सामग्री उपस्थित नही कि किस आधार पर उक्त प्रविष्टि अभिलिखित की गई है – अस्थि विकास परीक्षण दर्शाता है कि शरीर वयस्क है – वह निर्णय लेने के लिये स्वतंत्र है कि वह किसके साथ रहना चाहती है।

Cases referred :

AIR 2010 SC 2933, (2008) 13 SCC 133, 2010 AIR SCW 1866, (2012) 5 SCC 201, (2001) 5 SCC 714.

R.B.S. Tomar, for the appellant.
M.P.S. Raghuwanshi, Addl. A.G. for the respondents No. 1 to 3.
Balwant Singh, for the respondent No.4.

JUDGMENT

The Judgment of the Court was delivered by :
D.K. PALIWAL, J. :- This writ appeal has been preferred under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyaya Peeth Ko Appeal) Adhiniyam, 2005 against order dated 27.2.2013 passed by learned Single

Judge in writ petition No.4310/2012 (Habeas Corpus).

2. Brief facts of the case are that respondent No.4-Mahendra Singh filed writ petition No.4310/2012 (Habeas Corpus) for production of her minor daughter Ku. Seema before this Court who is in the wrongful confinement of appellant (respondent No.4 before the writ Court). She was missing since 11.10.11. Report of the incident was lodged at police Station, Bhanwarpura, Distt. Gwalior and a case under Sections 363 and 366 of IPC has been registered. In his return, the appellant submitted that Ku.Seema was major and he got married with her with her free consent under the Arya Samaj customs. It is further submitted that appellant and Ku.Seema had filed a writ petition No.1998/2012 and vide order dated 28.3.2012 passed in the writ petition this Court granted them protection considering the ossification report of Ku.Seema.Appellant had filed a petition under Section 482 of Cr.P.C. before this Court for quashing the criminal case registered against him and this Court after hearing the parties, directed the appellant to approach the Investigating Officer along with all the documents and proofs showing his innocence vide order dated 27/7/12. Thereafter, the police authorities got the ossification test of Ku.Seema conducted and it was found that Ku.Seema was major. It is submitted that police authorities have not submitted the ossification report along with the charge-sheet. It is further submitted that writ petition filed by respondent No.4 came up for hearing on 27.2.13 and this Court holding that Ku.Seema is minor, handed over her custody to respondent No.4. Being aggrieved, appellant has preferred this writ appeal.

3. It is submitted by Shri R.B.S.Tomar, learned counsel for the appellant, that the order passed by learned Single Bench is contrary to law, and therefore, deserves to be set aside. The Hon'ble Writ Court has not considered the fact that the mark-sheet submitted by respondent No.4 is suspicious. No inquiry about the age of Ku.Seema has been held. It is further submitted that life of Ku.Seema is not safe in the custody of respondent No.4. It is prayed that order dated 27.2.13 be set aside and custody of Ku. Seema be given to him. The learned counsel for the respondents submits that Ku.Seema is minor, therefore her custody has rightly been handed over to her father who is her natural guardian.

4. We have considered the rival submissions and perused the record. To prove that corpus is minor, school leaving certificate of Ku. Seema has been produced in which the date of birth of corpus has been mentioned as

5.12.1995. It has been verified by the police from the school admission register. The appellant has relied on the x-ray report in which the age has been reported as 18 years. This report has been issued by Kapoorchand Memorial Digital X-ray Clinic. The learned counsel for the appellant has submitted that police has also got the ossification test conducted regarding the age, but the ossification report has deliberately been suppressed.

5. Leaned counsel for the respondents/State has submitted that the date of birth mentioned in the school register would prevail over the age determined by radiological examination.

6. In the case of *Madan Mohan Singh and others vs Rajni Kant & another,* AIR 2010 SC 2933 the Supreme Court has observed in para 16 as under :-

> "16. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under section 35 of the Evidence Act but the Court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/ School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases."

7. In the matter of *Babloo Pasi Vs. State of Jharkhand and another reported in* (2008) 13 SCC 133, commenting on the evidentiary value of the entry in the school register, it is held by the Apex Court that Section 35 of the Evidence Act lays down that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact made by a public servant in the discharge of his official duty especially enjoined by the law of the country is itself a relevant fact. In para 28 it is observed that it is trite that to render a document admissible under Section 35, three conditions have to be satisfied, namely: (i) entry that is relied on must be one in a public or other official book, register or record; (ii) it must be an entry stating a fact in issue or a relevant fact, and (iii) it must be made by a public servant in discharge of his official duties, or in performance of his duty especially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Evidence Act but the entry regarding the

age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. (See *Birad Mal Singhvi v. Anand Purohit*, 1988 Supp SCC 604).

8. In the matter of *Jabar Singh v. Dinesh and another,* 2010 AIR SCW 1866, it has been held in para 12 that entry of date of birth of Respondent No. 1 in the admission form, the school records and transfer certificates did not satisfy the conditions laid down in Section 35 of the Evidence Act inasmuch as the entry was not in any public or official register and was not made either by a public servant in the discharge of his official duty or by any person in performance of a duty specially enjoined by the law of the country, therefore, the entry was not relevant under Section 35 of the Evidence Act for the purpose of determining the age of Respondent No. 1.

9. Now we shall examine the evidentiary value of the date of birth recorded in school admission register / school leaving certificate in the light of above settled legal position. In the copy of the school admission register date of birth of Ku.Seema has been mentioned as 5-12 1995. In Annexure P/1 (school leaving certificate), it is mentioned that Ku.Seema was admitted in class 3rd on 11/11/2006. The school leaving certificate is said to have been issued on 13-10-2011. A bare perusal of the said certificate would show that the appellant was admitted on 11-11-2006 and her name was struck off from the roll of the institution on 25-06-2009. The said school leaving certificate was not issued in ordinary course of business of the school. There is nothing on record to show that the said date of birth was recorded in a register maintained by the school in terms of the requirements of law as contained in Section 35 of the Evidence Act. There is no evidence that at whose instance and on what material the date of birth was recorded in the School admission register. Therefore, the entry regarding date of birth mentioned in the school admission register and in the school leaving certificate loses its evidentiary value.

10. The learned counsel for the appellant placing reliance on *Om Prakash Vs. State of Rajasthan and another,* (2012) 5 SCC 201, submitted that the opinion of the doctor regarding the age based on radiological examination and ossification test, be treated as strong evidence.

11. In the matter of *Ramdeo Chauhan v. State of Assam,* (2001) 5 SCC 714, the Hon'ble Apex Court has added an insight for determination of this issue when it recorded as follows:-

> "Of course the doctor's estimate of age is not a sturdy substitute for proof as it is only his opinion. But such opinion of an expert cannot be sidelined in the realm where the court gropes in the dark to find out what would possible have been the age of a citizen for the purpose of affording him a constitutional protection. In the absence of all other acceptable materials, if such opinion points to a reasonable possibility regarding the range of his age it has certainly to be considered."

12. The radiological report of Kapoorchand Memorial Digital X-ray Clinic shows that the age of Ku. Seema was 18 years. On the direction of this Court passed in the writ petition, the police had got examined Ku. Seema and in that report it has been opined that the age of Ku. Seema is above 18 years and below 19 years on 2.2.2013.

13. In view of above, we find that when it is not proved that date of birth was entered in the school admission Register in accordance with the provisions of Section 35 of the Evidence Act and also in absence of any material on the basis of which it was recorded, no reliance can be placed on it. In the light of medical opinion not only of a doctor of private clinic but also of a government medical officer, in our considered opinion, Ku. Seema appears to be major. Therefore, only she can decide with whom she wants to live.

14. Resultantly the appeal is partly allowed. The impugned order is set aside. Corpus Ku. Seema is at liberty to live with whom she wants.

Parties to bear their cost.

Appeal partly allowed.

I.L.R. [2013] M.P., 1526
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 262/2003 (Jabalpur) decided on 27 November, 2012

J.P. GUPTA & ors. ... Petitioners
Vs.
EVEREADY INDUSTRIES INDIA LTD. & ors. ...Respondents

***Industrial Disputes Act (14 of 1947), Section 25-N & 25-O - Closure of Establishment* - A harmonious reading of these provisions would make it clear that in case, sanction is granted u/s 25-O for closure**

of the establishment, there would not be any applicability of Section 25-N - The petitioners have received compensation on account of closure of the establishment - Consequently, there was no occasion for the petitioners to claim any relief against retrenchment - That being so, the Labour Court was not right in entertaining their application for retrenchment compensation - The Industrial Court was right in allowing appeal from the award of Labour Court - Writ Petition under Article 227 of the Constitution of India challenging the order of Industrial Court dismissed. (Paras 13 to 16)

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एन व 25ओ – स्थापना को बंद करना – इन उपबंधों को समन्वयपूर्वक पढ़ने पर यह स्पष्ट हो जायेगा कि यदि धारा 25–ओ के अंतर्गत स्थापना बंद किये जाने हेतु मंजूरी प्रदान की जाती है, तब धारा 25–एन की कोई प्रयोज्यता नहीं होगी – याची ने स्थापना बंद हो जाने के कारण प्रतिकर प्राप्त किया है – परिणामतः याचीगण के पास छंटनी के विरुद्ध किसी अनुतोष का दावा करने के लिए कोई कारण नहीं था – ऐसा होते हुए श्रम न्यायालय द्वारा छंटनी प्रतिकर हेतु उनका आवेदन ग्रहण करना उचित नहीं था – औद्योगिक न्यायालय द्वारा श्रम न्यायालय के अवार्ड की अपील मंजूर करना उचित था – औद्योगिक न्यायालय के आदेश को चुनौती देते हुए, भारत के संविधान के अनुच्छेद 227 के अंतर्गत रिट याचिका खारिज।

Cases referred :

AIR 1957 SC 95, AIR 1960 SC 923, AIR 1967 SC 121, AIR 1990 SC 1480, AIR 1990 SC 273, AIR 1992 SC 248, (1996) 7 SCC 139, AIR 1999 SC 355, AIR 2010 SC 1389, (1990) 3 SCC 682, AIR 2003 SC 3553, (2005) 2 SCC 638, M.P. No. 2109/1985 decided on 01.08.1991, 1986 MPLJ 473.

Shobha Menon with *Syed Shaukat Ali,* for the petitioners.
Brian D'silva with *V.Bhide*, for the respondents.

ORDER

K.K. Trivedi, J: This petition under Article 227 of the Constitution of India is directed against the Order dated 28th of June, 2002 passed by the Industrial Court, Bench at Bhopal whereby the appeal filed by the respondents against the award passed by the Labour Court has been allowed and the award has been set aside on the ground that dispute was raised by the petitioners with respect to the validity of an agreement executed by the employees' union with the employer with respect to the enhancement of the

retrenchment compensation and it was further contended that the action of retrenchment of the petitioners by the employer was unsustainable in eye of law because of non-compliance of the provisions of Section 25-N of Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). After adducing the evidence, the Labour Court reached to the conclusion that such an agreement by the Union was not in accordance with law and, therefore, the said agreement was declared to be invalid and illegal. Similarly the Labour Court reached to the conclusion that though a sanction was obtained for closure of the factory of the respondents, but it was necessary to comply with the provisions of Section 25-N of the Act and since it was not complied with, the petitioners were illegally retrenched on account of closure of the factory of respondents. It is contended that against said award, an appeal was preferred by the respondent employer and though the provisions of law were made clear, reliance was placed in several decisions of the Apex Court, wrongly relying the decisions which were not applicable, appeal of the respondent employer has been allowed, therefore, this writ petition is required to be filed.

2. A tragedic incident took place in the factory of respondents at Bhopal in intervening night of 2nd/3rd December, 1984. A prohibitory order was issued by the State Govt. to shut down the factory. Thereafter respondents moved an application for grant of sanction for closure of factory under section 25-O of the Act which was allowed and sanction was granted on the terms of payment of compensation to the existing workmen and to offer them employment in other units of respondents, if possible. Notice was given, compensation was paid and the factory was closed. There was an agreement said to be entered into between the employer and workers' Union for extra payment of compensation. Thereafter, challenging the said agreement and complaining non-compliance of provisions of section 25-N of the Act, thus seeking to set aside retrenchment claim, was made before the Labour Court, Bhopal, which was allowed. The appeal was preferred by the employer before the Industrial Court which was allowed by the impugned order, hence this writ petition is filed under Article 227 of the Constitution of India.

3. It is contended by the learned senior counsel for the petitioners that the law is well settled by the decisions of the Apex Court in several cases. Before amendment in the provisions of the Act, the operation of the law was different and different provisions were there for payment of compensation to workmen who were terminated on account of closure of any establishment.

However, after the decisions rendered by the Apex Court in certain cases, the amendments were made in the provisions of the Act and now it has become necessary to comply with the provisions of Section 25-N of the Act even if the establishment is closed on account of sanction granted by a competent Government. It is contended that this particular aspect has not been considered by the appellate authority and appeal of the respondents has illegally been allowed, therefore, order passed by Appellate Authority is liable to be set aside and that of the Labour Court is liable to be affirmed.

4. Per contra, it is submitted by learned senior counsel for the respondents that provisions of Section 25-N of the Act would be attracted only in such cases where the retrenchment is done. In case of termination of employees under the provisions of Section 25-O of the Act after obtaining sanction from the competent Government, the provisions of Section 25-FFF would be attracted and in such circumstances where the specific provisions are made for compensation to workmen in case of closing down of undertakings which have already been defined in the Act, the provisions of Section 25-N would not be attracted. Such a situation has been examined by the Apex Court, after taking note of the laws relating to application of such provisions in the decisions rendered on earlier occasions and since it has been held by the Apex Court that independent provisions of Section 25-FFF have been made in the Act, therefore, provisions of Section 25-N of the Act, would not be attracted. No wrong was committed by the Industrial Court in allowing the appeal of the employer and setting aside the award granted by the Labour Court on wrong interpretation of the provisions of the Act. It is contended that the entire petition being based on misconceived facts is liable to be dismissed.

5. I have heard learned counsel for the parties at length and examined the record.

6. Undisputedly, the provisions were added in the Act after several decisions of the Apex Court and specific chapters have been added. Chapter V-B has been added by an amendment made in the year 1976. Chapter V-B infact contains special provisions relating to law for retrenchment and closure of certain establishments. The said provisions are attracted in such industries as have been defined under Section 25L(a) . Specific provision has been made under Section 25-N as amended by Act No. 49 of 1984 with effect from 18.8.84. The provisions are re-produced for ready reference :-

"25-N. Conditions precedent to retrenchment of workmen.-

(1) No workman employed in any industrial establishment to which this Chapter applies, who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until,--

(a) the workman has been given three months' notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice; and

(b) the prior permission of the appropriate Government or such authority as may be specified by that Government by notification in the Official Gazette (hereafter in this section referred to as the specified authority) has been obtained on an application made in this behalf.

(2) An application for permission under sub- section (1) shall be made by the employer in the prescribed manner stating clearly the reasons for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

(3) Where an application for permission under sub-section (1) has been made, the appropriate Government or the specified authority, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen concerned and the persons interested in such retrenchment, may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the workmen and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(4) Where an application for permission has been made under sub- section (1) and the appropriate Government or the specified authority does not communicate the order granting or refusing to grant permission to the employer within a period

of sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(5) An order of the appropriate Government or the specified authority granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all the parties concerned and shall remain in force for one year from the date of such order.

(6) The appropriate Government or the specified authority may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub- section (3) or refer the matter or, as the case may be, cause it to be referred, to a Tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub- section, it shall pass an award within a period of thirty days from the date of such reference.

(7) Where no application for permission under sub-section (1) is made, or where the permission for any retrenchment has been refused, such retrenchment shall be deemed to be illegal from the date on which the notice of retrenchment was given to the workman and the workman shall be entitled to all the benefits under any law for the time being in force as if no notice had been given to him.

(8) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the establishment or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of sub- section (1) shall not apply in relation to such establishment for such period as may be specified in the order.

(9) Where permission for retrenchment has been granted under sub- section (3) or where permission for retrenchment is deemed to be granted under sub-section (4), every workman

who is employed in that establishment immediately before the date of application for permission under this section shall be entitled to receive, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months."

7. Similarly provisions of Section 25(O) are introduced by the Amending Act No. 46 of 1982 with effect from 21.8.1984 which reads thus :-

" 25(O). Procedure for closing down an undertaking-

(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall, in the prescribed manner, apply, for prior permission at least ninety days before the date on which the intended closure is to become effective, to the appropriate Government, stating clearly the reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen in the prescribed manner:

Provided that nothing in this sub-section shall apply to an undertaking set up for the construction of buildings, bridges, roads, canals, and dams or for other construction work.

(2) Where an application for permission has been made under sub-section (1) the appropriate Government, after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy of the reasons stated by the employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and a copy of such order shall be communicated to the employer and the workmen.

(3) Where an application has been made under sub-section (1) and the appropriate Government does not communicate the order granting or refusing to grant permission to the employer within a period of sixty days from the date on which

such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said period of sixty days.

(4) An order of the appropriate Government granting or refusing to grant permission shall, subject to the provisions of sub-section (5), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(5) The appropriate Government may, either on its own motion or on the application made by the employer or any workman, review its order granting or refusing to grant permission under sub-section (2) or refer the matter to a tribunal for adjudication:

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(6) Where no application for permission under sub-section (1) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(7) Notwithstanding anything contained in the foregoing provisions of this section, the appropriate Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like, it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

(8) Where an undertaking is permitted to be closed down under sub-section (2) or where permission for closure is deemed to be granted under sub-section (3), every workman who is employed in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous

service or any part thereof in excess of six months."

There is an amendment made in the said provision by the State of Madhya Pradesh vide Amending Act No. 32 of 1983, with effect from 28.10.1983 which reads thus :-

"25-O. Procedure for closing down an undertaking.—

(1) An employer who intends to close down an undertaking of an industrial establishment to which this Chapter applies shall apply for prior permission at least ninety days before the date on which the intended closure is to be become effective, to the State Government stating clearly reasons for the intended closure of the undertaking and a copy of such application shall also be served simultaneously on the representatives of the workmen by registered post with acknowledgment due.

(2) Where a notice has been served on the State Government by an employer under sub-section (1) of section 25FFA and the period of notice had not expired on the 5th August, 1983, such employer shall not close down the undertaking but shall, within a period of fifteen days from the said date, apply to the State Government for permission to close down the undertaking.

(3) Where an application for permission has been made under sub-section (1) or sub-section (2) the State Government after making such enquiry as it thinks fit and after giving a reasonable opportunity of being heard to the employer, the workmen and the persons interested in such closure may, having regard to the genuineness and adequacy or the reasons stated by employer, the interests of the general public and all other relevant factors, by order and for reasons to be recorded in writing, grant or refuse to grant such permission and copy of such order shall be communicated to the employer and the workmen.

(4) Where an application has been made under sub-section (1) or sub-section (2) as the case may be, and the State Government does not communicate the order granting or refusing to grant permission to the employer within a period of

sixty days from the date on which such application is made, the permission applied for shall be deemed to have been granted on the expiration of the said sixty days.

(5) An order of the State Government granting or refusing to grant permission shall, subject to the provisions of sub-section (6), be final and binding on all the parties and shall remain in force for one year from the date of such order.

(6) The State Government may, either on its own motion or on the application made by the employer or any workmen, review its order granting or refusing to grant permission under sub-section (3) or refer the matter to a Tribunal for adjudication:-

Provided that where a reference has been made to a Tribunal under this sub-section, it shall pass an award within a period of thirty days from the date of such reference.

(7) Where no application for permission under sub-section (1) or sub-section (2) is made within the period specified therein, or where the permission for closure has been refused, the closure of the undertaking shall be deemed to be illegal from the date of closure and the workmen shall be entitled to all the benefits under any law for the time being in force as if the undertaking had not been closed down.

(8) Notwithstanding anything contained in the foregoing provisions of the section, the State Government may, if it is satisfied that owing to such exceptional circumstances as accident in the undertaking or death of the employer or the like it is necessary so to do, by order, direct that the provisions of sub-section (1) shall not apply in relation to such undertaking for such period as may be specified in the order.

(9) Where an undertaking is permitted to be closed down under sub-section (3) or where permission for closure is deemed to be granted under sub-section (4), every workman who is empowered in that undertaking immediately before the date of application for permission under this section, shall be entitled to receive compensation which shall be equivalent to fifteen

days' average pay for every completed year of continuous service or any part thereof in excess of six months."

The only difference between the two is that before coming into the force of the Amendment in the year 1984, similar provisions were made by the State of M.P. by amending the Act with effect from 28.10.83. Undisputedly, the application for closure of the factory of the respondents was made sometime in the year 1984, i.e. after coming into force of the amendment made by the State of M.P. in Section 25-O of the Act with effect from 28.10.83. Now, therefore, it has to be examined whether there was any application of Section 25-N of the Act in such circumstances or not.

8 : The reason and object of providing reasonable restriction in the case of retrenchment of a workman as is mentioned in the amending Act is to make protection of such service of the employee so that he may not suffer the loss of emoluments and livelihood all of a sudden if he is retrenched from service without any notice. The said object is fulfilled by prescribing the method of seeking approval for closure of an undertaking as is added by the State of M.P. in the amendment made in Section 25-O of the Act, as in sub-section (9) of Section 25-O of the Act as amended by the State Government, it is specifically prescribed that where an undertaking is permitted to be closed down under sub-section (3) of Section 25-O of the Act or where permission for closure is deemed to be granted under sub-section (4) of Section 25-O of the Act, every workman who is employed in that undertaking immediately before the date of application for permission under this section shall be entitled to receive compensation which shall be equivalent to 15 days' average pay for every completed year of continuous service or any part thereof in excess of six months. The object of Section 25-N of the Act is, thus, fulfilled by giving such a protection in Section 25-O(9) of the Act and, therefore, it would not be necessary for an employer to seek sanction for retrenchment of an employee in case he is granted permission to close down his establishment. The closure of an establishment means nothing but retrenchment as is clearly mentioned in Section 25-FFF and 25-FFA of the Act. For better appreciation, provisions of Section 25-FFF are reproduced thus :-

"25FFF. Compensation to workmen in case of closing down of undertakings.-

(1) Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous

service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub- section (2), be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched:

Provided that where the undertaking is closed down on account of unavoidable circumstances beyond the control of the employer, the compensation to be paid to the workman under clause (b) of section 25F shall not exceed his average pay for three months.

Explanation.-- An undertaking which is closed down by reason merely of—

(i) financial difficulties (including financial losses); or

(ii) accumulation of undisposed of stocks; or

(iii) the expiry of the period of the lease or licence granted to it; or

(iv) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on; shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub- section.

(1A) Notwithstanding anything contained in sub- section (1), where an undertaking engaged in mining operations is closed down by reason merely of exhaustion of the minerals in the area in which such operations are carried on, no workman referred to in that sub- section shall be entitled to any notice or compensation in accordance with the provisions of section 25F, if--

(a) the employer provides the workman with alternative employment with effect from the date of closure at the same remuneration as he was entitled to receive, and on the same terms and conditions of service as were applicable to him,

immediately before the closure;

(b) the service of the workman has not been interrupted by such alternative employment; and

(c) the employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment.

(1B) For the purposes of sub- sections (1) and (1A), the expressions" minerals" and" mining operations" shall have the meanings respectively assigned to them in clauses (a) and (b) of section 3 of the Mines and Minerals (Regulation and Development) Act, 1957 (67 of 1957).

(2) Where any undertaking set- up for the construction of buildings, bridges, roads, canals, dams or other construction work is closed down on account of the completion of the work within two years from the date on which the undertaking had been set- up, no workman employed therein shall be entitled to any compensation under clause (b) of section 25F, but if the construction work is not so completed within two years, he shall be entitled to notice and compensation under that section for every [completed year of continuous service] or any part thereof in excess of six months."

A harmonious reading of the aforesaid provision will make it clear that once sanction is granted to close down an establishment, as is defined under Section 2(ka) (and it is not in dispute that the establishment of the respondents is covered under the aforesaid definition), retrenchment of workmen is obvious and compulsory. Such retrenchment would not be covered under the retrenchment protected under Section 25-N of the Act.

9 : As is contended by learned Senior counsel for petitioners, the laws laid down by the Apex Court which have taken note of by the appellate Court, relate to the consideration of the application of provisions as were existing before the amendment made in the Act. Reading in extenso the law laid down by the Apex Court in the case of *Pipraich Sugar Mills Ltd. vs. Pipraich Sugar Mills Mazdoor Union* (AIR 1957 SC 95), referring to the law laid

down by the Apex Court in the case of *M/s Hathisingh Manufacturing Co.Ltd. and another vs. Union of India and others* (AIR 1960 SC 923) and *Hariprasad Shivshanker Shukla and another vs.A.D.Divelkar and others* (AIR 1967 SC 121), it has been contended that the law laid down by the Apex Court was with respect to the provisions of the Act as were existing before the amendments incorporated by the Parliament in the Act. Since the law so laid down by the Apex Court was with respect to grant of benefit to the employer, ultimately protecting the rights of the employees or workmen, exhaustive amendments were made, new provisions were added and, therefore, it was necessary for the appellate Court to discard the submissions made by the employer and to hold that compliance of provisions of Section 25-N of the Act was mandatory even when the sanction was granted by the competent Government to close down the industry. It is further contended that in case of *Charan Lal Sahu vs. Union of India* (AIR 1990 SC 1480), *Union Carbide Corporation vs. Union of India and others* (AIR1990 SC 273), *Union Carbide Corporation etc. vs. Union of India etc.* (AIR 1992 SC 248) and *H.P. Mineral & Industrial Development Corporation Employees' Union vs. State of H.P. and others* [(1996) 7 SCC 139], again the law laid down was with respect to unamended provisions and the specific provisions of amendment were not taken note of as the case was not one which falls after coming into force of the amendment in the Act. It is contended that similar was the situation when the case was considered by the Apex Court in the matter of *Lal Mohd. Vs. Indian Railway Construction Company Limited* (AIR 1999 SC 355). It is further submitted by learned senior counsel for petitioners that the apex court has considered applicability of Section 25-N of the Act in the case of *M/s Empire Industries Limited Vs. State of Maharashtra and others,* AIR 2010 SC 1389 and as such the compliance of such a provision was necessary. Thus, it is contended that the law as is available was to be considered after coming into force of the amendment made in the Act and it was to be held that since the mandatory provisions of Section 25-N of the Act were not complied with, the retrenchment of the petitioners was illegal and in view of this, the findings arrived at by the Labour Court were to be affirmed. However, the Industrial Court has set aside the order passed by the Labour Court without giving any reason only on the basis of law laid down by the Apex Court in the aforesaid cases which in fact were not applicable at all. It is again contended that similar was the situation with respect to the agreement said to be executed and, therefore, findings arrived at by the Industrial Court were perverse and were liable to be set aside.

10 : In response to these submissions of the learned Senior counsel for petitioners, learned senior counsel appearing for respondents has placed reliance heavily in the case of *Lal Mohd.* (supra), *Punjab Land Development and Reclamation Corporation Limited, Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh and others* [(1990) 3 SCC 682], and in *S.M.Nilajkar and others vs. Telecom District Manager, Karnataka* (AIR 2003 SC 3553). Learned senior counsel has contended that in the aforesaid laws, the Apex Court has considered the applicability of the provisions of Section 25-N of the Act in the given circumstances. It is putforth that in the specific circumstances, the Apex Court has considered the applicability of Section 25-FFF of the Act and has reached to the conclusion that once a closure validly come into effect the relationship of employer and employee does not survive and ceases to exist. In view of the law laid down by the Apex Court, it has to be seen whether still there was requirement of compliance of Section 25-N of the Act or not. Placing reliance in the case of *Maruti Udyog Ltd. vs. Ram Lal and others* [(2005) 2 SCC 638], it is contended by learned Senior counsel for the respondents that earlier the provisions of Section 25-O was not available since the same was struck down by the Apex Court, the only protection that was available to the workman whose services were terminated as a result of closure was contained in Section 25-FFF of the Act. Even in the case of *H.P. Mineral and Industrial Development Corporation Employees Union* (supra), the Apex Court has given approval of an action if taken in compliance of provisions of Section 25-O of the Act, which came into force after the amendment made in the Act and it was categorically held that if the provisions in such manner have been complied with, there would not be any existence of relationship of master and servant between the employer and employees and, as such, there would not be an alleged non-compliance of any other mandatory provisions. Thus, it is contended that grant of sanction to close down the establishment of respondent itself was sufficient to authorise the discontinuance of service of persons like petitioners and undisputedly this provision was specifically complied with, therefore, there was no occasion for the Labour Court to hold that the action taken by the respondents for discontinuance of employment of workmen like petitioners was violative of provisions of Section 25-N of the Act. It is contended that independent procedure has been prescribed in Section 25-O of the Act, which further contains the provisions of grant of compensation for the retrenchment of employees/workmen in terms of the order of the closure of the establishment.

11 : Learned Senior counsel for respondents further has drawn the attention of this Court to the fact that the agreement sought to be challenged before the Labour Court in fact was challenged before this Court in M.P.No.2109/1985 (*Union Carbide Karmchari Sangh Navi Bagh Vs. Union of India and others*) and the Division Bench of this Court has dismissed the said writ petition vide order dated 1.8.1991. It is contended that since the agreement was once found to be legal by this Court, it could not be challenged before the Labour Court. In view of this, findings arrived at by the Labour Court were not sustainable and the same have been set aside in rightful manner by the Industrial Court.

12 : The Apex court has considered the law as was available before the amendment in the Act, in the cases of *Pipraich Sugar Mills Ltd.* (supra), *M/s Hathi Singh Manufacturing Co. Ltd.* (supra) and *Hari Prasad Shivshankar Shukla* (supra), but mainly the consideration was what would amount to retrenchment as prescribed in section 25F of the Act and as is defined in section 2(OO) of the Act. In none other but definite words the meaning 'retrenchment' was interpreted by the Apex court in the case of *Hari Prasad Shivshankar Shukla* (supra) in following manner :

> "For the reasons given above, we hold, contrary to the view expressed by the Bombay High Court, that retrenchment as defined in Section 2(oo) and as used in Section 25-F has no wider meaning than the ordinary, accepted connotation of the word: it means the discharge of surplus labour or staff by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, and it has no application where the services of all workmen have been terminated by the employer on a real and bonafide closure of business as in the case of *Shri Dinesh Mills Ltd.* or where the services of all workmen have been terminated by the employer on the business or undertaking being taken over by another employer in circumstances like those of the Railway Company."

The meaning of retrenchment would not be changed merely because some amendments are made in the Act because there is no amendment in the definition of retrenchment made by the Parliament. Even otherwise the provisions of Section 25-N of the Act are simply made for protection of employees from illegal retrenchment and said action do not contain any non-

abstente clause. Meaning thereby the other provisions of the Act are not made applicable only after compliance of provisions of section 25-N of the Act. This is further clear from the definite findings of the Apex court given in para 5, 6 and 7 in the case of *H.P. Mineral and Industrial Development Corporation Employees Union* (supra) which reads thus :-

> 5. We are unable to accept this contention. It is no doubt true that in Section 2(oo) the expression 'retrenchment' is defined to mean the termination by the employer of the service of a workman for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action and categories referred to in clauses (a) to (c) have been expressly excluded from the ambit of the said definition. But as far back as in 1957 a Constitution Bench of this Court in *Hariprasad Shivshankar Shukla v. A.D. Divikar* had laid down that 'retrenchment' under Section 2(oo) of the Act would not cover termination of services of all workmen as a result of the closure of the business. The said decision was considered by the Constitution Bench of this Court in *Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court,* wherein it has been observed:
>
> "Mr V.A. Bobde submits, and we think rightly, that the sole reason for the decision in *Hariprasad* was that the Act postulated the existence and continuance of an industry and where the industry, i.e., the undertaking, itself was closed down or transferred, the very substratum disappeared and the Act could not regulate industrial employment in the absence of an industry. The true position in that case was that Sections 2(oo) and 25-F could not be invoked since the undertaking itself ceased to exist.
>
> * * *
>
> The judgments in *Sundara Money* and the subsequent decisions in the line could not be held to be per incuriam inasmuch as in *Hindustan Steel and Santosh Gupta* cases, the Division Benches of this Court had referred to *Hariprasad* case and rightly held that its ratio did not extend beyond a case of

termination on the ground of closure and as such it would not be correct to say that the subsequent decisions ignored a binding precedent.

* * *

For the purpose of harmonious construction, it can be seen that the definitions contained in Section 2 are subject to there being anything repugnant in the subject or context. In view of this, it is clear that the extended meaning given to the term 'retrenchment' under clause (oo) of Section 2 is also subject to the context and the subject-matter. Section 25-F prescribed the conditions precedent to a valid retrenchment of workers as discussed earlier. Very briefly, the conditions prescribed are the giving of one month's notice indicating the reasons for retrenchment and payment of wages for the period of notice. Section 25-FF provides for compensation to workmen in case of transfer of undertakings. Very briefly, it provides that every workman who has been in continuous service for not less than one year in an undertaking immediately before such transfer shall be entitled to notice and compensation in accordance with the provisions of Section 25-F as if the workman had been retrenched. (emphasis supplied) Section 25-FFA provides that sixty days' notice must be given of intention to close down any undertaking and Section 25-FFF provides for compensation to workmen in case of closing down of undertakings. Very briefly stated Section 25-FFF which has been already discussed lays down that 'where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25-F, as if the workman had been retrenched'."

(emphasis supplied)

6. From the aforementioned observations it is evident that the definition of 'retrenchment' as defined in Section 2(oo) of

the Act has to be read in the context of Sections 25-FF and 25-FFF of the Act and if thus read 'retrenchment' under Section 2(oo) does not cover termination of service as a result of closure or transfer of an undertaking though such termination has been assimilated to retrenchment for certain purposes, namely, the compensation payable to the workmen whose services are terminated as a result of such closure. In that view of the matter Section 25-N which deals with retrenchment cannot apply to the present case where termination of the services of the workmen was brought about as a result of the closure of the undertaking.

7. There is one more reason why Section 25-N cannot be made applicable to the workmen in the present case. Sections 25-N and 25-O were inserted in the Act by Act No. 32 of 1976 whereby Chapter V-B was introduced in the Act. Section 25-N imposed restrictions in the matter of retrenchment of workmen employed in large undertakings while Section 25-O dealt with the procedure for closing down such undertakings. Section 25-O was held to be unconstitutional by this Court in *Excel Wear* case. The striking down of Section 25-O would not, ipso facto, result in enlargement of the ambit of Section 25-N so as to cover termination of services of workmen as a result of closure which was otherwise outside the ambit of Section 25-N. We are, therefore, unable to uphold the contention of Shri Sharma that Section 25-N was applicable in the present case and it was obligatory for the Management of the respondent- Company to give three months' notice as required by Section 25-N. Since Section 25-O was not available on account of the said provision having been struck down by this Court the only protection that was available to the workmen whose services were terminated as a result of closure was that contained in Sections 25-FFA and 25-FFF of the Act. It is not disputed that both these provisions have been complied with in the present case.

13 : It has been pointed out hereinabove, as to what is the law presently available under which the action has been taken. Section 25-FFF of the Act

has also been made as a protective provisions in the Act. Nothing has been said in Section 25-N of the Act that even in the case where the sanction is granted under Section 25-O of the Act, still the employer would require to obtain a sanction to retrench the employees/workmen, before complying with the order of closure of the establishment. Thus, if the reading of both the provisions are made harmoniously, it will be clear that there would not be application of Section 25-N of the Act, in case the sanction is granted for the closure of the establishment of an employer by the competent Government in exercise of its power prescribed under the provisions of the aforesaid Act.

14 : Reliance placed by learned senior counsel for the petitioners in the case of *Straw Products Limited, Bhopal and another vs. Union of India and others* 1986 MPLJ 473 is totally misconceived. Division Bench of this Court was examining the correctness of the order refusing to grant sanction to close down an industry as applied under Section 25-O of the Act and since simultaneously an application under Section 25-N of the Act, was also made by the said employer, both were rejected simultaneously. This Court was not, infact, examining the applicability of provisions of Section 25-N of the Act, despite the fact that sanction was granted under Section 25-O of the Act, to close down the industry. Thus, reliance placed by learned senior counsel for petitioners in the case of *Straw Products Limited, Bhopal and another vs. Union of India and others* (supra) is totally misconceived.

15 : Looking to these submissions if the law laid down by the Apex Court in the case of *Maruti Udyog Ltd.* (supra) is examined, it will be clear that the specific provisions made by the Parliament have been taken into consideration. The submission that special protection granted under the added provisions of Chapter V-B would not be affected, cannot be accepted. The scheme of the Act is to be seen. The scheme of the Act is to grant protection to the employees from the illegal action of retrenchment or removal of such employees or workmen from the industrial employment by the employer. If adequate arrangement is made for their protection even when sanction is required to be granted for closing down of an industry, it has to be treated that the object of the specific provisions made in Chapter V-B are achieved. That being so, contention of learned senior counsel for petitioners cannot be accepted. Undisputedly, petitioners have received compensation from the employer on account of their discontinuance from employment because of the closure of the establishment. It is also not in dispute that before the closure of the

establishment, sanction from the appropriate Government was asked for which was granted. It is also not in dispute that these facts were brought to the notice of the employees or workmen before effecting the closure of the establishment. Consequently, there was no occasion for the petitioners to claim any relief against the retrenchment as they were compensated for discontinuance from employment in adequate manner. This being so, Labour Court was not right in entertaining their application or granting any relief to them. Though specific discussion in this respect has not been done by the appellate authority in its order with respect to the application of Section 25-N of the Act or the provisions of Section 25-O of the Act as has been done hereinabove, but still the law permits such retrenchment in case of grant of sanction to close the establishment, of course, only after payment of compensation which in the case in hand has already been done.

16 : Consequently, there is no force in the writ petition, same deserves to be and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 1546
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 390/2011(S) (Jabalpur) decided on 2 January, 2013

CHANDRA BHUSAN ...Petitioner
Vs.
SOUTH EASTERN COAL FIELD LIMITED & anr. ...Respondents

Service Law - Date of Birth - Correction - Matriculation Certificate **- In the letter of offer of appointment, it was mentioned that in case the person fails to produce certificate in proof of age, the same shall be assessed by Medical Board - However, there is nothing that the date of birth was recorded on the basis of the certificate produced by Petitioner or on the basis of medical report - Matriculation certificate subsequently filed by Petitioner shows different date of birth - Other school certificates also tally with the date of birth mentioned in Matriculation Certificate - As per Implementation Instruction No. 76, Date of Birth is required to be treated as has been mentioned in Matriculation certificate - Respondents are directed to treat the date of birth of the petitioner as has been mentioned in Matriculation**

Certificate and to permit him to continue in service till he attains the age of superannuation according to said date of birth.(Paras 6, 7 & 8)

सेवा विधि – जन्मतिथि – सुधार – हाईस्कूल प्रमाण पत्र – नियुक्ति के प्रस्ताव पत्र में यह उल्लिखित था कि यदि वह व्यक्ति आयु के सबूत का प्रमाण पत्र प्रस्तुत करने में असफल होता है, तब उसे चिकित्सकीय बोर्ड द्वारा निर्धारित किया जायेगा – किन्तु, ऐसा कुछ नहीं कि जन्म तिथि को, याची द्वारा प्रस्तुत प्रमाण पत्र के आधार पर अभिलिखित किया गया या चिकित्सीय रिपोर्ट के आधार पर – याची द्वारा पश्चातवर्ती रुप से प्रस्तुत किया गया हाईस्कूल प्रमाण पत्र, भिन्न जन्म तिथि दर्शित करता है – अन्य शाला प्रमाण पत्र भी हाईस्कूल प्रमाण पत्र में उल्लिखित जन्म तिथि के साथ मेल खाते हैं – कार्यान्वयन अनुदेश क्र. 76 के अनुसार, जन्म तिथि को हाईस्कूल प्रमाण पत्र में उल्लिखित के अनुसार माना जाना अपेक्षित है – प्रत्यर्थीगण को याची की जन्म तिथि हाईस्कूल प्रमाण पत्र में उल्लिखित के अनुसार मानने के लिए और उक्त जन्म तिथि अधिवार्षिकी आयु प्राप्त करने तक सेवा में बने रहने की अनुमति देने के लिए निदेशित किया गया।

Cases referred :

W.A. No. 270/2009 decided on 03.09.2009, W.A. No. 584/2009 decided on 07.08.2009, AIR 1964 SC 1006.

K.C. Ghildiyal, for the petitioner.
Greeshm Jain, for the respondent No.1.
S. Chaturvedi, for the respondent No.2.

ORDER

K.K. Trivedi, J: The petitioner has approached this Court ventilating his grievance against the action of respondent No.1 of not recording the correct date of birth of the petitioner in his service roll and making the petitioner to retire on the basis of wrong date of birth recorded in the service record of the petitioner. It is contended that the original mark-sheet produced by the petitioner specifically contains the right date of birth of the petitioner to be 11.04.1956. Such a document was made available at the initial time of recruitment. This fact is clear from the endorsement made on the document itself by the Employment Exchange and, therefore, it was necessary for the respondent No.1 to act on the representation of the petitioner and to direct correction in the date of birth of the petitioner. It was found by the petitioner when a Pan Card was issued to the petitioner that his wrong date of birth was recorded in the service record and that being so, the representation was made by the petitioner. It was specifically pointed out by the petitioner that there is

some sort of manipulation done in the service record of the petitioner and, therefore, the correction of the date of birth of the petitioner was necessary in terms of the conditions mentioned in the statutory agreement. However, since such a prayer of the petitioner has been rejected by the respondents, he is required to approach this Court.

2. The contention of the petitioner is that he was appointed as Piece Rated Badli Loader in the establishment of South Eastern Coal Fields Limited in the year 1978. He was posted in Bijuri Sub Area, Hasdeo. The petitioner had completed 22 years of age on the date of his initial appointment. The relevant documents, such as mark-sheet of the examination of Higher Secondary School Certificate, were produced by the petitioner at that time. On 01.01.1985 the petitioner was promoted on the post of Explosive Carrier and subsequently on the post of Lamp Cleaner on 03.09.1996. Later on he was promoted as Lamp Charger category on 01.01.1999 and subsequently on the post of Lamp Fitter on 01.01.2006. At no point of time the petitioner was informed about correction in his date of birth. Even when he came to know about such mistake committed in recording the date of birth and made an application before the Personnel Manager of the respondent No.1 on 09.04.1998, nothing was done by the respondent No.1. The reminder was submitted by the petitioner on 12.09.2002 and he insisted for redressal of grievance but nothing was done. Since on the basis of wrong date of birth the petitioner is sought to be retired now, he is required to file the present writ petition.

3. Notices of the writ petition were issued. Under the order of the Court, respondent No.2, the Board of Secondary Education, Bhopal, was impleaded as a party. The respondents have filed their returns. Respondent No.1 has mainly relied on a document said to be prepared under Rule 48 of the Mines Rules, 1955. It is contended that in the said document the date of birth of the petitioner was not recorded but only the age of the petitioner was written. It was said that at the time of initial appointment the petitioner was aged 27 years. The initial date of appointment of the petitioner is 22.11.1978. However, nothing has been placed on record to indicate as to how this age was ascertained and whether any declaration was made by the petitioner in that respect or not. The return of respondent No.2 is only this much that the marksheet produced by the petitioner was got verified from the records of the Board and it is found that the correct entries in the date of birth of the petitioner are made in the

said certificate. The respondent No.1 was called upon to produce the original document Annexure R-1 relied by the respondent No.1, which has been produced and shown to the Court. However, even in the original record, there is no reference as to how age of the petitioner was mentioned in the statutory document.

4. The petitioner has filed certain application for taking documents on record. Such application has been considered and documents have been taken on record. A perusal of those documents will indicate that on certain occasion the petitioner was required to submit certain forms in which the details of his family were given. However, in some of the documents, manipulations have been found.

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

6. The sole question would be whether the petitioner was knowing about the recording of his date of birth in his service rolls or the statutory document prepared at the initial time of engagement of the petitioner in service or not. It is not in dispute that the offer was given to the petitioner by respondent No.1 for appointment on 15.11.1978. The said offer produced as Annexure P-1 indicates that the petitioner was called upon to furnish certain certificates, such as certificate of domicile, certificate of caste and certificate in proof of age. As far as the certificate in proof of age is concerned, a note was appended to this column wherein it was categorically said that in case the petitioner fails to produce certificate in proof of the age, the same shall be assessed by the Medical Board of the area. Soon after the offer extended to the petitioner, it appears that the document Annexure R-1 was prepared in which the name of the petitioner was mentioned. However, all other things were mentioned in accordance to the declaration made by the petitioner, except the age. Nothing was said with respect to the age whether any certificate in proof of the same was produced by the petitioner or not and whether the same was recorded on the basis of medical report after ascertainment of the age of the petitioner. Thus, it cannot be said that such fact relating to age of the petitioner on the date of initial appointment was recorded in terms of the instructions issued under the offer letter of the respondent No.1. Now if that was the situation and if any dispute was raised by the petitioner soon after coming into know about such discrepancy, it was necessary on the part of the respondents to get an enquiry conducted in that respect. The transfer certificate issued by the

school authorities further reflects the date of birth of the petitioner. The same is tallying with the date of birth mentioned in the Matriculation Certificate. In some of the records of the respondent No.1 subsequently prepared, the date of birth of the petitioner was written to be 22.11.1951 but there is nothing available on record to indicate that any such declaration was made by the petitioner or any document in that respect was produced by him. Though it is a fact that the petitioner has signed such forms but it cannot be said that the forms were filled by the petitioner in his own handwriting.

7. There is an agreement with respect to the correction in the date of birth. However, it is true that only if apparent error has been pointed out then only the matters are required to be referred to the Age Determination Committee but it is also clear that under the instructions so issued, the certificate of Matriculation has to be treated as the conclusive proof of date of birth. The document, as produced by the petitioner, indicates that he had already passed the matriculation on the date when initially he was offered the employment and the said document was produced before the Employment Exchange. The said document was duly endorsed by the Employment Exchange. Therefore, it cannot be accepted that such a document was never brought to the notice of respondent No.1. That being so, an enquiry in this respect was required to be conducted by the respondent No.1 to ascertain as to how a particular date of birth of the petitioner is mentioned in the statutory document when specially there was nothing placed on record to show that such a date of birth was declared by the petitioner. From where date of birth of the petitioner to be 22.11.1951 had come to the notice of respondent No.1, is not clear. Thus, it was imperative on the part of the respondents to look into such request made by the petitioner in the year 1998.

8. In the return of the respondent No.1, this particular document, making of the application, has not been denied. On the other hand, they have mentioned the said document, for the purpose that about the dispute of date of birth, for the first time after 20 years of service, the petitioner has made the representation. If such a representation was made, it was necessary for the respondent No.1 to get an enquiry conducted in that respect and to pass the appropriate orders. Learned Counsel for the petitioner has drawn attention of this Court to the order passed by the Division Bench of this Court in W.A. No.270/2009 (*Rajendra Kumar Mehta vs. South Eastern Coal Fields Ltd. & others*), decided on 03.09.2009. It is contended by learned Counsel

appearing for the petitioner that the dispute with respect to the date of birth, vis-à-vis making reference of the said dispute in terms of the Implementation Instruction No.76 was considered by the Division Bench of this Court and it has been categorically held by this Court that the date of birth is required to be treated as has been mentioned in the Matriculation Certificate in terms of the aforesaid Instruction No.76. Again relying in the case of *Sheikh Mumtaz vs. South Eastern Coal Fields Ltd. & others,* W.A. No.584/2009, decided on 07.08.2009, learned Counsel for the petitioner has pointed out that where the reliefs were refused by the Single Bench of this Court, the writ appellate Court has granted the relief in terms of Implementation Instruction No.76. It is contended that in view of the law laid-down by this Court, it would be appropriate to command the respondent No.1 to treat the petitioner in service till he attains the age of superannuation in accordance to the date of birth recorded in his Matriculation Certificate.

9. Per contra, it is contended by learned Counsel appearing for respondent No.1 that these instructions have been considered by this Court in various cases. Relying in the decisions rendered by the Apex Court as also by this Court in several other cases, the Single Bench of this Court has refused to entertain such a claim. It is pointed out that at the best the matter can be referred to the Age Determination Committee and no relief could be granted to the petitioner. Further placing reliance in the case of *State of Madhya Pradesh and others Vs. Bhailal Bhai,* AIR 1964 SC 1006, it is contended that because of the delay caused by the petitioner in raising the dispute with respect to the date of birth, he is not entitled to any relief and the writ petition deserves to be dismissed.

10. The submissions made by learned Counsel for the parties are considered. It is not the case that the petitioner was not vigilant about the discrepancies committed in mentioning the date of birth of the petitioner in the record. As has been pointed out herein above, the first representation was made by the petitioner in the year 1998. No attempt whatsoever was made by the respondent No.1 to get the said representation decided, after verifying the date of birth of the petitioner from the records of the respondent No.2, Board. It is also not proved by the respondent No.1 that petitioner was fully aware of the date of birth recorded in his service record from day one. Thus, it cannot be said that the petitioner was not vigilant about his rights. Such a stand taken by the

respondent No.1, thus, cannot be accepted. Now the fact remains that the statutory provisions have been made for verifying the date of birth of an employee. For the said purpose, even in the offer letter the note was made by the respondent No.1 itself. It is not acceptable as to why the petitioner would not have produced the Matriculation Certificate before the respondent No.1 in proof of his date of birth. It is also not clear as to why such a document was not available in the record of the respondent No.1 even when it was produced before the Employment Exchange from where reference was made with respect to employment of the petitioner. It is also not clear as to how a particular date as has been mentioned in subsequent forms, has been ascertained by the respondent No.1, especially when there was no such declaration made by the petitioner. Lastly, the petitioner was never put for medical examination for the purposes of ascertainment of his age on the initial date of appointment even in accordance to the note made in the offer letter issued to the petitioner. Therefore, in fact it has to be held that the petitioner has produced the certificate of Matriculation, which was to be accepted as proof of the date of birth but the same was never taken note of by the respondent No.1. In view of this, the petitioner is entitled to the relief as was granted by the Division Bench of this Court in the case of *Rajendra Kumar Mehta* (supra) and *Sheikh Mumtaj* (supra). The law laid-down by the Apex Court as also by this Court in different cases is not applicable in view of the basic difference in the facts and circumstances of the present case from the cases decided by the Apex Court and this Court.

11. Consequently, this writ petition is allowed. The respondents are directed to treat the date of birth of the petitioner as has been mentioned in the Matriculation Certificate in terms of the Implementation Instruction No.76 and to permit him to continue in the employment till he attains the age of superannuation according to the said date of birth. The petitioner be reinstated in service and the period of absence from service be regularized by making the payment of arrears of salary to the petitioner. The aforesaid exercise be completed within a period of one month from the date of the order.

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

Petition allowed.

I.L.R. [2013] M.P., 1553
WRIT PETITION

Before Mr. S.A. Bobde, Chief Justice & Mr. Justice Ajit Singh

W.P. No. 360/2002 (Jabalpur) decided on 21 March, 2013

RAVINDRA NATH TRIPATHI ...Petitioner

Vs.

UNION OF INDIA & ors. ...Respondents

A. Armed Forces Tribunal Act (55 of 2007), Section 14, Constitution, Article 226 - Jurisdiction of High Court - **Petitioner apart from challenging the punishment of discharge from service has also questioned the constitutionality of various provisions of Air Force Act, 1950 - Air Force Act confers jurisdiction, powers and authority exercisable by all Courts except the Supreme Court or High Court on the Tribunal - There is no exclusion of jurisdiction of High Court - High Court has jurisdiction to entertain the petition. (Paras 7 to 12)**

क. सशस्त्र बल अधिकरण अधिनियम (2007 का 55), धारा 14, संविधान, अनुच्छेद 226 – उच्च न्यायालय की अधिकारिता – याची ने सेवोन्मुक्त की शस्ति को चुनौती देने के अलावा, वायु सेना अधिनियम 1950 के विभिन्न उपबंधों की संवैधानिकता पर भी प्रश्न किया – वायु सेना अधिनियम, सर्वोच्च न्यायालय या उच्च न्यायालय को छोड़कर सभी न्यायालयों द्वारा प्रयोज्य अधिकारिता, शक्तियां एवं प्राधिकार अधिकरण को प्रदत्त करता है – उच्च न्यायालय की अधिकारिता का कोई अपवर्जन नहीं – उच्च न्यायालय को याचिका ग्रहण करने की अधिकारिता है।

B. Interpretation of Statutes - Exclusion of Jurisdiction - **Clauses which purports to exclude the jurisdiction of the Courts must be read strictly. (Para 10)**

ख. कानूनों का निर्वचन – अधिकारिता का अपवर्जन – खंड जो न्यायालयों की अधिकारिता का अपवर्जन तात्पर्यित करते हैं उन्हें यथावत रुप से पढ़ा जाना चाहिए।

Case referred :

(1997) 3 SCC 261.

Petitioner in person.

O.P. Namdev, for the respondents.

Rajendra Tiwari with *Abhishek Tiwari* as amicus curiae.

ORDER

The Order of the court was delivered by :

S.A. BOBDE, C.J.: A question is raised by the respondents whether the petitioner has an alternative remedy under Section 14 of the Armed Forces Tribunal Act, 2007 (hereinafter referred to as the AFT Act).

2. The petitioner has approached this Court for relief against the order dated 27.7.2000 imposing a punishment of discharge from service on him. In addition he has questioned the constitutionality of Sections 82, 83, 84 and 86 of the Air Force Act, 1950 being ultra vires Article 14 of the Constitution of India; Rules 24 and 31 of the Air Force Rules, 1969 being ultra vires Article 14 of the Constitution of India; Section 50 (b) of the Air force Act 1950 being ultra vires Article 22 (2) of the Constitution of India and Rule 15 (2) (g) (ii) of the Air Force Rules, 1969 being ultra vires Article 20 (2) of the Constitution of India.

3. According to the respondents the petitioner has equally efficacious alternative remedy under Section 14 of the AFT Act, which enables a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal for redressal. Since the question raised on behalf of the respondents is of general importance we requested Shri Rajendra Tiwari, learned Senior Counsel to assist the Court as amicus curiae.

4. According to the amicus curiae and the respondents, Section 14 of the AFT Act provides an alternative remedy to the petitioner even when he challenges the constitutional validity of provisions of a statute such as Air Force Act, 1950. The main submission of Shri Tiwari is based on the observations of the Supreme Court in the case of *L. Chandra Kumar Vs. Union of India and others* (1997) 3 SCC261, wherein the question raised was whether Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where constitutional issues are not involved. The Supreme Court rejected the contention that the matters relating to constitutional validity of statute cannot be raised before the Tribunals. The Supreme Court observed as follows:

> *"90.....It has been contended before us that the Tribunals should not be allowed to adjudicate upon matters where the vires of legislations is questioned, and that they should restrict themselves to handling matters where*

constitutional issues are not raised. We cannot bring ourselves to agree to this proposition as that may result in splitting up proceedings and may cause avoidable delay. If such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be quite frivolous, to directly approach the High Courts and thus subvert the jurisdiction of the Tribunals. Moreover, even in these special branches of law, some areas do involve the consideration of constitutional questions on a regular basis; for instance, in service law matters, a large majority of cases involve an interpretation of Articles 14, 15 and 16 of the Constitution. To hold that the Tribunals have no power to handle matters involving constitutional issues would not serve the purpose for which they were constituted. On the other hand, to hold that all such decisions will be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution before a Division Bench of the High Court within whose territorial jurisdiction the Tribunal concerned falls will serve two purposes. While saving the power of judicial review of legislative action vested in the High Courts under Article 226/227 of the Constitution, it will ensure that frivolous claims are filtered out through the process of adjudication in the Tribunal. The High Court will also have the benefit of a reasoned decision on merits which will be of use to it in finally deciding the matter.

91. It has also been contended before us that even in dealing with cases which are properly before the Tribunals, the manner in which justice is dispensed by them leaves much to be desired. Moreover, the remedy provided in the parent status, by way of an appeal by special leave under article 136 of the Constitution, is too costly and in accessible for it to be real and effective. Furthermore, the result of providing such a remedy is that the docket of the Supreme Court is crowded with decisions of Tribunals that are challenged on relatively trivial grounds and it is forced to perform the role of a First Appellate Court. We have

already emphasised the necessity for ensuring that the High Courts are able to exercise judicial superintendence over the decisions of Tribunals under Article 227 of the Constitution."

5. In conclusion the Supreme Court declared Clause 3 (d) of the Article 323-B to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution as unconstitutional in the following words

"In view of the reasoning adopted by us, we hold that Clause 2(d) of Article 323A and Clause 3(d) of Article 323B, to. the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/ 227 and 32 of the Constitution, are unconstitutional Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323A and 323B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323A and Article 323B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like course of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. Section 5(6) of the Act is valid

and constitutional and is to be interpreted in the manner we have indicated.

06. According to Shri Tiwari the same position in law would operate in relation to the jurisdiction conferred by AFT Act on the Tribunal constituted under that Act and, therefore, the petitioner must not only approach that Tribunal as an alternative remedy provided to him by law, but this Court cannot entertain the petition since the Supreme Court has observed that it is the Tribunal alone which should act as a Court of first instance, and not this Court. Shri Tiwari further contended that the statement of law by Supreme Court is binding on this Court, which indeed it is, and if this Court exercises jurisdiction, the same shall be contrary to the statutory provisions. We must, therefore, examine the statutory provisions. Section 14 of the Armed Forces Tribunal Act reads as follows:-

> ***"14 - Jurisdiction, powers and authority in service matters.*** *(1) Save as otherwise expressly provided in this Act, the Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority, exercisable immediately before that day by* ***all courts (except the Supreme Court or a High Court exercising jurisdiction under articles 226 and 227 of the Constitution)*** *in relation to all service matters.*
>
> *(2) Subject to the other provisions of this Act, a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal in such form and accompanied by such documents or other evidence and on payment of such fee as may be prescribed.*
>
> *(3) On receipt of an application relating to service matters, the Tribunal shall, if satisfied after due inquiry, as it may deem necessary, that it is fit for adjudication by it, admit such application; but where the Tribunal is not so satisfied, it may dismiss the application after recording its reasons in writing.*
>
> *(4) For the purpose of adjudicating an application, the Tribunal shall have the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, (5*

of 1908) while trying a suit in respect of the following matters, namely-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents:

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, (1 of 1872) requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing an application for default or deciding it exparte;

(h) setting aside any order of dismissal of any application for default or any order passed by it exparte; and

(i) any other matter which may be prescribed by the Central Government.

(5) The Tribunal shall decide both questions of law and facts that may be raised before it."

07. We find that on plain reading of Section 14 of the AFT Act, which in sharp contrast to Section 14 of the Administrative Tribunals Act, the AFT Act confers the jurisdiction, powers and authority exercisable by all Courts except the Supreme Court or the High Court exercising jurisdiction under Article 226 and 227 of the Constitution of India on the Tribunal on and from the appointed day. In other words it does not confer the jurisdiction, power and authority of the High Court under Articles 226 and 227 of the Constitution of India on the Tribunal.

08. On the other hand Section 14 of the Administrative Tribunals Act, 1985 reads as follows: -

"14. Jurisdiction, powers and authority of the Central Administrative Tribunal - (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court) in relation to -

(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a Post connected with defence or in the defence services, being, in either case, a post filed by a civilian;

(b) all service matters concerning -

(i) a member of any All-India Service; or

(ii) a person [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian [not being a member of an All-India Service or a person referred to in clause (c) appointed to any defence services or a post connected with defence, and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation or society owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation or society or other body, at the disposal of the Central Government for such appointment.

***Explanation:** For the removal of doubts, it is hereby*

*declared that references to "**Union**" in this sub-section shall be construed as including references also to a Union Territory."*

2. .....

3. .....

This provision purports to confer the jurisdiction, power and authority of all Courts (except the Supreme Court) and on Administrative Tribunal.

09. In the circumstances, we find that there is no exclusion of the jurisdiction of this Court under Article 226/227 of the Constitution in relation to subject matters, but on the contrary what is conferred on the Tribunal is the jurisdiction, powers and authority exercisable by all Courts except the powers and authority of the Supreme court and the High Court under Article 226 and 227 of the Constitution of India. *L. Chandra Kumar's* case (supra) cannot be treated as authority for the proposition as contended by Shri Tiwari that every Tribunal established under Articles 323-A and 323 (B) of the Constitution alone has jurisdiction to decide upon the matters involving the constitutional validity of statutes. Undoubtedly, Clause 2 (b) of Article 323-A and Clause 3 (d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution have been held to be unconstitutional, but that is clearly on the ground that the jurisdiction conferred upon the High Court under Article 226/227 of the Constitution of India and upon the Supreme Court under Article 32 of the Constitution of India is a part of the inviolable basic structure of our Constitution. Thus, the point can be viewed from two aspects; one, what powers have been conferred on the Tribunal under the AFT Act and two, correspondingly whether there is any exclusion of jurisdiction of the High Courts. This can be done only by considering the plain meaning of the parliamentary legislation by which jurisdiction has been conferred on the Tribunal. As noted earlier the plain words of Section 14 of the AFT Act only confers the jurisdiction, power and authority exercisable by all Courts and in the same breath carves out an exception in relation to the powers of the Supreme Court or the High Court exercising jurisdiction under Articles 226/227 of the Constitution. Considering the matter from the point of view of exclusion of jurisdiction of the High Court, Parliament has left no doubt in expressing its intention to retain the jurisdiction of the High Court under Article 226/227 of the Constitution in relation to the service matters governed by the AFT Act.

10. It is well settled that clauses which purported to exclude the jurisdiction of the Courts must be read strictly.

11. We may add that the observations apply with greater force while considering the subject of exclusion of jurisdiction of High Court under Articles 226/227 of the Constitution, which in fact cannot be excluded vide *L. Chandra Kumar* (supra).

12. In the result we are of the view that this matter is liable to be entertained by this Court. Hence issue Rule, Returnable within six weeks. Notice be issued to the Attorney General.

Order accordingly.

I.L.R. [2013] M.P., 1561
WRIT PETITION
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
W.P. No. 11254/2012 (Jabalpur) decided on 2 April, 2013

DEEPAK PUROHIT ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. National Security Act (65 of 1980), Section 3(2) & Constitution, Articles 22(5) & 19 - Preventive detention **- Order of detention against the detenu passed on 08.06.2012 - Activities of detenu which could have been prejudicial to the maintenance of Public Order in the year 2010, cannot be held to be proximate and relevant for forming subjective satisfaction of the detaining authority. (Para 14)**

क. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) व संविधान, अनुच्छेद 22(5) व 19 – निवारक निरोध – बंदी के विरुद्ध दिनांक 08.06.2012 को निरोध आदेश पारित किया गया – बंदी के कार्यकलाप जो सन् 2010 में लोक व्यवस्था के अनुरक्षण के लिये प्रतिकूल हो सकते थे, उन्हें निरोध प्राधिकारी की व्यक्तिनिष्ठ संतुष्टि बनाने हेतु आसन्न एवं सुसंगत होने की धारणा नहीं की जा सकती।

B. National Security Act (65 of 1980), Section 3(2) & Constitution, Articles 22(5) & 19 **- Order of Preventive detention passed on the ground pertaining to Public Order - Act of detenu was merely individual i.e. it affected only two injured persons, but did not affect the peace or tranquillity of rest of the community in any manner -**

Therefore, it could not be held to be a breach of Public Order constituting the basis of detention of the petitioner. (Para 10)

ख. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) व संविधान, अनुच्छेद 22(5) व 19 – लोक व्यवस्था से संबंधित आधार पर निवारक निरोध का आदेश पारित किया गया – बंदी का कृत्य मात्र व्यक्तिगत था अर्थात उससे केवल दो आहत व्यक्ति प्रभावित हुए परंतु शेष समुदाय की शांति एवं प्रशांति को किसी प्रकार से प्रभावित नहीं किया – अतः उसे लोक व्यवस्था का भंग नहीं माना जा सकता, जिससे याची के निरोध का आधार गठित हो सके।

***C. National Security Act (65 of 1980), Section 3(2) & Constitution, Articles 22(5) & 19* - Preventive Detention -Not punitive - Detenu can claim no right of peremptory hearing or a show cause notice before the detention order is passed by the authority. (Para 4)**

ग. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) व संविधान, अनुच्छेद 22(5) व 19 – निवारक निरोध – दण्डात्मक नहीं – बंदी, प्राधिकारी द्वारा निरोध आदेश पारित किये जाने से पूर्व अनिवार्य सुनवाई के अधिकार का या कारण बताओ नोटिस का दावा नहीं कर सकता।

***D. National Security Act (65 of 1980), Section 3(2) - Preventive Detention - Object of* - Objective of preventive detention is to prevent a person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order. (Para 4)**

घ. राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3(2) – निवारक निरोध – का उद्देश्य – निवारक निरोध का उद्देश्य व्यक्ति को राज्य की सुरक्षा के लिए प्रतिकूल किसी प्रकार की कार्यवाही करने से अथवा लोक व्यवस्था के अनुरक्षण के लिए प्रतिकूल किसी प्रकार की कार्यवाही करने से रोकना है।

Cases referred :

AIR 1957 SC 688, AIR 1975 SC 550, AIR 1974 SC 2154, AIR 1992 SC 687.

J.A. Shah, for the petitioner.

Yogesh Dhande, Dy. G.A. for the respondents.

ORDER

The Order of the court was delivered by :

RAKESH SAKSENA, J: Petitioner, the detenu, by this petition under Art.226 of the

Constitution of India, has invoked the writ jurisdiction of this Court seeking quashment of the order dated 8.6.2012 (Annexure-P/1) whereby he has been detained under the provisions of National Security Act, 1980. The aforesaid detention order was passed by District Magistrate, Indore on the following grounds:

आप एक शातिर बदमाश होकर अपराधिक पृवति के लोगो के साथ रहकर वर्ष 2006 से अपराध घटित करते हुए आपके द्वारा मारपीट, चाकुबाजी, प्राणघातक हमला जैसे 5 अपराध घटित किये है। आपके द्वारा घटित की जाने वाली घटनाओं से लोक व्यवस्था पर प्रतिकूल प्रभाव पड़ता है। आपकी अपराधिक गतिविधियों को रोकने के लिये समय समय पर प्रतिबंधात्मक कार्यवाही की गई है।

दिनांक 4–6–2012 को रात्रि 10–10 बजे नारायण मण्डलोई पिता खेमचंद मण्डलोई जब काम करके घर पर आ रहा था कि जैसे ही वह अग्रवाल की दुकान के सामने पहुंचा तो देखा कि उसके लड़के गोपाल पिता नारायण मण्डलोई को कालु उर्फ पुरूषोत्तम पालीवाल व अपने शराब पीन के लिये पानी नहीं देने के कारण जान से मारने की नियम से चाकू मारे जो उसके लड़के गोपाल के दाहिने पैर की जांघ के पास लगे तथा खून बहने लगा। लड़का चिल्लाया तो नारायण मण्डलोई बीच बचाव करने गया तो उसे भी कालु ने दाहिने हाथ की हथेली पर चोट पहुंचाई। इस घटना से क्षेत्र में दहशत का वातावरण निर्मित होकर लोक व्यवस्था भंग सी हो गई। रिपोर्ट पर थाना जूनी इन्दौर पर अप. क. 204/12 धारा 307, 34 भ.द.वि. व 3 :2:/3 :5: का पंजीबद्ध कर विवेचना में लिया गया। इस घटना से जनसामान्य में काफी दहशत हो गई है लोग अपने आपको असहाय महसुस कर रहे है। इस घटना के समाचार दिनांक 5–6–2012 को समाचार पत्र राजएक्सप्रेस, इन्दौर पत्रिका, दैनिक भास्कर, नई दुनिया, दबंग दुनिया में विस्तृत रूप से प्रकाशित हुए है। आपके विरूद्ध समय रहते कठोर कार्यवाही नहीं की गई तो आप कभी भी उक्त प्रकार की घटना घटित कर लोक व्यवस्था को भंग कर सकते है। अतः आपके विरूद्ध रासुका के तहत कार्यवाही की जाना नितान्त आवश्यक हो गया है।

3– वे विवरण जिनका इस मामले से संबंध है, नीचे दर्शाई गई अनुसूची में दिये गये है।

4– आपको उक्त आदेश के विरूद्ध गृह मंत्रालय, भारत सरकार, नई दिल्ली, राज्य शासन (प्रमुख सचिव, म.प्र. शासन गृह (सी) विभाग, भोपाल) को अभ्यावेदन करने का अधिकार है तथा मंत्रणा बोर्ड के समय उपस्थित होकर अपना पक्ष समर्थन करने एवं अभ्यावेदन करने का अधिकार है।

अनुसूची

(1) दिनांक 4–3–2006 को आपने फरियादी आनन्द पिता सुरेश बिलरवान

व उसके भाई को पुराने विवाद को लेकर धारदार हथियार खुखरी से मारपीट कर चोट पहुंचाई, नंगी–नंगी गालिया दी, चाकू व जाने से माने की धमकी दी। फरियादी की सूचना पर से थाना जूनी इंदौर पर अप. क. 94/2006 धारा 324, 323, 294, 506, 34 भा.द.वि. का कायम कर बाद विवेचना चालान न्यायालय पेश किया गया। जिसकी नकल जरायम रजिंस्टर परि. क. 1 पर संलग्न है।

(2) दिनांक 11–3–2009 को आपने फरियादी राकेश गलानी की स्कूटर नम्बर एम.पी. 09/यू/5039 बापू नगर से चुराकर ले गया, फरियादी की सूचना पर से थाना जूनी इंदौर पर अपराध कमांक 126/2006 धारा 379 भदवि. का कायम कर प्रकरण में दौरान विवेचना आरोपी दीपक को गिरफ्तार किया जाकर फरियादी की चोरी गई स्कूटर जप्त की गई। प्रकरण में बाद विवेचना चालान न्यायालय में पेश किया गया। जिसकी नकल परि. क. 2 पर संलग्न है।

(3) आपके द्वारा दिनांक 15–07–2010 को अपने साथियों सहित एकमत होकर फरियादी संजय कामले के साथ अवैध वसूली को लेकर मारपीट, झगड़ा फसाद कर, जान से मारने की धमकी दी। रिपोर्ट पर से थाना जूनी इंदौन पर अप. कं. 267/10 धारा 327, 323, 294, 506, 34 ताह. का कायम कर प्रकरण में बाद विवेचना चालान न्यायालय पेश किया गया। जिसकी नकल प्र.सू.रि. परिशिष्ट कं. 3 पर संलग्न है।

(4) आपके द्वारा दिनांक 2–9–2010 को अपने साथियों सहित एकमत होकर फरियादी मुकेश लुनिया से शराब पीने के लिये पैस मांगे नहीं देने पर, अश्लीन गालियां दी व जान से माने की नीयत से तलवार, सरिये एंव लट्ठ से मारपीठ कर प्राणघातक चोट पहुंचाई। फरियादी की रिपोर्ट पर से थाना जूनी इंदौर पर अपराध कमांक 343/10 धारा 307, 394, 34 भादवि ईजाफा धारा 25 आर्म्स एक्ट का प्रकरण कायम किया जाकर विवेचना में लिया जाकर प्रकरण मे बाद विवेचना चालान न्यायालय में पेश किया गया। जिसकी नकल प्र.सू.रि पिर. कं. 4 पर संलग्न है।

(5) दिनांक 4–6–2012 को रात्रि 10–10 बजे नारायण मण्डलोई पिता खेमचंद मण्डलोई जब काम करके घर पर आ रहा था कि जैसे ही वह अग्रवाल की दुकान के सामने पहुंचा तो देखा कि उसके लड़के गोपाल पिता नारायण मण्डलोई को कालु उर्फ पुरूषोत्तम पालीवाल व आपने शराब पीन के लिये पानी नहीं देने के कारण जान से मारने की नियत से चाकू मारे जो उसके लड़के गोपाल के दाहिने पैर की जांघ के पास लगे तथा खून बहने लगा। लड़का चिल्लाया तो नारायण मण्डलोई बीच बचाव करने गया तो उसे भी कालु ने दाहिने हाथ की हथेली पर चोट पहुंचाई। इस घटना से क्षेत्र में दहशत का वातावरण निर्मित होकर लोक व्यवस्था भंग सी हो गई। रिपोर्ट पर थाना जूनी

इन्दौन पर आ. क. 204/12 धारा 307, 34 भा.द.वि व 3 :2:/ 3 :5: का पंजीबद्ध कर विवेचना में लिया गया।

इस प्रकार उपरोक्त से मुझे यह विश्वास हो गया है कि आप निकट भविष्य में इसी प्रकार कृत्य कर लोक व्यवस्था को भंग कर सकते है। आपका स्वतंत्र रूप से विचरण करना जनसाधारण के हित में न होकर घातक है। साथ ही लोक व्यवस्था भंग होने की प्रबल संभावना है। मुझे इसलिये आपके विरूद्ध राष्ट्रीय सुरक्षा अधिनियम, 1980 की धारा 3 (2) के तहत कार्यवाही की जाना आवश्यक हो गया है।

उपरोक्त निरोध के आधार आज दिनांक 08–06–2012 को न्यायालयीन मुद्रा व मेरे हस्ताक्षर से जारी किये गये।

जिला दण्डाधिकारी

जिला इन्दौर, म.प्र.

2. The aforesaid order was passed on the representation made by Superintendent of Police, West district Indore on 7.6.2012. On the same day, the grounds of the order along with its particulars were supplied to detenu and he was sent to Central Jail, Rewa in execution of the detention order. An information in this regard was supplied to his father Radheshyam Purohit on the same day. Detention order was approved by the Government.

3. Petitioner has challenged his detention order mainly on the grounds that the said order was issued without affording any opportunity of hearing to him or giving any show cause notice to him and that the grounds on which the detention order was passed pertained merely to the law and order and not to public order since they did not affect the public at large.

4. As far as the first ground of challenge is concerned, the provisions of detention under National Security Act find roots in Arts. 21-22 of the Constitution of India. Art. 21 postulates that no person shall be deprived of his life or personal liberty except to the procedure established by law. Before a person is deprived of his life or personal liberty, the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected. Although Art.19 guarantees the freedom of all citizens to move freely throughout the territory of India, but it is subject to reasonable restrictions imposed by the Constitution of India. In the beginning in *Gopalan A.K. Vs. State of Madras*- AIR 1957 SC 688, the Apex Court held that the rights conferred by Art.19 are the rights of free men and a person

whose personal liberty has been taken away under a valid law of punitive [Art.21] or preventive [Art.22] detention cannot complain of the infringement of any of the fundamental rights guaranteed by Art.19. According to this view, Arts.21-22 formed a self-contained code to which the other provisions of Part III were not attracted. Though this view has, however, been overturned, bit by bit, by the Supreme Court itself, but in cases of *Khudiram Das Vs. State of W.B.*-AIR 1975 SC 550 and *Haradhon Saha Vs. State of W.B.*-AIR 1974 SC 2154, the Supreme Court held that even though Art.19 may be applicable, a law of preventive detention, which complies with the requirements of Art.22(5), cannot be held to offend against Art.19, as the elements of procedural reasonableness and natural justice are embodied in Art.22(5) itself. Even otherwise the law of preventive detention is not punitive, since the objective of preventive detention is to prevent a person from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of public order. Therefore, the grant of opportunity of hearing or issue of show cause notice before passing of the detention order would essentially frustrate the objective of the law. What the detaining authority is bound to do, is to follow the procedure strictly provided in the statute, as such we are of the view that detenu can claim no right of peremptory hearing or a show cause notice, before the detention order is passed by the authority.

5. Next ground of challenge of the detention is that the incidents, which have been made grounds for passing the detention order, are either stale or do not pertain to 'public order'.

6. In the order dated 8.6.2012, District Magistrate mentioned that in the year 2006, detenu committed five offences like Maar-peet, stabbing and attempt to commit murder etc. which affected public order of the society. For preventing such activities of the detenu time to time preventive measures were also taken.

7. The latest ground relates to the incident dated 4.6.2012 wherein it is alleged that in the night at about 10 o'clock detenu and his associate, Kalu @ Purushottam caused knife injury to Gopal when he did not give water to them for consuming liquor. Knife injury was caused on his thigh. When his father Narayan Mandloi tried to save him, Kalu also caused injury on his hand. It is alleged that by this incident an atmosphere of terror was created in the area and the public order was disrupted. On report being lodged with the police, offence under section 307/34 I.P.C. and section 3(2)(v) of SC/ST (Prevention

of Atrocities) Act was registered.

8. On perusal of the first information report of the aforesaid incident, it is revealed that it was lodged at 11:00 p.m., but it was not disclosed in it that any terror was caused in the locality or it affected anybody else than the victims of the incident. Though the said incident is said to have taken place near the shop of one Agrawal, but no particulars about the fact that the incident in any manner affected the public or the locality at large or unleashed a terror in the locality were given.

9. Supreme Court in number of cases held that there is clear distinction between "law and order" and "public order" and pointed the difference between the two. In case of *Victoria Fernandes Vs. Lalmal Sawma and others*-AIR 1992 SC 687, Supreme Court held:

> "The distinction between the areas of 'law and order' and 'public order' is one of degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it would raise the problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps distinguish it as an act affecting 'public order' from that concerning 'law and order'. The question to ask is : Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed ? This question has to be faced in every case on its facts.[See: *Dr.Ram Manohar Lohia Vs. State of Bihar,* (1966) 1 SCR 709=(AIR 1966 SC 740); *Arun Ghosh Vs. State of West Bengal,* (1970) 3 SCR 288= (AIR 1970 SC 1228); *Ram Ranjan Chatterjee Vs. State of West Bengal,* (1975) 3 SCR 301 = (AIR 1975 SC 609); *Ashok Kumar Vs. Delhi Administration*, (1982) 2 SCC 403= (AIR 1982 SC 1143)]."

10. Keeping in view the above proposition of law, if we examine the aforesaid ground, we find that the act of detenu was merely individual in the

sense that it affected only two injured persons, but did not affect the peace or tranquility of rest of the community in any manner, therefore, it could not be held to be a breach of public order constituting the basis of detention of the petitioner.

11. The ground relating to the incident dated 4.3.2006 is that because of an old dispute petitioner abused complainant and his brother and intimidated them by knife for which offence under sections 324,323,294,506,34 of the Indian Penal Code was registered. Apparently this incident also related to individual person and did not cause any breach of public order. Apart from it, it is stale also, since it cannot be held to be proximate or relevant for forming the subjective satisfaction of the detaining authority in the year 2012.

12. Other ground that on 11.3.2009 detenu committed theft of the scooter of Rakesh Galani and thereby committed offence under section 379 of the Indian Penal Code, in our opinion, cannot by any stretch of imagination be held to have caused breach of public order, in the absence of any particulars about the desperate character of the detenu indicating his indulgence in such type of activities regularly and affecting the public at large.

13. In the ground pertaining to the incident dated 15.7.2010 detenu along with his associates is said to have assaulted and intimidated complainant Sanjay Kamle for illegally extorting money from him. Similarly on 2.9.2010 he and his associates demanded money from complainant Mukesh Luniya for liquor and on not yielding his demand, hurled abuses and in an attempt to cause death, assaulted him with sword, iron rod and stick causing serious injuries to him. On report being lodged by complainant a case under sections 294, 307/ 34 I.P.C. was registered against detenu and his associates. On examining the first information reports of both the aforesaid incidents, it transpires that the incidents occurred at public places and detenu and his associates attempted to extort money from the complainants and also caused injuries to complainants. In the later incident, they reached armed with weapons at the milk diary of complainant in the night at about 8:30 p.m. and after abusing and intimidating him, caused serious injuries to him.

14. Looking to the nature of the above incidents, it can be concluded that the aforesaid acts of detenu could have impact upon large section of the community and have affect on the public order, but the fact remains that detaining authority passed the detention order on 8.6.2012 on the basis of incident which occurred in the night of 4.6.2012. As we have already found

that the said incident did not amount to be an activity of detenu affecting the public order, it is difficult to hold that the detention order could have been passed on the basis of incidents, which occurred in the year 2010, i.e. about 2 years earlier to the passing of detention order. The activities of detenu which could have been prejudicial to the maintenance of public order in the year 2010 cannot be held to be proximate and relevant for forming subjective satisfaction of the detaining authority for passing the detention order on 8.6.2012. No doubt, had the incident dated 4.6.2012 affected the public order of the society, the activities of detenu which affected public order of the society in the year 2010 could have been relevant, as the past conduct or antecedent history of detenu, and could appropriately be taken into account in making the detention order.

15. Since the detaining authority passed the detention order making the incident of 4.6.2012 a ground of detention of petitioner which we have found not affecting the public order, merely on the basis of past history of the detenu which, in our opinion, was not proximate or relevant for constituting the subjective satisfaction for passing the detention order, in our opinion, the impugned detention order cannot be sustained.

16. For the aforesaid reasons, we allow the petition and quash the detention order No.30/Detn./St./2012 dated 8.6.2012 passed against the petitioner. Respondents are directed to release the petitioner immediately if not required in any other case.

Petition allowed.

I.L.R. [2013] M.P., 1569
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 2285/2013 (Gwalior) decided on 8 April, 2013

RADHESHYAM RATHI ...Petitioner
Vs.
ROTARY CLUB & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 39 Rule 1,2,3 & Order 43, Rule (1)(r) - Ex parte Injunction - Appeal - **Order 39 Rule 3 is a method and prescribes a methodology and procedure for granting exparte Injunction - It is not an independent provision - It is part and parcel of Order 39 - It can't be divorced from the nature of power**

given under Rule 1 and 2 - Therefore such an order is appealable under Order 43 Rule (1)(r) - Hence petition under Art.227 is not maintainable. (Paras 9 & 12)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1,2,3 व आदेश 43, नियम (1)(आर) – एकपक्षीय व्यादेश – अपील – आदेश 39 नियम 3 एक विधि है और एकपक्षीय व्यादेश प्रदान करने हेतु प्रणाली एवं प्रक्रिया विहित करता है – वह स्वतंत्र उपबंध नहीं है – वह आदेश 39 का ही भाग है – उसे नियम 1 व 2 के अंतर्गत दी गई शक्ति के स्वरुप से अलग नहीं किया जा सकता – इसलिए उक्त आदेश, आदेश 43 नियम (1)(आर) के अंतर्गत अपीलीय है – अतः अनुच्छेद 227 के अंतर्गत याचिका पोषणीय नहीं।

Cases referred :

1993 MPLJ 52, AIR 1984 Gauhati 86 (FB), AIR 2000 SC 3032, AIR 1963 MP 208, 1978 (1) MPWN SN 447, AIR 2002 Gauhati 146, AIR 2004 AP 310.

Prashant Sharma, for the petitioner.
V.K. Bharadwaj with *Alok Katare*, for the respondent No.1.

ORDER

SUJOY PAUL, J: In this petition filed under Article 227 of the Constitution, the petitioner has challenged the order of the Court below dated 26.3.2013 whereby the Court below has passed the ex-parte injunction against the defendants. The matter was heard on the question of maintainability.

The brief facts necessary for adjudication of this matter are as under:-

1. The respondent No.1 filed a suit for declaration and permanent and mandatory injunction stating that the plaintiff- Club (Rotary Club, Birla Nagar) is running under Rotary International District 3050. A declaration is sought in the said suit that the election held on 3.10.2012 be quashed, result of elected candidate be set aside and a direction be issued to recount the valid votes in the presence of the election officer and after recounting, results be declared. Along with the said suit an application under Order 39 Rule 1 and 2 r/w Section 151 C.P.C. (Annexure P-6) and another application under Order 39 Rule 3 C.P.C. (Annexure P-7) were filed. The Court below entertained those applications and passed the impugned ex-parte injunction order. At the time of admission, an objection is raised by the plaintiff/respondent that the impugned

order is appealable under Order 43 Rule 1 C.P.C. and this petition is not entertainable. The petitioner submits that the petition is maintainable because the order passed by the Court below is under Order 39 Rule 3 C.P.C. and against this order no appeal lies under Order 43 Rule 1 C.P.C. Thus, with the consent of parties, this matter was heard on the question of maintainability.

2. Shri Prashant Sharma, learned counsel for the petitioner drew the attention of this Court on Order 43 Rule 1(r). This provision reads as under:-

> "1. Appeal from orders.-An appeal shall lie from the following orders under the provisions of section 104, namely:-
>
> (r) an order under rule 1, rule 2 (rule 2A), rule 4 or rule 10 of Order XXXIX."

3. By placing heavy reliance on the language employed in this rule, Shri Prashant Sharma submits that there is a deliberate omission and legislature has not chosen to insert rule 3 under the purview of Order 43 Rule 1(r) C.P.C. Thus, he submits that no appeal lies when order is passed by the Court below under Order 39 Rule 3 C.P.C. In addition, he relied on the order dated 2.5.2005 passed by the Apex Court in *Suresh Bhasin Vs. Ramesh Chandra and others* and judgment of this Court in *Gajraj Singh & Others Vs. Ram Kumar* reported in (1993 MPLJ 52).

4. Per contra, Shri V.K. Bharadwaj, learned senior counsel assisted by Shri Alok Katare, Advocate for respondent No.1 submits that the appeal is very much maintainable and in support of that contention he relied on various authorities.

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

6. A plain reading of Order 39 Rule1 shows that it has been compartmentalized into two divisions:-

(i) The temporary injunction.

(ii) Interlocutory orders.

7. Rule 1 to 5 fall under "temporary injunction", whereas rule 6 to 10 fall under interlocutory orders. It is, thus, clear that all orders under Order 1 to 5 of Rule 39 are, in fact order of "temporary injunction".

8. Proviso to Rule 3 under Order 39 was inserted by Act No.104 of

1976 w.e.f. 1.2.1977. In original Rule 3, the powers were given to the Court to grant ex-parte injunction without notice to the other side. However, a proviso aforesaid was added which mandates that while granting such injunction ex-parte, the Court shall record reasons for its opinion that the object of granting injunction would be defeated by the delay and may require the applicant/ plaintiff to fulfill the requirement of Clause (a) and (b). Thus, Rule 3 is a method by which the Court may grant ex-parte injunction and direct notices to the opposite party. This power is exercised in the situation where it appears to the Court that the object of granting injunction would be frustrated by the delay, in such cases ex-parte injunction can be passed. The basic power to grant temporary injunction is there in Rule 1 & 2 of Order 39. Rule 3 only deals with a particular situation for exercise of power to grant injunction ex-parte.

9. Under Order 39 Rule 3 a Court only decides whether to grant injunction ex-parte or after giving notice to the other side. If the Court decides to issue notice and passes injunction order after giving notice, the power, in fact, is exercised under Order 39 Rule 1 & 2. In cases where the Court decides to pass injunction order without giving notice, in that eventuality also, the power of granting injunction is traced and flows from Order 39 Rule 1 and 2. Order 39 Rule 3 is only a method and option for the Court to issue injunction after giving notice or without giving notice and prescribes the methodology and procedure for granting ex-parte injunction. In the event Court deems it proper to grant ex-parte injunction, it is obliged to assign reasons for its opinion.

10. In AIR 1984 Gauhati 86 (FB) (*Akmal Ali and others etc. Vs. State of Assam and others*), the Court opined that procedure for granting ex-parte injunction is laid down in Rule 3, whereas Rule 1 & 2 combined together is repository of Court's power of granting injunction.

11. In AIR 2000 S.C. 3032 (*A. Venkatasubbiah Naidu Vs. S. Chellappan and others*), the Apex Court opined that it cannot be contended that the power to pass ex-parte interim orders of injunction does not emanate from Order 39 Rule 1. The said rule is repository of the power to grant orders of temporary injunction with or without notice, interim or temporary or till further orders or till the disposal of the suit. Thus, it is held by the Apex Court that any order passed in exercise of aforesaid power in Rule 1 would be appealable under Order 43 Rule 1 CPC. This Court in AIR 1963 MP 208 (*Chhaganlal Vs. Niwasdas Goyal*) opined that where an order of temporary injunction is issued ex parte, that order is nonetheless an order under Rule (1) or (2) of

Order 39 CPC and would as such be appealable. The same view is taken by this Court in 1978 (1) MPWN SN 447 (*Sitaram V. Rajabeti*). In AIR 2002 Gauhati 146 the Single Judge followed the Full Bench judgment in *Akmal Ali* (supra). In AIR 2004 AP 310 (*Innovative Pharma Surgicals V. Pigeon Medical Devices Pvt. Ltd. & Ors.*) the High Court of A.P. took the same view. So far 1993 MPLJ 52 (*Gajraj Singh and others Vs. Ram Kumar and others*) is concerned, in my opinion, the said judgment is of no assistance to the petitioner. In the said case, the application was preferred under Order 39 Rule 3 CPC, but Court did not grant any injunction. Only notices were directed to be issued (para 7). If injunction is not granted, it is clear that the powers under Order 39 Rule 1 and 2 are not exercised. In that event, such order, by no stretch of imagination, can be said to be an order passed under Order 39 Rule 1 and 2. Mere issuance of notice without any injunction will not fall within the powers under Order 39 Rule 1 and 2. On this factual foundation, in *Gajraj Singh* (supra), the Court opined that mere issuance of notice will not make an order appealable under Order 43 Rule 1 (r). In the present case, admittedly, injunction has been passed which is necessarily an order passed under Order 39 Rule 1 and 2. On the basis of aforesaid analysis, the case of *Gajraj Singh* (supra) is distinguishable and is of no assistance to the petitioner.

12. In my considered opinion, merely because two separate applications were filed by the plaintiff under Order 39 Rule (1) and (2) read with Section 151 CPC and under Order 39 Rule 3 CPC respectively will not mean that Order 39 Rule 3 is an independent provision. Rule 3 is part and parcel of Order 39. Rule 3 merely provides a method to grant ex-parte injunction when certain conditions are satisfied. When the conditions are satisfied, the Court may grant injunction ex-parte which is necessarily a power exercised under Order 39 Rule 1 and 2 CPC. Rule 3 cannot be divorced from the nature of power given to the Court u/r 1 & 2 and it has to be read with Rule 1 and 2 CPC. In other words, in my opinion, when Court decides to grant injunction ex-parte by invoking Rule 3 aforesaid, even then it only shows that Court was satisfied that it is a fit case for grant of ex-parte injunction and in that eventuality, it exercises the power under Rule 1 & 2 to grant injunction. Therefore, merely because in Order 43 Rule 1 (r), the Rule 3 of Order 39 is not mentioned, it will not mean that the order impugned would not be appealable. Accordingly, I am unable to hold that this petition under Article 227 of the Constitution is maintainable. Petitioner has a remedy of appeal under Order 43 Rule 1 (r).

The order of the Supreme Court in *Suresh Bhasin* (supra) can be relied upon by the petitioner before the appropriate appellate forum. In my opinion, this petition is not tenable and therefore, I leave it open for the petitioner to rely on the said order before appropriate appellate forum. Petition is not entertainable for the reasons stated above. It is dismissed without expressing any opinion on the merits of the case. Needless to mention that liberty is reserved to petitioner to avail aforesaid remedy.

Certified copy of the impugned order be returned to the petitioner after obtaining photocopy of the same.

Petition dismissed.

I.L.R. [2013] M.P., 1574
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 7387/2012 (Gwalior) decided on 12 April, 2013

THAKUR LAL DHAKAD ...Petitioner
Vs.
STATE BANK OF INDIA & ors. ...Respondents

Constitution - Article 21 - Right to live with Dignity **- Freezing of bank account of the petitioner due to nonpayment of loan by his parents - Petitioner is neither borrower nor guarantor and not even a signatory of loan documents - Held - The action of the bank is without authority of law and violative of right to life. (Paras 6, 8 & 12)**

संविधान – अनुच्छेद 21 – प्रतिष्ठा के साथ जीवन का अधिकार – याची के बैंक खाते पर रोक लगा दी गई क्योंकि उसके माता–पिता द्वारा ऋण का भुगतान नहीं किया गया – याची न तो ऋणी है और न ही गारंटीकर्ता है और ऋण दस्तावेजों का हस्ताक्षरकर्ता तक भी नहीं – अभिनिर्धारित – बैंक की कार्यवाही बिना किसी विधिक प्राधिकारिता के है एवं जीवन के अधिकार का उल्लंघन है।

Cases referred :

II (1993) BC 326, (1997) BC 655, III (2004) BC 417, 2005(2) MPLJ 500.

V.K. Bharadwaj with *Arvind Agarwal*, for the petitioner.
M. Agarwal, for the Bank.

ORDER

SUJOY PAUL, J: This petition is directed against the action of the respondents State Bank of India (SBI) in freezing / seizing bank account of the petitioner.

Brief facts necessary for adjudication are as under :-

1. Petitioner is a teacher and is posted in Govt. Primary School, Vijaypur, District Sheopur (MP). The petitioner's monthly salary and allowances are regularly credited by the office of the District Education Officer, Sheopur in his saving account no. 53040600892 maintained by the respondent no. 2. Salary is only means of livelihood for the petitioner and his family. The petitioner has three daughters who are studying in higher classes of different educational institutions. It is the case of the petitioner that when he went to the Bank/ respondent no. 2 for taking payment of salary for the month of July, 2011 from said saving account, he was informed that said account is freezed by the respondent no. 2 on 24.6.2011. It is stated that the petitioner's wife is suffering from serious ailment and petitioner requires money for her treatment. MRI reports of petitioner's wife is filed as Annexure-P/3. In nutshell, the petitioner submits that his entire salary is deposited in the aforesaid saving account and if the said account is seized, it results into depriving him from the fruits of salary and leads him to starvation. He submits that in absence of salary from July, 2011, the petitioner is facing great financial hardship. It is difficult for him to run the cart of his family, provide adequate medical facility to ailing wife and pay fees and provide other expenses to his daughters. He submits that aforesaid action of the respondents Bank is without any authority of law and therefore, a mandamus be issued against the respondents.

2. In turn, Mr. M.P. Agarwal, learned counsel for the Bank submits that the petition is not maintainable. Disputed questions of fact are involved which can be determined by the civil court. It is stated that the petitioner's parents Smt. Savitri Devi Dhakad (mother) and Shri Khubiram Dhakad (father) had jointly obtained term loan for purchasing tractor on 15.4.1999 from the respondent no. 3 Bank. The said loan account of petitioner's parents became irregular. Later-on, the petitioner's father expired but the petitioner did not pay any heed to regularize the loan account. For this reason, the petitioner's loan account was put on hold. By placing reliance on Annexure- R/1 it is stated that the petitioner was informed to repay the said loan and therefore, his loan account was freezed. It is further argued by Mr. Agarwal that agreement

for hypothecation shows that borrower had given consent for recovery of loan as public money and therefore, it can be recovered from the petitioner. It is stated that the petitioner's parents signed the said agreement for hypothecation, which contains a clause that in the event loan is not repaid, it can be recovered from the heirs. He submits that the petitioner on the one hand wants to enjoy the property being legal representative and on the other hand wants to avoid repayment of loan liability. He submits that the petitioner being heir cannot avoid the said payment and respondents have not erred in freezing the said account. He relied on the judgment of Allahabad High court in *Radhika Devi and another vs. Branch Manager, Bank of Baroda and others,* reported in II (1993) BC 326; *Delhi High Court in State Bank of India vs. M/s. Samneel Engineering Company and Ors.,* reported in (1997) BC 655 and *Jharkhand High Court in Hindustan Malleables & Forgings ltd. vs. Union of India & Anr.,* reported in III (2004) BC 417 (DB).

3. Mr. V. K. Bhardwaj, was requested to assist the court in this matter as Amicus curie. Accordingly, I had advantage of hearing Mr. Bhardwaj, learned senior counsel with Shri Arvind Agrawal, Advocate for the petitioner. Mr. Bhardwaj, also addressed the court on the aforesaid issue.

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

5. First objection of the respondents SBI is that this petition is not maintainable. It is stated that disputed questions of fact are involved which cannot be gone into in this writ proceeding.

6. The petitioner is a teacher and freezed account is his salary account. This fact is not in dispute. It is also not in dispute between the parties that the petitioner has larger family liability and he is only bread winner in the family. His entire salary is deposited in the said saving account which is seized by the Bank. It cannot be also disputed that the respondents Bank is amenable to writ jurisdiction of this court being "State" within the meaning of Article 12 of the Constitution of India. The petitioner has approached this court for protection of his fundamental rights including the right to live with dignity. It is stated that because of freezing the account petitioner's source of livelihood is affected which hit Article 21 of the Constitution. In my opinion, the petition is very much maintainable. The petitioner's fundamental right flowing from Article 21 is affected and therefore, this writ petition is very much maintainable. In my opinion, there is no disputed questions of fact involved which necessitated this

court to relegate the petitioner to avail alternative remedy. Thus, this objection of the Bank is overruled.

7. The pivotal question to be decided in this case whether the action of the petitioner in freezing the petitioner account on account of nonpayment of loan by his parents is legal, justiciable and permissible in law ?

8. The petitioner admittedly is neither borrower nor the guarantor. His parents had obtained loan from the Bank. The petitioner is not a signatory of loan documents including the agreement of hypothecation. Accordingly, those documents cannot be pressed into the service against the petitioner. Despite repeated queries by the Bench, Mr. M.P. Agrawal, learned counsel for the respondents / Bank is unable to show any enabling provisions which gives powers to the Bank to recover the loan amount of parents from the petitioner.

9. In 2005 (2) MPLJ 500 (*Jagdish Prasad Batham vs. Union of India and others*), this court disapproved the action of the Bank in stopping withdrawal from the petitioner's account without his consent. It is held that the petitioner although stood his surety and guarantor to a loan, his saving account cannot be freezed without his consent and without following "due process".

10. In my opinion, the petitioner's case is on better footing. The present petitioner is neither borrower nor guarantor and accordingly, his loan account could not have been seized on account of nonpayment of loan by his parents. The bank may be at liberty to take action on the property which is mortgaged or file civil suit for recovery but in absence of any enabling provisions, they have no right to recover the amount by freezing the petitioner's saving account.

11. Judgments cited by Mr. M.P. Agrawal, has no application in the present facts and circumstances of the case. In *M/s. Samneel* (supra), Delhi High Court had discussed various provisions of recovery of debts due to Banks and Financial Institution Act, 1993. The said judgment has no application in the present matter. Similarly, in *Radhika Devi* (supra), the borrower undertook to repay the loan. Accordingly, Court ordered for repayment of loan in para 8 of the said order. The question involved in the present matter was not addressed by the Court in *Radhika Devi* (supra). In *Hindustan Malleables & Forgings* (supra) also, the issue was totally different. In that case it is held that the Bank may direct to open current account of the customer in the Bank. However, the said matter deals with the question of continuance of credit

facility to the customer. This judgment has also no application in the present matter.

12. In the considered opinion of this court, the respondents have erred in freezing the petitioner's loan account. The said action is without any authority of law. Accordingly, I am unable to approve the said action.

13. Resultantly, the respondents Bank is directed to permit the petitioner to operate the said account forthwith. The petitioner shall be free to operate the said account in accordance with law. However, this order will not preclude the Bank to recover loan of the petitioner's parents in accordance with law.

14. Petition is allowed to the extend as indicated above. No costs.

Petition allowed.

I.L.R. [2013] M.P., 1578
WRIT PETITION
Before Mr. Justice Ajit Singh
W.P. No. 18423/2010 (Jabalpur) decided on 16 April, 2013

RAM KUMAR ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36(1)(a), Constitution, Article 226 - Setting aside of election **- Respondent No. 7 contested the election of Member of Janpad Panchayat by suppressing the fact that he has already been convicted u/s 302 of I.P.C. and has been sentenced to undergo life imprisonment - Respondent No. 7 was apparently disqualified u/s 36(1)(a) of Adhiniyam, 1993 - High Court in suitable cases is not prevented from declaring under Article 226 that a person elected to Janpad Panchayat was not qualified to be chosen as a Member and in restraining him to function as a Member - Election of respondent No. 7 quashed. (Paras 5 to 7)**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36(1)(ए), संविधान, अनुच्छेद 226 – निर्वाचन को अपास्त किया जाना – प्रत्यर्थी क्र. 7 ने जनपद पंचायत के सदस्य का चुनाव लड़ा, इस तथ्य को छिपाकर कि उसे पहले ही भा.द.सं. की धारा 302 के अंतर्गत दोषसिद्ध किया

गया है और आजीवन कारावास भुगतने के लिए दण्डादिष्ट किया गया है – प्रत्यर्थी क्र. 7 प्रकट रुप से, अधिनियम 1993 की धारा 36(1)(ए) के अंतर्गत निरर्हित – उच्च न्यायालय, उचित प्रकरणों में अनुच्छेद 226 के अंतर्गत घोषणा करने के लिये निवारित नहीं कि जनपद पंचायत पर निर्वाचित कोई व्यक्ति, सदस्य के रुप में चुने जाने की अर्हता नहीं रखता और उसे सदस्य के रुप में कार्य करने से रोके – प्रत्यर्थी क्र. 7 का निर्वाचन अभिखंडित।

A.K. Mishra, for the petitioner.
Vivek Agrawal, G.A. for the respondents No. 1, 3 & 4.
Rahul Rawat, for the respondent No.7.

ORDER

AJIT SINGH, J: By this petition, the petitioner has prayed for quashing of the election of respondent no.7 Mohan Singh to Janpad Panchayat, Anuppur as Member and Vice President.

2. The facts in brief are that the petitioner is a resident of Village Lohasur, District Anuppur. His name also appears in the voter list at Serial No.714, Janpand Panchayat, Anuppur. Respondent no.7 has been convicted for offences under sections 302/149, 307/149 and 148 of the Indian Penal Code and sentenced to imprisonment for life and 10 years vide judgment dated 11.7.2008 passed by the Special Judge, Shahdol in Sessions Trial No.286/2000. Aggrieved, respondent no.7 has filed Criminal Appeal No.1637/2008 before the High Court and the same is pending for final decision. The High Court vide order dated 23.10.2008 has suspended the jail sentence of respondent no.7 and directed for his release on bail. In the result respondent no.7 after spending few months in jail has been released on bail. Respondent no.7 despite being disqualified to be an office bearer of Janpad Panchayat submitted his nomination form on 29.12.2009, Annexure P4, for his election as Member. In the nomination form respondent no.7 did not mention about his conviction under section 302 of the Indian Penal Code and sentence of life imprisonment. His nomination form was, therefore, accepted. He was then first declared elected as Member and thereafter as Vice President of Janpad Panchayat. It in this background, the petitioner has filed the present petition for quashing of the election of respondent no.7 as Member and Vice President of Janpad Panchayat.

3. Respondent no.7 in his return has not denied regarding his disqualification for being office-bearer of the Janpad Panchayat. The sole objection raised by him is that having regard to Article 243-0 of the Constitution his election can be challenged only by filing election petition under section 122 of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (in short "the Adhiniyam").

4. Section 36 of the Adhiniyam provides for disqualification for being office-bearer of Panchayat. Its relevant sub-section (1)(a) read as under:

36. Disqualification for being office-bearer of Panchayat.-

(1) No person shall be eligible to be an office-bearer of Panchayat who.-

(a) has, either before or after the commencement of this Act, been convicted.-

(i) of an offence under the Protection of Civil Rights Act, 1955 (No.22 of 1955) or under any law in connection with the use,consumption or sale of narcotics or any law corresponding thereto in force in any part of the State, unless a period of five years or such lesser period as the State Government may allow in any particular case has elapsed since his conviction; or

(ii) of any other offence and had been sentenced to imprisonment for not less than six months, unless a period of five years or such less period as the State Government may allow in any particular case has elapsed since his release; or

5. Respondent no.7 after his conviction under sections 302/149, 307/149 and 148 of the Indian Penal Code and sentence of imprisonment for life and 10 years is apparently disqualified under above quoted section 36(1)(a) of the Adhiniyam for being an office-bearer of Janpad Panchayat. In the nomination paper he deliberately suppressed the fact of his conviction in a serious crime of murder and attempt to commit murder and sentence of life imprisonment. He, therefore, by playing fraud got himself elected as Member and Vice President of Janpad Panchayat.

6. The objection of respondent no.7 that his election can be challenged only by filing an election petition under section 122 of the Adhiniyam is without any substance and cannot be accepted. The Supreme Court in *K. Venkatachalam Vs. A. Swamickan* AIR 1999 SC 1723 has held that Article 329 (b) does not prevent the High Court from declaring under Article 226 that a person elected to the legislative assembly of a State was not qualified to be chosen as a member and in restraining him to function as a member and directing realisation from him of penalty under Article 193. In this case the person concerned was not an elector in the Assembly Constituency which fact he knew and he got elected by impersonating another person of the same name entered in the electoral roll. The election was not challenged by election petition as the rival candidate, who later moved the High Court, came to know of the fraud long after the period for challenging the election by election petition had expired. Also Article 243-O, which relates to election to Panchayats, and Article 243ZG, which relates to election to Municipalities, were brought in by the Constitution 74th Amendment Act and which are similarly worded as Article 329 have been similarly construed but subject to the qualification that a Constitution Amendment cannot destroy the basic structure of judicial review enshrined in Article 32, 136 and 226 of the Constitution. (See *Principles of Statutory Interpretation by Justice G.P.Singh 13th Edition,* 2012 PP 813 and 814).

7. Therefore, in suitable cases the High Court is not prevented from declaring under Article 226 that a person elected to Janpad Panchayat was not qualified to be chosen as a Member and Vice President and in restraining him to function as a Member and Vice President. The case in hand is one such suitable case which deserves interference by the High Court under Article 226. I accordingly quash the election of respondent no.7 to Janpad Panchayat, Anuppur as Member and Vice President and direct that henceforth he shall not function as Member and Vice President.

8. The petition is allowed with cost of Rs.2000/- which shall be payable to the petitioner by respondent no.7 within one month from today.

Petition allowed.

I.L.R. [2013] M.P., 1582
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 1176/2013 (Gwalior) decided on 7 May, 2013

GWALIOR DEVELOPMENT AUTHORITY ...Petitioner
Vs.
DUSHYANT SHARMA & ors. ...Respondents

A. ***Constitution - Article 227 - Power of Superintendence - When to be exercised*** **- Held, if the order suffers from any jurisdictional error or manifest procedural irregularity or impropriety or it is pregnant with any palpable perversity - Interference can be made sparingly in rare cases when such ingredients are fulfilled - It cannot be made as a matter of routine on a drop of hat. (Para 17)**

क. संविधान – अनुच्छेद 227 – अधीक्षण की शक्ति – का प्रयोग कब किया जाना चाहिए – अभिनिर्धारित – यदि आदेश किसी अधिकारिता की त्रुटि या प्रकट प्रक्रियात्मक अनियमितता या अनौचित्य या प्रत्यक्ष रुप से विपर्यस्तता से ग्रसित है – विरल प्रकरणों में कृशता पूर्वक हस्तक्षेप किया जा सकता है जब उक्त संघटकों की पूर्ति होती है – ऐसा नैमित्यिक रुप से साधारणत नहीं किया जा सकता।

B. ***Evidence Act (1 of 1872), Sections 63 & 65 - Secondary evidence*** **- Both the sections are to be read conjointly - If one fulfills the test of secondary evidence, the document can be treated as secondary evidence. (Para 13)**

ख. साक्ष्य अधिनियम (1872 का 1), धाराऐं 63 व 65 – द्वितीयक साक्ष्य – दोनों धाराओं को एक साथ पढ़ा जाना चाहिए – यदि कोई द्वितीयक साक्ष्य के जांच पर खरा उतरता है, उस दस्तावेज को द्वितीयक साक्ष्य माना जा सकता है।

Cases referred :

AIR 1999 Punjab & Haryana 21, 2001(1) MPWN SN 54, 2012(5) MPHT 160, 2002(3) MPLJ 371, 2006(3) MPLJ 334, 2012(5) MPHT 381, 2013(2) MPHT 277, AIR 1958 Patna 133, AIR 2000 SC 2629, (2010) 4 SCC 329.

Raghvendra Dixit, for the petitioner.
J.P. Shrivastava, for the respondent No.1.

ORDER

Sujoy Paul, J: By invoking the jurisdiction of this Court under Article 227 of the Constitution, the petitioner-Gwalior Development Authority (GDA) has assailed the order dated 17.12.2012. By the said order, the application preferred by the petitioner/defendant No.1 under Section 65 of the Evidence Act is rejected by the court below.

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

The respondent No. 1-plaintiff filed a civil suit for declaration and permanent injunction on the ground that Survey No. 788 are 0.108 hectare situated in village Shankarpur, Tehsil and District Gwalior, is purchased by him through a registered sale deed dated 1.7.2009 from respondent No.2-Housing Society. Mutation has been done in revenue record. The land in question as an agricultural land. It is the case of the plaintiff that on 26.6.09, a Sub-Engineer of GDA threatened him for dispossession on the ground that the land in question is acquired by GDA by way of agreement dated 12.6.1998. The stand of GDA before the court below is that the land in question is a part of valuable notified scheme of Transport Nagar and in view of Section 53 of Nagar Tatha Gram Nivesh Adhiniyam, 1973 (for brevity, the 'Adhiniyam'), any sale subsequently done by respondent No.2 is void *ab initio* and a nullity in the eyes of law.

It is further stated by GDA that possession of the land question was taken over by them or 2.12.1998 from respondent. No.2 Society. The scheme needs to be implemented as per Section 56 of the Adhiniyam.

Learned trial court framed four issues after completion of pleadings. The plaintiff, thereafter submitted his affidavit under Order 18 Rule 4 CPC. The GDA cross-examined the plaintiff/respondent No.1 and its witnesses. The matter was then fixed for defendant evidence. An affidavit under Order 18 Rule 4 CPC with relevant documents was filed by GDA. The documents include agreement dated 12.6.1998, possession receipt, order dated 12.12.1998, allotment order dated 22.8.2000, final lay out plan of the scheme in question and copy of FIR dated 21.8.2000. The documents filed along with aforesaid affidavit by GDA are photocopies. Accordingly, GDA preferred an application under Section 65 of the Evidence Act (Annexure P-4) with a prayer that the said photocopies may be taken in evidence as secondary evidence. The singular reason assigned for seeking such permission was that

the original documents and files relating to present case have been stolen by some person from the office of GDA. A FIR was registered for this purpose and investigation is going on. Since the original documents have lost due to theft committed by some person and a criminal case is registered in this regard, the photocopies of the said documents can be treated as secondary evidence. The respondent No.1/plaintiff submitted his reply and prayed for rejection of said application.

The court below by impugned order dated 17.12.2012 rejected the said application preferred under Section 65 of the Evidence Act. The court below opined that Section 63 of the Evidence Act provides the categories of secondary evidence. In absence of original, secondary evidence is permissible under certain circumstances as enumerated in Section 63 r/w Sec. 65 of the Evidence Act. The court below opined that the documents filed by GDA do not fall within the five categories mentioned in Section 63 of the Evidence Act and said documents could not be compared with the original and, therefore, the said documents cannot be treated as secondary evidence. The court below opined that the photocopies can be compared with the original and then only it gathers relevance and genuineness. In absence thereof, the said documents cannot be treated as secondary evidence.

(3) Criticizing the said order, Shri Raghvendra Dixit, learned counsel for the GDA, submits that a careful reading of Section 63(a) (illustrations) r/w S. 65(c) makes it clear that the documents in question can be treated as secondary evidence. He relied on the definition of "proved" in the Evidence Act and submits that said documents would be proved by leading the evidence but at this stage the documents cannot be discarded. He relied on AIR 1999 PUNJAB & HARYANA 21 (*Smt. Sobha Rani and Others Vs. Ravi Kumar and others*); 2001 (1) MPWN SN 54 (*Tawar Singh vs. Ranjit Singh*), and 2012 (5) MPHT 160 (*Mahaveer Kumar Jain vs. Atal Bihari Tamrakar*).

(4) Shri J.P.Shrivastava, learned counsel for the respondent No.1 supported the order and submits that the photocopies of the documents do not fall within the ambit of *"secondary evidence"* as per the Evidence Act. He submits that the said documents were filed along with affidavit of witness of GDA, namely, Shri Manoj Mathur (Officer Incharge of the case-OIC). The OIC is admitted appointed on 11.9.2012. As per GDA's own case, the documents were stolen in 2004. The FIR was lodged in 2011. The OIC in his affidavit has nowhere stated that he had seen the original documents and

compared it with the photocopies. The aforesaid fact makes it crystal clear that the documents were stolen much before appointment of OIC and there is no occasion for the said OIC to certify the correctness and genuineness of the said documents of compare it with originals. He submits that in absence of taking that responsibility and comparing of documents with the original, the said documents are impermissible for the purpose of treating them as secondary evidence. He relied on, 2002 (3) MPLJ 371 (*Sunil Kumar and another Vs. Anguri Chaudhari and another*); 2006 (3) MPLJ 334 (*Haji Mohd. And another Vs. Asgar Ali and another*); 2012 (5) MPHT 381 (*Smt. Aneeta Rajpoot vs. Smt. Saraswati Gupta*) and, 2013 (2) MPHT 277 (*Vijendra Singh and others vs. Deena and others*).

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

(6) Before dealing with the rival contentions of the parties, it is apt to quote the relevant provisions of the Indian Evidence Act, 1872. Section 63(2) reads as under:

> *"63. Secondary evidence.-- Secondary evidence means and includes--*
>
> *(1) xxx xxx xxx*
>
> *(2) Copies made from the original by mechanical process which in themselves insure the accuracy of the copy, and copies compared with such copies."*

Section 63(a) and (b) (Illustrations) reads as under:

> *(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.*
>
> *(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original"*

Section 65(c) reads as under:

> *65. Cases in which secondary evidence relating to documents may be given.-- Secondary evidence may be*

given of the existence, condition, or contents of a document in the following cases:

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) when the original has been destroyed or lost, or whenthe party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonale time."

(7) The arguments of learned counsel for the parties are based on these provisions. Section 63(2) aforesaid makes it obligatory that the copies which are made from the original by mechanical process are required to be compared with such copies. Thus, there is no manner of doubt that two conditions are required to be fulfilled for applying Section 63(2) viz, (i) the copies are made from the original by mechanical process (ii) copies are compared with original copies.

Section 63 (Illustration) (a) has no application, in my opinion, in the present matter because the said illustration deals with photographs. Illustration (b) talks about comparing a letter with the oriqinal. Thus, a conjoint reading of Section 63(2) with Section 63 (Illustration) (c) makes it clear that aforesaid two conditions are necessary to bring a document within the ambit of *"secondary evidence"*.

Section 65(c) is an enabling provision where the original document is lost or destroyed and it is shown that the said event of loss or destroy of the document is not arising out of any default or neglect of the party concerned, the document can be taken as secondary evidence.

(8) Shri Raghvendra Dixit relied on the judgment of this Court in *Tawar Singh* (supra). In the said case, as per the statement of the witness it was established that the applicant was in possession of original of promissory note of which the photocopies are filed. On the basis of aforesaid factual backdrop, this Court treated the photocopies as secondary evidence. In *Mahavir Kumar Jain* (supra) another Bench of this Court delivered the judgment on the basis of *Tawar Singh* (supra). However, a perusal of this judgment shows that the nature of document which was directed to be taken in evidence is not reflected in the judgment. The, judgment is solely based on *Tawar Singh* (supra).

Pausing here for a moment, in *Tawar Singh* this Court rightly held that secondary evidence can be taken into account and photocopy is acceptable because the witness *prima facie* established that he was in possession of the original promissory note. In the present case, the affidavit preferred under Order 18 Rule 4 CPC of the OIC with other factual background mentioned in para 4 of this order makes it crystal clear that there was no occasion for OIC to see the original documents because the same were stolen in the year 2004 and OIC is appointed on 11.9.2012. In other words, this OIC had no opportunity either to see the original documents nor there was any chance for him to compare these documents with the original. There is no material to show that photocopy which is sought to be produced as secondary evidence is made from original by mechanical process. The facts narrated by Shri J.P.Shrivastava, mentioned in para 4, have not been doubted by Shri Raghvendra Dixit, learned counsel for the petitioner.

(9) In AIR 1958 PATNA 133 (*Katihar Jute Mills Ltd. vs. Calcutta Match Works (India) Ltd. and another*), the Patna High Court opined as under:

> *"(c) Evidence Act (1872), S. 63(5) - Secondary evidence - When is admissible.*
>
> *In the case of a document no secondary evidence can go in unless it is proved that the original has been destroyed or lost. Further so far as the oral account of its contents is concerned, it must be by a person who has himself seen it implying that he has read it. (Para 10)"*

(10) The judgment in *Sobharani* (supra) cited by the petitioner is of no assistance to him because in that case the High Court gave opinion on the basis of the pleadings of the parties. It was opined that existence of secondary evidence is proved from the facts mentioned in the plaint and reply of the defendant. This is not the position here and, accordingly, the said judgment has no application in the present matter.

(11) In AIR 2000 SC 2629 (*Marwari Kumhar and others Vs. Bhagwanpuri Guru Ganeshpuri and another,*) the Apex Court opined about a public document and held that such document can be taken into evidence when it is proved that the original was no longer available and certified copy was lost. The aforesaid statement of a party about the non-availability of the

document and certified copy is not disbelieved. In the present case, the defendant has disbelieved and doubted the correctness and genuineness of the photocopies sought to be taken by the petitioner as secondary evidence.

(12) Justice Dipak Misra (as His Lordship then was) in *Sunil Kumar* (supra) opined that when it is not disputed that neither the certified copy nor a true copy indicates and contains an endorsement and it was compared with original, the document does not meet the requirement of Section 63 of the Evidence Act. In another judgment in *Haji Mohd.* (supra), His Lordship opined that the other party denied the execution of the document. No proof was produced that the document was executed and it is in possession of the plaintiff. The copy filed was neither a certified copy nor a true copy of the original deed. It is further held that in absence of any proof and requirement of law, the said document cannot be treated as secondary evidence.

(13) In the present case, it is crystal clear that in application under Section 65 of the Evidence Act it is nowhere stated that the photocopies in question were made by mechanical process from the original and it is compared with the original. The OIC, by no stretch of imagination, could have compared or certified that these are taken from the original for the reasons stated above. In my opinion, Sections 63 and 65 of the Evidence Act are to be read conjointly and if one fulfills the test of secondary evidence, the documents can be treated as secondary evidence. In *Tukaram S. Dighole vs. Manikrao Shivaji Kokate, reported* in (2010) 4 SCC 329, the Apex Court opined that *"to put the matter briefly, the general rule is that secondary evidence is not admissible until the non-production of primary evidence is satisfactorily proved."*

(14) In a recent judgment, reported in *Vijendra Singh* (supra), this Court opined that unless there is some material to show that for admitting secondary evidence, the necessary ingredients were fulfilled by the petitioner, the document cannot be taken as secondary evidence.

(15) On the basis of aforesaid analysis, in my opinion, the court below has not committed any error of law in rejecting the application of the petitioner. The necessary ingredients for treating the documents in question as secondary evidence were not available and application preferred under Section 65 of Evidence Act does not contain necessary averments and declaration on the strength of which the documents could have been treated as secondary evidence.

(16) The last submission of Shri Raghvendra Dixit, learned counsel for the petitioner is based on the definition of *"proved"* is of no help to him at this stage. The question of treating a document or giving a finding about *"proved"* would arise provided the documents in question are taken into the evidence. At this stage, this argument is premature.

(17) For the aforesaid cumulative reasons and analysis, I find no infirmity in the order of court below. Interference under Article 227 of the Constitution can be made, if the order suffers from any jurisdictional error or manifest procedural irregularity or impropriety or it is pregnant with any palpable perversity. Another view is possible is not a ground for interference. Interference can be made sparingly in rare cases when such ingredients are fulfilled. It cannot be made as a matter of routine on a drop of hat. In my opinion, the court below has given justifiable and plausible reasons based on legal position. However, it is made clear that liberty is reserved to the petitioner to prefer proper application and affidavit before the court below which may fulfill the requirement of Sections 63 and 65 of the Evidence Act. This Court has given opinion on the basis of present affidavit preferred by the petitioner under Order 18 Rule 4 CPC and on the basis of application under Section 65 of the Evidence Act.

(18) With the aforesaid observations, petition is dismissed. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 1589
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
M.A. No. 1946/2012 (Jabalpur) decided on 11 January, 2013

SKOL BREWERIES LTD. ...Appellant
Vs.
SOM DISTILLERIES LTD & BREWERIES LTD. ...Respondent

A. ***Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2, Designs Act (2 of 1911), Section 22, Trade Marks Act (47 of 1999), Sections 134, 135 - Requirements of granting injunction - Prima facie case*** **- Plaintiff by an interim injunction undoubtedly seeks to interfere with the rights of the defendants before the plaintiff's right is finally established, therefore very strong prima facie case in respect of his rights should be asserted and it should so exist in**

favour of the plaintiff. **(Para 16)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2, डिजाइन अधिनियम (1911 का 2), धारा 22, व्यापार चिन्ह अधिनियम (1999 का 47), धाराऐं 134, 135 – व्यादेश प्रदान करने की अपेक्षाऐं – प्रथम दृष्ट्या प्रकरण – वादी, अंतरिम व्यादेश द्वारा निःसंदेह रुप से वादी का अधिकार अंतिमतः स्थापित होने से पहले, प्रतिवादियों के अधिकारों में हस्तक्षेप चाहता है, इसलिए, उसे अपने अधिकारों के संबंध में अधिक प्रबल प्रथम दृष्ट्या प्रकरण का प्राख्यान करना चाहिए और वह इस प्रकार वादी के पक्ष में विद्यमान होना चाहिए।

***B. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction - Irreparable Injury* - The plaintiffs can be compensated by way of damages and by keeping this important aspect in mind the legislature has enacted Section 22(2) of the Designs Act, wherein it is enacted that the suit can be filed for grant of damages and therefore it can not be said that the plaintiff will suffer irreparable injury.** **(Para 29)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – अपूर्णीय क्षति – नुकसानी द्वारा वादीगण की क्षतिपूर्ति की जा सकती है और इस महत्वपूर्ण पहलू को ध्यान में रखकर विधायिका के डिजाईन अधिनियम की धारा 22 (2) की अधिनियमिती की है, जिसमें यह अधिनियमित किया गया है कि नुकसानी प्रदान किये जाने के लिए वाद प्रस्तुत किया जा सकता है और इसलिए यह नहीं कहा जा सकता कि वादी अपूर्णीय क्षति सहन करेगा।

***C. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction* - The grant of temporary injunction is discretionary relief and discretion is to be exercised in favour of plaintiff, if he comes with clean hands and with fair conduct.** **(Para 32)**

ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश – अस्थाई व्यादेश वैवेकिक अनुतोष है और विवेकाधिकार को वादी के पक्ष में प्रयोग करना होगा, यदि वह निष्कपटता से एवं सदाचरण से आता है।

Cases referred :

2002(24) PTC 93=2002(3)SCC 65, 2010 (42) PTC 806, O.A. No. 815/2011 & 816/2011 in C.S. No. 652/2011 decided on 12.09.2012, (2011) 11 SCC 524, AIR 1991 Delhi 25, (2005) 5 SCC 30, (2008) 10 SCC 657, 149 (2008) DLT 338, 2007 (35) PTC 257, (2008) 10 SCC 723, (2004) 6 SCC 145, (2001) 5 SCC 73.

S.C. Agrawal with *M.S. Bharat & Sankalp Kochar,* for the appellant.

Kishore Shrivastava with *Anshuman Singh & Rahul Diwakar,* for the respondent.

ORDER

A.K. Shrivastava, J. :- This appeal under Order 43 Rule 1(r) CPC has been filed at the instance of plaintiff whose application for issuance of temporary injunction has been rejected by learned Trial court on 03.07.2012 in Civil Suit No.2-A/2012.

2. In brief the suit of the plaintiff as borne out from the plaint is that the plaintiff is a Company registered under the Companies Act, 1956 (in short "Companies Act") having its registered office mentioned in para 1 of the plaint. The plaintiff is involved in the business of brewing, marketing and sale of beer, non-alcoholic beverages and mineral water. The plaintiff manufactures and sells the beer in the name and trademark "Haywards 5000" while name of defendant's Beer is "Black Fort". The plaintiff has registered the bottle of its beer under Section 9(1) of the Designs Act, 2000 (in short "Designs Act") having registration No.223479 dated 19.06.2009 registered on 15.01.2000. The beer which defendant manufactures is filled and bottled in its own bottles and apart from it, the defendant also used to purchase the empty bottles from the junk market and after recycling it fills its own product "Black Fort" and sells in the market. Thus, the defendant also used to sale its own product (beer Black Fort) in the empty bottles of the plaintiff's bottle whose design has been registered under the Designs Act for which defendant has no right and its action is contrary to the said Act. It is the further case of the plaintiff that defendant used to sell his beer in the empty bottle of plaintiff with a *mala fide* intention that because the plaintiff is having own reputation in the market and therefore customers may purchase the beer of defendant under the impression that it is the product (beer Haywards 5000) of plaintiff and thus the plaintiff has filed the suit with the aid of Section 22 of Designs Act and Section 134(1)(c), 135(1) and 135(2) of the Trade Marks Act, 1999 (in short "Trade Marks Act") for grant of decree of injunction against the defendant against design infringement, passing-off, misrepresentation, his act of unfair competition and also for damages.

3. An application for issuance of temporary injunction has also been filed by the plaintiff-appellant praying that till the suit is decided the defendant be

restrained from selling its product beer Black Fort in the bottle of plaintiff whose design has been registered under the Designs Act.

4. The defendant-respondent filed written-statement and has also filed reply against the plaintiff's application for issuance of temporary injunction and has pleaded that defendant is not using the plaintiff's name and design and product to sell its product Black Fort beer. The defendant has its own registered trade mark under which its products are sold. Specific denial has been made that defendant has made any unauthorized use of trade mark/name of plaintiff. According to defendant as per practice prevailing in the beer trade, every beer sold in the market is not contained in a freshly manufactured bottle. Used bottles are collected from the open market for recycling and rebottling. According to defendant, the plaintiff and defendant are practitioner of the same system of bottling and sale of beer in recycled bottles. Denial has been made in the written-statement that plaintiff's bottle has a unique visual appeal to beer consumers or the bottles are visually distinguishable from the bottles of other brands. The averments of plaintiff are also denied that consumers identify or associate any unique shape of a bottle to the beer manufactured by the plaintiff. According to the defendant the registration of plaintiff does not bear any distinguishing feather of plaintiff's alleged design to make the plaintiff alleged bottle unique. It has also been pleaded in the written statement that plaintiff's claim of certain rights by operation of the Designs Act is subject to restrictions and conditions under the said Act and since the design of plaintiff's bottle is not unique or a new design created by or exclusive to the product of plaintiff, the plaintiff has no right to lay any claim under the said Designs Act. In additional pleas it has been pleaded that the defendant-Company was formed in the year 1985-86 and is achieving greater height of success. Further in para 7 of the additional pleas of the written-statement it has been pleaded that the plaintiff himself has stated that until recent past the brewers in India sold their beer in a common bottles. According to defendant, used bottles of beer are collected by the junk dealer (Kabadis) from the market and are sold back to different brewers for the purpose of recycling the bottles. The bottles are sold by junk dealers to brewers with or without labels of different companies, who in the process of recycling ensure that all previous labels are carefully removed and labels of respective companies are pasted prominently on the bottle during rebottling process. Thus, the re-filled bottles come out in to the market with the fresh labels of respective companies which are easily distinguishable from each other and are sold in different brands and

names of different companies. In para 8 of the additional pleas it has been pleaded by the defendant that the consumers of beer identify the beer of its brand name and brand name is prominently displayed by a label pasted on the face of the bottle and also a paper covering the neck at the cap of the bottle. The consumers do not identify a particular brand of beer by the shape of its bottle especially as the most prominent feature exclusive to the product is the unique brand name pasted during the labeling on the face of the bottle having exclusive use of words, fonts, pattern, colour, design etc. on the label.

5. The defendant-respondent also filed written reply of plaintiff's application for issuance of temporary injunction and by refuting the averments prayed that temporary injunction application be dismissed.

6. Learned Trial Court after hearing the parties did not find any case for grant of temporary injunction in favour of plaintiff and eventually dismissed the application by the impugned order.

7. In this manner this appeal has been filed by the plaintiff.

8. Shri Agrawal, learned Senior Counsel for plaintiff-appellant by inviting my attention to Section 22 of the Designs Act has submitted that since the design of the bottle of the plaintiff has been registered having registration no.223479 and this has not been disputed by the defendant, therefore, the defendant cannot sell its own product (beer Black Fort) in the bottles of plaintiff whose design has been registered. Further by inviting my attention to Section 27(2) of the Trade Marks Act and doctrine of passing-off it has been contended by learned Senior Counsel that why the bottles of plaintiff-appellant are being used by defendant in which he is selling his own product (beer Black Fort). Obviously because the buyers may be misled that the beer which they are purchasing is the product of plaintiff or the defendant has some connection or some bondage with the plaintiff and therefore the plaintiff's bottles are being used by the defendant. In support of his contention, learned Senior Counsel has put emphasis mainly on the decisions *Laxmikant V. Patel vs. Chetanbhat Shah & Anr.* 2002 (24) PTC 93 = 2002(3) SCC 65, decision of Delhi High Court *Rhizome Distilleries P. Ltd. & Ors. v. Pernod Ricard S.A. France & Ors.* 2010 (42) PTC 806 (Del.) (DB) and decision of Madras High Court in O.A. No.815/2011 and 816/2011 in Civil Suit No.652/2011 decided on 12.09.2012. Learned Senior Counsel has also invited my attention to other case laws and has submitted that a *prima facie* case of plaintiff is made out and if temporary injunction is not granted plaintiff company will suffer

irreparable loss and balance of convenience is also in its favour. But, despite the principles granting temporary injunction exist in favour of plaintiff, the Trial Court illegally and contrary to law has rejected the application of temporary injunction and thus it has been prayed that by allowing this appeal, the temporary injunction prayed by the plaintiff be allowed restraining the defendant not to sell its beer Black Fort in the bottles of the plaintiff whose design has been registered under the Designs Act.

9. Shri Kishore Shrivastava, learned Senior Counsel appearing for defendant-respondent argued in support of the impugned order and has raised an objection that suit itself is not maintainable because as per the plaintiff's own showing the plaintiff is a company registered under the Companies Act but there is no resolution of the Company in terms of Sections 291 and 292 of the Companies Act to file a suit. In this regard he has also placed reliance upon the decision of Supreme Court in *State Bank of Travancore v. Kingston Computers India Private Limited* (2011) 11 SCC 524, *M/s. Nibro Limited v. National Insurance Co. Ltd.* AIR 1991 *Delhi 25 and Shubh Shanti Services Ltd. v. Manjula S. Agarwalla and others* (2005) 5 SCC 30.

10. Learned Senior Counsel for respondent by inviting my attention to Section 19 of Designs Act has submitted that defendant has applied for cancellation of registration of plaintiff and has also taken a defence which is available to defendant under Section 22(3) of the Designs Act. Eventually, an application under Section 22(4) of the Designs Act was submitted by the plaintiff which was rejected by the Trial Court on 22.11.2011 although a petition under Article 227 of the Constitution of India is pending in this Court against the said order. By inviting my attention to para 15 of the plaint it has been put-forth by him that no cause of action has accrued to the plaintiff because in this para the plaintiff himself has pleaded that its unique shaped bottles have already been introduced in the State of Andhra Pradesh, Rajasthan, Haryana, Punjab, Delhi, Chandigarh, Maharashtra and Orrisa but there is no pleading that it has been introduced in the State of M.P. and therefore no cause of action has been accrued to the plaintiff because it is not the pleading of plaintiff that the plaintiff's bottle is having circulation in State of M.P.

11. On merits my attention has been drawn to Section 2(d) of the Designs Act wherein the definition of 'design' has been mentioned and has submitted that on its bare perusal it is clear that the similarities should appeal to and are judged solely by eyes and these words are deliberately and purposely used in

this section. By inviting my attention to different photographs of the bottles of the plaintiff's brand and that of defendant which were also filed in the Court below and after giving the permission by this Court on being prayed by learned Senior Counsel for both the parties, the empty bottles were also demonstrated in the Court, it has been submitted that bottles in which plaintiff's product (beer Haywards 5000) is filled is not having any particular eye appeal and therefore defendant can take the protection under Section 22(3) and 19 of the Designs Act. Learned Senior Counsel has also placed reliance upon the decision of the Supreme Court *Bharat Glass Tube Limited v. Gopal Glass Works Limited* (2008) 10 SCC 657 and also on decision of Delhi High Court *Dabur India Limited v. Mr. Rajesh Kumar and Ors.* 149 (2008) DLT 338. He has also placed reliance upon another decision of Delhi High Court *Dabur India Limited v. Mr. Amit Jain and Anr.* 2007 (35) PTC 257. According to learned Senior Counsel for respondent Section 22(3) pertains to defence and registration under the Designs Act can be cancelled under Section 19 of the said Act. Learned Senior Counsel has also invited my attention to endorsement made in the certificate of registration of plaintiff and has submitted that in the registration itself there is a note that no claim is made by virtue of this registration to the exclusive use of words, letters, numerals, flags, crons, arms, shaded portion and reflection etc. including the background and thus submitted that registration certificate does not authorize the plaintiff to claim any benefit.

12. In replying the contention of learned Senior Counsel for the appellant on the point of passing-off, reliance has been placed by learned Senior Counsel for respondent upon *Khoday Distilleries Limited v. Scotch Whisky Association and others* (2008) 10 SCC 723 and *Satyam Infoway Ltd. v. Sifynet Solutions (P) Ltd.* (2004) 6 SCC 145. Learned Senior Counsel submits that the question of mis-description or any type of confusion in the mind of consumers does not arise for the simple reason that on the beer bottle of defendant eye-catching label of Som Distilleries by name Black Fort label and manufactured by Som Distilleries is embossed. Thus, according to learned Senior Counsel the buyer will never be deceived or will be confused in any manner. In this context learned Senior Counsel has placed reliance upon the decision of Supreme Court *Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.* (2001) 5 SCC 73 and the decision of Supreme Court in *Laxmikant V. Patel* (supra) which is also relied upon by learned Senior Counsel for respondent.

13. At the last it has been submitted that plaintiff himself is using the bottles

of beer Kingfisher by filling his own product (beer Haywards 5000) and by showing a bottle of Kingfisher to this Court, it has been submitted that by pasting its label upon the bottles of Kingfisher in which its name is embossed is selling its product Haywards 5000 and therefore the plaintiff has not come with clean hands before this Court and thus the application of temporary injunction has been rightly dismissed by the Trial Court because neither the plaintiff is having *prima facie* case nor it will face any irreparable loss if temporary injunction is not granted and balance of convenience is also not in favour of the plaintiff.

14. In reply Shri Agrawal learned Senior Counsel for plaintiff-appellant submitted that so far as the question of maintainability of suit etc. is concerned, it shall be left open to the Trial Court to decide it at the time of decision of the suit particularly when no pleading of defendant is there in the written-statement. He has also submitted that if the plaintiff is using the bottles upon which Kingfisher's name is embossed by mistake it happened. Learned Senior Counsel submits that looking to the mandate envisaged under Section 22 of the Designs Act since deliberately the plaintiff's bottles are being used by defendant in filling his product (beer Black Fort) the real intention is to be seen and therefore why the defendant is using plaintiff's bottle? The answer is simple that because the buyers may get confused and deceived and by understanding that they are purchasing the product of plaintiff or defendant is having some bondage or connection with the plaintiff, therefore, they will purchase the product of the defendant with the understanding that it belongs to plaintiff and hence it has been prayed that appeal be allowed and temporary injunction as sought in the application be granted in favour of the plaintiff by setting aside the impugned order.

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

16. Since the plaintiff by an interim injunction undoubtedly seeks to interfere with the rights of the defendant before the plaintiff's right is finally established, therefore, very strong *prima facie* case in respect of his right should be asserted and it should so exist in favour of the plaintiff. It is equally true that at the interlocutory stage, the Court should not embark upon detailed investigation on the relevant merits of the contentions of the parties. It is enough if the plaintiff raises a question of substantive character, calling for a decision after an examination of facts and law rising in the case. The Court dealing with

the application of temporary injunction is also having wisdom to consider the nature and merits of the rival contention *prima facie* at the interlocutory stage for the limited purpose of determining as to whether or not the plaintiff has made out a strong *prima facie* case.

17. The plaintiff should next demonstrate that the court's interference is necessary to protect him from an injury or mischief which is imminent and at the same time that it is irreparable. He should make out that the injury is so serious, irreparable and imminent that an immediate order of the court is necessary even before the rights are established at the trial.

18. Needless to say that this burden will lie upon the plaintiff to make that the comparative mischief or inconvenience which would ensue from withholding the injunction would be far greater than what would ensue from the injunction being granted.

19. In precise way, the abovesaid three points are well settled that plaintiff should have a strong *prima facie* case in his favour, he will suffer irreparable loss in case temporary injunction sought for is not granted and balance of convenience also lies in his favour. I may add that these three essential ingredients to pass an order of temporary injunction are akin to that of three strong pillars upon which the roof of temporary injunction would rest and I may further add that if any pillar is lacking, the roof will collapse and fall down, meaning thereby the plaintiff would not be entitled for temporary injunction. By keeping the aforesaid three principles in my mind, I shall now consider the cases of parties vis-à-vis to each other.

Regarding *prima facie* case :

20. Broadly speaking and as borne out from the argument of learned Senior Counsel for the appellant, the plaintiff is banking upon *prima facie* case on two points. Firstly the plaintiff company has registered the design of its bottle having a registration number under the Designs Act and because defendant in the bottles of the plaintiff is selling its own product by filling Black Fort beer, therefore, his act and action runs de hors to Section 22(1) of the Designs Act. The remedy is also provided against the person who acts in contravention to Section 22(1) which is provided under subsection (2) of Section 22 of the Designs Act. Secondly, the plaintiff is placing very strong reliance upon the doctrine of "passing-off".

21. So far as the first point in regard to having a prima facie case in favour

of plaintiff is concerned, it would be condign to go through first the definition of "design" as envisaged under Section 2(d) of the Designs Act, which reads thus :-

> 2(d) "design" means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, ***which in the finished article appeal to and are judged solely by the eye***; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 (43 of 1958) or property mark as defined in section 479 of the Indian Penal Code (45 of 1860) or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957 (14 of 1957).
>
> (emphasis supplied)

The legislature has deliberately used the words upon which I have put emphasis while quoting the definition clause. Several photographs from different angles of the various bottles are on record. Apart from that on the prayer of both the parties, this Court allowed to show empty bottles in which the defendant is selling its own product (beer Black Fort). On examination by naked eye this Court finds no peculiar distinguishing feature from the ordinary bottle is seen in order to judge plaintiff's bottle solely by eye. The structure of the bottles is not an eye-catching. It is only an ordinary bottle which is being used. Upon each bottle almost covering its middle part of the bottle, a label showing brand name of defendant "Black Fort" the name of distillery and manufacturer etc. has been pasted and at a glance one could very easily see even if that bottle is kept with several other beer bottles and even alongwith the bottles of plaintiff that the bottle contains the product of defendant. On bare perusal of the plaintiff's bottle this Court finds that it is an ordinary shaped bottle and there is nothing peculiar or special in order to observe at a glance or an eye-catch that this type of shape of bottle is of plaintiff. On seeing the bottle, one would not be confused even if the defendant's product is filled in the bottle of plaintiff which is registered under the Designs Act because of covering the large size

label of defendant upon the bottle. Thus, by keeping this important aspect in mind by the legislature deliberately the words "which in the finished article appeal to and are judged solely by the eye" have been used in the definition clause of "design" under the Designs Act. For further clarification I may add that the shape, design, pattern, configuration, ornament etc. should be so peculiar and distinct as eye-catching and can be caught by an intending buyer that a particular bottle having its own shape, design, pattern and configuration is of particular brand only and therefore according to me, deliberately the legislature has further enacted Section 22(3) and section 19 of the Designs Act. On bare perusal of subsection (3) to Section 22 of the said Act this Court finds that it is a defence which is available to the defendant. If a particular brand is not having any particular or eye-catching or appeal to its shape, pattern, configuration etc. any person can apply for cancellation of the design under Section 19 of the Designs Act. In this regard rightly reliance has been placed by learned Senior Counsel for respondent to the decision of Supreme Court *Bharat Glass Tube Ltd.* (supra) in which para 26, 29 and 30 are quite relevant. I have also gone through the decision of Delhi High Court in *Dabur India Limited v. Mr. Rajesh Kumar* (supra) and I am of the view that para 11 of this decision is quite relevant and *ratio dicidendi* is also applicable in the present case. Similarly another decision of Delhi High Court in *Dabur India Limited v. Mr. Amit Jain and Anr.* 2007(35) PTC 257 para 7 is also relevant.

22. In this backdrop of facts and circumstances, the decisions which have been placed reliance by learned Senior Counsel for appellant pertaining to Designs Act are not applicable.

23. Thus, by paying heed to the expression "design" as defined in the Designs Act according to me it means features of shape, configuration, pattern or ornament applied to an article by any industrial process, being features which in the finished article appeal to and are judged solely by the eye, but it does not include-

(a) a method or principle of construction or

(b) features of shape or configuration which

(i) are dictated solely by the function which the article has to perform; or

(ii) are dependent upon the appearance of another

> article of which the article is intended by the author of the design to form an integral part.

In this context, I may again rely upon the decision of Apex *Court Bharat Glass Tube Limited* (supra) para 35, which fully supports the case of defendant-respondent. Thus, I am of the view on the first point in regard to prima facie case, plaintiff stands nowhere.

24. In order to prove its *prima facie* case on the second point the plaintiff company is placing reliance upon the doctrine of "passing-off". The ingredients of the action for passing off has been reiterated in the Halsbury's Laws of England, fourth edition Vol.48 para 144 at page 98, which reads thus :

> **144. Ingredients of the action for passing off; .....** (1) a misrepresentation (2) made by a trader in the course of trade (3) to prospective customers of his or ultimate consumers of goods or services supplied by him (4) which is calculated to injure the business or goodwill of another trader, in the sense that this is a reasonably foreseeable consequence, and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or, in a quia timet action, will probably do so.

25. The doctrine 'passing off' is usually taken into account while considering the cases under the Trade Marks Act. Indeed term "passing-off" has not been defined in this Act also although in section 27(2) there is a reference of these wordings. The plaintiff-appellant indeed is also placing heavy reliance upon this provision. Before dealing with this point, it shall be apt to quote Section 27(2) of the Trade Marks Act, which reads thus;

> **27. No action for infringement of unregistered trade mark;-**
>
> (1) ... ...
>
> (2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods or services as the goods of another person or as services provided by another person, or the remedies in respect thereof.

According to me, an action for passing-off as a phrase "passing off" itself suggests is to restrain defendant from passing-off its goods or services to the

public as that of plaintiff's {see the decision of Supreme Court in *Satyam Infoway Ltd* (supra)}. In para 13 of this decision the Supreme Court has further held that it is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. According to me, this action is normally available to the owner of a distinctive trade mark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The second element that must be established by the plaintiff in the passing off action is misrepresentation by the defendant to the public. In the same judgment the Supreme Court in para 14 has held that if the misrepresentation is intentional, it might lead to an inference that the reputation of the plaintiff is such that it is worth the defendant's while to cash in on it. What has to be established is the likelihood of confusion in the minds of the public that the goods or services offered by the defendant are the goods or the services of the plaintiff.

26. In the given case at hand, both the plaintiff and defendant are the manufacturer and seller of beer. The plaintiff is manufacturing and selling the product beer Haywards 5000 while defendant is manufacturing and selling the product beer Black Fort. On seeing the bottles and certain photographs of the bottles it is gathered that almost middle part of the bottle is covered with very peculiar label of each manufacturer and the company so that the buyer or consumer may purchase it by going through the label, its design, colour, etc. Thus, according to me no intending buyer is getting confused because with an intention to purchase a particular brand (which may be either of plaintiff or defendant) he will go to market and buy the beer by seeing the label, which covers maximum portion of the bottle and not from the size of the bottle.

27. I have already held hereinabove that shape, size, dimension, pattern, configuration, etc. of bottle of plaintiff is not of an eye-catching or appeal to eye having its own distinct feature. Thus, according to me, the intending consumer is not at all being misrepresented or is deceived in any manner. Certainly, he will go to market and buy the product if he wants to purchase the product of plaintiff or defendant by seeing the label upon the bottle. Therefore, it cannot be said at this stage that intending buyers are deceived.

In this context the decision of Supreme Court *Cadila Health Care Ltd.* (supra) para 20 may be seen. Needless to say on bare perusal of the label pasted on the bottle of plaintiff and defendant they are quite distinct to each other and even an illiterate person can distinct the manufacturer. The same principle has been reiterated in the decision of *Laxmikant V. Patel* (supra) in para 8 which has been placed reliance by learned Senior Counsel for both the parties. Shri Agrawal learned Senior Counsel for appellant has also placed reliance upon para 10 of this decision that law does not permit any one to carry on his business in which a way as would persuade the customers or clients in believing that the goods or services belonging to someone else are his or are associated therewith. But, according to me as I have already held hereinabove looking to the quite distinguishing features upon the labels on the bottles of plaintiff and defendant the intending buyer is not persuaded even if bottle of plaintiff registered under the Designs Act has been used by the defendant.

28. On the elucidation of facts and law, I am of the view that there is no *prima facie* case exists in favour of plaintiff and learned Trial Court has rightly held so. Thus, if plaintiff company is not having any *prima facie* case, no temporary injunction can be granted in its favour.

Regarding irreparable injury :

29. So far as irreparable injury is concerned, if ultimately the suit is decreed, the plaintiff can be compensated by way of damages and by keeping this important aspect in mind the legislature has enacted Section 22(2) of the Designs Act wherein it is enacted that the suit can be filed for the grant of damages and therefore it cannot be said that the plaintiff will suffer any irreparable injury.

Regarding balance of convenience :

30. At present it cannot be said that comparative mischief or inconvenience which would ensue from withholding the injunction would be far greater than what would ensue from the injunction being granted and therefore according to me the balance of convenience is also not in favour of the plaintiff.

31. The grant of temporary injunction is a discretionary power and discretion should be exercised upon the well settled sound principles for granting the temporary injunction. The plaintiff is not having any *prima facie* case in his favour, he shall also not suffer any irreparable loss which cannot be compensated by damages and further balance of convenience is also not in his

favour. Thus, according to me, the plaintiff is not entitled to temporary injunction.

32. That apart, one important fact which cannot be marginalized and blinked away and which has not been disputed by learned Senior Counsel for appellant during the course of argument that the plaintiff's Company itself is filling its own product (beer Haywards 5000) in the bottle of beer seller Kingfisher. During the course of argument learned Senior Counsel for respondent also placed before me the empty bottle of the beer of Kingfisher upon which brand name of Kingfisher is embossed and label of plaintiff's company is pasted. According to me, before passing a temporary injunction order in favour of plaintiff, the Court must have due regard to conduct and dealings of the plaintiff. This is so because the Court where summary inference is invoked, the conduct of the party is always seen and the Court will refuse to grant temporary injunction in a case where the action of the plaintiff is not fair. It is well settled law that the grant of temporary injunction is a discretionary relief and discretion is to be exercised in favour of plaintiff, if he comes with clean hands and with fair conduct. No authority is need but I may place reliance on **Halsbury's laws of England Fourth Edition Vol.24 para 1006 at page 563.**

33. So far as maintainability of suit is concerned, all the submissions which are made by learned Senior Counsel for respondent cannot be taken into account at present for the simple reason that these are having nexus with the facts and they have not been pleaded in the written-statement. The respondent shall be free to amend the written-statement to raise all these objections. If necessary pleadings in regard to maintainability of suit is taken in the Court below by filing amendment application to amend the written-statement, that application may be considered by learned Trial Court and if the amendment application is allowed, an issue shall be framed in that regard and it may be decided in accordance with law. At-present in this appeal, the question of maintainability of suit is not taken into account and it is left open to learned Trial Court to decide the same in accordance with law.

34. For the reasons stated hereinabove, I do not find any merit in this appeal, the same is hereby dismissed with costs. Counsel fee Rs.10,000/- if pre-certified.

Appeal dismissed.

I.L.R. [2013] M.P., 1604
APPELLATE CIVIL
Before Mr. Justice J.K. Maheshwari
M.A. No. 69/2011 (Indore) decided on 7 February, 2013

JAKIR HUSSAIN & ors. ...Appellants
Vs.
DINESH & ors. ...Respondents

***Motor Vehicles Act (59 of 1988), Sections 166 & 173 - Compensation - Multiplier* - Multiplier on the age of claimants would be applicable if their age is more than the age of deceased - In a case of bachelor's death one half deduction towards personal expenses may be made from the earning of deceased to capitalize the loss of dependency applying the multiplier either at the age of deceased or as per the age of the claimant whichever is higher. (Para 23)**

मोटर यान अधिनियम (1988 का 59), धाराऐं 166 व 173 – प्रतिकर – गुणक – दावाकर्ताओं की आयु का गुणक लागू होगा यदि उनकी आयु मृतक की आयु से अधिक है – अविवाहित की मृत्यू के प्रकरण में या तो मृतक की आयु का गुणक लागू करके या दावाकर्ताओं की आयु के अनुसार, जो भी अधिक हो आश्रितता की हानि को पंजीकृत करने के लिए मृतक की आय से आधे की कटौती व्यक्तिगत खर्चे के अंतर्गत की जा सकती है।

Cases referred :

2009 ACJ 1298, 2011 ACJ 737, 2012 ACJ 2002, AIR 2003 MP 81,1994 ACJ 1, 1996 ACJ 831, 2007 ACJ 2188, 2003 ACJ 2153, 2011 ACJ 15, 2011 ACJ 1990, 2012 ACJ 702, 2011(3) ACC 848, M.A. No. 2754/2007 decided on 11.12.2012, (1992) AC 601, 1958-65 ACJ 179, (1951) AC 601, 2008 ACJ 814, 2007 ACJ 2816 (SC).

Manish Jain, for the appellants.
Sameer Verma, for the respondents No. 1 & 2.
Pradeep Gupta & Bhashkar Agrawal, for the respondent/Insurance Co.

O R D E R

J.K. MAHESHWARI, J. :- All these five appeals are arising out of the common award dated 20/07/2010 passed by Member. Motor Accident Claims Tribunal, Bhanpura, Distt. Mandsour in Claim Case No. 15/2007, Claim Case No. 23/2007. Claim Case No. 14/2007. Claim Case No. 24/2007 and Claim Case No. 32/2007 whereby the Tribunal awarded the sum of

compensation in the case of death and injuries in the respective cases.

2. As per Claim averments, on 10/05/2007 Ashfaq along with his friends Areef and Mustafa were standing at new bus stand, Bhanpura near Vijay Stambh with the motorcycle Hero Honda Splender. At about 10.20 p.m. in the night Mahindra Pickup Jeep bearing registration No. M.P. 14-G.A./0157 driven rashly and negligently by the driver-non-applicant No.1, dashed to them and also to Mustafa, Shabbeer, Fareed, Jeeshan, Ashraf and Bilal, wherein Ashfaq and Areef were died and other persons received injuries. Legal heirs and injured persons have filed their claim petition seeking compensation before Motor Accident Claims Tribunal.

3. In Claim Case No. 14/2007Ashfaq is the deceased and his widow, son, daughter, mother and father residing jointly filed claim petition. It is contended that he was the owner of Truck bearing No.RJ-33-GA/O171 and a Trollar No. RJ-33-GA/0470 having earning Rs.30,000/- per month. He was also the President of Rajeev Matsya Udyog Sahakari Samiti Maryadit, Bhanpura and have earning from fishing work however, compensation to the tune of Rs.16,65,000/- has been prayed for.

4. In Claim Case No.15/2007 Areef is the deceased and claimants are mother, father, brother and sister. The deceased was the owner of Troller bearing No. R.J. 33G.A./0173 having monthly income of Rs. Rs.20,000/-, however, compensation to the tune of Rs.17,05,000/- has been prayed for.

5. In claim case No.23/2007 claim petition was filed by Jahir and his minor son Jishan jointly on account of the injuries received to them. Injured Jahir received injury over the head, stomach, back, left leg toe, left hand in thumb. For those injuries compensation to the tune of Rs.2,80,000/- was prayed but Claim Tribunal rejected it. For the injuries received to Jishan over the head, right leg, knee, having fracture at tibia fabula bone and the permanent disability (Ex.P-3) the compensation to the tune of Rs.6,63,000/- was claimed.

6. In claim case No.24/2007, Ashraf and his minor son Bilal have filed a joint claim for the injuries received to them. Ashraf received the fracture in left hand and left leg ankle. Certificate of permanent disability (Ex P-5) was filed. However, looking to the injuries compensation to the tune of Rs. 12,37,000/- was prayed for. While in case of Bilal, he received fracture of left leg femur bone having permanent disability as per (Ex.P-12). However, compensation to the tune of Rs. 4,66,000/- was prayed for.

7. In claim case No. 32/2007 injured Mustafa Hussain received fracture of ankle bone and right leg and certificate of permanent disability (Ex.P-1). However, the compensation to the tune of Rs. 5,76,000/- has been prayed for.

8. It is not in dispute that respondent No.2 is the owner of Mahindra Pickup Jeep bearing registration No. M.P.14-G.A./0157 which was driven by driver Dinesh. It is also not disputed that driver was possessing a driving license which was valied up to 8/1/2027. It is also not disputed that the said vehicle was insured with the National Insurance Company Limited bearing policy No. 320303/3106/6350008491 for the period 11/5/2006 to 10/05/2007. It is also not in dispute that all the claimants have filed claim petition under Section 166 of the Motor Vehicles Act seeking compensation as specified in their respective claims.

9. Learned Claims Tribunal recorded the finding that the accident has taken place on account of rash and negligent driving of the driver of the offending vehicle Mahindra Pickup Jeep bearing registration No.M.P.l4-G.A./0157 on 10.5.2007. It has further been held that the said jeep was owned by respondent No.2 and insured with National Insurance Company Limited. The finding has also been recorded that the respondents are jointly and severally liable to pay compensation because violation of the terms and conditions of policy has not been proved, accordingly, awarded the sum which shall be reflect from the following tables :-

Serial No.	Nature of Case	Claim Case No.	Claimants	Amount Claimed	Amount Awarded
1	Fatal	14/07	Ashfaq (deceased) 7 Claimants	Rs .16,65,000/-	Rs. 6,02,000/-
2.	Fatal	15/07	Arif (deceased) 7 Claimants	Rs. 17,05,000/-	Rs. 3,42,000/-
3.	Non-Fatal	23/07	I Jahir II Jishan	I Rs. 2,80,000/-in Jahir is Case	I. Nothing to Jahir
				II Rs. 6,60,000/-in Jishan's case	II. Rs. 19,138/- to Jishan
4.	Non-fatal	24/07	I Ashraf II Bilal	I Rs. 12,37,000/-in Ashraf's case	Rs. 82,900/- in total to both
				II Rs. 3 lac in Bilal's case	
5.	Non-fatal	32/07	I Mustafa	Rs. 5,76,000/-	Rs. 9,000/-

10. Learned Counsel appearing for claimants has argued at length, inter-alia, contending that the compensation awarded in a case of death of Areef Rs.3,42,000/- is inadequate accepting the earning of Rs. 2,500/- per month and applying the multiplier of 17 after deduction of 1/3 towards personal expenses, however, compensation so awarded may be reasonably enhanced accepting his earning as pleaded in the claim petition.

11. Learned counsel for the claimants by placing heavy reliance on the judgments of the Apex Court in the cases of *Sarla Verma and others V. Delhi Transport Corporation and another,* 2009 ACJ 1298, P.S. *Somanathan and others V. District Insurance Officer and another*, 2011 ACJ 737, *Amrit Bhanu Shali and others V. National Insurance Co. Ltd. and others,* 2012 ACJ 2002, has contended that even in a case of bachelor's death multiplier shall be applicable on the age of deceased with deduction 1/3 and not as per the age of the claimants after and one half deduction. Thus, Claims Tribunal has rightly deducted 1/3 amount towards expenses and applying the multiplier on the age of the deceased awarded the sum, therefore, interference is not called for, however, by placing reliance on the Full Bench judgment of this Court in the case of *Jabalpur Bus Operator Association Vs. State of M.P. and others*, AIR 2003 MP 81, contended that later decision in the cases of *Amrit Bhanu Shali and others* (supra) and *P.S. Somanathan and others* (supra) are binding, because in those cases the judgment of *Sarla Verma* (supra) has been considered therefore, on the instance of the insurance company the deduction towards personal expenses cannot be made ½ and the multiplier as per the age of claimant in case of bachelor's death cannot be applied for. In case of death of Ashraf, the earning so accepted by the Tribunal is adequate because he was the owner of the truck and troller, however, accepting the reasonable earning looking to material brought on record, adequate amount of compensation may be awarded. In other case of injuries i.e. Jahir and Jishan, the claim of Jahir has wrongly been rejected and the finding so recorded is perverse. It is also submitted that reasonable amount of compensation may be awarded to Jahir and Jishan directing enhancement. Similarly, in the case of Ashraf, Bilal and Mustafa and looking to the injuries received to them, amount of compensation as awarded is un-reasonable which may also be enhanced.

12. Per contra, learned counsel representing owner driver and the Insurance Company, have strenuously urged that as per Section 167 of the Motor Vehicles Act, adequate, just and reasonable amount of compensation

may be awarded. In the present case dependents are the mother, father, major sister, and brother, therefore, deduction 1/3 made by the Tribunal is inappropriate. In such a case ½ deduction ought to be made and the brothers and sisters cannot be said to be the dependents on deceased because his father is alive. It is also submitted that the multiplier at the age of the claimant would be applicable in Bachelor's death. In addition to it, it is submitted that deceased was the owner of the Trollar but the same was given by the father Jakir Husain to him, however deceased was not having any independent earning, therefore, earning accepted by the Tribunal Rs.2,500/- is just and proper and the compensation as awarded is not liable to be enhanced in the facts of the case.

13. While learned counsel for the Insurance Company placing reliance on the judgment of the Apex Court in the case of *General Manager, Kerala State Road Transport Corporation V. Susamma Thomas and others,* 1994 ACJ 1. three Judges Bench judgment in the case of *U.P. State Road Transport Corporation and others vs Trilok Chandra and others*, 1996 ACJ 831 which is relied upon in the case of *Sarla Verma* (supra), at the Division Bench of Apex Court. It is submitted that the observations made in three Judges Bench in the case of *Trilok Chandra and others* (supra) regarding applicability of the multiplier on the age of parents in bachelor's death has been considered in the judgment of *Sarla Verma (*supra) also. It is further contended that in the judgment of *Sarla Verma* (supra), as well as the other two judgments relied upon by earned counsel for the claimants, three Judges Bench of the Apex Court in the case of *New India Assurance Co.Ltd. V. Shanti Pathak and others,* 2007 ACJ 2188 has not been considered. It is also said that other two Judges Bench of Apex Court in the case of *Gyanchand Jain and another V. Parmanand and others,* 2003 ACJ 2153 has considered and explained on the issue of applicability of the multiplier. In addition to the same, the Apex Court applying the judgment of *Sarla Verma* (supra) in the case of *Shakti Devi V. New India Assurance Co. Ltd and another,* 2011 ACJ 15, *National Insurance Co. Ltd V. Shyam Singh and others,* 2011 ACJ 1990 and also in a case of *New India Assurance Co. Ltd. V. Yogesh Devi and others*, 2012 ACJ 702 applied the multiplier as per the age of claimant in a case of bachelor's death after deducting ½. In such circumstances, compensation has rightly been awarded by the Tribunal. Learned counsel for the Insurance Company as well as the owner and driver submitted on the of enhancement as prayed by the claimant, that the Claim Tribunal in the facts and circumstances of the case,

has adequately awarded the amount of compensation which is not liable to be interfered with.

14. Learned counsel for the claimants has also placed reliance on a Single Bench judgment of this Court in the case of *Kamlabai and another Vs. Ashish and others* reported in 2011 (3) ACC 848 wherein in a bachelor's death, multiplier on the age of deceased has been made applicable while the counsel for insurance Company has placed reliance on another judgment of Single Bench of this Court in the case of *Narsingh and others Vs. Ghasiram_and others* passed in M.A. No.2754/2007 decided on 11/12/2012, and contended that the multiplier as per the age of the parents shall be applicable. In such circumstances, controversy as involved in the case is required to be resolved on the issue of applicability of the multiplier in a case of bachelor's death.

15. After hearing learned counsel appearing on behalf of the parties, first of all, the law led down by various judgments of Hon'ble Apex Court is required to be considered. In the said context, the Division Bench of Apex Court in the case of *Susamma Thomas and others* (supra) has taken note that in a fatal accident cases, accepted measure of damages awarded to the dependents is the pecuniary loss suffered by them as a result of death to determine "how many members and the widow are suffered due to death". 'In answer to the same, Lord Wright in *Davies V. Powell Duffryn Associated Collieries Ltd.*, (1992) AC 601 observed as under:-

> **"The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended. for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties, for instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt."**

16. The observation of Lord Macmilian has been considered that the measure of damage is the pecuniary loss suffered and is likely to be suffered by each dependent. Thus, "except where there is express statutory direction

to the contrary, the damages to be awarded to a dependent of a deceased person to the fatal accident must taken into account any pecuniary benefit accruing to the dependent in consequence of the death of the deceased. It is the net loss on balance which constitutes the measure of damages." The observation of Lord Wright has also been considered that the actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him by reason of the death. The aforesaid principle has been adopted in India in the case of *Gobald Motor Service Ltd. V. R.M..K. Veluswami*, 1958-65 ACJ 179 (SC). Considering the aforesaid in the case of *Susamma Thomas and others* (supra), the Court observed that the assessment of damages to compensate the dependents is beset with difficulties because from the nature of things, it has to take into account many imponderables, e.g. the life expectancy of the deceased and the dependents, the amount that the deceased would have earned during the remainder life, the amount that he would have contributed to the dependents during that period, the chances that the deceased may not have lived or the dependents may not lived up to the estimated remaining period of their life expectancy, the chances that the deceased might have got better employment or income or might have lost his employment or income altogether. In the said context, it is observed that the manner to arrive at the damages is to ascertain the net income of the deceased available for the support of himself and his dependents, and to deduct therefrom such part of his income as the deceased was accustomed to spend upon himself, as regard both self-maintenance and pleasure and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependents. Then remaining income should he capitalized by multiplying it by a figure representing the proper number of year's purchased. In the said context, it is observed that much of the calculation necessarily remains in the realm of hypothesis "and in that region arithmetic is a good servant but a bad master" since there are so often many imponderables. In every case 'it is the overall picture that matters" and the Court must try to assess at best as it can the loss suffered. In the said context, two methods were adopted for determination and for calculation of compensation in fatal accident actions, the first is multiplier method borrowed from *Davies V. Powell Duffryn Associate Collieries Ltd.* (supra) and second in *Nance V. British Columbia Electric Railway Co. Ltd.*, (1951) AC 601. In the said context, it has been observed that the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard

to the circumstances of the case and capitalizing the sum by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants, whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed up cover the period for which the dependency in expected to last.

17. Thereafter, in the case of *Trilokchandra* (supra) three judges Bench of Hon'ble Apex Court has Considered the issue regarding applicability of the multiplier in the case of bachelor's death. In the said case the judgment of *Susamma Thomas* (supra) was considered and it was held that the maximum multiplier can be upto 18 and not 24 as was held in the said case. In para 18, the Court observed as under :-

> **We must at once point out that the calculation of compensation and the amount worked out in the Schedule suffer from several defects. For example, in item No.1 for a victim aged 15 years, the multiplier is shown to be 15 years and the multiplicand is shown to be rs.3,000/-. The total should be rs.3000/- x 15 = Rs.45,000/- but the same is worked out at Rs.60,000/-. Similarly, in the second item the multiplier is 16 and the annual income is Rs.9.000/-; the total should have been Rs.1,44,000/- but is shown to be Rs.1,71,000/-. To put it briefly, the Table abounds in such mistakes. Neither the Tribunal is nor the courts can go by the ready reckoner. It can only be used as a guide. Besides, the selection of multiplier cannot in all cases be solely dependent on the age of the deceased. For example, if the deceased, a bachelor, dies at the age of 45 and his dependents are his parents, age of the parents would also be relevant in the choice of multiplier. But these mistakes are limited to actual calculations only and not in respect of other items. What we propose to emphasize is that the multiplier cannot exceed 18 years' purchase factor. This is the improvement over the earlier position that ordinarily it should not exceed 16. We thought it necessary to state**

the correct legal position as courts and Tribunals are using higher multiplier as in the present case where the Tribunal used the multiplier of 24 which the High Court raised to 34, thereby showing lack of awareness of the background of the multiplier system in *Davies' case*, (supra)."

18. In the case of *Gyanchand Jain and another* (supra), the Division Beach of Apex Court in the matter of applicability of the multiplier in para-4 observed as under:-

"4. Claimants, being aggrieved, filed the special leave petition in which leave was granted. The learned counsel appearing for appellants argued that in the present case, keeping in view the age of the deceased, multiplier of 18 ought to have been applied. We do not find any merit in this submission. It is not disputed that maximum multiplier that could be applied is 18. Since the deceased was unmarried and the age of the mother was 49 years and that of the father was 55 years, the total loss of dependency has to be determined keeping in view the age of the parents. It is well established that age of claimants when they happen to be parents in the case of a deceased unmarried child is a relevant factor for determining the multiplier to be adopted. Under such circumstances, the multiplier applied by the Tribunal which was upheld by the High Court is appropriate."

19. Again the issue of applicability of the multiplier in the case of bachelor's death has come up for consideration before the three Judges' Bench of Hon'ble Apex Court in the case of *Shanti Pathak & Others* wherein, Hon'ble Apex Court has held as under:-

"Considering the income that was taken, the foundation for working out the compensation cannot be faulted. Monthly contribution was fixed at Rs. 3,500. In the normal course we would have remitted the matter to the high Court for consideration on the materials placed before it. But considering the fact that the matter is pending since long, it would be appropriate to take the multiplier of 5 considering the fact that

the mother of the deceased is about 65 years at the time of the accident and age of the father is more than 65 years. Taking into account the monthly contribution at Rs.3,500 as held by the Tribunal and the High Court, the entitlement of the claim would be Rs.2,10,000. The same shall bear interest at the rate of 7.5 per cent per annum from the date of the application for compensation. Payment already made shall be adjusted from the amount due."

20. In view of the forgoing facts, it is clear that the principles adopted with respect to the applicability of the multiplier *Davies's* case (supra) has been recognized in India. Three Judges Bench of the Supreme Court in the case of *Trilokchandra* (supra) has also applied the multiplier either as per the age of the deceased or as per the age of the claimant whichever is higher. Thereafter, before the Hon'ble Supreme Court in the case of *Ramesh Singh and another* 2008 ACJ 814 , the aforesaid issue has brought for consideration. After considering various judgments including the judgment in the case of *Trilokchandra* Hon'ble Apex Court in para 5 relying upon the judgment of the *Oriental Insurance Company Limited Vs. Syed Ibrahim* reported in 2007 ACJ 2816 (SC) held that the multiplier applied on the age of claimant by the Claims Tribunal is just and proper. The observations of Hon'ble Supreme Court in the said judgment are relevant, which reads as under :-

"5.- The learned counsel relying on the Second Schedule to the Act contended that the deceased being about 22 years of age, a multiplier of 16 or 17 should have been granted. It is undoubtedly true that section 163-A was brought on the statute book to shorten the period of litigation. The burden to prove negligence or fault on the part of driver and other allied burdens under section 140 or 166 were really cumbersome and time-consuming. Therefore, 'as a part of social justice, a system was introduced via section 163-A wherein such burden was avoided and thereby a speedy remedy was provided. The relief under section 163-A has been held not to be additional be alternate. The Schedule provided has been threadbare discussed in various pronouncements including *Deepal Girishbhan Soni Vs. United India Insurance Co. Ltd.*, 2004 ACJ 934 (SC). Second Schedule is to be used not only referring to age of victim but also other factors relevant

> therefore. Complicated question of facts and law arising in accident cases cannot be answered all times by relying on mathematical equations. In fact in *U.P. State Road Trans. Corpn.v. Trilok Chandra,* 1995 ACJ 831 (SC), Ahmedi, J. (as the Chief Justice then was) has pointed out the shortcomings in the said Schedule and has held that the Schedule can only be used as a guide. It was also held that selection of multiplier cannot in all cases be solely dependent on the age of the deceased. If a young man is killed in the accident leaving behind aged parents who may not survive long enough to match with a High multiplier provided by the Second Schedule then the court has to offset such high multiplier balance the same with the short life expectancy of the claimants. That precisely has happened in this case. Age of the parent was held as a relevant factor in case of minor's death in recent decision in *Oriental Insurance Syed Ibrahim* 2007 ACJ 2816 (SC). In our considered opinion, . the courts below rightly struck the said balance."

21. Thereafter, in the case of *Sarla Verma* (supra), the said issue has come up for consideration wherein also the recognition of "Davies Theory" has been affirmed in a case falling under section 166 of the Motor Vehicles Act. In the case of *Sarla Verma,* it is laid down that as per schedule of Motor Vehicles Act, the applicability of the multiplier is on the basis of the age. It has also been observed that in case of Bachelor's death, the multiplier may be made applicable as per the age of the deceased or as per the age of the claimant whichever is higher. Thus, it is clear that in *Shakti Devi's* case (supra) the two Judges Bench of Supreme Court considering the judgment of *Sarla Verma* itself, has observed in para 12 as under :-

> "12. So far as the present case is concerned, at the time of accident, the deceased was 22-year old and not married. He was running a general store from his house and earning about Rs. 1000/-- per month from the business. In *Sarla Verma,* this Court stated that where the deceased was self-employed, the court shall usually take only the actual income at the time of death; a departure from there should be made only in rare and exceptional cases involving special circumstances. Does the present case involve special circumstances? In our view, it

does. The evidence has come that the deceased was to get employment in the forest department after the retirement of his father. Obviously the evidence is based on the government policy. The deceased, thus, had a reasonable expectation of the government employment in near future. In the circumstances, the actual income at the time of deceased's death needs to be revised and taking into consideration the special circumstances of the case, in our view, the monthly income of the deceased deserves to be fixed at Rs. 2000/-. As regards the personal expenses, since the deceased was not married, we are satisfied that the principle stated in Sarla Verma 3 that 50% should be treated as the personal and living expenses of the bachelor may he applied. Seen thus, the annual loss of dependency would come to Rs. 12,000/-. Insofar as multiplier is concerned, the Tribunal applied the multiplier of 8. Learned counsel for the appellant argued that the multiplier of 18 should have been applied keeping in view the age of the deceased. The argument is devoid of any substance. In a case where the age of the claimant is higher than the age of the deceased, the age of claimant and not the age of the deceased has to be taken into account for the capitalization of the lost dependency. It is so because the choice of multiplier is determined by the age of the deceased or that of the claimant, whichever is higher. The exact age of the claimant has not come on record. As per the evidence of AWl (Pankaj Kumar Sinha), on the date of his deposition, the claimant's age was about 63 years. The date of deposition of AW-1 is not available. The accident occurred in 1991 and the date of decision of the Tribunal is June 6, 2000. Ordinarily, the Tribunal would not have taken much time after the evidence was complete. We may assume that the statement of AW-1 was recorded somewhere in 1998 or 1999. If that be so, the age of the claimant on the date of the accident would be about 54-55 years. As per the table prepared in Sarla Verma, the multiplier of 11 would, therefore, be applicable. By multiplying the annual loss of dependency (Rs.12000/-) with the multiplier of 11, the claimant becomes entitled to the compensation in the sum of Rs. 1,32,000/-. The compensation determined by the Tribunal at Rs. 60,000/

- and confirmed by the High Court in the appeals manifestly erroneous and is enhanced to Rs. 1,32.000/-."

22. In subsequent three judgments in the case of *PS Somnathan & another* (supra), *Shyam Singh* (supra) and *Amrit Bhanu Shali* (supra) Hon'ble the Supreme Court though considered the judgment of *Sarla Verma,* but without considering the case of *Shakti Devi* held that the multiplier or the age of deceased should be applicable. Thus, it is clear that the three Judges' Bench judgment in the case of *Shanti Pathak* and two Judges' Bench judgment of *Shakti Devi* which were of prior dates and not considered in the subsequent said three judgments of Hon'ble the Supreme Court. In such circumstances, as per the judgment in the case of *Jabalpur Bus Operator Association* (supra), this Court is bound by the earlier three Judges' Bench judgment and the two Judges' Bench judgment which has not been considered in the subsequent judgments.

23. - In addition to the aforesaid, the principle of the law applicability in India recognized in principle as specified in *Davies'* Case. In *Davies's* case on the point of applicability of the multiplier, it should be applicable either on the age of the deceased or on the age of the claimant whichever is higher. Therefore, in the considered opinion of this Court the multiplier on the age of the claimants would be applicable if their age is more than the age of the deceased. In such circumstances, the two judgments of learned Single Judge of this Court in the case of *Kamla Bai* (supra) and *Narsingh* (supra) are hereby explained. Thus, As per the aforesaid discussion, now it is apparent that in a case of bachelor's death one half deduction towards personal expenses may be made from the earning of deceased to capitalize the loss of dependency, applying the multiplier either at the age of the deceased or a7s per the age of the claimant whichever is higher.

25. In the context of the said legal position, if the case of the deceased Arif is being considered, then as per the documents available on record (Exhibit P-353) it is clear that he was the registered owner of the Troller RJ-33-GA-0173. From the document Exhibit P-305 to Exhibit P-351 the Troller was financed and every month EMI of Rs.27,055/- was paid to creditor. In the said context the earning of the deceased in addition to the aforesaid repayment further Rs.8000/- may safely be accepted, looking to the fact, he was not income-tax payee. Thereby the annual earning comes to Rs.96,000/-. On reducing one half towards personal expenses and applying the multiplier of 9

as per the age of the claimant, the loss of dependency comes to Rs.4,32,000/-. On adding Rs.25,000/- in conventional heads i.e. funeral loss of estate and loss of love & affection then, the total sum of compensation comes to Rs.4,57,000/-. On deducting the amount awarded by the Tribunal Rs.3,42,000/- net enhancement comes to Rs. 1,15,000/-. The claimant would be entitled to receive the said enhanced amount along with interest.

26. In the Claim Case No.14/2007, Ashfaq, aged 43 has died. The claimants are the widow, four sons, a daughter. mother and father. As per the pleadings and the evidence brought on record, it is apparent that he was the owner of the Truck RJ-33-GA-173 and the Troller RJ-33-GA-0470. It has also been brought on record that he has not paid income-tax for the financial year 2007-08, but he was the driver of heavy transport vehicle, however his earning can safely be accepted of Rs.10,000/- per month which annually comes to Rs.1,20,000/-. Looking to number of of dependents, if 1/4th is deducted towards the personal expenses, then loss of dependency comes to Rs.90,000/-. As per the age of the deceased, if multiplier of 14 is applied for, then loss of dependency comes to Rs.12,60,000/-. By adding Rs.25,000/- in funeral consortium, loss of estate and love & affection, the total compensation comes to Rs.12,85,000/-. On deducting the amount so awarded by the Tribunal, the net enhanced amount comes to Rs.6,83,000/- and payable alongwith interest.

27. The Claim case No.23/2007 has been filed seeking compensation in case of injuries-received by Jahir Hussain and Jishan. The claim petition of the Jahir was dismissed by the Claims Tribunal because the MLC of claimant Jahir was not produced. While in case of Jishan, who received fracture of Tibia Fibula in his right leg and a certificate of permanent disability has also been produced, the Tribunal has awarded Rs.19,138/- only.

28. On perusal of the record the MLC of Jahir (Exhibit P-29)is available and he has received the injuries over the head, face, shoulder and other parts of the body, for which he was hospitalized for a day and the medical papers are also produced on record. Thus, the finding recorded by the Claims Tribunal to reject the claim petition of Jahir due to non-availability of MLC is perverse. However looking to the MLC and papers of medical expenses of injured Jahir and also looking to the fact he was not, having any bony injury, in lump sum Rs.20,000/- deserves to be awarded. While in case of Jishan, who suffered

a fracture of Tibia Fibula bone in his right leg and remained hospitalized for about five days in Kota, medical expenses incurred by him amounting to Rs.14,138/-, however the compensation so awarded by the Tribunal appears to be meager, therefore, enhanced by Rs.31,000/- in lump sum. Thus, the finding of rejection of the claim petition of Jahir Hussain is hereby set aside. It is held that Jahir would be entitled to receive Rs.20,000/-, while in case of Jishan, the compensation awarded is enhanced by Rs.31,000/- and payable alongwith interest.

29. In claim case No. 32/2007, the injured has suffered a fracture of right ankle bone, right leg and remained in hospital for a day having expenses of Rs. 3,298/- alongwith certificate of permanent disability. But the Tribunal has merely awarded Rs. 9,000/-. In the considered opinion of this Court looking to the documents (Exhibit P-200 to P-202), Discharge-Ticket (Exhibit P-203) and the medical expenses, in lump sum Rs. 25,000/- further deserves to be awarded. Making the total compensation of Rs. 34,000/- The enhanced amount shall payable alongwith interest.

30. In Claim Case No. 24/2007, Ashraf and Bilal are the injured. Ashraf received injury in his left hand humerus bone and in left leg Ankle, while Bilal is having fracture of Femur bone in his left leg. Both were hospitalized for 5-6 days. The Tribunal in the case of Ashraf awarded Rs. 61,278/- out of which Rs. 50,229/- in Medical Expenses. Though the certificate of permanent disability is available on record, but it has not been believed. Similarly, in case of Bilal medical expenses of Rs. 10,629/- are available, but the Tribunal has awarded Rs. 19,138/-. After over all consideration of the documents Exhibit P-46 to Exhibit P-155 and 199 and also the documents P-156 to P-195 and other documents, in the considered opinion of this Court, the claimant Ashraf Hussain would be entitled to receive the amount of Rs. 70,000/- in addition and in case of Bilal, he is entitled to Rs.40,000/- in addition lump sum respectively. Thus in case of Ashraf, the total compensation comes to Rs.1,31,278/- while in case of Bilal, it comes to Rs.59,138/-. The enhanced amount shall payable alongwith interest.

31. In view of the foregoing discussion, it is to be held that in case of Bachelor's death, where mother and father are claimants, the deduction one half may be made. In exceptional cases, the court may look into facts the and circumstances of the individual case. It is to be further observed that as per the Motor Vehicles Act in second schedule, the multiplier at

the age of the deceased would be applicable. But where the dependents are the mother and father, who are old aged, in such case looking to the expectancy of life of dependents, the suitable multiplier may be made applicable, applying the principle of the *Devies's* case that while calculating the compensation, the multiplication as per the age of the deceased or as per the age of the claimants whichever is higher, would be applicable.

32. Accordingly, MA No.69/2011 is hereby allowed in part and the enhancement of Rs.1,15,000/- is directed. Similarly M.A. No.77/2011 is also allowed in part and the enhancement of Rs.6,83,000/- is directed. In M.A. No.73/2011 is allowed in part and it is held that the rejection of the claim of Jahir is illegal and the findings are perverse, however such findings are set aside and claimant Jahir would be entitled to receive the amount of Rs.20,000/- while Jishan would be entitled to receive the enhanced amount of Rs.30,000/-. M.A. No.85/2011 is also allowed in part and the enhancement of Rs.25,000/- in addition is directed M.A. No.81/2011 is also allowed in part. In the said case, for the injuries received by Ashraf, he would be entitled to receive the enhanced amount of Rs.70,000/- and for the injuries of Bilal, the enhancement of Rs.40,000/- is directed. It is made clear here that the claimants in all the appeals would be entitled to receive the amount awarded or enhanced amount along with interest @ 7.5% p.a. from the date of filing of the claim petition till its realization. In the facts and circumstances of the case, parties to bear their own costs.

Appeal partly allowed.

I.L.R. [2013] M.P., 1619
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
F.A. No. 358/1995 (Jabalpur) decided on 21 February, 2013

DULARI BAI (SMT.) (DEAD) & ors. ...Appellants
Vs.
RAMESHWAR DAYAL SHRIVASTAVA & anr. ...Respondents

A. ***Specific Relief Act (47 of 1963), Section 20 - Suit for specific performance*** **- Agreement to sell or loan transaction - More than 90% of the sale consideration and that too in odd figures of Rs. 22,984/- is alleged to have been paid at the time of agreement - In agreement it was mentioned that one gentleman is residing in the suit**

property and the sale deed will be executed after getting it vacated from him - In plaint it was mentioned that as the defendants are not getting the suitable alternative accommodation therefore, time for the execution of sale deed was extended thrice - Plaintiff also admitted that he does not know about the measurements of the house - Conduct of plaintiff in agreeing to purchase a house without inspecting it is highly unnatural - It can be inferred that real intention was not to purchase the house in question and the defendant never intended to sell the house to plaintiff. (Paras 15-21)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – विनिर्दिष्ट पालन हेतु वाद – विक्रय का करार अथवा ऋण संव्यवहार – विक्रय प्रतिफल का 90 प्रतिशत से अधिक और वह भी रु. 22,984/– की विषम संख्या में अभिकथित रुप से करार के समय अदा किया गया – करार में यह उल्लिखित था कि एक सज्जन, वाद सम्पत्ति में निवासरत है और उसे उससे रिक्त कराये जाने के पश्चात विक्रय विलेख निष्पादित किया जायेगा – वाद पत्र में यह उल्लिखित था कि क्योंकि प्रतिवादीगण को योग्य वैकल्पिक स्थान नहीं मिल पा रहा है, इसलिए विक्रय विलेख के निष्पादन का समय तीन बार बढ़ाया गया था – वादी ने यह भी स्वीकार किया कि वह मकान के नाप के बारे में नहीं जानता था – मकान का मुआयना किये बिना उसे क्रय करने के लिए करार करने का वादी का आचरण अत्याधिक अस्वमाविक है – यह निष्कर्ष निकाला जा सकता है कि वास्तविक आशय प्रश्नगत मकान का क्रय करना नहीं था और प्रतिवादी का आशय, वादी को मकान विक्रय करना कभी नहीं था।

B. Specific Relief Act (47 of 1963), Section 20 - Specific Performance of Contract **- Decree of specific performance is a discretionary relief and Court is not bound to grant such relief on its asking - Although discretion is to be exercised on the basis of sound and reasonable grounds but the Court should take care to see that it is not used as an instrument of oppression to have unfair advantage to the plaintiff - Value of the house at the time of agreement was more than Rs. 2 lacs and would never fetch the value of Rs. 25,000/- on the date of agreement - Appeal is partly allowed - Decree of Specific Performance of Contract set aside - Plaintiff is entitled to a decree of refund of advance amount of Rs. 22,984/- with interest @ 6% per annum. (Paras 26-31)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – संविदा का विनिर्दिष्ट पालन – विनिर्दिष्ट पालन की डिक्री वैवेकिक अनुतोष है और उसे मांगे जाने पर उक्त अनुतोष प्रदान करने के लिए न्यायालय बाध्य नहीं – यद्यपि

विवेकाधिकार का प्रयोग तर्कसंगत एवं युक्तियुक्त आधारों पर किया जाना चाहिए, किन्तु न्यायालय को यह देखने का ध्यान रखना चाहिए कि उसका उपयोग दमन के साधन के रुप में वादी को अनुचित लाभ देकर नहीं किया जायेगा – करार के समय मकान का मूल्य रु. 2 लाख से अधिक था और करार की तिथि को रु. 25,000/– के मूल्य पर कभी नहीं बिक सकता – अपील अंशतः मंजूर – संविदा के विनिर्दिष्ट पालन की डिक्री अपास्त – वादी, 6 प्रतिशत प्रतिवर्ष की दर से ब्याज के साथ अग्रिम रकम रु. 22,984/– की वापसी की डिक्री का हकदार।

Cases referred :

(2008) 12 SCC 145, 1987 (Suppl.) SCC 340.

Mrigendra Singh with *Amit Khatri* for the appellants.
Manikant Sharma, for the respondent No.1/Plaintiff.
A.K. Choubey, for the respondent No.2.

JUDGMENT

A.K. Shrivastava, J. :- Feeling aggrieved by the judgment and decree dated 04.08.1995 passed by learned Second Additional District Judge, Hoshangabad in Civil Suit No.19-A/1991 (Old No.91-/1986) whereby the suit of plaintiff-respondent has been decreed, this appeal under Section 96 of the CPC has been filed by the defendants no.1 to 4-appellants.

2. In the Trial Court the suit has been filed by Rameshwar Dayal Shrivastava against Prem Narayan alias Rabude however during the pendency of the suit the defendant died and present appellants as well as respondent no.2 Smt. Sangeeta were brought on record as defendants, however, the fifth defendant (respondent no.2) Smt.Sangeeta was proceeded *ex parte*.

3. The facts in compendium are that a suit for specific performance of contract has been filed by the plaintiff-first respondent in respect to a double-storeyed house, the description whereof has been mentioned in the plaint and which is the subject matter of the suit. According to the plaintiff in order to contest the election the original defendant Prem Narayan was in need of money, as a result of which, he gave an offer to the plaintiff to purchase his house for a consideration of Rs.25000/- which was readily accepted by the plaintiff-respondent. Thereafter, on 17.04.1980 a registered agreement of sale was executed between the parties in which it has been stated that today i.e. 17.04.1980 the original defendant has obtained a sum of Rs.22,984/- towards advance money and balance amount of consideration Rs.2016/- would be

paid within three year latest by 17.04.1983 and thereafter the sale-deed can be executed and the possession would also be delivered at that time. It was also agreed between the parties that the possession of the house in question will be delivered to plaintiff after getting the tenant evicted from the suit shop. When the original defendant failed to get the sale-deed executed, on 28.05.1983 a notice was sent to him by the plaintiff to get it executed. But, the original defendant requested that because at present he is unable to get an alternative residential accommodation for him and his family members and hence requested on humanitarian ground to provide some more time to get the sale-deed executed. Thereafter on 05.07.1983 another agreement of sale was executed between the parties wherein it has been mentioned by defendant that since still he could not arrange an alternative residential accommodation, therefore, furhter period of one year more may be provided to execute the sale-deed. This agreement was notarized. When the original defendant did not execute the saledeed, again an agreement was executed acknowledging the earlier execution of agreements of sale and this was also stated in the said document that although in the agreement dated 05.07.1983 the original defendant sought time to execute the sale-deed but because again alternative residential house was not found, therefore, again time of one year was sought to execute the sale-deed. In the agreement dated 23.06.1984 it has been mentioned that additional sum of Rs.16/- has also been paid towards advance by the plaintiff which has been received by original defendant Prem Narayan and he is only required to obtain balance consideration of Rs.2000/-. Thereafter another agreement was executed by said Prem Narayan on 11.10.1985 wherein it was agreed by the defendant to get the sale-deed executed of the disputed house in favour of plaintiff upto 17.04.1986. But when the defendant failed to perform his part of contract after sending a registered AD post notice to him on 12.04.1986 and also on 07.10.1986 the plaintiff has filed the present suit for specific performance of contract.

4. In the plaint it has been pleaded by the plaintiff that he was throughout ready and willing to perform his part of contract but every time under the pretext that defendant could not arrange alternative house for himself and his family members, therefore, the sale-deed was not executed by him. In the plaint it is also pleaded that even today the plaintiff is ready to purchase the suit house after making the payment of requisite balance consideration of Rs.2000/- and thus it has been prayed that a decree of specific performance of contract be passed.

5. The original defendant before he passed away filed written-statement but his statement could be recorded in the Court. Upon his death, the present appellants and second respondent were brought on record as defendants 1 to 5. In the written-statement filed on behalf of original defendant averments made in the plaint were denied but on bare perusal of the pleading of the written-statement and particularly by paying heed to additional pleas it is gathered that document of agreement of sale dated 17.04.1980 was executed by the defendant but it was a loan transaction and in order to settle the loan account this document was executed. In para 16 and 17 of the additional pleas it has been pleaded by the defendant that since relationship between the plaintiff and him was quite cordial, therefore, on 14.04.1978 he obtained a loan of Rs.3000/- and similarly in March, 1983 he obtained loan from him. According to the plaintiff earlier to 1978 also he was taking loan from the plaintiff. In the year 1980 the plaintiff asked defendant to clear and settle all accounts and loan amount which defendant has taken by repaying to him, but, the defendant put his inability that presently his financial condition is weak and therefore he is unable to pay the loan amount in lump sum. Thus, by calculating the original amount of loan and the interest, document of agreement of sale dated 17.04.1980 was executed. It has also been pleaded by him that he never executed a document of agreement of sale dated 17.04.1980. It is also pleaded that on 17.04.1980 the plaintiff never paid any amount towards advance to him and the said document is without consideration and has been executed towards the security of earlier loan.

6. In para 18 it has been specifically pleaded by defendant that suit house is situated on main Court road of Hoshangabad city and on 17.04.1980 its value was Rs.2 lac and therefore the question of selling it for a meagre amount of Rs.25000/- does not arise. It is also pleaded by him in this para that houses in the nearby locality where the suit house is situated are also having high valuation. According to the defendant the suit house is constructed in a huge area and is a double storeyed Pakka house. Since on 17.04.1980, when it is said that the document of agreement of sale was executed the valuation of suit house was Rs.2 lac, therefore one could infer that transaction between the parties was of loan. According to the defendant on 17.04.1980 the cost of the doors and widows of the disputed house was more than Rs.30,000/- and therefore entire house which is 100 sq.feet towards northern and southern side and 25 sq. feet towards eastern and western side cannot be agreed to be sold for a meagre amount of Rs.25,000/-. According to defendant on

17.04.1980 the valuation of the plot itself was Rs.1 lac and therefore double storeyed house built upon it cannot be sold for Rs.25,000/- hence it has been prayed that the suit be dismissed.

7. The learned Trial Court framed necessary issues and after recording the evidence of the parties, decreed the suit of the plaintiff. In this manner this appeal has been filed by the LRs of the original defendant.

8. The contention of Shri Mrigendra Singh, learned counsel for appellants is that if the evidence of plaintiff and his witnesses is considered in proper perspective manner and is tested on the touchstone and anvil of the evidence of defendant and his witnesses it would reveal that the transaction between the parties was of loan. Learned counsel further submits that there is overwhelming documentary evidence on record that on 17.04.1980 (the date of execution of agreement of sale) the valuation of the suit house which is constructed in a huge area and double storeyed was having valuation of Rs.2 lac and therefore learned Trial Court erred in decreeing the suit of the plaintiff.

9. Apart from this it has also been vehemently argued by him that the document of agreement of sale dated 17.04.1980 which is a registered document has been attested by two attesting witnesses, they are Shankar Singh and Dhanpal Singh. By inviting my attention to the testimony of plaintiff it has been argued that according to the plaintiff both these attesting witnesses have died which is *ex facie* false because one of the witnesses Shankar Singh was alive and the appellants have filed the affidavit of attesting witness Shankar Singh dated 02.11.1995 alongwith application under Order XLI Rule 27 CPC (I.A. No.1388/2012) on 23.11.2012 but lateron said Shankar Singh died and the appellants have also filed his death certificate alongwith the application. Learned counsel submits that the grant of decree of specific performance of contract is a discretionary relief and discretion should be exercised in favour of plaintiff only when he comes with clean hands.Learned counsel submits that looking to the controversy in the matter since the valuation of the suit house is having handsome value even on the date of alleged agreement of sale and because the grain may not come out of chaff in order to expose the plaintiff that the real intention between the parties was of loan transaction, deliberately he did not examine the attesting witnesses and particularly Shankar Singh whose affidavit has been filed by him alongwith application under Order XLI Rule 27 CPC. By inviting my attention to the averments made in the affidavit of Shankar Singh it has been contended by him that *ex facie* falsely the plaintiff

deposed that this witness died when the trial of the suit was going on. In the affidavit attesting witness Shankar Singh has deposed by giving the details of his sons, who are residing at Sehore and Jabalpur and has deposed that he used to stay with his sons also. He has also deposed that transaction between the parties was of loan and on the date of alleged document of agreement of sale the valuation of the suit house was in between Rs.2.50 lac and Rs.3 lac and thus it has been prayed that by allowing the application (I.A.No.13388/2012) the additional evidence may be taken on record. Learned counsel submits that no reply of the said application has been filed by the plaintiff nor any affidavit in rebuttal to the affidavit of Shankar Singh is filed that said Shankar Singh is not the same person who attested the document of agreement of sale dated 17.04.1980 (Ex.P/1). Learned counsel has also submitted that in the registered document (Ex.P/1) the name of Shankar Singh S/o. Kanhaiya Singh Rajput R/o. Sanischara Tehsil and District Hoshangabad is mentioned and in para 1 of the affidavit said Shankar Singh S/o. Kanhaiya Singh has specifically stated that he was earlier residing in Ward No.1, Sanischara, District Hoshangabad but for certain reasons he has shifted and now residing in Village Bori Post Semri Tehil Budhni P.S. Rehati District Sehore. It has also been deposed that for some days in every year this witness used to stay with his sons who are residing in Sehore and Jabalpur and therefore since the plaintiff has not come with clean hands the suit of specific performance be dismissed.

10. On the other hand Shri Sharma, learned counsel appearing for plaintiff-respondent no.1 argued in support of the impugned judgment and submitted that since the factum of admitting the signature upon the document of agreement of sale and its attestation has been admitted by the plaintiff, therefore, the burden was upon him to prove that the transaction was of loan and parties never agreed to sell the suit property. Learned counsel submits that as per the defendant's pleading the plaintiff is a money lender but there is no cogent evidence of his to prove this fact and therefore the arguments which are advanced by the learned counsel for appellants are not having any sanctity in the eye of law. Learned counsel submits that throughout his life, first defendant was a Councilor in the Municipality Hoshangabad and in order to contest the election of M.L.A. he was in need of money and therefore he requested the plaintiff to purchase his house for a consideration of Rs.25000/- and accordingly a document of agreement of sale was executed which is a registered document. Learned counsel submits that first defendant is not an

illiterate person and from time to time he executed three agreements acknowledging the original agreement of sale dated 17.04.1980 and every time sought time to get the sale-deed executed because he is not in a position to get an alternative residential accommodation where he could settle his family to reside and therefore learned Trial Court after considering each and every aspect of the matter rightly decreed the suit of the plaintiff.

11. By inviting my attention to the document (Ex.P/20) which is a certified copy of the order-sheet dated 30.03.1981 of the Court of First Civil Judge, Class-II Hoshangabad in Civil Suit No.35-B/1979 (*Gyan Chand S/o. Hazarilal v. Prem Narayan and Smt. Dulari Bai*) it has been contended by learned counsel that in the said suit there is an admission of defendant Prem Narayan that house in question has been agreed to be sold in favour of the plaintiff and therefore the house may not be attached upon the application under Order XXXVIII Rule 5 CPC. Hence, it has been prayed that looking to the admission of defendant Prem Narayan there is no scope of any interference in the impugned judgment which has been passed by learned Trial Court decreeing the suit of plaintiff for specific performance of contract.

12. Learned counsel for plaintiff-respondent no.1 further submitted that a false plea has been taken in the written-statement stating that valuation of the suit house is Rs.2 lac. Indeed since the price index of immovable property has been escalated tremendously between 1980 and 1985, therefore, with a mala fide intention false plea has been taken by the defendant so that he may sell the house in question for a high price to third person. Thus, it has been prayed that the appeal be dismissed.

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

14. On the basis of arguments advanced before me, I am constrained to decide the following questions :-

(i) Whether, the document Ex.P/1 which is an agreement of sale has been executed in between the parties with an intention that plaintiff has agreed to purchase the suit property or it was a loan transaction?

(ii) Whether, the subsequent agreements between the plaintiff and defendant Ex.P/5, Ex.P/9 and Ex.P/13 are the documents extending time to repay the loan obtained by original

defendant Prem Narayan or these documents were executed to extend the time to get the sale-deed executed?

(iii) Whether, on 17.04.1980 when the document of agreement of sale Ex.P/1 was executed between the plaintiff and defendant Prem Narayan, the valuation of the suit house was Rs.2 lac? If yes, whether can it be inferred that the real intention between the parties was not to get the disputed property sold in favour of plaintiff?

(iv) Whether, in the facts and circumstances of the case, the discretion should be exercised not to pass a decree of specific performance of contract according to section 20 of the Specific Relief Act?

Regarding questions No.(i) and (ii)

15. In the present case the registered document of agreement of sale dated 17.04.1980 is Ex.P/1. This has been signed by first defendant Prem Narayan and has been attested by two witnesses namely Shankar Singh S/o. Kanhaiya Singh R/o. Sanischara district Hoshangabad and Dhanpal Singh S/o. Semri Harchand Tehsil Suhagpur District Hoshangabad. Apart from the registered document there are some more agreements which are Ex.P/5 dated 05.07.1983, Ex.P/9 dated 23.06.1984 and Ex.P/13 dated 19.10.1985. Apart from these three agreements there are notices which were sent by plaintiff's counsel through registered AD post, the acknowledgment receipts as well as postal receipts are also on record. On going through the basic document Ex.P/1 which is a registered document dated 17.04.1980 it is gathered that the house in question was agreed to be sold by defendant Prem Narayan in favour of plaintiff for a consideration of Rs.25,000/- and a sum of Rs.22,984/- was obtained towards part consideration of the sale price which is more than 90%. In this document further it has been mentioned that a sum of Rs.12,984/- has been received at the house and a sum of Rs.10,000/- would be taken in the office of Sub Registrar. In this document it is mentioned that three years time was obtained by defendant to get the sale-deed executed and the reason has also been assigned that because one person is residing in the suit house, therefore, after getting it vacated from him the sale-deed would be executed. However, the name of that person is not mentioned and this much is mentioned that अभी उसमें एक साहब रहते हैं उनसे मकान खाली कर देने के बाद बेनामा आपको कर देवेंगे। (at present one gentleman is residing and after getting it vacated from

him sale-deed will be executed). Nowhere in this document it is mentioned that defendant is residing in different locality or in the part of the suit house. It is also not mentioned that said person is residing in the entire house in its one part. In the plaint para 3 it has also been pleaded that in the suit house the tenants are residing and it was agreed that defendant will execute the sale-deed after getting it vacated from the tenants but if we test the pleading of plaintiff on the touchstone and upon the anvil of subsequent agreements Ex.P/5, Ex.P/9 and Ex.P/13 this Court finds that the time has been sought on the ground because the defendant is not able to find any suitable residential house for him. Hence on this point the pleading of plaintiff is contrary to his own documents. Thus, according to me, when the defendant was not at all residing in the suit house why by executing subsequent agreements Ex.P/5, P/9 and P/13 he sought time to get sale-deed executed under the pretext that he is unable to find out alternative suitable residential house for himself and his family members. Apart from this, in a document of agreement of sale if some advance money is paid, normally it is in round figure and not in the odd figure. On bare perusal of the document dated 17.04.1980 (Ex.P/1) as well as averments made in the plaint it is gathered that a sum of Rs.22984/- has been paid to the defendant towards advance money. Why a meager amount of Rs.116/- was not paid in order to put the advance money in round figure of Rs.23,000/-. It is well settled in law that civil cases are decided on the basis of high degree of preponderance and probabilities and thus by keeping this important principle of law in my mind, I shall examine the evidence of the parties.

16. Shri Sharma learned counsel for plaintiff-respondent no.1 appears to be correct that looking to the additional pleadings taken by the defendant in the written-statement that the transaction between the parties was of loan and thus the burden of proof was on defendant to prove this plea. Thus, I shall examine the evidence of plaintiff and the defendant in this regard. Right from beginning the stand of defendant is that transaction between the parties was of loan and the defendant never intended to get the suit house sold. Although suggestion in this regard has been denied by the plaintiff but in cross-examination para 18 it has been specifically stated by plaintiff that he did not remember whether he has handed over the pro-notes executed by the defendant Prem Narayan or not. According to me, the plaintiff very conveniently is trying to avoid the factum of loan transaction because if the loan transaction did not take place between him and defendant, straightway he should have denied the suggestion that he is not having any pro-notes executed by the defendant but

instead of denying it he avoided by saying that he did not remember whether he has handed-over all the pro-notes to defendant Prem Narayan or not. Not only this Banshilal, witness of plaintiff (PW2) who is the attesting witness of all the subsequent agreements Ex.P/5, P/9 and P/13 has categorically stated in his examination-in-chief itself that at the time of execution of the document Ex.P/5, P/9 and P/13 interaction between the plaintiff and defendant was in regard to payment of money and for its payment the time was sought by defendant by executing the agreements. According to me, when plaintiff's own witness is saying in examination-in-chief that the transaction was of money, the plaintiff is bound by the statement given by his own witness that too in examination-in-chief. Not only this in cross-examination also again this witness (PW2) has reiterated this fact and has deposed that all the agreements (i.e. Ex.P/5, P/9 and P/13) were executed to extend the period of time to pay the amount which defendant took from the plaintiff. According to me, if the transaction between the parties was not of loan why the plaintiff's own witness is admitting that document Ex.P/13 was executed only to extend the time to make the payment to plaintiff by defendant. Thus, it appears and it can be inferred that transaction between the parties was of loan.

17. Unfortunately in the present case although written-statement was filed by defendant Prem Narayan but he could not appear in the Court as he passed away before he could be examined, but his son Rajesh (DW1) has specifically deposed in his testimony that in the year 1978 a sum of Rs.3000/- was obtained by his father from plaintiff towards loan and this fact was told by his father to him being his eldest son. Thereafter, in the year 1980 a sum of Rs.10,000/- was obtained because he wanted to contest the election of MLA and he was in need of money. He also deposed that how the figure of Rs.22,984/- is shown in the document of agreement of sale Ex.P/1 and he has stated that total amount of loan was Rs.13,000/- which his father obtained from plaintiff and if by calculating the future interest of three year which was agreed by them a figure of Rs.22984/- would come and therefore this amount has been shown as advance money in the document of agreement of sale. He has also deposed that since he is eldest son of his father the factum of obtaining loan was stated to him by his father and therefore according to me from the plaintiff's evidence only it can be inferred on the basis of preponderance and probabilities that the transaction between the parties was of loan and not of sale.

18. Learned Trial Court in para 14 of its judgment has simply narrated that part of evidence of Banshilal (PW2) who is the attesting witness to the

documents (Ex.P/5, P/9 and P/13) that plaintiff and defendant Prem Narayan were interacting on the point of payment of money, but, the Court has not marshalled this evidence vis-a-vis to the evidence of plaintiff and defendant. The learned Trial Court has not considered and marshalled the material evidence of plaintiff which has come during his cross-examination para 18 which I have already mentioned hereinabove that plaintiff has very conveniently tried to avoid to give specific answer that he did not remember whether he handed over the pro-notes to the defendant Prem Narayan or not. I would like to quote the said piece of testimony of para 18 of the plaintiff which reads thus "मैंने प्रेमनारायण को कर्ज बाबत् समय–समय पर पत्र नहीं लिखें। मुझे ख्याल नहीं कि मैंने प्रेमनारायण को उसके प्रोनोट वापिस किये थे कि नहीं....."(I did not write letters from time to time regarding loan to Prem Narayan. I do not remember whether I handed-over the pro-notes to Prem Narayan or not). At this juncture only, I would like to quote that part of examination-in-chief of plaintiff's witness Banshilal (PW2) as well as his cross-examination wherein the transaction was of loan has been stated by him, "मेरे सामने दोनों में पैसे के लेन–देन की बात हुई थी, जिसके संबंध में तारीख बढ़ाने बाबत् यह लिखा–पढ़ी तीन बार की गई थी।" (in my presence both of them were interacting in respect to payment of money and thrice the documents were executed for extension of time of payment of money). The same version he has given in the cross-examination also that तीन बार ऐसा हुआ था कि प्रेमनारायण द्वारा लिये गये पैसे की अवधि बढ़ाने के लिए लिखा–पढ़ी की गई। इसके अलावा और कोई बात नहीं हुई। (for three times the documents were executed to extend the period for payment of money and accept this no other conversation took place between the parties). This piece of material evidence going to the root of the matter has not been properly considered and marshalled vis-a-vis to the statement of plaintiff and his witness Banshilal (PW2). Learned Trial Court has paid heed simply on the statement of Rajesh (DW1) who is son of deceased-defendant who has deposed that pro-notes were got executed by the plaintiff, but, when and in whose presence it was written there is no evidence of defendant. According to me, the entire episode is to be visualized by keeping in mind that what actually transpired between the parties. The original defendant Prem Narayan has passed away before his evidence could be recorded. Therefore, certainly the son of defendant Prem Narayan was not in a position to depose all the facts and the conversation which actually took place between his father Prem Narayan and plaintiff. However, I do not find any ground to disregard his evidence that being the eldest son his father told him about receiving of the loan from plaintiff. In the present case the interesting feature is that the case of defendant is proved from the evidence of plaintiff

and his witness Banshilal who is attesting witness of all the three agreements (Ex.P/5, Ex.P/9 and Ex.P/13). In these state of affairs, it can be inferred that transaction between the parties was of loan and defendant never intended to sell the house in question to the plaintiff. In the entire judgment of learned Trial Court while deciding issues from 1(a), 1(b), 2, 3, 4 and 5 from para 10 to 30, narration of evidence has been stated and also the execution of the document of agreement of sale Ex.P/1 and other agreements as well as other documents in regard to sending notice etc. have been mentioned. Looking to the pleadings and evidence, the execution of documents is not at all disputed. Learned Trial Court has paid heed that defendant Prem Narayan was fully literate person and he was also a Councilor hence certainly he will not sign upon the blank papers or would sign the papers without reading them. The document of agreement of sale (Ex.P/1) is a registered document. The contention of learned counsel for plaintiff-first respondent appears to be correct that the deceased defendant would not sign the blank papers or before signing the documents he would not read them. According to me, although deceased defendant Prem Narayan signed the documents but the real intention between the parties was clear between them that the transaction was of loan only and defendant never intended to execute the sale-deed.

19. Learned Trial Court as well as learned counsel for plaintiff-respondent no.1 has put much emphasis on Ex.P/20 which is a certified copy of the order-sheet in Civil Suit No.35-B/1979 of the Court of First Civil Judge, Class-II Hoshangabad between *Gyan Chand v. Prem Narayan and Smt. Dulari Bai.* Indeed Smt. Dulari Bai is wife of Prem Narayan. In the said order-sheet dated 10.03.1981 upon the application filed under Order XXXVIII Rule 5 CPC to get the house attached it was stated by Prem Narayan that defendant has agreed to sell this house to present plaintiff. Thus, according to learned counsel for plaintiff-respondent no.1 this amounts to admission of defendant that transaction between the parties was to execute the sale-deed and not the loan transaction. To me, the admissions are always not conclusive and it may be explained also. Certainly defendant Prem Narayan who was also defendant in the suit filed by Gyan Chand in order to save his skin and to come out from the clutches of attachment of house before judgment must have stated that house in question has been agreed to be sold to present plaintiff. But, this admission of plaintiff is to be tested on the touchstone and anvil of the present scenario upon the documentary and oral evidence of the present case. Apart from this, document Ex.P/20 was not confronted to defendant Rajesh (DW1)

in his crossexamination. Hence, no reliance can be placed upon Ex.P/20 in this suit.

20. It is matter of common parlance that if immovable property that too a house is to be purchased certainly the intending purchaser would see and examine the property which he is purchasing in order to ascertain whether he is paying right price for the said house or not. But, in the present case the plaintiff before entering into the agreement of sale neither at that time nor later on saw the house of the defendant Prem Narayan. In cross-examination para 15 he has admitted thatlength, width and dimension of the house in question, he does not know. According to him, who has prepared the plaint map, he cannot say. Further he has stated that who has measured the dimension while preparing the plaint map he cannot say. This witness is unable to state that what is the length and width of house from east to west and north to south. Further has stated that he has seen the hotel (restaurant) on the frontage of the suit house but has not seen the rear side of the house. He has further admitted that on the date of agreement of sale also he did not see the house. He cannot say house in question consists of two big rooms and six small rooms. House in question might be having latrine, bathroom and open verandah. To me, surprisingly the plaintiff is purchasing a house but without inspecting it he has agreed to purchase the house which is highly unnatural and thus it can be inferred that real intention of plaintiff was not to purchase the house in question and defendant Prem Narayan never intended to sell his house to plaintiff.

21. For the reasons stated hereinabove, point No.(i) is decided that transaction between the parties was of loan and defendant never intended to sell the disputed house to the plaintiff. Point No.(ii) is decided that the subsequent agreements (Ex.P/5, Ex.P/9 and P/13) are the documents of extension of time to repay the loan amount and not to extend period of time to get the sale-deed executed. Both these points are decided against the plaintiff-respondent no.1.

Regarding Point No.(iii)

22. The burden of proof was on defendant to prove that on 17.04.1980 when the document of agreement of sale (Ex.P/1) was executed the valuation of house in question was Rs.2 lac and not Rs.25,000/- which is sale consideration mentioned in Ex.P/1. The defendant Prem Narayan unfortunately passed away before he could be examined in the Court and thus on behalf of defendant Rajesh (DW1) who is eldest son of Prem Narayan has been

examined. This witness has categorically proved the pleadings pleaded by defendant Prem Narayan in his oral testimony and by other documentary evidence and also by cross-examining the plaintiff and his witness in this regard. Thus, this Court is required to see whether the value of the house in question on the date of agreement of sale was Rs.25,000/- or it was Rs.2 lac as per the case of defendant. In para 4 of the examination-in-chief Rajesh (DW1) has deposed that in the year 1980 the valuation of his house must be between Rs.2.75 lac or Rs.3 lac. In cross-examination para 7 this witness has stated that in between year 1980 and 1982 the rate of open plot upon the main road was Rs.40-45 to Rs.70/- per square feet. At this juncture only, I would like to mention that it is borne out from the pleadings and evidence placed on record that house in question is a double-storeyed house and the plot area according to plaint map is 90x19.4 feet. It is a pakka constructed house having two shops on the frontage and the disputed house is on the main road. In between two shops which are on the front side of disputed house, there is a space of entrance to go inside the residential house. The residential portion consists of one hall, three rooms, three verandahs, latrine and bathroom on the ground floor and on the first floor there are five rooms and two open verandahs. In this regard para 1 of the testimony of Rajesh (DW1) may be seen.

23. During the cross-examination, the suggestion has been given to the plaintiff that the house in question would fetch Rs.2 lac in the year 1980, although this suggestion has been denied by him, but, the plaintiff was further cross-examined on this point and he has very conveniently tried to avoid and admit the factum of valuation of house in question. He has simply stated by trying to sweep and avoid the crossexamination that valuation of the suit house which he has said to be Rs.25,000/- is based upon approximation. Defendant Rajesh (DW1) has examined Pratap Singh (DW2) and Ram Singh (DW4) in order to prove the fact that the valuation of disputed house was much high. The house of DW2 is in the same locality. According to him, he has seen the house of defendant Prem Narayan which is located on the main road. This witness has purchased a plot adjacent to the disputed house of defendant from Narottam Rao. His plot area is 1055 sq. feet which he purchased in the year 1985 for a consideration of Rs.20,000/-. It be noted that plot area of defendant's house as mentioned in Ex.P/1 is 1740 sq. feet. This witness has also proved his sale-deed Ex.D/1. This witness has further stated that when he bought his plot at that juncture the double storeyed house of Prem Narayan

was already there. In the sale-deed Ex.D/1 of this witness on the eastern side the house of Prem Narayan (defendant) has been shown. On bare perusal of the sale-deed of this witness and the map attached to it this Court finds that from main road frontage of plot of this witness is only 12 feet while frontage of defendant's house is 19.4 feet. Thus, the evidence of this witness is having higher credential value and it can be inferred that in the year 1980 when the plot area of the defendant was near about double of the area of the plot of this witness, its value must be at-least Rs.25,000/- because on 19.08.1985 when this witness purchased the plot of 1055 sq. feet its valuation was Rs.20,000/-. DW2 further says that after purchasing the plot he constructed the ground floor in which he incurred a sum of Rs.1.50 lac consisting of four rooms, kitchen, latrine and bathroom.

24. Defendant has also examined Ram Singh (DW4). This witness has purchased a house from plaintiff and his brother Ramdayal situated at Kothi Bazaar on 19.11.1984. According to this witness, the said house was purchased by him for Rs.40,000/- vide registered saledeed (Ex.D/2). But, this house is a single-storeyed and roof is not *Pakka* and is made of *Khaprel* (earthen tiles). The plot area in which house is constructed is only 14x44 feet (total area 616 sq.feet). This witness has specifically stated that he has seen the house of defendant Prem Narayan which is on main road while house purchased by him in the name of his wife Shakuntala is not on main road. This witness has further deposed that disputed house is double-storeyed and *Pakka.* In cross-examination this witness has admitted that the house which has been purchased by him in the name of his wife is inside the gali (lane).

25. The plaintiff has also examined Mukesh Shrivastava (DW3) who is a builder and is running his business in the name and style "M/s.Prabhat Constructions". According to this witness defendant Prem Narayan was known to him and he has also seen disputed house which is double-storeyed *pakka* house. According to this witness house is constructed in the area 1700 sq.feet and its cost at-present on the date of deposition (04.05.1995) was Rs.7.5 lac. He has categorically stated that 15 years ago the valuation of the suit house must be Rs.2.50 lac. This witness has been examined as an expert. In cross-examination he has admitted that he is a designer and is also performing the business of valuation of the house. He has further admitted that he is doing business of designing, valuing the house, lands etc. and also carrying the business of construction. Thus, according to me, evidence of this witness is having great weightage.

26. From the aforesaid analysis and marshalling of evidence, the point no.(iii) is decided that value of the house in question on 17.04.1980 was not less than Rs.2 lac and it would never fetch the value of Rs.25,000/- on the date of document of the execution of agreement of sale (Ex.P/1). This point is also decided against the plaintiff-respondent no.1.

Regarding point No.(iv) :

27. According to Section 20 (1) of the Specific Relief Act a decree of specific performance is a discretionary relief and Court is not bound to grant such relief merely on its asking. No doubt it is true that discretion is to be exercised on the basis of sound and reasonable grounds and not in a arbitrary manner. In sub-section (1) itself the powers have been vested in the Appellate Authority also to examine whether discretion has been exercised on sound and reasonable reasonings guided by judicial principle and further the said discretion exercised by Trial Court is capable of correction by the Appellate Court. On bare perusal of Section 20(2) (a) of the said Act this Court finds whether terms of contract and conduct of the parties at the time of entering into contract or the other circumstance under which the contract was entered into are such that the contract though not voidable, gives the plaintiff an unfair advantage over the defendant. If this provision is tested on the touchstone and anvil of the pleadings and evidence of the present case it would reveal that specific case of the plaintiff is that defendant is in need of money to contest the election. The case of defendant is that there was a loan transaction between the parties and he never intenteded to sell his house which is double-storeyed house situated on the main road having high valuation of Rs.2 lac on 17.04.1980. Since the defendant was in need of money, therefore, the plaintiff took an unfair advantage over the defendant. I have already held hereinabove by marshalling the evidence that the defendant never intended to sell the house and the transaction between the parties was of loan. Further I have already held that valuation of house on 17.04.1980 was not Rs.25,000/- but it was Rs.2 lac or even more and therefore in these facts and circumstances sub Clause (a) to subsection (2) of Section 20 of the said Act is squarely applicable in the present case and so also clause (c) of sub-section (2) to Section 20 which speaks as to whether the defendant entered into a contract under the circumstance which though not rendering the contract voidable makes it inequitable to enforce specific performance. To me, in the facts and circumstances it is inequitable to pass a decree of

specific performance of contract of a property which was having valuation of Rs.2 lac on 17.04.1980 to be sold for a meagre amount of Rs.25,000/- particularly when it is proved that the transaction was of loan and defendant never intended to sell the disputed house. According to me, the Court should take care to see that the agreement should not be used as an instrument of oppression to have an unfair advantage to the plaintiff. In this context I may profitably place reliance upon two decisions of Supreme Court *Bal Krishna and another v. Bhagwan Das (dead) by LRs and others* (2008) 12 SCC 145 and *Parakunnan Veetill Joseph's Son Mathew v. Nedumbara Kuruvila's Son and others,* 1987 (Suppl.) SCC 340. In para 14 of the decision of *Bal Krishna* (supra) it has been held by Supreme Court that section 20 of the Specific Relief Act gives a discretion to the Court and Court is not bound to grant the relief of specific performance merely because it is lawful to do so. The exercise of discretion should be based upon equitable grounds and while considering the discretion the Court would certainly take into consideration the circumstances of the case, the conduct of the parties and their respective interest under the contract. The Supreme Court further held that decree of specific performance of contract will not be granted even if the contract is not misrepresented by fraud, if it would give unfair advantage to plaintiff and would give undue hardship to defendant. It would be profitable to reiterate para 14 of the said decision which reads thus;

> 14. It is also settled by various decisions of this Court that by virtue of Section 20 of the Act, the relief for specific performance lies in the discretion of the court and the court is not found to grant such relief merely because it is lawful to do so. The exercise of the discretion to order specific performance would require the court to satisfy itself that the circumstances are such that it is equitable to grant decree for specific performance of the contract. While exercising the discretion, the court would take into consideration the circumstances of the case, the conduct of the parties, and their respective interests under the contract. No specific performance of a contract, though it is not vitiated by fraud or misrepresentation, can be granted if it would give an unfair advantage to the plaintiff and where the performance of the contract would involve some

> hardship on the defendant, which he did not foresee. In other words, the court's discretion to grant specific performance is not exercised if the contract is not equal and fair, although the contract is not void.

In this case the Trial Court decreed the suit for specific performance of contract but High Court dismissed the suit reversing the decree and the Supreme Court has upheld the decision of High Court.

28. In *Parakunnan Veetill Joseph's Son Mathew* (supra) the Trial Court denied the relief of specific performance of contract but decreed the suit only to return the advance money in addition to damages for a sum of Rs.5625/-. But, in appeal to the High Court, judgment was reversed and it was directed to convey the suit property and transfer possession thereof. The Supreme Court allowed the appeal and reversed the judgment of High Court and restored that of Trial Court. In para 14 the Supreme Court has held that Section 20 of the Specific Relief Act preserves judicial discretion of courts as to decreeing specific performance. The Supreme Court further held that the Court should meticulously consider all facts and circumstances of the case and the Court is not bound to grant specific performance merely because it is lawful to do so. The Supreme Court has further held that motive behind the litigation should also enter into judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have unfair advantage to the plaintiff. In the present case, the motive part of defendant is proved that he was in need of money and therefore he took loan from the plaintiff and unfair part of plaintiff is that he executed the document of agreement of sale which is although not void or voidable but would give unfair advantage to him to purchase the property having valuation in the year 1980 Rs.2 lac for a meagre amount of Rs.25,000/- only.

29. In the aforesaid decision *Bal Krishna* (supra) in para 14 it has been held by the Apex Court that while exercising discretion theCourt should take into consideration the circumstances of the case respective interests and also the conduct of the parties. In the present case throughout from the beginning conduct of the plaintiff is quite unfair and this I have already held hereinabove by marshalling oral and documentary evidence vis-a-vis to evidence of witnesses of the parties. One peculiar fact which I would like to mention here that conduct of the plaintiff is

also not fair rather it is unfair because in examination-in-chief he has deposed that attesting witness to the material document which is the foundation stone of the case i.e. agreement of sale dated 17.04.1980 (Ex.P/1) its attesting witnesses Shankar Singh and Dhanpal Singh are dead but his evidence is false because an affidavit of Shankar Singh has been filed in this Court wherein he has specifically stated that he is still alive and it has been incorrectly stated by the plaintiff that he is dead. Unfortunately the said witness has also died later on 30.07.2009 and his death certificate is also filed. The plaintiff-respondent no.1 was not having any courage to rebut the said affidavit. Thus, the conduct of the plaintiff is also quite unfair and it can be inferred that attesting witness to document Ex.P/1 was not examined by the plaintiff with uttermost object that if he would have been examined he would have deposed the truth that transaction was of loan and not to execute the sale-deed. I have already marshalled the evidence hereinabove but, at the cost of repetition I must say here again that Banshilal (PW-1) who has been examined by plaintiff not only in his examination-in-chief but in cross-examination has stated that subsequent agreements were in respect of extending time to repay the loan amount.

31. Thus, point No.(iv) is also decided against the plaintiff. It is hereby held that while exercising the power under Section 20(1) of Specific Relief Act this Court as Appellate Court, it would not be lawful to pass a decree of specific performance of contract. However, the plaintiff is entitled to a decree of refund of advance amount of Rs.22,984/- with interest @6% per annum from the date of passing of decree by the Trial Court which is 4.8.1995.

32. *Ex consequenti,* this appeal succeeds in part and is hereby allowed. The judgment and decree passed by learned Trial Court is hereby set aside and the suit of the plaintiff is decreed only to the extent of refund of money of advance as indicated hereinabove.

33. In the facts and circumstances of the case, the application (I.A. No.13388/2012) under Order XLI Rule 27 CPC is not being decided.

34. Looking to the facts and circumstances, the parties are directed to bear their own costs.

Appeal allowed.

I.L.R. [2013] M.P., 1639
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
F.A. No. 166/2011 (Gwalior) decided on 22 February, 2013

RAMDEVI (SMT.) & anr. ...Appellants
Vs.
MADHYA PRADESH VIDYUT MANDAL & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Section 96 - Death by Electrocution - Deceased came in contact with loose and hanging live wire -Compensation - **In order to decide the just and proper compensation or sum of damages, the court is bound to adopt the practical approach - If specific provision, rule, regulation or guideline is not available, the court may borrow the provision of some other enactment to assess the compensation amount. (Para 10)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 96 – विद्युत आघात से मृत्यु – मृतक खुले और लटकते हुए विद्युत प्रवाहित तार के सम्पर्क में आया – प्रतिकर – न्यायसंगत एवं उचित प्रतिकर या क्षतिपूर्ति की राशी निर्धारित करने हेतु, न्यायालय व्यावहारिक दृष्टिकोण अपनाने के लिए बाध्य है – यदि कोई विनिर्दिष्ट उपबंध, नियम, विनियमन या दिशानिर्देश उपलब्ध नहीं है तब न्यायालय, प्रतिकर की रकम निर्धारित करने के लिए किसी अन्य अधिनियमिती का उपबंध लागू कर सकता है।

B. Law of Torts - Strict Liability - Negligence of Servant or employee - **Respondent or company can not escape from the liability on any count. (Para 11)**

ख. अपकृत्य विधि – कठोर उत्तरदायित्व – सेवक या कर्मचारी द्वारा उपेक्षा – प्रत्यर्थी या कंपनी किसी भी स्थिति में उत्तरदायित्व से नहीं बच सकता।

Case referred :

(2009) 6 SCC 121.

Ravi Gupta, for the appellants.
Rajendra Bhargava, for the respondents.

ORDER

U.C. MAHESHWARI, J: The appellants/ plaintiffs have filed this appeal under section 96 of the CPC, for enhancement of the sum decreed by the Ist

ADJ, Pichhore district Shivpuri in COS No.5-B/09 vide judgment dated 19/1/2011 whereby their suit for damages and compensation of Rs.3 lacs in respect of electrocution death of Chimanlal Gupta, the husband of appellant No.1 while father of appellant No.2, has been decreed against respondents No.1 to 5 only for the sum of Rs.75,000/- along with interest at the rate of 6% per annum from the date of filing the suit with a direction to pay such decreetal sum jointly and severally by such respondents.

2. The facts giving rise to this appeal in short are that the appellants herein being wife and son of deceased Chimanlal by impleading respondent No.6 and 7 the mother and daughter of deceased Chimanlal, have filed the impugned suit for damages and compensation of Rs.3,00,000/- along with interest and cost contending that on dated 1.4.08 at about 6 O' Clock in the morning said Chimanlal went at the back of his residence to answer the call of nature where due to negligence of the officials of the respondent/ electricity board, the live electricity line of 11 KV being loose was hanging. /Due to such situation, he came into the contact of such hanging electric line and after sustaining the electric current died on the spot. This incident was reported to the Police Chowki Himmatpura, PS Pichhore, on which, a marg intimation was registered under section 174 of the Cr.P.C. After holding the inquiry of such inquest intimation, an offence under section 304-A of the IPC was registered against respondent No.5 Hariram, the Lineman of the respondent-Board. After holding the investigation, he was charge sheeted for his prosecution before the criminal court. Such criminal case is still pending. Before happening the alleged incident, a complaint in writing with the signature of the villagers in the shape of Panchnama was also given to the aforesaid Lineman respondent No.5, inspite of that such wire was not repaired. On account of such negligence, the alleged incident was happened in which aforesaid Chimanlal died and for that respondents are jointly and severally liable to pay the compensation. In further averments it is stated that at the time of death deceased Chimanlal was working as Asst.Teacher in the Govt. Primary School, Gouchoni, Pichhore and after requisite necessary duductions, he was getting Rs.13646/- per month as monthly salary and the appellants as well as respondents No.6 and 7 were dependent on him. On account of his untimely death in the alleged incident, the appellants as well as the respondent No.6 and 7 suffered the mental agony of the incident. Besides this, the appellant No.1 has also lost the company of her husband and they have also lost the earning member. It is further stated that appellants do not have any source of

income and, in such premises, the impugned suit initially was filed for Rs.6,00,000/- but subsequently, till the extent of respondent No.6 and 7, the same was reduced upto 3,00,000/- for the present appellants as compensation along with interest as stated above.

3. In the written statement of respondent No.4, the material averments of the complaint with respect of the alleged incident have been denied. In additional to it, it is stated that the particulars of respondents No.2,3 and 4 have not been correctly mentioned in the suit. The suit has been filed under collusion with the respondent No.6 and 7, as such, the appellants or respondents No.6 and 7 were not dependent on the income of the deceased. In addition, it is stated that one day earlier to the incident, i.e. on 31.3.08 in the night there was heavy storm so due to such act of God, the insulator got burst consequently the wire was broken and the same was hanging till the next morning. It is further stated that the complaint regarding breaking and hanging of electric wire was not received by the respondents/authorities within time so, in the lack of such information, repairing was not possible and, in such premises, it could not be said that any negligence was committed by the respondent board or its officials in maintaining the aforesaid line. In such premises, it is stated that the respondents-board or its officials are not liable to pay any compensation as prayed by the plaintiffs or respondent No.6 and 7. The inquest report was also lodged on the false averments. The police case was also wrongly registered and respondent No.5 was produced before the court for his prosecution under wrong premises. In addition, it is stated that deceased himself was responsible for the incident because at about 6 O' clock in the morning there was day time and due to his negligence he came into the contact of the live electric wire. So, in such premises, such liability could not be saddled against the respondents. In addition it is stated that deceased was working in the Govt. school as Asst. Teacher but after his death, his terminal benefits of the service, the sum of insurance and the compassionate appointment was also given to his wife. So, in such premises, the appellants are not entitled for any compensation from the respondents/company and its officials. With these averments prayer for dismissal of the suit was made.

4. After framing the issues and recording the evidence of the parties, on appreciation of the same, by holding that the aforesaid electric line had become loose and was hanging due to improper maintenance of the same by the respondent/company and its officials, it was held that due to such negligence of respondents No.1 to 5, on coming into contact of such electric line after

sustaining the electric current said Chimanlal had died and in such premises, the suit of the appellants was decreed only for 75,000/- along with interest as stated above, on which, appellants have come to this court for further enhancement of such sum and decreeing the suit for the entire sum of Rs.3,00,000/- along with interest as claimed in the plaint.

5. Appellants counsel after taking me through the record of the trial court as well as the impugned judgment argued that on appreciation the trial court held that the deceased was working as Asst. Teacher in Govt. School and after necessary deductions was getting the salary of Rs.13646/- per month. It was held that the deceased died due to negligence of the respondent/ company and its officials in maintaining the above mentioned electric line. In such premises, there was no occasion with the trial court to decree the suit for lesser amount Rs.75,000/- only but, on any calculation, Rs.3,00,000/- was not the sum of higher side. In continuation he said that although there is no rule, regulation or guideline to assess the compensation or the damages but in order to assess the just and proper compensation, treating the death of Chimanlal as accidental death, till some extent, by borrowing the provision and interpretation of Motor Vehicle Act, the compensation could have been assessed by the trial court and, in such premises, on assessing the same even then the compensation comes more than Rs.7,00,000/- for the appellants. In continuation, he said that if 1/3rd of the salary is deducted on the expenses of the deceased which he would have spent, had he been alive, then dependency comes to Rs.9000/- per month, and in such premises, the same comes to Rs. 1,08,000/- per annum and in the light of the age of the deceased as 50 years, on applying the multiplier of 13 as decided by the Apex Court in the matter of *Sarla Verma (smt) and others Vs. Delhi Transport Corporation and another*-(2009) 6 SCC 121, the compensation comes near about 14,00,000/- but the suit was filed only for Rs.3,00,000/- and, in such premises, prayed to enhance the amount and decree the suit for Rs.3,00,000/- in accordance with the plaint by allowing this appeal.

6. The aforesaid prayer has been opposed by the counsel of the respondents saying that the impugned judgment has been passed by the trial court on proper appreciation of the evidence available on record. In continuation he said that in the lack of specific provision, rules, regulation and guideline in this regard, taking into consideration the provision and interpretation of the Motor Vehicle Act, the compensation could not be assessed. He further said that the compensation assessed by the trial court is

just and proper and it does not require further enhancement and prayed for dismissal of this appeal.

7. Having heard, keeping in view the arguments advanced by the counsel, I have carefully gone through the record of the trial court along with the impugned judgment so also the evidence led by the parties and the exhibited documents.

8. In view of the aforesaid discussion, in the absence of any appeal on behalf of the respondent/company or its officials, this court has not to examine or decide the validity of the findings of the impugned judgment according to which it was held that the alleged accident of electrocution in which Chimanlal had died was happened due to negligence of the respondent No.1 and its officials. So, this court has to answer the question whether the quantum of compensation of Rs.75,000/- as decreed by the trial court is sufficient for the appellants or it requires some further enhancement as prayed in the plaint.

9. As per the available evidence, it is undisputed fact that the deceased was working as Asst. Teacher in some Govt. School from where after necessary deduction, he was getting Rs.13,646/- per month and his age was 50 years. It is also undisputed fact from the evidence that respondent No.6 and 7, his mother and daughter along with the appellants wife and son, were dependent on him. So, in such premises, it could be assumed that if he had not died in the alleged accident then he would have helped his family from the aforesaid salary upto the age of his retirement.

10. In order to decide or assess the just and proper compensation or sum of damages, the court is bound to adopt the practical approach and if some specific provision, rules, regulation or guidelines is not available in the special provision or any enactment then in that circumstance, the court may borrow the provision of some other enactment to assess the compensation. For the sake of arguments to assess the reasonable compensation or damages if the provisions of Motor Vehicle Act and its interpretation are taken into consideration then in view the salary of the deceased on the date of the incident Rs.13646/-, in the light of said case of *Sarla Verma* (supra) , on deducting its 1/3rd sum on account of expenses of the deceased which he would have spent on himself had he been alive, then the dependency of the appellants and respondent No.6 and 7 on the deceased comes to Rs.9000/- per month. Accordingly, the annual dependency comes to Rs.1,08,000/- and in view of the aforesaid

case of *Sarla Verma* (supra) on applying the multiplier of 13, the total compensation comes to Rs.14,04,000/-. In the lack of the court fee and also in view of the prayer clause of the suit, the same has not been decreed for respondent No.6 and 7, therefore, if fifty percent amount from the aforesaid sum is deducted on such count then appellants claim comes to Rs.7,02,000/- besides the other expenses but the appellants have filed the suit only for Rs.3,00,000/-. So, in such premises, the impugned decree of the trial court allowing the suit of the appellant only for Rs.75,000/- could not be said to be correct and, in such premises, the impugned decree requires modification by enhancing the sum upto the aforesaid limit but because the suit has been filed only for Rs.3,00,000/-, and the court fees was paid accordingly, therefore, this court is bound to consider the prayer of the appellants only upto the aforesaid maximum limit of the prayer clause of the suit.

11. In the aforesaid premises it is held that the trial court has committed error in decreeing the suit only for Rs.75,000/-. In the available circumstances, as discussed above, the same requires further enhancement upto Rs.3,00,000/- as prayed in the plaint. It is needless to say that on any count the respondents/ company could not escape from the aforesaid liability in view of the principle of strict liability.

12. In view of the aforesaid, by allowing this appeal, the suit of the appellants till their extent is hereby decreed for three lacs as prayed in the plaint along with interest @ 6% per annum from the date of filing the suit. If remaining decreetal amount is not paid by the respondents No.1 to 5 within three months from today then the appellants shall be entitled to get the interest on the remaining sum @ 9% per annum. It is made clear that by this judgment, the sum of the impugned decree has been enhanced from Rs.75,000/- to Rs.3 lacs with the aforesaid interest. The respondents/company and its officials shall bear their own cost as well as the cost of appellants of both the courts. Counsel fees shall be payable in accordance with the schedule, if the same is certified. Till this extent, the impugned judgment and decree is modified while the other findings of the same are hereby affirmed. The decree be drawn up accordingly.

13. The appeal is allowed as indicated above.

Appeal allowed.

I.L.R. [2013] M.P., 1645
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
M.A. No. 755/2013 (Jabalpur) decided on 26 March, 2013

RAM GOPAL & anr. ...Appellants
VS.
HANEEF KHAN & ORS. ...Respondents

***Court Fee (M.P. Amendment) Act, 2012 (3 of 2013), Section 3* - Court Fee on appeals arising out of Motor Accident Claim - Court fee on motor accident appeal which arises out of motor accident claim filed after 2nd of April 2008 shall be payable only @ 2.5% on the enhanced amount. (Para 16)**

न्यायालय शुल्क (म.प्र. संशोधन) अधिनियम, 2012 (2013 का 3) धारा 3 – मोटर दुर्घटना दावे से उत्पन्न अपील में न्यायालय शुल्क – 2 अप्रैल 2008 के पश्चात प्रस्तुत मोटर दुर्घटना दावे से उत्पन्न मोटर दुर्घटना अपील पर न्यायालय शुल्क, बढ़ाई गई रकम पर केवल 2.5 प्रतिशत की दर से देय होगा।

Cases referred :

AIR 1957 SC 540, AIR 1960 SC 980, 1980 MPLJ 801, 2009(4) MPLJ 50, M.A. No. 2110/2008, AIR 1995 SC 1215, (2004) 8 SCC 1.

Kapil Patwardhan, for the appellants.
R.D. Jain, A.G., P.K. Kaurav, Addl. A.G. & A. Namdeo, P.L. for the respondents.

ORDER

M.C. GARG, J. :- This order shall govern in M.A. No. 1283/2011, M.A.No. 2545/2011., M.A.No. 2551/2011, M.A. No. 2556/2011, M.A No. 2562/2011, M.A.No. 2564/2011, M.A. No. 2566/2011, M.A.No. 2573/2011, M.A.No. 3593/2011, M.A. No. 4873/2011, M.A.No. 30/2012, M.A.No. 33/2012, M.A.No. 34/2012, M.A.No. 36/2012, M.A.No. 38/2012, M.A.No. 45/2012, M.A.No. 1492/2012, M.A.No. 2452/2012, M.A.No. 642/2013, M.A.No. 668/2013, M.A.No. 669/2013, M.A.No. 671/2013, M.A.No. 672/2013, M.A.No. 673/2013, M.A.No. 674/2013, M.A.No. 675/2013, M.A.No. 676/2013, M.A.No. 679/2013, M.A.No. 680/2013, M.A.No. 687/2013, M.A.No. 688/2013,

M.A.No. 689/2013, M.A.No. 690/2013, M.A.No. 692/2013,
M.A.No. 693/2013, M.A.No. 696/2013, M.A.No. 699/2013,
M.A.No. 700/2013, M.A.No. 701/2013, M.A.No. 704/2013,
M.A No. 705/2013, M.A.No. 707/2013, M.A.No. 709/2013,
M.A.No. 710/2013, M.A.No. 711/2013, M.A.No. 712/2013,
M.A No, 713/2013, M.A.No. 715/2013, M.A.No. 724/2013,
M.A.No. 725/2013, M.A. No.726/2013, M.A.No. 733/2013,
M.A.No. 734/2013, M.A. No.735/2013, M.A.No. 737/2013,
M.A.No. 738/2013, M.A. No.739/2013, M.A.No. 740/2013,
M.A.No. 741/2013, M.A. No.743/2013, M.A.No. 744/2013
M.A.No. 745/2013, M.A. No.746/2013 M.A.No. 747/2013
M.A.No. 748/2013, M.A.No.751/2013, M.A.No. 756/2013,
M.A.No. 757/2013, M.A.No.758/2013, M.A.No. 759/2013,
M.A.No. 761/2013, M.A.No.763/2013, M.A.No. 764/2013,
M.A.No. 766/2013, M.A.No.769/2013, M.A.No. 770/2013,
M.A.No. 773/2013, M.A.No.774/2013, M.A.No. 776/2013,
M.A.No. 777/2013, M.A.No.778/2013, M.A.No. 779/2013,
M.A.No. 780/2013, M.A.No.781/2013, M.A.No. 783/2013,
M.A.No. 784/2013, M.A.No.785/2013, M.A.No. 786/2013,
M.A.No. 787/2013, M.A.No.788/2013, M.A.No. 790/2013,
M.A.No. 792/2013, M.A.No.793/2013, M.A.No. 794/2013,
M.A.No. 795/2013, M.A.No.797/2013, M.A.No. 798/2013,
M.A.No. 800/2013, M.A.No.801/2013, M.A.No. 804/2013,
M.A.No. 805/2013, M.A.No.806/2013, M.A.No. 807/2013,
M.A.No. 810/2013, M.A.No.811/2013, M.A.No. 812/2013,
M.A.No. 813/2013, M.A.No.814/2013, M.A.No. 816/2013,
M.A.No. 817/2013, M.A.No.818/2013, M.A.No. 819/2013,
M.A.No.821/2013, M.A.No.823/2013, M.A.No. 824/2013,
M.A.No.825/2013, M.A.No.826/2013, M.A.No. 830/2013,
M.A.No. 237/2011, M.A.No.365/2013, M.A.No. 47/2012
M.A.No. 51/2012, M.A.No. 56/2012, M.A.No. 60/2012,
M.A.No. 61/2012, M.A.No. 62/2012, M.A.No. 63/2012,
M.A.No. 64/2012, M.A.No. 66/2012, M.A.No. 67/2012,
M.A.No. 69/2012, M.A.No. 73/2012, M.A.No. 75/2012,
M.A.No. 76/2012, M.A.No. 77/2012, M.A.No.789/2013,
M.A.No. 822/2013, M.A.No. 827/2013, M.A.No. 828/2013,
M.A.No. 829/2013, M.A.No. 831/2013, M.A.No. 832/2013,
M.A.No. 833/2013, M.A.No. 834/2013, M.A.No. 835/2013,

M.A.No. 836/2013, M.A.No. 838/2013, M.A.No. 840/2013,
M.A.No. 842/2013, M.A.No. 843/2013, M.A.No. 844/2013,
M.A.No. 845/2013, M.A.No. 847/2013, M.A.No. 852/2013,
M.A.No. 855/2013, M.A.No. 857/2013, M.A.No. 858/2013,
M.A.No. 859/2013, M.A.No. 860/2013 & M.A.No. 78/2012.

2. Arguments heard on the question as to what amount of Court Fee is payable on an appeal filed under Section 173 of the Motor Vehicles Act for enhancement of compensation against the award passed by the Motor Accident Claims Tribunal after the amendment of the II Schedule of the Court Fees Act, 1870 in its application to the State of Madhya Pradesh.

3. It has been argued on behalf of the learned counsel for the appellants that after coming into force of the Second Amendment in the Court Fees Act by way of Madhya Pradesh Amendment Act therein vide Court Fees (Madhya Pradesh) Amendment Act, 2012, the Court fee on appeal flied in the year 2013 arising out of an accident claim case except for those accidents claim case filed prior to 2nd of April, 2008 is payable only @ 2.5% and not @ 10% as was contemplated in the first State Amendment of the Court Fees Act by the State of Madhya Pradesh vide first amendment., i.e. the Court Fees (MP) Amendment Act, 2008.

4. I have also heard the learned Advocate General. According to him, the Court Fee on the appeal for enhanced compensation is payable according to the date of filing of the accident claim that is to say, if the claim has been filed prior to 2nd April, 2008 then the fixed Court Fee of Rs.30/- is payable, however if the claim has been filed after 2nd April, 2008 and between 9th January, 2013 then the Court Fee shall be payable @ 10% of the enhanced claim. However, if the claim has been filed after 9th January 2013, the Court Fee shall be payable @ 2.5% of the claim amount. He has relied upon the following judgments; -

AIR 1957 SC 540

AIR 1960 SC 980

1980 MPLJ 801 (Para-4)

2009 (4) MPLJ 50

5. It is submitted that the first amendment was incorporated on 2nd April, 2008 requiring 10% of the Court Fee on the difference amount awarded by

the Claims Tribunal and that claimed in the appeal, from 2013 by virtue of the second amendment, to be of the fee be reduced, but the term substituted in the second amendment will not change the law, which was in force prior to the amendment.

6. I have considered the judgment cited by the learned Advocate General. In the case of *Garkapati Veeraya V Subbiah Choudhry and others* [AIR 1957 SC 540] the Hon'ble Supreme Court had considered the right of appeal and in this regard it has been submitted that the right of the appeal is vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date of 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. It has been held, that the vested right of appeal cannot be taken away. In the present case the issue is not about the right to appeal but is about the Court Fee payable on the appeal.

7. In the second judgment in the case of *State of Bombay Vs. M/s Supreme General Films Exchange Ltd.* [AIR 1960 SC 980] the issue involved was claim of enhanced Court Fee on a claim filed prior to coming into force of the notification enhancing the Court Fee. In that context the Hon'ble Supreme Court made the following observation: -

> "In *Anand Ram Pramhans and others v. Ramgulam Sahu*, AIR 1923 Pat 150, the question which was mooted and discussed related to the proper presentation of a memorandum of appeal, and incidentally it was observed that the new Bihar and Orissa Court Fees Act which had already come into force applied to the case. There was no discussion of the question as to whether the enactment in question was given retrospective effect or not. As to the decision in ILR 1941 All 558: (AIR 1941 All 298) on which so much reliance has been placed by the appellant, it is necessary to point out that the question there was if the right of appeal created by S. 6A of the Court Fees Act, which was added by U. P Act, XIX of 1938, was available as against an order passed after the coming into force of the latter Act, although that Act was not in existence and consequently there was no right of appeal at the date of filing

that plaint. It was held that the enactment, by the amending Act of 1938, of S. 6A which allowed an appeal against an order demanding the payment of a deficiency in court fees did not take away any right which was vested in the plaintiff on the date on which he filed the plaint, it only conferred on him a new right; nor did it take away any right which was vested in the defendant, for though the defendant could object if the plaint was not properly stamped and might also have a right to have the matter determined by the court he had no vested right in the procedure by which it was to be determined, and this procedure could be changed pending the suit and a change in procedure could not be said to deprive him of any vested right. It would appear from what has been stated above that the decision proceeded on the footing that the amending Act conferred a new right of appeal, and not that it took away a vested right of appeal; and the reason of the decision was based on the principle that there is no vested right in the procedure by which the sufficiency of court fees is determined by a court. That is a principle of a different character from the one we are concerned with in the present case, viz., the retrospective effect of a subsequent enactment which either takes away a right of appeal or impairs it by imposing a more stringent or onerous condition thereon. We do not, therefore, think that the Allahabad decision helps the appellant."

8. Now, coming to the judgment of this Court the Division Bench of this Court in the case of *Fatehchand V. Land Acquisition and Rehabilitation Officer and others* 2009 (4) M.PL.J. 50] where the question of amendment in Court Fees Act has been considered, the Court has opined that with respect to Court Fees Act, the amendment which reduces the Court Fees without there being anything said in the amendment that it will be retrospective will permit the Court Fees payable at an amount provided for by the amendment even with respect to a claim filed earlier.

Paragraphs- 8, 9 and 13 are applicable, which are as under: -

"8. As per this amendment in a suit or in an appeal, the maximum limit of Rs.1,50,000/- has been provided, but the entire Amendment Act does not provide that this amendment shall

be retrospective in nature, in absence of which it should be treated as prospective in nature.

"9. The Apex Court has an occasion to consider this aspect in *Supreme General Films Exchange Ltd.* (supra). The Apex Court considering this aspect held thus: -

"Where a suit is filed prior to 01.04.1954, on which the Court-Fees (Bombay Amendment) Act, 1954, levying enhanced Court-fees, came into force, in the absence of provisions giving retrospective effect to the amendments, the Court-fees payable on the memorandum of appeal filed after the relevant date (1.4.1954) are payable according to the law in force at the date of filing of the suit (which was prior to the relevant date) and not according to the law in force at the date of the filing of the memorandum of appeal (which was after the relevant date:; (S) AIR 1955 Bom 332, Affirmed.

It is thus clear in a long line of decisions approved by this Court and at least in one given by this Court, it has been held that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition is not a matter of procedure only; it impairs or imperils a substantive right and an enactment which does so is not retrospective unless it says so expressly or by necessary intendment.

We are, therefore, of the view that the High Court was right in the view it took, and the orders of refund of excess Court fees which it passed were correct in law."

9. In the present case, the second amendment reads as under: -

"MADHYA PRADESH ACT

NO.3 OF 2013

THE COURT-FEE (MADHYA PRADESH AMENDMENT) ACT

2012

(Received the assent of the Governor on the 8th January, 2013, assent first published in the "Madhya Pradesh Gazette (extra ordinary)", dated the 9th January, 2013.)

An Act further to amend the Court-fee Act, 1870 in its application to the State of Madhya Pradesh,

Be it enacted by the Madhya Pradesh Legislature in the Sixty- third year of the Republic of India as follows:-

1. This Act may be called the Court-fee (Madhya Pradesh Amendment) Act, 2012.

2. The Court-fees Act, 1870 (No.VII of 1870) (hereinafter referred to as the principal Act), in its application to the State of Madhya Pradesh be amended in the manner hereinafter provided.

3. In Schedule II to the Principal Act, in article 11, in clause (a), in sub-clause (i), in the column pertaining to proper fee, for the words "Ten percent of the enhanced amount claimed in appeal", the words "Two and one half percent of the enhanced amount claimed in appeal subject to a maximum of "one lac rupees" **shall be substituted.**"

10. In this peculiar situation where the second amendment has substituted the word 10% to 2.5%, the question arise as to what shall be the Court Fee payable on appeal, irrespective of the fact that the accident claim was filed after 2nd April, 2008 or after 9th January, 2013.

11. As per the Division Bench Judgment of this Court delivered in the case of *Smt. Supriya Kathane and others Vs. Shri Lal Singh and others,* [M.A. No.2110/2008], despite the amendment brought in by the State of Madhya Pradesh in the Court Fee Act applicable to the State of Madhya Pradesh, with respect to any appeal which arose out of the accident claim filed prior to 2nd April, 2008, the Court Fee @ Rs.30/-, which was payable is as per the original schedule irrespective of the fact that the appeal was filed after 2nd April 2008 and prior to 9th January 2013.

12. However, after coming into force of the amendment by the State of Madhya Pradesh, the Court Fee @ 10% becomes payable on an appeal filed for enhancement of the amount of award passed by the Motor Accident Claims

Tribunal in a case which was instituted after coming into force of the Madhya Pradesh Amendment enhancing the Court Fee payable on the enhanced amount claimed in the appeal @ 10% w.e.f. i.e. the date, the amended provision came into being i.e. w.e.f. 02.04.2008 would be payable.

13. It is the matter of record that the aforesaid judgment is now subject matter of a review before the Division Bench of this Court in terms of the directions given by the Hon'ble Supreme Court.

14. It may be observed here, that in the second amendment there is no provision for enhancing the Court Fee on the accident claim case. In fact, the Court fee payable on appeal is substituted @ 2.5% instead of 10%. Thus, it is the contention of the appellants that if appeal arises even with respect to accident claim filed either after 2nd April, 2008 or after 9th January, 2013 while, the Court Fee on the original claim amount is fixed but the Court Fee payable on an appeal on account of the amendment of the Act, becomes payable only @ 2.5%. Moreover, the Motor Vehicles Act, is a welfare legislation, any benefit granted by the statute must be reached in such a manner that it confers benefit to the poor litigant, who are coming to the Court for redressal of the grievance for obtaining accident claim. It was in the light of that schedule, Court Fee on appeal was only payable @ Rs.30/-. Using the word, "substituted" from 10% to 2.5% also reflects to the intention of the Legislature. In this regard my attention was brought to the judgment of the Hon'ble Supreme Court in the case of *Dahiben* widow of *Ranchhodji Jivanji and others V. Vasanji Kevalbhai* (dead)[AIR 1995 SC 1215] wherein in respect of pending suit despite the amendment brought in Bombay Tenancy and Agricultural Lands Act, 1948, which made the Act applicable even to those areas where it was not applicable earlier, it was held that the amendment was not applicable to those areas for which a suit for eviction has been filed.

15. In this regard it would be appropriate take note of the judgment of Hon'ble the Supreme Court delivered in the case of *Zile Singh Vs. State of Haryana* [(2004) 8 SCC1], wherein it has been held: -

> *"25.Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (See Principles of Statutory Interpretation, ibid, p.565.). If any authority is needed in support of the proposition, it is to be found in West U.P Sugar Mills Assn. and Ors. Vs. State of UP, State of Rajasthan Vs. Mangilal Pindwal, Koteswar Vittal Kamath Vs. K.*

Rangappa Baliga and Co. and A.L.V.R.S.T. Veerappa Chettiar Vs. S. Michael & Ors. In West UP Sugar Mills Assn. case a three-Judges Bench of this Court held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centering around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal's case this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar's case a three-Judge Bench of this Court emphasized the distinction between 'supersession' of a rule and 'substitution' of a rule and held that the process of substitution consists of two steps : first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place."

16. Thus, on account of substitution of the Court Fee payable from 10% to 2.5% only by way of amendment brought in force on 9th January, 2013, the Court Fee on motor accident appeal which arise out of motor accident claim filed after 2nd of April, 2008, shall now be payable only @ 2.5% on the enhanced amount. Accordingly, it is held that Court Fee on the appeal which is filed after coming into force of the second amendment, which become effective from 9th January, 2013, shall be payable only @ 2.5%.

17. The appellants are allowed 2 weeks' time to deposit the Court Fee. The Registry after ensuring that the Court fee is filed as paid in terms of the direction and also after ensuring that other defects are removed would place the matter before the Court for the purpose of admission.

18. The order passed in this appeal shall apply *ipso facto* in respect of all the appeals whereby the enhancement of compensation sought for where accident claim was filed after 02.04.2008.

A copy of which order be placed in all connected files.

Order accordingly.

I.L.R. [2013] M.P., 1654
APPELLATE CIVIL
Before Mr. Justice Sheel Nagu
S.A. No.155/2011 (Gwalior) decided on 8 July, 2013

HARISINGH & anr. ...Appellants
Vs.
VIKRAM SINGH & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 8 Rules 3 & 5, Evidence Act (1 of 1872), Section 18 - Implied or deemed admission **- Vague or evasive reply in written statement - Pleadings made in the plaint can get converted into evidence only when it passes test of proof - Mere alleging a fact in the plaint with absence of denial in the written statement with regard to the fact, cannot by itself entitle the plaintiffs to decree by deemed admission. (Para 7)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 3 व 5, साक्ष्य अधिनियम (1872 का 1), धारा 18 – विवक्षित या समझी गयी स्वीकृति – लिखित कथन में अस्पष्ट या वंचनात्मक उत्तर – वाद पत्र में किये गये अभिवचनों को साक्ष्य में केवल तब परिवर्तित किया जा सकता है जब वह सबूत की कसौटी पार करे – तथ्य के संबंध में लिखित कथन में अस्वीकृति के अभाव के साथ वाद पत्र में तथ्य का मात्र अभिकथन अपने आप में समझी गयी स्वीकृति द्वारा वादीगण को डिक्री का हकदार नहीं बनाता।

Case referred :

2004(1) MPLJ 180.

Ashish Saraswat, for the appellants.
J.P. Mishra, for the respondents No.1, 2, 5, 6, 8, 9 & 10.

JUDGMENT

SHEEL NAGU, J. :- Learned counsel for the rival parties are heard on the question of admission. Record of both the Courts below is perused.

2. This second appeal arises out of concurrent findings of both the Courts below in rejecting the suit for declaration of title and permanent injunction filed by the plaintiffs-appellants on the strength of partition between the plaintiffs and the defendants, which took place 40 to 50 years ago in respect of the agricultural land in question.

3. The defendants in their written statement denied the factum of partition as alleged by the plaintiffs. The defendants further contend that land falling in the share of Narayan Singh had been alienated by the said Narayan Singh during his life time by way of registered sale deed dated 18.06.1991 in favour of defendant No. 10 Rajesh, who has been put in possession. The defendants thus contended that the suit has been filed after 17 years of the said sale deed having been executed and, therefore, the same deserves to be rejected.

4. The trial court after framing various issues including issue No. 2 as to whether any partition took place 40 to 50 years ago between Dalel Singh, Narayan Singh and Bhagwan Singh or not ? held on the basis of evidence adduced on record that the factum of partition as alleged by the plaintiffs is not established. The trial Court found that during life time of Suwaju, the property in dispute were in joint ownership and possession of Suwaju, Narayan Singh, Bhagwan Singh and Dalel Singh. The trial Court found that Suwaju died prior to 1950 till when the land in question was in joint ownership and possession. The trial Court further found that after the death of Suwaju, the suit property was in joint ownership and possession of Dalel Singh, Bhagwan Singh and Narayan Singh and that no partition as alleged by the plaintiffs could be established. Consequently, the trial Court held that the plaintiffs could not be said to be in separate ownership and possession of their respective shares in the suit property. Accordingly, the suit for declaration and permanent injunction was decreed against the plaintiffs.

5. The first appellate court has upheld the judgment and decree of the trial Court by finding that the trial Court has rightly found the factum of partition to be not established thereby rendering negative findings in respect of other issues against the plaintiffs.

6. Learned counsel for the appellants primarily contends that since the factum of partition was not denied by the defendants in their written statement the same ought to have been treated as admitted fact under Order 8 Rule 3 & 5 of CPC for which reliance has been placed on the decision of this Court in the case of *Mohd. Syed and Anr. Vs. Hindustan Petroleum and Three Ors*. reported in 2004(1) MPLJ 180.

7. True it is, implied admission is inferred under Order 8 Rule 3 & 5 of CPC in case of vague or evasive reply in written statement to the pleadings in the plaint, but at the same time pleadings made in the plaint can get converted into evidence only when it passes test of proof. In other words, mere alleging

a fact in the plaint with absence of denial in the written statement with regard to the fact, cannot by itself entitle the plaintiffs to decree by deemed admission. The plaintiffs have to produce documentary / oral evidence to establish the pleadings. When the Court finds that the evidence produced in support of the fact alleged are sufficient after being weighed on the scale of preponderance of probability, can pleadings get transformed into proof, thereby entitling the Court to render findings on that basis.

8. In the instant case, the plaintiffs desperately failed to produce the evidence in support of their basic and primary contention of partition of the suit land in question having been occasioned 40 to 50 years ago. Thus the pleading of partition in the plaint remained "pleading" and could not get converted to proof, notwithstanding the failure of the defendants denying the said factum in the written statement.

9. A bare scrutiny of concurrent findings rendered by both the Courts below, this Court does not find any glaring irregularity or illegality in the said findings and, therefore, this Court is of the considered view that neither any of the proposed substantial questions of law nor any new one arises for consideration.

10. Accordingly, this second appeal deserves to be and is hereby dismissed at admission stage, Sans cost.

Appeal dismissed.

I.L.R. [2013] M.P., 1656
APPELLATE CIVIL
Before Mr. Justice M.K. Mudgal
F.A. No.184/2004 (Gwalior) decided on 9 July, 2013

BALRAM SHIVHARE & ors. ... Appellants
Vs.
SUNEETA SHIVHARE (SMT.) & anr. ... Respondents

Family Court Act (66 of 1984), Sections 3, 7 & 8(c) **- Suit for recovery of 'Stridhan' was filed on 01.05.2000 at Gwalior Court - On 04.03.2002 the Family Court was established under Family Courts Act to the area of Municipal Corporation, Gwalior - Held - All the proceedings after 08.03.2002 by Civil/District Court cannot be held to be legal and decree passed by trial Court (ADJ) is found to be without**

jurisdiction - Suit is transferred as per Section 8(c) of the Act to the Family Court, Gwalior. (Para 20)

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धाराऐं 3, 7 व 8(सी) – स्त्रीधन की वसूली हेतु वाद ग्वालियर न्यायालय से 01.05.2000 को प्रस्तुत किया – 04.03.2002 को, कुटुम्ब न्यायालय अधिनियम के अंतर्गत नगर पालिका निगम, ग्वालियर क्षेत्र के लिये कुटुम्ब न्यायालय स्थापित किया गया था – अभिनिर्धारित – 08.03.2002 के पश्चात सिविल/जिला न्यायालय द्वारा की गई सभी कार्यवाहियों को वैध नहीं ठहराया जा सकता और विचारण न्यायालय (एडीजे) द्वारा पारित की गई डिक्री बिना अधिकारिता के होना पाया गया – वाद को अधिनियम की धारा 8(सी) के अनुसार कुटुम्ब न्यायालय, ग्वालियर को अंतरित किया गया।

Case referred :

AIR 1985 SC 628, 2003(3) MPLJ 524, AIR 2003 Orissa 89, 2004(1) JLJ 353, 2005(3) JLJ 173, (2012) 4 SCC 148, 1997 SC 3562, AIR 1982 Punjab & Haryana 372, 2003(3) MPLJ 544 (SC), AIR 1996 SC 1819, AIR 1993 SC 1756, AIR 1996 SC 2821.

K.S. Tomar with *J.S. Kaurav,* for the appellants.
Madhusudan Shrivastava, for the respondents.

JUDGMENT

M.K. MUDGAL, J. :- By filing this appeal under Section 96 of the Code of Civil Procedure, appellants/defendants have challenged the validity and legality of the judgment and decree dated 20.2.2004 passed by the Court of II Additional District Judge Gwalior in Civil Suit No.53A of 2001 whereby, partly allowing the suit filed by the respondent/plaintiff no.1 the trial Court has awarded Rs.50,000/- along with interest at the rate of 9% per annum from the date of filing of the suit till realization of the entire money as ***`Stridhan'***. In this appeal, the appellants are referred as `defendants' and respondents as `plaintiffs'.

(2). The admitted facts are as follows :

(I). Smt. Suneeta plaintiff no.1 and Hari Babu Shivhare (now deceased) were married on 6.6.1991 at Gwalior. Out of their wedlock, Shashank plaintiff no.2 was born. Hari Babu Shivhare died on 2.8.1999 in a jeep accident.

(3). Facts in brief of the plaint are that the parents of the plaintiff no.1 had given Rs.1,00,000/- along with chain and ring made of gold, scooter and

other articles at the time of ring ceremony. Besides other gold ornaments as ear-rings, bangles, necklace and other articles mentioned in para 2 of the plaint were given by her parents at the time of marriage. Apart from this, some articles were also given by her in-laws to her in the marriage. The total cost of the said articles has been estimated at Rs.1,50,000/- by the plaintiff no.1 in para 9 of the plaint. The plaintiff no.1 has further alleged that she is residing with her parents at Gwalior because, she was forced to leave her in-laws house by the defendants after the death of her husband. All the articles including money given in the marriage to the plaintiff no.1 are her ***Stridhan*** which were in possession of the defendants. Hence, the suit for recovery of ***Stridhan*** was filed by the plaintiff on 1.5.2000 against the defendants.

(4). Denying the allegations of the plaint, the defendants have submitted that the plaintiff's parents (no.1) gave only Rs.10,000/- at the time of ring ceremony. Neither Rs.1,00,000/- nor gold ornaments referred in the plaint were given by the them to the plaintiff no.1. The defendants have, further, stated that they had given to the plaintiff no.1 Suneeta a few gold ornaments in the marriage which are still in her possession. The scooter given by her parents was in her custody and it was also sold by her. The defendants have, further, pleaded that all the articles given to her by her parents and by them are in her possession and thus, nothing remains in the possession of the defendants. Therefore, the plaintiff no.1 is not entitled to get any relief from the defendants as claimed by her in the plaint.

(5). The learned trial Court after framing 11 issues and after recording evidence of both the parties and having discussed the recorded evidence in detail, has decreed the suit partly by the impugned judgment and decree as stated earlier.

(6). The following question arises for consideration in this appeal :

(I). Whether, the learned trial Court had the jurisdiction to entertain the suit?

(7). Heard the arguments of both the parties and perused the record.

(8). Learned Senior counsel for the appellants has pointed out only one aspect of the case i.e. the jurisdiction of the trial Court. The learned Senior Counsel has strenuously argued that the trial Court had no jurisdiction to entertain the suit as the Family Court Act (referred to `the Act') came into force in Madhya Pradesh in 1986 I.e. 14.11.1986. As per contention of learned counsel under Section 7 of the said Act, the exclusive jurisdiction has

been given to the Family Court to entertain the matters relating to property involved in a marriage. ***Stridhan*** comes under the purview of `property'. The learned Senior counsel has cited the following judgments in his submission.

> "(I). *Pratibha Rani Vs. Suraj Kumar and another* AIR 1985 SC 628;
>
> (ii). *K.A.Abdul Jaleel Vs. T.A.Shahida* 2003 (3) MPLJ 524;
>
> (iii). *Sanjay Kumar Sharma Vs. Smt. Vidya Sharma and Another* AIR 2003 Orissa 89;
>
> (iv). *Dwarka Prasad Agrawal (D) by Lrs and another Vs. B.D.Agarwal and Others* 2004 (1) JLJ 353;
>
> (v). *Vijendra (Brijendra) Singh Yadav Vs. Smt. Rajkumari Yadav and Others* 2005 (3) JLJ 173;
>
> (vi). *Raheja Universal Ltd. Vs. NRC Ltd. And Others* (2012) 4 SCC 148;"

(9). Refuting the submissions made by appellants' counsel, counsel for the respondents submits that the appellants/defendants did not challenge the jurisdiction of the suit before the trial Court in the written statement. Besides, no ground for challenging the jurisdiction of the trial Court has been stated in the appeal memo, because of which,appellants are estopped from saying that the lower Court had no jurisdiction to entertain the suit and the impugned judgment and decree are without jurisdiction. The learned counsel has further submitted that the dispute of the instant suit does not come in the purview of Section 7 of the Family Court Act. As per requirement of Section 7, the dispute should be between the parties to a marriage whereas, in the instant case, the defendants are not party of marriage in the plaint. The learned counsel has further argued that when the suit was filed before the trial Court, the Family Courts were not established under Section 3 of the Family Court Act. Hence, it was not possible for the plaintiff to have filed the suit before the Family Court. Learned counsel has further submitted that no sufficient reason has been shown on behalf of the appellants to interfere in the impugned judgment.

10. In chapter III of the family Court under Section 7, the following provision has been made regarding jurisdiction:-

> (1) Subject to the other provisions of this Act, a Family

Court shall-

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.- The suits and proceedings referred to in this subsection are suits and proceedings of the following nature, namely:-

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them. The relief sought by the plaintiff for recovery of ***Stridhan*** comes under the purview of Section 27 of the Act.;

11. At the outset, we have to consider whether ***Stridhan*** is a property of the parties to a marriage. In para 10 of *Balkrishna Ramchandra Kadam v. Sangeeta Balkrishna Kadam*, AIR 1997 SC 3562, the Hon'ble Apex Court has held as under :

> "The property, as contemplated by Section 27 is not the property which is given to the wife at the time of marriage only. It includes the property given to the parties before or after marriage also, so long as it is relatable to the marriage. The expression "at or about the time of marriage" has to be properly construed to include such property which is given at the time of marriage as also the property given before or after marriage to the parties to become their "joint property", implying thereby that the property can be traced to have connection with the marriage. All such property is covered by Section 27 of the Act".

12. In the same manner in *Vinod Kumar Vs. State of Punjab and Haryana* AIR 1982 Pujab and Haryana 372, the Full Bench has taken the view that Section 27 in no way abolishes ***Stridhan*** but expressly recognizes the property exclusively owned by the wife. In this connection, the Court

observed thus :

> "The express words of the provision refer to property 'which may belong jointly to both the husband and the wife'. It nowhere says that all the wife's property belongs jointly to the couple or that Stridhan is abolished and she cannot be the exclusive owner thereof. Indeed, in using the above terminology the statute expressly recognize that property which exclusively owned by the wife is not within the ambit of Section 27 of the Hindu Marriage Act..... Equally no other provision in the Hindu Marriage Act could be pointed out which erodes the concept of Stridhan or in any way incapacitates the Hindu wife to hold property as an exclusive owner".

Considering the aforesaid views, there is no iota of doubt that ***Stridhan*** is a property of marriage and dispute relating to ***Stridhan*** comes in the arena of Section 7 of the Act as quoted in para 11 of this judgment.

(13). Interpreting Section 7 of the Family Court, Hon'ble Apex Court in *K.A.Abdul Jaleel Vs. T.A.Shahida* 2003 (3) MPLJ 544 (SC) has observed as under :

> "It is now well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally. The restricted meaning if ascribed to Explanation (c) to section 7 of the Family Courts Act, would frustrate the object where for the Family Courts were set up. The wording 'disputes relating to marriage and family affairs and for matters connected therewith' in the preamble must be given a broad construction. The statement of objects and reasons of the Act would clearly go to show that the jurisdiction of the Family Court extends, inter alia in relation to properties of spouses or of either of them which would clearly mean that the properties claimed by the parties thereto as a spouse of other, irrespective of the claim whether property is claimed during the subsistence of a marriage or otherwise. Family Court has jurisdiction to adjudicate upon any question relating to the properties of divorced parties. (Paras 14-17)"

Considering the said view, it is inferred that the Family Court has jurisdiction to entertain such a matter that comes under the purview of Section 7 of the

Family Court Act.

(14). Now, the question that arises for consideration is that whether a Family Court has exclusive jurisdiction to entertain a suit referred to under Section 7 of the Act. In this regard, the learned counsel for the appellants inviting the attention to Section 8 of the Family Court Act, contended that after the Family Court Act coming into force, the Civil Court has no jurisdiction to entertain the suit. Hence, if a decree is passed by a civil Court, it being without jurisdiction shall have the effect of nullity. Section 8 of the Family Court Act is as under :

> **"8. Exclusion of jurisdiction and pending proceedings.-** Where a Family Court has been established for any area, -
>
> (a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;
>
> (b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);
>
> (c) every suit or proceeding of the nature referred to the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal procedure, 1973 (2 of 1974) :-
>
> (I). which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and
>
> (ii). Which would have been required to be instituted or taken before or any such Family Court if, before the date on which, such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established shall stand transferred to such Family Court on the date on which, it is established.

(15). By reading of Section 8 of the Family Court Act, it is explicitly clear that after coming into force of the said Act and after establishment of a Family

Court for any area under Section 3 of the Act, a civil Court of that area shall not have jurisdiction to entertain the disputes as defined under Section 7 of the Act.

(16). The contention submitted by learned counsel for the respondents to the effect that the defendant no.1 had not raised the objection as regards the exclusive jurisdiction of Family Court before the trial Court in the written statement, so that objection cannot be raised before this Court in appeal, does not appear to be acceptable wherein there is inherent lack of jurisdiction of a Court, it may be raised not only in appeal, even it may be raised in execution proceedings also. If a decree is passed by a Court without having jurisdiction to entertain a suit, the decree would have the effect of nullity. As held by the Hon'ble Apex Court in *Urban Improvement Trust Jodhpur Vs. Gokul Narain and another* AIR 1996 SC 1819.

(17). Now, the question raised by learned counsel for the respondent that arises for consideration is that whether, after establishment of the family Court under Section 3 of the Act to the area from which, the cause of action for filing the suit to the plaintiff had arisen in the instant case ? Indisputably, the Family Courts Act, 1984 has come into force in Madhya Pradesh since 19.11.1986 vide SO No.79/6/86 dated 14.11.1986 Gazetted of India. Extra: Part II Section 1. However, the Family Courts under Section 3 of the Act to the area of Municipal Corporation Gwalior were established from 8.3.2002 vide notification No.F.No.4.1.2002 Twenty one-B(one) Family Court Act, 1984 dated 4.3.2002. On perusal of the said notification, it is crystal clear that the family Courts for the area of Municipal Corporation Gwalior were established on 8.3.2002. The instant suit was filed on 1.5.2000. Thus, it is inferred that when the instant suit was filed, no family Court was in existence for the area of Municipal Corporation, Gwalior. Resultantly, it is inferred that the civil court had jurisdiction to entertain the said suit. It is true that under Section 8 (c) of the Family Court Act, the provision is made that after establishment of the Family Court under Section 3 of the Act, pending cases in the civil Court shall stand transferred to such Family Court having jurisdiction for that area.

(18). Going through the record, it becomes clear that during pendency of the instant case before the learned trial Court, family Court came into force on 8.3.2002 for the jurisdiction of the area to entertain the disputed matter. Nonetheless, the instant case was decided by the impugned judgment and decree dated 20.2.2004 by the learned trial Court. It is also true that no

objection was raised by either party before learned trial court during pendency of the suit regarding section 8 of the Act. In spite of the fact that after establishment of the Family Court, the Civil Court had no jurisdiction to proceed with the suit as the civil Court's jurisdiction was ousted by the Family Court set up under Section 3 of the Family Court Act. Moreover, under Section 8 (c) of the Act, the provision has been made relating to the pending cases for which, it has been provided that the pending cases shall stand transferred to the Family Court. What would be the effect of new enactment on the pending cases which were filed before the competent Court having jurisdiction to entertain them at the time of filing of the cases. Similar legal point was considered by the Hon'ble Apex Court in *Shri Inacio Martins Deceased through Lrs Vs. Narayan Hari Naik and Others* AIR 1993 SC 1756 and in para 9, it has been held as under :

> "Before we answer those questions we must decide on the impact of the fifth amendment on pending litigation. The question whether the fifth amendment is prospective or retrospective really recedes in the background if we examine the question from the angle whether the civil court can decide any question falling within the jurisdiction of the special forum under the Act in a pending litigation in the absence of an express provision in that behalf. If the question of tenancy in regard to agricultural land cannot be decided by the civil court under the Act and there is no express saving clause permitting the civil court to decide the same, it is obvious that any decision rendered by the civil court would be without jurisdiction. A similar situation did arise in the context of another statute. In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha*[1] the facts were that the landlord had filed a suit for eviction on April 25, 1957 in the regular court, i.e., the Court of the Joint Civil Judge (Junior Division), Erandol, which admittedly had jurisdiction to pass a decree for possession of the demised premises. However, during the pendency of the suit, a notification was issued under Section 6 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, (hereinafter called 'the Rent Act') applying Part II of the Act to areas where the property in question was situate. The tenants claimed protection of Section

12 in Part II of the Rent Act which deprived the landlord of the right of possession under certain circumstances. The question which arose for consideration was whether the tenants were entitled to the protection of Section 12 in pending cases and if yes, its effect. Since Section 12 of the Rent Act was held to be prospective, the question which arose for consideration was whether its protection could be extended to tenants in pending litigation. This Court pointed out that the point of time when sub-section (1) of Section 12 operates is when the court is called upon to pass a decree for eviction. Thus, said this Court, the language of the sub-section applies equally to suits pending when Part II comes into force and those to be filed subsequently. The contention of the landlord that the operation of Section 12(1) is limited to suits filed after the Rent Act comes into force in a particular area was not accepted. Applying the same principle to the facts of the present case, we have no hesitation in concluding that the provisions of the fifth amendment would apply to pending suits also. However, the Act does not preclude the institution of a suit by a tenant for restoration of possession from a trespasser. If the defendant who is sued as a tres passer raises a plea of tenancy, a question arises whether his plea of tenancy can be decided by the civil court as incidental to the grant of relief for possession or is the civil court precluded from deciding the same in view of Section 7 read with Section 58(2) of the Act. As pointed out earlier, Section 7 in terms states that if any question arises whether any person is a tenant or should be deemed to be a tenant under the Act, the Mamlatdar shall decide such question. The jurisdiction is, therefore, vested in the Mamlatdar under Section 7 of the Act and Section 58(2) specifically bars the jurisdiction of all other courts to settle, decide or deal with any question which is by or under the Act required to be settled, decided or dealt with by the Mamlatdar. Section 8(2) has limited operation where a person referred to in Section 4 has been evicted on or after July 1, 1962. In that case he would be entitled to recover immediate possession of the land in the manner prescribed by or under the Act unless it is shown that his tenancy was terminated in the manner

authorised by Section 9. In the present case, the plaintiff came to court contending that even though his lease was not terminated as provided by Section 9 of the Act, defendant 1 had dispossessed him by an act of trespass. He, therefore, sought possession of the demised property from the trespasser, defendant 1. He impleaded the owner of the land as defendant 2 on the plea that she had colluded with defendant 1. Defendant 1 raised a contention in his written statement that he was lawfully inducted as a tenant in the lands in question by the owner, defendant 2. In other words, he disputed the plaintiff's contention that he was a trespasser and pleaded tenancy. If his plea was found to be well-founded, he would be entitled to retain possession but not otherwise. Therefore, the question which arose in the suit was whether defendant 1 proved that he was a tenant in respect of the land in question. This question could not be gone into by the civil court in view of the clear language of Section 7 read with Section 58(2) of the Act. What procedure should the court follow in such situations? It would not stand to reason to non-suit the plaintiff who had filed the suit in a competent court having jurisdiction to try the same merely because of the subsequent change in law. The proper course, therefore, would be one which was followed by the Bombay High Court in *Bhimaji Shanker Kulkarni v. Dundappa Vithappa Udapudi* [2]. That was a case arising under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. The lands in question were agricultural lands. Section 29(2) of that law provided that no landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar on an application made in that behalf in the prescribed form. Section 70(b) next provided that for the purposes of the Act, one of the duties and functions to be performed by the Mamlatdar is to decide whether a person is a tenant or a protected tenant or a permanent tenant. Section 85(1) laid down that no civil court shall have jurisdiction to settle, decide or deal with any question which is required to be settled, decided or dealt with by the Mamlatdar under the statute. The law was silent as to how a dispute of this nature raised in a suit filed for eviction on the

footing that the defendant is a trespasser should be dealt with by the civil court. This question squarely arose for consideration by the Bombay High Court in *Dhondi Tukaram v. Dadoo Piraji*[3] wherein that court observed as under:

"Therefore, we hold that in a suit filed against the defendant on the footing that he is a trespasser, if he raises the plea that he is a tenant or a protected tenant, the civil court would have no jurisdiction to deal with that plea .... We would, however, like to add that in all such cases where the civil court cannot entertain the plea and accepts the objection that it has no jurisdiction to try it, it should not proceed to dismiss the suit straightway. We think that the proper procedure to adopt in such cases would be to direct the party who raises such a plea to obtain a decision from the Mamlatdar within a reasonable time. If the decision of the Mamlatdaris in favour of the party raising the plea, the suit for possession would have to be dismissed, because it would not be open to the civil court to give any relief to the landlord by way of possession of the agricultural land. If, on the other hand, the Mamlatdar rejects the plea raised under the Tenancy Act, the civil court would be entitled to deal with the dispute on the footing that the defendant is a trespasser." Pursuant to the court's recommendation, the Bombay Legislature introduced Section 85-A which provided that if in any suit instituted in a civil court issues which are required to be settled, decided and dealt with by any authority competent to settle, decide and deal with the same arise, the civil court shall stay the suit and refer such issues to such competent authority for determination under the statute. Unfortunately even under the Act with which we are concerned the legislature though aware of Section 85-A has not chosen to make any provision for dealing with such situations. We are, therefore, of the opinion that it would be just and fair that the issue whether defendant 1 was a tenant in respect of the lands in question should be referred to the Mamlatdar for decision and after his decision is received by the civil court if the issue is held against defendant 1, the civil court may consider passing of a decree in eviction but if on

the other hand he is held to be tenant, the civil court may be required to dismiss the suit".

The same view has been taken by the Hon'ble Apex Court in *Mrs. Judith Fernandes and Others Vs. Conceicao Antonio Fernandes and another* AIR 1996 SC 2821.

(19). Having gone through the Apex Court's judgment, it is inferred that after coming into force of the Act and establishment of the Family Court under Section 3 of the Act on 8.3.2002 in the Municipal Corporation area Gwalior, the learned trial Court had no jurisdiction to proceed with the suit. Consequently, the impugned judgment and decree passed by learned Court is found to be without jurisdiction. On account of this, the impugned judgment and decree has the effect of nullity. It is also inferred that after establishment and coming into force of the Family Court, all the proceedings after 8.3.2002 cannot be held to be legal. However, entire suit cannot be dismissed because, when the suit was filed on 1.5.2000, the learned trial Court had jurisdiction to entertain the suit and during pendency of the suit, jurisdiction of the learned trial Court was ousted by coming into force of the Family Court as stated earlier. In view of the facts, it would be apt to transfer the case as per provisions of Section 8 (c) of the Act from learned trial Court to the Family Court Gwalior which has jurisdiction to entertain the suit after its establishment under Section 3 of the Act.

(20). Having considered the submissions made by the learned counsels for both the parties, allowing the appeal, the impugned judgment and decree passed by learned trial Court is hereby set-aside being without jurisdiction and all the proceedings of the trial Court after establishment of the Family Court at Gwalior on 8.3.2002 are also cancelled as being found to be without jurisdiction. The suit is transferred as per Section 8 (c) of the Act to the Family Court Gwalior from learned trial Court for a fresh decision as per provisions of law mentioned before. The parties are directed to appear before the Family Court Gwalior on 26.8.2013. Office is directed to send the record along with a copy of this judgment to the trial Court and the trial Court in turn shall immediately transfer it to the Family Court and inform the parties concerned for appearance before the Family Court Gwalior on 26.8.2013. The Family Court is directed to decide the case on the priority as early as possible as the case is old one and has been pending since 2000. Considering the facts, no order as to the costs.

Decree be drawn up accordingly.

Appeal allowed.

I.L.R. [2013] M.P., 1669
APPELLATE CIVIL
Before Mr. Justice Sheel Nagu
S.A. No.330/2012 (Gwalior) decided on 9 July, 2013

KAILASH ... Appellant
Vs.
BABULAL & ors. ... Respondents

Civil Procedure Code (5 of 1908), Order 41 Rule 33 - Power of appellate court **- No such plea of adverse possession was raised before the trial court nor any declaration for ownership was sought and the suit was merely for permanent injunction - Plaintiff solely sought permanent injunction for restraining defendants from dispossessing the plaintiff from the suit property - Trial court dismissed the suit by holding that plaintiff has failed to prove his possession over the suit property and also failed to prove that the defendants were attempting to dispossess him - First appellate court proceeded to decide the case on the assumption that the suit was for declaration of ownership of plaintiff/appellant based upon adverse possession - Held - The first appellate court has misdirected itself by rejecting the appeal of the plaintiff on the ground not germane to the issue involved in the case - Second appeal allowed with direction to the first appellate court to decide the appeal afresh on merits. (Paras 7 & 9)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 33 – अपीली न्यायालय की शक्ति – विचारण न्यायालय के समक्ष न तो प्रतिकूल कब्जे का कोई ऐसा अभिवाक् किया गया था और न ही स्वामित्व की कोई घोषणा चाही गई थी एवं वाद केवल स्थायी व्यादेश के लिए था – वादी ने, वाद सम्पत्ति से वादी को बेकब्जा करने से प्रतिवादियों को रोकने हेतु मात्र स्थायी व्यादेश चाहा – विचारण न्यायालय ने यह धारणा करते हुए वाद खारिज किया कि वाद सम्पति पर वादी अपना कब्जा साबित करने में असफल रहा और यह साबित करने में भी असफल रहा कि प्रतिवादीगण उसे बेकब्जा करने का प्रयत्न कर रहे थे – प्रथम अपीली न्यायालय यह मानकर विनिश्चिय करने के लिए अग्रसर हुआ कि वाद, प्रतिकूल कब्जे पर आधारित वादी/अपीलार्थी के स्वामित्व की घोषणा के लिए था – अभिनिर्धारित – प्रथम अपीली न्यायालय ने उस आधार पर जो प्रकरण में अंतर्ग्रस्त विवाधक से संबंद्ध नहीं था, वादी की अपील खारिज करके स्वयं की दिशाभूल की – प्रथम अपीली न्यायालय को अपील का कुल विनिश्चिय, गुणदोषों के आधार पर करने का निदेश देते हुए द्वितीय अपील मंजूर।

S.K. Shrivastava, for the appellant.
S.S. Rajput, for the respondents.

JUDGMENT

SHEEL NAGU, J. :- Learned counsel for the rival parties are heard on the question of admission.

2. This appeal is admitted for hearing on the following substantial question of law:-

> "Whether the first appellate court was right in rejecting the appeal of the plaintiff by rendering the findings in respect of plaintiff being not entitled to declaration of ownership on the suit property on the strength of adverse possession, when no such plea of adverse possession was raised before the trial court nor any declaration for ownership was sought and the suit was merely for permanent injunction".

3. Since the contesting parties are represented, this Court deemed it appropriate to decide this matter finally at this stage with the consent of rival parties as the controversy involved lies within a narrow campus. The record of trial court and the first appellate court are perused.

4. Suit was brought by the plaintiff solely seeking permanent injunction for restraining the defendants from dispossessing the plaintiff from the suit property.

5. Issues which were framed by the trial court also related to the above said relief. The trial court dismissed the suit by holding that plaintiff has failed to prove his possession over the suit property and also failed to prove that the defendants were attempting to dispossess him.

6. While deciding the first appeal preferred against the judgment and decree of the trial court, the first appellate court in para 7 of its judgment and decree proceeded to decide the case on the assumption that the suit was for declaration of ownership of plaintiff/appellant based upon adverse possession.

7. From reading of the judgment and decree of the first appellate court, it is evident that the first appellate court has misdirected itself by rejecting the appeal of the plaintiff on the ground not germane to the issue involved in the case.

8. Accordingly, this Court deems it appropriate to answer the above said substantial law in favour of the plaintiff/appellant herein.

9. Consequently, this second appeal is allowed. The judgment and decree of the first appellate court dated 26.04.2012 passed in Civil Appeal No. 8-A/2011 is set aside with direction to the first appellate court to decide the appeal afresh on merits as expeditiously as possible.

Appeal allowed.

I.L.R. [2013] M.P., 1671
APPELLATE CIVIL
Before Mr. Justice G.D. Saxena
M. A. No. 936/2007 (Gwalior) decided on 18 July, 2013

UNITED INDIA INSURANCE CO. LTD. ...Appellant
Vs.
JAGANNATH & ors. ...Respondents

Motor Vehicle Act (59 of 1988), Sections 147 & 149 - Liability of Insurance Company **- When there is no statutory liability to pay compensation by the Insurance Company to the deceased who had travelled as an unauthorised passenger in the vehicle, the Insurance Company cannot be directed to pay the compensation amount and recover the same from the owner of the vehicle.**

In a case, where the Insurance Company is successful in its defence under section 149, it may yet be required to pay the amount to the claimant and thereafter, it may recover from the owner of the vehicle - When the insurance company is not statutorily required to cover the liability in respect of a passenger in a vehicle under section 147 unless such passengers is the owner or agent of the owner of the goods accompanying such goods absolutely there is no need for the Insurance Company to pay compensation since there is no contractual liability under the statute to pay the amount to the gratuitous passenger travelling in the goods carriage vehicle.

(Paras 18 & 20)

मोटर यान अधिनियम (1988 का 59), धाराऐं 147 व 149 – बीमा कम्पनी का उत्तरदायित्व – जब बीमा कम्पनी द्वारा ऐसे मृतक को प्रतिकर अदा करने का

कोई कानूनी दायित्व नहीं जिसने वाहन में अनाधिकृत यात्री के रुप में यात्रा की थी. बीमा कम्पनी को प्रतिकर राशि अदा करने एवं उसे वाहन के स्वामी से वसूलने के लिए निदेशित नहीं किया जा सकता।

Cases referred :

AIR 2004 SC 4338, AIR 2007 SC 1971, AIR 2004 SC 1340, AIR 2005 SC 2337, 2008 ACJ 1043, (2012) 2 SCC 770.

Arvind Agrawal, for the appellant.
Amit Lahoti, for the respondents No. 1 to 3.
O.P. Singhal, for the respondents No. 4 & 5.

ORDER

G.D. SAXENA, J: The United India Insurance Company has come up with the present appeal, feeling aggrieved by the award dated 14th August, 2007 passed by the Additional Member of the Motor Accidents Claims Tribunal, Chachoda, district Guna in Claim Case No.14/2006 whereby the learned Claims Tribunal has directed the Insurance Company to pay the amount to the claimants/respondents No. 1 to 3 of the deceased and recover the same from the owner of the vehicle.

(2) Indisputably, respondents No.4 and 5, owner and driver of the offending vehicle did not prefer any appeal nor file any cross-objection against the Award assailing the impugned findings in this appeal. Same is the situation with respondents No. 1 to 3/claimants because they did not prefer any appeal for enhancement of compensation. Further there is no dispute about quantum of Award by either of the parties.

(3) Admitted facts of the case are that on 22nd May 2006, in night, deceased Badambai alongwith her husband went in a tractor-trolley bearing registration No. MP08/H-9294, driven by Suraj (Respondent No.5) and owned by Babulal (Respondent No. 4). In mid-way, due to negligence and rash driving on the part of the driver, the said tractor and trolley turned turtle. Consequently, Smt. Badambai, wife of Jagannath died on the spot. On reporting the above accident, the crime was registered against the driver and charge-sheet was filed before the criminal court. It is also admitted that at the time of accident, the offending tractor was only registered under "Farmer's Package Insurance with the Insurer Company/ appellant, herein, and the driver of the offending vehicle was having the valid driving licence. The learned claims

tribunal after considering the evidence adduced from both the sides and after hearing them issued an Award in favour of the claimants in the sum of Rs. 1,77,000/- (Rs. One Lac Seventy Seven thousand Only) in all heads. While recording the aforesaid findings, the tribunal, however, exonerated the Insurance Company on the ground of violation of the terms of policy known as 'Farmer's Package Insurance' but was directed on the principles of "pay and recover" to satisfy the awarded amount and then recover the same from the owner of the offending vehicle. Being aggrieved, the Insurance Company has submitted the present appeal.

(4) Learned counsel appearing for the appellant- Insurance Company submitted that the deceased had travelled as a passenger in the vehicle, which is in violation of the provisions of Section 147(b)(1) of the Motor vehicles Act and the learned tribunal in this manner has rightly chosen to consider the submissions put forth while fixing liability on the part of the owner of the vehicle.

(5) Learned counsel further submitted that the principle of 'pay and recover' will arise only in the circumstances where the Insurance Company is successful in its defence available to them under section 149. If there is any statutory violation under section 147 by allowing a person to travel in a vehicle as an unauthorised passenger, then absolutely there is no contract between the insured and the insurer to pay the amount. It is the submission of the learned counsel that in this case, the owner of the vehicle, by permitting the deceased to travel in the vehicle as an un-authorised passenger has committed statutory violation. Therefore, under section 147(b)(1) of the Motor Vehicles Act, the Insurance Company cannot be held responsible to pay the compensation and the doctrine of 'pay and recover' does not arise in the cases of statutory violation.

(6) Further submission put forth on behalf of the appellant is that except the offending tractor, no other attachment parts such as trolley or agricultural implements were insured vide insurance policy (Ex.D/1). It is submitted that at the time of accident, the offending tractor and attached trolley were used for transporting the stone flooring chips while carrying the persons for commercial purposes. No additional premium for carrying such persons or workers for agricultural purpose was paid by the owner and so the offending vehicle was driven in utter violation of the terms and conditions of specified insurance policy. Under these circumstances, it is prayed that the finding of the Tribunal on the principle of 'pay and recover' is not legally sustainable and

is liable to be set aside by allowing the present appeal.

(7) *Per contra*, learned counsel appearing for the claimants/respondent No. 1 to 3 submitted that as on date, there is an Award in favour of the claimants by the Tribunal. When there is an award in favour of the claimants by the Tribunal, under section 149, the Insurer shall pay to the person entitled to the benefit of the decree and even if there is any violation, the appellant, after paying the amount to the claimants, can recover the same from the owner of the vehicle. He accordingly prayed for early payment of the awarded amount to the claimants in accordance with law.

(8) The respondents No. 4 and 5, i.e., owner and driver of the offending vehicle, on the other hand, submitted that the vehicle was at the time of accident was used for agricultural purposes for transporting the stone flooring chips for construction of boundaries of agricultural field and the persons were hired as masonry labourers on the trolley. Hence, according to them, the tractor-trolley was being driven within the sphere of the insurance policy and in such circumstances, the Insurance Company was fully responsible for satisfaction of the award passed in favour of the claimants by the tribunal. On the aforesaid pleadings as well as grounds, it is prayed that the appeal may be dismissed.

(9) Heard the learned counsel for the parties and perused the materials.

(10) In view of the submissions made by the learned counsel on either side, now the question that arises for consideration is :-

> "Whether the learned tribunal has any statutory power to direct insurer to pay amount of compensation for which it is exonerated from liability in view of fundamental breach of the policy conditions, and direct that it may be subsequently recovered from the insured ?"

(11) Before discussing the issue with regard to the doctrine of 'pay and recover', it could be appropriate to extract the relevant provisions of the Motor Vehicles Act.

> **"S.147. Requirements of policies and limits of liability:-**
> (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-
>
> (a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) --

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person including, owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place."

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.

(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of section 163-A is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment. (2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely;-

(a) that there has been a breach of a specified condition of the

policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false is some material particular.

...

(4) Where a certificate of insurance has been issued under sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 147, be of no effect: Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person."

(12) In *National Insurance Co. Ltd. Vs. Chinnmma* (AIR 2004 SC 4338), the Hon. Apex Court has observed as follows :-

"There is nothing on records to show that the owner of the tractor had produced any insurance cover in respect of the trolley. It is furthermore not disputed that the tractor was insured only for the purpose of carrying out agricultural works. The representative of the Insurance Company Mr. Hari Singh Meena on cross-examination merely accepted the suggestion that cutting the earth and levelling the field with earth would be an agricultural work but respondent No.1 himself categorically stated in his claim petition before the Tribunal stating that the earth had been dug and was being carried in the trolley to the brick-kiln. Evidently the earth was meant to be used only for the purpose of manufacturing bricks. Digging of earth for the purpose of manufacture of brick-kiln indisputably cannot amount to carrying out of the agricultural work. On above facts Apex court considered the above facts and observed as follows :-

16. Furthermore, a tractor is not even a goods carriage. The "goods carriage" has been defined in Section 2(14) to mean "any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods" whereas "tractor" has been defined in Section 2(44) to mean "a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller". The "trailer" has been defined in Section 2(46) to mean "any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle."

"17. A tractor fitted with a trailer may or may not answer the definition of goods carriage contained in Section 2(14) of the Motor Vehicles Act. The tractor was meant to be used for agricultural purposes. The trailer attached to the tractor, thus, necessarily is required to be used for agricultural purpose, unless registered otherwise. It may be, as has been contended by Mrs. K. Sharda Devi, that carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes but the same by itself would not be construed to mean that the tractor and trailer can be used for carriage of goods by another person for his business activities. The deceased was a businessman. He used to deal in vegetables. After he purchased the vegetables, he was to transport the same to market for the purpose of sale thereof and not for any agricultural purpose. The tractor and trailer, therefore, were not being used for agricultural purposes. However, even if it be assumed that the trailer would answer the description of the "goods carriage" as contained in Section 2(14) of the Motor Vehicles Act, the case would be covered by the decisions of this Court in *Asha Rani* (supra) and other decisions following the same, as the accident had taken place on 24.11.1991, i.e., much prior to coming into force of 1994 amendment.

(13) In *Oriental Insurance Co. Ltd. Vs. Brij Mohan (*AIR 2007 SC 1971), it is observed as follows :-

10. Furthermore, respondent was not the owner of the tractor. He was also not the driver thereof. He was merely a passenger travelling on the trolley attached to the tractor. His claim petition, therefore, could not have been allowed in view of the decision of this Court in *New India Assurance Co. Ltd. v. Asha Rani and Ors.* [(2003) 2 SCC 223] wherein the earlier decision of this Court in *New India Assurance Co. v. Satpal Singh [(*2000) 1 SCC 237] was overruled. In *Asha Rani* (supra) it was, inter alia, held :-

"25. Section 147 of the 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to

any passenger of "public service vehicle". Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen Compensation Act. It does not speak of any passenger in a "goods carriage".

26. In view of the changes in the relevant provisions in the 1988 Act vis-a-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place."

(14) In *National Insurance Co. Ltd. v. Baljit Kaur (*AIR 2004 SC 1340), the Hon. Apex Court court observed as follows:-

"20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in S. 147 with respect to persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the Legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither

contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.

21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in *Satpal Singh* (supra). The said decision has been overruled only in *Asha Rani* (supra). We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing Court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of S. 168 of the Motor Vehicles Act, 1988 in terms whereof it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."

(15) In *National Insurance Co. Ltd Vs. Prembai Patel* (AIR 2005 SC 2337), it is observed as follows :-

"The insurance policy being in the nature of a contract, it is permissible for an owner to take such a policy whereunder the entire liability in respect of the death of or bodily injury to any

such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b) may be fastened upon the insurance company and insurance company may become liable to satisfy the entire award. However, for this purpose the owner must take a policy of that particular kind for which he may be required to pay additional premium and the policy must clearly show that the liability of the insurance company in case of death of or bodily injury to the aforesaid kind of employees is not restricted to that provided under the Workmen's Act and is either more or unlimited depending upon the quantum of premium paid and the terms of the policy.

It is thus clear that in case the owner of the vehicle wants the liability of the insurance company in respect of death of or bodily injury to any such employee as is described in clauses (a) or (b) or (c) of proviso (i) to Section 147(1) (b) should not be restricted to that under the Workmen's Act but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions "a policy for Act Liability" or "Act Liability", the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act. "

(16) In the case of *Bhav Singh Vs. Savirani & another* 2008 ACJ 1043 Full bench of this court observes as follows :-

"10. Sub Section (5) of Section 147 of the Act, however provides that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under Section 147 of the Act shall be liable to indemnify a person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or classes of persons. Thus if the policy of insurance covers any liability in addition to the liability under Section 147 (1) of the Act , the insurer will be liability to indemnify the insured in case of any liability not because of the provisions of sub section (1) of section 147 but because of

the terms and conditions of contract of insurance between the insurer and the insured. Therefore, if the contract of insurance provides for a liability to a passenger or to an employee other than the liabilities provided under sub section (1) of the Section 147 of the Act, the insurer would be liable to indemnify the insured against such liability."

(17) Recently, in *S.M. Sharmila Vs. National Insurance Company* (2012) 2 SCC 770, the Hon. Apex Court considered where the appellant, the owner of vehicle and her workman were travelling in the offending vehicle. The workman claimed compensation contending that accident arose out of and in course of employment. So, liability was fixed on respondent insurance company. In appeal High Court concluded that vehicle involved in accident was not insured with the insurer on the date of accident and fixed the liability on the owner of the vehicle, which was held to be justified.

(18) A reading of the above judgments would show that only in a case, where the Insurance Company is successful in its defence under section 149, it may yet be required to pay the amount to the claimant and thereafter, it may recover from the owner of the vehicle. When the insurance company is not statutorily required to cover the liability in respect of a passenger in a vehicle under section 147 unless such passengers is the owner or agent of the owner. of the goods accompanying such goods absolutely there is no need for the Insurance Company to pay compensation since there is no contractual liability under the statute to pay the amount to the gratuitous passenger travelling in the goods carriage vehicle. Under such circumstances, in the opinion of this court, a direction could not be given to the Insurance Company to pay to the claimants and recover from the owner of the vehicle.

(19) Thus, from an analysis of the statutory provisions as explained by Hon. Supreme Court in various decisions rendered from time to time, the following picture emerges :

(i) The Insurance Policy is required to cover the liability envisages under Section 147, but wider risk can always be undertaken.

(ii) Section 149 envisages the defences which are open to the Insurance Company. Where the Insurance Company is not successful in its defence, obviously it is required to satisfy the

decree and the award. Where it is successful in its defence, it may yet be required to pay the amount to the claimant and thereafter recover the same from the owner under such circumstance envisaged and enumerated in Section 149(4) and Section 149(5).

(iii) Under Section 147 the Insurance Company is not statutorily required to cover the liability in respect of a passenger in a goods vehicle unless such passenger is the owner or agent of the owner of the goods accompanying such goods in the concerned goods vehicle.

(iv) Since there is no statutory requirement to cover the liability in respect of a passenger in a goods vehicle, the principle of 'pay and recover', as statutorily recognised in Section 149(4) and Section 149(5), is not applicable ipso facto to such cases and, therefore, ordinarily the Court is not expected to issue such á direction to the Insurance Company to pay to the claimant and thereafter recover from the owner.

(v) Where, by relying upon the decision of Hon. Supreme Court in *Satpal Singh's* case, either expressly or even by implication, there has been a direction by the Trial Court to the Insurance Company to pay, the appellate court is obviously required to consider as to whether such direction should be set aside in its entirety and the liability should be fastened only on the driver and the owner or whether the Insurance Company should be directed to comply with the direction regarding payment to the claimant and recover thereafter from the owner.

(vi) No such direction can be issued by any trial court to the Insurance Company to pay and recover relating to liability in respect of a passenger travelling in a goods vehicle after the decision in *Baljit Kaur's* case merely because the date of accident was before such decision. The date of the accident is immaterial. Since the law has been specifically clarified, no trial court is expected to decide contrary to such decision.

(vii) Where, however, the matter has already been decided by the trial court before the decision in *Baljit Kaur's* case, it would

be in the discretion of the appellate court, depending upon the facts and circumstances of the case, whether the doctrine of 'pay and recover' should be applied or as to whether the claimant would be left to recover the amount from the person liable, i.e., the driver or the owner, as the case may be.

(20) Now, turning to the case at hand, on perusal of the record, it appears that the offending vehicle "tractor" was insured by the insured vide insurance policy Ex.D/1 (Cover-note) under 'Farmer's package Insurance' but no documents relating to the insurance of the attachments like trolley or any terms or conditions of the insurance in relation therewith are placed on record. The cover note (Ex.D/1) contained in the record indicates that a lump sum premium amount of Rs. 5919/- was paid for the period during 31st January 2006 to 30th January 2007. So, upon carefully going through the pleadings vis-a-vis evidence on record, it is gathered that Jagannath, son of Kishore, husband of deceased appeared as AW-1 before the tribunal. He deposed that at the time of accident, the stone floor chips were loaded and carried for the purpose of construction of the boundary of agriculture field and the persons travelling in the offending vehicle were going for the labour work. The record of the case clearly shows that no premium was received in respect of any non-fare paying non-employees. Witness Jagannath (AW-1) also admitted in his evidence that neither he nor his wife had paid any charges for travelling in the tractor. The Insurance Company is bound to compensate but where owner of the vehicle or others are proposed to be covered, an additional premium is required to be paid for covering their life and property. So far as this case is concerned, there is a statutory violation under section 147 of the Act. Therefore, following the principles laid down in *Baljit Kaur's case* (supra), this court is of the view that the Insurance Company is not liable to pay compensation. When there is no statutory liability to pay compensation by the Insurance Company to the deceased who had travelled as an un-authorised passenger in the vehicle, the Insurance Company cannot be directed to pay the compensation amount and recover the same from the owner of the vehicle.

(21) Therefore, this court has no hesitation to hold that there is an excess of jurisdiction by the learned tribunal. In the light of the decisions of the Hon. Supreme Court on the issue, the direction of the Tribunal fastening the liability on the appellant-Insurance Company to pay compensation and to recover the same from the owner is liable to be set aside and accordingly set aside.

(22) For the reasons stated above, the miscellaneous appeal stands hereby allowed. The respondents No. 4 and 5 are directed to make the payment of the amount of award to the claimants alongwith interest @ 6% per annum from the date of filing of claim petition, else the amount shall carry penal interest @ 9% per annum.

No costs.

Appeal allowed.

I.L.R. [2013] M.P., 1685
APPELLATE CIVIL
Before Mr. Justice M.K. Mudgal
F.A. No. 149/2001 (Gwalior) decided on 23 July, 2013

RAM PRASAD ... Appellant
Vs.
RAJENDRA SINGH & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 11 - Res judicata - **It is necessary that the matter should be finally heard and decided by a competent court.** **(Para 7)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – पूर्व न्याय – यह आवश्यक है कि मामले को सक्षम न्यायालय द्वारा अंतिम रुप से सुना एवं निर्णित किया जाना चाहिए।

B. Civil Procedure Code (5 of 1908), Order 23 Rule 1(4) - **Suit filed by plaintiff for declaration of title/share and injunction, was withdrawn in Lok Adalat without seeking permission for filing a suit - Subsequent suit shall be precluded on the same cause of action.** **(Para 8)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 1(4) – वादी द्वारा प्रस्तुत हक की घोषणा एवं व्यादेश के लिए वाद को, वाद प्रस्तुत करने की अनुमति चाहे बिना लोक अदालत में वापस लिया गया – समान वाद हेतुक पर पश्चातवर्ती वाद प्रवारित होगा।

Case referred :

2000(II) MPWN 31.

R.P. Gupta, for the appellant.
None for the respondents.

JUDGMENT

M.K. MUDGAL, J. :- The appellant/plaintiff has filed the appeal under Section 96 of the Civil Procedure Code, being aggrieved by the judgment and decree dated 12.4.2001 passed by the Court of Additional District Judge, Gohad District Bhind in Civil Suit No.11A/2000, dismissing the suit for declaration of title permanent injunction and cancellation of sale deed dated 5.4.2000 executed by Shyam Lal in favour of defendant No.1 Rajendra Singh. In this appeal plaintiff is referred as appellant and defendants as respondents.

2. The admitted facts are that the plaintiff Ramprasad and defendants No.1 Rajendra Singh, defendant No.2 Ram Lakhan are real brothers and defendant No.3 Smt. Panchobai is the mother, and Shyam Lal was the father of them. The disputed agricultural land was recorded in the name of Shyam Lal as Bhoomiswami. Earlier the plaintiff filed a suit No.8A/86 for declaration of title to ¼ share in the disputed agricultural land and permanent injunction before the Court of Additional District Judge, Gohad against his father Shyam Lal stating that the disputed agriculture land is ancestral property. His father inherited the disputed property from his father. The said suit was withdrawn vide order dated 22.3.1987 in Lok Adalat. After dismissal of the suit the father of the plaintiff Shyam Lal executed a sale deed dated 5.4.2000 in favour of his son Rajendra Singh defendant No.1.

3. Facts in brief of the plaint are that, the disputed agricultural land is the ancestral property of plaintiff and the father Shyam Lal who inherited the disputed agricultural land from his father, thus the plaintiff has ¼ share in the disputed land being ancestral property. Shyam Lal has no right to sale the entire disputed agricultural land to defendant No.1. Hence, suit for the relief as stated earlier was filed on 9.5.2000 against the defendants.

4. The defendants have filed an objection under Order 7 Rule 11 of the Civil Procedure Code before the trial Court, stating that the suit filed by the plaintiff was not maintainable, as the earlier suit filed by him was dismissed vide order dated 22.3.1987 as withdrawn. Hence, the earlier order dismissing the suit has the effect of res-judicata. That objection was decided by the impugned order dated 11.4.2001 and the suit was dismissed holding that suit filed by the plaintiff is barred by res-judicata under Section 11 of Civil Procedure Code.

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

passed by the learned trial Court is contrary to the provision of law as the earlier suit No. 8A/86 was not finally heard and decided on merits. The said suit was withdrawn by the plaintiff/ appellant on the basis of compromise. Hence, the suit ought to have not been dismissed by the learned trial Court by the impugned order. Learned counsel requests that the impugned order be set aside and case be remanded back for fresh disposal as per provisions of law.

6. No one is appearing on behalf of the respondents to pursue the appeal. Arguments of the appellant's counsel were considered.

7. On perusal of the record of the trial Court, it is indisputably clear that the former suit No.08A/86 filed by the plaintiff/ appellant for the same relief as stated by him in the instant suit No.11A/2000. The plaintiff filed earlier suit for declaration of title to ¼ share in the disputed agricultural land against his father Shyam Lal. The said suit was withdrawn vide order dated 22.3.87 by the appellant / plaintiff before Lok Adalat without seeking permission for filing a fresh suit on the same cause of action. It is true that the suit 8A/86 was not decided on merits by the trial Court. For application of Section 11 of the Civil Procedure Code, it is necessary that the matter should be finally heard and decided by a competent Court. Hence, the opinion of the trial Court for application of res-judicata in this case is not proper as per the provision of Section 11 of the Civil Procedure Code which is an under -

> "11. Res judicata.-No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
>
> Explanation 1.-The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto."

However, the suit filed by the plaintiff was not maintainable. It was barred by Sub Rule 4 of Rule 1 of Order 23 of Civil Procedure Code. The provision of the aforesaid rule is as under:

> Withdrawal of suit or abandonment of part of claim

1.....

2.....

3....

4. Where the plaintiff

(a) abandons any suit or part of claim under sub- rule (1) or

(b) withdraws from a suit or part of claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

8. On perusal of the said provision, it becomes clear that the suit filed by the plaintiff is precluded by the provision of Sub Rule 4 Rule 1 of Order 23 of Civil Procedure Code, as former suit was withdrawn by the plaintiff without seeking permission for filing a suit for the same cause of action relating to the same subject matter where the suit is withdrawn without seeking permission the subsequent suit shall be precluded on the same cause of action. As held in 2000 (II) MPWN 31, *Dayachand v. Kesarbai.*

9. It is correct that the former suit was filed by the plaintiff against his father and the instant suit has been filed against his brother defendant No.1 but the status of defendant No.1 would be the same as that of his father because the defendant No.1 has purchased the disputed land from the deceased father Shyam Lal. The defendant No.1 being transferee of the property has stepped in the shoes of his father. Hence, the plaintiff cannot claimed that the parties of both the suit are not same.

10. Therefore, it is concluded that the suit filed by the plaintiff was not maintainable. Hence, the lower Court has not committed any mistake in dismissing the suit. Accordingly, the appeal has no substance and is hereby dismissed.

No order as to the cost.

Appeal dismissed.

I.L.R. [2013] M.P., 1689
APPELLATE CIVIL
Before Mr. Justice M.K. Mudgal
F.A. No.51/2003 (Gwalior) decided on 24 July, 2013

KALURAM AGARWAL ... Appellant
Vs.
DINESH KUMAR & ors. ... Respondents

A. Specific Relief Act, 1963 (47 of 1963), Section 16(c) - Readiness & Willingness - **Plaintiff compelling defendant for closing of windows and ventilators and making partition wall, which was not a part of the contract - Held - The plaintiff was not ready & willing for getting sale deed executed in his favour and he himself was avoiding to perform the agreement by imposing arbitrary conditions.**
(Paras 25,26 & 27)

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 (सी) – तैयार व रजामंद – वादी, प्रतिवादी को खिड़कियां और रोशनदानों को बंद करने के लिए विवश कर रहा है तथा विभाजित करने वाली दीवार का निर्माण कर रहा है, जो कि संविदा का भाग नहीं था – अभिनिर्धारित – वादी अपने पक्ष में विक्रय विलेख का निष्पादन कराये जाने हेतु तैयार व रजामंद नहीं था और वह स्वयं, मनमानी शर्तें अधिरोपित कर करार का पालन करने से बच रहा है।

B. Specific Relief Act, 1963 (47 of 1963), Section 22 - Refund of earnest money - **Earnest money for part consideration of the contract and mentioned as such in the contract - No clause forfeit for earnest money made in the contract -The defendant has a duty to refund it to the plaintiff with interest.** **(Para 28)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 22 – अग्रिम धन की वापसी – संविदा के आंशिक प्रतिफल हेतु अग्रिम धन और संविदा में तद्नुसार उल्लिखित – अग्रिम धन के लिये संविदा में कोई समपहृत खंड नहीं – वादी को उसे ब्याज के साथ वापिस करना प्रतिवादी का कर्तव्य है।

C. Specific Relief Act, 1963 (47 of 1963), Section 20 - Specific performance of contract - **The plaintiff himself was avoiding the performance of the contract - He unnecessarily burdened the defendant with conditions, not a part of the contract before execution of sale deed - The trial court committed no mistake in refusing the decree for performance of contract.** **(Para 27)**

ग. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 20 – संविदा का विनिर्दिष्ट पालन – वादी स्वयं संविदा के पालन से बच रहा था – उसने अनावश्यक रुप से प्रतिवादी पर शर्तें लादीं जो विक्रय विलेख के निष्पादन से पूर्व संविदा का भाग नहीं था – विचारण न्यायालय ने संविदा के पालन हेतु डिक्री नामंजूर करने में कोई भूल नहीं कारित की।

Case referred :

(2008) 8 SCC 511, (2001) 10 SCC 619, 2002(3) MPHT 414, (2008) 5 SCC 676, (2006) 12 SCC 146, (2012) 8 SCC 659, (2004) 8 SCC 689, (1997) 2 SCC 200, 2001 SC 2783, 2003 (11) SCC 17.

Nandita Dubey, for the appellant.
Manoj Gupta, for the respondent No.1.
Arvind Dwivedi, for the respondents No.2 & 3.

JUDGMENT

M.K. MUDGAL, J. :- By this common judgment both the appeals No. 51/03 filed by the plaintiff, Kaluram and appeal No. 89/03 filed by the defendant No. 1, Dinesh Kumar Agarwal, arising out of the same judgment dated 11/11/2002 passed by the Court of 3rd Additional District Judge, Gwalior in Civil Suit No. 47A/95 filed by the plaintiff are being decided.

2. The said suit has been partly decreed in favour of the plaintiff for recovery of Rs. 10,000/- along with compound interest @ 12% per annum dismissing the suit of specific performance of the contract against which the appeal No. 51/03 has been filed.

3. Appeal No. 89/03 has been filed by Dinesh Kumar Agarwal, being aggrieved by the finding of the impugned judgment and decree regarding recovery of Rs. 10,000/- along with the compound interest from him.

4. The undisputed facts are that the disputed house No. 7-A described in para 1 & 2 of the plaint owned by the defendant No. 1, Dinesh Kumar Agarwal who executed an agreement to sell the disputed house on 26/12/1992 to the plaintiff for consideration of Rs. 1,95,000/- and sum of Rs. 10,000/- was received by him as advance vide Account Payee Cheque dated 26/12/1992. It is also an undisputed fact that as per terms and conditions of the said agreement the permission under Section 26 of the Urban Land Ceiling Act, 1976 for the sale of the property was to be obtained by the vendor at his own cost. The vendor would execute the sale deed of the property in favour

of the vendee or in the name of third party within three days from the date of permission for sale. If the permission for sale under the Urban Land Ceiling Act was received early within the time limit for execution of the sale deed and the period of registration of sale deed would be sixty days from the date of agreement. The actual possession of the house would be delivered by the vendee at the time of registration after due measurement.

5. From para 5 and 6 of the plaintiff Kalu Ram's (PW1) statement and para 4, 5 and 6 of the defendant Dinesh Kumar's (DW1) statement and para 1,3 and 4 of the defendant Ram Babu Goyal's (DW3) statement, it has undisputedly come on record that before contracting to sell the disputed property on 26/12/1992 by the defendant No. 1 Dinesh Kumar Agarwal to the plaintiff, the defendant No. 1, Dinesh Kumar Agarwal had agreed to sell the entire house to the defendant No. 2 Smt. Shushila wife of plaintiff's younger brother Ram Babu Agarwal, defendant No. 3 for consideration of Rs. 5,75,000/- and executed a document of agreement for sale Ex.P-13. When the defendant No. 2 and 3 were unable to get the sale deed executed in their favour in the stipulated time, the contract for sale Ex. P-1 was made in favour of plaintiff with the consent of the defendant No. 2 and 3 for selling to him the half portion of the house. The sale deed dated 19/09/1993 Ex. P-10 was executed by the defendant No. 1 in favour of defendant No. 2.

6. In brief, facts of the plaint are that the plaintiff had been ready and willing to perform the contract as per terms and conditions of the contract Ex. P-1. The plaintiff has further pleaded that in furtherance of agreement of sale he applied for loan of Rs. 1,85,000/- for paying the remaining part of the consideration which was sanctioned on 10/01/1993 by his employer, the Dena Bank and pay order bearing No. 3299/147 dated 13/03/1993 was also issued for the sum of Rs. 1,85,000/- in favour of the defendant. The plaintiff gave a notice dated 04/04/1993 Ex. P-7 to the defendant to get the registered sale deed executed in his favour in respect of the disputed property at his expenses. However, the defendant did not perform the contract. On the other hand, the defendant No. 1 had executed the sale deed dated 19/09/1993 in favour of the defendant No. 2 who had full knowledge of the existence of sale agreement dated 26/12/1992 in favour of the plaintiff. In view, of the facts the plaintiff filed a suit for specific performance of the contract.

7. Defendant No. 1 denying the allegations of the plaint has submitted that he had been always ready and willing to perform the contract. After

obtaining the permission under the Urban Land Ceiling Act he requested the plaintiff time and again for performance of the contract and also gave a notice to him for the same. Nonetheless the plaintiff raised some objections and did not get the contract executed. The defendant No. 1 has further pleaded that after cancellation of the said contract he executed a sale deed in favour of the defendant No. 2 who is wife of plaintiff's younger brother, defendant No. 3 and further has added that he had not committed any breach in performance of the contract. The trial Court has committed the mistake decreeing the suit for payment of money along with compound interest.

8. Defendants No. 2 and 3 also denying the allegations made in the plaint have submitted that they are bonafide purchaser. They have further pleaded that plaintiff was not ready for getting the sale deed executed in his favour from the defendant No. 1 and so defendant No. 1 Dinesh Kumar Agarwal canceled the agreement for sale executed in favour of the plaintiff. Thereafter, defendant No. 2 purchased the disputed house after paying the agreed consideration to the defendant No. 1. They have further submitted that defendant No. 2 purchasing the house secured its possession given from the defendant No. 1.

9. Learned Trial Court after framing issues and after recording the evidence of both the parties and having discussed the evidence has dismissed the suit for specific performance of the contract Ex. P-1 and only decreed the suit for payment of Rs. 10,000/- with compound interest as stated earlier.

10. The following issues crop up for consideration in this appeal:-

(I) Whether, the plaintiff had been ready and willing to perform the contract of sale Ex. P-1.

(ii) Whether the suit decreed regarding the payment of Rs. 10,000/- along with compound interest is not based on proper reasonings.

11. The appellant has filed an application I.A. No.8201/10 under order 41 rule 27 of the C.P.C. for taking an additional evidence on record a photo copy of bank draft dated 13/03/1993 issued by Dena Bank, Gwalior in favour of defendant No. 1 for payment to the same as part consideration of the contract Ex.P-1. Learned counsel for the appellant placing reliance on the judgment *North Eastern Railway Vs. dead Bhagwan Das* by his LR's (2008) 8 SCC

511, *State of Rajasthan Vs. T. N. Sahani & ors.* (2001) 10 SCC 619 and *Nawab Saheb Vs. Firoz Ahmed* 2002(3) MPHT 414 has submitted that the additional evidence at the appellate stage may be taken on record. Considering the facts stated in the application and perusing the cited judgments the application is allowed and the document is taken on record.

12. Assailing the findings recorded by the trial Court the learned counsel Smt. Nandita Dube for the appellant submits that the plaintiff had successfully proved his readiness and willingness for performing the contract of sale Ex. P-1 but the learned Trial Court has erred in giving findings against the plaintiff and further adds that the plaintiff after having received the sanction from Dena Bank, Gwalior for grant of loan of Rs. 1,85,000/- sent an information to the same effect to the defendant No. 1 vide notice Ex. P-7 dated 04/04/1993 and requested him to execute the sale deed in his favour as per terms and conditions of the contract Ex. P-1 but the defendant Dinesh Kumar did not do so. Besides, the defendant No. 1 had to seek the permission for sale from the Urban Land Ceiling Department and inform the plaintiff for executing the sale deed in his favour even though he failed to perform his part of the contract. The counsel placing reliance on the following judgments has submitted that the impugned judgment and decree be set aside and suit be decreed in favour of the plaintiff. The judgments are as follows:-

(i) *Dead Rameshwar Prasad by LR's Vs. Basanti Lal* (2008) 5 SCC 676.

(ii) *Faquir Chand & another Vs. Sudesh Kumari* (2006) 12 SCC 146.

(iii) *Since deceased Rattan Lal through his LR's Vs. S. N. Bhalla & ors* (2012) 8 SCC 659.

(iv) *Smt. Swarnam Ramachandran & another vs. Aravacode Chakungal Jayapalan* (2004)8 SCC 689.

(v) *Sukhbir Singh & ors. Vs. Brij Pal Singh & ors.* (1997) 2 SCC 200.

13. Combating the submissions made on behalf of the appellant, the learned counsel Shri Manoj Gupta for the respondent No. 1 submits that the findings recorded by the learned Trial Court dismissing the suit for specific performance of the contract are based on proper and cogent reasons as the defendant No.

1 after getting the permission Ex D-1 from the concerned department gave the notice, Ex.D-2A along with the copy of the Ex. D-1 to the plaintiff and requested him to get the sale deed executed in his favour but the plaintiff had no money for its execution. The counsel further pleads in his submissions that the defendant was ready and willing to perform the contract and he was not at fault. The learned Trial Court seems to have committed the mistake in passing the decree as regards payment of Rs. 10,000/- with compound interest thereon.

14. The learned counsel, Arvind Dwivedi for respondents No. 2 and 3 submits that the defendant No. 2 is a bonafide purchaser. After the plaintiff's failure to get the sale deed executed in his favour, the defendant No. 1, canceled the contract Ex P-1 and thereafter defendant No. 2 got the sale deed executed in her favour after paying the full consideration to the defendant No. 1. The counsel, therefore, argues that there is no proper reason for the interference in the findings of the Trial Court.

15. The submissions made by both the parties were considered.

16. The execution of agreement to sell Ex. P-1 dated 26/12/92 is not disputed. The main terms and conditions to be complied by the plaintiff and defendant No. 1 are as follow:-

(i) The defendant No. 1 was required to seek permission under section 26 of the Urban Land Ceiling Act for selling the disputed property and intimate to the plaintiff for execution of the sale deed.

(ii) The plaintiff had to get the sale deed executed in three days after obtaining the permission and if the permission was not received at the earliest the period for execution of the contract would be sixty days.

(iii) The plaintiff was required to take the loan from the bank for paying the consideration to the defendant No. 1 and was to get the sale deed executed in his favour.

17. The plaintiff has made the statement in support of his pleadings and has produced the document. The notice dated 4.4.1993 Ex. P/7 was given by the plaintiff to the defendant, there in, he stated that he got the loan sanctioned for payment of consideration and requested the defendant No.1 to seek permission from the concerned department and executed the sale deed in his

favour appropose of the contract Ex.P/1. The said notice was replied by the defendant No.1 vide notice dated 24.4.1993 Ex. D-2-A. In this connection, the defendant No.1 deposing in his statement in para 2 has stated that the plaintiff did not get the sale deed executed after receiving the Ex.D/2-A. The plaintiff has not specifically denied in para 16 of his statement receiving of notice Ex. D/2 A in the cross examination.

18. In this regard the defendant Dinesh Agarwal was cross examined on behalf of the plaintiff in para 7 of his statement, it has come on record that the defendant giving the notice Ex.D-2-A along with copy of Ex.D/1 asked the plaintiff for getting the sale deed executed in his favour. The plaintiff again sent a notice Ex. P/15 dated 1.5.1993 and dated 8.5.1993 Ex. P/17 to the defendant No.1 in which the plaintiff has not alleged that the information regarding required permission for sale was not received by him. On perusal of both the notices Ex. P/15 and Ex. P/17, it is evident that permission letter was not demanded again by the plaintiff as asked by him in Ex. P/7 dated 4.4.1993. In this connection, the learned trial Court considering the evidence in paras 21 and 22 of the impugned judgment has inferred that the letter as regard the permission for sale was received by the plaintiff. The findings given by the trial Court seem to be proper.

19. The defendant No.1 has tried to say in his pleadings as well as in his statement that he was ready and willing for performance of the contract but after receiving the letter of permission, the plaintiff did not make sincere efforts for getting the sale deed executed in his favour. On the contrary, by giving notice dated 8.5.1993 Ex. P/17 the plaintiff directed the defendant to make the partition wall and closed the windows and ventilators of his house which opened on the disputed property. The contents of Ex. P/17 are as follows:

> *"यह कि आप अपने शेष भवन व मेरे पक्षकार को बेचने वाले भवन का खुली भू–भाग के मध्य में स्थित खुले रास्ते में खिड़कियॉ, रोशनदान आदि को बन्द करते हुए 10 फीट ऊंची दीवाल पार्टीशन बनाकर मेरे पक्षकार को विकीत किये जाने वाले भाग का स्वतंत्र आधिपत्य देकर उक्त चाहे रजिस्टर्ड विक्रय पत्र मेरे पक्षकार के हित में कर सकते हैं।*

20. The said notice Ex.P/17 dated 8.5.1993 was given by the plaintiff to the defendant in response to the notice dated 7.5.1993 Ex.P.11 which was sent by the defendant No.1, thereby the defendant warned the plaintiff that he should get the performance of the contract executed in his favour within 10 days, otherwise the agreement would be cancelled but the plaintiff persisted

with his demand referred to above to the defendant No.1 in his notice dated 18.5.1993 Ex. D/2. On perusal of Ex. P/17 and Ex. D/2 it become clear that plaintiff was persisting the defendant to get the partition wall constructed and windows and ventilators closed of his portion. The condition for making partition wall and closing windows and ventilators was not a part of the contract. In this reference, in para 16 of the plaintiff's statement it is on record that it is true there is no mention in the agreement Ex.P/1 about closing of windows and ventilators and making partition wall.

21. In view of the facts it is concluded that plaintiff was compelling the defendant to make the construction which was not a condition for performing the contract. The defendant No.1 was repeatedly requesting the plaintiff to perform the contract but the plaintiff was not read and willing for getting sale deed executed in his favour and he himself was avoiding to perform the agreement Ex. P/1 by imposing arbitrary conditions which were not part of the contract and which the defendant No.1 was not under any obligation to perform. It is pertinent to mention here that after receipt of the defendant letter dated 7.5.1993 Ex. P/11 the plaintiff did not fix any date and did not inform the defendant No.1 for getting the sale deed executed in his favour.

22. The provision of Section 16 (c) of the Specific Relief Act, 1963 (in short "the Act" are as follows:

> *"16 Personal bars to relief –Specific performance of a contract cannot be enforced in favour of a person-*
>
> *(a)-(b)*
>
> *(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant."*
>
> *The basic principle behind Section 16 (c) read with Explanation (ii) is that any person seeking benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him to the specific relief. The provision imposes a personal bar. The court is to grant relief on the basis of the conduct of the person seeking relief. If the pleadings manifest that*

the conduct of the plaintiff entitles him to get the relief on perusal of the plaint he should not be denied the relief. Section 16 (c) of the Act mandates the plaintiff to aver in the plaint and establish as the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract.

These aspect were highlighted in *Sugani Vs. Rameshwar Das* 2 (2006) 11. SCC 587.

23. The learned counsel for the appellant contends that the finding given by the trial Court in para 26 of the judgment are perverse and against the contents of the documents as the document Ex/P/4 and P/5 have not been understood correctly. The arguments were considered. The certificate dated 17.9.98 Ex. P/4 issued by the Dena Bank is related to the payment of Rs.10,000/- by cheque dated 26.12.1992 which was given by the plaintiff to the defendant No.1 as earnest money for part consideration of the contract and it is mentioned in the contract for sale Ex. P/1 dated 26.12.1992.

24. Though a photo copy of the bank draft dated 1.7.1992 issued by the State Bank of Indore Branch Gwalior has been produced on record, yet it has neither been exhibited in the evidence by the plaintiff nor has been tendered by the defendant during the cross examination. All the same, no explanation in this regard has been sought from the plaintiff on behalf of the defendant. Where the photo copy of the document was not proved in evidence by either of the party of the case, it could not have been made the basis of findings.

25. The plaintiff has stated in para 2 of his statement that he had got the loan of Rs.1,85,000/- sanctioned from the Dena Bank and informed the defendant No.1 about the same vide notice Ex. P/7. The Ex. P/5 dated 10.1.1993 being a loan sanction letter corroborates the plaintiff statement whereby the loan of Rs. 1,85,000/- was sanctioned to the plaintiff. On perusal of the notice dated 4.4.1993 Ex. P/7 it becomes clear that the plaintiff had given the intimation to the defendant No.1 about the loan having been sanctioned to him for payment of remaining consideration of the contract but on the basis of said fact, it cannot be held that the plaintiff was ready and willing to perform the contract. As discussed earlier the plaintiff was compelling the defendant to make the construction which was not a condition for performance of the contract. In view of the fact that the defendant No.1 cannot be blamed for non-performing the contract Ex.P-1. Over and above, the

plaintiff did not take steps to get the sale deed executed in his favour for considerable period after receipt of letter dated 7.5.1993 Ex.P/11 sent by the defendant No.1, who executed the sale deed dated 20.9.1993 Ex. P/10 in favour of the defendant No.2. It shows that the defendant No.1 had waited for sufficient time before execution of the sale deed Ex.P.10.

26. As per Section 20 of Specific Relief Act, relief of specific performance is discretionary as held in A.I.R. 2001 Supreme Court 2783 *A.C. Arulappan Vs. Smt. Ahalya Naik.*

27. In the instant case the plaintiff himself was avoiding the performance of the contract. He unnecessarily burdened the defendant No.1 with conditions which were not a part of the contract before execution of sale deed. In the facts and circumstances of the case, it can be concluded that the learned trial Court has not committed any mistake in refusing the decree for performance of the contract Ex. P/1. The judgment cited on behalf of the appellant do not support his case in any manner, they are based on different facts and circumstances and different from the instant case.

28. The learned counsel for the defendant No.1 contends that the defendant was ever ready and willing to perform the contract, so the trial Court ought not to have passed the decree for refund of Rs.10,000/- along with compound interest at the rate of 12% per annum. The submission placed by the learned counsel do not appear to be acceptable in to-to as no clause forfeit for earnest money has been made in the contract Ex.P/1. Besides, the defendant No.1 do not make any such intention in the letter dated 7.5.1993 Ex.P/11 also. Where the defendant No.1 had received Rs. 10,000/- as earnest money it was his duty to refund it to the plaintiff with interest as he was getting the benefit of the plaintiff's money. It is true that the trial Court has erred in awarding the compound interest at the rate 12% per annum. In the interest of justice, payment of interest at the rate of 12% per annum (Simple) will be justified as held by the Honble Supreme Court in para 9 of the judgment 2003 (11) SCC 17 *Aditya Mass Communication (P) Ltd. Vs. A.P. SRTC.*

29. Having taken into account, the recorded evidence, this Court comes to the conclusion that findings given by the learned trial Court for rejection of the suit for relief of specific performance of the contract are affirmed and Appeal No. 51/2003 is hereby dismissed.

30. Appeal No. 89/2003 is hereby partly allowed and it is ordered that

the rate of interest is changed from the compound to simple. It is clarified that defendant No.1 would pay simple interest at the rate of 12% per annum instead of compound interest.

31. The remaining conditions shall be same as per trial Court's judgment.

32. The cost of the appeal for the respondent shall be borne by the appellant.

33. Let decree be drown up accordingly.

Order accordingly.

I.L.R. [2013] M.P., 1699
APPELLATE CRIMINAL
Before Mr. Justice U.C. Maheshwari
Cr. A. No. 943/1997 (Jabalpur) decided on 15 January, 2013

RAM SANEHI & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

Penal Code (45 of 1860), Sections 307, 323/34 - Attempt to Murder **- According to x-ray report no bony injury was found - Neither the Radiologist was examined nor x-ray report was proved - Held - The only act which could fall within the perview of Section 307, I.P.C. is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events and accused's criminal liability must be limited to the act which he in fact did, and can not be extended so as to embrace the consequence of another act which he might have done but he did not do - Conviction u/s 307 converted into Section 323/ 34 of I.P.C. (Paras 8, 9 & 10)**

दण्ड संहिता (1860 का 45), धाराऐं 307, 323/34 – हत्या का प्रयत्न – एक्स–रे रिपोर्ट के अनुसार कोई अस्थि चोट नहीं पाई गई – न तो विकिरण विशेषज्ञ का परीक्षण किया गया और न ही एक्स–रे रिपोर्ट साबित की गई – अभिनिर्धारित – धारा 307 भा.द.सं. की परिधि में आने वाला एकमात्र कृत्य वह कृत्य है जो अपने आप में घटना के प्राकृतिक एवं सामान्य क्रम में मृत्यु कारित करने में सामान्यतः सक्षम है और अभियुक्त का आपराधिक दायित्व उस कृत्य तक सीमित होना चाहिए जिसे उसने वास्तव में किया हो और उसे विस्तारित नहीं किया जा सकता जिससे कि किसी अन्य कृत्य का परिणाम जो वह कर सकता था परंतु उसने नहीं किया समाविष्ट हो – धारा 307 के अंतर्गत दोषसिद्धि को धारा 323/34 भा.

द.सं. में संपरिवर्तित।

Case referred :

AIR (29) 1942 Peshwar 21(1).

Raj Kamal Chaturvedi, for the appellants.
Lalit Joglekar, P.L. for the respondent/State.

JUDGMENT

U.C. MAHESHWARI, J. :- The appellants accused have preferred this appeal under Section 374 (1) of Cr.P.C being aggrieved by the judgment dated 21st April 1997 passed by the Sessions Judge, Chhatarpur in S.T. No. 102/94 convicting and sentencing to each of them under Section 307/34 of IPC for RI five years with fine of Rs.500/-. In default of depositing the fine amount further three months RI has been awarded.

2. The facts giving rise to this appeal in short are that on 12.2.1994 at about 4.30 in the noon the victim Thowan came to the P.S. Rajnagar, district Chhatarpur and lodged the FIR contending that he being an agriculturist is having his own field in village, while adjoining field to his field belongs to the appellants. At about 3 o'clock in the noon, he was removing the bushes of Beshram from the boundary of his field, at the same time the appellants with their common intention to cause him injuries came there and asked him why he is removing the bushes of beshram and in continuation gave him a threat to kill him. Thereafter the appellant no. 1, Ram Sanehi gave a blow of stick on his head. Resultantly he sustained injury. He was also subjected to blows of sticks by the co-accused, the appellant nos. 2 and 3, namely Ram Kripal and Munna @ Gopal. Resultantly on sustaining the injuries, he fell down on the floor, on his shouting, Hemraj and Pragi working at the nearest place also came there, on which the appellants flade away from the spot. Such persons brought the victim to his residence from where he was taken to the Police Station where he lodged the report, on which a crime for the offence of under Section 307/34 of IPC was registered against the appellants. He was sent to the hospital where after medical examination, his MLC report was prepared. He was referred for x-ray of head injury and some other injuries. On carrying out the same, no bony injury was found on his person. The appellants were arrested. Witnesses were interrogated and on completion of investigation, the appellants were charged sheeted for the offence of Section 307/34 of IPC.

3. On committing the matter to the Sessions Court, on evaluation of the

charge sheet, the charge of above mentioned Section was framed against each of the appellants. They abjured the guilt, on which the trial was held. On appreciation of the evidence after holding guilty to the appellants under Section 307/34, each of them were punished with the punishment, as stated above. Being dissatisfied with such conviction and sentence, the appellants have come to this court with this appeal.

4. Initially the appellants' counsel has argued the case on merits for extending the acquittal to the appellants. But in response of some query of the court, the appellants' counsel has restricted his arguments and without challenging any findings of the trial court holding guilty to the appellants for causing the alleged incident with the victim argued that on taking into consideration the evidence adduced by the prosecution including the medical evidence, as accepted in its entirety, even then looking to the nature of the injuries sustained by the victim, so also in the lack of any fracture, as stated by the Doctor in the MLC report, (Ex.P-4), of the victim, this was not the case of conviction of more than Section 323 of IPC. According to him because in the MLC report except the injury no. 1, all other injuries were found to be simple in nature while such injury no. 1 was stated to be dangerous to life and in such premises, such injury alongwith injury nos. 5, 6 and 9 was referred for x-ray also. The same was carried out and its report was also place with the charge sheet. But it is apparent fact on record that neither the Radiologist was examined nor in any other manner x-ray report was proved on such record. Even on taking into consideration the x-ray report available on record, then according to it, no bony injury was found on the person of the victim. He also said that as per deposition of Dr. I.D. Chourasiya, (PW-4), in the absence of any fracture in the injury no. 1 was also the same injury in nature, while the same was stated by the Doctor in the MLC report as dangerous to life. With these submissions, he prayed to modify the impugned conviction of the appellants from Section 307/34 of IPC. In continuation he said that on such modification, taking into consideration that the appellants being first offenders did not have any criminal antecedents in their earlier life or subsequent to the impugned incident and during last 15-16 years, they have suffered the mental agony of this case and have also settled in their families and on sending them again to jail, then in comparison to themselves, their families have to suffer a lot. So firstly he prayed for extending the benefit of Probation of Offenders Act to the appellants and in alternate prayed that if such benefit is not extended to them, then by adopting some lenient view, they be punished with the jail

sentence for which they have already undergone either in the judicial custody during the pendency of the trial or subsequent to the impugned judgment till passing the order for suspension of their remaining jail sentence by this court by enhancing some amount of fine under the discretion of the court. In this regard, he also said that as per record the appellant no. 1 – Ram Sanehi was remained in judicial custody from 13.2.1994 to 12.4.1994, i. e. near about two months while other appellants were remained in judicial custody from 13.2.1994 to 28.2.1994, i.e. for 15 days and besides this, each of the appellants has suffered the awarded jail sentence from the date of the impugned judgment, i.e. 21.4.1997 till 12.6.1997, on which date the remaining jail sentence of the appellants was suspended by this court and prayed to allow this appeal.

5. The aforesaid prayer has been opposed by the State's Counsel saying that in the available circumstances and scenario in which the intention of the appellants was apparent to cause death of the victim and on such appreciation the impugned conviction and sentence has been imposed on the appellants. The same being in consonance with the available evidence, does not require any interference at this stage either for modification of the offence from Section 307/34 of IPC to Section 323/34 or in any case for reduction of the awarded jail sentence. He also said that in any case if the offence is modified as prayed by the appellants' counsel, then the appellants be punished with the maximum punishment provided under Section 323/34 and prayed for dismissal of this appeal.

6. Having heard, keeping in view their arguments I have carefully gone through the record of the trial court alongwith the impugned judgment. I am of the considered view that in the available circumstances the approach of the trial court holding guilty to the appellants for the offence of Section 307/34 is not sustainable. On proper appreciation of the available evidence, the trial court ought to have convicted the appellants for the offence under Section 323/34 of IPC and not more than that.

7. Before proceeding further, I would like to mention the injuries sustained by the victim which was found and stated in the MLC report, (Ex.P-4) of the victim Thowan, (PW-4). The same is read as under:-

> (I) Lacerated wound 10x.5x2.00 cm in the mid parietal region. (Profuse bleeding) and horizontally placed bone deep.

(II) Lacerated wound 1x.5 cm on the left side of chin.

(III) Lacerated wound 2.5x.5 cm on the right eye brow.

(IV) Lacerated wound 1x.5 cm on the post aspect of left forearm near elbow.

(V) Contusion with tenderness near the left elbow.

(VI) Contusion 12x 2.5 cm on the left chest at the level of 4th and 5th rib.

(VII) Contusion two parallel to each other 10x2.5 cm – over the left lumber region.

(VIII) Multiple contusions – Irregularly each measuring 10x2.5 cm on the left Gluteal region placed.

(IX) Contusion – 12 x2.5 cm on the left Pendenem soleal region.

8. It is apparent from aforesaid injuries, except injury no. 1, in the lack of fracture all other injuries were simple in nature and it is also apparent on record that neither the Radiologist has been examined nor x-ray report has been exhibited on record. X-ray report is available on record from which it is apparent that on carrying out the x-ray of the injuries advised by the Doctor no bony injury was found on the person of the victim. Even in the head injury also no fracture was found. On recording the deposition of Doctor Chourasiya, (PW-4), in para 12 of his deposition he categorically stated that in the lack of fracture in injury no. 1, such injury is also simple in nature and in such premises, the same could not be treated to be dangerous to life. So in such premises, there is no option with the court except to hold that injury no. 1 was also simple in nature and it is also apparent that the victim sustained nine injuries and out of them, some were contusions, abrasions and some of them were lacerated wounds. No other injury was found on the person of the victim which was caused by hard and sharp weapon. In such premises, when lacerated simple injuries or contusions were found on the person of the victim, then the appellants could not be convicted more than the offence of Section 323/34 of IPC. In such premises, it is held that the trial court has committed grave error in holding guilty to the appellants for the offence under Section 307/34 of IPC. Pursuant to it, such conviction and sentence of the appellants

under Section 307/34 of IPC is hereby set aside and instead of it, they are held guilty for the offence of Section 323/34 of IPC. The findings of the trial court holding that alleged incident was caused by the appellants in furtherance of their common intention does not require any interference. Pursuant to it, the same are affirmed.

9. It is settled proposition of criminal law that accused like the appellants should be convicted for such act which they have actually committed with the victim and not for that act, which they could have committed but did not commit. In the present case the appellants could have committed the offence of Section 307/34 but actually they did not commit. As such they have committed the offence which has been made punishable under Section 323/34 of IPC. My such approach is also fortified by the decision of the *Peshwar Judicial Commissioner's Court* of undivided India in the matter of *Sultan Mohd. Khan Vs. Risaldar Abdul Karim Khan and others* reported in AIR (29) 1942 Peshwar 21 (1), in which it was held as under:-

> "The only act which could fall within the purview of S.307 is an act which by itself must be ordinarily capable of causing death in the natural and ordinary course of events and accused's criminal liability must be limited to the act which he in fact did, and cannot be extended so as to embrace the consequence of another act which he might have done but did not do.
>
> Accused stabbed the complainant with a knife and caused two injuries one in the back 3/4" x 1/4" x 3/4" deep and another on the back of the thigh 1, 1/2" x ½" x 1/4" deep. Both the injuries were simple in nature:-
>
> Held that the offence was under S. 324 and not under S. 307: 21 I.C. 881 (Bom.) and ('31) 18 AIR 1931 Lah. 63, Rel. on."

10. In view of the aforesaid by allowing this appeal in part, the impugned conviction and sentence of the appellants under Section 307/34 of IPC is hereby set aside and instead it, the appellants are held guilty under Section 323/34 of IPC and each of them are punished with the jail sentenced for which they have already undergone in the judicial custody during trial and subsequent to passing the impugned judgment till passing the order by this

court for suspension of the remaining jail sentence of the appellants, as stated above in para 4 of this judgment, which on verification from the record is found correct, by imposing the fine of Rs.1000/- against each of the appellants. Such imposed amount of fine is to be deposited within 45 days from today by each of the appellants with the trial court. The amount of fine deposited in connection of the offence under Section 307/34 of IPC shall be adjusted in the aforesaid imposed fine amount. Failing in depositing the remaining fine amount within the stipulated period, the concerning appellants has to suffer further three months SI. On depositing the aforesaid sum, out of it, Rs.1500/-, in addition to the amount given by the trial court by the impugned judgment to the victim, be also given him by calling in the trial court through summon. The bail bonds of the appellants are hereby cancelled. Till the aforesaid extend the impugned judgment is modified while the other findings of the trial court are hereby affirmed.

11. The appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2013] M.P., 1705
APPELLATE CRIMINAL
Before Mr. Justice U.C. Maheshwari
Cr. A. No. 1002/1997 (Jabalpur) decided on 16 January, 2013

CHHOTE ALIAS SURENDRA ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 376, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(xi), Evidence Act (1 of 1872), Section 45 - Caste of Prosecutrix - Any documentary evidence - Whether produced or proved on record*** **- No inference could have been drawn by the trial court to hold the caste of prosecutrix covered under the Act - To hold conviction under the Act the prosecution is bound to prove the caste of the victim covered under the Act as well as of the accused like appellant to invoke the provision of the Act - Convition and sentence of the appellant set aside. (Para 9)**

क. दण्ड संहिता (1860 का 45), धारा 376, अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(xi), साक्ष्य

अधिनियम (1872 का 1), धारा 45 – अभियोक्त्री की जाति – कोई दस्तावेजी साक्ष्य – क्या अभिलेख पर प्रस्तुत अथवा साबित किया गया – अधिनियम के अंतर्गत अभियोक्त्री की जाति आने की धारणा करने के लिए विचारण न्यायालय द्वारा कोई निष्कर्ष नहीं निकला जा सकता था – अधिनियम के अंतर्गत दोषसिद्धि अभिनिर्धारित करने के लिए अभियोजन अधिनियम के उपबंध का अवलंब लेने हेतु पीड़ित और साथ ही अभियुक्त की जाति अधिनियम के अंतर्गत होना साबित करने के लिए बाध्य है – अपीलार्थी की दोषसिद्धि और दण्डादेश अपास्त।

B. ***Penal Code (45 of 1860), Section 376 - Rape -*** **Lack of injury - It is well settled propostition of law that mere lack of injury or sign of struggle on the person of the prosecutrix or absence of any injury on her private parts are not sufficient circumstance to disbelieve the version of the prosecutrix - Where the ocular evidence as well as expert evidence (medical evidence) are available and both are conflicting to each other then in such a situation, the ocular evidence would prevail over the expert evidence. (Paras 12 & 13)**

ख. दण्ड संहिता (1860 का 45), धारा 376 – बलात्कार – चोट का अभाव – यह विधि का भलिभांति स्थापित प्रतिपादन है कि मात्र अभियोक्त्री के शरीर पर किसी चोट या गुत्थमगुत्था के चिन्ह का अभाव या उसके गुप्तांगों पर किसी चोट की अनुपस्थिति, अभियोक्त्री के कथन पर अविश्वास करने के लिये पर्याप्त परिस्थिति नहीं है – जहां चाक्षुष साक्ष्य के साथ–साथ विशेषज्ञ साक्ष्य (चिकित्सीय साक्ष्य) उपलब्ध है और दोनों एक दूसरे से विरोधाभाषी है, तब ऐसी स्थिति में, चाक्षुष साक्ष्य, विशेषज्ञ साक्ष्य पर अभिभावी होगी।

Sharad Verma, for the appellant.
Geetesh Singh Thakur, P.L. for the respondent.

JUDGMENT

U.C. MAHESHWARI, J. :- This appeal is directed by the appellant/ accused under section 374(2) of the Cr.P.C being aggrieved by the judgment dated 9.5.1997 passed by the Special Judge, Satna in Special Sessions Trial No.71/95, convicting and sentencing him under section 376(1) of IPC and section 3(1)(xi) of the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989 (in short `the Act'), for RI 7 years with fine of Rs.5000/-, in default of depositing the fine for six months RI in the earlier section while RI 2 years in the later section. The sentences are directed to run concurrently.

2. The facts giving rise to this appeal in short are that on 9.4.95 at about 10 O' Clock in the morning the prosecutrix Janki, aged 10 years lodged the

FIR at P.S. Tala, district Satna against the appellant contending that prior to the date of incident, she was used to work as laborer in the family of Ramkripal the father of the appellant and assigned the work to take the animals for grazing. On 8.4.95 in the night, after taking dinner, she was sleeping in the courtyard of the appellant's house. In the mid-night, she was subjected to forcefully intercourse by the appellant due to which blood was profused from her private part. She immediately informed about the incident to Ramkripal, the father of the appellant and Lallu, the elder brother of the appellant but they did not take any care and sent her with the appellant to her parents home. After leaving her at parental home, the appellant fled away. On reaching to home, she apprised about the incident to her mother Chourasia Bai (P.W.4). Then accompanied with her mother and village watchman Lalman (PW 2), she went to police station and lodged the FIR, on which, the offence of section 376 IPC and section 3(1)(xi) of the Act was registered against the appellant and he was arrested. The witnesses were interrogated. On completion of investigation the appellant was charge-sheeted for the aforesaid offence.

3. After committing the case to the Sessions Court, on evaluation of the charge sheet also taking into consideration that the prosecutrix is from the community and caste covered under the Act, the charge of section 376 IPC and 3(1)(xi) of the Act were framed against the appellant. He abjured the guilt, on which, the trial was held. After recording the evidence, on appreciation of the same, the appellant was held guilty for the above mentioned offence and was also punished with the punishment as stated above. Being dissatisfied with such conviction and sentence, the appellant has come to this court with this appeal.

4. Shri Sharad Verma, learned counsel of the appellant after taking me through the record of the trial court including the evidence led by the prosecution as well as by the defence so also the impugned judgment argued that due to some previous enmity between the family of the appellant and father of the prosecutrix, the appellant has been falsely implicated in the matter while, in fact, he has not committed any offence. In continuation, he argued that the story putforth by the prosecution has not been supported by any independent source of the evidence. Even the story putforth by the prosecutrix has not been supported by the medical evidence. The doctor who examined the prosecutrix immediately after the incident and prepared her MLC report had also not stated specifically that the rape or intercourse was committed with the prosecutrix. He also referred the concerning part of the deposition of such doctor and said that in the lack of any positive medical evidence, mere

on the testimony of the prosecutrix, the accused like the appellant could not have been convicted in the matter. He further said that even on taking into consideration, the deposition of the prosecutrix and her parents as accepted in its entirety then the act of penetration by the appellant in the private part of the prosecutrix, is not made out and in such situation also the impugned offence could not be said to be the offence of section 376(1) of IPC or any other part of such section. According to him, it was not the case of more than section 376 (1) read with section 511 of the IPC. With these arguments firstly he prayed for extending acquittal to the appellant and, in alternate, prayed that by adopting the lenient view the impugned case be modified from section 376(1) of the IPC into section 376(1) read with section 511 of the IPC and in such premises, he be punished with the lesser sentence i.e upto the period for which he has already undergone during pendency of the trial and subsequent to judgment of the trial court till passing the order for suspension of his jail sentence. He also argued that in the available circumstances, the ingredients of the offence of section 3(1)(xi) of the Act are also not made out and prayed for extending acquittal to the appellant under such section also.

5. On the other hand, Shri Geetesh Singh Thakur, PL by justifying the impugned conviction and sentence of the appellant said that the findings and the approach of the trial court in this regard being based on proper appreciation of the evidence are in conformity with law, the same does not require any interference at this stage either for acquittal to the appellant or modifying his awarded conviction and sentence into some other section and prayed for dismissing this appeal.

6. Having heard the counsel, keeping in view the arguments advanced, I have carefully gone through the record of the trial court including the evidence led by the prosecution as well as by the defence along with the impugned judgment.

7. It is apparent that in FIR the prosecutrix was shown to be the age of 10 years. According to the ossification test, carried out by Dr. V.G.Hinduja (PW 12) Asst. Surgeon posted at district hospital Satna, in view of x-ray plate (Ex.P/16) and report (Ex.P/17), her age was shown and proved to be between 9 to 12 years. However, in cross-examination, he categorically stated that he only received the x-ray plate and on that basis he has given the report Ex.P/7. He further stated that he did not personally see the prosecutrix. But it is apparent from the cross-examination that such x-ray plate and x-ray report has not been challenged on behalf of the defence saying that the same is not

related to the prosecutrix.

8. Apart the aforesaid, on recording the deposition of the prosecutrix Janki, her age was recorded 10 years by the Court in her deposition sheet. Her mother Chourasia Bai (PW 4) in her deposition stated her age to be years. Dr. Mahendra Singh (PW 8) who initially examined the prosecutrix and prepared her MLC report (Ex.P/10) also stated her age to be 10 years. Accordingly in the aforesaid depositions the age of the prosecutrix was shown to be between 9 to 12 or 10 years. The same have not been disputed in the cross-examination of any such witnesses. So, in such premises, it is held that the trial court has not committed any error in holding the prosecutrix to be minor in the age. So, till this extent the impugned judgment does not require any interference, hence such finding of the trial court are hereby affirmed.

9. The prosecution had initiated the case stating the prosecutrix is belonging to the community of schedule caste "chamaar" covered under the Act. But it is apparent from the evidence led by the prosecution as well as the papers exhibited on the record that in order to prove the caste of the prosecutrix covered by the Act, any documentary admissible evidence has neither been produced nor proved on the record. It is also apparent from the record that any certificate issued by the appropriate authority regarding caste of the prosecutrix has neither been produced nor proved on the record. In the lack of such certificate so also in view of the depositions of the prosecutrix as well as her mother Chourasia Bai (PW 4) in which they have not stated that they are from the community covered under the Act, mere on the statement of the father of the appellant Ramkripal examined as defence witness, no inference could have been drawn by the trial court to hold the caste of the prosecutrix covered under the Act. It is settled proposition of the law that to hold the conviction under the Act the prosecution is bound to prove the caste of the victim covered under the Act as well as of the accused like appellant to invoke the provision of the Act but prosecution has failed to prove the same. In such premises, the trial court has committed error in holding guilty to the appellant for the offence under section 3(1)(xi) of the Act. Pursuant to it, such findings as well as conviction and sentence of the appellant imposed by the trial court under such section is hereby set aside and he is acquitted from such charge.

10. Coming to consider the sustainability of conviction and sentence of the appellant under section 376(1) of the IPC, is concerned, on recording the deposition the prosecutrix Janki (PW 3) aged 10 years had categorically stated

that on the date of the incident she was working in the family of the appellant and was assigned the work to take the animals for grazing. During such working as labor, she was residing at the courtyard of the house of appellant's father. Before the alleged incident in the day time she was caught-hold by the appellant then she called elder brother of the appellant to save her, on which, the appellant fled away. She also informed about this incident to the father of the appellant. She also stated some other things of such day. In further deposition she stated that in the evening after taking meals, she went to sleep in the aforesaid courtyard of the appellant's house. At about 2 O' Clock in the night, the appellant came there and after pulling her leg upside, pressed her hands and committed intercourse on her. She categorically stated that the appellant inserted his private part into her private part. Due to which blood profused from her private part, on which, she became unconscious. Thereafter the appellant took her to her parental home. On the way she became conscious, on which, appellant said her that he will give her two rupees if she will not tell about the incident to other person. She further stated that on reaching home, appellant apprised her mother that the prosecutrix sustained the injuries due to some beating and thereafter appellant fled away from the residence. On going through the entire cross-examination of the prosecutrix, I have not found any substance showing that any of the material statement stated in the in-chief has been destroyed by any version of such cross-examination.

11. The version of the prosecutrix is further supported by her mother Chourasia Bai (P.W.4) who on recording her deposition categorically stated that her daughter was brought to her home by the appellant in the morning at about 7 O' Clock and he informed her that the prosecutrix has been subjected to beating by the ghosts. But when she asked about the incident from Janki then she narrated the entire incident according to which rape was committed by the appellant on her. Her version of in-chief has not been destroyed in her cross-examination. So, accordingly the alleged incident has been proved by the prosecutrix herself which is further supported by her mother who was informed by the prosecutrix immediately after the incident.

12. True it is that in the deposition of Dr. Mahendra Singh (PW 8) and Dr. Snehlata Gulati (PW 7) it has come on the record that no defnite opinion could have been given about committing the rape on the prosecutrix. They have also stated that they have not seen any sign of struggle on the person of the prosecutrix. Apart it, it was also stated by them that the prosecutrix was habitual of intercourse and no blood was found on her private parts. It is

settled proposition of the law that mere lack of injury or sign of struggle on the person of the prosecutrix or absence of any injury on her private parts, are not sufficient circumstance to disbelieve the version of the prosecutrix. The prosecutrix has categorically stated in her deposition that rape has been committed on her by the appellant and specially when the particulars of such incident have been stated by the witness and from the other available evidence if her version does not appear to be false then the prosecutrix could not be disbelieved mere on the basis of the expert opinion or the deposition of the doctors. In the case at hand, the version stated by the prosecutrix has been further proved by her mother Chourasia Bai (PW 4) to whom the prosecutrix informed about the incident soon after it was committed on her by the appellant.

13. It is settled proposition of the law where the ocular evidence as well as expert evidence (medical evidence) are available and both are conflicting to each other then in such a situation, the ocular evidence would prevail over the expert evidence and not the expert evidence over the ocular evidence. So, in view of such principle also, the trial court has not committed any error in relying on the deposition of the prosecutrix and her mother for holding guilty to the appellant under section 376(1) of the IPC.

14. In the aforesaid premises, I have not found any perversity, infirmity, illegality or anything against the propriety of the law in appreciation of the evidence in the impugned judgment for holding guilty to the appellant under section 376 of the IPC. So, in such premises, the impugned conviction of the appellant does not require any interference at this stage in the appellate jurisdiction of this court.

15. True it is that as per available record the prosecutrix was below 12 years of age on the date of the incident and the impugned case ought to have been considered and decided by the trial court by framing the charge of section 376(2)(f) of the IPC in which minimum sentence of 10 years is provided but neither such charge was framed nor such aspect has been considered by the trial court. In the lack of framing the charge of section 376(2)(f) of the IPC by the trial court after 15 years from the date of impugned judgment I do not find fit to consider such matter afresh at this stage specially in the absence of any appeal at the instance of the State or on behalf of the prosecutrix. I am of the considered view that the trial court has not committed any illegality in holding guilty and punishing the appellant under section 376(1) of the IPC.

16. I am also of the view that in order to consider the charge of section

376(2)(f) the court has to frame the charge of such section afresh against the appellant because this is the major offence in comparison to section 376(1) of the IPC and on framing such charge again the court is bound to remand the matter to the trial court by extending opportunity to adduce the additional evidence to the parties and, in such circumstance, possibility to make prayer for recalling the prosecutrix for reexamination, could not be ruled out. At the time of incident, the prosecutrix was 10 years of age and now she must be near about 27 years of age and might have settled in her family and; on remanding the matter, if she is recalled for examination then it may create difficulty in her family life. So, in such circumstance, I do not find fit either to frame the charge of section 376(2)(f) of the IPC or to remand the matter for any purpose even for the question regarding enhancement of the awarded jail sentence.

17. In view of the aforesaid by allowing this appeal in part, the conviction and sentence awarded to the appellant under section 3(1)(xi) of the Act is hereby set aside while his conviction and sentence awarded by the trial court under section 376(1) of the IPC is hereby affirmed. Pursuant to it, the appellant is directed to surrender himself before the trial court on or before 15.2.2013 for facing the remaining awarded jail sentence, failing which the trial court shall be at liberty to take appropriate steps in this regard to serve the remaining jail sentence to the appellant. Till the aforesaid extent, the impugned judgment is modified while the other findings of the same are hereby affirmed. The bail bonds of the appellant are hereby canceled.

18. Appeal is allowed in part as indicated above.

Appeal partly allowed.

I.L.R. [2013] M.P., 1712
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr. A. No. 34/1997 (Jabalpur) decided on 19 March, 2013

SANJU & anr . ...Appellants
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Murder* - Appellant No. 2 who was having a katar in his hand had caught hold the deceased and appellant No. 1 inflicted injuries by knife - 10 injuries of sharp and pointed weapon found by doctor on**

the person of deceased - Evidence of eye witnesses, oral dying declaration and dying declaration found to be cogent, consistent and reliable - It stood established that both the appellants assaulted deceased with knife/katar with the intention of committing his murder - Sentence of life impriosnment held proper. (Paras 21,22,23 & 24)

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 32 – हत्या – अपीलार्थी क्रं. 2 अपने हाथ में कटार लिये, मृतक को पकड़े रखा और अपीलार्थी क्रं. 1 ने चाकू से क्षतियां पहुंचाई – चिकित्सक ने मृतक के शरीर पर धारदार एवं नुकीले शस्त्र की 10 चोटें पाई – प्रत्यक्षदर्शी साक्षियों का साक्ष्य, मौखिक मृत्युकालिक कथन एवं मृत्युकालिक कथन, प्रबल, सुसंगत एवं विश्वसनीय होना पाये गये – यह स्थापित होता है कि दोनों अपीलार्थियों ने मृतक पर उसकी हत्या कारित करने के आशय से चाकू/कटार से हमला किया – आजीवन कारावास का दण्डादेश उचित ठहराया गया।

S.K. Gangrade with *Anita Kaithwas*, for the appellants.
Amit Pandey, P.L. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **RAKESH SAKSENA, J. :-** Appellants have filed this appeal against the judgment dated 26.12.1996 passed by I Additional Sessions Judge, Hoshangabad in Sessions Trial No.105/1995 convicting to appellant No.1 under section 302 of the Indian Penal Code and to appellant No.2 under section 302/34 of the Indian Penal Code and sentencing each of them to imprisonment for life.

2. Initially, this appeal was disposed of by this Court by the judgment dated 8.2.2005 by affirming the judgment of conviction passed by the trial Court. However, the Hon'ble Apex Court by order dated 5th July, 2010 passed in Criminal Appeal No.1153/2010 set aside the said judgment and remitted the matter back to this Court for fresh hearing on merits after appointing an *amicus curiae* or directing the Legal Aid Committee to nominate an experienced Advocate to represent the appellant. Earlier, the appeal was decided when learned counsel for the appellants did not appear to argue the matter. Presently, appellants have been represented by Shri S.K.Gangrade and Ku. Anita Kaithwas, Advocates.

3. In short, the prosecution case is that on 3.12.94 in the night around 9:30 p.m. when complainant Gulab Singh was asleep in his house in Itarsi, Bablu Shukla (PW-2) came to him and informed that his son Ajay was lying in

his house in injured condition. Appellants Sanju and Sheru had assaulted him with knives. Gulab Singh (PW-1) rushed to the house of Bablu Shukla and saw his son in injured condition. Ajay told to Gulab that Sanju and Sheru had dealt knife blows to him. Complainant sent injured Ajay along with Lalji Ram (PW-6) to hospital and himself went to police station, Itarsi and lodged report Ex.P/1. It is said that Ajay was assaulted because he protested against the teasing of girls by the appellants.

4. In Itarsi hospital, Dr. A.T.Mangtani (PW-5) examined the injuries of Ajay. Ajay also told to him that Sanju and Sheru had assaulted him. Dr. Mangtani referred the injured to Surgical Specialist for treatment. On 4.12.94 i.e. on the next day, S.D.M. Itarsi viz. Madanlal Kaurav (PW-15), in the presence of Dr.Sanad Dalal (PW-14),recorded dying declaration of Ajay wherein he reiterated that appellants assaulted him with knife and Katar. Ajay was thereafter referred to Hamidia hospital, Bhopal for further treatment, but on 6.12.94 he succumbed to his injuries. Dr. D.K.Satpathi, Director Medico Legal Institute, Bhopal (PW-8) conducted autopsy of the dead body of Ajay.

5. During investigation, Investigating Officer M.S.Thakur (PW-9) prepared the spot map, arrested accused persons and seized knife and Katar from them and sent them to Forensic Science Laboratory for examination. After completion of investigation, charge sheet was filed in the Court of Magistrate and the case was thereafter committed for trial.

6. During trial, appellants abjured their guilt and pleaded false implication.

7. Learned Additional Sessions Judge after appreciating the evidence on record, held the appellants guilty, convicted and sentenced them as mentioned above. Aggrieved by their conviction and sentence, appellants have filed the present appeal.

8. Learned counsel for the appellants submitted that the evidence of eyewitnesses as well as the dying declaration allegedly recorded by S.D.M. was not reliable. It was not possible for deceased to have spoken anything in seriously injured condition. He submitted that appellant Sanju has already been released from jail after serving out his sentence. Learned trial Judge committed error in convicting appellant Sheru @ Narendra with the aid of section 34 of the Indian Penal Code merely on the ground that he held deceased at the time of occurrence. On the other hand, learned counsel for State while supporting and justifying the impugned judgment of conviction, submitted that

the evidence on record was cogent, consistent and reliable.

9. We have heard the learned counsel for the parties at length, perused the impugned judgment and the evidence on record carefully.

10. It has not been disputed by the appellants that deceased Ajay @ Bablu met with a homicidal death. Dr. A.T.Mangtani (PW-5) Assistant Surgeon of Itarsi hospital, deposed that on 3.12.94 Ajay @ Bablu was brought to hospital in injured condition by Lalji Ram. Lalji Ram disclosed to him that Sanju and Sheru had caused injuries to him. He also received requisition for his medical examination from police station, Itarsi. On examination, as per report Ex.P/10, he found following injuries on body of Ajay:-

(1) Incised wound 2" x 1" on abdominal cavity on left lumber region. Omentum protruding out.

(2) Incised wound 1" x 1/4" in third intercostal space muscle deep. Emphysema present.

(3) Incised wound 1¼" x 1/4" x depth not taken on right side scapular region.

(4) Incised wound 3/4" x 1/4" x bone deep on right scapular region.

(5) Incised wound on right side back 1" lateral to injury no.4.

(6) Incised wound 1/2" x 1/4" on left scapular region.

(7) Incised wound 1½" x 3/4" x muscle deep on right upper arm.

(8) Incised wound 1½" x 1/4" x muscle deep on left forearm.

(9) Incised wound 3" x 1½" x muscle deep on left upper arm on posterior aspect.

(10) Incised wound 1/2" x 1/4" x muscle deep on left upper arm.

Injuries from 1 to 10 were caused by sharp edged weapon within 6 hours from the time of examination. Patient

was in the state of semi-conscious.

Because of serious condition, Ajay was referred to Hamidia hospital, Bhopal for further treatment where on 6.12.94 he expired. Postmortem examination of the body of deceased was performed by Dr.D.K.Satpathi (PW-8) who vide his postmortem report Ex.P/15 opined that the death of deceased occurred due to shock and haemorrhage as a result of Thoracic abdominal injury. As per report Ex.P/15, he found following injuries on the body of deceased:-

(1) Stitched incised wound situated over right arm cubical fosse 4 x 5cm tranverse medially muscle deep.

(2) Incised wound (stitched) over right arm medial aspect obliquely vertical 6 x .5cm muscle deep.

(3) Stab wound right pectoral region 2.5 x 1cm travel obliquely upward within the muscles for a length of 6cm.

(4) Stitched stab wound situated over right flank extending from 13cm below the axillary pit 2.5 x 1cm communicating with thoracic cavity.

(5) Abrasion present over right lateral stolid 1cm dia.

(6) Defence incised wound present over right palm upper part transverse skin deep tapering laterally.

(7) Stitched incised wound present over right lumber region of abdomen starting from 8cm right to midline 5 x1cm transverse through which loops of intestine protruding out.

(8) Stitched incised wound present over left side of abdomen extending from 5cm. left to midline vertical underneath all the layers of abdomen is stitched in layers. Another stitched wound present 2.5cm left to this stitched wound. It is 2.5 x .5cm and also communicating with abdominal wall (cavity).

(9) There is incised nick present just above left supermiliae spine. Size .5 x .1cm.

(10) Stitched incised wound situated over left forearm

exterior aspect medially 10cm. below obesanon tip 4.5 x 1cm vertically muscle deep.

(11) Stab wound present over right back 4cm right to midline and 5cm above iliac crest medial end is broad, lateral end is sharp 2.5 x 1.5cm it has gone with the Para vertebral muscles obliquely upward medially and struck in the vertebra, total length is 8cm.

(12) Stab wound situated over left scapula vertical 2.5 x .5cm it has reached upto muscle with 5cm deep. Lower end is broad.

(13) Stab wound 4cm right to midline vertical 2.5 x .5cm lower end is broad over medial aspect of scapula right. It has reached the thoracic cavity and stabs the right upper lobe and has travel within the lung for 5cm length.

(14) Stab wound present over mid of right scapula lower end is broad 2.5 x 0.5cm runs obliquely upward medially within 5cm.

(15) Stab wound present over lower end of scapula transverse medial end is broad 2.5 x .5cm. It has travel within the muscle deep for 7cm length.

(16) Stitched incised wound paramedial line of abdomen it is 20cm long underneath all abdominal layers stitched layer by layer.

(17) Both thoracic cavities contain blood tinged fluid about 300cc some of which is clotted along with abdominal cavity.

(18) Transverse colon repaired at three places. Small intestine is anatomized at one place. Descending colon also repaired at left iliac region.

These injuries were caused by sharp edged weapon. In the opinion of doctor, the injuries were sufficient to cause death in the ordinary course of nature. Cause of death was shock due to excessive haemorrhage. The death was homicidal in nature.

11. From the aforesaid evidence, we find it established that deceased died a homicidal death on account of shock and haemorrhage resulting from the injuries caused on his chest and abdomen by hard and sharp pointed object.

12. Now it has to be seen whether appellants caused injuries to deceased which resulted into his death ? In this regard, the case mainly rests on the evidence of eyewitnesses Narmada Prasad (PW-3),Ram Kumar Sharma (PW-4) and dying declaration Ex.P/19 recorded by S.D.M.Madanlal Kaurav (PW-15).

13. Narmada Prasad (PW-3) deposed that he and Ajay @ Bablu had gone to market for purchase of some articles. When they were returning, they saw appellants standing on the crossing. They came forward and appellant Sanju dealt a knife blow in the abdomen of Bablu. When he tried to repeat the assault he caught his hand whereby the blow was prevented. When Bablu begged pardon from him they started talking peacefully. Appellant Sanju then proposed to take Bablu to doctor. They went where a compounder lived but he was not found at the house. In the meantime, appellant Sanju asked him to bring his bicycle. When he came back with bicycle he saw appellant Sheru holding Bablu with his one hand and in another hand holding a Katar and appellant Sanju inflicting knife blows to him. When he tried to intervene Sanju pushed him and ran after him. Getting scared he ran away crying. He then met Gulab Singh, the father of Bablu, who asked him to bring a rickshaw. Bablu was lying in the house of Shukla saying that Sanju and Sheru assaulted him.

14. Ram Kumar Sharma (PW-4), the another eyewitness,reiterated almost the same story. He deposed that in the night at about 9 o'clock on hearing cries *"Bachao Bachao"* he came out of his house and saw appellant Sheru holding the hand of Ajay @ Bablu by one hand and holding a Katar in another. Appellant Sanju was inflicting knife blows to Bablu. He saw the incident in the street light in front of his house. He corroborated Narmada Prasad (PW-3) by saying that when Narmada came, Sanju and Sheru pushed Bablu over him and ran away towards the crossing. Bablu and Narmada also ran away. Subsequently he saw Bablu lying on a bed in the house of Shukla Master. Father of Bablu also reached there and called a rickshaw. With Bablu he also went to hospital. He stated that no passer-by stopped there. Though people of the neighbourhood saw the quarrel from their house but none came forward. Though he was not scared, but out of fear he did not go near the assailants to save his friend.

15. Narmada Prasad (PW-3) and Ram Kumar Sharma (PW-4) were though subjected to a lengthy cross-examination but nothing material could be brought out to discredit their testimony.

16. Matru @ Brajkishore (PW-13) though did not support the prosecution case wholly and was declared hostile still corroborated the evidence of Narmada (PW-3) by saying that in the night at about 9-9:30 when he was coming back from picture, near the crossing he saw Bablu @ Ajay, Narmada and appellants standing. They were indulging in some altercation. He saw blood oozing out from the abdomen of Bablu and appellant Sanju holding a knife in his hand. According to him, he saw nothing in the hand of another appellant and also did not see as to who caused injuries to Bablu. He stated that when he reached his house he heard the noise of quarrel between appellants and Ajay and also the shrieks of Ajay. In cross-examination, when this witness was confronted with his police statement Ex.P/10 he admitted that he disclosed to police that Sanju dealt a blow of knife in the abdomen of Bablu.

17. Gulab Singh (PW-1), the father of deceased, deposed that in the night at about 9-10:00 p.m. Bablu Shukla (Sunil) came to his house and informed that his son Ajay was lying in his house soiled in blood. He reached the house of Bablu Shukla and saw his son injured. There were number of injuries on his body. On his asking,his son told that appellants Sanju and Sheru assaulted him with *Chhuri* and *Gupti*. He and Lalji Ram then carried Ajay to Jan Sewa hospital, Itarsi. The doctors refused to provide treatment in the absence of police report. He then went to police station, Itarsi and lodged report Ex.P/1. For further treatment, on the advice of doctors, he took Ajay to Hamidia hospital, Bhopal where on 6.12.94 he died.

18. The evidence of Gulab (PW-1) comes in the category of oral dying declaration since he categorically stated that deceased told to him that Sanju dealt knife blows in his abdomen and that appellant Sheru also gave blows to him. According to Gulab, though Bablu Shukla (Sunil-PW-2) was also present there, but Sunil stated that deceased did not tell anything to him. He, however, admitted that on asking of his father he went to the house of Gulab Singh and called him to his house and that Gulab Singh immediately thereafter reached his house. Evidence of Gulab Singh however finds support from the evidence of Lalji Ram (PW-6) who also reached at the house of Shuklaji. When he went in his house and asked from deceased, he told to him that Sanju and Sheru assaulted him with Katar etc. He then arranged for a rickshaw and

along with Gulab Singh carried Bablu to hospital. This witness remained firm in stating that Bablu told to him that Sanju and Sheru caused injuries to him with *Katar* etc. His evidence finds further corroboration from the evidence of Dr. A.T.Mangtani (PW-5) who deposed that when Lalji Ram brought injured to him he informed him that injured had told to him that Sanju and Sheru had caused injuries to him.

19. Apart from the above evidence, prosecution also examined S.D.M.Madanlal Kaurav (PW-15) to prove dying declaration Ex.P/19 recorded by him. S.D.M. (PW-15) deposed that on receiving information from police station for recording dying declaration of Ajay, son of Gulab Singh, on 4.12.94 he went to Jan Sewa hospital, Itarsi and at 10:40 a.m. recorded dying declaration of Ajay. He obtained certificate from doctor about the fitness and mental condition of Ajay before recording his statement. Deceased stated that "in the last night at about 8 o'clock just ahead of Panja Chowraha Sanjay Gadwal and Sheru Goswami dealt Katar blows in his abdomen. They also had a six round (pistol) which also they took out. He was coming after taking goods from the shop. Both the assailants lived near his house. Narmada saw them assaulting. Father's name of Narmada is Devlal. Lalji Badkur had brought him to hospital. He had no quarrel with them; they used to do Rangbaji (teasing girls) because of which quarrel occurred. No more he has to say." Since there were injuries on the hands of Ajay, he obtained his left hand thumb impression on Ex.P/19.

20. Learned counsel for the appellants submitted that the said dying declaration was not reliable. No separate certificate about the fitness of deceased was taken before recording his dying declaration. We are unable to accept the submission made by learned counsel for the appellants for the reason that the certificate given by Dr. Sanad Dalal is endorsed on the dying declaration Ex.P/19 itself. Dr. Dalal (PW-14) deposed that on 4.12.94 he was posted as Surgical Specialist in Jan Sewa hospital, Itarsi. At 10:40 a.m. S.D.M. Itarsi had recorded dying declaration of Ajay. At that time he was on the round and he had endorsed the certificate on Ex.P/19 that during recording of the dying declaration patient had remained conscious. It is true that Dr. Dalal admitted that the certificate was not given before recording the statement but he endorsed the certificate when recording of the statement was completed. Dr. Dalal clarified that though the condition of patient was delicate but it did not mean that he was not in a position to talk. The delicacy of the condition

was recorded by him before the patient was sent for operation. This was for obtaining the consent before administering anesthesia to patient. Learned counsel for the appellants referring to the evidence of Dr. A.T. Mangtani (PW-5) submitted that at the time of examination by him deceased was semi-conscious and was not answering the questions effectively because of shock, therefore, it was suspicious that his dying declaration could be recorded by S.D.M. (PW-15). We find no substance in the aforesaid submission. The condition of patient just after 5-6 hours of the occurrence may be different then the condition after administering treatment to him. The condition noted by Dr. Mangtani pertained to the time just after the occurrence on 3.12.94 whereas the dying declaration Ex.P/19 was recorded by S.D.M. on 4.12.94. Apart from it, S.D.M. (PW-15) and Dr.Sanad Dalal (PW-14) are not alleged to have any animus against the appellants for which they would have created false declaration against them.

21. After scanning and critically analysing the evidence of eyewitnesses, the oral dying declaration and dying declaration Ex.P/19 recorded by S.D.M. (PW-15), we find them to be cogent, consistent and reliable, as such we hold that the trial Court committed no error in appreciating the aforesaid evidence and holding that appellants caused injuries to deceased with knife and *Katar* which resulted into his death.

22. Learned counsel for the appellants contended that since the eyewitnesses did not say that appellant Sheru @ Narendra dealt any blow with *Katar* to deceased, his conviction with the aid of section 34 of the Indian Penal Code was not justified. We have already discussed that Narmada (PW-3) and Ram Kumar (PW-4) proved that both the appellants participated in the incident together, armed with knife and Katar and that while appellant Sanju dealt blows with knife to deceased, appellant Sheru kept on holding him armed with a Katar facilitating Sanju to inflict injuries to deceased. Apart from it, oral dying declarations made by deceased to Gulab Singh (PW-1) and Lalji Ram (PW-6) and the dying declaration Ex.P/19 recorded by S.D.M. (PW-15), it clearly stood established that both the appellants caused injuries to deceased in furtherance of their common intention to cause death of deceased. In our considered opinion, learned trial Judge rightly convicted appellant Sheru @ Narmada under section 302/34 of I.P.C.

23. From the evidence of Dr.Mangtani (PW-5), who examined the injuries of deceased, while he was alive and from the evidence of Dr.D.K.Satpathi

(PW-8) who conducted autopsy of the body of deceased, it is apparent that at least 10 injuries were caused on the body of deceased by sharp and pointed weapon. Injuries were also caused on the vital parts of the body of deceased. Thus, in our opinion, it stood established that both the appellants assaulted deceased with knife with the intention of committing his murder.

24. For the aforesaid reasons, the conviction of appellant No.1 Sanju under section 302 of I.P.C. and the conviction of appellant No.2 Sheru @ Narendra under section 302/34 of I.P.C. and the sentence of imprisonment for life awarded to them by the trial Court is affirmed.

25. Appeal being devoid of merits, is dismissed.

Appeal dismised.

I.L.R. [2013] M.P., 1722
APPELLATE CRIMINAL
Before Mr. Justice S.K. Seth & Mr. Justice J.K. Maheshwari
Cr. A. No. 789/2005 (Indore) decided on 9 April, 2013

THAVRIYA @ THAVAR SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Sections 302, 352, 84, 304-II - Unsoundness of mind - **Various questions put by trial Court to accused answered satisfactorily - Trial Court observed that he understand that the act done by him is wrong - Held - Defence of unsoundness of mind or incapable of knowing the nature of the act committed by him is to be established by the accused by cogent defence - Otherwise the common man is presumed to know the nature of the consequence of the act done. (Paras 7 & 8)**

क. दण्ड संहिता (1860 का 45), धाराऐं 302, 352, 84 व 304 II– चित्त विकृति – विचारण न्यायालय द्वारा पूछे गये विभिन्न प्रश्नों का अभियुक्त ने संतोषजनक रुप से उत्तर दिया – विचारण न्यायालय ने प्रेक्षण किया कि उसे समझ है कि उसके द्वारा किया गया कृत्य गलत है – अभिनिर्धारित – चित्त विकृत्ति या उसके द्वारा किये गये कृत्य के स्वरुप को जानने में अक्षम होने का बचाव, अभियुक्त द्वारा प्रबल बचाव से स्थापित होना चाहिए – अन्यथा सामान्य मनुष्य को किये गये कृत्य के परिणामों का स्वरुप ज्ञात होने की उपधारणा होती है।

B. Evidence Act (1 of 1872), Section 3 - Evidence of Eye

Witnesses - Reliability **- Appellant caught hold the infant child, push on his chest, inflicted injury over the stomach by knife thereby his intestine has come out - Eye witnesses version supported by doctor - Held - Testimony of witnesses remained in ocular which is apparent from the autopsy report - Prosecution has proved the charge beyond reasonable doubt by cogent evidence. (Para 9)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – प्रत्यक्षदर्शी साक्षियों का साक्ष्य – विश्वसनीयता – अपीलार्थी ने नन्हें शिशु को पकड़ा, उसके सीने पर धक्का दिया, पेट पर चाकू से चोट पहुंचाई जिससे उसकी आतें बाहर आई गईं – प्रत्यक्षदर्शी साक्षी का वर्णन, चिकित्सक द्वारा समर्थित – अभिनिर्धारित – साक्षियों की परिसाक्ष्य चाक्षुष बनी रही है, जो शव प्रतिवेदन से स्पष्ट है – अभियोजन ने आरोप को प्रबल साक्ष्य से युक्तियुक्त संदेह से परे साबित किया।

C. Penal Code (45 of 1860), Sections 302 or 304-II - Murder or Culpable Homicide not amounting to murder **- Appellant created a scene when he was stopped, he caused injury to his infant son using knife, which he was having - Held - He was having motive-Offence u/s 302 IPC cannot be converted into Section 304 Part II, IPC. (Para 10)**

ग. दण्ड संहिता (1860 का 45), धाराएं 302 या 304 II– हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अपीलार्थी ने तमाशा किया और जब उसे रोका गया, उसने अपने शिशु पुत्र को चाकू से चोट कारित की जो उसके पास था – अभिनिर्धारित – उसके पास हेतुक था – धारा 302 भा.द.सं. का अपराध, धारा 304 भाग II भा.द.सं. में संपरिवर्तित नहीं किया जा सकता।

D. Penal Code (45 of 1860), Section 352 - Use of Criminal Force - Held **- Said charge has been fully established from the evidence of P.W.1 - No argument to disprove has been made - Same has rightly been found proved - Appeal dismissed. (Para 11)**

घ. दण्ड संहिता (1860 का 45), धारा 352 – आपराधिक बल का प्रयोग – अभिनिर्धारित – उक्त आरोप अ.सा. 1 के साक्ष्य से पूर्णतः स्थापित किया गया – नासाबित करने के लिए कोई तर्क नहीं किया गया – उक्त को उचित रुप से साबित पाया गया – अपील खारिज।

Case referred :

Cr.A. No. 1004/2002 decided on 30.11.2012.

Vivek Singh, for the appellant.
Raghavendra Singh Bais, Dy. G.A. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **J.K. MAHESHWARI, J. :-** Being aggrieved by the judgment dated 25.07.2005, passed by 2nd Additional Sessions Judge (Fast Track) Jhabua, in Sessions Trial No.356/2004, convicting the appellant for the offence under Section 302, IPC directing to undergo life imprisonment with default stipulation and for the charge uridcr Section 352, IPC directing one month's R.I., this appeal has been filed under Section 374 of Cr. P.C.

2. As per the prosecution story on 24.08.2004 Noora, wife of the appellant was admitted in Government Hospital, Thandla due to labour pain, where she gave birth to male child. She is also having a female child, aged 3 years. On the next date i.e. 25.08.2004 nurse Elizabeth Rawat (PW-2) has intimated to the Dr. Kiranbala Chaturvedi (PW-1) at 06:15am that appellant creating violence and dancing with his daughter keeping in his hand and thereafter, throw her on bed. When the nurse went to save him the accused taking infant male child in hands inflicted knife injury over the stomach. On intimation doctor came to the hospital and tried to remove the accused, who was shouting, thereupon accused also assaulted her. A written intimation was given to the Police Station Thandla and the medical assistance to the child was offered thereupon an offence at Crime No.160/2004 at Police Station Thandla under Section 307, IPC was registered. The infant during treatment succumbed to the injuries, however, Section 302, IPC was further added.

3. After committal by the Judicial Magistrate First Class, Thandla the case was assigned to the Sessions Court, Jhabua where the charge under Section 302 and 352, IPC were framed. Accused has abjured his guilt and took defence that under influence of some extraneous power he was dancing and jumping, at that time the incident has taken place. During course of trial the defence of unsoundness of mind of the accused was put-forth but it was not believed by the trial Court while recording satisfaction as specified under Section 328, Cr.PC. The prosecution has examined as many as 13 witnesses while the appellant has not examined any witness in defence. The trial Court believing the testimony of Elizabeth Rawat (PW-2), Dr. Kiranbala Chaturvedi (PW-1) and the autopsy report (Ex. P-12) supported by the testimony of Dr. Ashok Mahajan (PW-12) found the prosecution story proved, however, convicted the appellant for the said charges and directed to undergo sentence as specified herein above.

4. The facts in the present case which are not in dispute are that on

24.08.2004 Noora wife of accused was admitted in Government Hospital, Thandla at 11:00 am in the morning due to labour pain where a male child was born at 11:50 am. She is also having a female child, aged three years. It is also not in dispute that on 25.08.2004 Elizabeth Rawat (PW-2) was posted on night duty in the Hospital and Dr. Kiranbala Chaturvedi (PW-1) was the doctor posted in the Government Hospital, Thandla. The infant received knife injury over the stomach, due to said injury he has developed septicemia and succumbed to those injuries.

5. Learned counsel Shri Vivek Singh appearing on behalf of the appellant has strenuously urged that as per the statement of the prosecution witness Elizabeth Rawat (PW-2) and Dr. Kiranbala Chaturvedi (PW-1) it is clear that at the time of incident accused was not of a fit mental state of mind, however was of unsoundness of mind. It is his contention that he was incapable of knowing the nature of the act which he was doing is wrong or contrary to law. In such circumstances he ought to be acquitted accepting the said defence. It is also his contention that there was no motive to the accused to commit culpable homicide amounting to murder. Looking to the fact that the injury by knife has been inflicted all of a sudden without any motive and the incident is all of sudden, therefore, it may hardly be a case of Section 304 Part-II, IPC. It is also submitted by him that on causing injury the infant was died after three weeks due to septicemia, therefore, the charge under Section 302, IPC has not brought at home by the prosecution in the facts of the case. So far as the charge under 352, IPC is concerned it is submitted that the sentence has already been undergone, therefore, by allowing this appeal sentence may be reduced for the charge under Section 302, IPC setting aside the finding and the judgment of the trial Court.

6. Shri Raghavendra Singh Bais, learned Deputy Government Advocate representing the State referring the statement of the prosecution witnesses and also relying upon the autopsy report and the statement of the doctor performing the autopsy (Ex. P-12) urged that the injury has been inflicted by knife by the accused himself to an infant of about 20 hours old. By the said injury the intestine of the said infant has come out and during treatment septicemia was developed thereby he has died, therefore, the cause of death is septicemia developed on account of the injury inflicted by the accused, however, the trial Court has rightly convicted the appellant and directed the sentence, thus, interference in this appeal is not warranted.

7. After hearing learned counsel appearing for the parties at length, first

of all the defence of unsoundness of mind put-forth by the accused requires consideration. In this aspect it is relevant to note here that the accused has moved an application before the trial Court under Section 84, IPC, which was rejected on 24.12.2004. Learned trial Court has put various questions to the accused, which has been answered satisfactorily by him. The trial Court was satisfied that the accused is not of unsound mind. In the said order it was observed that he is capable of understanding the questions and to answer it. It has further been observed that he understand that the act done by him is wrong. In such circumstances after satisfaction the defence put by accused under Section 84 of IPC was denied. After passing the order by the trial Court steps were not taken to prefer the appeal before the Medical Board or to file a revision assailing the said order, however, it has become absolute. In the said context, on the plea of insanity the guidance can safely be taken by the Division Bench Judgment of this Court in the case of *Bhagirath Vs. State* [Criminal Appeal No.1004 of 2002], decided on 30.11.2012, the Court has observed as under: -

> "11. The law on the subject of insanity is very clear. Section 84 IPC deals with legal insanity as a general exception to an offence punishable under the Penal code or under any special or penal law This section lays down the legal test of responsibility in cases of alleged unsoundness of mind. Under it, a person is not guilty of an offence, who at the time of doing such act by reason of unsoundness of mind, is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. This is known as *Mc'Naghten's* Rule. The burden of proving insanity or *non-compos mentis lies* on the accused.
>
> It is for him to establish that his cognitive faculties were lost due to aberration of mind. In other words, defence of unsoundness of mind being one of the general exceptions to criminal liability, the prosecution having established the main ingredients of the offence the burden to prove insanity at the time of occurrence is on the defense. Everyone is presumed to know the nature or consequence of his act. The accused may rebut this presumption with cogent and reliable evidence about his insanity"

8. In view of the foregoing nothing has been brought on record to establish that the accused was of unsound mind at the time of incident. The defence of unsoundness of mind or incapable of knowing the nature of the act

committed by him to be established by the accused otherwise the common man is presumed to know the nature of the consequence of the act done until rebutted by cogent defence. In such circumstances the argument on the said issue of the learned counsel for the appellant is hereby repelled.

9. As per the prosecution story it is apparent that on 25.08.2004 at about 06:15 am when the nurse Elizabeth Rawat (PW-2) was on night duty she visualized that accused keeping his daughter on his hand dancing and thrown him on bed. Thereafter caught hold the infant child and push on his chest. When she has tried to save him, he was having knife in his hand inflicted injury to infant son over the stomach thereby his intestine has come out. She has immediately rushed to call Dr. Kiranbala Chaturvedi (PW-1). The doctor came on spot, has also supported the version of Elizabeth Rawat (PW-2) and an intimation of the incident was given by her to the Police Station. With the help of Police and other persons the accused was caught hold and sent to the custody. The cause of death of the infant boy is due to injury received over his stomach by knife, and due to septicemia. The said fact is apparent from the autopsy report (Ex. P-12) and the statement of Dr. Ashok Mahajan (PW12). The testimony of these witnesses has remained in ocular to inflict the injury by the accused to the infant deceased by knife. In such circumstances, the prosecution has proved the charge under Section 302, IPC beyond reasonable doubt by cogent evidence. Thus, the finding of conviction, as recorded by the trial Court after due appreciation of the evidence which do not warrant any interference.

10. Now, the argument advanced by learned counsel for the appellant having no motive to cause death and looking, to the injury it may not be a case of culpable homicide amounting to murder but it is a case under Section 304-II of IPC, requires consideration. In this respect, as per the evidence of the prosecution witnesses it is fully proved that the accused has come along with his wife Noora in the Hospital. In the evening he was seated on her bed and discussing on the next day morning he has created a seen and when he was stopped by the Hospital staff including Elizabeth Rawat (PW-2) and Dr. Kiranbala Chaturvedi (PW-1) using a knife which he was having caused injury to his infant son, who cannot be in a position to assert. The aforesaid sequel of facts indicates that after creating the scene using a knife which he was having with him injury has been caused to the infant which ultimately resulted into death after developing septicemia during treatment. The infant, who was on the threshold at childhood and not known to the niceties of society received injury caused by his father and died in the said incident. In such circumstances it cannot be said that the offence under Section 302, IPC may be

converted into Section 304 Part-II, IPC and the accused is having no motive. Considering the aforesaid and looking to the finding so recorded by the trial Court after due appreciation of the evidence we are of the opinion that the conviction of the appellant under Section 302, IPC has rightly been directed by the trial Court.

11. So far as the charge under Section 352, IPC is concerned the said charge has been fully established from the evidence of the Dr. Kiranbala Chaturvedi (PW1) and the argument to disprove the said charge has not been made before this Court. In such circumstances, the charge under Section 352, IPC has rightly been found prove by the trial Court and the finding of fact so recorded do not warrant any interference in this appeal.

12. Accordingly, the appeal filed by the appellant is devoid of any substance, therefore, upholding the judgment of conviction and sentence so awarded by the trial Court this appeal stands dismissed. The appellant shall undergo the remaining sentence as directed by the Court.

Appeal dismissed.

I.L.R. [2013] M.P., 1728
APPELLATE CRIMINAL
Before Mr. Justice G.D. Saxena
Cr. A. No. 228/2011 (Gwalior) decided on 10 May, 2013

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

***Evidence Act (1 of 1872), Section 9 - Delayed Test Identification Parade* - After a lapse of considerable time identification by strangers cannot be relied on - Identification by a witness for the first time in court, should not form basis of conviction - Such evidence is a weak type of evidence unless corroborated by the previous parade or other evidence - Previous Identification is a check valve to the evidence of Identification in the court. (Para 19)**

साक्ष्य अधिनियम (1872 का 1), धारा 9 – विलंब से की गई पहचान परेड – अधिक समय बीत जाने के पश्चात, अपरिचित द्वारा की गई पहचान पर विश्वास नहीं किया जा सकता – साक्षी द्वारा न्यायालय में प्रथम बार पहचान करना, दोषसिद्धि का आधार नहीं बनना चाहिए – ऐसा साक्ष्य कमजोर प्रकार का साक्ष्य है जब तक कि पूर्वतर परेड या अन्य साक्ष्य द्वारा अभिपुष्ट न हो – पूर्वतर पहचान, न्यायालय में पहचान के साक्ष्य का चेक वाल्व है।

Cases referred :

(2010) 7 SCC 697, (2001) 3 SCC 468, (2003) 12 SCC 554.

Rajmani Bansal, for the appellants.
R.K. Shrivastava, P.L. for the respondent/State.

JUDGMENT

G.D. SAXENA, J. :- This appeal under Section 374(2) of the Code of Criminal Procedure 1973 has been preferred by appellants/accused against a judgment dated 25th February 2011 in Special Sessions Case No. 22/2008 delivered by the Special Judge, Datia (Under M.P. Dakaity and Vyapaharan Prabhavit Kshetra Adhiniyam), hereinafter referred to Adhiniyam, thereby convicting the appellants/accused for commission of offence punishable under section 397 read with section 13 of the Adhiniyam and sentencing them to undergo seven years' rigorous imprisonment with a fine of Rs. 5,000/- (Rs. Five Thousand Only), each, in default of payment of which to serve additional one year's rigorous imprisonment each by the accused.

(2) In brief, as per prosecution version, the incident in short, is that on 3rd October 2007 at 8 a.m., when complainant Shahid @ Seth proceeded from his house on his motorcycle with a cash of Rs.50,000/- to purchase goats and coming back at around 2 o' clock, then on the way, between Pathhari to Chak Halai, three miscreants came to him riding on the black coloured Yamaha Motorcycle bearing No. MP07 CB 0693. The miscreants compelled him to stop his motorcycle and by putting the country-made pistol on his chest and neck extorted Rs.35,000/-from his pocket. On the resistance of complainant, they caused injury on his palm by means of butt of the pistol. Thereafter the miscreants fled away from the spot. The complainant the lodged F.I.R. at about 3-50 p.m. on the same day in police station, Jigna district Datia M.P . The investigation was set in motion. The injured complainant was medically examined. During investigation, accused Jagmohan was arrested on 20th December 2007. Thereafter on information as mentioned in the memorandum under Section 27 of the Evidence Act, the looted property viz one currency note of Rs. Five Hundred wrapped in the handkerchief was recovered. The motorbike used in the incident was also recovered from the agricultural field situated on village road at Pathari to Chak Halai. The arrested accused Jagmohan was identified on 5th March 2008 in presence of Shri P.C. Niranjan Executive Magistrate Datia. Rest two accused Jeewan was arrested on 12th May 2008 and on his information recorded in Memorandum

under Section 27 of the Evidence Act, looted property viz. one currency note of Rs. Five Hundred was also recovered from him. Remaining accused Keshav was absconded. After investigation, the charge-sheet against accused Jagmohan, Jeevan and supplementary charge sheet against accused Keshav were filed before the criminal court. On committal, the sessions trial commenced against the present accused/appellants. The charges for offence under Section 397 read with section 13 of the Adhiniyam were framed. After evidence of prosecution, the trial judge convicted the accused and sentenced them accordingly, hence, the appellants/accused preferred this appeal.

(3) The contention of the appellants is that the judgment under appeal is against the law and procedure and therefore same is liable to be set aside. It is submitted that the trial Judge while convicting the accused/appellants did not properly assesse the evidence and the documents on record, therefore, the conclusion arrived at without proper consideration of factual and legal aspects is not sustainable in law. It is argued that the main ingredients of the offence under Section 397 of I.P.C. are not proved by the evidence on record. It is further submitted that for belated test identification of accused Jagmohan, no cogent reason has been given by the prosecution and the conviction of the accused is based upon flimsy grounds. Accordingly, it is prayed that by allowing the appeal, judgment under challenge may be set aside and the accused-appellants may be acquitted of the alleged offence.

(4) *Per contra,* the learned Panel Lawyer appearing on behalf of the respondent/State contended that the prosecution by placing reliable and cogent evidence very ably proved the guilt against accused/appellants and there is no infirmity or illegality committed by the trial court in awarding conviction and sentence. Hence, it is prayed that by dismissing the appeal, the conviction and sentence recorded by the learned trial court may be upheld.

(5) Heard the learned counsel appearing for the appellants and the learned Panel Lawyer for the respondent/State. Also perused the record of the trial court and the law applicable to the present case.

(6) The question for consideration in this appeal is whether the ingredients of offence of dacoity under Section 397 of I.P.C. are attracted in the present case and the trial Judge has rightly concluded on the basis of evidence ?

(7) Heard the learned counsel for the appellants and the learned Panel Lawyer for the respondent/State. Also perused the record of the trial Judge

and the law applicable to the case.

(8) To prove the guilt, the prosecution examined in all fourteen witnesses.

(9) The victim/complainant Shahid (PW-9) deposed in his evidence that 2-3 years ago, he was going from village Pathhai to village Chak for purchasing the goats on his motor bike. At the time of departure from his residence he was possessing Rs.50,000/- with him and in village Jugna, he purchased goats valued Rs.9,000/-. In village Pathhai he purchased the goats valued Rs. 6,000/-. So, at the time of incident he was possessing cash of Rs. 35,000/- with him. In the noon, when he proceeded from village Chirai to village Chakh, on way, three accused prevented him. Then accused Jeewan put his country made pistol on his back while accused Jagmohan put country made pistol on his head. On the point of pistols, the accused snatched Rs. 35,000/- from his pocket forcefully. When he objected, the accused inflicted a blow by country-made pistol injuring his hand. Other accused also assaulted on his body. When all accused after committing incident ran away, he chased them and tried to stop by pelting stones. He lodged F.I.R. (Ex.P/6) in Police Jigna. Thereafter the police seized the motor bike used by the accused in commission of crime by seizure memo Ex.P/4. The police referred him to the District Hospital Datia for medical examination of the injuries sustained during incident. During medical examination of the injured, a fracture of left hand was found. In Panchayat Bhawan in presence of Mahadev Brahmin, he identified currency note of Rs. 500/- which was soaked with oil drops and the handkerchief of pink coloured with engraved number '786' on it. The identification memo to that respect is Ex.P/5. He also identified the accused in presence of Naib Tahsildar of Datia by test identification memo Ex.P/7. In cross-examination the witness admitted that prior to the incident he did not know the name of the accused and so he did not mention their names in the F.I.R. He also admitted that at time of offence, one of the accused was covering his face. After incident he informed the same on mobile phone to his brother Nasir. After lodging F.I.R. by the complainant, a spot map was prepared in his presence and his case diary statement was also recorded on the day of incident by the police.

(10) P.C.Niranjan (PW-10) Naib Tahsildar of Tahsil Datia deposed that in Crime No. 88/2007 of Police Station Jigna on 5th March 2008 he conducted the test identification pared and complainant Shahid (PW-9) identified accused Jagmohan among 5-6 persons in prison. Accordingly, he prepared the test identification memo Ex.P/7.

(11) Ajay Chanana (PW-14), Station House Officer of P.S., Jigna deposed that on 3rd October 2007 at about 3-40 p.m., he being posted as Sub Inspector in the Police Station Jigna recorded the F.I.R. on oral instruction of injured complainant Shahid and registered the Crime No. 0/61/2007 under section 394 of I.P.C. and section 11/13 of the Adhiniyam in Police outpost at Urgaova and sent the FIR for registration of crime in Police Station Jigna. He prepared spot map (Ex.P/7) in presence on the direction of complainant. On the day of incident he recovered the motorbike Yamaha black coloured bearing Registration No.MP07 CB 0693 used in commission of crime by accused from the agricultural field in presence of complainant and two attesting witnesses vide Ex.P/4. He stated that the case-diary statement of the complainant was recorded on the day of incident and the victim was sent for medical examination on that day to District Hospital Datia. Rest investigation in this case was conducted by Siddharth Priyadarshan (PW-13) the In-charge of the Police Station Jigna. He recorded the case diary statements of witnesses from 14th to 17th December 2007. He received the X-ray report of complainant and spot-map prepared by Patwari on the basis of revenue record. He prepared the memorandum under Section 27 of the Evidence Act vide Ex.P/2 on the basis of information given by arrested accused Jagmohan about looted property and thereafter on production by accused Jagmohan, he seized one currency note of Rs. 500/- wrapped in one white coloured handkerchief from accused by seizure memo Ex.P/3. On 11th May 2008, he arrested accused Jeewan Parihar by arrest memo Ex.P/11 and on 14th May 2008 he prepared the memorandum under Section 27 of the Evidence Act vide Ex.P/12 regarding the currency note of Rs. 500/-. He was also informed of the weapon of crime (country-made pistol) which was seized by Police Chirula district Datia. He also recovered currency of Rs.500/- on production by accused Jeewan by seizure memo Ex.P/13.

(12) Dr. G.L.Verma (PW-11) was posted in the District Hospital Datia at the relevant time. He deposed that on 3rd October 2007 he examined injured Shahid, son of Mansur Ali, resident of village Choti-Badoni, district Datia who was brought by Police Constable No. 60 Mahesh and on examination vide his report (Ex.P/8) he found (i) lacerated wound of size 3 cm. x 4 cm. up to bone deep on right palm medially ; (ii) contusion of size 2 cm. x 2 cm. on right frontal head; and (iii) complaining pain on back and chest, but no external injury. As per the doctor, except injury No.(i) rest were simple and caused by hard and blunt object. On X-ray examination vide Ex.P/9, little fracture in fifth metacarpal bone in right hand was detected. This injury was grievous in nature caused by hard and blunt object.

(13) Other witnesses Suraj Singh (PW-1) and Yogesh Bhargava (PW-2) have not supported the prosecution version hence were declared hostile.

(14) Kalicharan Yadav (PW-3) in his statement deposed that police had seized currency note of Rs.500/- in his presence from accused Jagmohan, but he denied to have been informed by the accused about the looted property in his presence, consequence of which the memorandum (Ex.P/2) was prepared. Saheb Singh (PW-4), constable posted in the Police Station Jigna deposed that on 3rd October 2007, Sub Inspector Ajay Channa seized one motor bike bearing registration No. MP 07 CB 0693 from nearby road side of agricultural field vide seizure memo Ex.P/4. Komal (PW-5), Mahadev (PW-6), and Kailash (PW-8) who were related to the identification of looted property turned hostile and they did not support the prosecution version.

(15) In the statements of accused it was pleaded that due to previous enmity with complainant, they had been falsely implicated and they had no connection at all. However, no defence witness was examined to prove their plea.

(16) On perusal of the F.I.R. it is gathered that the same was lodged mentioning the identity of those unknown persons. It is also mentioned that the corners of looted property viz. currency notes of Rs.500/- which were wrapped in the handkerchief of white coloured with engraved number '786' on it, were partly oil soaked.

(17) Now, the question that arises for consideration is as to whether the accused appeared before the court alongwith an absconded accused robbed the complainant, as alleged ?

(18) As mentioned above, the complainant Shahid (PW-9) lodged the report against the miscreants who were not known by names or faces previously to the complainant. They reached on the spot on black coloured motor bike bearing registration No. MP 07 CB 0693. That motor bike used in incident was also recovered on the day of incident lying in abandoned state. The accused Jagmohan was arrested on 20th December 2007 and he was identified before P.C. Niranjan (PW-10) Executive Magistrate-cum-Naib Tahsildar Datia on 5th March 2008 near about three months later from the date of arrest and no cogent reason was assigned for his delayed test identification. Another accused Jeewan was arrested on 12th December 2005 after filing the charge sheet. But no test identification parade was conducted for him. The complainant Shahid (PW-9) in his court statement identified the accused in dock and also stated about the specific role in commission of incident. The belated

identification parade in relation with accused Jagmohan and absence of test identification parade regarding another accused Jeewan will not help the prosecution for establishing the crime against the accused Jagmohan and Jeewan in the incident in question. At this juncture, it would be relevant to refer the decisions which proceeded on the point in issue as following:

(i) *Siddanki Ram Reddy Vs. State of Andhra Pradesh*, (2010) 7 SCC 697, at page 703 : wherein it has been observed as under :-

"23. This Court has held in *Daya Singh v. State of Haryana* cited by Mr Reddy that the purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that the substantive evidence of a witness is the evidence in the court and if that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. In the facts of the present case, a mob attacked the deceased in the crowded corridors of the Court of the Second Additional District Judge and PW 1, PW 5 and PW 6 in their evidence in the court claim to have seen Accused 1 (appellant) chasing the deceased with an axe and assaulting the deceased with the axe on his neck. All these three eyewitnesses have also stated that soon after the assault the appellant ran away from the court premises. The three eyewitnesses thus saw the assailant for a very short time when he assaulted the deceased with the axe and thereafter when he made his escape from the court premises.

24. When an attack is made on the injured/ deceased by a mob in a crowded place and the eyewitnesses had little time to see the accused, the substantive evidence should be sufficiently corroborated by a test identification parade held soon after the occurrence and any delay in holding the test identification parade may be held to be fatal to the prosecution case. In *Lal Singh v. State of U.P.*, this Court has held that: (SCC p. 567, para 28)

"28. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously."

(ii) In *Daya Singh v. State of Haryana*, (2001) 3SCC

468, at page 478 : the Hon. Apex Court held as follows :-

"13. The question, therefore, is - whether the evidence of injured eyewitnesses PW 37 and PW 38 is sufficient to connect the appellant with the crime beyond reasonable doubt. For this purpose, it is to be borne in mind that the purpose of test identification is to have corroboration to the evidence of the eyewitnesses in the form of earlier identification and that substantive evidence of a witness is the evidence in the court. If that evidence is found to be reliable then absence of corroboration by test identification would not be in any way material. Further, where reasons for gaining an enduring iimpress of the identity on the mind and memory of the witnesses are brought on record, it is no use to magnify the theoretical possibilities and arrive at conclusion - what in present-day social environment infested by terrorism is really unimportant. In such cases, not holding of identification parade is not fatal to the prosecution. The purpose of identification parade is succinctly stated by this Court in *State of Maharashtra v. Suresh* as under: (SCC p. 478, para 22)

"22 We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence."

(iii) In *Lal Singh v. State of U.P.*, (2003) 12 SCC 554, at page 566 : the Hon. Apex Court observed as follows :-

"28. The next question is whether the prosecution has proved beyond reasonable doubt that the appellants are the real culprits. The value to be attached to a test identification parade depends on the facts and circumstances of each case and no hard-and-fast rule can be laid down. The court has to examine the facts of the case to find out whether there was sufficient opportunity for the witnesses

to identify the accused. The court has also to rule out the possibility of their having been shown to the witnesses before holding a test identification parade. Where there is an inordinate delay in holding a test identification parade, the court must adopt a cautious approach so as to prevent miscarriage of justice. In cases of inordinate delay, it may be that the witnesses may forget the features of the accused put up for identification in the test identification parade. This, however, is not an absolute rule because it depends upon the facts of each case and the opportunity which the witnesses had to notice the features of the accused and the circumstances in which they had seen the accused committing the offence. Where the witness had only a fleeting glimpse of the accused at the time of occurrence, delay in holding a test identification parade has to be viewed seriously. Where, however, the court is satisfied that the witnesses had ample opportunity of seeing the accused at the time of the commission of the offence and there is no chance of mistaken identity, delay in holding the test identification parade may not be held to be fatal. It all depends upon the facts and circumstances of each case."

(19) In view of the law analysed above, this court has come to conclude that after a lapse of considerable time in case of total strangers the identification cannot be relied upon when the witness had only a fleeting glimpse of the person identified or had no particular reason to remember the person concerned. Whether the absence of a test identification parade makes the identification in the dock inadmissible or useless and whether such identification deserves credence depends on the facts and circumstances of each case but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. No doubt, the previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law. Therefore, where an accused is not named in the first information report, his identification by witnesses after inordinate delay, should not be relied upon, especially when they did not disclose name

of the accused before the police. The purpose of prior test identification, therefore, is to test and strengthen the trustworthiness of the evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings but where there is delay in conducting TIP, the court has to be cautious in placing reliance on the evidence of the victim.

(20) Now coming to the case, this court finds that after arrest of accused Jeewan, the memorandum Ex.P/12 regarding the looted property was prepared and on that ground the part of the looted property was recovered by seizure memo Ex.P/13. That looted property was identified before witness Mahadev (PW-6) by complainant Shahid, but this witness turned hostile and did not support the identification parade proceedings (Ex.P/5) and more so the looted properties recovered from both accused were not produced for identification by the complainant during trial, therefore, the looted properties viz. two currency notes each of Rs. 500/- and specified handkerchief could not be identified by the complainant. So, in the present case the prosecution could neither prove the identity of accused nor property looted beyond doubts and except identification of person and property which are not proved beyond doubts nothing is on record which may involve the present accused/appellants in robbery of present incident with the complainant.

(21) Resultantly, this appeal is allowed and the judgment of conviction and sentence under appeal is set aside and it is directed that the accused appellants who are in custody be released forthwith, if not required in any other case.

Appeal allowed.

I.L.R. [2013] M.P., 1737
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr. A. No. 1429/2005 (Jabalpur) decided on 17 May, 2013

RAKESH TIWARI ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 302 - Circumstantial Evidence*** **- Appellant was sleeping with his wife in his room - In the morning he lodged a complaint that in the night his wife has committed suicide by**

hanging herself - In postmortem the cause of death was strangulation and was homicidal in nature - As the appellant was alone in the room and the explanation given by him appears blatantly false and unreliable - Appellant is guilty of committing murder. (Paras 11 to 21)

क. दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – अपीलार्थी अपने कमरे में अपनी पत्नी के साथ सो रहा था – सुबह उसने शिकायत दर्ज की, कि उसकी पत्नी ने रात्रि में स्वयं को फंदे पर लटकाकर आत्महत्या कारित की – शव परीक्षण में मृत्यु का कारण गला घोंटना एवं मानव वध स्वरुप का बताया गया – चूंकि अपीलार्थी कमरे में अकेला था और उसके द्वारा दिया गया स्पष्टीकरण पूर्णतः मिथ्या एवं अविश्वसनीय प्रतीत होता है – अपीलार्थी हत्या का दोषी।

***B. Penal Code (45 of 1860), Section 302 - Suicidal or Homicidal - Medical Evidence* - Ligatures marks were found to be transverse on the neck however, in the case of suicide they would have gone upwards - When the team of doctors have opined with certainty that it was a case of strangulation, then it would be difficult for the Court to substitute its opinion and hold that the death was suicidal. (Para 16)**

ख. दण्ड संहिता (1860 का 45), धारा 302 –आत्महत्या या मानववध – चिकित्सीय साक्ष्य – गर्दन पर तिरछा बंध का निशान पाया गया किन्तु, आत्महत्या की स्थिति में वह ऊपर की ओर चला जाता – जब चिकित्सकों की टीम ने निश्चितता के साथ राय दी है कि यह गला घोंटने का प्रकरण था, तब न्यायालय के लिए उनके अभिमत को प्रतिस्थापित करना और मृत्यु को आत्महत्या होने की धारणा करना कठिन होगा।

***C. Penal Code (45 of 1860), Section 302 - Medical Evidence - Authoritative text books* - Portion of any other authoritative text books be put to the Doctor with a view to give him an opportunity to explain his stand. (Para 16)**

ग. दण्ड संहिता (1860 का 45), धारा 302 – चिकित्सीय साक्ष्य – पाठ्य पुस्तकें – चिकित्सक को अपने कहे को स्पष्ट करने का अवसर दिये जाने को दृष्टिगत रखते हुए चिकित्सक का सामना किसी दूसरी मान्य पुस्तक के भाग से कराना होगा।

Cases referred :

2009 Cr.L.J. 3002, (2004) 11 SCC 282, (2006) 10 SCC 681.

Prakash Upadhyay, for the appellant.
Amit Pandey, P.L. for the respondent.
Anand Nayak, for the complainant.

JUDGMENT

The Judgment of the Court was delivered by :

RAKESH SAKSENA J. :- Since both the appeals arise out of the common impugned judgment, this judgment shall govern disposal of both the appeals.

2. Appellants have filed the above appeals against the judgment dated 12th July,2005 passed by I Additional Sessions Judge, Khandwa East Nimad (M.P.) in Sessions Trial No.23/2003 convicting appellant Rakesh Tiwari under section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.5000/-. In default of payment of fine further rigorous imprisonment for one year, and convicting appellants Ramesh Tiwari, Smt.Kusumlata Tiwari and Ku.Snehlata Tiwari under section 498-A of the Indian Penal Code and sentencing them to rigorous imprisonment for 2 years with fine of Rs.1000/-. In default of payment of fine, further rigorous imprisonment for 6 months. Appellants Smt. Kusumlata Tiwari and Ku. Snehlata Tiwari have further been convicted under section 4 of the Dowry Prohibition Act and sentenced to rigorous imprisonment for 3 years. All the jail sentences have been directed to run concurrently.

3. In short, the prosecution case is that Jyoti, the daughter of Naval Kishore (PW-13) was married to appellant Rakesh Tiwari on 30.6.2002. After marriage, Rakesh Tiwari, her father-in-law Ramesh Tiwari, mother-in-law Kusumlata Tiwari and sister-in-law Snehlata Tiwari made demand of dowry and on not meeting the said demand, subjected her to cruelty. On 30.9.2002, early in the morning in the room of husband Rakesh Tiwari, Jyoti was found dead. On the same day, at about 6:45 a.m., accused Rakesh went to police Kotwali, Khandwa and tendered information that in the night of 29.9.2002, he slept with his wife in the same room, but in the morning at about 6:15 a.m. when he woke up he saw that his wife Jyoti had committed suicide by hanging on the ceiling fan with the help of her saree. On this information, head constable Gulab Singh Kajle (PW-12) recorded marg intimation Ex.P/13. When this information was sent to Sub Divisional Magistrate, Khandwa, on his direction Additional Tehsildar/ Executive Magistrate Smt. Usha Singh (PW-6) reached house No.9/24 Police line Khandwa where accused persons resided and prepared inquest memorandum Ex.P/2. Investigating Officer, after inquest, sent the dead body to district hospital Khandwa for postmortem examination. In the course of inquiry, statements of witnesses including brothers and brother-in-law of deceased were recorded.

4. On 30.9.2002, Gajendra Narvariya (PW-8), Scientific Officer of Crime Mobile Unit, Khandwa, along with a photographer also reached the spot . He drew up a map of the spot and also got the scene of the crime photographed. PW-8 sent his report to police Kotwali, Khandwa.

5. On 1.10.2002 at-about 8:30 a.m. Dr.S.B.Jain (PW-7), Dr.N.K.Jain and Dr.Hemlata Gupta conducted postmortem examination of the dead body of Jyoti in district hospital, Khandwa. In their opinion, the death of Jyoti was due to strangulation and was homicidal in nature.

6 After completing marg inquiry, DSP Manoj Shrivastava (PW-16) registered first information report Ex.P/29 against the accused persons under sections 302 & 498-A/34 of the Indian Penal Code. After completion of investigation, charge sheet, against the accused persons, was filed in the Court of Chief Judicial Magistrate, Khandwa and the case was thereafter committed for trial.

7. During trial,accused persons abjured their guilt and denied the charges. Accused Rakesh Tiwari denied commission of murder of his wife; according to him, in the morning when he woke up he saw his wife hanging with the help of her saree on the fan. Though he removed her string and made her to lie on the bed but she was not alive. He then reported the matter to police. According to Ramesh Tiwari, in the night he was on duty at the office of Superintendent of Police. Kusumlata and Snehlata pleaded false implication. According to them, they never harassed deceased.

8 To substantiate its case, prosecution examined 16 witnesses. In their defence, accused Ramesh examined Omkarprasad Sharma (DW-1) and Kailash Patidar (DW-2). After appreciating the evidence on record, learned Additional Sessions Judge convicted and sentenced the accused persons as mentioned earlier. Aggrieved by the impugned judgment of conviction and sentence, accused/ appellants have preferred these appeals.

9. Shri Prakash Upadhyay, learned counsel for the appellants,submitted that learned trial Judge mis-appreciated the evidence on record and committed error in holding that appellants Ramesh Tiwari, Smt. Kusumlata Tiwari and Ku. Snehlata Tiwari subjected deceased to cruelty and made demand of dowry. He submitted that learned trial Judge further misappreciated the evidence of Dr.S.B.Jain (PW-7) and erred in holding that death of deceased was homicidal in nature. On the other hand, Shri Amit Pandey, learned Panel Lawyer for State and Shri Anand Nayak, learned counsel for complainant, submitted that the trial Court committed no error in holding accused/appellants guilty and convicting them. The evidence

on record is sufficient to prove guilt of the appellants. Finding of conviction recorded by the trial Court does not call for any interference.

10. We have heard the learned counsel for the parties at length, perused the impugned judgment and the evidence on record carefully.

11. The first and foremost question in the case is whether the death of deceased Jyoti was homicidal? Admittedly the death of deceased took place in the room in which she slept with her husband/accused Rakesh Tiwari. Rakesh, in the morning at 6:45 a.m. on 30.9.2002, gave intimation at police Kotwali, Khandwa that in the night he slept with his wife in the room. At about 6:15 a.m. when he woke up he saw that his wife committed suicide by hanging with a saree on the ceiling fan. This report Ex.P/13 was recorded as Marg No.44/2002 by head constable Gulab Singh (PW-12). After receipt of this information, Sub Divisional Magistrate, Khandwa directed Additional Tehsildar/ Executive Magistrate Smt. Usha Singh (PW-6) to inspect the spot. PW-6 went at the house of accused persons and found dead body of deceased kept on the bed. On inspection of the body, she observed bluish marks on the left arm, right hand, neck and chest of deceased. She prepared a "Naksha Panchnama" Ex.P/2 and directed body of the deceased to be sent to district hospital, Khandwa for postmortem examination. She stated that accused Rakesh told to her that he removed the body of Jyoti from the fan. On the same day, at about 8:00 a.m., Scientific Officer of Crime Unit Khandwa Gajendra Narvariya (PW-8) inspected the spot and drew a sketch Ex.P/12 of the spot. He also got the photographs Ex.P/5 to Ex.P/11 taken by a photographer. PW-8 deposed that the knot of the saree was tied about 1 feet away from the fan. The distance between the bed and the knot was 7 feet and 8 inches. The height of the bed, on which the body of deceased was lying, was 1 feet and 7 inches. The stool having height of 1 feet and 8 inches was kept about 4 feet away from the bed. On opening the lips of deceased, he saw traces of blood under the teeth. There was slight bluish swelling on the right cheek. There was mild redness in the eyes. Both the hands of the deceased were bluish.

12. Postmortem examination of the body of deceased was conducted by Dr. S.B.Jain (PW-7) on 1.10.2002 along with Dr. N.K.Jain and Dr.Hemlata Gupta. According to Dr. Jain, Rigor mortis was present all over the body of deceased. The eyes of the deceased were closed and there was swelling on the face. There were marks of petechial haemorrhage over her neck, upper part of chest and both the arms. Bleeding was present from both the nostrils. A transverse ligature mark was present on the anterior aspect of the neck below thyroid cartilage. Postmortem lividity was present on the back. No

other external injury was seen on the body. On internal examination, he found thyroid cartilage of the trachea broken. There were blood clots beneath the ligature mark. Trachea was congested. Left chamber of heart was empty; right chamber was filled with blood. Brain, spinal cord, diaphragm, ribs, trachea, right and left lungs, membranes of the eyes, intestine, liver, spleen and kidneys were congested. In his, and in the opinion of his colleague doctors, deceased had died of asphyxia due to strangulation within 48 hours prior to postmortem. The nature of death of deceased was homicidal. Postmortem report Ex.P/3-A was written and signed by him and also by his colleague doctors.

13. Dr. Jain was subjected to a lengthy cross-examination. He stated that in cases of strangulation and throttling struggle marks may or may not come. The ligature marks found on the neck could have been caused by saree, rope or a 'Dupatta'.

14. Learned counsel for the appellants submitted that since the tongue of deceased was found inside the mouth, it was wrongly opined by the doctor that it was a case of strangulation. He submitted that if it would have been a case of strangulation, the struggle marks would have been found on the body of deceased as well as on the body of accused, but since no such marks were found, it was quite probable that deceased might have committed suicide by hanging. Dr. Jain remained firm in his finding and firmly stated that it was not a case of hanging since the dribbling of saliva from the mouth was not present and ligature marks were straight in the front whereas in case of hanging the ligature marks are found going upwards from both sides of the neck. He also indicated that there was bleeding from the nose. Learned counsel for the appellants placing reliance on the ratio of the Apex Court decisions rendered in *Subramaniam vs.State of T.N. and Anr.*-2009 CRI.L.J.3002 and *Dasari Siva Prasad Reddy vs. Public Prosecutor, High Court of A.P.*-(2004) 11 SCC 282 submitted that though it is a strong circumstance against accused if death of wife occurs in the matrimonial home and no explanation as to cause of death is given by accused-husband, but it cannot be made basis for conviction in absence of any evidence of violence on deceased and further if the symptoms usually found in death by asphyxia are not found, the opinion of doctor that the cause of death was asphyxia cannot be relied upon.

15. In the case of *Subramaniam* (supra), Apex Court observed:

> "14. So far as the circumstance that they had been living together is concerned, indisputably, the entirety of the situation

should be taken into consideration. Ordinarily when the husband and wife remained within the four walls of a house and a death by homicide takes place it will be for the husband to explain the circumstances in which she might have died. However, we cannot lose sight of the fact that although the same may be considered to be a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive. It may be difficult to arrive at a conclusion that the husband and husband alone was responsible therefor."

Apex Court further observed: "Despite noticing that some of the usual symptoms that would be available in the case of death due to asphyxia by smothering were necessary still a purported formal opinion was arrived at that the prosecution had definitely established the cause of death."

16. On examining the evidence adduced by the prosecution in the instant case, we find that a team of doctors minutely examined the body of deceased and found that it was a case of homicidal death by strangulation. Had it been a case of hanging the ligature marks on the neck would not have been found transverse on the neck, instead they would have gone upwards. When a team of doctors opined with certainty that it was a case of strangulation and not of a death by hanging, it would be difficult for this Court to substitute its opinion and hold that the death of deceased was not homicidal in nature. Though in cross-examination, Dr.Jain (PW-7) admitted that the Medical Jurisprudence of Taylor and Modi are recognized treatise in the medical field, but he was not confronted with any particular portion of the book expressing any inconsistent opinion under similar circumstances. For discrediting a doctor, who conducted postmortem examination and gave his opinion, it would be necessary that the portion of any other authoritative text books be put to him with a view to give him an opportunity to explain his stand.

17. In the case of *Trimukh Maroti Kirkan vs. State of Maharashtra*-(2006)10 SCC 681, the Apex Court held that "where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling house where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an

explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

18. Learned counsel for the appellants submitted that since prosecution did not prove motive on the part of appellant Rakesh Tiwari to commit murder of his wife, merely on the basis of circumstance of last seen together, he cannot be held guilty for committing murder of his wife. In this regard, learned counsel for the appellants placed reliance on the case of *Dasari Siva Prasad Reddy* (supra). With due respect the facts of the said case are different than the facts of the case in hand. In case of *Dasari Siva Prasad Reddy* (supra), Apex Court observed that "High Court agreed with the trial Court that there was no immediate motive that prompted the accused to kill his wife, the allegation of accused demanding additional dowry or suspecting the fidelity of his wife was not established beyond doubt and the evidence relating to deceased last seen in the company of accused was not reliable. Therefore, merely because death of deceased had taken place by asphyxia due to strangulation, the High Court ought not to have reversed the finding of acquittal of accused recorded by the trial Court since it was based on possible view.

19. In the instant case, it is admitted case of accused Rakesh Tiwari that he was alone with his wife in the night. Scientific Officer Gajendra Narvariya (PW-8) deposed that knot of saree tied with the fan was about 1 feet away from the fan. On perusal of photographs of the scene of occurrence, it is apparent that there was a long gap between the portion of the saree lying under the neck of deceased and the part of saree tied with the fan. It does not appear possible for deceased to have shortened the string allegedly made by saree. Apart from it, it is quite improbable that accused Rakesh, who was sleeping on the same bed could not wake up when deceased made preparation of hanging and pushed away the stool from the bed, since without removing the stool she could not have hanged herself. It is also significant to note that Executive Magistrate Smt. Usha Singh (PW-6) when inspected the body of deceased, she found blue marks on the hand, cheek, chest and back of deceased and further that no dribbling of saliva was found from the mouth.

20. In the light of aforesaid circumstances, we are of the view that learned trial Judge rightly held that the death of deceased was due to asphyxia by strangulation and was homicidal in nature, and further that it was only accused Rakesh Tiwari who caused the death of deceased Jyoti.

21. As far as question of motive is concerned, it is not always possible for

the prosecution to prove the same by direct evidence since motive often remains hidden in the heart and mind of accused, yet the trial Court found that when demands of saree and other articles were made from deceased by the mother and sister of accused Rakesh, it was disclosed by her to her father and brother in front of him at Betul. She also disclosed the conduct of his parents and sister about meeting out cruelty to her in his presence. He therefore, feeling insulted must have entertained grudge against her, and because of that, in the night, he strangulated her to death. The explanation given by appellant that in the morning when he woke up he found deceased hanging with the fan, appears blatantly false and unreliable. We, therefore, affirm the conviction of appellant under section 302 of the Indian Penal Code.

22. As far as the question of conviction of appellants Ramesh Tiwari, Smt. Kusumlata Tiwari and Ku. Snehlata Tiwari under section 498-A I.P.C. and conviction of appellants Smt. Kusumlata Tiwari and Ku. Snehlata Tiwari under section 4 of the Dowry Prohibition Act is concerned, it rests mainly on the evidence of Naval Kishore (PW-13), Shyam Kishore (PW-1), Ramkishore (PW-9) and Basant Kumar Dixit (PW-11). These witnesses are respectively, the father, brothers and brother-in-law of deceased.

23. It is undisputed that marriage of deceased with accused Rakesh Tiwari took place on 30.6.2002 and deceased died of homicidal death on 30.9.2002. The death of deceased thus took place exactly within three months after her marriage. On appreciation of the evidence of aforesaid witnesses, learned trial Judge in paragraphs 19 & 23 of its judgment found that before 8.7.2002 none of the accused demanded dowry or anything else. Whatever was given to deceased in marriage were voluntary and customary gifts. However, after 8.7.2002, aforesaid accused persons started making demand of articles and subjected deceased to cruelty.

24. Shyam Kishore Shukla (PW-1), the brother of deceased, deposed that after about 1 month 11 or 12 days of the marriage his brother Rajesh Shukla took Jyoti to village Kesiya where his parents resided. His another brother Sanjay when came to Betul, informed him that Jyoti told to him that her husband, father-in-law and sister-in-law made demand of 20 banarasi sarees, four daily wear sarees, other clothes, ornaments and full makeup articles. The same facts were reiterated by Ramkishore (PW-9), another brother of deceased. Ramkishore (PW-9) stated that when accused Rakesh came to Betul, Jyoti, in front of him, told that the behaviour of her father-in-law, mother-in-law and sister-in-law was not good. She also disclosed that

these persons also told that she (Jyoti) was mad and they would marry Rakesh again. Rakesh then assured them that the mistake committed by his family members shall not be repeated.

25. Naval Kishore (PW-13), the father of deceased, stated that after about 1½ months, fatherin- law of Jyoti sent her to village Kesiya where he lived. At that time his daughter was in pitiable condition. She told him that her in-laws have made her to swear that she should not tell anything happened in their house, to her parents otherwise her all the four brothers shall die. She disclosed about the intimidation given by them that they will kill her. They only gave left over food to her to eat and taunted her. Naval Kishore stated that deceased told to him that her in-laws made demands of 20 banarasi sarees, other clothes, wheat, rice and other articles from her. They also intimidated her to leave their house after packing her luggage. Naval Kishore stated that Jyoti narrated all the facts about cruelty meted out to her by her in-laws, at Betul before accused Rakesh when he came there. He admitted that Rakesh apologised for the same and assured that there shall be no complaint in future. Though, certain contradictions and omissions were pointed out by the learned counsel in the statement of Naval Kishore (PW-13), but after perusal of his police statement Ex.D/15 we find that there were no such omissions, but the facts were recorded in somewhat different manner.

26. After a careful scrutiny of the evidence of aforesaid prosecution witnesses, we find that the learned trial Judge committed no error in holding that appellants Ramesh Tiwari, Smt. Kusumlata Tiwari and Ku.Snehlata Tiwari subjected deceased to cruelty punishable under section 498-A of the Indian Penal Code, and that Smt.Kusumlata Tiwari and Ku. Snehlata Tiwari also committed offence under section 4 of the Dowry Prohibition Act. Their conviction on the aforesaid charges is, therefore, affirmed.

27. Learned counsel for the appellants submitted that the incident had occurred in the year 2002 since then about 10 years have elapsed. Appellants Ramesh Tiwari, Smt.Kusumlata Tiwari and Ku.Snehlata Tiwari have already remained in jail for a period of over three months. Appellants Ramesh Tiwari and Kusumlata Tiwari have now grown old attaining age above 60 years. Snehlata Tiwari has been married and is now living with her husband and family members. If they are sent back to jail after so many years again, it shall serve no useful purpose. In these circumstances, he prayed that their sentence of imprisonment for 2 years under section 498-A I.P.C. be reduced to the period of sentence already undergone by them. We find substance in the

submission made by learned counsel for the appellants.

28. For the aforesaid reasons:

(i) Criminal Appeal No.1429/2005 of appellant Rakesh Tiwari is dismissed. His conviction and sentence awarded by the trial Court under section 302 I.P.C. is affirmed.

(ii) Criminal Appeal No.1431/2005 is partly allowed. Conviction of appellants No.1 Ramesh Tiwari, No.2 Smt.Kusumlata Tiwari and No.3 Ku.Snehlata Tiwari under section 498-A I.P.C. is affirmed. However, sentence of rigorous imprisonment for 2 years awarded to them by the trial Court is reduced to the period of sentence already undergone by them. Sentence of fine is affirmed. Conviction and sentence awarded to appellants No.2 Smt. Kusumlata Tiwari and No.3 Ku.Snehlata Tiwari under section 4 of the Dowry Prohibition Act is affirmed. Their bail bonds and surety bonds stand discharged.

A copy of this judgment be kept in the record of Criminal Appeal No.1431/2005.

Order accordingly.

I.L.R. [2013] M.P., 1747
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 367/2011 (Jabalpur) decided on 14 May, 2013

ANIRUDH SAINI ...Applicant
Vs.
PIYUSH AGRAWAL ...Non-applicant

A. Negotiable Instruments Act (26 of 1881), Sections 138 & 139 - Burden of Proof - **Initially the burden of proof is on accused to rebut the presumptions u/s 139 of N.I. Act by raising a probable defence - If he discharges the said burden, the onus thereafter shifts on the complainant to prove his case. (Para 14)**

क. परक्राम्य लिखत अधिनियम (1881 का 26), धाराऐं 138 व 139 – सबूत का भार – संभाव्य बचाव पेश करके परक्राम्य लिखत अधिनियम की धारा 139 के अंतर्गत उपधारणाओं का खंडन करने के लिए, सबूत का भार प्रारंभिक रुप से

अभियुक्त पर होता है – यदि वह अपने उक्त भार का निर्वहन करता है, तब उसके पश्चात शिकायतकर्ता पर अपने प्रकरण को साबित करने का भार आता है।

B. Negotiable Instruments Act (26 of 1881), Sections 138 & 139 - Burden of Proof **- In cases of Section 138 of N.I. Act, presumption u/s 139 of N.I. Act may not lead to injustice or mistaken conviction - Doctrine of reverse burden introduced by Section 139 of N.I. Act should be delicately balanced. (Para 14)**

ख. परक्राम्य लिखत अधिनियम (1881 का 26), धाराऐं 138 व 139 – सबूत का भार – परक्राम्य लिखत अधिनियम की धारा 138 के प्रकरणों में, परक्राम्य लिखत अधिनियम की धारा 139 के अंतर्गत उपधारणा, अन्याय या भूलवश दोषसिद्धि की ओर नहीं ले जा सकती – परक्राम्य लिखत अधिनियम की धारा 139 द्वारा प्रस्तावित विपरीत भार का सिद्धांत सूक्ष्मता से संतुलित होना चाहिए।

Cases referred :

(2009) 6 SCC 72, (2006) 6 SCC 39, (2008) 4 SCC 54, (2013) 1 SCC 327, (2010) 6 SCC 230.

Anil Khare with *Harjeet Singh Chhabra*, for the applicant.
Sanjay Dwivedi, for the non-applicant.

ORDER

N.K.GUPTA, J: These two criminal revisions arose from the judgment dated 4.2.2011 passed by the Additional Judge to the First Additional Sessions Judge, Jabalpur in Criminal Appeal No.317/2009, and therefore both these revisions are decided by the common order.

2. Applicant Anirudh Saini (herein after he would be referred as **"applicant/ accused"**) was convicted for the offence under Section 138 of the Negotiable Instruments Acts (for brevity **"N.I. Act"**) vide judgment dated 9.10.2009 passed by the JMFC Jabalpur (Shri Ajay Kumar Singh) in Complaint Case No.28694/ 2006 whereby he was sentenced for two years' RI with fine of Rs.1,000/- and compensation of Rs.8 lakhs. In Criminal Appeal No.317/2009 the learned First Additional Sessions Judge, Jabalpur vide judgment dated 4.2.2011 partly allowed the appeal by which the conviction was maintained, but the sentence of two years RI was altered, whereas the sentence of fine and compensation was maintained. Being aggrieved with both the judgments, the applicant/accused has filed the present criminal revision No.367/2011.

3. On the other hand, the applicant Piyush Agrawal (herein after he would

be referred as **"complainant"**) has preferred criminal revision No.468/2011 against the impugned judgment to set aside the impugned judgment and to maintain the sentence directed by the trial Court.

4. The complainant had preferred a complaint against the applicant/ accused that the applicant/accused was involved in share marketing whereby he lost some amount, and therefore a cheque of Rs.7,67,027/- was issued in favour of the complainant. When the cheque was submitted for its encashment, the complainant was informed that the cheque could not be encashed, because a direction of stop payment was given by the applicant/accused. Thereafter a notice of the demand was given to the applicant/accused, but he did not pay the amount of the cheque, and therefore a complaint was filed.

5. The applicant/accused has submitted a reply to the complaint that some utensils were purchased by the applicant/accused from the complainant, and therefore a payment of Rs.1200/- was to be made to the complainant. Therefore, the applicant/accused detached the cheque from the cheque book, but it was lost during transit in Gorakhpur area on 27.10.2004. The applicant/accused came to know that the complainant has fraudulently submitted a cheque with the sum of Rs.7,67,027/-, thereupon he directed the bank to stop the payment, as no sum was due towards the applicant/accused. The applicant/accused had also filed a complaint against the complainant for the offence under Section 420 of IPC. One such case was also lodged by Smt. Sobha Soni against the complainant for a cheque of Rs.1 lakh, which was dishonoured.

6. Ultimately, the applicant/accused abjured his guilt. He took a specific plea in the defence that the complainant had mentioned the amount on the cheque in his own handwriting and no amount was due towards the applicant/accused. In defence Hoshiyar Keshav Chinoy (DW-1) was examined, whereas so many documents Ex.D-2 to Ex.D-10 were produced in support of the defence.

7. The learned JMFC, Jabalpur after considering the evidence adduced by the parties convicted and sentenced the applicant/accused as mentioned above, whereas in appeal the jail sentence was removed by the learned appellate Court.

8. I have heard the learned counsel for the parties at length.

9. The learned senior counsel for the applicant/accused has submitted that the cheque was not issued. It was stolen, and therefore its payment was stopped. The complainant has claimed that the cheque was given because of transaction done by

the applicant/accused with the complainant. However, it is proved by the defence witness Hoshiyar Keshav Chinoy (DW-1) that the applicant/accused had direct transaction with the main broker and not with the sub-broker, and therefore no amount was due to be paid to the complainant. Therefore, no cheque was given to the complainant. The learned senior counsel for the applicant/accused has read the statements of various witnesses to show that no transaction took place between the applicant/accused and the complainant. The applicant/accused had lodged reports Ex.D-1 and Ex.D-6 about missing of the cheque. It was for the complainant to prove the liability upon the applicant/accused to pay the sum. In support of his contention, he has placed reliance upon the judgments of Hon'ble the Apex Court in the cases of *"Raj Kumar Khurana Vs. State of (NCT of Delhi)"* [(2009) 6 SCC 72], *"M.S.Narayana Menon alias Mani Vs. State of Kerala"* [(2006) 6 SCC 39], *"Krishna Janardhan Bhat Vs. Dattatraya G. Hegde"* [(2008) 4 SCC 54] and *"Reverend Mother Marykutty Vs. Reni C. Kottaram"* [(2013) 1 SCC 327].

10. On the other hand, the learned counsel for the complainant has submitted that the transaction was admitted. The applicant/accused could not prove that his cheque was stolen. On the contrary, it was established that he issued the cheque in the name of the complainant himself, and therefore all aforesaid judgments of Hon'ble the Apex Court are not applicable in the present case due to difference of factual aspects. The complainant had lodged a complaint prior to the FIRs lodged about the lost of the cheque, and therefore the FIRs relating to lost of the cheque were nothing, but an after thought overt-act of the applicant/accused to defeat the payment. It is further submitted that looking to the conduct of the applicant/accused, he should have been punished with the jail sentence.

11. After considering the submissions made by the learned counsel for the parties, if the evidence adduced by the parties is perused, then it is apparent that a cheque Ex.P-1 for a sum of Rs.7,67,027/- in the name of the complainant was in fact issued from the cheque book of the applicant/accused. The applicant/accused has submitted in reply to the complaint filed under Section 138 of the N.I. Act that no cheque was given to the complainant, but it was stolen and there was nothing to be paid by the applicant/accused towards the complainant. The applicant/accused has submitted an affidavit that he had lodged a report Ex.D-5 to the bank for stoppage of the payment and an FIR Ex.D-6 was also lodged at Police Station Gorakhpur, Jabalpur. He had also moved a complaint against the complainant that he had a direct relation with Mehta & Company, who was broker in the National Stock Exchange, Mumbai and no transaction

took place between the applicant/accused and the complainant. In support of his defence, Hoshiyar Keshav Chinoy (DW-1) was also examined. Initially the applicant/accused took a defence that he had to pay a sum of Rs.1200/- towards the sale price of some utensils to the complainant, but the cheque was stolen. However, in the statement before the trial Court the applicant/accused did not mention anything about that fact that he purchased some utensils from the complainant for sum of Rs.1200/-, and therefore it would be apparent that the applicant/accused has waived such a defence.

12. On considering the evidence given by the parties, prima facie if the cheque Ex.P-1 is perused, then it is true that it was not filled up in the handwriting of the applicant/accused. The learned senior counsel for the applicant/accused has submitted that the burden was shifted upon the complainant to prove that the cheque was issued to the complainant. In support of his contention, he has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *Reverend Mother Marykutty* (supra) which says that if the cheque is not in the handwriting of the accused, then it would strengthen defence version that the cheque was not issued in favour of the payee/complainant. However, the factual position of the case is different, and therefore by the fact that the cheque was not in the handwriting of the accused, no adverse effect is caused in the present case. If the cheque Ex.P-1 is perused, then it would be apparent from the cheque that initially the date of the cheque was mentioned to be 27.7.2006 and thereafter it was modified and the date 14.10.2004 was written on the cheque and the applicant/accused placed his signature on that correction in the cheque. If the blank cheque with the signature of applicant/accused was stolen, then there was no possibility that the applicant/accused would have appended his signature for the correction of the date, and therefore the story of theft of the cheque is nothing, but an after thought and after putting a future date on the cheque the applicant/accused moved various applications before the bank and the police about the theft and to stop the payment of the cheque. It is not the case of the applicant/accused that the cheque was issued to someone else or stop payment was directed, because there was a dispute of accounts between the parties. Under such circumstances, where the applicant/accused appended his signature on the modification of the cheque, clearly indicates that it was not lost but it was given to the complainant. Under such circumstances, the burden is not only shifted upon the complainant, but the applicant/accused could not discharge his burden that the cheque was not issued to the complainant.

13. The learned senior counsel for the applicant/ accused has also relied upon the judgment of Hon'ble the Apex Court in the case of *Raj Kumar Khurana* (supra) that if the cheque was lost, then the accused cannot be convicted for the offence under Section 138 of N.I. Act. However, in the present case, it is proved that the cheque was not lost, but it was issued to the complainant by the applicant/accused after modification of its date and remaining portion of the cheque was filled up by some other person. Under such circumstances, the law laid down in the case of *Raj Kumar Khurana* (supra) cannot be applied in the present case.

14. Once the cheque was issued in favour of the complainant, then again the burden shifts upon the accused to prove that the sum which was mentioned in the cheque was not due towards the complainant. In this connection, the judgment of Hon'ble the Apex Court in the case of *Krishna Janardhan Bhat* (supra) may be perused, in which it is mentioned that in cases of Section 138 of the N.I. Act, presumption under Section 139 of the N.I. Act may not be lead to injustice or mistaken conviction. The presumption of innocence is a human right and the doctrine of reverse burden introduced by Section 139 of N.I. Act should be delicately balanced. Such balancing acts would largely depend upon the factual matrix of each case, the materials brought on record and having regard to legal principles governing the same. Also in the case of *M.S. Narayana Menon alias Mani* (supra) Hon'ble the Apex Court has held that initially the burden of proof is on accused to rebut the presumptions under Section 139 of the N.I by raising a probable defence. If he discharges the said burden, the onus thereafter shifts on to the complainant to prove his case. In the light of the aforesaid judgment, the burden to prove the innocence appears to be upon the applicant/accused, because his plea that his cheque was lost appears to be a falsehood. He gave a cheque after modification of its date, and therefore it was not lost. Thereafter he made so many complaints but such complaints were made only to defeat the issuance of the cheque. By such complaints, it is not proved at all that the cheque was lost. Under such circumstances, where the preliminary burden was discharged by the complainant that the applicant/accused dealt in the share market and for losses caused to him, he gave a cheque to the complainant. The cheque is not given on round figure basis but it is given for specific sum of Rs.7,67,027/- which indicates that the cheque was issued after calculation of the loss caused to the applicant/accused. Therefore, a heavy burden was caused upon the applicant/ accused to prove that the cheque was not given to the complainant.

15. It is apparent that the applicant/accused could not discharge his burden in any manner. To rebut the allegation of the complainant, the applicant/accused examined one Hoshiyar Keshav Chinoy (DW-1) to show that he had direct connection with broker Mehta & Company for transaction in the share market and he never entered in such a contract with the complainant. However, the witness Hoshiyar Keshav Chinoy (DW-1) has accepted that it was the complainant who introduced the applicant/accused with broker Mehta & Company. He has also admitted that he has produced the account which was related to the cash transaction and he could not show any account which was related to the cheque transaction or transaction done on oral instructions. Under such circumstances, by the evidence of this witness, it was proved that the applicant/accused entered into the share marketing with the help of the complainant and he was introduced to Mehta & Company by the complainant.

16. The applicant/accused was expected to come with a clean hand that the amount which is shown in the cheque was not due to be paid by him and he should have either filed a suit for accounts in civil side from the complainant or he could have said that the amount which was filled up in the cheque was excessive and it was not due, therefore the applicant/accused directed for stoppage of the payment, but the applicant/accused did not take such a plea in the entire case. On the contrary, first of all he denied that the cheque was issued to the complainant and secondly he has stated that no share business was done by him through the complainant. However, the applicant/accused could not prove the aforesaid defence taken by him, and therefore now the burden which was shifted upon the applicant/accused was not discharged, and therefore the presumption in favour of the complainant takes a shape of proof that a sum of Rs.7,67,027/- was due towards the applicant/accused. Thereafter by an act which was not bonafide at all, the applicant/accused not only stopped the payment of the cheque but also lodged a counter complaint against the complainant. Hence, the offence under Section 138 of the N.I. Act is established against the applicant/accused that sum of Rs.7,67,027/- was due towards the complainant and the applicant/accused had issued a cheque in favour of the complainant for payment of that sum and the cheque was dishonoured. Under such circumstances, both the courts below did not commit any error in convicting the applicant/accused for the offence under Section 138 of the N.I. Act. There is no basis by which any interference can be done in the concurrent findings of both the courts below relating to the conviction for the offence under Section 138 of the N.I. Act, which was based on the evidence and facts.

17. So far as the sentence is concerned, the complainant has also filed a revision that the appellate Court has reduced the jail sentence of the applicant/ accused without any basis. The learned senior counsel for the applicant/accused could not show any precedent in the matter that the sentence reduced by the appellate Court was proper. However, Hon'ble the Apex Court in the case of *"K.A. Abbas H.S.A. Vs. Sabu Joseph and another"* [(2010) 6 SCC 230] has held that the default sentence can be granted for default in payment of compensation awarded under Section 357(3) of Cr.P.C. The whole purpose of the provision is to accommodate the interests of the victims in the criminal justice system. Sometimes the situation becomes such that there is no purpose served by keeping a person behind bars. Instead directing the accused to pay an amount of compensation to the victim or affected party can ensure delivery of total justice. By the aforesaid judgment, it would be apparent that while reducing the sentence, interest of the complainant/victim should not be overlooked. In the case of N.I. Act a sentence is prescribed and simultaneously a provision of compensation is also prescribed, which would be dependent upon the value of the cheque. Under such circumstances, while granting the sentence, the grant of compensation has a different role in the present situation. By aforesaid judgment Hon'ble the Apex Court did not prohibit to direct jail sentence in an appropriate case. If the overt-act of the applicant/accused is considered, then he refused to pay the sum though he had issued a cheque in favour of the complainant, he lodged a counter complaint against the complainant. He did not deposit any amount in compliance to the judgment of the trial Court. He did not deposit much amount during the appeal. Under such circumstances, looking to the overt-act of the applicant/ accused, it is not the case in which the applicant/accused may be released without any jail sentence. In the present case, mere grant of compensation is not an effective sentence. The compensation may be granted to the victim after giving an effective sentence in the case. Looking to the facts and circumstances of the case and conduct of the applicant/accused, it is apparent that the learned Additional Sessions Judge has committed an error in removing the entire jail sentence passed against the applicant/accused. A nominal jail sentence was required to be passed in the present criminal case.

18. On the basis of the aforesaid discussion, the Criminal Revision No.367/ 2011 filed by the applicant/accused cannot be accepted. There is no basis by which any interference can be done in the concurrent findings of both the Courts below, and therefore conviction directed by both the courts below for

the offence under Section 138 of N.I. Act is hereby maintained. The fine and compensation imposed by the appellate Court are also maintained. Therefore the Criminal Revision No.367/2011 filed by the applicant/accused is hereby dismissed. Whereas Criminal Revision No.468/2011 filed the complainant is hereby partly allowed. The judgment relating to the jail sentence of the applicant/accused passed by the learned Additional Sessions Judge is hereby set aside up to that extent which relates to the sentence. However, the sentence of two years' RI directed by the trial Court is reduced to the period of six months' RI, and therefore Cr.R. No.468/2011 filed by the complainant is hereby partly allowed. The applicant/ accused shall also undergo for six months' RI for the offence under Section 138 of N.I. Act.

19. The applicant-accused is directed to surrender before the trial Court without any delay so that he may be sent for execution of jail sentence.

20. A copy of this order be sent to the trial Court as well as the appellate Court for information and compliance.

Order accordingly.

I.L.R. [2013] M.P., 1755
CRIMINAL REVISION
Before Mr. Justice Brij Kishore Dube
Cr. Rev. No. 493/2013 (Gwalior) decided on 26 July, 2013

SHARIF KHA ... Applicant
Vs.
GAJANAND & anr. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 391 & 401 **- Judicial Magistrate First Class, convicted the accused u/s 138 of the Negotiable Instruments Act and sentenced to suffer imprisonment with fine - Petitioner/accused preferred an appeal against the judgment of conviction and sentence - During pendency of the appeal, an application u/s 391 of Cr.P.C. was filed by the petitioner for taking two documents as additional evidence - The application was allowed and by keeping the appeal pending for decision by the impugned order, the matter was remanded back to the Trail Court for recording the additional evidence of the parties - Held - No infirmity and illegality in the impugned order that may call for any interference in exercise of the revisional jurisdiction. (Paras 2 & 14)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 391 व 401 – न्यायिक मजिस्ट्रेट प्रथम श्रेणी ने अभियुक्त को परक्राम्य लिखत अधिनियम की धारा 138 के अंतर्गत दोषसिद्ध किया और कारावास के साथ अर्थदण्ड से दण्डादिष्ट किया – याची/अभियुक्त ने दोषसिद्धि एवं दण्डादेश के निर्णय के विरुद्ध अपील की – अपील लंबित रहने के दौरान, द.प्र.सं. की धारा 391 के अंतर्गत दो दस्तावेजों को अतिरिक्त साक्ष्य के रुप में लिये जाने हेतु याची द्वारा आवेदन प्रस्तुत किया गया – आवेदन मंजूर किया गया और आक्षेपित आदेश द्वारा अपील को निर्णय के लिए लंबित रखकर, प्रकरण विचारण न्यायालय को पक्षकार के अतिरिक्त साक्ष्य अभिलिखित करने हेतु प्रतिप्रेषित किया गया – अभिनिर्धारित – आक्षेपित आदेश में कोई कमी या अवैधता नहीं कि पुनरीक्षण अधिकारिता का प्रयोग करते हुए किसी हस्तक्षेप की आवश्यकता हो।

Cases referred :

2010 CR.L.R.(MP) 647, 2009(1) MPHT 439.

Shishir Saxena, for the applicant.
Ravi Gupta, for the non-applicant No.1.
Kuldeep Singh, P.L., for the non-applicant No.2/State.

ORDER

BRIJ KISHORE DUBE , J: This Criminal Revision under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (for short the 'Code') is preferred against the order dated 07/06/2013 passed by III Additional Sessions Judge, Guna in Criminal Appeal No.390/11 whereby allowed an application under Section 391 of the Code submitted by the petitioner herein/appellant and remanded the matter back to the Trial Court for recording the additional evidence.

2. Short facts of the case are that on the basis of a private complaint filed by the respondent herein/complainant, the Trial Court had taken cognizance under Section 138 of the Negotiable Instruments Act (for short the 'Act') against the petitioner herein/accused and the case was proceeded. Vide the judgment dated 02/09/2011 passed in Criminal Case No.914/2009 by the Judicial Magistrate, First Class, Guna, convicted the accused under Section 138 of the Act and sentenced to suffer 06 months rigorous imprisonment with fine of Rs.2,50,000/. Being aggrieved thereof, the petitioner herein/accused preferred an appeal against the judgment of conviction and order of sentence which was numbered as Cr. Appeal No.390/2011. During pendency of the appeal, an application under Section 391 of the Code was preferred by the petitioner herein for taking two documents as additional evidence. The application was allowed and by keeping the appeal pending for decision, by the impugned order the matter was remanded back to the Trial Court for

recording the additional evidence of the parties by passing the following order:

"अपीलार्थी की यह अपील लंबित रखी जाती है।

विचारण न्यायालय का अभिलेख् अपीलार्थी की ओर से प्रस्तुत किय गए दस्तावेज के साथ इस निर्देश के साथ प्रेषित किये जाने का आदेश दिया जाता है कि, विचारण न्यायालय अपीलार्थी की ओर से प्रस्तुत व्यवहार वाद कमांक 12ए/2011 में घोषित निर्णय एवं जयपत्र दिनांक 23.12.2011 एवं अनुज्ञप्ति दिनांक 28.09.2002 के संबंध में अपीलार्थी को अपनी अतिरिक्त साक्ष्य प्रस्तुत करने का अवसर प्रदान करने तथा उक्त दोनों ही दस्तावेज पर अपीलार्थी को प्रत्यर्थी कमांक 1 का प्रतिपरीक्षण करने का अवसर प्रदान करे और यदि खण्डन में प्रत्यर्थी कमांक 1 केवल उक्त अतिरिक्त साक्ष्य के संबंध में अपनी ओर से कोई साक्ष्य प्रस्तुत करना चाहे तो उसे भी ऐसा करने का अवसर प्रदान करे और साक्ष्य लिपिबद्ध करने के उपरान्त, विचारण न्यायालय उक्त साक्ष्य सहित सम्पूर्ण अभिलेख इस न्यायालय को आज दिनांक से एक माह के अन्दर भेज दे ।"

3. Against the aforesaid remanded order, the present revision is preferred by the petitioner herein/accused.

4. Learned counsel for the petitioner submits that the impugned order is illegal, incorrect and deserves to be set aside as the Appellate Court remanded the matter only for a limited purpose. Looking to the nature of the documents, the Appellate Court should have remanded the whole matter for deciding it afresh after setting aside the judgment of conviction and order of sentence passed against the petitioner herein/accused. According to him, the learned Appellate Court erred in law by remanding the matter for a limited purpose. Learned counsel prays for setting aside the impugned order and to remand the whole matter to the Trial Court for fresh decision. In support of his contention, he has placed reliance on the decision of *Shobharam and others Vs. State of M.P.*, 2010 Cr. L.R. (MP) 647.

5. In response, learned counsel for the respondent No.1 argued in support of the impugned order, however, he submitted that looking to the nature of the documents submitted by the accused, the Appellate Court should itself decide the case and should have not remanded the matter back to the Trial Court for recording the additional evidence. In support of his contention, he placed reliance on the decision of this Court in the case of *Babulal S/o Mukund Shah Gupta and others Vs. State of M.P.*, 2009(1) MPHT 439.

6. Considered the rival contentions of the learned counsel for the parties.

7. Section 391 of the Code reads as under:

"391. Appellate Court may take further evidence or direct it to be taken:

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

8. From a bare perusal of sub-section (1) of Section 391 of the Code, it is clear that in dealing with an appeal, the Appellate Court if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate.

9. Section 391 of the Code forms an exception to the general rule that an appeal must be decided on the evidence which was before the Trial Court. The Section does not contemplate retrial but only taking of the additional evidence Appellate Court may itself take further evidence or direct Magistrate to take fresh evidence on a particular point where it feels that it is necessary in the interest of justice and for a proper decision.

10. In *Shobharam & others* (supra), this Court held as under:

"Keeping in view the fact that in the incident, which took place for which the case was registered at Crime No. 219/2004 the appellants also sustained injuries and upon the complaint of the appellants party case was registered at Crime No.218/2004 and also keeping in view the aforesaid position of law the application filed by the appellants is allowed and the impugned judgment passed by the learned Sessions Court is set aside and the case is remanded back to the Sessions Court to give an opportunity to the appellants to adduce the evidence in defence and pass a fresh

judgment. It is also made clear that while passing the judgment learned Sessions Judge shall also take into consideration the final outcome of criminal case registered at Crime No.219/2004. Parties are directed to remain present before the learned Court below on 14.05.2010."

11. In *Babulal S/o Mukund Shah Gupta and others* (supra), this Court held that it is well settled that though an Appellate Court has power to take additional evidence in a suitable case, but the discretion should not be exercised to fill up gaps or lacunae in the prosecution case though Section 391 of Cr.P.C., is akin to Order XLI Rule 27 of C.P.C., but avoids de novo trial.

12. Thus, the case cited by the learned counsel for the petitioner in the case of *Shobharam and others* (supra) is distinguishable and not applicable to the case in hand.

13. So far as the case cited by the learned counsel for the respondent in the case of *Babulal S/o Mukund Shah Gupta and others* (supra) is concerned, since the discretion as available under Section 319(1) of the Code has been properly exercised by the Appellate Court in the case in hand, no error of jurisdiction has been committed in remanding the case to the Trial Court for recording the additional evidence.

14. Resultantly, in the facts and circumstances of the case, the settled legal position and for the reasons given hereinabove, I do not find any infirmity and illegality in the impugned order that may call for any interference in exercise of the revisional jurisdiction under Sections 397 read with 401 of Cr. P.C., This revision petition is devoid of merit and is therefore, dismissed.

Revision dismissed.

I.L.R. [2013] M.P., 1759

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Anil Sharma

M.Cr.C. No. 12249/2012 (Jabalpur) decided on 1 March, 2013

AJAY GOENKA (DR.) & ors. ...Applicants

Vs.

STATE OF M.P. & ors. ...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - Investigation **- Power conferred under Section 156(3) of Cr.P.C. on Judicial Magistrate is to be exercised with due caution - Before doing so he has to**

apply his mind to know whether allegations in complaint, prima facie, make out a case - Dispute between the complainant and petitioner is regarding settlement of account which is a civil dispute - Magistrate was not justified in referring the matter without assigning any reason and without considering the complaint - Order passed by JMFC and F.I.R. registered in pursuance of order of Magistrate quashed. (Paras 12 & 13)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – अन्वेषण – द.प्र.सं. की धारा 156(3) के अंतर्गत, न्यायिक मजिस्ट्रेट को प्रदत्त की गई शक्ति का प्रयोग सम्यक सावधानी के साथ किया जाना चाहिए – ऐसा करने से पूर्व उसे अपने मस्तिष्क का प्रयोग करना चाहिए यह जानने के लिये कि क्या शिकायत के अभिकथन प्रथम दृष्ट्या प्रकरण गठित करते हैं – शिकायतकर्ता एवं याची के बीच लेखा के निर्धारण से संबंधित विवाद सिविल विवाद है – कोई कारण दिये बिना और शिकायत पर विचार किये बिना मजिस्ट्रेट द्वारा मामला निर्देशित किया जाना न्यायोचित नहीं – न्यायिक मजिस्ट्रेट प्रथम श्रेणी द्वारा पारित किया गया आदेश और मजिस्ट्रेट के आदेश के अनुसरण में पंजीबद्ध की गयी प्रथम सूचना रिपोर्ट अभिखंडित।

Cases referred :

2008 CR.L.J. 2287, 2006 CR.L.J. 3180, 1998 CR.L.J. 463, 2001 CR.L.J. 3363, 1997 CR.L.J. 3948, (2008) 5 SCC 668, (1998) 1 SCC 692.

Ajay Gupta, for the applicants.
Pratibha Mishra, P.L. for the non-applicant No. 1/State.
None for other non-applicants.

ORDER

ANIL SHARMA, J: By invoking the inherent jurisdiction of this Court, the instant petition has been filed by the petitioners under Section 482 of Code of Criminal Procedure,1973 for quashing the proceedings of FIR registered at crime No.68/12 at Police Station Talaiya District Bhopal and also for quashing the subsequent proceedings initiated thereupon being abuse of process of law.

2- The brief facts in narrow compass are that respondents No.2 & 3 against the petitioners alleging commission of offence punishable under Sections 420, 406, 415 and 120-B of IPC stated that they have done the construction work of Hospital Building of Chirayu Medical College and Hospital which belongs to Chirayu Charitable Trust located at Village Bhainsakhedi, Tahsil Huzoor District Bhopal. It has been further stated that the work of construction was got executed by petitioner No.1 -Dr. Ajay Goenka, Secretary Trustee on behalf of the Trust and the work of construction has been executed by Mr. Vipin Goel. Complainant has further stated

that against whom it has been alleged that he has brought certain plant, machinery and construction material from the site. In the month of July, 2010, the complainant has stopped the work of construction and left it due to non-payment. Complainant has left the plant and machinery at the site for being used in construction work. It has been alleged by the complainant that the accused persons are not returning the plant and machinery despite being asked by the complainant and complainant has alleged that they have come to know that one Greaves Concrete Pump Type 350-D machine has been sold by the accused persons to the L.I.C. Construction Co. Pvt. Ltd. Copy of the complaint preferred by the complainant is attached with this petition as Annexure P/3.

3- Petitioners' counsel submitted that the allegations are absolutely false in fact the excess amount has been paid by the petitioners to the complainant of which no proper account has been submitted by the complainant. Thus, it is not the petitioners who have committed fraud with the complainant but it is the complainant who has committed fraud with the petitioners. In the month of July, 2010, complainant has started demanding more money without providing accounts for the amount which had already been paid by the petitioners to the complainant. It has been further submitted that supervisors were also not performing the duties satisfactorily due to which the construction work was hampered badly. On the one hand, the complainant are avoiding to submit the accounts for settlement and on the other hands they are adopting such illegal tactics only to create undue pressure on the petitioners to succumb to their illegal demands. Learned counsel for the petitioners further submitted that no case of cognizable offence is made out against the petitioner. The bare perusal of complaint does not make out any case of criminal nature, hence prayer for quashing the complaint and other proceedings has been made.

4- Learned counsel for the petitioners drew attention of this Court towards the order dated 10-02-2012 passed in unregistered complaint case by learned JMFC, Bhopal whereby the complaint filed by respondents has been referred to police investigation under Section 156(3) of Cr.P.C. for registration of case. The aforesaid order has been put to challenge by the petitioners availing the remedy of revisional jurisdiction before learned revisional Court which was registered as Criminal Revision No.127/2012 in the Court of First Additional Sessions Judge, Bhopal, who vide impugned order dated 14-03-2012 has dismissed the revision filed by the petitioners without considering the material aspects of the matter.

5- Learned counsel for the petitioners submitted that both the Courts below

have committed grave error in registering the complaint against the petitioners without considering the fact that the dispute between the parties are of civil nature which connotes with regard to settlement of accounts and even bare perusal of complaint does not smell with regard to any cognizable offence against the petitioners. It has been further submitted that while referring the matter under Section 156(3) of Cr.P.C. to police investigation, learned Magistrate has totally failed to apply its mind and he sent the complaint for police investigation without assigning any cogent and plausible reason. On perusal of Annexure P/2, the order passed by learned Magistrate, it is apparent that no application under Section 156(3) has been filed by the complainant for referring the matter to police investigation since there is no reference made by learned Magistrate at the time of passing hte order impugned. The order passed by learned Magistrate, referring the matter to police investigation is reproduced. below:

> 'परिवादी सहित श्री शशांक पाण्डे अधिवक्ता ने उपस्थित होकर अभियुक्तगण के विरूद्ध यह परिवादपत्र अंतर्गत धारा –200 दं.प्र. सं. के तहत मय दस्तावेजों के प्रस्तुत किया। तथा श्री शशांक पाण्डे अधिवक्ता द्वारा साथ में अपना उपस्थिति मेमो प्रस्तुत किया गया।
>
> परिवाद पत्र धारा–156(3) द.प्र.सं. के तहत आरक्षी केन्द्र तलैया को इस निर्देश के साथ प्रेषित किया जाता है कि पंजीबद्ध कर विवेचना उपरांत अंतिम प्रतिवेदन न्यायालय में प्रस्तुत करें तथा आदेशित किया जाता है कि प्रकरण पंजीबद्ध किये जाने की एक प्रति सूचनार्थ न्यायालय को प्रेषित करें ।

6- Learned counsel for the petitioners submitted that learned trial Court has not applied its mind as to what kind of cognizable offence is made out against the petitioners at the time of referring the matter to police investigation. In order to strengthen his contention, learned counsel for the petitioners placed reliance on the decision of Andhra Pradesh High Court in the matter of *D.K.Pattanaik and another Vs. Station House Officer and another,* 2008 Cri.L.J. 2287 in which it has been held that before a Magistrate orders for investigation by police under Section 156(3) of Cr.P.C. he has to apply his mind to know whether allegations in complaint, prima facie, make out a case. It has been further held that the complaint filed against the petitioners for the offence under Section 420 of Penal Code there is no allegation in the complaint that petitioners intentionally induced respondent to attend the interview. The grievance of respondent that Selection Committee in interview has not awarded the marks as prescribed by the guidelines, such allegation even if true by itself, does not constitute an offence of cheating. Allegations contained in the complaint filed by respondent do not disclose commission of any offence,

much less an offence of cheating hence quashed the complaint under Section 482 of Cr.P.C.

7. Learned counsel for the petitoners further placed reliance on the decision of Gujrat High Court in the matter of *Dr. Anil K. Khandelwal and another Vs. Maksud Saiyed and another*, 2006 CriL.J. 3180 in which it has been held that the order impugned reveals that the Magistrate has not gone through the complaint and straight way issued the direction under Section 156(3) of Cr.P.C. to investigate into the matter which was not just and proper in the facts of the case. Further reliance has been placed by petitioners' counsel on the decision of Gujrat High Court in the matter of *Arvindbhai Rajvibhai Patel Vs. State of Gujrat and others,* 1998 Cri.L.J. 463 in which while considering the provisions of Section 156(3) of Cr.P.C. it has been laid down that the allegation in complaint simple and could be investigated by Court itself and the action of Magistrate in mechanically directing police to investigate case has been deprecated. Such passing of buck to police for doing needful is improper and amounts to abdication and dereliction of duty. Paragraph 5 of the judgment is relevant as it has always been seen in State of Madhya Pradesh that almost all the Magistrates are frequently using the power for referring the matter under Section 156(3) of Cr.P.C. without any application of mind merely on the ground that the complaint contains the allegations of cognizable offence, ignoring the riders which have been mentioned by the Apex Court for quashing the FIR and criminal proceedings if the dispute is of civil nature for which the civil suit is pending or the complaint does not disclose any cognizable offence. Paragraph 5 reads as under:

> "Further still, while dismissing this petition what is quite disturbing is the most indiscreet manner in which the learned Magistrate has mechanically directed the PI of the concerned police station to investigate the case under Section 156(3) of the Code and submit his report. In fact, if we peruse the allegations in the complaint, they are too simple requiring any assistance worth the name of the police to investigate into the matter !! And yet the fact remains that the learned Magistrate has quite curiously directed police to investigate under Section 156(3) of the Code and report back. As a matter of fact, instead of directing the PI to investigate under Section 156(3) of the Code, it was the duty of the learned Magistrate of his own to straightway take the cognizance of alleged offences and decide the case after recording the oral and

documentary evidence as the case may be as lead by the complainant and hearing the defence version. In fact, having regard to the facts and circumstances of the case, this is not at all the case where by any stretch of imagination, the learned Magistrate needed any police assistance to inquire into the case. One can quite understand some such complex, complicated cases wherein a Judge/ Magistrate sitting in the Court-room cannot go out of it to various places and persons to collect the data, and accordingly seize some, muddamal articles, documents in possession of accused or his associates, etc. which requires investigation and because of which in absence of police investigating under Section 156(3) of the Code ultimately the cause of justice would suffer. Accordingly, it is indeed here in such cases only where the Investigating Agency is required to be called in assistance and will figure into the picture to supplement its role as one of the important components /functionary of the administration of justice to assist the Court. In this view of the matter, all the learned Magistrates of the State are hereby specifically directed to be henceforth be quite discreet enough in not mechanically directing the police to investigate the case under Section 156(3) of the Code. When the allegations in the complaint are simple enough and further where the Court undoubtedly can straightway proceed to conduct the trial, in such cases the Court before which the complaint is filed, shall never mechanically abandon its sacrosanct duty of recording the evidence and doing justice by passing a buck to the police for doing the needful. This is clear abdication and dereliction of duty. In fact, this Court in number of such cases have noticed quite unfortunate growing tendency on the part of some of the learned Magistrates to direct the police to investigate under Section 156(3) of the Code and report reflecting total armchair relaxed attitude and non-application of mind!! This is required to be curbed in the overall interests of justice. When the complainant approaches the Court making a grievance disclosing cognizable offence, it is the duty of every Court in the first instance to carefully examine the complaint and find out whether it prima facie discloses the offence worthy of issuing the process, in the second instance, whether the allegations in the complaint are such which involve quite complex and complicated investigation of the case which without the active

and expertize assistance of the police cannot be undertaken, then in that case, in the third instance, it would be quite desirable to serve notice along with a copy of the complaint to the concerned P. I. or P. S. I. to remain personally present before the Court, appraise him of the situation and take a stock of the situation as to within what time bound period, he would be in a position to complete the investigation and submit his report under Section 156(3) of the Code, and in the fourth instance; when it is of the view that having regard to the nature of allegations in the complaint calling of the police report under Section 156(3) of the Code is unavoidable, then in that case while ordering for the same, it shall make it time bound that is to say report to be submitted within some stipulated period, as warranted by the facts and circumstances of the particular case, directing the concerned police officer to submit the periodical progress report of the investigation every two weeks on affidavit till the final report is submitted on the given date. This is absolutely necessary to keep the investigating agency alert, efficient and under the control of the Court to avoid, in some cases, lethargy and avoidable delay in investigation of the case. In substance, while passing any order pursuant to the complaint, it must reflect the total application of mind by the learned Magistrate"

8- Learned counsel for the petitioners further placed reliance on the Full Bench decision of Allahabad High Court in the matter of *Ram Babu Gupta and another Vs. State of U.P. and others,* 2001 Cri.L.J. 3363 in which it has been held that on receipt of complaint Magistrate has to apply its mind to the allegations made in the complaint and he may at once proceed to take cognizance and may order it to go to police station for being registered and investigated. The Magistrate's order must indicate application of mind. Further reliance has been placed by petitioners' counsel on the decision of Gujrat High Court in the matter of *Suresh Kumar Gupta Vs. State of Gujrat,* 1997 Cri.L.J. 3948 in which while considering the provisions of Section 156(3) of Cr.P.C. it has been held that the parties dealing in business transaction of purchase and sale of commodity, accused indebted to complainant and has allegedly hurled filthy abuses and slapped the complainant when the demand of money was made. The incident take place at the shop of complainant and there is no medical evidence of injury, no independent witness has been examined and no reason explained as to why the accused visit the

complainant particularly when he was indebted to him. Paragraph 11 of the judgment is reproduced below:

> "The above issue is required to be considered and determined in view of the present trend of the litigants, professionals (legal) to go for criminal complaints and of the learned Magistrates to order investigation under Section 156(3) of the Code indiscriminately without inquiring and applying mind whether facts stated constitute offence or dispute between the parties is not of the civil nature. It is not the job of the Postman that the Magistrate has to do on receipt of a complaint that without application of mind straightaway to order investigation under Section 156(3), unless there is a clear case which needs investigation to assist the learned Magistrate to do justice. Before he orders or directs investigation under Section 156(3), he has to notionally decide that investigation through Police agency is needed in this case and the enquiry by himself may not be sufficient. Investigation consists generally of (1) proceeding to the spot; (2) ascertainment of facts and circumstances; (3) discovery and arrest of suspected offender; (4) collection of evidence which may consists of (a) examination of persons, including accused, and recording statement, if thought fit, (b). search of place and seizure of incriminating things: (c) consideration whether the materials are enough for submitting charge-sheet. Such and other things if needed to investigate into the matter, then the question is what is that evidence to prove case cannot be procured by the Court itself and complainant cannot produce it before the Court without the help of investigating agency and help of the concerned Police Officer to proceed in the matter is needed. There are cases, more particularly non-cognizable offences, and some of the cognizable ones where the complainant may produce the whole of the evidence to prove the case. The learned Magistrate himself through complainant can collect necessary evidence to prove guilt. For example, in number of cases, it may not be necessary to proceed to the spot, ascertainment of facts and circumstances can be gathered by the Magistrate himself by calling the witnesses, discovery and arrest of suspected offender may not be necessary and necessary evidence to prove the case may be produced by the complainant himself with or without the

> assistance of the Court. There may be no necessity of any search of place or seizure of the things. In such a situation, when the necessary material to prove guilt can be produced before the Court with or without the help of the Court by the complainant, why direction for investigation under Section 156(3) of the Code? So, when a complaint is received be it for an offence cognizable or non-cognizable, the learned Magistrate has to look at the complaint or the information received, apply his mind and has to come to a tentative decision whether necessary material to prove the guilt of the accused can be gathered by him without any difficulty through the complaint or it is necessary to take assistance of investigating agency. If for the proof of guilt it is felt necessary to go to spot, to discover and seize some incriminating article, to search a place, etc., then direction to investigate stands justified. In all cases where the complainant approaches the Court by private complaint, anything needed to prove case can be and has to be done by complainant. For example, in facts of the case on hand, though cognizable offence is alleged to have been committed, why was it necessary to direct the Police to investigate?"

9- Learned counsel for the petitioners submitted that the judgment passed by the Gujrat High Court in the matter of *Dr. Anil K. Khandelwal and others* (supra) has been affirmed by the Apex Court in the appeal filed by Maksud Saiyed in the title of *Maksud Saiyed Vs. State of Gujrat and others,* (2008) 5 SCC 668 and held that while considering the provisions of Section 482 and 156(3) of Cr.P.C. for quashing of proceeding by High Court that the allegations in the complaint petition have to be examined with regard to correct statutory provisions vis-à-vis conduct of parties. The Magistrate ordering police investigation under Section 156(3) of Cr.P.C. without application of mind on these principles and the Magistrate not considering bona fide mistake of director in publishing the prospectus of company, quashing of proceedings by High Court has been upheld. Relevant paragraph No. 13 of the judgment is reproduced below :

> "Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the

Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability"

10- Learned counsel for the petitioners further placed reliance on the decision of Apex Court in the matter of *Madhavrao Jiwajirao Scindia and others Vs. Sambhajirao Chandrojirao Angree and others*, (1988) 1 SCC 692 in which it has been held that while considering the question that when the criminal proceedings can be quashed at preliminary stage by High Court under Section 482 of Cr.P.C. In that case summons issued on a complaint filed by a trustee alleging that Secretary and Manager of the trust property in conspiracy with the co-trustee and his wife created tenancy in respect of the property in favour of the co-trustee's wife. Defence case that the property intended for tenancy and accordingly co- trustee's wife being an independent person having her own income inducted as tenant at the rate of rent which outgoing tenant was paying as higher rent was not chargeable under existing law. Tenant's wife volunteering to surrender the tenancy in response to a notice. On facts and in view of the strained relationship between settlor of the trust and the co-trustee and his wife, held the High Court justified in quashing the proceedings as ingredients of criminal offence punishable under Sections 406, 467 read with Section 34 and 120-B of IPC are wanting.

11- Learned P.L. for the respondent/State submitted that according to case-diary, the machinery which is alleged to be sold by the complainant in his complaint was found intact and no machinery has been sold by the petitioner as it is reflected from the investigation.

12- On perusal of record and case-diary it is clear that the dispute between the complainant and petitioner is regarding settlement of account which is a civil dispute. The machinery and plant of complainant has been kept in the premises of petitioners under mutual understanding of complainant and petitioner No.1 and learned JMFC is not justified in referring the matter without assigning any reason

and without considering the complaint, to the police investigation under Section 156(3) of Cr.P.C. The power conferred under Section 156(3) of Cr.P.C. on the Judicial Magistrate are to be exercised with due caution as exercising of power against the person i.e. opposite party exposes the accused to the highhandness of investigating agency by fulfilling the intention of harassment of accused by the complainant, therefore, considering the citations mentioned above, learned trial Court is not justified in referring the complaint to police investigation under Section 156(3) of Cr.P.C. and learned revisional Court is also not justified in upholding the order passed by learned trial Court.

13- Considering the overall conspectus of facts and circumstances of the case, the petition filed by the petitioners is hereby allowed. Order passed by learned both the Courts below are hereby quashed and the FIR registered at Crime No.68/12 at Police Station Talaiya District Bhopal in pursuance to the order of trial Court is hereby quashed and further proceedings thereto are also quashed being abuse of process of law.

Registry of this Court is directed to forward the copy of this judgment to all the Judges of State of Madhya Pradesh and to the director of Judicial Officer Training and Research Institute, Jabalpur for guidelines as it has always been seen that all the Judicial Magistrates are passing the similar orders without giving cogent and plausible reason prior to referring the matter to police investigation in exercise of power vested under Section 156(3) of Cr.P.C. which has resulted in harassment of opposite party.

Following measures are to be adopted by the Judicial Magistrate prior to referring the matter by invoking the provisions under Section 156(3) of Cr.P.C. to police investigation:

i. Whether any cognizable offence is made out from perusal of complaint or not.

ii- Whether the complaint is not misuse of provisions of Jaw to drag the innocent person under the threat of criminal law.

iii- Sometimes the complaints are filed after registration of FIR by the police for addition of some more offences and the complainant alleges after 3-4 months certainly after getting advice that the police has not written certain facts

which form the graver offence such as offence of theft has been registered and the ingredients of robbery has not been mentioned by the police or the offence related to outraging of modesty of woman has been registered and ingredients of rape was not mentioned.

iv- Sometimes the civil litigation regarding document is pending between the parties which has been mentioned in the complaint and genuineness of document is to be proved in the civil suit but the complainant alleges that the forged document has been produced by the other parties before the civil Court.

v- To avoid such misuse of Court, the Courts below are required to consider the complaint in the light of above-mentioned measures so that the innocent person cannot be dragged to criminal complication by obtaining the order of the Court which has certainly misused the process of law and court both.

Necessary orders from Hon'ble The Chief Justice be obtained by the Registry prior to circulating this judgment to all the members of District Judiciaries.

Petition allowed.

I.L.R. [2013] M.P., 1770
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice G.D. Saxena
M.Cr.C. No. 7212/2012 (Gwalior) decided on 17 May, 2013

BABBURAJA ...Applicant
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. Criminal Procedure Code, 1973 (2 of 1974), Section 91 - Summons to produce documents - **Statements of some of the witnesses recorded during investigation were not filed along with charge sheet - Prosecutors are expected to act independently without affecting the investigation - If some evidence is collected during investigation and is relevant for the purposes of trial, enquiry or other proceedings before Court, and if investigating agency purposefully does not like to disclose**

the same, it is the duty of prosecution to make a request to bring all other evidence collected but not produced before Court for fair justice.(Para 8)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 –दस्तावेज प्रस्तुत करने के लिए समन – अन्वेषण के दौरान अभिलिखित किये गये कुछ साक्षियों के कथन, आरोप पत्र के साथ प्रस्तुत नहीं किये गये – अन्वेषण को प्रभावित किये बिना स्वतंत्र रुप से कार्यवाही करना, अभियोजकों से अपेक्षित है – यदि अन्वेषण के दौरान कोई साक्ष्य एकत्रित किया गया है और विचारण जांच या न्यायालय के समक्ष अन्य कार्यवाहियों के प्रयोजन हेतु सुसंगत है, और यदि अन्वेषण एजेंसी उद्देश्य सहित उसे प्रकट नहीं करना चाहती, तब अभियोजन का कर्तव्य है कि समुचित न्याय के लिये, ऐसे सभी अन्य साक्ष्य बुलाने का निवेदन करे, जिन्हें एकत्रित किया गया है परंतु न्यायालय के समक्ष प्रस्तुत नहीं किया गया है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 91 - Locus Standi* - One of the witness filed an application for production of statements of witnesses recorded during investigation but not filed along with charge sheet - As witness was not a complainant therefore, he has no right to participate independently in criminal trial - However, when the investigating agency itself while submitting charge sheet keeps mum and adopts method of pick and choose, Court is bound to consider the relevancy of the documents - Courts exist for dispensation of justice and not for its denial for technical reasons. (Para 9)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 91 – सुने जाने का अधिकार – एक साक्षी ने ऐसे साक्षियों के कथन प्रस्तुत किये जाने हेतु आवेदन प्रस्तुत किया, जिन्हें अन्वेषण के दौरान अभिलिखित किया गया था, परन्तु आरोप पत्र के साथ पेश नहीं किया गया – चूंकि साक्षी शिकायतकर्ता नहीं है, इसलिए उसे आपराधिक विचारण में स्वतंत्र रुप से सहभाग लेने का कोई अधिकार नहीं – अपितु, जब अन्वेषण एजेंसी स्वयं आरोप पत्र प्रस्तुत करते समय खामोश है और सोच समझकर सावधानी से चुनने का ढंग अपनाती है, न्यायालय ऐसे दस्तावेजों की सुसंगतता पर विचार करने के लिए बाध्य है – न्यायालयों का अस्तित्व, न्याय करने के लिए और न कि तकनीकी कारणों पर उससे वंचित करने के लिए।

Cases referred :

M.Cr.C. No. 1430/2012, AIR 2012 SC 364

Suresh Agrawal, for the applicant.
Vijay Sunderam, P.L. for the non-applicant No.1/State.
Pradeep Katare, for the non-applicant No. 2.

ORDER

G.D.SAXENA, J: Having been aggrieved by the directions issued vide order dated 1/8/12 in Misc. Cri. Case No.1430/2012 (Baijnath Singh Vs. State of M.P. & another) which are reproduced below, the petitioner has knocked the doors of this court with a request for exercising powers under section 482 of Cr.P.C. to secure the ends of justice :-

> "Consequently, the impugned order dated 11/11/11 is quashed. The petition stands hereby allowed. The application filed on behalf of petitioner under Section 91 of of Cr.P.C. is also allowed (which apparently by mistake or typographical error is mentioning the words "on behalf of the accused-petitioner", whereas it was filed by the interested party in trial against the accused-respondent No.2, herein). It is directed that the learned trial court shall summon the statements mentioned in the application filed by the petitioner through the Investigating Agency and thereafter proceed with the matter in accordance with law, without being influenced by any of the observations made during the course of this order"

(2) In the present petition before this court, the petitioner prays for the reliefs as following:-

> "It is therefore, most humbly prayed that the petition filed by the petitioner may kindly be allowed and order dated 01.08.2012 passed by this Hon'ble court in MCRC No.1430/ 2012 may kindly be reviewed and heard on merits by giving opportunity to the petitioner."

(3) On perusal of the record of Misc. Cr. Case No.1430/2012, it appears that on 1st August, 2012, after having heard the learned counsel for petitioner/ interested party as well as learned Public Prosecutor appeared on behalf of the respondent No.1/State, admittedly without issuing notice to respondent No.2-accused, this court passed the order which is called in question.

(4) Learned counsel for the petitioner vehemently argued that the respondent No.2 has no locus standi to participate by way of petition under Section 301 of Cr.P.C. in trial against the accused and also by moving previous petition before this court. He has no locus standi to file the petition under Section 91 of Cr.P.C. for calling the statements of the witnesses stated to

have been recorded in investigation but not filed with the charge-sheet by the I.O. under Section 174 of Cr.P.C. It is further submitted that no such petition was filed with consent of the prosecutor before the trial court. In these circumstances, the learned trial court has not committed any mistake in rejecting the prayer of the respondent No.2 which ultimately was allowed by this court in a petition so preferred, hence, this petition.

(5) The learned Public Prosecutor appearing for the respondent No.1-State, as well as learned counsel appearing for the respondent No.2/accused, on the other hand, submitted that although the Inquiry Officer at earlier point of time, at the time of inquiry into marg, recorded the statements of Baijnath Singh Guraia, Roop Singh and Vinod, but during investigation concluded that there was inimical terms of these witnesses with the accused and so their statements are not relevant. On this ground, the statements of those witnesses were kept aside from the investigation and the charge sheet on the available evidence as collected for offence punishable under Section 306 of I.P.C. was filled. Consequently, the trial court framed the charges on the basis of material available by the I.O. It is submitted that in compliance of the order of this court in a petition, the statements of the aforesaid witnesses were taken on record which disclosed prima facie offence against the accused under Section 302/34 of I.P.C. Under such circumstances, the charge for the alleged offence is framed against the petitioner/accused vide impugned order. On these grounds, it is prayed for dismissal of the petition.

(6) Heard the learned counsel for the petitioner and the learned counsel for the respondent No.1-State as well as learned counsel appearing for the respondent No.2, at sufficient length. Also perused the proceedings of case diary written by the Investigating Officer/Inquiry Officer of the Marg and examined the relevant provisions of law.

(7) At this juncture, it would be useful to reproduce Section 91 and 301 of Cr.P.C, which read as is under:-

> **"91. Summons to produce document or other thing-** (1) Whenever any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceedings under this code by or before such Court or such officer, such Court may issue a summons

or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed-

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.

301. Appearance by Public Prosecutors.-(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

(8) A bare perusal of the provisions as contained in Section 91 of Cr.P.C. makes it clear that whenever the court considers that a production of any document is necessary or desirable for the purposes of any trial, the court may issue direction for its production before the court in trial. The court should find out the truth which appears either from record or from other sources and it should not act as per the choice of the prosecutor or accused. In such cases, the prosecutors are expected to act independently without affecting the investigation. If some evidence is collected during investigation and is relevant for the purposes of the enquiry, trial or other proceeding before the court and

if the Investigating Agency purposefully does not like to disclose the same before the court while submitting charge-sheet and keeps the same in case diary, in that condition, it is duty of the prosecution to make a request to bring all other evidence though collected but not produced before the trial court for consideration, for fair justice. Simultaneously, provisions contemplated in Section 301(2) of Cr.P.C. clearly indicated that if in such case any private person instructs a pleader to prosecute any person, the pleader so instructed may assist the public prosecutor and with permission of the court may submit written arguments after evidence is closed in the case.

(9) Now on coming to the merits of the present case, it appears that in the case of death of Smt. Meenesh wife of accused-petitioner, on information of Ramveer Singh, a marg report was lodged at No. 08/2009. During inquiry, statements of neighboring witnesses Baijnath Singh, Roop Singh and Vinod Singh were recorded. After marg inquiry, the FIR was lodged and in investigation the statements of the above-mentioned witnesses were recorded. But after investigation, by removing the statements of these three above witnesses, the charge sheet was filed against the accused for offence under Section 306 of I.P.C. In trial, the trial Judge on the basis of charge-sheet and the prosecution evidence enclosed therewith, framed charges against the accused. During trial, the trial Judge recorded statements of prosecution witnesses. Most of the ocular witnesses did not support the prosecution version. At that juncture, one of the witnesses, namely, Baijnath Singh who was a neighbour and an eye-witness of the incident filed an application under Section 91 of Cr.P.C. before the trial court which after hearing the parties was rejected. Being aggrieved by the said order rejecting his application under Section 91 of Cr.P.C., said witness Baijnath Singh filed a petition under Section 482 of Cr.P.C. being Misc. Cri. Case No. 1430/2012 which was allowed by this court under the order impugned directing the trial court for summoning the case diary of the crime and taking the statements of the above three witnesses on record. True it is, in view of the provisions contemplated in Section 301 of Cr.P.C., the said witness Baijnath Singh was not complainant and so he was not having any right to participate independently in criminal trial against the accused but when the Investigating Agency itself while submitting charge-sheet papers keeps mum and adopts method of pick and choose in filing the documents alongwith the charge-sheet before the court and when an application is

made to a court under Section 91 of Cr.P.C., at that juncture, obviously the court is bound to consider whether there is a prima facie case for supposing that the statements are relevant and the same are likely to have a bearing on the case. It was in this context, when the application was rejected by the trial court and the trial court did not focus any attention on the question whether the statements sought to be summoned by the petitioner/respondent no.2 had any relevancy in the case, the petitioner/ respondent No.2 approached this court under Section 482 of Cr.P.C. Keeping in view the fact that the courts exist for dispensation of justice and not for its denial for technical reasons when law and justice otherwise demand, this court interfered under its inherent powers vested under section 482 of Cr.P.C. and directed the trial court to look into the statements and proceed in accordance with law. A reference may be made to the decision in the case of *State of Punjab Vs. Davinder Pal Singh Bhullar* (AIR 2012 SC 364) wherein the Hon. Apex Court observed as follows :-

> "31. The inherent power under Section 482, Cr.P.C. is intended to prevent the abuse of the process of the Court and to secure the ends of justice. Such power cannot be exercised to do something which is expressly barred under the Cr.P.C. If any. consideration of the facts by way of review is not permissible under the Cr.P.C. and is expressly barred, it is not for the Court to exercise its inherent power to reconsider the matter and record a conflicting decision If there had been change in the circumstances of the case, it would be in order for the High Court to exercise in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the Court. Where there are no such changed circumstances. and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under Section 362, Cr.P.C. (See: *Simrikhia v. Dolley Mukherjee and Chhabi Mukherjee and Anr.,* (1990) 2 SCC 437 : (AIR 1990 SC 1605)).
>
> 32. The inherent power of the court under Section 482, Cr.P.C. is saved only where an order has been passed by the

criminal court which is required to be set aside to secure the ends of justice or where the proceeding pending before a court, amounts to abuse of the process of court. Therefore, such powers can be exercised by the High Court in relation to a matter pending before a criminal court or where a power is exercised by the court under the Cr.P.C. Inherent powers cannot be exercised assuming that the statute conferred an unfettered and arbitrary jurisdiction, nor can the High Court act at its whim or caprice. The statutory power has to be exercised sparingly with circumspection and in the rarest of rare cases. (Vide: *Kurukshetra University and Anr. v. State of Haryana and Anr.*, AIR 1977 SC 2229; and *State of W.B. and Ors. v. Sujit Kumar Rana*, (2004) 4 SCC 129 : (AIR 2004 SC 1851)).

33. The power under Section 482, Cr.P.C. cannot be resorted to if there is a specific provision in the Cr.P.C. for the redressal of the grievance of the aggrieved party or where alternative remedy is available. Such powers cannot be exercised as against the express bar of the law and engrafted in any other provision of the Cr.P.C. Such powers can be exercised to secure the ends of justice and to prevent the abuse of the process of court. However, such expressions do not confer unlimited/unfettered jurisdiction on the High Court as the "ends of justice" and "abuse of the process of the court" have to be dealt with in accordance with law including the procedural law and not otherwise. Such powers can be exercised ex debito justitiae to do real and substantial justice as the courts have been conferred such inherent jurisdiction, in absence of any express provision, as inherent in their constitution, or such powers as are necessary to do the right and to undo a wrong in course of administration of justice as provided in the legal maxim "quando lex aliquid alique, concedit, conceditur et id sine quo res ipsa esse non potest". However, the High Court has not been given nor does it possess any inherent power to make any order, which in the opinion of the court, could be in the interest of justice as the statutory provision is not intended to by-pass the procedure prescribed. (Vide:

Lalit Mohan Mondal and Ors. v. Benoyendra Nath Chatterjee, AIR 1982 SC 785; *Rameshchandra Nandlal Parikh v. State of Gujarat and Anr.*, AIR 2006 SC 915; *Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS and Anr.*, AIR 2006 SC 2872; *Inder Mohan Goswami and Anr. v. State of Uttaranchal and Ors.*, AIR 2008 SC 251; and *Pankaj Kumar v. State of Maharashtra and Ors.*, AIR 2008 SC 3077).

(10) Every trial must be a fair trial and fair trial is the theme song of provisions of Criminal Procedure Code. The concept of fair trial cannot vary from case to case, accused to accused and person to person. It has to be a consistent concept applicable to all cases. In fact, detailed procedure laid down by Cr.P.C. takes care of ensuring fair trial to the accused. Thus, a trial according to Cr.P.C. has to be considered a fair trial. It is only if provisions of Cr.P.C. are not followed, one can say that the trial is not fair trial. An important facet of fair trial is that trial must conclude within a reasonable time and it must not be fair only to the accused but must be fair to the society, to the victim and to the witnesses. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is 'necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code'.

(11) The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. In so far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. Therefore, when the section talks of the document being necessary and desirable, it is implicit that necessity and desirability of such document is to be examined by the trial court considering the stage when such a prayer for summoning and production is made.

(12) In view of the aforesaid discussions, this court does not find any error committed in passing the impugned order. The petition is accordingly dismissed. Of course the petitioner/accused shall have a legal right to defend and prove his innocence by leading cogent and reliable evidence at subsequent stage of defence in the trial which may be considered by the trial court in proper perspective and the case shall be decided in accordance with law.

Petition dismissed.

I.L.R. [2013] M.P., 1779
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Brij Kishore Dube
M.Cr.C. No. 4835/2013 (Gwalior) decided on 3 July, 2013

DINESH KUMAR YADAV ...Applicant
Vs.
UNION OF INDIA ...Non-applicant

Narcotic Drugs and Psychotropic Substances Act (61 of 1985) - Re-testing of Samples **- Heroine was seized from the possession of Petitioner - However, the F.S.L. report shows the contraband as Opium - Prosecution filed application for re-testing of sample from Hyderabad - Any request for re-testing of sample may be permitted in exceptional circumstances for cogent reasons to be recorded - Application must be made within 15 days from the date of receipt of test report - Cogent reasons have been assigned by Trial Court - Revision dismissed. (Paras 7 & 8)**

स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61) – नमूनों की पुन: जांच – याची के कब्जे से हैरोईन जब्त की गई – किन्तु एफ.एस.एल. की रिपोर्ट, विनिषिद्ध पदार्थ को गांजा दर्शाती है – अभियोजन ने नमूने की पुन: जांच हैदराबाद से कराने का आवेदन प्रस्तुत किया – नमूने की पुन: जांच का कोई निवेदन अपवादिक परिस्थितियों में मंजूर किया जा सकता है, जिसक प्रबल कारण अभिलिखित किये गये हो – जांच प्रतिवेदन प्राप्ति की तिथि से 15 दिनों के भीतर आवेदन करना चाहिए – विचारण न्यायालय द्वारा प्रबल कारण दिये गये हैं – पुनरीक्षण खारिज।

Cases referred :

Cr.A.No.1640/2010 decided in 23.01.2013, 2001 Cr.L.J. 2690, 2007 Cr.L.J. 2074.

N.P. Dwivedi & Gagan Sharma for the applicant.
Ankur Mody, Assistant Solicitor General for the non-applicant.

ORDER

BRIJ KISHORE DUBE, J: This petition under Section 482 of the Code of the Criminal Procedure, 1973 (For short, the Code) is preferred by the petitioner herein/accused for quashing the impugned order dated 07/05/13 passed by the Special Judge (NDPS Act), Vidisha in Special Case No. 02/2013 whereby allowed the application to send the samples for retesting them to the Government FSL, Hyderabad.

2. The short facts of the case are that on 07/02/2013 on the basis of information received through an informer, 1.210 kgs heroine contained in two packets was seized on platform No.1 of the Vidisha railway station from the illegal possession of the petitioner. Two samples P1S1, P1S2 and P2S1 & P2S2 were prepared from each packet. On 11/02/13, two samples P1S1 and P2S1 were sent to the Government and Alkaloid Works, Neemuch (M.P.) for chemical examination and the Chemical Examiner submitted a report according to which each of the two samples is found by qualitative and quantitative analysis to be "OPIUM" within the meaning of NDPS Act, 1985.

3. After completing the investigation, challan has been filed against the petitioner before the Special Judge (NDPS Act), Vidisha on 10/04/2013 and on the same date, an application was submitted by the respondent herein before the Court below praying that P1S2 and P2S2 be sent to the FSL, Hyderabad for retesting the samples. The application was opposed by the petitioner.

4. Learned Court below by the impugned order accepted the application and directed that the samples P1S2 and P2S2 be sent to FSL, Hyderabad for retesting. The relevant paragraphs of the order reads as under:

> "8– सहायक रासायनिक परीक्षक द्वारा किये गये परीक्षण टेस्ट के अवलोकन से स्पष्ट है कि भौतिक परीक्षण करने पर जप्तसुदा मादक पदार्थ को brownish coloured coarse powder होंना पाया गया न कि pasty mass having charactraistic odour of OPIUM सहायक रासायनिक परीक्षक द्वय द्वारा रासायनिक परीक्षण व थिन लेयर क्रोमोग्राफी (T.O.C.C.) परीक्षण किया जाना प्रतीत नहीं होता ।
>
> 9– अधिनियम की धारा 2 में परिभाषित अफीम एवं कंडिका 07 में उल्लेखित मार्फीन के प्रतिशत पर विचार किया गया । ऐसी स्थिति में प्रथम दृष्टया परिवाद पक्ष का रिपोर्ट से असहमत व असंतुष्ट होंना वर्तमान प्रकम में विधि सम्मत प्रतीत होता है। इस न्यायालय द्वारा वर्तमान प्रकम पर उक्त रिपोर्ट पर गुणदोषों के

आधार पर विचार किया जाना अपेक्षित नहीं है।

10— माननीय सर्वोच्च न्यायालय द्वारा क्रिमिनल अपील नम्बर 1640/2010 थानसिंह वि0 सेंट्रल ब्यूरो आफ नारकोटिक्स में पारित निर्णय दिनांक 23 जनवरी 2013 की मंशा के अनुसार प्रस्तुत मामले की परिस्थितियां विरल होंने के कारण विशिष्ट परिस्थितियों में जप्तसुदा मादक पदार्थ के द्वितीय नमूना पैकिट P1S2 व P2S2 मादक को न्यायालय के माध्यम से हैदराबाद आंध्रप्रदेश की मुख्य स्टेट एफ.एस.एल. से परीक्षण कराया जाना प्रकरण के विधिवत न्यायनिर्णयन व न्यायसंगत विनिश्चय हेतु आवश्यक प्रतीत होता है। परिवादी द्वारा उक्त आवेदन पत्र परिवाद पत्र प्रस्तुत दिनांक 10.4.13 को ही अतिशीघ्र प्रस्तुत किया गया है।

11— फलतः परिवाद द्वारा प्रस्तुत आवेदन पत्र स्वीकार किया जाता है

12— परिवादी द्वारा नमूना पैकिट P1S2 व P2S2 प्रस्तुत किये जाने की दशा में विधि अनुसार न्यायालय की सील का उपयोग करते हुये विधिवत सीलबंद कर एफ.एस.एल. हैदराबाद (आंध्रप्रदेश) नमूना पैकिट पुनः परीक्षण हेतु प्रेषित किया जाये। इस हेतु देय व्यय परिवादी द्वारा वहन किया जावेगा।"

Being aggrieved thereof, this petition is preferred by the petitioner.

4. Shri N.P.Dwivedi, learned counsel for the petitioner submits that there is no provision under the NDPS Act for retesting of the samples. The Apex Court in the case of *Thana Singh Vs: Central Bureau of Narcotics,* Criminal Appeal No.1640/2010 decided on 23/01/2013 held that request for retesting of the samples shall not be entertained under the NDPS Act as a matter of course, however, it would be permitted in extremely exceptional circumstances. According to him, the learned Court below allowed the application of the respondent herein on superficial grounds as there is no existence of the compelling circumstances on which the application may be allowed. The prosecution cannot be permitted to fillup the lacunae of its case by filing an application for retesting of the samples because the possibility of tampering of the second sample cannot be ruled out as it was in the possession of the respondent herein. On these grounds, learned counsel prays for setting aside the impugned order passed by the Court below. In support of his contention, he has placed reliance in the cases of State of *Kerala Vs. Deepak P. Shah,* 2001 Cr. L.J. 2690 of *Kerala High Court and Nihal Khan Vs. State (Govt. of NCT of Delhi)*, 2007 Cr. L.J. 2074 of Delhi High Court.

5. In response, learned Assistant Solicitor General argued in support of the

impugned order and submits that the application for retesting of the samples was filed within 15 days and the learned Court below by recording the cogent reasons and in the light of the law laid down by the Apex Court in the case of *Thana Singh* (supra) passed the impugned order and, therefore, the petition may be dismissed.

6. I have considered the rival contentions of the learned counsel for the parties and perused the record.

7. The scope of retesting or resampling under the NDPS Act was considered by the Apex Court in the case of Thana Singh (supra) and by considering the judgments of High Courts in the cases of *Deepak P.Shah* (supra) and *Nihal Khan* (supra) held as under:

> "25. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the concerned laboratories, results of the same must be furnished to all parties concerned with the matter. Any requests as to retesting/ resampling shall not be entertained under the NDPS Act as a matter of course. There may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for retesting/ resampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of retesting/ resampling is strictly prohibited under the NDPS Act."

8. From a perusal of the record and the impugned order, it is apparent that the application for retesting of the samples has been made within the prescribed period fixed by the Hon'ble Apex Court and cogent reasons have been assigned for allowing the application of the respondent herein in the impugned order by the Court below.

9. For the foregoing reasons and peculiar facts and circumstances of the case, this Court in exercise of the powers under Section 482 of the Code does not find any ground to interfere in the impugned order. This petition being devoid of merit and substance deserves to be and hereby dismissed.

Certified copy as per rules.

Petition dismissed.

I.L.R. [2013] M.P., 1783

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice D.K. Paliwal

M.Cr.C. No. 6183/2011 (Gwalior) decided on 17 July, 2013

LEKHRAJ SINGH KUSHWAH ... Applicant

Vs.

BRAHMANAND TIWARI ... Non-applicant

Negotiable Instruments Act (26 of 1881), Section 138 - Amendment in the complaint - **Complainant wrongly mentioned the cheque No.332534 in place of 332554 in the complaint as well as in the notice - After completion of cross-examination of complainant an application for amendment in complaint regarding cheque number filed, which was allowed by the trial court - Revision against the order was also dismissed by the A.S.J. observing that the case is at defence stage and petitioner/accused has an opportunity to defend his case - Held - Courts below have committed illegality in allowing such amendment. (Paras 5 & 10)**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – शिकायत में संशोधन – शिकायतकर्ता ने शिकायत मे तथा नोटिस में चेक नं. 332554 के स्थान पर चेक नं. 332534 गलत रुप से उल्लिखित किया – शिकायतकर्ता के प्रतिपरीक्षण पूर्ण होने के उपरांत चेक नम्बर के संबंध में शिकायत में संशोधन हेतु आवेदन प्रस्तुत किया गया, जिसे विचारण न्यायालय द्वारा मंजूर किया गया – आदेश के विरुद्ध पुनरीक्षण भी अति. सत्र न्यायाधीश द्वारा इस टिप्पणी के साथ खारिज किया गया कि प्रकरण बचाव के प्रक्रम पर है और याची/अभियुक्त को मामले में अपने बचाव का अवसर उपलब्ध है – अभिनिर्धारित – उक्त संशोधन मंजूर करने में निचले न्यायालयों ने अवैधता कारित की है।

Cases referred :

2010(II) MPJR 228, 2002(5) MPLJ 178, 2004(2) DCR 158, 2009(1) DCR 363, (2010) 13 SCC 336.

S.K. Shrivastava, for the applicant.

K.S. Shrivastava, for the non-applicant.

ORDER

D.K. PALIWAL, J: This petition under Section 482 of Cr.P.C. is for quashing the order dated 4.8.2011 passed by the Third ASJ, Vidisha, in Criminal Revision No.12/11, whereby order dated 24.11.10 passed by JMFC,

Kurwai, in Criminal Case No.37/2010 has been affirmed.

2. The brief facts of the case are that the respondent has filed a private complaint under Section 138 of the Negotiable Instruments Act (in short the Act) alleging that petitioner use to do agricultural work and also owns a nursery for which the petitioner borrowed a sum of Rs.74,000/- from the respondent and in return gave an account payee cheque of Rs.74,400/- of the State Bank of India dated 20.3.2009. It is further alleged that when the respondent presented the cheque in Barbai branch of State Bank of India, the same was dishonoured. Thereafter, a registered notice was given to the petitioner, but the amount has not been paid. After inquiry, the complaint has been registered and during the evidence, respondent was examined and cross-examined. After completion of the cross-examination, the respondent filed an application for amendment in the complaint before the trial Court submitting that cheque No.332534 has been wrongly mentioned in place of 332554 due to negligence of the respondent's counsel and not because of the respondent. The learned trial Court allowed the application and ordered for carrying out necessary amendment in the complaint. Being aggrieved, the order passed by the learned trial Court was challenged before the learned ASJ who has affirmed the order passed by the trial Court. Being aggrieved, this petition has been filed.

3. It is submitted by learned counsel for the petitioner that impugned order is manifestly illegal, arbitrary and against the provisions of law. In the complaint, the respondent has mentioned the number of cheque as 332534. In the notice, Annexure P/4, the same number has been mentioned. Thus, there is a clear inconsistency in the number of cheque given by the respondent. There is no provision in the Cr.P.C. to make any amendment in the statement already given. The learned trial Court has erred in holding that if the application filed by the respondent is not allowed, the whole purpose of filing the complaint would be frustrated. The respondent has mentioned the cheque No. 332534 in the complaint whereas the actual cheque No. is 332554 for which neither the complaint has been filed nor the notice has been issued to the petitioner. Therefore, by allowing the amendment, illegality has been committed. It is prayed that order passed by the Courts below be set aside.

4. The learned counsel for the respondent supported the impugned order and submits that there is a typographical error which can be amended, therefore, there is no scope for any interference in the impugned orders passed by the Courts below.

5. The crucial question arises for consideration before this Court is

where the amendment in the complaint filed under Section 138 of the Act is permissible under the law. It is not disputed that there is no express provision in the Code of Criminal Procedure to allow the amendment. The order passed by the learned ASJ reveals that while dismissing the revision of the petitioner, it is observed by the learned ASJ that during cross-examination of the respondent/complainant suggestion given by the petitioner does not deny the existence of the questioned cheque, case is at defence stage, petitioner/accused has an opportunity to defend his case. Reliance has also been placed on the decision rendered in *Pt.Gorelal & Anr. Vs. Rahul Punjabi*, 2010 (II) MPJR 228.

6. The learned counsel for the petitioner submits that this Court in the case of *Kunstocom Electronics (I) Ltd. Vs. State of M.P. & another*, 2002(5) M.P.L.J.178 considering the point as to whether amendment can be made in the complaint, by placing reliance on *Ashok Chaturvedi Vs. Shitul H. Chanchani;* AIR 1998 SC 2976, *State of Kerala and others vs. O.C.K.Kuttan;* 1999 SCC (Cri) 304 and *M. Krishnan Vs. Vijay Singh and another,* 2001(4) Crimes 65 (SC), held that there is no provision in the Code of Criminal Procedure giving right to the parties to file an application for amendment in the pleadings and give powers to lower Courts to allow the same. Again this Court in Criminal Revision No.1041/2007 (*Sunder Dev Vs. Yogesh*) decided on 18.3.2008 has held that such amendment cannot be allowed by observing that "allowing the application at this stage of the proceeding when the matter of Section 138 of the Negotiable Instruments Act is considered, the liability as well as the compliance demand strict mandatory compliance then under the said circumstances if the benefit has accrued to the petitioner, the respondent cannot be allowed to get away with the negligence at this stage of the proceedings".

7. Learned counsel for the petitioner has pointed out that in the matter of *Pt. Gorelal* (supra), this Court has taken note of *Kunstocom Electronics (I) Ltd's* case, but still allowed the amendment referring the decision rendered in the matter of *Pradeep Premchandani Vs. Smt. Neeta Jain* (M.Cr.C.No.2907/2007) decided on 18.9.2008, wherein this Court has held that so far as wrong mention of the cheque number either in the notice or in the complaint are concerned, the Court would always have the jurisdiction to look into the fact and do complete justice in the matter. Further a decision of Rajasthan High Court rendered in the matter of *Bhim Singh Vs. Kansingh,* 2004(2) DCR 158, wherein the application

for amendment of cheque number and date of information by bank on ground of typographical mistake was allowed by the trial Court, it was held that trial Court has inherent power to rectify such typographical mistakes to do justice, and a decision of Calcutta High Court in the matter of *Babli Majmudar Vs. State of West Bengal,* 2009(1) DCR 363, wherein it has been held that wrong number on dishonour cheque is of no relevance for the drawer to pay the amount covered by such cheque, have also been referred in *Pt. Gorelal's* case.

8. It is evident that this Court has taken a consistent view in *Kunstocom Electronics (I) Ltd and Sunder Dev* (supra), that there is no provision for amendment in the Code of Criminal Procedure and the amendment in the complaint cannot be permitted, but in the case of *Pt. Gorelal* (supra) taking note of the aforesaid cases, it has been held that application for correction of cheque number can be allowed.

9. The Hon'ble Supreme Court in the matter of *Sant Lal Gupta and others Vs. Modern Cooperative Group Housing Society Limited and others,* (2010) 13 SCC 336 observed in paras 17 and 18 as under :-

> "17. A coordinate Bench cannot comment upon the discretion exercised or judgment rendered by another coordinate Bench of the same Court. The rule of precedent is binding for the reason that there is a desire to secure uniformity and certainty in law. Thus, in judicial administration precedents which enunciate the rules of law from the foundation of the administration of justice under our system. Therefore, it has always been insisted that the decision of a coordinate Bench must be followed.
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> 18. In *Rajasthan Public Service Commission v. Harish Kumar Purohit,* (2003) 5 SCC 480, this Court held that a Bench must follow the decision of a coordinate Bench and take the same view as has been taken earlier. The earlier decision of the coordinate Bench is binding upon any latter coordinate Bench deciding the same or similar issues. If the latter Bench wants to take a different view than that taken by the earlier Bench, the proper course is for it to refer the matter to a larger Bench."

10. Thus, looking to the fact that coordinate Bench of this Court has consistently held in *Kunstocom Electronics (I) Ltd and Sunder Dev* (supra) which has been decided much prior to *Pt. Gorelal's* case, the decision is binding upon latter

coordinate Bench. Considering the facts of the instant case that not only in the pleadings of the complaint, but in the notice as well as in the affidavit filed by the respondent, number of cheque has been mentioned as 332534, in my opinion, the learned Courts below have committed illegality in allowing such amendment.

11. In view of the above analysis, the orders passed by the Courts below are not sustainable. Hence, the petition is allowed and orders passed by the Courts below dated 24.11.2010 and 4.8.2011 are quashed.

Petition allowed.

I.L.R. [2013] M.P., 1787
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Brij Kishore Dube
M.Cr.C. No. 5230/2013 (Gwalior) decided on 25 July, 2013

SURENDRA SHARMA & ors. ... Applicants
Vs.
RAMCHARAN LAL JATAV & ors. ... Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Sections 156(3) & 482 **- On date of incident a F.I.R. was lodged by respondent No.2 in police station and the same was registered under section 294, 324, 506-B/34 I.P.C. - Later on respondents No.1 & 2 filed a complaint under Sections 307, 326, 294, 506(B) of I.P.C. and Section 3(1)(x) of Scheduled Case and Scheduled Tribe (Prevention of Atrocities) Act regarding same incident - Complaint/application (filed by the respondents No.1 & 2) was ordered to be sent to the concerned Police Station for lodging of the FIR on the basis of the complaint and submit a report after conducting the investigation in the matter - Held - Impugned order to register the alleged second FIR on the basis of complaint application is contrary to law - Petition allowed.** **(Paras 2 & 9)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 156(3) व 482 – घटना दिनांक को प्रत्यर्थी क्र. 2 द्वारा पुलिस थाना में एक प्रथम सूचना रिपोर्ट दर्ज करायी गयी और उसे धारा 294, 324, 506–बी/34 भा.द.सं. के अंतर्गत पंजीबद्ध किया गया – बाद में, प्रत्यर्थी क्र. 1 व 2 ने भा.द.सं. की धाराऐं 307, 326, 294, 506(बी) तथा अनुसूचित जाति एवं अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम की धारा 3(1)(x) के अंतर्गत शिकायत उसी घटना के संबंध में प्रस्तुत की गई – (प्रत्यर्थी क्र. 1 व 2 द्वारा प्रस्तुत) शिकायत/आवेदन संबंधित थाना में शिकायत के आधार पर प्रथम सूचना रिपोर्ट दर्ज करने हेतु भेजे जाने के लिये और मामले में जांच करने

के उपरांत रिपोर्ट पेश करने के लिए आदेशित किया गया – अभिनिर्धारित – शिकायत आवेदन के आधार पर अभिकथित द्वितीय प्रथम सूचना रिपोर्ट दर्ज करने का आक्षेपित आदेश, विधि विरुद्ध है – याचिका मंजूर।

Cases referred :

1997 CRLJ 813, 2001 CRLJ 3329, 2013 CRLJ 2313, (2012) 1 SCC 130, (2013) 6 SCC 384.

Y.K. Pathak, for the applicants.
R.K. Goyal, for the non-applicants No.1 & 2.
Kuldeep Singh, P.L., for the non-applicants No.3 & 4/State.

ORDER

BRIJ KISHORE DUBE, J: This petition under Section 482 of Cr.P.C. is preferred by the petitioners for quashing the order dated 15.04.2013 passed by Judicial Magistrate First Class, Gwalior in Criminal Case No._____/2013 complaint (*Ramcharan Lal and others v. Surendra Sharma and others*) whereby the complaint application filed by the respondents No.1 & 2 herein/ complainants was ordered to be sent to Officer-in-Charge of the concerned Police Station for lodging of the FIR on the basis of the complaint and submit a report after conducting the investigation in the matter.

2. Short facts of the case are that on 07.04.2013 at 11.00 a.m. Omprakash (Respondent No.2 herein) alongwith his neighbour, Ratan Singh Kushwah reached to the Police Station, Thatipur and lodged a report to the effect that on the same day i.e., 07.04.2013 at 9.30 a.m. he was cleaning his shop situated in his house, at that time the accused, Surendra Sh[illegible]a, Harsh Sharma, Bunty and Shailu came to his shop and hurled abuses [illegible]n restraining to do so, Bunty dealt a lathi blow which struck over his head, then he shrieked, on hearing the shriek, his father, Ram Charan Lal came to save him, then all the accused persons caught hold and threw down as well as beaten him, Harsh dealt a danda blow as a result of which, his father sustained injuries over his both the legs. Surendra dragged him out from the shop and threw down and beaten him as a result of which, he also sustained the injuries. They also threatened to kill him. On the basis of the aforesaid, an FIR was registered at Crime No.135/2013 for the offence under Sections 294, 323, 506 read with 34 of IPC. The criminal law was triggered and set in motion. Thereafter, the respondents No.1 & 2 filed a complaint application under Sections 3 (1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,

1989 and 307, 326, 294, 506-B read with 34 of IPC against the accused persons (petitioners herein) before the Court on 15.04.2013 alleging the incident and that the police has not recorded the report as per the incident narrated by the complainants but the report has been distorted. The complainants are getting treatment in J.A. Group of Hospital as indoor patients and belongs to the Scheduled Caste. Ramcharanlal has sustained fracture in both the legs. The accused being influenced persons, the report was not properly lodged and no suitable action has been taken on the complaint, therefore, case may be registered against the accused (petitioners herein) under Section 3 (1)(x) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and 307, 326, 294, 506-B read with 34 of IPC. The Court below considered the complaint application and vide the impugned order passed under Section 156 (3) of Cr.P.C. ordered to send the complaint application to the Officer-in-Charge of the concerned Police Station with a direction to register the FIR on the basis of the complaint and to make the investigation and submit the report to the Court. Being aggrieved thereof, this petition has been preferred by the petitioners.

3. Learned counsel for the petitioners submits that respondent No.1, Ramcharan Lal has agreed to sell his house in favour of the petitioner No.1, Surendra Sharma for a consideration of Rs.85.00 lacs and executed an agreement. Subsequently, Ramcharan Lal did not execute the sale deed, therefore, Surendra Sharma filed a Civil Suit for Specific Performance of the Contract to Sale and permanent injunction which is pending before III Additional District Judge, Gwalior wherein temporary injunction has been passed in favour of the petitioners. On 07.04.2013, respondents No.1 & 2 alongwith their associates came and tried to forcibly dispossess, therefore, a quarrel took place between both the parties in which members of both the parties have sustained injuries. On the basis of report lodged by both the parties, cases were registered against each other. It is further submitted that on the basis of report lodged by the respondent No.2, an FIR at Crime No.135/2013 was registered and the case is under investigation. The complainants had filed the complaint with an intention to harass the petitioners. He also submits that the complaint submitted by the respondents No.1 & 2 is of the same incident, therefore, on the basis of same facts, second FIR as directed by the learned Magistrate cannot be registered. There can be no second FIR in respect of the same cognizable offence. In this regard, learned counsel placed reliance upon the following decisions:-

(i) *Ashwini Kumar v. State of Rajasthan,* 1997 Cri.L.J. 813;

(ii) *T.T. Antony v. State of Kerala and others*, 2001 Cri.L.J. 3329;

(iii) *Amitbhai Anilchandra Shah v. Central Bureau of Investigation and Anr.*, 2013 Cri.L.J. 2313.

4. In response, learned counsel for the respondents argued in support of the impugned order. Shri R.K. Goyal, learned counsel for the respondents No.1 & 2 submits that the law does not prohibit registration and investigation of two FIRs in respect of the same incident, therefore, learned Trial Court has not committed any error in exercising the power under Section 156 (3) of Cr.P.C. to register the FIR. Learned counsel in support of his contention placed reliance upon the cases of *Shivshankar Singh v. State of Bihar*, (2012) 1 SCC 130 and *Anju Chaudhary v. State of Uttar Pradesh and another,* (2013) 6 SCC 384.

5. I have considered the rival contentions of the learned counsel for the parties and perused the record.

6. In *Ashwini Kumar* (supra), the first FIR was lodged under Sections 409, 420, 120(B) of Penal Code and after completing the investigation challan was filed. In that situation, it was held by the High Court of Rajasthan that subsequent FIR lodged for the offence under NDPS Act on same facts given in the earlier FIR is not permissible though the police has right to conduct further investigation and submit supplementary charge-sheet. In the case of *T.T. Antony* (supra), the Hon'ble Apex Court held that there can be no second FIR in respect of same cognizable offence or same incident or occurrence. It has further been held by the Apex Court that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of Cr.P.C. only the earlier or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154, Cr.P.C. Thus, there can be no second FIR and consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer-in-charge of a Police Station has to investigate not merely the cognizable offence report in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Cr.P.C. In the case of *Amitbhai Anilchandra Shah,* the Hon'ble Apex Court

held that where offences committed in same transaction, recording of second FIR impermissible.

7. The Hon'ble Apex Court in the case of *Anju Choudhary* (supra) considered a cardinal question of public importance that whether there can be more than one FIR in relation to the same incident or different incidents arising from the same occurrence? The Apex Court after considering its earlier decisions on the question including in the case of *Shivshankar Singh* (supra) held as under:-

> 25. The First Information Report is a very important document, besides that it sets the machinery of criminal law in motion. It is a very material document on which the entire case of the prosecution is built. Upon registration of FIR, beginning of investigation in a case, collection of evidence during investigation and formation of the final opinion is the sequence which results in filing of a report under Section 173 of the Code. The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. Other materials and information given to or received otherwise by the investigating officer would be statements covered under Section 162 of the Code. The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of 'sameness' to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed. However, in case the contrary is proved, whether the version of the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible, This is the view expressed by this Court in the case of *Babu Babubhai v. State of Gujarat and Ors.* [(2010) 12 SCC 254]. This judgment clearly spells out the distinction between two FIRs relating to the same incident and two FIRs relating to different incident or occurrences of the same incident etc.
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> 24. To illustrate such a situation, one can give an example of the

same group of people committing theft in a similar manner in different localities falling under different jurisdictions. Even if the incidents were committed in close proximity of time, there could be separate FIRs and institution of even one stating that a number of thefts had been committed, would not debar the registration of another FIR. Similarly, riots may break out because of the same event but in different areas and between different people. The registration of a primary FIR which triggered the riots would not debar registration of subsequent FIRs in different areas. However, to the contra, for the same event and offences against the same people, there cannot be a second FIR. This Court has consistently taken this view and even in the case of *Chirra Shivraj* (supra), the Court took the view that:

> "14. .... there cannot be a second FIR in respect of same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the First Information Report."

8. On examining the facts of the present case, it is apparent that the alleged incident mentioned in the complaint application was occurred on 07.04.2013 at 9.30 am. The place of occurrence of the incident is the same i.e., the shop of the complainants. Thus, it is clear that both the FIRs relates to the same incident and to the same occurrence.

9. In view of the above discussion and in light of the principles stated (supra), the direction issued by the learned Magistrate by the impugned order to register the alleged second FIR on the basis of complaint application is contrary to law and accordingly deserves to be set aside.

10. In view of the aforesaid, the impugned order is having apparent perversity and as such requires interference, therefore, by invoking the inherent powers under Section 482 of Cr.P.C., the impugned order dated 15.04.2013 passed by Judicial Magistrate First Class, Gwalior is set aside. It is made clear that this Court has not gone into the merits of the rival claims of both the parties and it is for the Trial Court to decide the same in accordance with law.

11. With the aforesaid, the petition stands allowed and disposed of accordingly.

Petition allowed.