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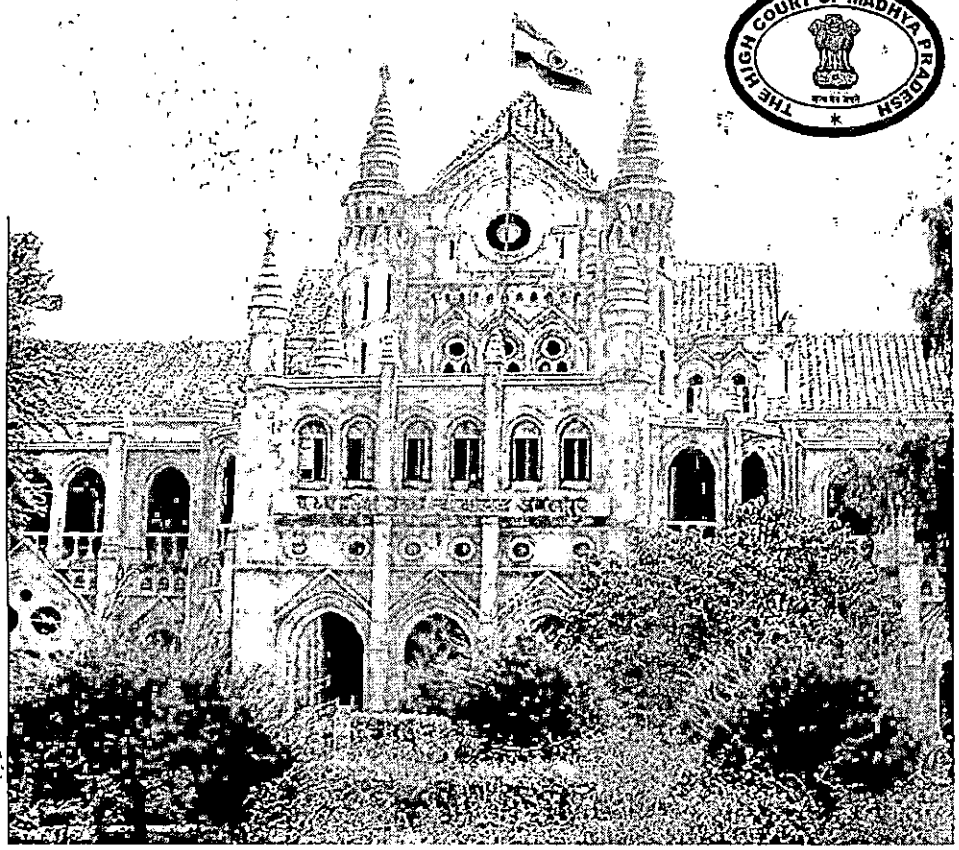
Year-5 **Vol.2**



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Administrative law - When the statute confers a discretion on the authority to take action in the prescribed manner, the authority has to exercise the discretion independently on its own - If an Authority exercises the discretion vested in it by law under dictation from or at the behest of the Superior Authority in a specific manner, the same would tantamount to non-exercise of discretionary power by the authority and such an action or decision cannot have any sanctity in law. [K.K. Singh Chouhan Vs. State of M.P.] ...820

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सिंगापुर अंतर्राष्ट्रीय माध्यस्थम केन्द्र नियमों के अधीन सिंगापुर में संचालित की गई माध्यस्थम कार्यवाही में मध्यस्थ द्वारा अंतरिम अवार्ड पारित किया गया – अपीलार्थी, सिंगापुर के न्यायालयों के समक्ष आवेदन प्रस्तुत करके अंतरिम अवार्ड की वैधता को चुनौती दे सकता है – एक बार जब अपीलार्थी ने माध्यस्थम कार्यवाहियों हेतु एसआईएसी (SIAC) नियमों को स्वीकार किया है, सभी विवादकों को जिसमें अवार्ड की वैधता को चुनौती शामिल है, उस न्यायालय के समक्ष उठाये जाने होंगे जिसकी अधिकारिता को अपीलार्थी ने स्वीकार किया है – भारत के न्यायालयों को अधिकारिता नहीं। (योगराज इन्फ्रास्ट्रक्चर लि. वि. सेंग्यांग इंजीनियरिंग एण्ड कंस्ट्रक्शन कं. लि.) **(DB)...1466**

प्रतिकर की मात्रा का निर्धारण – यदि अधिनियमिती में विनिर्दिष्ट उपबंध उपलब्ध नहीं है, तब न्यायालय किसी अन्य अधिनियमिती के उपबंधों को विचार में ले सकता है जैसे कि मोटर यान अधिनियम और प्रतिकर के निर्धारण हेतु उनके निर्वचन। (मध्यप्रदेश स्टेट इलेक्ट्रिसिटी बोर्ड वि. गिरवन धाकड़) **...868**

केन्द्रीय सिविल सेवा (पेंशन) नियम, 1972 – नियम 33 व 34 – याची द्वारा याचिका इस आधार पर प्रस्तुत की गई कि प्रत्यर्थी द्वारा प्रस्तुत ओ.ए. को, प्रत्यर्थी का वेतन निर्धारण, उच्चतर वेतन मान में करने तथा उक्त वेतन निर्धारण के आधार पर बकाया एवं निवृत्ति लाभों का भुगतान करने के निदेश के साथ अनुचित रुप से मंजूर किया गया था – अभिनिर्धारित – प्रत्यर्थी उच्चतर पद पर स्थानापन्न था और प्रत्यर्थी ने अपने मूल पद से महत्वपूर्ण उत्तरदायित्वों का निर्वहन किया – प्रत्यर्थी की औसत परिलब्धियों का निर्धारण करना था और केवल उक्त औसत परिलब्धियों के आधार पर प्रत्यर्थी की पेंशन की संगणना अपेक्षित थी। (यूनियन ऑफ इंडिया वि. राधेलाल गौड़) **(DB)...1325**

केन्द्रीय उत्पाद शुल्क अधिनियम, 1985 (1986 का 5), अध्याय 28 – वर्गीकरण – पी.व्ही.सी. रेजिन (राल), एच.डी.पी.ई. रेजिन (राल) को आयुक्त द्वारा एक रासायनिक उत्पाद और न रसायन के तौर पर वर्गीकृत किया गया – उक्त निष्कर्ष पर पहुंचने के लिए किसी विभागीय अथवा स्वतंत्र विशेषज्ञ का मत नहीं चाहा गया – उस क्षेत्र के विशेषज्ञ का मत प्राप्त करने के लिए प्राधिकारी को मामला प्रतिप्रेषित और यदि ऐसा कोई विभागीय विशेषज्ञ उपलब्ध नहीं है, आयुक्त इस संबंध में किसी स्वतंत्र विशेषज्ञ का मत चाह सकता है – याचिकायें मंजूर। (टेक्समो पाईप एण्ड प्रोडक्टस् लि. (मे.) वि. असिस्टेन्ट कमिश्नर) **(DB)...1349**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 व आदेश 22 नियम 2 –

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2 - Joint decree of Possession & injunction - Where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. [Hari Singh Vs. Sudhir Singh] ...1478

Civil Procedure Code (5 of 1908), Section 100 - Second Appeal - Concurrent finding of the courts below on the question of possession - Being finding of fact could not be interfered in second appeal - If there is lack of substantial question of law, such appeal liable to be dismissed at the stage of motion hearing. [Pahalwan Singh Vs. Swaroop @ Ramswaroop] ...*21

Civil Procedure Code (5 of 1908), Section 100 - The concurrent findings of the Courts below based on available evidence on the question of possession of agricultural land being findings of fact, could not be interfered at the stage of Second Appeal. [Prabhu Dayal Vs. Bari Bai (Smt.)] ...*24

Civil Procedure Code (5 of 1908), Section 115 - Admissibility of Promissory Note - If the requisite duty is paid on the document like promissory note, Such document could not be held to be inadmissible - So that duty may be either in the shape of embossed stamp or revenue ticket or stamp - Such findings of holding the document/promissory note inadmissible are liable to be set aside - Hence, the findings may be modified in revisional jurisdiction. [Bhagwati Devi (Smt.) Vs. Jameela Begam] ...1193

Civil Procedure Code (5 of 1908), Section 115, Order 9 Rule 9 & Limitation Act (36 of 1963), Section 5 - If on the date, counsel of the party did not appear then instead to dismiss the suit or to proceed exparte, it is the duty of the court to inform the party through summons by fixing the case on some future date - If party did not appear on that day then the court may pass order either for dismissal of the suit or to proceed exparte - In such circumstances trial court ought to have allowed the application u/s 5 of Limitation Act and Order 9 Rule 9, C.P.C. - The appellate court has not committed any error in setting aside the order of the trial court and in allowing restoration of the suit. [Riyaj Khan Vs. Kasam Khan] ...*17

कब्जे एवं व्यादेश की संयुक्त डिक्री – जब सहदायिक का हित अनिश्चित, अनिर्धारित तथा संपत्ति के किसी एक हिस्से से संबंधित होना विनिर्दिष्ट रुप से नहीं कहा जा सकता, तब पक्षकारों के अधिकारों को, विभाजन वाद में समुचित डिक्री द्वारा सुनिश्चित करने से पहले, डिक्री को प्रभावशील नहीं किया जा सकता। (हरिसिंह वि. सुधीर सिंह) ...1478

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – कब्जे के प्रश्न पर निचली अदालतों के समवर्ती निष्कर्ष – तथ्यों का निष्कर्ष होने से द्वितीय अपील में हस्तक्षेप नहीं किया जा सकता – यदि यहां विधि के सारवान प्रश्न का अभाव है, ऐसी अपील समावेदन की सुनवाई के प्रक्रम पर ही खारिज किये जाने योग्य। (पहलवान सिंह वि. स्वरूप उर्फ रामस्वरूप) ...*21

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – कृषि भूमि के कब्जे के प्रश्न पर, उपलब्ध साक्ष्य के आधार पर निचले न्यायालयों के समवर्ती निष्कर्ष, तथ्य के निष्कर्ष होने के नाते, द्वितीय अपील के प्रक्रम पर हस्तक्षेप नहीं किया जा सकता। (प्रभूदयाल वि. बारी बाई (श्रीमति)) ...*24

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – वचनपत्र की ग्राह्यता – यदि वचन पत्र जैसे दस्तावेज पर अपेक्षित शुल्क का भुगतान किया गया हो, उक्त दस्तावेज को अग्रहाय नहीं ठहराया जा सकता – इसलिये यह शुल्क या तो समुद्धृत स्टाम्प या रसीदी टिकट या स्टाम्प हो सकता है – दस्तावेज/वचनपत्र को अग्राह्य ठहराने के उक्त निष्कर्ष अपास्त किये जाने योग्य – अतः निष्कर्षों को पुनरीक्षण अधिकारिता में आशोधित किया जा सकता है। (भगवती देवी (श्रीमति) वि. जमीला बेगम) ...1193

सिविल प्रक्रिया संहिता (1908 का 5), धारा 115, आदेश 9 नियम 9 व परिसीमा अधिनियम (1963 का 36), धारा 5 – यदि नियत तारीख पर पक्षकार के अधिवक्ता उपस्थित नहीं होते हैं, तब वाद खारिज करने या एकपक्षीय कार्यवाही करने की बजाए न्यायालय का यह कर्तव्य है कि प्रकरण भविष्य की किसी तिथि के लिए नियत कर समन द्वारा पक्षकार को सूचित करे – यदि पक्षकार उस दिन उपस्थित नहीं होता है तब न्यायालय वाद की खारिजी का आदेश पारित कर सकता है या एकपक्षीय कार्यवाही कर सकता है – इस परिस्थिति में विचारण न्यायालय को सि.प्र.सं. के आदेश 9 नियम 9 व परिसीमा अधिनियम की धारा 5 के अंतर्गत किया गया आवेदन मंजूर करना चाहिए था – अपीली न्यायालय ने विचारण न्यायालय का आदेश अपास्त करने में तथा वाद पुनःस्थापित करने में कोई भूल कारित नहीं की है। (रियाज खान वि. कासम खान) ...*17

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Civil Procedure Code (5 of 1908), Order 6 Rule 2 - Pleadings - Construction - Pleadings are loosely drafted and Courts should not scrutinize the pleading with such meticulous care so as to result in genuine claims being defeated on trivial grounds - Further pleadings has to be read as a whole to ascertain its true import and not to cull out a passage to read the same in isolation. [Uday Chand Jain Vs. Smt. Sharda Jain] ...1142

Civil Procedure Code (5 of 1908), Order 6 Rule 4 - Pleadings regarding property of Joint Hindu Family - Plaintiff claiming suit property to be of Joint Hindu Family - Not clarified in pleading as to how the property was acquired by the plaintiffs and his brother defendant - Plaintiffs are five brothers but out of them two brothers are not shown as the members of Joint Hindu Family, and their shares are not defined in the suit property - It can be inferred that the entire plaintiff's case is based on baseless and bogus facts. [Gajanand Vs. Gordhan] ...1422

Civil Procedure Code (5 of 1908), Order 18 Rule 4(1) - Examination of witnesses on commission - Commissioner was appointed for examination of witnesses - As the Petitioner had failed to keep the witnesses present before the Commissioner, his right to lead evidence was closed - Order of Trial Court was set aside by High Court by giving last opportunity to keep his witnesses present on payment of cost - Petitioner again failed to keep the witnesses present before the Commissioner therefore his right to lead further evidence was closed - Held - Order 18 Rule 4(1) was introduced with a view to reducing consumption of judicial hours in the process of recording of oral evidence - However, in cases of serious disputes, the Court, as far as possible, may prefer to itself record the cross-examination of material witnesses and the prayer for recording evidence by Commissioner may be declined by Court - Order appointing Commissioner is also liable to be set aside as well as the order closing the right to lead evidence is also set aside - Trial Court directed to record itself the cross examination and re-examination of witnesses - Petition allowed. [Babulal Vs. Tarachand] ...1065

Civil Services (Classification, Control and Appeal) Rules, M.P. 1966, Rule 9 - See - Municipal Corporation Act, M.P., 1956, Sections 52, 53, 420 [K.K. Singh Chouhan Vs. State of M.P.] ...820

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सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 2 – अभिकथन – अर्थान्वयन – अभिवचनों को अयथार्थ रुप से ड्राफ्ट किया जाता है और न्यायालय को अभिवचन की संविक्षा इतनी बारीकी से नहीं करनी चाहिए कि जिसके परिणामस्वरुप वास्तविक दावे, तुच्छ आधारों पर विफल हो जाए – इसके अतिरिक्त अभिवचनों के मूल आशय को सुनिश्चित करने के लिए उसे संपूर्णता से पढ़ा जाना चाहिए और न कि किसी अंश को छांटकर उसे अलग से पढ़ना चाहिए। (उदय चंद जैन वि. श्रीमति शारदा जैन) **...1142**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 4 – संयुक्त हिन्दू कुटुम्ब की सम्पत्ति से संबंधित अभिवचन – वादी ने वाद सम्पत्ति, संयुक्त हिन्दू कुटुम्ब की होने का दावा किया – अभिवचन में स्पष्ट नहीं कि सम्पत्ति को वादीगण एवं उसके भाई प्रतिवादी द्वारा कैसे अर्जित किया गया था – वादीगण पांच भाई हैं, परन्तु दो भाईयों को संयुक्त हिन्दू कुटुम्ब का सदस्य नहीं दर्शाया गया और वाद सम्पत्ति में उनका हिस्सा परिनिश्चित नहीं – यह निष्कर्ष निकाला जा सकता है कि वादी का प्रकरण, आधारहीन एवं मिथ्या तथ्यों पर आधारित है। (गजानंद वि. गोरधन) **...1422**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 18 नियम 4(1) – साक्षियों का कमीशन द्वारा परीक्षण – साक्षियों के परीक्षण हेतु कमिश्नर नियुक्त किया गया – चूंकि याची साक्षीगण को कमिश्नर के समक्ष उपस्थित करने में असफल रहा, उसका साक्ष्य पेश करने का अधिकार समाप्त किया गया – उच्च न्यायालय द्वारा उसे, व्यय का भुगतान करने पर अपने साक्षियों को उपस्थित रखने का अंतिम अवसर देते हुए विचारण न्यायालय का आदेश अपास्त किया गया – याची, कमिश्नर के समक्ष साक्षीगण को उपस्थित रखने में पुनः विफल रहा, इसलिए उसे अतिरिक्त साक्ष्य पेश करने का अधिकार समाप्त किया गया – अभिनिर्धारित – आदेश 18 नियम 4(1) को इस दृष्टि से पुरः स्थापित किया गया था कि मौखिक साक्ष्य अभिलिखित किये जाने की प्रक्रिया में न्यायिक समय उपभोग घटाया जा सके – किन्तु गंभीर विवादों के प्रकरणों में न्यायालय जहां तक संभव हो स्वयं तात्विक साक्षियों का प्रति परीक्षण अभिलिखित करने को प्राथमिकता दे सकता है और कमिशन द्वारा साक्ष्य अभिलिखित किये जाने की प्रार्थना को न्यायालय अमान्य कर सकता है – कमिश्नर की नियुक्ति का आदेश अपास्त किये जाने योग्य और साथ ही साक्ष्य पेश करने का अधिकार समाप्त करने का आदेश भी अपास्त – विचारण न्यायालय को स्वयं, साक्षियों का प्रतिपरीक्षण एवं पुनः परीक्षण अभिलिखित करने के लिए निदेशित किया गया – याचिका मंजूर। (बाबूलाल वि. ताराचंद) **...1065**

सिविल सेवा (वर्गीकरण, नियंत्रण एवं अपील) नियम, म.प्र., 1966, नियम 9 – देखें – नगरपालिक निगम अधिनियम, म.प्र., 1956, धाराऐं 52, 53, 420 (के.के. सिंह चौहान वि. म.प्र. राज्य) **...820**

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Civil Services (Classification, Control and Appeal) Rules M.P., 1966 - Rule 14 - Major Penalty - Withholding of increment with cumulative effect - Withholding of increment with cumulative effect amounts to major penalty - Cannot be sustained in absence of a detailed enquiry in terms of Rule 14. [Baby John Vs. State of M.P.] ...785

Constitution - Article 142 & 226 - Powers of High Court - Supreme Court in exercise of powers under Article 142 of Constitution of India while holding that "Koshti" is not a part of "Halba" Tribe, moulded the relief by permitting the beneficiaries to retain the benefits of the degree - Powers under Article 142 of Constitution of India are not available to High Court - Benefit of directions issued by Supreme Court cannot be extended to the Petitioner. [Urmila Koshti (Smt.) Vs. Secretary, M.P. State Electricity Board, Jabalpur] ...1022

Constitution - Article 226 - Alternative Remedy - Exhaustion of alternative remedy is not a rule of law but is a rule of policy, convenience and discretion - It is not a compulsion but discretion. [Central Homeopathic & Biochemic Association, Gwalior Vs. State of M.P.] ...837

Constitution - Article 226 - Judicial Review - Petitioner appointed as Asstt. Project Officer in ICDS Project which was subsequently taken over by Women and Child Development Department by orders of the State Govt. - Petitioner was still considered to be the project employee - Where an order of State Authority is found to be illegal or arbitrary, unreasonable or irrational, the same is open to judicial review - However, the High Court will not proceed to substitute its own decision as it would amount to exercise of power of authority itself - Petition disposed off with direction to consider the claim of petitioner for absorption - Petition disposed of. [Sanjeev Kumar Jain Vs. State of M.P.] ...1015

Constitution - Article 226 - Review - Order was obtained by respondent No.1 under the Micro Small and Medium Enterprises Development Act, 2006 on the basis of a forged order by which he succeeded by letting the Council to believe that he has been penalized to the tune of Rs. 36,32,508/- and is entitled to recover the same from applicant with interest as it was the applicant who did not submit the form C - Whereas in fact only a penalty of Rs. 500/- was imposed on the respondent

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सिविल सेवा (वर्गीकरण, नियंत्रण और अपील) नियम, म.प्र. 1966 – नियम 14 – गुरुत्तर शास्ति – संचयी प्रभाव से वेतनवृद्धि को रोका जाना – संचयी प्रभाव से वेतनवृद्धि को रोका जाना गुरुत्तर शास्ति की कोटि में आता है – नियम 14 की शर्तोनुसार, विस्तृत जांच के अभाव में कायम नहीं रखा जा सकता। (बेबी जॉन वि. म.प्र. राज्य) ...785

संविधान – अनुच्छेद 142 व 226 – उच्च न्यायालय की शक्तियां – भारत के संविधान के अनुच्छेद 142 के अंतर्गत शक्तियों का प्रयोग करते हुए सर्वोच्च न्यायालय ने 'कोष्टि' को 'हल्बा' जनजाति का भाग नहीं मानते हुए, लाभग्राहियों को डिग्री के लाभ कायम रखने की अनुमति देते हुए अनुतोष को सुधारा – भारत के संविधान के अनुच्छेद 142 के अंतर्गत शक्तियां, उच्च न्यायालय को उपलब्ध नहीं – सर्वोच्च न्यायालय द्वारा जारी किये गये निर्देशों का लाभ, याची को नहीं दिया जा सकता। (उर्मिला कोष्ठी (श्रीमति) वि. सेक्रेटरी, एम.पी. स्टेट इलेक्ट्रिसिटी बोर्ड, जबलपुर) ...1022

संविधान – अनुच्छेद 226 – वैकल्पिक उपचार – वैकल्पिक उपचार का समापन किया जाना, विधि का नियम नहीं बल्कि नीति, सुविधा एवं विवेकाधिकार का नियम है – यह अनिवार्यता नहीं बल्कि विवेकाधिकार है। (सेन्ट्रल होमियोपेथिक एण्ड बायोकेमिक एसोसिएशन, ग्वालियर वि. म.प्र. राज्य) ...837

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No. 1 by the Commercial Tax Department - The order of the Council is set aside as well as the order of the High Court is recalled - Application allowed. [Sterlite Technologies Ltd. Vs. Dhar Industries] ...1381

Constitution - Article 226 - Review - Scope - Power to review an order passed in writ petition under Article 226 of Constitution of India is not confined to examine as to error on the face of record but it would be within the jurisdiction to examine the case in its entirety when a review is sought on the ground of fraud being committed. [Sterlite Technologies Ltd. Vs. Dhar Industries] ...1381

Constitution - Article 226 - Territorial Jurisdiction - Petitioner was posted in Maharashtra - Departmental Enquiry was conducted in Maharashtra - Orders of Appellate and Revisional Authorities were served in State of Maharashtra - No part of cause of action arose within the State of Madhya Pradesh - Petitioner/Service holder cannot clothe the Court with jurisdiction because of his residence. [R.P. Tiwari Vs. The Senior Commandant] ...*25

Constitution - Article 226 - This court can entertain a petition when it challenges vires of any act, rules etc. or when the order is contrary to natural justice or when such an order is passed by the authority who has no jurisdiction - In such cases the plea of Alternative remedy may be rejected. [Pratap Wahini Samaj Kalyan Sansthan Vs. State of M.P.] ...*16

Constitution - Article 226/227 - Natural Justice - If the respondent/Government has permitted the petitioners to obtain appropriate Nazul NOC and submit it before the department - Such an action of the Government is in consonance with the principles of Natural justice, equity and fair play. [Mukesh Singh Chaturvedi Vs. State of M.P.] ...1339

Constitution - Article 226/227 - Promissory estoppel - Legality, Validity & Propriety of Govt. Orders - Promissory Estoppels against the Government - Cannot be pressed into service against Government, when Government is fulfilling public duty as per the public policy - Government is always at liberty to examine the record with accuracy and precision and ensure that public / Govt. land is not misused or enjoyed by anybody without there being any entitlement. [Mukesh Singh Chaturvedi Vs. State of M.P.] ...1339

और साथ ही उच्च न्यायालय के आदेश को वापस लिया गया – आवेदन मंजूर। (स्टरलाईट टेक्नॉलाजीस् लि. वि. धार इंडस्ट्रीज) ...1381

संविधान – अनुच्छेद 226 – पुनर्विलोकन – व्याप्ति – भारत के संविधान के अनुच्छेद 226 के अंतर्गत रिट याचिका में पारित किये गये आदेश के पुनर्विलोकन की शक्ति, अभिलेख पर प्रत्यक्ष त्रुटि के परीक्षण तक सीमित नहीं बल्कि जब पुनर्विलोकन को कपट कारित होने के आधार पर चाहा गया है, तब प्रकरण का परीक्षण उसकी संपूर्णता से करना अधिकारिता के भीतर होगा। (स्टरलाईट टेक्नॉलाजीस् लि. वि. धार इंडस्ट्रीज) ...1381

संविधान – अनुच्छेद 226 – क्षेत्रिय अधिकारिता – याची महाराष्ट्र में पदस्थ था – विभागीय जांच महाराष्ट्र में की गई – अपीली और पुनरीक्षण प्राधिकारियों के आदेश महाराष्ट्र राज्य में तामील किये गये – मध्यप्रदेश राज्य के भीतर वाद कारण का कोई भाग उत्पन्न नहीं – याची/सेवा धारक अपने निवास के आधार पर न्यायालय की अधिकारिता प्रगट नहीं कर सकता। (आर.पी. तिवारी वि. द सीनियर कमांडेन्ट) ...*25

संविधान – अनुच्छेद 226 – यह न्यायालय याचिका ग्रहण कर सकता है, जब वह किसी अधिनियम, नियम इत्यादि की शक्तिमत्ता को चुनौती देती है या जब आदेश नैसर्गिक न्याय के विरुद्ध है या जब उक्त आदेश को ऐसे प्राधिकारी द्वारा पारित किया गया है जिसे अधिकारिता नहीं है – उक्त प्रकरणों में वैकल्पिक उपचार के अभिवाक् को अस्वीकार किया जा सकता है। (प्रताप वाहिनी समाज कल्याण संस्थान वि. म.प्र. राज्य) ...*16

संविधान – अनुच्छेद 226/227 – नैसर्गिक न्याय – प्रत्यर्थी/सरकार ने याचीगण को समुचित नजूल अनापत्ति प्रमाण पत्र अभिप्राप्त करने की अनुमति दी है – सरकार की उक्त कार्यवाही नैसर्गिक न्याय के सिद्धांत, साम्या और निष्पक्ष व्यवहार के अनुरुप है। (मुकेश सिंह चतुर्वेदी वि. म.प्र. राज्य) ...1339

संविधान – अनुच्छेद 226/227 – वचन विबंध – सरकारी आदेशों की वैधता, विधि मान्यता एवं औचित्य – सरकार के विरुद्ध वचन विबंध – सरकार के विरुद्ध लागू नहीं किया जा सकता जब सरकार, लोक नीति के अनुसार लोक कर्तव्यों का निर्वहन कर रही होती है – सरकार, सदैव अभिलेख का परीक्षण यथार्थता एवं सूक्ष्मता से करने के लिए स्वतंत्र है तथा यह सुनिश्चित करेगी कि लोक/सरकारी भूमि का, बिना किसी हकदारी के कोई व्यक्ति उसका दुरुपयोग या उपभोग ना करे। (मुकेश सिंह चतुर्वेदी वि. म.प्र. राज्य) ...1339

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Contract Act (9 of 1872), Section 5 - Proposal - Proposal can be revoked at any time before the communication of its acceptance is complete against the proposer. [Onkar Yadav (M/s.) Vs. State of M.P.] (DB)...771

Contract Act (9 of 1872), Section 7 - Acceptance - Notice Inviting Tender - There was no condition in NIT requiring a successful bidder to deposit any performance security - Since the respondent has imposed such a condition at the stage of acceptance of tender and before the execution of the agreement, therefore, such an acceptance cannot be held to be unconditional acceptance of tender - No concluded contract had come into existence - Forfeiture of Earnest Money for want of deposit of 12% P.A. bad in law. [Onkar Yadav (M/s.) Vs. State of M.P.] (DB)...771

Contract Act (9 of 1872), Section 7 - Acceptance - Unqualified and absolute - Acceptance must be based or founded on 3 components - Certainty, commitment and communication - If there is variance between the offer and acceptance even in respect of any material term, acceptance cannot be said to be absolute and unqualified and the same will not result in formation of a legal contract. [Onkar Yadav (M/s.) Vs. State of M.P.] (DB)...771

Contract - Reserved Price - Non-disclosure - Elaborate mechanism for fixation of upset price which takes into account the sale rate during last five years, sale rate in the preceding year and upset price in preceding year and market trend - Upset price so fixed are approved by the Chairman prior to invitation of tenders - There is no unfairness in not disclosing the reserve price because when reserve price is disclosed, bidders often form cartels and bid at or around the disclosed price, though the market price is much higher - Non-disclosure of reserve price proper - Appeal dismissed. [Aman Traders Vs. State of M.P.] (DB)...1294

Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Registrar/Joint Registrar - When an authority vested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to non-exercise of power, statutorily vested - Authorities have to form an opinion and that must be based on some objective criteria, which has nexus with

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संविदा अधिनियम (1872 का 9), धारा 5 – प्रस्ताव – प्रस्ताव की स्वीकृति की संसूचना प्रस्तावक के लिए पूर्ण होने से पहले उसे किसी भी समय प्रतिसंहृत किया जा सकता है। (ओंकार यादव (मे.) वि. म.प्र. राज्य) **(DB)...771**

संविदा अधिनियम (1872 का 9), धारा 7 – स्वीकृति – निविदा आमंत्रण सूचना – निविदा आमंत्रण सूचना में सफल बोली लगाने वाले को किसी संपादन सुरक्षा निधि को जमा करने की अपेक्षा की कोई शर्त नहीं – चूंकि प्रत्यर्थी ने उक्त शर्त निविदा स्वीकार करने के प्रक्रम पर और करार के निष्पादन से पूर्व अधिरोपित की, इसलिए, उक्त स्वीकृति को निविदा की बिना शर्त स्वीकृति नहीं ठहराया जा सकता – कोई अंतिम संविदा अस्तित्व में नहीं आयी – 12 प्रतिशत प्रतिवर्ष जमा नहीं किये जाने से अग्रिम राशी का समपहरण विधि अंतर्गत उचित नहीं। (ओंकार यादव (मे.) वि. म.प्र. राज्य) **(DB)...771**

संविदा अधिनियम (1872 का 9), धारा 7 – स्वीकृति – बिना शर्त और पूर्ण – स्वीकृति को तीन घटकों पर आधारित होना चाहिए – निश्चितता, प्रतिबद्धता और संसूचना – यदि प्रस्ताव एवं स्वीकृति के बीच अंतर हो, चाहे किसी तात्विक निबंधन के संबंध में ही क्यों न हो, स्वीकृति को पूर्ण या बिना शर्त नहीं कहा जा सकता और उक्त से विधिक संविदा निर्मित नहीं होगी। (ओंकार यादव (मे.) वि. म.प्र. राज्य) **(DB)...771**

संविदा – आरक्षित मूल्य – अप्रकटन – अपसेट कीमत नियत करने हेतु विस्तृत तकनीक जिसमें पिछले पांच वर्षों के दौरान की विक्रय दर, पूर्व वर्ष की विक्रय दर एवं पूर्व वर्ष की अपसेट कीमत और बाजार प्रवृत्ति को ध्यान में रखा जाता है – इस प्रकार नियत अपसेट कीमत को अध्यक्ष द्वारा निविदायें आमंत्रित करने से पूर्व, अनुमोदित किया जाता है – आरक्षित मूल्य के अप्रकटन में कोई अनुचितता नहीं क्योंकि जब आरक्षित मूल्य को प्रकट किया जाता है, प्रायः बोली लगाने वाले उत्पादक संघ निर्मित कर प्रकटित कीमत पर या आसपास बोली लगाते हैं, यद्यपि बाजार मूल्य काफी अधिक होता है – आरक्षित मूल्य का अप्रकटन उचित – अपील खारिज। (अमन ट्रेडर्स वि. म.प्र. राज्य) **(DB)...1294**

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – रजिस्ट्रार/संयुक्त रजिस्ट्रार – जब प्राधिकारी जिसमें शक्ति निहित है, स्वयं से कार्यवाही करना दिखाता है किन्तु वास्तव में शक्ति का प्रयोग बाध्य मार्गदर्शन या दबाव में किया गया हो तब, यह कानूनी रुप से निहित शक्ति का प्रयोग नहीं किये जाने की कोटि में आयेगा – प्राधिकारी को अपनी राय बनानी चाहिए और वह किसी तटस्थ मानदण्ड पर आधारित होनी चाहिए जिसका अंतिम निर्णय से संबंध हो –

final decision - Authority shall not act with pre-conceived notion and shall not speak his masters's voice - Registrar and Joint Registrar are bound to follow the Judicial precedents. [State of M.P. Vs. Sanjay Nagayach] (SC)...1245

Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Supersession of Board of Directors - Board of Directors were superseded in violation of provisions of Section 53 - As per the report of NABARD and RBI the charges levelled against the Board of Directors do not provide strong ground to supersede the Board - Board of Directors could have continued till 15.10.2012 however, the same was superseded on 30.9.2011 - The period during which the Board of Directors remained under supersession be excluded in computing the period of five year - Joint Registrar directed to put Board of Directors back in office so as to complete the period during which they were out of office. [State of M.P. Vs. Sanjay Nagayach] (SC)...1245

Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Supersession of Board of Directors - Directions issued. [State of M.P. Vs. Sanjay Nagayach] (SC)...1245

Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Supersession of Board of Directors - Some of the charges against Board of Directors were relating to the period of the previous committee for which the subsequent committee could not be held responsible. [State of M.P. Vs. Sanjay Nagayach] (SC)...1245

Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53(1), Proviso 2 - Supersession of Board of Directors - Consultation with R.B.I. - Consultation with R.B.I. has to be effective consultation - For effective consultation, the copy of show cause notice with other relevant materials including the copy of reply filed by the Bank to the various charges and allegations levelled against them should also be made available to R.B.I. - R.B.I. should be told of the action the Joint Registrar is intending to take. [State of M.P. Vs. Sanjay Nagayach] (SC)...1245

Co-operative Societies Act, M.P. 1960 (17 of 1961), Sections 72, 74 & 76, Criminal Procedure Code, 1973 (2 of 1974), Section 5 - Cancellation of Plot - Maintainability of Complaint - Complainant was allotted plot by the society, however, the allotment was cancelled

प्राधिकारी पूर्वाग्रह के साथ कार्यवाही नहीं करेगा और अपने मालिक की भाषा नहीं बोलेगा – रजिस्ट्रार और संयुक्त रजिस्ट्रार, न्यायिक दृष्टांतों का पालन करने के लिए बाध्य है। (म.प्र. राज्य वि. संजय नगाइच) (SC)...1245

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – संचालक मंडल का अधिक्रमण – संचालक मंडल का अधिक्रमण, धारा 53 के उपबंधों के अतिलंघन में किया गया – नाबार्ड (एन.ए.बी.ए.आर.डी.) एवं आर.बी.आई. की रिपोर्ट के अनुसार संचालक मंडल के विरुद्ध लगाये गये आरोप, मंडल का अधिक्रमण करने का ठोस आधार उपलब्ध नहीं कराते – संचालक मंडल, 15.10.2012 तक जारी रहता किन्तु उसे 30.09.2011 को अधिक्रमित किया गया – जिस अवधि के दौरान संचालक मंडल अधिक्रमण के आधीन रहा है, उसे पांच वर्ष की अवधि की संगणना में से अपवर्जित किया जाये – संयुक्त रजिस्ट्रार को निदेशित किया गया कि संचालक मंडल को पुनः पद पर लौटाये जिससे कि वह अवधि जिसके दौरान वे पद से दूर रहे हैं, उसे पूर्ण किया जा सके। (म.प्र. राज्य वि. संजय नगाइच) (SC)...1245

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – संचालक मंडल का अधिक्रमण – निदेश जारी किये गये। (म.प्र. राज्य वि. संजय नगाइच) (SC)...1245

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – संचालक मंडल का अधिक्रमण – संचालक मंडल के विरुद्ध लगाये गये कुछ आरोप पूर्वतर समिति की अवधि से संबंधित थे, जिसके लिए पश्चातवर्ती समिति को उत्तरदायी नहीं ठहराया जा सकता। (म.प्र. राज्य वि. संजय नगाइच) (SC)...1245

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53(1), परन्तुक 2 – संचालक मंडल का अधिक्रमण – आर.बी.आई. के साथ परामर्श – आर. बी.आई. के साथ परामर्श, प्रभावकारी परामर्श होना चाहिए – प्रभावकारी परामर्श के लिए, कारण बताओ नोटिस के साथ अन्य सुसंगत सामग्री, जिसमें बैंक द्वारा प्रस्तुत उसके विरुद्ध लगाये गये विभिन्न आरोपों और अभिकथनों के जवाब की प्रतिलिपि भी समाविष्ट है, आर.बी.आई. को उपलब्ध कराना चाहिए – आर.बी.आई. को संयुक्त रजिस्ट्रार द्वारा आशयित कार्यवाही के बारे में बताया जाना चाहिए। (म.प्र. राज्य वि. संजय नगाइच) (SC)...1245

सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराऐं 72, 74 व 76, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 5 – प्लॉट का रद्दकरण – शिकायत की पोषणीयता – शिकायतकर्ता को सोसायटी द्वारा प्लॉट आवंटित किया गया, किन्तु आवंटन रद्द किया गया क्योंकि उसने अनुरक्षण प्रभार, भू–भाटक

as he had not deposited the maintenance charges, Bhoo Bhatak and further did not complete the registration process - Complainant did not remove deficiencies inspite of repeated notices issued to him - Held - Dispute regarding allotment or cancellation of plot is punishable under Sections 72, 74 of Act and cognizance can be taken only on a sanction given by Registrar under Section 76 - Provisions of Cr.P.C. not applicable [Avdhesh Raghuvanshi Vs. State of M.P.] ...1227

Criminal Procedure Code, 1973 (2 of 1974) (Amendment) Act, M.P., 2007 - First Schedule - Change of Forum - Whether Retrospective or Prospective - Full Bench of High Court held that all cases pending before the Magistrate on 22.02.2008 remained unaffected by amendment and were triable by J.M.F.C. - Held - Any amendment shifting the forum of trial has to be on principle of retrospective in nature in absence of any indication in the amendment Act to the contrary, although proceedings concluded under the old law cannot be reopened for the purpose of applying the new procedure - Right of forum is not recognized as vested right - Judgment of Full Bench that amended provision to be applicable to pending cases is not correct on principle - Decision rendered by Full Bench overruled. [Ramesh Kumar Soni Vs. State of M.P.] (SC)...741

Criminal Procedure Code, 1973 (2 of 1974), First Schedule, Penal Code (45 of 1860), Sections 408, 420, 467, 468 & 471 - Whether Triable by Court of Sessions or Magistrate - Offence under Sections 408, 420, 467, 468 & 471 of I.P.C. was registered against appellant on 18.05.2007 - Amendment in first schedule of Cr.P.C. making the offences triable by Court of Sessions received assent of President on 22.02.2008 - Charge sheet was filed subsequently - Case is triable by Court of Sessions as no case was pending before the Magistrate on the date the amendment Act came into force. [Ramesh Kumar Soni Vs. State of M.P.] (SC)...741

Criminal Procedure Code, 1973 (2 of 1974), Section 5 - See - Co-operative Societies Act, M.P. 1960, Sections 72, 74 & 76 [Avdhesh Raghuvanshi Vs. State of M.P.] ...1227

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - Compromise Deed - If the wife wants to get the compromise deed complied with, she can proceed by any legal procedure

जमा नहीं किया और इसके अतिरिक्त पंजीयन प्रक्रिया पूरी नहीं की – शिकायतकर्ता ने, उसे बारम्बार नोटिस जारी किये जाने के बावजूद कमियों को दूर नहीं किया – अभिनिर्धारित – प्लॉट के आवंटन या रद्दकरण से संबंधित विवाद अधिनियम की धारा 72, 74 के अंतर्गत दण्डनीय है और केवल रजिस्ट्रार द्वारा धारा 76 के अंतर्गत दी गई मंजूरी पर ही संज्ञान लिया जा सकता है – द.प्र.सं. के उपबंध लागू नहीं होते। (अवधेश रघुवंशी वि. म.प्र. राज्य) ...1227

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) (संशोधन) अधिनियम, म.प्र., 2007 – प्रथम अनुसूची – न्यायालय का बदलना – क्या भूतलक्षी है या भविष्यलक्षी – उच्च न्यायालय की पूर्ण न्यायपीठ ने अभिनिर्धारित किया कि मजिस्ट्रेट के समक्ष 22.02.2008 को लंबित सभी प्रकरण संशोधन से अप्रभावित रहे और जे.एम.एफ.सी. द्वारा विचारण योग्य है – अभिनिर्धारित – कोई संशोधन जिससे विचारण के न्यायालय को बदला गया है उसे, संशोधन अधिनियम में अन्यथा कुछ नहीं दर्शाये जाने की स्थिति में सैद्धांतिक रुप से भूतलक्षी होना चाहिए, यद्यपि, पुरानी विधि के अंतर्गत समाप्त की गई कार्यवाहियों का, नयी प्रक्रिया लागू करने के प्रयोजन हेतु, नये सिरे से विचार नहीं किया जा सकता – न्यायालय के अधिकार को विहित अधिकार के रुप में मान्यता नहीं – पूर्ण न्यायपीठ का निर्णय कि लंबित प्रकरणों को संशोधित उपबंध लागू हो, सिद्धांत पर सही नहीं है – पूर्ण न्यायपीठ द्वारा दिया गया निर्णय उलट दिया। (रमेश कुमार सोनी वि. म.प्र. राज्य) (SC)...741

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), प्रथम अनुसूची, दण्ड संहिता (1860 का 45), धाराऐं 408, 420, 467, 468 व 471 – क्या सत्र न्यायालय द्वारा या मजिस्ट्रेट द्वारा विचारण योग्य – अपीलार्थी के विरुद्ध 18.05.2007 को धारा 408, 420, 467, 468 व 471 भा.द.सं. के अंतर्गत अपराध दर्ज – द.प्र.सं. के प्रथम अनुसूची में संशोधन को राष्ट्रपति की अनुमति दिनांक 22.02.2008 को प्राप्त हुई जिससे अपराध को सत्र न्यायालय द्वारा विचारण योग्य बनाया गया – आरोप पत्र बाद में प्रस्तुत किया गया – प्रकरण सत्र न्यायालय द्वारा विचारण योग्य क्योंकि जिस तिथि को संशोधन अधिनियम प्रवर्तित हुआ, उस तिथि को मजिस्ट्रेट के समक्ष कोई प्रकरण लंबित नहीं था। (रमेश कुमार सोनी वि. म.प्र. राज्य) (SC)...741

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 5 – देखें – सहकारी सोसाइटी अधिनियम, म.प्र. 1960, धाराऐं 72, 74 व 76 (अवधेश रघुवंशी वि. म.प्र. राज्य) ...1227

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – समझौता विलेख – यदि पत्नी समझौता विलेख का अनुपालन कराना चाहती है, वह समझौता विलेख का पालन कराने के लिए किसी विधिक प्रक्रिया द्वारा कार्यवाही कर

to get the compliance of compromise deed - However, she is not entitled for maintenance amount under Section 125 of Cr.P.C. [Tarachand Vishwakarma Vs. Smt. Pushpa Devi Vishwakarma] ...956

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - Legally wedded wife - Respondent was already married and without obtaining divorce from first husband she claims to have married the applicant - Second marriage during the subsistence of first marriage is no marriage in the eye of law - Period of live-in-relation has no concern in the present case. [Tarachand Vishwakarma Vs. Smt. Pushpa Devi Vishwakarma] ...956

Criminal Procedure Code, 1973 (2 of 1974), Section 145 - Dispute regarding land or water is likely to cause breach of peace - It merely recites the circumstances under which a presumption of possession may be made in favour of the dispossessed party - If the Magistrate decides the question as to which of the party was in possession on the relevant date, then it is not necessary to see whether or not any of the parties had been dispossessed within two months next before the date of the preliminary order. [Ramcharan Vs. Yogendra Singh (Minor)] ...1238

Criminal Procedure Code, 1973 (2 of 1974), Section 156(3) - The Complaint must disclose the material ingredients of cognizable offence - If there is flavour of civil nature, the same cannot be agitated in the form of criminal proceeding - The magistrate cannot act merely as a post office and he is bound to apply his mind before ordering investigation u/s 156(3). [Balwant Singh Tomar @ Balwanta Vs. Tigmanshu Dhulia] ...967

Criminal Procedure Code, 1973 (2 of 1974), Section 161, Evidence Act (1 of 1872), Section 32 - Dying Declaration - Statement of deceased recorded by police officer under Section 161 of Cr.P.C. as to the cause of his death and also about the circumstances of the transaction which resulted in his death, amounts to be a dying declaration. [Suresh Vs. State of M.P.] (DB) ...1177

Criminal Procedure Code, 1973 (2 of 1974), Sections 167(2) & 482 - Filing of Charge sheet during pendency of application for statutory bail does not affect the right of the accused to Bail u/s 167(2) - The orders of both the courts below set aside - Petition allowed. [Bazeer Khan @ Lalla Khan Vs. State of M.P.] ...979

सकती है – किन्तु वह द.प्र.सं. की धारा 125 के अंतर्गत भरण पोषण के लिए हकदार नहीं। (ताराचन्द विश्वकर्मा वि. श्रीमति पुष्पा देवी विश्वकर्मा) ...956

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – वैधानिक विवाहित पत्नी – प्रत्यर्थी पहले से विवाहित थी और पहले पति से तलाक लिये बिना उसने आवेदक से विवाह किया – पहला विवाह कायम रहते हुए दूसरा विवाह कानून की दृष्टि में विवाह नहीं है – वर्तमान प्रकरण में साथ रहने की अवधि का कोई प्रभाव नहीं। (ताराचन्द विश्वकर्मा वि. श्रीमति पुष्पा देवी विश्वकर्मा) ...956

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 145 – भूमि या पानी से संबंधित विवाद से शांति भंग होने की संभावना है – यह मात्र उन परिस्थतियों का कथन करती है जिसके अंतर्गत बेदखल पक्षकार के पक्ष में कब्जे की उपधारणा की जा सकती है – यदि मजिस्ट्रेट इस प्रश्न का विनिश्चय करता है कि सुसंगत तिथि को कौन से पक्षकार का कब्जा था, तब यह देखा जाना आवश्यक नहीं कि क्या किसी पक्षकार को, प्रारंभिक आदेश की तिथि से दो माह पूर्व की अवधि के भीतर बेकब्जा किया गया था अथवा नहीं। (रामचरण वि. योगेन्द्र सिंह (अवयस्क)) ...1238

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 156(3) – परिवाद में संज्ञेय अपराध के तात्विक घटक प्रकट होने चाहिए – यदि सिविल स्वरुप के गुण विशेष हैं, उसे दाण्डिक कार्यवाही के रुप में नहीं उठाया जा सकता – न्यायाधीश मात्र डाक घर के रुप में कार्य नहीं कर सकता और वह धारा 156(3) के अंतर्गत अन्वेषण आदेशित करने से पहले अपने मस्तिष्क का प्रयोग करने के लिए बाध्य है। (बलवंत सिंह तोमर उर्फ बलवंता वि. तिग्मांशु धूलिया) ...967

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 161, साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – पुलिस अधिकारी द्वारा धारा 161, द.प्र.सं. के अंतर्गत मृतक की मृत्य के कारणों के बारे में तथा उन संव्यवहारों की परिस्थितियों के बारे में भी जिसके परिणामस्वरुप उसकी मृत्यु हुई, अभिलिखित किया गया मृतक का कथन, मृत्युकालिक कथन की कोटि में आता है। (सुरेश वि. म.प्र. राज्य) (DB)...1177

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 167(2) व 482 – कानूनी जमानत हेतु आवेदन लंबित रहने के दौरान आरोप पत्र पेश करने से अभियुक्त को धारा 167(2) के अंतर्गत जमानत का अधिकार प्रभावित नहीं होता – दोनों निचले न्यायालयों के आदेश अपास्त – याचिका मंजूर। (बजीर खान उर्फ लल्ला खान वि. म.प्र. राज्य) ...979

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Criminal Procedure Code, 1973 (2 of 1974), Section 211 - Framing of Charges - Documents produced by accused - Documents placed on record by accused cannot be taken into consideration to examine the sustainability of charges - Charges should be framed only on the basis of documents filed along with charge sheet. [Basant Kumar Rawat Vs. State of M.P.] ...950

Criminal Procedure Code, 1973 (2 of 1974), Section 211 - Framing of Charges - If the Court is satisfied that evidence produced only gives rise to suspicion as distinguished from grave suspicion he can discharge the accused - While framing charges, the broad test to be applied is that whether the materials on record, if unrebutted, makes a conviction reasonably possible, then charge should be framed. [Basant Kumar Rawat Vs. State of M.P.] ...950

Criminal Procedure Code, 1973 (2 of 1974), Section 211, Penal Code (45 of 1860), Sections 467 & 468 - Framing of charge - Applicant is alleged to have involved himself in conspiracy with main accused in fabricating and forging mark sheet and facilitated the main accused to appear in the counselling - Prima facie evidence that the applicant had signed the mark sheet as Principal of School - Revision dismissed. [Basant Kumar Rawat Vs. State of M.P.] ...950

Criminal Procedure Code, 1973 (2 of 1974), Section 233(3) - Summoning of Prosecution witness as defence witness - If the prosecution witness is called as a defence witness then, his statement shall continue which was recorded in the deposition sheet, where his prosecution evidence was completed - His statement shall be started as a defence witness from the end of his previous statement. [Pappu @ Chandra Pravesh Tiwari Vs. State of M.P.] ...1208

Criminal Procedure Code, 1973 (2 of 1974), Sections 233(3) & 311 - Summoning of witness in defence - Two prosecution witnesses were examined and cross examined - Application under Section 311 for recall of those witnesses rejected - Application filed under Section 233(3) of Cr.P.C. without disclosing as to what defence, the applicant wants to establish - Application was rightly rejected as the same was not bonafide and was made with a view to frustrate the order rejecting application under Section 311 of Cr.P.C. [Pappu @ Chandra Pravesh Tiwari Vs. State of M.P.] ...1208

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 211 – आरोप विरचित करना – अभियुक्त द्वारा प्रस्तुत दस्तावेज – आरोपों की पोषणीयता के परीक्षण में अभियुक्त द्वारा अभिलेख में प्रस्तुत दस्तावेज पर विचार नहीं किया जा सकता – मात्र आरोप पत्र के साथ प्रस्तुत दस्तावेजों के आधार पर आरोप विरचित किये जाने चाहिए। (बसंत कुमार रावत वि. म.प्र. राज्य) ...950

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 211 – आरोप विरचित करना – यदि न्यायालय की संतुष्टि होती है कि प्रस्तुत साक्ष्य घोर संदेह से भिन्न केवल संदेह उत्पन्न करता है, वह अभियुक्त को आरोप मुक्त कर सकता है – आरोप विरचित करते समय, मोटे तौर पर यह परीक्षण लागू करना चाहिए कि क्या अभिलेख की सामग्री, यदि अखंडित है, दोषसिद्धि को युक्तियुक्त रुप से संभव बनाती है, तब आरोप विरचित करना चाहिए। (बसंत कुमार रावत वि. म.प्र. राज्य) ...950

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 211, दण्ड संहिता (1860 का 45), धाराऐं 467 व 468 – आरोप विरचित करना – आवेदक पर आरोप कि जाली अंक सूची की कूट रचना के षडयंत्र में वह स्वयं मुख्य अभियुक्त के साथ शामिल था और मुख्य अभियुक्त को परामर्श में शामिल होने में सहायता की – प्रथम दृष्टया साक्ष्य कि आवेदक ने शाला के प्राचार्य की हैसियत से अंक सूची हस्ताक्षरित की – पुनरीक्षण खारिज। (बसंत कुमार रावत वि. म.प्र. राज्य) ...950

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 233(3) – अभियोजन साक्षी को बचाव साक्षी के रुप में समन करना – यदि अभियोजन साक्षी को बचाव साक्षी के रुप में बुलाया जाता है, तब उसका कथन, जहां उसका अभियोजन साक्ष्य पूर्ण होता, वहां से कथन अभिलिखित किये गये पृष्ठ से जारी रहेगा – उसका कथन बचाव साक्षी के रुप में वहां से आरंभ होगा जहां उसका पूर्वतर कथन समाप्त हुआ है। (पप्पू उर्फ चंद्र प्रवेश तिवारी वि. म.प्र. राज्य) ...1208

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 233(3) व 311 – बचाव में साक्षी को समन करना – दो अभियोजन साक्षियों का परीक्षण एवं प्रतिपरीक्षण किया गया – धारा 311 के अंतर्गत उन्हें पुनः बुलाये जाने का आवेदन अस्वीकार किया गया – द.प्र.सं. की धारा 233(3) के अंतर्गत आवेदन प्रस्तुत किया गया बचाव को प्रकट किये बिना, जिसे आवेदक स्थापित करना चाहता है – आवेदन उचित रुप से खारिज किया गया क्योंकि वह सद्भाविक नहीं था और द.प्र.सं. की धारा 311 के अंतर्गत आवेदन के खारिजी आदेश को विफल करने की दृष्टि से किया गया था। (पप्पू उर्फ चंद्र प्रवेश तिवारी वि. म.प्र. राज्य) ...1208

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Criminal Procedure Code, 1973 (2 of 1974), Section 245(2) - Discharge - Magistrate has discretion to discharge the accused at any stage previous to recording of any evidence for prosecution - Formation of opinion before issuance of process in a warrant case does not preclude the Magistrate from exercising this discretion judicially if there are adequate reasons for doing so. [Duncans Industries Ltd. Vs. Jairam Das Panjwani] ...1483

Criminal Procedure Code, 1973 (2 of 1974), Section 251 - Summons Case - It is impermissible for Magistrate to reconsider his decision to issue process in absence of any specific provision to recall such order. [Duncans Industries Ltd. Vs. Jairam Das Panjwani] ...1483

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Addition of accused - No Proposed accused can be added in absence of convincing evidence - There are lot of contradictions in the statements of witnesses - Same set of witnesses were not believed by the Trial Court for making companions of applicant as accused - There is no cogent evidence against the applicant and in case if he is added then, the prosecution case against present accused persons would be damaged - Order passed by Trial Court under Section 319 set aside. [Sunny Gaur Vs. State of M.P.] ...1199

Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Simultaneous Trial - Investigating agency during investigation found that Security Guards had opened fired, although it was mentioned in F.I.R. that initially the applicant opened fired and thereafter other office bearers of the factory opened fire - Scriber of the F.I.R. did not support the F.I.R. during trial - Case of Security Guards is diagonally opposite to the case of applicant - If it is presumed that the firing was done by applicant and his companions then the case of prosecution against the security guards would go away and trial would not proceed against them because two contradictory cases cannot be tried simultaneously - Addition of applicant as accused bad. [Sunny Gaur Vs. State of M.P.] ...1199

Criminal Procedure Code, 1973 (2 of 1974), Section 374 - Appeal from Convictions - Misappreciation of Evidence - There is no evidence on record to establish that the deceased was ever provoked or encouraged or persuaded or compelled by the appellant/ accused to

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 245(2) – आरोपमुक्त – अभियोजन का कोई साक्ष्य अभिलिखित किये जाने से पूर्व किसी भी प्रक्रम पर अभियुक्त को आरोप मुक्त करने का मजिस्ट्रेट को विवेकाधिकार है – वारंट प्रकरण में आदेशिका जारी किये जाने से पूर्व, अभिमत बना लेने से मजिस्ट्रेट इस विवेकाधिकार का प्रयोग न्यायिक रुप से करने से मजिस्ट्रेट प्रवारित नहीं यदि ऐसा करने के लिए पर्याप्त कारण है। (डंकन्स इंडस्ट्रीज लि. वि. जयराम दास पंजवानी) ...1483

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 251 – समंस प्रकरण – यह मजिस्ट्रेट के लिए अननुज्ञेय है कि वह आदेशिका जारी करने के अपने निर्णय पर पुनर्विचार करे, जबकि उक्त आदेश को वापस लेने का कोई विनिर्दिष्ट उपबंध विद्यमान नहीं। (डंकन्स इंडस्ट्रीज लि. वि. जयराम दास पंजवानी) ...1483

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अभियुक्त को जोड़ा जाना – संतोषप्रद साक्ष्य की अनुपस्थिति में किसी प्रस्तावित अभियुक्त को जोड़ा नहीं जा सकता – साक्षियों के कथनों में काफी विरोधाभास हैं – आवेदक के साथियों को अभियुक्त के रुप में बनाये जाने हेतु समान साक्षियों के समूह पर विचारण न्यायालय द्वारा विश्वास नहीं किया गया – आवेदक के विरुद्ध कोई प्रबल साक्ष्य नहीं और यदि उसे जोड़ा गया तो वर्तमान अभियुक्तगण के विरुद्ध अभियोजन के प्रकरण को हानि होगी – विचारण न्यायालय द्वारा धारा 319 के अंतर्गत पारित किया गया आदेश अपास्त। (सन्नी गौर वि. म.प्र. राज्य) ...1199

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – एक साथ विचारण – जांच एजेंसी ने अन्वेषण के दौरान पाया कि सुरक्षा गार्डो ने गोलियां चलाई थी,यद्यपि प्रथम सूचना रिपोर्ट में यह उल्लिखित था कि पहले आवेदक ने गोलियां चलाई और उसके बाद कारखाने के अन्य पद धारियों ने गोलियां चलाई – प्रथम सूचना रिपोर्ट के लेखकर्ता ने विचारण के दौरान प्रथम सूचना रिपोर्ट का समर्थन नहीं किया – सुरक्षा गार्डो का मामला, आवेदक के मामले से विकर्णतः विरुद्ध है – यदि यह उपधारणा की जाये कि गोलीबारी आवेदक तथा उसके साथियों द्वारा की गई तब सुरक्षा गार्डो के विरुद्ध अभियोजन का प्रकरण समाप्त होगा और उनके विरुद्ध आगे विचारण नहीं किया जायेगा क्योंकि दो परस्पर विरोधी प्रकरणों का विचारण एक साथ नहीं किया जा सकता – अभियुक्त के रुप में आवेदक को जोड़ा जाना अनुचित। (सन्नी गौर वि. म.प्र. राज्य) ...1199

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 374 – दोषसिद्धि की अपील – साक्ष्य का गलत मूल्यांकन – अभिलेख पर, यह स्थापित करने के लिये कोई साक्ष्य नहीं कि मृतक को अपीलार्थी/अभियुक्त द्वारा आत्महत्या कारित करने के लिए कभी उकसाया गया या प्रोत्साहित किया गया या दुष्प्रेरित किया गया या बाध्य किया गया

commit suicide - Act of commission of suicide was not the consequence of any of acts allegedly committed by the accused - Ingredients of Section 306 have not been established - Hence, conviction recorded by the trial court cannot be maintained. [Shrikrishna Vs. State of M.P.] ...*19

Criminal Procedure Code, 1973 (2 of 1974), Section 378 - Appeal against acquittal - Appellate Court for compelling reasons should not hesitate to reverse a judgment of acquittal, if the findings so recorded by the Court below are found to be perverse and if the Court's entire approach with respect to dealing with evidence is found to be patently illegal, leading to miscarriage of justice or if its judgment is unreasonable and is based on erroneous understanding of law. [State of M.P. Vs. Dal Singh] (SC)...1265

Criminal Procedure Code, 1973 (2 of 1974), Sections 391 & 482 - Additional Evidence - The whole scheme of this section suggests that like civil cases an application for taking additional evidence on record should be considered and disposed of after hearing the criminal appeal on merits - Such application should not be decided in isolation i.e. Without hearing the appeal on merits - If so, there may be cases of failure of justice. [Pramod Gupta Vs. State of M.P.] ...984

Criminal Procedure Code, 1973 (2 of 1974), Section 438 - Anticipatory Bail - The Court may examine the FIR or Complaint on its face value at this stage. [Ummed Singh Vs. State of M.P.] ...1214

Criminal Procedure Code, 1973 (2 of 1974), Section 438 & Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 18 - Maintainability of Anticipatory Bail - If the Litmus test is satisfied i.e. the offence is prima facie not made out anticipatory bail can be granted - The objection regarding maintainability of anticipatory bail in the teeth of Section 18 of the Act overruled. [Ummed Singh Vs. State of M.P.] ...1214

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - If there is no infirmity or illegality in the order - No interference can be called for u/s 482 - Petition is liable to be dismissed. [Balwant Singh Tomar @ Balwanta Vs. Tigmanshu Dhulia] ...967

Electricity Act (36 of 2003), Section 126 - Cases of excess load of consumption of electricity are squarely covered under Explanation

– आत्महत्या का कृत्य, अभियुक्त द्वारा अभिकथित रुप से कारित किसी कृत्य का परिणाम नहीं था – धारा 306 के अवयव स्थापित नहीं किये गये – अतः विचारण न्यायालय द्वारा अभिलिखित दोषसिद्धि कायम नहीं रखी जा सकती। (श्रीकृष्ण वि. म. प्र. राज्य) ...*19

दण्ड-प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378 – दोषमुक्ति के विरुद्ध अपील – अपीली न्यायालय को प्रबल कारणों पर दोषमुक्ति के निर्णय को पलटाने में संकोच नहीं होना चाहिए, यदि निचले न्यायालय द्वारा इस प्रकार अभिलिखित निष्कर्ष दूषित पाये जाते हैं और यदि साक्ष्य का विचार करने के संबंध में न्यायालय का संपूर्ण दृष्टिकोण प्रत्यक्ष रुप से अवैध पाया जाता है, जिससे न्याय हानि कारित हुई है या यदि उसका निर्णय अयुक्तियुक्त है एवं विधि की त्रुटिपूर्ण समझ पर आधारित है। (म.प्र. राज्य वि. दल सिंह) (SC)...1265

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – न्यायालय इस प्रक्रम पर प्रथम सूचना रिपोर्ट या शिकायत की प्रत्यक्षतः के आधार पर परीक्षण कर सकता है। (उम्मेद सिंह वि. म.प्र. राज्य) ...1214

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विद्युत अधिनियम (2003 का 36), धारा 126 – अधिक भार के विद्युत उपभोग वाले प्रकरण सीधे धारा 126 के स्पष्टीकरण (बी) (iv) के अंतर्गत समाविष्ट है।

(b) (iv) of Section 126. [Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd. Vs. Smt. Savitri Devi] ...1027

Electricity Act (36 of 2003), Sections 126, 135 and MPERC (Establishment of Forum and Electricity Ombudsman for Redressal of Grievances of the Consumers) (Revisions-I) Regulations, 2009, Clause 2.4 (d), (m) and 3.35 - Jurisdiction - If a problem does not fall within the ambit of 'Complaint' and 'Grievance' under the regulations, the Electricity Consumer Grievance Redressal Forum cannot be said to have Jurisdiction to entertain it - An order passed without jurisdiction is 'non-est' i.e. nullity - Said order has no authority - Impugned order set aside. [Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd. Vs. Smt. Savitri Devi] ...1027

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Entry Tax Rules, (M.P.), 1976, Rule 4(1)(iii) - See - Entry Tax Act, M.P., 1976, Section 4(1) [Western Coal Field Ltd. Vs. Addl. Commissioner, Commercial] (DB)...1037

Evidence Act (1 of 1872), Section 3 - Witness - Exaggeration per se does not render the evidence brittle - It can be one of the factors against which the credibility of the prosecution story can be tested - Mere marginal variations in the statements of witnesses cannot be dubbed as improvements. [State of M.P. Vs. Dal Singh] (SC)...1265

Evidence Act (1 of 1872), Section 9 - Test Identification Parade - Complainant has admitted that the appellants were shown to him in the hospital prior to the T.I.P. - Test Identification is of no consequence. [Pankaj Shah Vs. State of M.P.] ...1448

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(मध्यप्रदेश मध्य क्षेत्र विद्युत वितरण कंपनी लि. वि. श्रीमति सावित्री देवी)
...1027

विद्युत अधिनियम (2003 का 36), धाराएं 126, 135 तथा म.प्र.वि.नि. कंपनी (फ़ोरम की स्थापना एवं उपभोक्ता शिकायत निवारण के लिए विद्युत लोकपाल) (पुनरीक्षण–I) विनियमन, 2009, खंड 2.4(d)(m) एवं 3.35 – अधिकारिता – यदि समस्या, विनियमनों के अंतर्गत शिकायत की परिधि के भीतर नहीं आती – तब विद्युत उपभोक्ता शिकायत निवारण मंच को उसे ग्रहण करने की अधिकारिता होना नहीं कहा जा सकता – अधिकारिता के बिना पारित किया गया कोई आदेश 'नॉन–इस्ट' अर्थात अकृत है – उक्त आदेश की कोई प्राधिकारिता नहीं – आक्षेपित आदेश अपास्त। (मध्यप्रदेश मध्य क्षेत्र विद्युत वितरण कंपनी लि. वि. श्रीमति सावित्री देवी) ...1027

प्रवेश कर अधिनियम, म.प्र. (1976 का 52), धारा 4(1), प्रवेश कर नियम, (म.प्र.), 1976, नियम 4(1)(iii) – रियायती दर – कोयला – याची ने म.प्र.वि.मं. को कच्चे माल के रुप में उपयोग हेतु कोयला प्रदाय किया – इस संबंध में घोषणा स्वीकार की गई और 1 प्रतिशत रियायती दर लागू की गई – अपितु, संभागीय आयुक्त के आदेशों से निर्धारण फिर से किया गया – अभिनिर्धारित – कोयले पर रियायती दर लागू थी जब स्थानीय क्षेत्र में पंजीकृत डीलर द्वारा अन्य वस्तुओं के विनिर्माण में कच्चे माल के रुप में उपयोग हेतु, प्रवेश कराया गया – निर्धारण अधिकारी ने उचित रुप से घोषणा स्वीकार की – निर्धारण फिर से करने का आदेश अभिखंडित। (वेस्टर्न कोल फील्ड लि. वि. एडिशनल कमिश्नर, कमर्शियल) (DB) ...1037

प्रवेश कर नियम, (म.प्र.), 1976, नियम 4(1)(iii) – देखें – प्रवेश कर अधिनियम, म.प्र., 1976, धारा 4(1) (वेस्टर्न कोल फील्ड लि. वि. एडिशनल कमिश्नर, कमर्शियल) (DB) ...1037

साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – अतिश्योक्ति अपने आप में साक्ष्य को कमजोर नहीं करती – यह उन कारकों में से एक हो सकता है जिसके विरुद्ध अभियोजन कहानी की विश्वसनीयता का परीक्षण किया जा सकता है – साक्षियों के कथनों में मात्र सीमांत भिन्नता को सुधार किया जाना नहीं कहा जा सकता। (म.प्र. राज्य वि. दल सिंह) (SC)...1265

साक्ष्य अधिनियम (1872 का 1), धारा 9 – पहचान परेड – शिकायतकर्ता ने स्वीकार किया कि पहचान परेड से पूर्व उसे अपीलार्थीगण को चिकित्सालय में दिखाया गया था – पहचान परेड निष्फल। (पंकज शाह वि. म.प्र. राज्य) ...1448

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Evidence Act (1 of 1872), Section 9 - Test Identification Parade - Person who conducted Test Identification Parade not examined - Property was also shown in the police station prior to holding of T.I.P. - Not creditworthy. [Lakkhu @ Lakhanlal Gond Vs. State of M.P.] (DB)...934

Evidence Act (1 of 1872), Sections 17 & 18 - Admission - Written statement by L.Rs. of one defendant (seller of suit property), admitting the facts of the plaint, does not affect the right of another defendant (buyer of the property). [Gajanand Vs. Gordhan] ...1422

Evidence Act (1 of 1872), Section 21 - Proof of admissions - Admissions are substantive evidence by themselves though they are not conclusive proof of the matter admitted - Witness must be asked questions which would test his veracity more so where there is a direct contradiction and conflict between his statements before the Court and alleged previous admission. [Jagdish Prasad Vs. Kanhaiyalal @ Kandhi] ...1122

Evidence Act (1 of 1872), Sections 21, 138 & 146 - Proof of admissions - Defendant in reply to notice had stated that the plaintiff had become unchaste after the death of her husband - In written statement it was pleaded that the plaintiff was unchaste during the life time of her husband and therefore, she was ousted from her matrimonial house in the year 1950 itself - As the defendant had made clear and specific statements which were directly in conflict with the statement in reply, the appellants were required to and should have confronted the defendant with the same during his cross-examination to test his veracity. [Jagdish Prasad Vs. Kanhaiyalal @ Kandhi] ...1122

Evidence Act (1 of 1872), Section 27 - Recovery of articles - Blood Group - No report about blood group of deceased - In absence of comparison of blood group of deceased with blood group of stains found on articles no inference can be drawn against the appellant. [Lakkhu @ Lakhanlal Gond Vs. State of M.P.] (DB)...934

Evidence Act (1 of 1872), Section 32 - Dying Declaration - Deceased suffer 45 injuries including gun shot injuries thereby sustaining fatal injuries to the internal organs - Deceased died because of excessive haemorrhage from injuries - It would not be safe to place reliance on the oral dying declaration by holding that deceased was in fit state of mind and body to make a dying declaration. [Bhuria Vs. State of M.P.] (DB)...917

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साक्ष्य अधिनियम (1872 का 1), धारा 9 – पहचान परेड – उस व्यक्ति का परीक्षण नहीं किया गया जिसने पहचान परेड संचालित की थी – पहचान परेड कराने से पूर्व पुलिस थाने में संपत्ति को दिखाया भी गया था – विश्वसनीय नहीं। (लक्खू उर्फ लखनलाल गौंड वि. म.प्र. राज्य) **(DB)...934**

साक्ष्य अधिनियम (1872 का 1), धाराऐं 17 व 18 – स्वीकृति – एक प्रतिवादी (वाद सम्पत्ति का विक्रेता) के विधिक प्रतिनिधिगण के लिखित कथन में वाद पत्र के तथ्यों की स्वीकृति से अन्य प्रतिवादी (सम्पत्ति के क्रेता) का अधिकार प्रभावित नहीं होता। (गजानंद वि. गोरधन) **...1422**

साक्ष्य अधिनियम (1872 का 1), धारा 21 – स्वीकृतियों का प्रमाण – स्वीकृतियां अपने आप में सारभूत साक्ष्य है यद्यपि वह, स्वीकार किये गये तथ्य के निश्चायक प्रमाण नहीं है – साक्षी से ऐसे प्रश्न पूछे जाने चाहिए जिससे उसकी सत्यता की जांच होगी और तब अधिक आवश्यक है जब न्यायालय के समक्ष दिये गये कथनों में और अभिकथित पूर्वतर स्वीकृति के बीच प्रत्यक्ष अंतर्विरोध एवं विरोधाभास है। (जगदीश प्रसाद वि. कन्हैयालाल उर्फ कंधी) **...1122**

साक्ष्य अधिनियम (1872 का 1), धाराऐं 21, 138 व 146 – स्वीकृतियों का प्रमाण – नोटिस के जबाव में प्रतिवादी का कथन है कि वादी, अपने पति की मृत्यु पश्चात व्याभिचारी बन गई थी – लिखित कथन में यह अभिवाक् किया गया कि वादी, अपने पति के जीवित रहते व्याभिचारी थी इसलिए, उसे उसके ससुराल से सन् 1950 में ही बाहर निकाल दिया गया था – चूंकि प्रतिवादी ने स्पष्ट एवं विनिर्दिष्ट कथन दिये हैं जो जबाव के कथन से प्रत्यक्ष रुप से विरोधाभासी हैं, अपीलार्थीगण को प्रतिवादी की सत्यता को जांचने के लिए उसके प्रतिपरीक्षण के दौरान इससे उसका सामना कराना अपेक्षित था और कराना चाहिए था। (जगदीश प्रसाद वि. कन्हैयालाल उर्फ कंधी) **...1122**

साक्ष्य अधिनियम (1872 का 1), धारा 27 – वस्तुओं की बरामदगी – रक्त समूह – मृतक के रक्त समूह के बारे में कोई रिपोर्ट नहीं – मृतक के रक्त समूह के साथ, वस्तुओं पर पाये गये दाग के रक्त समूह का मिलान नहीं किये जाने से, अपीलार्थी के विरुद्ध कोई निष्कर्ष नहीं निकाला जा सकता। (लक्खू उर्फ लखनलाल गौंड वि. म.प्र. राज्य) **(DB)...934**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – मृतक ने 45 क्षतियां सहन की जिसमें गोली के घाव समाविष्ट हैं जिससे उसने आंतरिक अंगों की घातक क्षतियां सहन की – मृतक की मृत्यु घावों से अत्याधिक रक्तस्त्राव के कारण हुई – यह धारणा करते हुए कि मृतक मृत्युकालिक कथन करने के लिए उचित मानसिक एवं शारीरिक स्थिति में था, मौखिक मृत्युकालिक कथन पर विश्वास करना सुरक्षित नहीं होगा। (भूरिया वि. म.प्र. राज्य) **(DB)...917**

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Evidence Act (1 of 1872), Section 32 - Dying Declaration - Law does not provide who can record a dying declaration - There is no prescribed form, format or procedure for the same - Person who records the dying declaration must be satisfied that the maker is in fit state of mind and is capable of making such a statement - Requirement of certificate by Doctor in respect of such state of mind is not essential in every case. [State of M.P. Vs. Dal Singh] (SC)...1265

Evidence Act (1 of 1872), Section 32 - Dying Declaration - Statement recorded by police officer - The same is not challenged on the ground that the officer who recorded the statement was in any manner interested in bringing about the conviction of appellants by concocting the said statement - It could not be held that the statement was doubtful or suspicious. [Suresh Vs. State of M.P.] (DB)...1177

Evidence Act (1 of 1872), Section 32 - See - Criminal Procedure Code, 1973, Section 161 [Suresh Vs. State of M.P.] (DB)...1177

Evidence Act (1 of 1872), Section 32 - See - Penal Code, 1860, Section 302 [Gajendra Singh Chouhan Vs. State of M.P.] (DB)...939

Evidence Act (1 of 1872), Section 32 - See - Penal Code, 1860, Section 302 [State of M.P. Vs. Dal Singh] (SC)...1265

Evidence Act (1 of 1872), Sections 45 & 47 - Expert Opinion - As a matter of extreme caution and judicial sobriety, the Court should not normally take up itself the responsibility of comparing the disputed signatures with that of admitted signatures or handwriting - In the event of doubt, it should leave the matter to the wisdom of experts. [State of M.P. Vs. Narayan Singh] (DB)...946

Evidence Act (1 of 1872), Section 52 - Admission - Admission in pleadings or judicial admissions or admissions under Section 58 of Act, 1872 made by parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary value. [Lalman Soni Vs. Shri Rupinder Singh Gill] ...1088

Evidence Act (1 of 1872), Section 64 - See - Forest Act, 1927, Section 52(5) [Ramendra Pal Singh Vs. State of M.P.] (DB)...1304

Evidence Act (1 of 1872), Section 65-B - Admissibility of Electronic Evidence - Public Prosecutor desired to exhibit the C.D. -

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साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – विधि में उपबंधित नहीं कि कौन मृत्युकालिक कथन अभिलिखित कर सकता है – इसके लिये कोई विहित प्रारुप, रुप विधान या प्रक्रिया नहीं है – जो व्यक्ति मृत्युकालिक कथन अभिलिखित करता है उसे संतुष्ट होना चाहिए कि कर्ता सक्षम मनः स्थिति में है और उक्त कथन करने में सक्षम है – उक्त मनः स्थिति के संबंध में चिकित्सक द्वारा प्रमाण पत्र की अपेक्षा प्रत्येक प्रकरण में आवश्यक नहीं। (म.प्र. राज्य वि. दल सिंह) **(SC)...1265**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – पुलिस अधिकारी द्वारा अभिलिखित कथन – उक्त को इस आधार पर चुनौती नहीं दी गई कि अधिकारी जिसने कथन अभिलिखित किया, वह उक्त कथन की मिथ्या रचना द्वारा अपीलार्थीगण को दोषिसिद्ध साबित करने में किसी प्रकार से हितबद्ध था – यह धारणा नहीं की जा सकती कि कथन शंकास्पद या संदेहास्पद था। (सुरेश वि. म. प्र. राज्य) **(DB) ...1177**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 161 (सुरेश वि. म.प्र. राज्य) **(DB) ...1177**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धारा 302 (गजेन्द्र सिंह चौहान वि म.प्र. राज्य) **(DB)...939**

साक्ष्य अधिनियम (1872 का 1), धारा 32 – देखें – दण्ड संहिता, 1860, धारा 302 (म.प्र. राज्य वि. दल सिंह) **(SC)...1265**

साक्ष्य अधिनियम (1872 का 1), धाराऐं 45 व 47 – विशेषज्ञ राय– आत्यांतिक सतर्कता एवं न्यायिक संजीदगी को ध्यान में रखते हुए न्यायालय को सामान्यतः अपने ऊपर विवादित हस्ताक्षर का मिलान स्वीकृत हस्ताक्षर या हस्तलेख से करने की जिम्मेदारी नहीं लेनी चाहिए – संदेह की स्थिति में, उसे, मामले को विशेषज्ञ के विवेक पर छोड़ देना चाहिए। (म.प्र. राज्य वि. नारायण सिंह) **(DB)...946**

साक्ष्य अधिनियम (1872 का 1), धारा 52 – स्वीकृति – प्रकरण की सुनवाई के समय या उससे पूर्व, पक्षकारों द्वारा या उनके अभिकर्ता द्वारा अभिवचनों में की गई स्वीकृतियां या न्यायिक स्वीकृतियां या अधिनियम 1872 की धारा 58 के अंतर्गत की गई स्वीकृतियों का स्तर साक्ष्यिक मूल्य से उच्चतर होगा। (लालमन सोनी वि. श्री रूपिन्दर सिंह गिल) **...1088**

साक्ष्य अधिनियम (1872 का 1), धारा 64 – देखें – वन अधिनियम, 1927, धारा 52(5) (रामेन्द्र पाल सिंह वि. म.प्र. राज्य) **(DB)...1304**

साक्ष्य अधिनियम (1872 का 1), धारा 65बी – इलेक्ट्रॉनिक साक्ष्य की ग्राहयता – लोक अभियोजक ने सी.डी. को प्रदर्शित करना चाहा – सी.डी. की

Objection as to the admissibility of C.D. was raised which was rejected by Trial Court - Held - Special Judge is required to properly appreciate the requirement of Section 65-B of the Act, more particularly the requirement of the certificate as contained in Section 65(4) of the Act - Order of Trial Court set aside with a direction to decide the objection afresh in the light of provisions of Section 65-B of the Act. [Satish Meharwal Vs. State of M.P.] (DB)...777

Evidence Act (1 of 1872), Sections 67 & 68 - See - Succession Act, 1925, Sections 59 & 63 [Sitaram Dubey (Since Deceased) Vs. Manaklal (Since Deceased)] ...1406

Evidence Act (1 of 1872), Sections 106, 114 - Presumption - Adverse inference has to be drawn if evidence regarding fact specially within the knowledge of any person, is not produced by such person - Non-examination of officer to prove the authenticity of the contents of certificate is sufficient to draw an adverse inference under Section 114 of Evidence Act. [Ram Lal Kol Vs. Moti Kashyap @ Motilal] ...1364

Evidence Act (1 of 1872), Section 114 - Long Cohabitation - Presumption of marriage - In absence of assertion of a legal marriage, presumption of a legally valid marriage cannot be drawn on the basis of long cohabitation. [Sitaram Dubey (Since Deceased) Vs. Manaklal (Since Deceased)] ...1406

Forest Act (16 of 1927), Section 52(1) - Confiscation of vehicles - Discharge of appellant for forest offence - Proceedings under Indian Forest Act are independent proceedings - Section 52 casts duty upon the Forest Officer to satisfy himself whether any forest offence has been committed in respect of any forest produce and there is any reason to believe that such an offence has been committed - Merely because appellant has been discharged in relation to same incident under the provisions of Indian Penal Code, it cannot be said that the vehicles are not liable to be confiscated. [Ramendra Pal Singh Vs. State of M.P.] (DB)...1304

Forest Act (16 of 1927), Section 52(5), Evidence Act (1 of 1872), Section 64 - Photo copy of agreement - Petitioner alleged that he had given the machines on hire to the contractor which were used without his knowledge or connivance - Photo copy of the agreement was filed - Proceedings under the Forest Act are governed by Evidence Act - Petitioner was bound to produce the original agreement - No application

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ग्राहयता के संबंध में आक्षेप उठाया गया जिसे विचारण न्यायालय द्वारा अस्वीकार किया गया – अभिनिर्धारित – विशेष न्यायाधीश को अधिनियम की धारा 65बी की अपेक्षाओं का उचित रुप से मूल्यांकन करना अपेक्षित था, विशेष रुप से प्रमाण पत्र की आवश्यकता जैसा कि अधिनियम की धारा 65(4) में अंतर्विष्ट है – विचारण न्यायालय का आदेश अपास्त, इस निदेश के साथ कि आक्षेप का पुनः निर्धारण, अधिनियम की धारा 65बी के उपबंधों के आलोक में करें। (सतीश मेहरवाल वि. म: प्र. राज्य) **(DB)...777**

साक्ष्य अधिनियम (1872 का 1), धाराऐं 67 व 68 – देखें – उत्तराधिकार अधिनियम, 1925, धाराऐं 59 व 63 (सीताराम दुबे (पूर्व मृतक) वि. मानकलाल (पूर्व मृतक)) **...1406**

साक्ष्य अधिनियम (1872 का 1), धाराऐं 106, 114 – उपधारणा – प्रतिकूल निष्कर्ष निकालना होगा यदि किसी व्यक्ति की विशेष जानकारी में के तथ्यों से संबंधित साक्ष्य को उक्त व्यक्ति द्वारा प्रस्तुत नहीं किया गया है – प्रमाण पत्र की अंतर्वस्तु की प्रमाणिकता साबित करने के लिए अधिकारी का परीक्षण नहीं किया जाना, साक्ष्य अधिनियम की धारा 114 के अंतर्गत प्रतिकूल निष्कर्ष निकालने के लिए पर्याप्त है। (राम लाल कोल वि. मोती कश्यप उर्फ मोतीलाल) **...1364**

साक्ष्य अधिनियम (1872 का 1), धारा 114 – दीर्घ सहवास – विवाह की उपधारणा – वैध विवाह के प्राख्यान की अनुपस्थिति में, दीर्घ सहवास के आधार पर वैध रुप से मान्य विवाह की उपधारणा नहीं की जा सकती। (सीताराम दुबे (पूर्व मृतक) वि. मानकलाल (पूर्व मृतक)) **...1406**

वन अधिनियम (1927 का 16), धारा 52(1) – वाहनों का अधिहरण – वन अपराध से अपीलार्थी आरोप मुक्त – भारतीय वन अधिनियम के अंतर्गत कार्यवाहियां, स्वतंत्र कार्यवाहियां हैं – धारा 52, वन अधिकारी को कर्तव्य बाध्य करता है कि वह स्वयं की संतुष्टि करे कि क्या किसी वन उत्पाद से संबंधित कोई वन अपराध कारित किया गया है और यह विश्वास करने का कोई कारण है कि उक्त अपराध कारित किया गया है – मात्र इसलिए कि अपीलार्थी को भा.द.सं. के उपबंधों के अंतर्गत, उसी घटना के संबंध में आरोप मुक्त किया गया है, यह नहीं कहा जा सकता कि वाहन अधिहरण किये जाने योग्य नहीं। (रामेन्द्र पाल सिंह वि. म.प्र. राज्य) **(DB)...1304**

वन अधिनियम (1927 का 16), धारा 52(5), साक्ष्य अधिनियम (1872 का 1), धारा 64 – करार की प्रतिलिपि – याची का अभिकथन कि उसने ठेकेदार को मशीनें किराये पर दी थीं, जिसका उपयोग उसकी जानकारी एवं सहमति के बिना किया गया – करार की प्रतिलिपि प्रस्तुत की गई – वन अधिनियम के अंतर्गत कार्यवाहियां, साक्ष्य अधिनियम द्वारा शासित होती हैं – याची मूल करार पेश करने के लिए बाध्य था – द्वितीयक साक्ष्य प्रस्तुत करने की अनुमति हेतु कोई आवेदन नहीं किया गया

was made for permission to produce secondary evidence - Photo copy of agreement cannot be considered. [Ramendra Pal Singh Vs. State of M.P.] (DB)...1304

Fundamental Rules (As Amended in M.P. Act 29 of 1967), Rule 56(1-a) - Term "Government Educational Institution" - Meaning - Women Weaving Centres under the Women and Child Development Department are to be treated as educational institutions - Petitioner appointed on the post of Instructor in such centre must be treated as a teacher and would be entitled to continue on the post till he attains the age of 62 years. [Yugul Kishore Sharma Vs. State of M.P.] ...791

Hindu Marriage Act (25 of 1955), Section 13B - Divorce by mutual consent - Not living as husband and wife - Petition for divorce by mutual consent was filed with specific averment that the parties are not living as husband and wife since last one year - Petition was dismissed on the ground that the appellant is living separately in her parental house since 19.02.2011 and the petition was filed on 11.01.2012 - Held - Living Separately connotes not living like husband and wife - It has no reference to place of living - Further the requisite period of one year under Section 13B(1) of the Act was already elapsed when the judgment was delivered - Judgment of Family Court set aside - Decree of divorce is granted to the parties by mutual consent. [Vartika (Smt.) Vs. Ankit Jain] (DB)...854

Income Tax Act (43 of 1961), Section 256 (1), (2) - Dharmada Account - Assessee was charging Dharmada at the rate of 2% and was maintaining separate account - However, the said account was treated as Revenue Receipts as the assessee had failed to bring on record any material to indicate contribution on regular basis to some of the Institutions - M.C.C. No. 668/1993 was dismissed - However, in the case of Commissioner of Income Tax Vs. Bijli Cotton Mills (P) Limited, Hon'ble Supreme Court had held that an amount collected as Dharmada and deposited in a separate account is not a revenue receipt - Earlier judgment passed was not contrary to the judgment passed by Hon'ble Supreme Court as no law was laid down or no decision was taken - Authorities are entitled to ascertain on the basis of the facts of each individual case as to whether the amount collected in the name of Dharmada is actually meant for a charitable purpose or not - Decision passed in case of M.C.C. No. 668/1993 was based on peculiar facts of that case and no law contrary to law

– करार की प्रतिलिपि को विचार में नहीं लिया जा सकता। (रामेन्द्र पाल सिंह वि. म.प्र. राज्य) (DB)...1304

मूलमूत नियम (म.प्र. अधिनियम 1967 का 29 में यथा संशोधित), नियम 56(1–ए) – शब्द "सरकारी शैक्षणिक संस्था" – अर्थ – महिला एवं बाल विकास विभाग के अंतर्गत महिला बुनकर केन्द्रों को शैक्षणिक संस्थान समझा जाना चाहिए – उक्त केन्द्र में अनुदेशक के पद पर नियुक्त याची को शिक्षक के रुप में माना जाना चाहिए और वह उस पद पर बने रहने का हकदार होगा जब तक वह 62 वर्ष की आयु प्राप्त नहीं करता। (युगल किशोर शर्मा वि. म.प्र. राज्य) ...791

हिन्दू विवाह अधिनियम (1955 का 25), धारा 13बी – आपसी सहमति से विवाह विच्छेद – पति–पत्नी के रुप में नही रह रहे – आपसी सहमति से विवाह विच्छेद हेतु याचिका इस विनिर्दिष्ट प्राक्कथन के साथ प्रस्तुत की गयी कि पक्षकार पिछले एक वर्ष से पति–पत्नी के रुप में नहीं रह रहे हैं – याचिका को इस आधार पर खारिज किया गया कि अपीलार्थी अलग से अपने माता–पिता के घर में 19.02.2011 से निवासरत है और याचिका 11.01.2012 को प्रस्तुत की गई – अभिनिर्धारित – अलग रहना दर्शाता है कि पति–पत्नी के समान नहीं रह रहे हैं – इसमें निवास के स्थान का कोई संदर्भ नहीं – इसके अतिरिक्त अधिनियम की धारा 13बी(1) के अंतर्गत एक वर्ष की अनिवार्य अवधि पहले ही व्यपगत हो चुकी थी जब निर्णय घोषित किया गया था – कुटुम्ब न्यायालय का निर्णय अपास्त – पक्षकारों को आपसी सहमति से विवाह विच्छेद की डिक्री प्रदान की गई। (वर्तिका (श्रीमति) वि. अंकित जैन) (DB)...854

आयकर अधिनियम (1961 का 43), धारा 256 (1),(2) – धर्मदा लेखा – निर्धारिती 2 प्रतिशत की दर से धर्मदा पर भार लगा रहा था और पृथक खाता चला रहा था – अपितु, उक्त खाते को राजस्व प्राप्तियां माना गया क्योंकि निर्धारिती अभिलेख पर ऐसा कोई तथ्य लाने में असफल रहा जो यह दर्शाता कि निर्धारिती नियमित रुप से कुछ संस्थानों को अंशदान करता हो – एम.सी.सी. क्र. 668/1993 खारिज कर दी गई – किन्तु, कमिश्नर, इन्कम टैक्स वि. बिजली कॉटन मिल (प्रा.) लिमि. के प्रकरण में मान्नीय सर्वोच्च न्यायालय ने अभिनिर्धारित किया है कि रकम जो धर्मदा के रुप में इकट्ठा की गई और पृथक खाते में जमा की गई है वह राजस्व प्राप्ति नहीं – पूर्व में पारित निर्णय, सर्वोच्च न्यायालय द्वारा पारित निर्णय के विपरीत नहीं क्योंकि कोई विधि प्रतिपादित नहीं की गई या कोई निर्णय नहीं लिया गया – प्राधिकारीगण प्रत्येक प्रकरण के तथ्यों के आधार पर यह सुनिश्चित करने के हकदार हैं कि क्या धर्मदा के नाम पर एकत्रित की गई राशी वास्तविक रुप से पूर्व प्रयोजन हेतु है अथवा नहीं – एम.सी.सी. क्र. 668/1993 में पारित किया गया निर्णय, उस प्रकरण के विशिष्ट तथ्यों पर आधारित था और बिजली कॉटन मिल में प्रतिपादित विधि के विरुद्ध विधि नहीं है इसलिए एम.सी.सी. क्र. 668/1993 में

laid down in Bijli Cotton Mills, therefore, judgment passed in M.C.C. 668/ 1993 cannot be said to be bad law. [Lilasons Breweries Ltd., Bhopal (M/s.) Vs. Commissioner of Income Tax, Bhopal] (FB)...756

Industrial Disputes Act (14 of 1947), Section 2(oo)(bb) - Non-renewal of contract - Since the service of the petitioner have been terminated as a result of non-renewal of contract of employment the same would not amount to retrenchment - No relief can be granted.. [Mohd. Sagir Vs. Bharat Heavy Electricals Ltd., Bhopal] ...813

Industrial Disputes Act (14 of 1947), Section 25-B - Continuous Service - 240 days - Sundays and other holidays, by contract or statute should be treated as days on which the employee actually worked under the employer for the purposes of Section 25-F and 25-B of the Act. [State Bank of India Vs. Central Government Industrial Tribunal-Cum-Labour Court] ...1312

Industrial Disputes Act (14 of 1947), Section 25-B - Reinstatement or Compensation - When the High Court has found that the award of re-instatement and back wages passed by Tribunal is just and proper, the same is to be affirmed and alternative relief of grant of compensation cannot be granted. [State Bank of India Vs. Central Government Industrial Tribunal-Cum-Labour Court] ...1312

Industrial Disputes Act (14 of 1947), Section 25-B,F,N - Continuous Service - Burden of Proof - Workmen discharged his burden to prove that he has worked for more than 240 days by filing affidavit with details of working days - No question was put to him in cross examination by Bank - Nothing on record to suggest that the affidavit is erroneous - Even according to Petitioner, the respondent No. 2 had worked for a period 217 days excluding Sundays and Holidays - Respondent No. 2 had proved that he had worked for more than 240 days. [State Bank of India Vs. Central Government Industrial Tribunal-Cum-Labour Court] ...1312

Industrial Disputes Act (14 of 1947), Section 25-F - Re-instatement with Back wages - Tribunal had directed for re-instatement of the respondent No.2 on the ground of retrenchment - Respondent No.2 can be directed to be reinstated in service even when he was put for selection for employment in bank service, he was not found fit for such employment by Selection Committee - There is material on record that the respondent

पारित निर्णय को विधि की दृष्टि से दोषपूर्ण नहीं कहा जा सकता। (लीलासंस ब्रेवरीज लि., भोपाल (मे.) वि. कमिश्नर ऑफ इनकम टैक्स, भोपाल) (FB)...756

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 2 (oo)(बी बी)– संविदा का नवीनीकरण नहीं किया जाना – चूंकि याची की सेवा, नियोजन की संविदा का नवीनीकरण नहीं किये जाने के फलस्वरुप समाप्त कर दी गई है, यह छंटनी की कोटि में नहीं आयेगा – कोई अनुतोष प्रदान नहीं किया जा सकता। (मो. सगीर वि. भारत हैवी इलेक्ट्रिकल्स लि., भोपाल) ...813

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25बी – सतत/निरंतर सेवा – 240 दिन – रविवार और अन्य छुट्टियां, संविदा या कानून द्वारा ऐसे दिवस समझे जाने चाहिए जैसे कर्मचारी, अधिनियम की धारा 25एफ व 25बी के प्रयोजन हेतु नियोक्ता के अधीन वास्तविक रुप से कार्यरत है। (स्टेट बैंक ऑफ इंडिया वि. सेन्ट्रल गवर्नमैंट इंडस्ट्रियल ट्रिब्यूनल–कम–लेबर कोर्ट) ...1312

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25बी – बहाली या प्रतिकर – जब उच्च न्यायालय ने पाया है कि अधिकरण द्वारा पारित किया गया बहाली और पिछले वेतन का अवार्ड न्यायसंगत एवं उचित है, उसे अभिपुष्ट किया जाये और प्रतिकर प्रदान करने का वैकल्पिक अनुतोष प्रदान नहीं किया जा सकता। (स्टेट बैंक ऑफ इंडिया वि. सेन्ट्रल गवर्नमैंट इंडस्ट्रियल ट्रिब्यूनल–कम–लेबर कोर्ट) ...1312

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25बी,एफ,एन – सतत/निरंतर सेवा – सबूत का भार – कर्मकार ने कार्य दिवस के विवरण के साथ शपथपत्र प्रस्तुत करके अपने भार का निर्वहन किया कि उसने 240 दिनों से अधिक कार्य किया है – प्रतिपरीक्षण में बैंक द्वारा उससे कोई प्रश्न नहीं पूछा गया – अभिलेख पर, यह दर्शाने के लिए कुछ नहीं कि शपथपत्र त्रुटिपूर्ण है – याची के अनुसार भी, प्रत्यर्थी क्र. 2 ने 217 दिनों की अवधि के लिए कार्य किया, रविवार और छुट्टियां छोड़कर – प्रत्यर्थी क्र. 2 ने साबित किया कि उसने 240 दिनों से अधिक कार्य किया था। (स्टेट बैंक ऑफ इंडिया वि. सेन्ट्रल गवर्नमैंट इंडस्ट्रियल ट्रिब्यूनल–कम–लेबर कोर्ट) ...1312

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ – पिछले वेतन के साथ बहाल किया जाना – अधिकरण ने प्रत्यर्थी क्र. 2 को छंटनी के आधार पर बहाल किये जाने के लिए निदेशित किया – प्रत्यर्थी क्र. 2 को बहाल किये जाने के लिए निदेशित किया जा सकता है, तब भी जब उसे बैंक सेवा में नियोजन हेतु चयन के लिए चयन समिति द्वारा उसे उक्त नियोजन हेतु सक्षम नहीं पाया गया था – अभिलेख पर सामग्री है कि प्रत्यर्थी क्र. 2, अपने असतत किये जाने के बाद से

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No.2 after his discontinuance was unemployed through out - No material to show that the respondent No.2 was employed gainfully during the aforesaid period - Award passed by Tribunal for grant of back wages cannot be said to be bad. [State Bank of India Vs. Central Government Industrial Tribunal-Cum-Labour Court] ...1312

Industrial Disputes Act (14 of 1947), Section 25-F - See - Industrial Relations Act, M.P., 1960, Section 31(3) [Mohd. Sagir Vs. Bharat Heavy Electricals Ltd., Bhopal] ...813

Industrial Disputes Act (14 of 1947), Section 110, Industrial Relations Act, M.P. (27 of 1960), Section 62 - Respondent dismissed from service on 25.09.2004 - Had the right vested in him to bring an action provided under 1960 Act, merely because the action could not be brought within the limitation prescribed in 1960 Act and that the forum for redressal of the grievance having changed where no limitation is prescribed - Held - The right to take action is not lost to the respondent who rightly availed the same under 1947 Act and the Central Government was well within its jurisdiction to entertain and refer the dispute for adjudication to CGIT by the impugned order. [Bharat Heavy Electricals Vs. Ratanlal] ...1353

Industrial Relations Act, M.P. (27 of 1960), Section 31(3), Industrial Disputes Act (14 of 1947), Section 25-F - Petitioner appointed as Medical Attendant, remained absent for a period exceeding 30 days - Notice was sent to resume duty - He neither joined nor submitted any explanation for his un-authorised absence - Thereafter, drawing a presumption under Clause 42(10) of Standing Order, that the petitioner had voluntarily abandoned the services, name of the petitioner was struck off from the roll of the company and intimation was sent to him which was refused to accept - The petitioner thereafter approached the Company - Demanded copy of order, which was supplied to him on the same day - Labour Welfare Supervisor also met petitioner on 30.05.78 at his residence and persuaded him to join duty, however the petitioner did not resume duty - Held - There is no violation of principles of natural justice in dispensing with the services of the petitioner as the same were complied with. [Mohd. Sagir Vs. Bharat Heavy Electricals Ltd., Bhopal] ...813

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भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 57 व 247, खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 10, गौण खनिज नियम (म.प्र.), 1996, नियम 9 – भूमि खदान पट्टे के सरकारी पट्टेदार को सीमित अधिकार है – राज्य सरकार, निजी भूमि के भी नीचे पड़े खनिजों की स्वामी है – अतः वह उक्त भूमि के स्वामी या अधिभोगी की पूर्व सहमति के बिना भी पट्टा प्रदान कर सकती है – चूंकि संपूर्ण भूमि राज्य सरकार की है और भूमि में खान और खनिज एवं खदानें भी समाविष्ट है। (अपर्ण ग्रामीण विकास संस्था समिति सोसायटी वि. म.प्र. राज्य) (DB)...762

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 110 – धारा 110 तहसीलदार द्वारा निर्णय देने की प्रक्रिया उपबंधित करती है – नामांतरण की सूचना उचित रीति से संबंधित गांव में ढोल बजाकर प्रसारित की जाना चाहिये और इसकी प्रति गांव के चौपाल, गढ़ी एवं लोक आवागमन के अन्य स्थलों पर चस्पा की जाना अपेक्षित है और एक प्रति ग्राम पंचायत को भी प्रेषित की जाये। (शकुन्तला बाई (श्रीमति) वि. चतुर सिंह) ...995

भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 110 व 111 – हितबद्ध व्यक्ति – याचीगण मूल स्वामी हैं – मुख्त्यारनामा द्वारा निष्पादित विक्रय विलेख के आधार पर नामांतरण चाहा गया – नामांतरण की सूचना याचीगण को देना आवश्यक था क्योंकि वे आवश्यक पक्षकार है। (शकुन्तला बाई (श्रीमति) वि. चतुर सिंह) ...995

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Land Revenue Code, M.P. (20 of 1959), Section 111 - Remedy of Civil Suit - Mutation order can be challenged by filing appeal - It is the choice of the litigant to decide the forum where more than one forums are available - The subsequent filing of suit for a different relief will not wipe out the right of the petitioner to challenge orders passed by authorities under MPLRC arising out of order of Tehsildar - Petitioner is considered as "dominus litis". [Shakuntala Bai (Smt.) Vs. Chatur Singh] ...995

Limitation Act (36 of 1963), Section 5 - Condonation of delay - Besides considering all other things, the court is also bound to consider the stake of litigation. [Riyaj Khan Vs. Kasam Khan] ...*17

Limitation Act (36 of 1963), Section 5 - See - Civil Procedure Code, 1908, Section 115, Order 9 Rule 9 [Riyaj Khan Vs. Kasam Khan] ...*17

Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 10 - See - Land Revenue Code, M.P., 1959, Sections 57 & 247 [Aparn Gramin Vikas Sanstha Samiti Society Vs. State of M.,P.] (DB)...762

Minor Minerals Rules (M.P.), 1996, Rule 9 - See - Land Revenue Code, M.P., 1959, Sections 57 & 247 [Aparn Gramin Vikas Sanstha Samiti Society Vs. State of M.,P.] (DB)...762

Motor Vehicles Act (59 of 1988), Sections 10 & 147 - Liability of Insurance Company -License - Road roller is a different class of vehicle requiring separate license - Driver was possessing license of L.M.V. - As driver was not possessing valid driving license but since the deceased was a third party, Insurance Company shall pay with right of recovery from owner and driver - Appeal allowed. [Manju Sahu Vs. Gyani Singh Rajput] ...874

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भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 110 व 111 – नामांतरण कार्यवाहियां – शब्द 'उसे हितबद्ध प्रतीत होने वाले सभी व्यक्ति' का यह अर्थ नहीं कि तहसीलदार को अपनी सनक और कल्पना के अनुसार किसी भी व्यक्ति को नोटिस करने का कोई बंधनमुक्त एवं अनियंत्रित विवेकाधिकार है – इस शक्ति का प्रयोग तत्परतापूर्वक करना चाहिए और ऐसे सभी व्यक्तियों को सूचित करना चाहिए जो हितबद्ध हो सकते हैं। (शकुन्तला बाई (श्रीमति) वि. चतुर सिंह) ...995

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 111 – सिविल वाद का उपचार – नामांतरण आदेश को अपील प्रस्तुत करके चुनौती दी जा सकती है – जहां एक से अधिक न्यायालयों का विकल्प उपलब्ध होता है, तब न्यायालय को चुनना, वादकर्ता की पसंद पर है – भिन्न अनुतोष हेतु पश्चातवर्ती वाद प्रस्तुत करने से तहसीलदार के आदेश से उत्पन्न म.प्र. भू राजस्व संहिता के अंतर्गत प्राधिकारियों द्वारा पारित आदेशों को चुनौती देने का याची का अधिकार समाप्त नहीं होगा – याची को "डोमिनस लिटिस" समझा गया। (शकुन्तला बाई (श्रीमति) वि. चतुर सिंह) ...995

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब की माफी – अन्य सभी तथ्यों का विचार करने के अलावा, न्यायालय मुकदमे में लगे दांव को विचार में लेने के लिए भी बाध्य है। (रियाज खान वि. कासम खान) ...*17

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गौण खनिज नियम (म.प्र.), 1996, नियम 9 – देखें – भू राजस्व संहिता, म. प्र., 1959, धाराऐं 57 व 247 (अपर्ण ग्रामीण विकास संस्था समिति सोसायटी वि. म. प्र. राज्य) (DB)...762

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Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Act Policy - No plea was raised in written statement that policy which was issued was an act policy - In absence of any plea raised in written statement, evidence and cross-objection, the claim of the claimants cannot be defeated on the ground which is raised for the first time during course of arguments. [Saraswati Kushwaha Vs. Badri Singh] ...1101

Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Driving License - Driver was not holding valid driving license on the date of accident - As deceased was third party therefore, right of recovery could be given to Insurance Company of Truck - As the liability of Insurance Company of Motor Bike is limited to Rs. 1,00,000/- therefore, Insurance Company is rightly held liable to that extent. [Gayatri Singh (Smt.) Vs. Santosh Chaturvedi] ...904

Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Violation of Insurance Policy - Tractor was insured for agricultural purposes while it was carrying stones - As the Tractor was being used in violation of the insurance policy, Insurance Company is not liable. [Ram Milan Gupta Vs. Dashrath Singh Gond] ...1116

Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Violation of Policy - Insurance Company alleged that offending vehicle was hired by occupants whereas the witness examined by Company in this regard was only a hearsay witness which is having no evidentiary value - There is nothing on record to prove that vehicle was being used for commercial purpose - Insurance Company Liable. [Saraswati Kushwaha Vs. Badri Singh] ...1101

Motor Vehicles Act (59 of 1988), Section 163 - Compensation - Income - Claimants filed and proved the last pay certificate - Name of bank is also mentioned in certificate - Employee maintaining the record was also examined - Tribunal erred in holding that claimants have failed to prove that deceased was teacher and was getting salary of Rs. 4,284/- Compensation enhanced. [Manju Sahu Vs. Gyani Singh Rajput] ...874

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Motor Vehicles Act (59 of 1988), Section 168 - Contributory Negligence - Deceased was going on his motor bike when he met with an accident with truck when the deceased tried to overtake the truck - Driver of the Truck did not appear before Tribunal to explain under what circumstances accident took place - Contributory negligence on the part of the deceased assessed at 25% instead of 50% as assessed by Tribunal. [Gayatri Singh (Smt.) Vs. Santosh Chaturvedi] ...904

Motor Vehicles Act (59 of 1988), Section 173 - Enhancement of compensation - Tribunal as well as appellate court are bound to take into consideration not only the present scenario or the present income of the deceased but also his education status and future prospects - Even the non earning person of the family if suffers the injury or dies in the vehicular accident, then on the basis of notional income the victim or dependent are entitled to get compensation - In such cases compensation may be awarded either on the basis of principle of notional income or as per the rate of minimum wages fixed by the State. [Om Prakash Gupta Vs. Wajeer Ahmad Ali Nayak Wadi] ...877

Motor Vehicles Act (59 of 1988), Section 173 - Unless the requisite sum is deposited, the appeal against award allowing claim could not be entertained for setting aside such award - The provisions are mandatory and are equally applicable on entertaining and hearing of cross objections filed by respondents. [Oriental Insurance Co. Ltd. Vs. Manorama (Smt.)] ...1399

MPERC (Establishment of Forum and Electricity Ombudsman for Redressal of Grievances of the Consumers) (Revisions-I) Regulations, 2009, Clause 2.4 (d), (m) and 3.35 - See - Electricity Act, 2003, Sections 126, 135 [Madhya Pradesh Madhya Kshetra Vidyut Vitran Co. Ltd. Vs. Smt. Savitri Devi] ...1027

हटकर विचार किया जा सकता है जहां मृतक की आय में बढ़ोत्तरी पायी जाती है। (श्यामा मालवीय (श्रीमति) वि. मुकेश कुमार गोयल) ...909

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मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर की रकम को बढ़ाना – अधिकरण तथा अपीली न्यायालय भी, न केवल वर्तमान स्थिति या मृतक की वर्तमान आय को विचार में लेने के लिए बाध्य है बल्कि उसका शिक्षण, प्रतिष्ठा एवं भावी संभावनाएं भी – परिवार का कमाई न करने वाला कोई व्यक्ति भी यदि वाहन दुर्घटना में चोट सहन करता है या उसकी मृत्यु होती है तब भी काल्पनिक आय के आधार पर पीड़ित या आश्रित प्रतिकर प्राप्त करने का हकदार होगा – ऐसे प्रकरण में प्रतिकर या तो काल्पनिक आय के सिद्धांत के आधार पर अवार्ड किया जा सकता है या राज्य द्वारा निर्धारित किये गये न्यूनतम वेतन की दर से किया जा सकता है। (ओमप्रकाश गुप्ता वि. वजीर अहमद अली नायक वाडी) ...877

मोटर यान अधिनियम (1988 का 59), धारा 173 – जब तक कि आवश्यक रकम जमा नहीं की जाती, दावा मंजूरी के अवार्ड के विरुद्ध अपील उक्त अवार्ड को अपास्त किये जाने हेतु ग्रहण नहीं की जा सकती – उपबंध आज्ञापक हैं और ग्रहण करने पर एवं प्रत्यर्थीगण द्वारा प्रस्तुत प्रत्याक्षेपों की सुनवाई पर समान रुप से लागू होते हैं। (ऑरिएन्टल इंश्योरेंस कं.लि. वि. मनोरमा (श्रीमति)) ...1399

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Municipal Corporation Act, M.P. (23 of 1956), Section 420 - Power to demand punishment or dismissal - Non-obstante clause gives an overriding effect on all other provisions of the Act as well as sub-ordinate legislation including the rules and empowers the State Govt. to direct Corporation to suspend, fine or otherwise punish any officer or servant of Corporation who is negligent in discharge of his duties. [K. K. Singh Chouhan Vs. State of M.P.] (DB)...989

Municipal Corporation (Appointment and conditions of Service of Officers and servants) Rules, M.P. 2000, Rule 13(2) - See - Municipal Corporation Act, M.P., 1956, Sections 52, 53, 420 [K.K. Singh Chouhan Vs. State of M.P.] ...820

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 20 - Identification of Contraband - There is no averment in the seizure memo that on what basis the alleged substance was stated to be the Ganja - It is not stated that either by tasting or by smelling it was found to be Ganja - It is also not mentioned that by whom and by which instrument, the substance was weighed - How the contraband was handled after its seizure is also not explained - Possibility of tampering the substance is also not ruled out. [Beta alias Ram Kinker Vs. State of M.P.] ...1431

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20 - Person who took the samples to F.S.L. not examined - Rojnamcha entries pertaining to the departure of police officer taking samples to F.S.L. not produced - It cannot be assumed that same samples were sent to F.S.L. [Beta alias Ram Kinker Vs. State of M.P.] ...1431

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 42 - Intimation regarding information from the informer about

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नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराऐं 52, 53, 420 व नगरपालिक निगम (अधिकारियों व कर्मचारियों की नियुक्ति एवं सेवा शर्तें) नियम, म.प्र. 2000, नियम 13(2) व सिविल सेवा (वर्गीकरण, नियंत्रण एवं अपील) नियम, म. प्र., 1966, नियम 9 – याची अपर आयुक्त, नगरपालिक निगम, भोपाल को नगरपालिक आयुक्त द्वारा राज्य सरकार के निदेशों की शर्तों के अनुसार निलंबित किया गया – आयुक्त, नियम 9 के अंतर्गत उसमें निहित विवेकाधिकार का प्रयोग करने में असफल रहा और अपीली प्राधिकारी के कहने पर उक्त का प्रयोग किया – निलंबन का आदेश अभिखंडित। (के.के. सिंह चौहान वि. म.प्र. राज्य) ...820

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 420 – शस्ति या पदच्युति की मांग की शक्ति – सर्वोपरि खंड अधिनियम के सभी अन्य उपबंधों पर और साथ ही अधीनस्थ विधायन जिसमे नियम समाविष्ट है, पर अध्यारोही प्रभाव देता है और निगम के किसी ऐसे अधिकारी या कर्मचारी को, जो अपने कर्तव्य के पालन में उपेक्षावान है, निलंबित करने, अर्थदण्ड या अन्यथा से दण्डित करने हेतु निगम को निदेश देने के लिए राज्य सरकार को सशक्त करता है। (के. के. सिंह चौहान वि. म.प्र. राज्य) (DB)...989

नगरपालिक निगम (अधिकारियों व कर्मचारियों की नियुक्ति एवं सेवा शर्तें) नियम, म.प्र. 2000, नियम 13(2) – देखें – नगरपालिक निगम अधिनियम, म.प्र., 1956, धाराऐं 52, 53, 420 (के.के. सिंह चौहान वि. म.प्र. राज्य) ...820

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धाराऐं 8 व 20 – विनिषिद्ध पदार्थ की पहचान – जब्ती मेमो में कोई प्राक्कथन नहीं कि किस आधार पर अभिकथित पदार्थ को गांजा कहा गया – यह नहीं कहा गया कि या तो चखकर या सूंघकर उसे गांजा होना पाया गया – यह भी उल्लिखित नहीं कि किसके द्वारा तथा किस यंत्र से पदार्थ को तौला गया – जब्ती पश्चात विनिषिद्ध पदार्थ को कैसे संभाला गया यह भी स्पष्ट नहीं किया गया – पदार्थ के साथ छेड़छाड़ की संभावना से भी इंकार नहीं। (बेटा उर्फ राम किंकर वि. म.प्र. राज्य) ...1431

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20 – उस व्यक्ति का परीक्षण नहीं किया गया, जो नमूनों को एफ.एस.एल. ले गया था – नमूना लेकर पुलिस अधिकारी की एफ.एस.एल. को रवानगी से संबंधित रोजनामचा प्रविष्टियों को प्रस्तुत नहीं किया गया – यह अवधारणा नहीं की जा सकती कि वही नमूने एफ.एस.एल. भेजे गये थे। (बेटा उर्फ राम किंकर वि. म.प्र. राज्य) ...1431

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 42 – विनिषिद्ध पदार्थ का कब्जा होने की मुखबिर की सूचना के बारे में वरिष्ठ

having possession of contraband not sent to superior officer - No Rojnamcha Sanha produced to prove that telephonic message was given to the C.S.P. - Provisions of Section 42 of Act, 1985 not complied. [Beta alias Ram Kinker Vs. State of M.P.] ...1431

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 50 - Option - On search of body, key was recovered by which suitcase was opened and contraband was found - Prosecution had to comply with the mandatory provisions of Section 50 - Mere consent letter of the appellant prepared by seizing officer to carry out his search by said police officer does not fulfill the requirement of Section 50. [Beta alias Ram Kinker Vs. State of M.P.] ...1431

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 55 - Safe Custody - Entry of Malkhana Register neither produced nor proved - It cannot be assumed that the substance was kept in safe custody. [Beta alias Ram Kinker Vs. State of M.P.] ...1431

Natural Justice - Whether impugned order is outcome of a quasi judicial act or an administrative act - In both the situations the principle must be complied with. [Central Homeopathic & Biochemic Association, Gwalior Vs. State of M.P.] ...837

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 37, Panchayat (Resignation by Office Bearer) Rules, M.P. 1995, Rule 4 - Acceptance of Resignation - Resignation submitted by an office bearer can be accepted only after a full and complete compliance with the provisions of Rule 4 of Rules 1995, contemplating consideration thereon by Panchayat at its next meeting under notice to petitioner - As resignation was accepted circumventing the procedure prescribed therefor and in view of non-compliance of mandatory provisions of rule 4(2) and (3), it is sufficient to hold that the resignation was not validly accepted - Petition allowed. [Bihari Das Vs. State of M.P.] ...1069

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 70, Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, M.P. , 2005, Rule 14 - Maximum Age - It is within the powers of State Govt. to prescribe for minimum and maximum age of recruitment and even to amend the same by issuing executive order - By circular dated 03.11.2012 maximum age limit is 45 years for direct recruitment - Merely because the petitioner has

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अधिकारी को प्रज्ञापना नहीं भेजी गयी – यह साबित करने के लिए रोजनामचा सान्हा पेश नहीं किया कि सी.एस.पी. को दूरभाष संदेश दिया गया था – अधिनियम 1985 की धारा 42 के उपबंधों का अनुपालन नहीं हुआ। (बेटा उर्फ राम किंकर वि. म.प्र. राज्य) ...1431

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 50 – विकल्प – शरीर की तलाशी लेने पर, चाबी बरामद हुई जिससे सूटकेस खोला गया और विनिषिद्ध पदार्थ पाया गया – अभियोजन को धारा 50 के आज्ञापक उपबंधों का अनुपालन करना चाहिए – अपीलार्थी का मात्र सहमति पत्र जिसे जब्ती अधिकारी ने उक्त पुलिस अधिकारी द्वारा उसकी तलाशी लिये जाने हेतु तैयार किया गया था, धारा 50 की अपेक्षाओं को पूरा नहीं करता। (बेटा उर्फ राम किंकर वि. म. प्र. राज्य) ...1431

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 55 – सुरक्षित अभिरक्षा – मालखाना रजिस्टर की प्रविष्टि न तो प्रस्तुत की गई और न ही साबित की गई – यह उपधारणा नहीं की जा सकती कि पदार्थ को सुरक्षित अभिरक्षा में रखा गया था। (बेटा उर्फ राम किंकर वि. म.प्र. राज्य) ...1431

नैसर्गिक न्याय – क्या आक्षेपित आदेश किसी अर्द्धन्यायिक कार्यवाही का परिणाम है अथवा किसी प्रशासनिक कार्यवाही का – दोनों स्थितियों में सिद्धांत का अनुपालन किया जाना चाहिए। (सेन्ट्रल होमियोपेथिक एण्ड बायोकेमिक एसोसिएशन, ग्वालियर वि. म.प्र. राज्य) ...837

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 37, पंचायत (पदाधिकारी द्वारा त्यागपत्र) नियम, म.प्र. 1995, नियम 4 – त्यागपत्र की स्वीकृति – पदाधिकारी द्वारा प्रस्तुत त्यागपत्र को केवल नियम 1995 के नियम 4 के उपबंधों का संपूर्ण अनुपालन करने के पश्चात ही स्वीकार किया जा सकता है, जिसमें पंचायत द्वारा याची को नोटिस देकर अपनी आगामी सभा में उस पर विचार किया जाना अनुध्यात करता है – चूंकि त्यागपत्र को स्वीकृति, उसके लिए विहित प्रक्रिया की परिवचंना करके दी गई है तथा नियम 4(2) व (3) के आज्ञापक उपबंधों के अननुपालन को दृष्टिगत रखते हुए यह धारणा करने के लिये पर्याप्त है कि त्यागपत्र की स्वीकृति विधिमान्य रुप से नहीं की गई – याचिका मंजूर। (बिहारी दास वि. म.प्र. राज्य) ...1069

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passed the eligibility test, no vested right is created in her favour - It has been rightly held that as the petitioner has crossed the age limit of 45 years, she is not entitled for counseling for appointment to the post of Samvida Shala Shikshak Grade I - Petition dismissed. [Urmila Rajak (Smt.) Vs. State of M.P.] ...1057

Panchayat (Resignation by Office Bearer) Rules, M.P. 1995, Rule 4 - See -Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993, Section 37 [Bihari Das Vs. State of M.P.] ...1069

Panchayat Samvida Shala Shikshak (Employment and Condition of Contract) Rules, M.P., 2005 - Appointment - Qualification - Petitioners are having B.Ed. degree whereas the qualification required is D.Ed. Degree - Recruitment in public services should be strictly in accordance with terms of advertisement and recruitment rules, if any - If a deviation is made from the Rules, the same would allow entry of in-eligible persons and it deprives many others who could not have competed for the posts - It is equally well settled that fixation of qualification for a particular post is a matter of recruitment policy - Merely because petitioners are over qualified, therefore, the contention that they cannot be excluded from the consideration cannot be accepted. [Sanyogita Thakur (Smt.) Vs. State of M.P.] ...1357

Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, M.P. , 2005, Rule 14 - See - Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993, Section 70 [Urmila Rajak (Smt.) Vs. State of M.P.] ...1057

Penal Code (45 of 1860), Section 34 - Common Intention - Deceased was working in a Mangoda shop - Appellants were passing from the front of the shop when the liquor bottle slipped from the hands of appellant No.3 - Deceased asked him to remove pieces of glass scattered in front of the shop - Appellant No.3 pierced the spear in the abdomen of deceased - All the appellants grappled with witnesses - Held - No injury was caused to the deceased by the appellants No.1 and 2 - It does not appear that appellants No. 1 and 2 shared common intention of appellant No.3 of causing spear injury to deceased - As the incident took place suddenly and the appellant No.3 assaulted deceased with spear which he was already having in his hand, it cannot be held that the appellants No. 1 and 2 shared common intention with appellant No. 3 [Suresh Vs. State of M.P.] (DB) ...1177

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रुप से धारणा की गई कि चूंकि याची ने 45 वर्ष की आयु सीमा पार कर ली है, वह संविदा शाला शिक्षक ग्रेड–I के पद पर नियुक्ति हेतु परामर्श के लिए हकदार नहीं – याचिका खारिज। (उर्मिला रजक (श्रीमति) वि. म.प्र. राज्य) ...1057

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पंचायत संविदा शाला शिक्षक (रोजगार एवं संविदा की शर्तें), नियम, म.प्र, 2005, नियम 14–देखें–पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993, धारा 70 (उर्मिला रजक (श्रीमति) वि. म.प्र. राज्य) ...1057

दण्ड संहिता (1860 का 45), धारा 34 – सामान्य आशय – मृतक मंगोड़े की दुकान में काम करता था – अपीलार्थीगण दुकान के सामने से गुजर रहे थे तब अपीलार्थी क्र. 3 के हाथों से मदिरा की बोतल फिसल गई – मृतक ने उसे दुकान के सामने बिखरे हुए कांच के टुकड़े हटाने को कहा – अपीलार्थी क्र. 3 ने मृतक के पेट में भाला घोंप दिया – सभी अपीलार्थीगण साक्षियों से भिड़ पड़े – अभिनिर्धारित – अपीलार्थी क्र. 1 व 2 द्वारा मृतक को कोई चोट कारित नहीं की गई – यह प्रतीत नहीं होता कि अपीलार्थी क्र. 1 व 2 मृतक को भाले से चोट पहुंचाने के अपीलार्थी क्र. 3 के सामान्य आशय में शामिल थे – चूंकि घटना अचानक घटित हुई और अपीलार्थी क्र. 3 ने मृतक पर भाले से हमला किया, जो पहले से उसके हाथ में था, यह धारणा नहीं की जा सकती कि अपीलार्थी क्र. 1 व 2 का अपीलार्थी क्र. 3 के साथ सामान्य आशय था। (सुरेश वि. म.प्र. राज्य) (DB)...1177

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Penal Code (45 of 1860), Section 149 - Unlawful Assembly - Deceased and his sons were cutting grass in their field when two accused persons came there and asked the deceased about his village - The deceased was attacked by appellants - It cannot be said that the appellants had not formed an unlawful assembly within the meaning of Section 141 of I.P.C. - Use of force by members of unlawful assembly gives rise to offence of rioting which is punishable under Section 147 or 148 of I.P.C. [Mahendra @ Mota Vs. State of M.P.] (DB)...1453

Penal Code (45 of 1860), Sections 149 & 302 - Murder - Common Object - P.W. 4 had admonished accused No. 9 when he went to site and asked his labourers to discontinue work - This provoked the accused persons to teach a lesson to P.W. 4 and therefore, the common object of the assembly was to commit murder of P.W. 4 - However, deceased was attacked when he was seen with P.W. 4 who escaped unhurt - It cannot be said that the common object of the assembly was to commit murder of deceased - Appellants No. 1, 3, 5, 7 & 8 were unarmed and did not cause any injury - It cannot be said that appellants No. 1, 3, 5, 7, & 8 had shared common object to kill the deceased - Appeals of Appellants No. 1, 3, 5, 7 & 8 are allowed and they are acquitted - Conviction and sentence of remaining appellants who had actually caused injuries to the deceased are maintained - Appeal partly allowed. [Bhuria Vs. State of M.P.] (DB)...917

Penal Code (45 of 1860), Sections 149, 302, 325 - Unlawful Assembly - Liability - Liability of each assailant under any other provision of I.P.C. would depend on the role played by them and their object during unlawful assembly - Appellants No. 2 and 3 caused injuries on the hands and legs of deceased - It is clear that their object during unlawful assembly was not to cause murder of deceased - Appellants No. 2 and 3 are guilty of offence under Sections 325/149 of I.P.C. [Mahendra @ Mota Vs. State of M.P.] (DB)...1453

Penal Code (45 of 1860), Section 302 - 100% burns - Degrees - Deceased had suffered 100% superficial burns - Burn injuries are classified into three degrees - There may be a situation where a part of the body may bear upon it severe burns but a small part of the body may have none - Burns can usually be distinguished from wounds inflicted before the body was burnt by their appearance, their position in areas highly susceptible to burning and on fleshy areas by findings recorded after internal

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दण्ड संहिता (1860 का 45), धारा 149 – विधिविरुद्ध जमाव – मृतक व उसका पुत्र अपने खेत में घास काट रहे थे जब दो अभियुक्त वहां आये और मृतक से उसके गांव के बारे में पूछा – मृतक पर अपीलार्थीयों द्वारा हमला किया गया – यह नहीं कहा जा सकता कि अपीलार्थीगण ने धारा 141 भा.द.सं. के अर्थान्तर्गत विधिविरुद्ध जमाव निर्मित नहीं किया – विधिविरुद्ध जमाव के सदस्यों द्वारा बल का प्रयोग, बलवा के अपराध को उत्पन्न करता है जो भा.द.सं. की धारा 147 या 148 के अंतर्गत दण्डनीय है। (महेन्द्र उर्फ मोटा वि. म.प्र. राज्य) **(DB)...1453**

दण्ड संहिता (1860 का 45), धाराऐं 149 व 302 – हत्या – सामान्य उद्धेश्य – अ.सा. 4 ने अभियुक्त क्र. 9 को डांटा जब वह मौके पर गया और उसके मजदूरों से काम रोकने को कहा – इससे अभियुक्तगण, अ.सा. 4 को सबक सिखाने के लिए उत्तेजित हो गये और इसलिए जमाव का सामान्य उद्देश्य अ.सा. 4 की हत्या कारित करने का था – किन्तु मृतक पर हमला किया गया जब वह अ.सा. 4 के साथ देखा गया जो बिना चोट बच निकला – यह नहीं कहा जा सकता कि जमाव का सामान्य उद्देश्य मृतक की हत्या कारित करना था – अपीलार्थी क्र. 1,3,5,7 व 8 निशस्त्र थे और उन्होंने कोई चोट कारित नहीं की – यह नहीं कहा जा सकता कि अपीलार्थी क्र. 1,3,5,7 व 8 का सामान्य उद्देश्य मृतक को जान से मारना था – अपीलार्थी क्र. 1,3,5,7 व 8 की अपीलें मंजूर और उन्हें दोषमुक्त किया जाता है – शेष अपीलार्थीगण की दोषसिद्धि व दंडादेश, जिन्होंने वास्तविक रुप से मृतक को क्षतियां कारित की, कायम रखा जाता है – अपील, अंशतः मंजूर। (भूरिया वि. म.प्र. राज्य) **(DB)...917**

दण्ड संहिता (1860 का 45), धाराऐं 149, 302, 325 – विधिविरुद्ध जमाव – दायित्व – भा.द.सं. के किसी अन्य उपबंध के अंतर्गत प्रत्येक हमलावर का दायित्व विधिविरुद्ध जमाव के दौरान उनके द्वारा निभाई गई भूमिका और उनके उद्देश्य पर निर्भर होगा – अपीलार्थी क्र. 2 व 3 ने मृतक के हाथों और पैरों में चोटें कारित की – यह स्पष्ट है कि विधिविरुद्ध जमाव के दौरान उनका उद्देश्य मृतक की हत्या कारित करना नहीं था – अपीलार्थी क्र. 2 व 3 भा.द.सं. की धाराऐं 325/149 के अपराध के दोषी हैं। (महेन्द्र उर्फ मोटा वि. म.प्र. राज्य) **(DB)...1453**

दण्ड संहिता (1860 का 45), धारा 302 – 100 प्रतिशत जलना – मात्रा – मृतक ने 100 प्रतिशत उपारिष्ठ जलने की क्षतियां सहन कीं – जलने की क्षतियां तीन मात्राओं में वर्गीकृत है – ऐसी स्थिति हो सकती है जहां शरीर के एक हिस्से पर गंभीर जलने की क्षतियां हों परंतु शरीर के छोटे हिस्से पर कुछ न हो – जलने को शरीर जलने से पहले पहुंचाई गई चोटों से उनके स्वरुप को देखकर, उनकी स्थिति को देखकर उन भागों में जो जलने के लिए अधिक संवेदनशील है, एवं मांसल भाग, आंतरिक परीक्षण पश्चात अभिलिखित निष्कर्षों द्वारा सुभिन्न किया जा

examination. [State of M.P. Vs. Dal Singh] (SC)...1265

Penal Code (45 of 1860), Section 302 - Circumstantial Evidence - Deceased, the wife of the appellant died because of strangulation - Appellant was in the house along with his wife and children at the time of death - No explanation offered by the appellant - Recovery of Pillow and gold nose-pin at the instance of appellant - Appellant guilty of committing murder of his wife - Appeal dismissed. [Mohammad Hussain Ansari Vs. State of M.P.] (DB) ...1147

Penal Code (45 of 1860), Section 302 - Circumstantial Evidence - Deceased wife of the appellant No.1 and daughter in law of appellant No.2 found dead in the house - Deceased was living with the appellants - Deceased died of homicidal death - No explanation offered by the appellants as to how the deceased suffered injuries and died - Appellants guilty of committing murder - Appeal dismissed. [Suraj Chandrawanshi Vs. State of M.P.] (DB) ...1153

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Dying Declaration - Deceased suffered 100% superficial burn injuries - In such state of mind, one cannot expect that a person in such a physical condition would be able to give the exact version of incident - She had been suffering from great mental and physical agony - No suggestion and explanation as to why the witnesses who recorded the dying declaration would have deposed against the respondents - Appeal allowed - Judgment of acquittal set aside - Judgment of Trial Court restored. [State of M.P. Vs. Dal Singh] (SC)...1265

Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Murder - Dying Declarations - In written dying declarations, information given by one of the deceased to the Doctor and the Dehati Nalishi lodged by the deceased clearly speaks that the appellant poured kerosene oil and ignited the deceased persons - There is nothing on record to show that the dying declarations were result of imagination, tutoring or prompting - Dying Declarations were made voluntarily - Appellant guilty of committing murder - Appeal dismissed. [Gajendra Singh Chouhan Vs. State of M.P.] (DB)...939

Penal Code (45 of 1860), Section 302 - Medical Evidence - Evidence of Doctor - Unless there existed some inherent and apparent defect, the court could not have substitute its opinion for that of the

सकता है। (म.प्र. राज्य वि. दल सिंह) (SC)...1265

दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – मृतिका, अपीलार्थी की पत्नी की गला घोंटने से मृत्यु हुई – मृत्यु के समय अपीलार्थी अपनी पत्नी एवं बच्चों के साथ मकान में था – अपीलार्थी द्वारा कोई स्पष्टीकरण नहीं दिया गया – अपीलार्थी की निशांदेही पर तकिया एवं सोने की लौंग बरामद की गई – अपीलार्थी अपनी पत्नी की हत्या कारित करने का दोषी – अपील खारिज। (मोहम्मद हुसैन अंसारी वि. म.प्र. राज्य) (DB)...1147

दण्ड संहिता (1860 का 45), धारा 302 – परिस्थितिजन्य साक्ष्य – मृतिका, अपीलार्थी क्रं. 1 की पत्नी एवं अपीलार्थी क्रं. 2 की बहु को घर में मृत पाया गया – मृतिका अपीलार्थीगण के साथ निवासरत थी – मृतिका की मृत्यु मानव वध से हुई – अपीलार्थीगण द्वारा कोई स्पष्टीकरण नहीं दिया गया कि मृतिका को चोटें कैसे आयीं और कैसे उसकी मृत्यु हुई – अपीलार्थीगण हत्या कारित करने के दोषी – अपील खारिज। (सूरज चंद्रवंशी वि. म.प्र. राज्य) (DB)...1153

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्यु कालिक कथन – मृतक ने 100 प्रतिशत उपारिष्ठ जलने की क्षतियां सहन कीं – ऐसी मनःस्थिति में, यह अपेक्षा नहीं की जा सकती कि उक्त शारीरिक स्थिति में कोई व्यक्ति घटना का यथार्थ विवरण दे सकेगा – वह घोर मानसिक एवं शारीरिक कष्ट से गुजर रही थी – कोई सुझाव एवं स्पष्टीकरण नहीं कि मृत्युकालिक कथन अभिलिखित करने वाले साक्षीगण, प्रत्यर्थीगण के विरुद्ध क्यों कथन दिये – अपील मंजूर – दोषमुक्ति का निर्णय अपास्त – विचारण न्यायालय का निर्णय पुनःस्थापित। (म.प्र. राज्य वि. दल सिंह) (SC)...1265

दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 32 – हत्या – मृत्युकालिक कथन – लिखित मृत्युकालिक कथन में, मृतको में से एक ने देहाती नालिसी अभिलिखित कर स्पष्ट यह कहा कि अपीलार्थी ने मिट्टी का तेल उडेला और मृतक व्यक्तियों को जला दिया – यहां अभिलेख पर कुछ नहीं जो यह दर्शाता हो कि मृत्युकालिक कथन काल्पनिक, पढ़ाया हुआ या अनुबोधन का परिणाम थे – मृत्युकालिक कथन स्वेच्छापूर्वक दिये गये थे – अपीलार्थी हत्या का दोषी – अपील खारिज। (गजेन्द्र सिंह चौहान वि म.प्र. राज्य) (DB)...939

दण्ड संहिता (1860 का 45), धारा 302 – चिकित्सीय साक्ष्य – चिकित्सक का साक्ष्य – जब तक कि कोई अंतर्निहित या प्रकट त्रुटि अस्तित्वमान न हो, चिकित्सक के अभिमत को न्यायालय अपना अभिमत प्रतिस्थापित नहीं कर सकता था। (म.प्र.

Doctor's. [State of M.P. Vs. Dal Singh] (SC)...1265

Penal Code (45 of 1860), Section 302 - Murder - Circumstantial Evidence - Conviction based on memorandum of accused and recovery of articles - Held - Circumstances sought to be proved against the appellant were not established by cogent and convincing evidence - Suspicion however strong can not take the place of proof - Conviction set aside - Appeal allowed. [Lakkhu @ Lakhanlal Gond Vs. State of M.P.] (DB)...934

Penal Code (45 of 1860), Section 302 - Murder - Circumstantial Evidence - Last Seen Together - Material omissions and contradictions in the statement of witnesses - Complainant admitted that he knew the appellant even then it was mentioned in the Marg Intimation that one person was seen carrying the can - Marg intimation is not corroborated by the statement of the witness - Prosecution has failed to prove that the deceased and appellant were last seen together - Appellant acquitted. [Karan Vs. State of M.P.] (DB) ...1162

Penal Code (45 of 1860), Sections 302 & 304 Part I - Murder or Culpable Homicide not amounting to murder - Appellant came back to his house in drunken condition - Quarrel between the appellant and his deceased wife took place in the course of which appellant poured kerosene on deceased and ignited her - Held - It could be inferred that the incident occurred under a sudden impulse without any premeditation - However, since setting fire to deceased after pouring kerosene on her indicated that appellant acted either with the intention of causing death or of causing such bodily injury as was likely to cause death - Appellant convicted under Section 304 Part I and sentence of 10 years R.I. [Roop Singh Vs. State of M.P.] (DB)....1169

Penal Code (45 of 1860), Sections 302, 304 Part II - Murder or Culpable Homicide not amounting to murder - Appellant went to the house of P.W. 5 along with his wife where they had meals and consumed liquor - Wife of the appellant slept on a cot and refused to go home - Appellant slapped her twice and took her on his shoulder and threw his wife on the floor in front of his house and started giving fist blows - Deceased died because of severe bleeding - Held - Incident took place without any premeditation - There was no previous quarrel - Assault was made with an intention to cause bodily injury only - Injuries were

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राज्य वि. दल सिंह) (SC)...1265

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अभियुक्त के ज्ञापन एवं वस्तुओं की बरामदगी पर आधारित दोषसिद्धि – अभिनिर्धारित – अपीलार्थी के विरुद्ध जिन परिस्थितियों को साबित करना चाहा गया था, वे युक्तिसंगत एवं विश्वासप्रद साक्ष्य द्वारा स्थापित नहीं की गई – संदेह कितना भी प्रबल हो, किन्तु सबूत का स्थान नहीं ले सकता – दोषसिद्धि अपास्त – अपील मंजूर। (लक्खू उर्फ लखनलाल गौंड वि. म.प्र. राज्य) (DB)...934

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अंतिम बार एक साथ देखा जाना – साक्षियों के कथन में तात्विक लोप एवं विरोधाभास – शिकायतकर्ता ने स्वीकार किया कि वह अपीलार्थी को जानता था तब भी मर्ग सूचना में यह उल्लिखित किया गया कि एक व्यक्ति को कनस्तर ले जाते देखा गया था – साक्षी के कथन से मर्ग सूचना की पुष्टि नहीं हुई है – अभियोजन साबित करने में असफल रहा कि मृतक व अपीलार्थी को अंतिम बार एक साथ देखा गया था – अपीलार्थी दोषमुक्त। (करन वि. म.प्र. राज्य) (DB)...1162

दण्ड संहिता (1860 का 45), धाराऐं 302 व 304 भाग–I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अपीलार्थी नशे की हालत में अपने घर लौटा – अपीलार्थी और उसकी पत्नी के बीच विवाद हुआ जिसके दौरान अपीलार्थी ने मृतिका पर मिट्टी का तेल उडेलकर उसे आग लगा दी–अभिनिर्धारित –यह निष्कर्ष निकाला जा सकता है कि घटना अचानक मनोवेग में घटी, बिना किसी पूर्व चिंतन के –अपितु, चूंकि मिट्टी का तेल उडेलने के पश्चात मृतिका को आग लगा देना दर्शाता है कि अपीलार्थी का कृत्य या तो मृत्यु कारित करने के आशय से किया गया या ऐसी शारीरिक क्षति करने के आशय से किया गया जिससे संभावित रुप से मृत्यु कारित हो सकती थी – अपीलार्थी धारा 304 भाग–I के अंतर्गत दोषसिद्ध और 10 वर्ष के सश्रम कारावास से दंडित। (रूप सिंह वि. म.प्र. राज्य) (DB)...1169

दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग II – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अपीलार्थी अ.सा. 5 के घर अपनी पत्नी के साथ गया, जहां उन्होनें भोजन किया और मदिरा का सेवन किया – अपीलार्थी की पत्नी खाट पर सो गई और घर जाने से मना किया – अपीलार्थी ने उसे दो बार थप्पड़ मारे और अपने कंधे पर लेकर अपनी पत्नी को जमीन पर अपने घर के सामने पटक दिया और उसे घूंसे मारने लगा – अधिक रक्तस्त्राव के कारण पीड़िता की मृत्यु हुई – अभिनिर्धारित – घटना बिना किसी पूर्व चिंतन से कारित हुई – कोई पूर्वतर झगड़ा नहीं हुआ – हमला केवल शारीरिक क्षति कारित करने के उद्देश्य से किया गया था – प्रकृति के सामान्य क्रम में मृत्यु कारित करने के लिए क्षतियां पर्याप्त नहीं

not sufficient in the ordinary course of nature to cause death - Appellant is guilty under Section 304 Part II and not under Section 302 - Appeal partly allowed. [Chhabbilal Goud Vs. State of M.P.] (DB)...928

Penal Code (45 of 1860), Section 306 - Abetment to commit suicide - Evidence of Sister with regard to cruelty and harassment due to non-satisfaction of demand for watch and cycle did not find place in police statements - Parents of the deceased not examined - Independent witness stated that the deceased and her devrani had run away from the house after taking all their ornaments - Both were reprimanded by appellant and co-villagers and therefore, deceased committed suicide by feeling ashamed for the misconduct - Conviction of appellant under Section 306 not sustainable. [Virendra Singh Vs. State of M.P.]...912

Penal Code (45 of 1860), Section 307 - Attempt to murder - Medical Evidence - Complainant asserted that the bullet had passed through and through his right thigh - No exit wound was found - No bullet or pellets embedded inside thigh were found - No bony injury was noticed in x-ray - Evidence of complainant incompatible with the medical evidence. [Pankaj Shah Vs. State of M.P.] ...1448

Penal Code (45 of 1860), Section 307 - Recovery of Weapon - Independent seizure witnesses did not support prosecution - Act of showing the accused to the complainant prior to holding of T.I.P. shows the interestedness of the Investigating officer - Recovery not proved. [Pankaj Shah Vs. State of M.P.] ...1448

Penal Code (45 of 1860), Section 376 - F.I.R. - Delay - F.I.R. was lodged after delay of 6 days - Explanation offered by prosecutrix that her father was suffering from epilepsy and her uncle was not available and she had also become ill is plausible - Explanation not challenged by defence in cross-examination also - Delay explained. [Ram Ratan Kewat Vs. State of M.P.] ...1184

Penal Code (45 of 1860), Section 376(2)(g) - Gang Rape - Appellant No.2 entered inside the house of the prosecutrix while she was alone in the house - Appellant No.1 who had come along with appellant No.2 remained outside the house - It cannot be deemed that appellant No.1 had come with appellant No.2 with intention to commit rape on the prosecutrix or he had committed any act in furtherance of their common intention to commit rape - Appellant No.1 acquitted -

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थी – अपीलार्थी धारा 304 भाग–*II* के अंतर्गत दोषी और न कि धारा 302 के अंतर्गत – अपील अंशतः मंजूर। (छब्बीलाल गौड वि. म.प्र. राज्य) **(DB)...928**

दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या कारित करने का दुष्प्रेरण – घड़ी एवं साईकिल की मांग को पूरा न किये जाने के कारण क्रूरता एवं उत्पीड़न के संबंध में बहिन का साक्ष्य पुलिस अभिकथन में नहीं पाया गया – मृतिका के माता–पिता का परीक्षण नहीं – स्वतंत्र साक्षी का कथन कि मृतिका एवं उसकी देवरानी अपने सारे जेवर लेने के बाद घर से भागीं – अपीलार्थी एवं गांव वालों ने, दोनों की भर्त्सना की और इसलिए मृतिका ने अपने दुराचरण के लिये शर्मिंदगी महसूस करने के कारण आत्महत्या की – धारा 306 के अंतर्गत अपीलार्थी की दोषसिद्धि कायम रखने योग्य नहीं। (वीरेन्द्र सिंह वि. म.प्र. राज्य) **...912**

दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – चिकित्सीय साक्ष्य – शिकायतकर्ता का प्राख्यान कि गोली उसकी दांयी जांघ के आर पार हो गई थी – निकासी की कोई चोट नहीं पाई गई – जांघ के अंदर घंसी कोई गोली या छर्रा नहीं पाया गया – कोई अस्थि चोट, एक्स रे में दर्शित नहीं – शिकायतकर्ता का साक्ष्य, चिकित्सीय साक्ष्य से असंगत। (पंकज शाह वि. म.प्र. राज्य) **...1448**

दण्ड संहिता (1860 का 45), धारा 307 – शस्त्र की बरामदगी – स्वतंत्र जब्ती साक्षियों ने अभियोजन का समर्थन नहीं किया – शिकायतकर्ता को पहचान परेड करने से पूर्व, अभियुक्त को दिखाने का कृत्य, अन्वेषण अधिकारी की हितबद्धता दर्शाता है – बरामदगी साबित नहीं की गई। (पंकज शाह वि. म.प्र. राज्य) **...1448**

दण्ड संहिता (1860 का 45), धारा 376 – प्रथम सूचना रिपोर्ट– विलम्ब – प्रथम सूचना रिपोर्ट 6 दिनों के विलम्ब के पश्चात की गई – अभियोक्त्री द्वारा प्रस्तावित स्पष्टीकरण कि उसका पिता मिरगी का रोगी था और उसका चाचा उपलब्ध नहीं था तथा वह भी बीमार हो गई थी, विश्वसनीय है – स्पष्टीकरण को बचाव पक्ष द्वारा प्रतिपरीक्षण में भी चुनौती नहीं दी गई – विलम्ब स्पष्ट किया गया है। (राम रतन केवट वि. म.प्र. राज्य) **...1184**

दण्ड संहिता (1860 का 45), धारा 376(2)(जी) – सामूहिक बलात्कार – अपीलार्थी क्र. 2 ने अभियोक्त्री के मकान में प्रवेश किया जब वह घर में अकेली थी – अपीलार्थी क्र. 1 जो अपीलार्थी क्र. 2 के साथ आया था, मकान के बाहर रहा – यह नहीं माना जा सकता कि अपीलार्थी क्र. 1, अपीलार्थी क्र. 2 के साथ अभियोक्त्री का बलात्कार करने के आशय से आया था या उसने बलात्कार कारित करने के सामान्य आशय के अग्रसरण में कोई कृत्य किया – अपीलार्थी क्र.1 दोषमुक्त – अपीलार्थी क्र. 2 की दोषसिद्धि भा.द.सं. की धारा 376(1) में परिवर्तित। (राम रतन

Conviction of appellant No.2 altered to 376(1) of I.P.C. [Ram Ratan Kewat Vs. State of M.P.] ...1184

Penal Code (45 of 1860), Sections 403, 405, 415 & 425 - Civil Nature - If allegations in the complaint are taken on their face value, discloses a criminal offence, complaint cannot be quashed merely because it relates to a commercial transaction or breach of contract for which civil remedy is available or has been availed - Commercial transaction may also involve a criminal offence. [Avdhesh Raghuvanshi Vs. State of M.P.] ...1227

Penal Code (45 of 1860), Sections 408, 420, 467, 468 & 471 - See - Criminal Procedure Code, 1973, First Schedule [Ramesh Kumar Soni Vs. State of M.P.] (SC)...741

Penal Code (45 of 1860), Sections 409, 418, 420/34 - Civil Nature - Same transaction relating to breach of contract, can give rise to civil as well as criminal liability - Magistrate rightly did not discharge the petitioners. [Duncans Industries Ltd. Vs. Jairam Das Panjwani] ...1483

Penal Code (45 of 1860), Sections 409, 420, 467 & 471 - Cheating - Respondent was alleged to have withdrawn the amount by forging the signatures of complainant - Evidence of Bank Manager and Handwriting Expert shows that the signature of complainant on the cheque do tally with her admitted signatures - Evidentiary value of testimony of Bank Manager is having high credential value since he must be tallying and comparing thousands of signatures on the withdrawal forms - Revision dismissed. [State of M.P. Vs. Narayan Singh] (DB)...946

Penal Code (45 of 1860), Section 420 - Complaint reveals that the allegations are of civil nature and do not prima facie disclose the commission of criminal offence of cheating - Hence mere use of expression "Cheating" in the complaint is of no consequence. [Balwant Singh Tomar @ Balwanta Vs. Tigmanshu Dhulia] ...967

Penal Code (45 of 1860), Sections 467 & 468 - See - Criminal Procedure Code, 1973, Section 211 [Basant Kumar Rawat Vs. State of M.P.] ...950

Prospective Overruling - Overruling of Judgment passed by Full Bench will not affect cases which have already been tried or are at an advanced stage before Magistrates in terms of said decision. [Ramesh Kumar Soni Vs. State of M.P.] (SC)...741

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दण्ड संहिता (1860 का 45), धाराऐं 403, 405, 415 व 425 – सिविल स्वरुप – यदि शिकायत के अभिकथनों को लिये जाने पर प्रत्यक्षतः दाण्डिक अपराध प्रकट होता है, तब शिकायत को मात्र इसलिए अभिखंडित नहीं किया जा सकता कि वह वाणिज्यिक संव्यवहार या संविदा के भंग से संबंधित है, जिसके लिए सिविल उपचार उपलब्ध है या उसका उपयोग किया गया है – वाणिज्यिक संव्यवहार में दाण्डिक अपराध भी अंतर्ग्रस्त हो सकता है। (अवधेश रघुवंशी वि. म.प्र. राज्य) ...1227

दण्ड संहिता (1860 का 45), धाराऐं 408, 420, 467, 468 व 471 – देखें – दण्ड प्रक्रिया संहिता, 1973, प्रथम अनुसूची (रमेश कुमार सोनी वि. म.प्र. राज्य) (SC)...741

दण्ड संहिता (1860 का 45), धाराऐं 409, 418, 420/34 – सिविल स्वरुप – संविदा के भंग से संबंधित समान संव्यवहार सिविल तथा दाण्डिक उत्तरदायित्व को उत्पन्न कर सकता है – मजिस्ट्रेट ने उचित रुप से याचीगण को आरोपमुक्त नहीं किया। (डंकन्स इंडस्ट्रीज लि. वि. जयराम दास पंजवानी) ...1483

दण्ड संहिता (1860 का 45), धाराऐं 409, 420, 467 व 471 – छल – अभिकथित रुप से प्रत्यर्थी ने शिकायतकर्ता के जाली हस्ताक्षर करके रकम निकाली – बैंक प्रबंधक एवं हस्ताक्षर विशेषज्ञ का साक्ष्य दर्शाता है कि शिकायतकर्ता के चेक पर हस्ताक्षर उसके द्वारा स्वीकृत हस्ताक्षरों से मिलते हैं – बैंक प्रबंधक के परिसाक्ष्य का साक्ष्यिक मूल्य, उच्च कोटि की विश्वसनीयता का मूल्य रखता है, क्योंकि वह निकासी प्रपत्रों के हजारों हस्ताक्षरों का मिलान एवं तुलना करता होगा – पुनरीक्षण खारिज। (म.प्र. राज्य वि. नारायण सिंह) (DB)...946

दण्ड संहिता (1860 का 45), धारा 420 – शिकायत प्रकट करती है कि अभिकथन सिविल स्वरुप के हैं और प्रथम दृष्टया छल का दाण्डिक अपराध कारित होना नहीं दर्शाते – अतः शिकायत में मात्र 'छल' शब्द के प्रयोग को कोई महत्व नहीं। (बलवंत सिंह तोमर उर्फ बलवंता वि. तिग्मांशु धूलिया) ...967

दण्ड संहिता (1860 का 45), धाराऐं 467 व 468 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 211 (बसंत कुमार रावत वि. म.प्र. राज्य) ...950

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Public Trusts Act, M.P. (30 of 1951), Sections 8 & 9 - Notice to affected parties - Board of Trustees removed certain trustees and appointed new trustees by passing resolution - Application was made to Registrar to record the changes brought in trusteeship of Public Trust - Registrar accordingly recorded the changes in trusteeship - Meeting of Board of Trustees was held without giving any notice to the removed trustees - Registrar, also recorded the changes without issuing notices to the removed trustees - Registrar should have issued notices to the removed trustees about the proposed changes and then should have passed appropriate order after hearing them - Remedy of Civil Suit under Section 8 of the Act is available to the removed trustees even if changes would have been accepted by the Registrar by holding an enquiry in accordance with law after giving notice to the removed trustees - As principles of natural justice were not followed therefore, the order passed by Registrar is bad and rightly quashed by Single Judge - Appeal dismissed. [Sushil Kumar Kasliwal Vs. State of M.P.] (DB)...1296

Railways Act (24 of 1989), Sections 123, 124-A - Compensation - Deceased was a bonafide passenger and fell down from the train - Respondents opposed the petition alleging that the train had no scheduled stoppage and after it passed the station, alarm chain was pulled and the co-passenger got down however before the deceased could get down the train started again and the deceased got down from the running train as a result of which he sustained injuries - Co-passenger controverted the statement recorded by police - Respondents did not examine the person who had recorded the statement of co-passenger - Since the death was not suicide or his own criminal act, Tribunal wrongly dismissed the petition - Respondents directed to pay the amount of compensation as prescribed in death case along with interest from the date of application as prescribed. [Sushila Bai (Smt.) Vs. Union of India] ...1394

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लोक न्यास अधिनियम, म.प्र. (1951 का 30), धाराऐं 8 व 9 – प्रभावित पक्षकार को नोटिस – न्यासियों के बोर्ड ने संकल्प पारित कर कतिपय न्यासियों को हटाया और नये न्यासियों को नियुक्त किया – लोक न्यास की न्यासधारिता मे लाये गये बदलाव को अभिलिखित किये जाने के लिए रजिस्ट्रार को आवेदन किया गया – रजिस्ट्रार ने तद्नुसार न्यासधारिता में बदलाव अभिलिखित किये – न्यासियों के बोर्ड की सभा हटाये गये न्यासियों को सूचना दिये बिना कराई गई थी – रजिस्ट्रार ने भी, हटाये गये न्यासियों को नोटिस जारी किये बिना बदलाव अभिलिखित किये – रजिस्ट्रार को प्रस्तावित बदलाव के बारे में हटाये गये न्यासियों को नोटिस जारी करने चाहिए थे और उन्हें सुने जाने के पश्चात समुचित आदेश पारित करना चाहिए था – हटाये गये न्यासियों को तब भी अधिनियम की धारा 8 के अंतर्गत सिविल वाद का उपचार उपलब्ध है यदि रजिस्ट्रार द्वारा हटाये गये न्यासियों को नोटिस देने के पश्चात विधिनुसार जांच कर, बदलावों को स्वीकार किया जाता – चूंकि नैसर्गिक न्याय के सिद्धांतों का पालन नहीं किया गया, इसलिए रजिस्ट्रार द्वारा पारित किया गया आदेश अनुचित तथा एकल न्यायमूर्ति द्वारा उचित रुप से अभिखंडित किया गया – अपील खारिज। (सुशील कुमार कासलीवाल वि. म.प्र. राज्य) **(DB)...1296**

रेल अधिनियम (1989 का 24), धाराऐं 123, 124ए – प्रतिकर – मृतक वास्तविक यात्री था और ट्रेन से नीचे गिरा – प्रत्यर्थीगण ने यह अभिकथित करते हुए याचिका का विरोध किया कि ट्रेन का कोई निर्धारित ठहराव नहीं था और स्टेशन पार करने के पश्चात, खतरे की जंजीर खींची गयी और सह यात्री उतर गया, परन्तु इससे पहले कि मृतक उतर पाता, ट्रेन पुनः चल पड़ी और मृतक चलती ट्रेन से नीचे उतरा जिसके परिणामस्वरुप उसे चोटें आयीं – सह यात्री ने पुलिस द्वारा अभिलिखित कथन का खंडन किया – प्रत्यर्थीगण ने उस व्यक्ति का परीक्षण नहीं किया जिसने सह यात्री का कथन अभिलिखित किया था – चूंकि मृत्यु, आत्महत्या नहीं थी या उसका स्वयं का आपराधिक कृत्य नहीं था, अधिकरण ने अनुचित रुप से याचिका खारिज की – प्रत्यर्थीगण को मृत्यु प्रकरण में यथा विहित प्रतिकर, आवेदन की तिथि से ब्याज के साथ जैसा कि विहित किया गया है, अदा करने के लिए निदेशित किया गया। (सुशीला बाई (श्रीमति) वि. यूनियन ऑफ इंडिया) **...1394**

रेल दावा अधिकरण अधिनियम (1987 का 54), धारा 17(1)(बी)(2) – विलंब के लिए माफी – मोटर यान अधिनियम की धारा 166(3) को हटाये जाने के पश्चात, दावा अधिकरण को उदार दृष्टिकोण अपनाना चाहिए था और दावा याचिका को मात्र पांच वर्ष के विलंब के आधार पर खारिज नहीं करना चाहिए था – अपील मंजूर और मामला गुणदोषों पर निर्णित किये जाने हेतु अधिकरण को प्रतिप्रेषित। (एम. पीताम्बर वि. यूनियन ऑफ इंडिया) **...1107**

रजिस्ट्रीकरण अधिनियम (1908 का 16), धारा 17, सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 5 – सम्पत्ति का अंतरण – रजिस्ट्रीकरण – किसी वैध

cannot be a valid transfer of ownership of building in question to the State Govt. in absence of a valid conveyance deed - In terms of Section 17(b) of Act, 1908, registration of the documents is mandatory as the value of the property is more than Rs. 100/-. [Nagar Palika Parishad Vs. State of M.P.] ...1092

Representation of the People Act (43 of 1951), Section 33 - Presentation of Valid Nomination - Caste - Constituency was reserved for Scheduled Caste - Petitioner had sought to contest the election as member of Scheduled Caste - However, error crept in showing him as a candidate belonging to General Category on one page of form - Not sufficient to reject the same on the ground of disqualification. [Rajesh Kumar Vs. Devendra Singh] ...1072

Representation of the People Act (43 of 1951), Section 33 - Presentation of Valid Nomination - Incomplete Electoral Roll - Petitioner filed incomplete electoral roll - No where pleaded that he or his authorized representative was present at the time of scrutiny of nomination paper and had requested for postponing the scrutiny to the next day so as to enable him to file a complete copy of electoral roll - As per Section 33(5) electoral roll could be produced only either with the nomination paper or at the time of scrutiny - Statute does not contemplate any other time for production of such copy - Returning officer did not commit any impropriety in rejecting petitioner's nomination form - Petition dismissed. [Rajesh Kumar Vs. Devendra Singh] ...1072

Representation of the People Act (43 of 1951), Sections 33 & 36 - Presentation of Valid Nomination - Power of Election Tribunal - Election Tribunal is not bound to confine itself only to the material available to the Returning Officer at the time of scrutiny - Tribunal is well within its power in considering the question of propriety and legality of order of rejection of nomination papers on the evidence produced in the course of trial of the election petition. [Rajesh Kumar Vs. Devendra Singh] ...1072

Representation of the People Act (43 of 1951), Section 100 - Election Petition - Caste Certificate - Election petition is intended to focus any illegality attached to the election - Scrutiny as to the authenticity of the caste certificate furnished by the returned candidate before the returning officer is not beyond the scope of an election dispute. [Ram Lal Kol Vs. Moti Kashyap @ Motilal] ...1364

हस्तातंरण पत्र की अनुपस्थिति में राज्य सरकार को प्रश्नगत भवन के स्वामित्व का वैध अंतरण नहीं हो सकता – अधिनियम 1908 की धारा 17(बी) की शर्तों नुसार, दस्तावेजों का रजिस्ट्रीकरण आज्ञापक है क्योंकि सम्पत्ति का मूल्य 100/–रुपये से अधिक है। (नगर पालिका परिषद् वि. म.प्र. राज्य) ...1092

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33 – वैध नामांकन का प्रस्तुतीकरण – जाति – निर्वाचन क्षेत्र अनुसूचित जाति के लिए आरक्षित था – याची ने अनुसूचित जाति के सदस्य के रुप में चुनाव लड़ना चाहा – किन्तु, उसे प्रपत्र के एक पृष्ठ पर सामान्य श्रेणी का प्रत्याशी दर्शाने की त्रुटि सामने आयी – अपात्रता के आधार पर अस्वीकार किये जाने के लिये यह पर्याप्त नहीं। (राजेश कुमार वि. देवेन्द्र सिंह) ...1072

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 33 – वैध नामांकन का प्रस्तुतीकरण – अपूर्ण निर्वाचक नामावली – याची ने अपूर्ण निर्वाचक नामावली प्रस्तुत की – कहीं भी अभिवाक् नहीं कि नामांकन पत्र की संविक्षा के समय वह या उसका प्राधिकृत प्रतिनिधि उपस्थित था और संविक्षा को अगले दिन के लिए मुल्तवी करने का निवेदन किया गया जिससे कि वह निर्वाचक नामावली की संपूर्ण प्रति प्रस्तुत कर सके – धारा 33(5) के अनुसार निर्वाचक नामावली केवल, या तो नामांकन पत्र के साथ या संविक्षा के समय प्रस्तुत की जा सकती है – उक्त प्रति को किसी और समय प्रस्तुत करने के लिए कानून अनुध्यात नहीं करता – निर्वाचन अधिकारी ने याची का नामांकन पत्र अस्वीकार करने में कोई अनुचितता कारित नहीं की – याचिका खारिज। (राजेश कुमार वि. देवेन्द्र सिंह) ...1072

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धाराऐं 33 व 36 – वैध नामांकन का प्रस्तुतीकरण – निर्वाचन अधिकरण की शक्ति – निर्वाचन अधिकरण, संविक्षा के समय केवल चुनाव अधिकारी को उपलब्ध सामग्री तक ही स्वयं को सीमित रखने के लिए बाध्य नहीं – अधिकरण को निर्वाचन याचिका के विचारण के दौरान प्रस्तुत साक्ष्य पर नामांकन पत्रों की अस्वीकृति के आदेश का औचित्य एवं वैधता के प्रश्न पर विचार करने की शक्ति भलिभांति प्राप्त है। (राजेश कुमार वि. देवेन्द्र सिंह) ...1072

लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100 – निर्वाचन याचिका – जाति प्रमाण पत्र – निर्वाचन याचिका का आशय निर्वाचन से जुड़ी किसी अवैधता को दर्शित करना है – निर्वाचित प्रत्याशी द्वारा चुनाव अधिकारी के समक्ष प्रस्तुत जाति प्रमाण पत्र की प्रमाणिकता के बारे में संविक्षा, निर्वाचन विवाद की परिधि से परे नहीं। (राम लाल कोल वि. मोती कश्यप उर्फ मोतीलाल) ...1364

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Representation of the People Act (43 of 1951), Section 100 - Election Petition - Caste Certificate - The fact that the returned candidate was permitted to contest the earlier elections to the seat reserved for S.T. is of no consequence as the authenticity of the caste certificate was never examined on judicial side. [Ram Lal Kol Vs. Moti Kashyap @ Motilal]...1364

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Sections 2(c), 3(1)(v) - Caste Certificate - Prosecution has to prove by cogent and an impeachable evidence that complainant falls within castes, races or tribes or parts of or groups within such castes, races or tribes which have been notified as Scheduled Castes or Tribes - Caste certificate issued by competent authority ought to be produced to discharge such burden - Mere saying of complainant that he belongs to Scheduled Caste or Tribe is not sufficient - Prosecution has failed to prove that complainant belongs to Scheduled Caste - Consequently charge under Section 3(1)(v) of the Act is also not found proved. [Har Lal Vs. State of M.P.] ...1440

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 3(1)(x) - It must be prima facie clear that the incident took place in 'public view' - An essential ingredient of the section - If it is not clear prima facie bail u/s 438 can be granted - However the discussion made in the bail order will not affect the trial of the case in any manner. [Ummed Singh Vs. State of M.P.] ...1214

Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (33 of 1989), Section 18 - See - Criminal Procedure Code, 1973, Section 438 [Ummed Singh Vs. State of M.P.] ...1214

Service Law - Contractual Appointment - The Principle of Natural Justice and Article 14 of Constitution shall apply - National Institute of Open Schooling (NIOS) running under the aegis of Ministry of Human Resources Development,Govt.of India - It is equivalent to all Boards like CBSE, CISCE - Therefore its Vocational Certificates cannot be discarded merely on the ground that it is not affiliated with NCVT - Narrow interpretation of eligibility condition will lead to absurdity and create conflict between recognized institutions of the Government - The order of termination on this ground without following the principle of natural Justice liable to be set aside. [Prem Chand Yadav Vs. Madhya Pradesh Poorva Kshetra Vidyut Vitran Co. Ltd.] ...*22

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लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100 – निर्वाचन याचिका – जाति प्रमाण पत्र – तथ्य कि निर्वाचित प्रत्याशी को पूर्व के चुनावों में एस.टी. के लिए आरक्षित सीट पर लड़ने की अनुमति दी गई थी, का कोई महत्व नहीं क्योंकि जाति प्रमाण पत्र की प्रमाणिकता की न्यायिक रुप से जांच कभी नहीं की गई थी। (राम लाल कोल वि. मोती कश्यप उर्फ मोतीलाल) ...1364

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धाराऐं 2(सी), 3(1)(v)– जाति प्रमाण पत्र – अभियोजन को तर्कपूर्ण एवं संदेह से परे साक्ष्य द्वारा साबित करना चाहिए कि शिकायतकर्ता ऐसी जाति, वर्ण या जनजाति अथवा उक्त जाति, वर्ण या जनजाति के भीतर के भाग या समूह के अंतर्गत आता है, जिसे अनुसूचित जाति या जनजाति के रुप में अधिसूचित किया गया है – उक्त भार के उन्मोचन हेतु सक्षम प्राधिकारी द्वारा जारी किया गया जाति प्रमाण पत्र प्रस्तुत किया जाना चाहिए – शिकायतकर्ता का मात्र यह कहना कि वह अनुसूचित जाति या जनजाति का है, पर्याप्त नहीं – अभियोजन साबित करने में असफल रहा कि शिकायतकर्ता अनुसूचित जाति का है – परिणामस्वरुप अधिनियम की धारा 3(1)(v) के अंतर्गत आरोप भी साबित नहीं पाया। (हरलाल वि. म.प्र. राज्य) ...1440

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 3(1)(x) – यह प्रथम दृष्ट्या स्पष्ट होना चाहिए कि घटना 'लोक दृष्टिगोचर' घटित हुई – धारा का आवश्यक घटक है – यदि यह प्रथम दृष्टया स्पष्ट नहीं, तब धारा 438 के अंतर्गत जमानत प्रदान की जा सकती है – किन्तु जमानत आदेश में की गई विवेचना, प्रकरण के विचारण को किसी प्रकार से प्रभावित नहीं करेगी। (उम्मेद सिंह वि. म.प्र. राज्य) ...1214

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 18 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 438 (उम्मेद सिंह वि. म.प्र. राज्य) ...1214

सेवा विधि – संविदात्मक नियुक्ति – नैसर्गिक न्याय का सिद्धांत एवं संविधान का अनुच्छेद 14 लागू होगा – राष्ट्रीय मुक्त विद्यालय संस्थान (NIOS) भारत सरकार के मानव संसाधन विकास मंत्रालय के संरक्षण में संचालित होता है – यह सभी बोर्ड जैसे सीबीएसई, सीआईएससीई के समकक्ष है – इसके व्यावसायिक प्रमाण पत्र को केवल इस आधार पर अस्वीकार नहीं किया जा सकता कि यह एनसीव्हीटी के साथ संबंद्ध नहीं है – अर्हता शर्तों की संकीर्ण व्याख्या बेतुकी होगी और शासन के मान्यता प्राप्त संस्थानों के बीच विरोधाभास उत्पन्न करेगी – नैसर्गिक न्याय के सिद्धांतों का पालन किये बिना, उक्त आधार पर सेवा समाप्ति का आदेश अपास्त किये जाने योग्य। (प्रेम चंद यादव वि. म.प्र. पूर्व क्षेत्र विद्युत वितरण कंपनी लि.) ...*22

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Service Law - Date of birth - Attestation - If any entry is made, there must be some attesting proof of the same available in the service record - Without there being any attesting proof, the correctness of the date of birth recorded in the service record is not acceptable. [Bhai Lal Burma Vs. Food Corporation of India] ...*23

Service Law - Date of birth - Manipulation in entries - Manipulation was not engineered by the petitioner - In such circumstances, it was the duty of the respondents No. 1 & 2 to get the age of the petitioner verified. [Bhai Lal Burma Vs. Food Corporation of India] ...*23

Service Law - Departmental Enquiry - Competent Authority - State Govt., in view of Income Tax raid directed the Corporation to suspend and take disciplinary action against the petitioner - Commissioner placed the petitioner under suspension and issued Charge sheet - Mayor-in-council, which is the appointing authority by its resolution approved and sanctioned the action being taken by Commissioner in compliance of order issued by State Govt. - Single Judge had quashed the order of suspension and had dismissed the petition regarding competency of issuance of Charge sheet - As no appeal has been filed against the order quashing the suspension, therefore, the result is not interfered with although the findings in that regard are set aside - Appeal dismissed. [K. K. Singh Chouhan Vs. State of M.P.] (DB)...989

Service Law - Higher Pay Scale - Scheme was formulated for giving the benefit of placement in pay scale on completion of 9/18/25 years of service - Benefit was denied on the ground that he was not sent for training on account of becoming overage - Held - Respondents have failed to show any scheme for selection was prescribed for sending any persons for technical training in training institute - Petitioner cannot be held responsible in absence of any such scheme - He on his own also could not have made an application to the Training Institute for admitting him for such training - There was no fault on the part of the petitioner so as to deny the benefit of consideration for grant of second higher pay scale. [Ganesh Prasad Tiwari Vs. The Secretary/Addl. Secretary, M.P.S.E.B.] ...802

Service Law - House Rent Allowance - Grant of - H.R.A. is required to be paid to only one spouse and not to both if they are living together in one house. [Baby John Vs. State of M.P.] ...785

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सेवा विधि – जन्म तिथि – अनुप्रमाणन – यदि कोई प्रविष्टि की जाती है, तब उसका कोई अनुप्रमाणित सबूत, सेवा अभिलेख में उपलब्ध होना चाहिए – किसी अनुप्रमाणित सबूत के बिना, सेवा अभिलेख में अभिलिखित जन्म तिथि की प्रमाणिकता स्वीकार्य नहीं। (भाई लाल बर्मा वि. फुड कारपोरेशन ऑफ इंडिया) ...*23

सेवा विधि – जन्म तिथि – प्रविष्टियों में हेरफेर – याची द्वारा हेरफेर को अंजाम नहीं दिया गया – ऐसी परिस्थितियों में, याची के वय को सत्यापित करवाना प्रत्यर्थी क्र. 1 व 2 का कर्तव्य था। (भाई लाल बर्मा वि. फुड कारपोरेशन ऑफ इंडिया) ...*23

सेवा विधि – विभागीय जांच – सक्षम प्राधिकारी – राज्य सरकार ने आयकर छापे को दृष्टिगत रखते हुए निगम को याची को निलंबित करने और अनुशासनिक कार्यवाही करने के लिए निदेशित किया – आयुक्त ने याची को निलंबित किया और आरोप पत्र जारी किया – महापौर परिषद जो नियोक्ता प्राधिकारी है, ने अपने संकल्प द्वारा, राज्य सरकार द्वारा जारी किये गये आदेश के अनुपालन में आयुक्त द्वारा की गई कार्यवाही का अनुमोदन किया और मंजूरी दी – एकल न्यायपीठ ने निलंबन आदेश अभिखंडित किया और आरोप पत्र जारी किये जाने की सक्षमता से संबंधित याचिका खारिज की – चूंकि निलंबन अभिखंडित करने के आदेश के विरुद्ध कोई अपील नहीं की गई इसलिए परिणाम में हस्तक्षेप नहीं, यद्यपि उसके संबंध में निष्कर्ष अपास्त – अपील खारिज। (के. के. सिंह चौहान वि. म.प्र. राज्य) (DB)...989

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सेवा विधि – गृह भाड़ा भत्ता – की मंजूरी – गृह भाड़ा भत्ता, पति या पत्नी में से केवल एक को दिया जाना अपेक्षित है और न कि दोनों को यदि वे एक घर में एक साथ निवासरत हैं। (बेबी जॉन वि. म.प्र. राज्य) ...785

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Service Law - Krammonati - Scheme - Annual Confidential Report - In case an employee is granted the benefit of Krammonati or the first Higher Pay Scale, his A.C.R.s are not required to be considered for the purposes of granting second higher pay scale, as per the scheme. [Baby John Vs. State of M.P.] ...785

Service Law - Officiating Post - Officiating posting will not mean an appointment to the post carrying higher responsibility. [Union of India Vs. Radhelal Goud] (DB)...1325

Service Law - Police Regulations - Regulation 226 - Punishment - Removal from Service - Quantum - Police Regulations are having statutory force - Clauses (iii) and (v) of Regulation 226 are applicable to constables and pertains to the penalty to be awarded to a Constable - Charges were framed in regard to disobeying lawful orders of Superiors, therefore, before passing the extreme order of punishment of removal from service, clauses (iii) and (v) of Regulation ought to have been seen by Disciplinary as well as Appellate Authority - Matter remanded back to disciplinary authority to examine the case vis-à-vis Regulation 226 and fresh order in accordance to law may be passed. [Ganesh Kumar Sharma Vs. State of M.P.] (DB)...*15

Service Law - Promotion - Committee constituted for considering the Senior Lecturer for promotion to the post of Reader recommended the name of petitioner along with other Senior Lecturers - Recommendations of Committee also approved by Executive Council - Promotion of petitioner was stayed on the ground of pendency of Departmental Enquiry - Held - There is no material to show that when the promotion was recommended by Committee, any charge sheet was issued to the petitioner or any Departmental Enquiry was pending - Issuance of Charge sheet subsequent to promotion will not hamper the promotion recommended on merit - Petitioner be promoted as per recommendation of committee which were affirmed by Executive Council - Petition partly allowed. [Amitabh Shukla (Dr.) Vs. Rani Durgawati Vishwavidyalaya] ...797

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सेवा विधि – क्रमोन्नति – योजना – वार्षिक गोपनीय प्रतिवेदन – कर्मचारी को क्रमोन्नति का या प्रथम उच्चतर वेतनमान का लाभ प्रदान किये जाने की स्थिति में योजना के अनुसार, उसे द्वितीय उच्चतर वेतनमान प्रदान करने के प्रयोजन हेतु, उसके वार्षिक गोपनीय प्रतिवेदनों को विचार में लेना अपेक्षित नहीं। (बेबी जॉन वि. म.प्र. राज्य) ...785

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सेवा विधि – पुलिस विनियमन – विनियमन 226 – शास्ति – सेवा से हटाया जाना – मात्रा – पुलिस विनियमन को कानूनी बल प्राप्त है – विनियमन 226 के खंड (iii) व (v), आरक्षकों पर लागू होते हैं और आरक्षक को दी जाने वाली शास्ति से संबंधित है – वरिष्ठों के विधिपूर्ण आदेशों की अवेहलना के संबंध में आरोप विरचित किये गये हैं, इसलिए, सेवा से हटाये जाने का आत्यांतिक आदेश पारित करने से पूर्व विनियमन के खंड (iii) व (v) को अनुशासनिक प्राधिकारी तथा अपीली प्राधिकारी द्वारा देखा जाना चाहिए था – प्रकरण का, विनियमन 226 सामने रखकर परीक्षण करने के लिए अनुशासनिक प्राधिकारी को मामला प्रतिप्रेषित एवं विधि के अनुसार नया आदेश पारित किया जा सकता है। (गणेश कुमार शर्मा वि. म.प्र. राज्य) (DB)...*15

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promotion to the administrative post the original seniority of Assistant Surgeon ought to be considered - Petition allowed. [S.K. Saxena (Dr.) Vs. State of M.P.] ...*18

Service Law - Promotion - Promotion is not a right though consideration is - Initiation of promotion will not create any right in incumbent nor promotions made at the later date can be treated from the date of initiation of proceedings. [Union of India Vs. Rajendra Prasad Yadav] (DB)...1008

Service Law - Seniority - Traction Rolling Stock in Electric Loco Shed was formed and 216 posts of group D posts were required to be filled - Applications were invited from eligible Group D employees - Seniority of staff transferred from different units of Central Railway is to be decided upon the length of substantive post held by such staff in their parent cadre and not from the date of their joining in TRS. [Union of India Vs. Rajendra Prasad Yadav] (DB)...1008

Service Law - State Administrative Service Classification Recruitment & Condition of Service Rules, M.P., 1975, Rule 13(3) - The word 'prescribed' is used in relation to 'examination' and not in relation to the word 'question papers' - An officer is required to pass the prescribed examination and the department is not bound to confine the examination only to the papers - The Employer is the best judge to decide as to which kind of papers are required to be introduced with a view to equip its officers with proper knowledge - Employer can always Add, Amend or Reduce the number of papers - Once new paper is inserted in the examination the said paper forms part of 'prescribed examination' - Petitioner is required to pass the said exam. within the time initially granted i.e. two years - Department can assign seniority to the probationer from the date she has completed probation and passed the departmental exam. [Minakshi Singh (Smt.) Vs. State of M.P.] ...1332

Service Law - Time Scale of Pay Upgradation Policy - Petitioner was granted first Kramonnati - Benefit of Upgradation in time scale pay was not granted on the ground that the petitioner did not fulfill the criteria evolved by the D.P.C. - As per Policy once the employee has been granted the benefit of Kramonnati in terms of scheme, his ACRS would not be reassessed for the purposes of granting the benefit under New Scheme - Petitioner was also granted promotions - Held - Those

सहायक शल्य चिकित्सक की मूल वरिष्ठता को विचार में लिया जाना चाहिए था – याचिका मंजूर। (एस.के. सक्सेना (डॉ.) वि. म.प्र. राज्य) ...*18

सेवा विधि – पदोन्नति – पदोन्नति, अधिकार नहीं है, यद्यपि विचार किया जाना, अधिकार है – पदोन्नति के प्रवर्तन से पदधारी के किसी अधिकार का सृजन नहीं होगा और न ही बाद की तिथि में दी गई पदोन्नतियों को कार्यवाही आरंभ होने की तिथि से समझा जा सकता है। (यूनियन ऑफ इंडिया वि. राजेन्द्र प्रसाद यादव) (DB)...1008

सेवा विधि – ज्येष्ठता – इलेक्ट्रिक लोको शैड में ट्रेक्शन रोलिंग स्टॉक बनाया गया और ग्रुप 'डी' पदों के 216 पद भरा जाना अपेक्षित था – ग्रुप 'डी' के पात्रताधारी कर्मचारियों से आवेदन आमंत्रित किये गये – मध्य रेल के विभिन्न ईकाईयों से स्थानांतरित स्टाफ की ज्येष्ठता का निर्धारण, उक्त स्टाफ द्वारा उनके पैतृक कैडर में धारण किये गये मूल पद की अवधि पर किया जाना चाहिए और न कि उनके द्वारा टीआरएस में कार्यग्रहण की तिथि से। (यूनियन ऑफ इंडिया वि. राजेन्द्र प्रसाद यादव) (DB)...1008

सेवा विधि – राज्य प्रशासनिक सेवा वर्गीकरण, भर्ती एवं सेवा शर्तें नियम, म.प्र. 1975, नियम 13(3) – शब्द " विहित" का उपयोग "परीक्षा" से संबंधित है और न कि शब्द 'प्रश्नपत्र' से संबंधित – एक अधिकारी को विहित परीक्षा उत्तीर्ण करना आवश्यक है और विभाग, परीक्षा को केवल प्रश्नपत्रों तक सीमित रखने के लिए बाध्य नहीं है –नियोक्ता ही सर्वोत्तम निर्णयकर्ता है वह विनिश्चय करने के लिए कि उसके अधिकारियों को समुचित ज्ञान के साथ तैयार करने की दृष्टि से किस प्रकार के प्रश्नपत्रों को शामिल किया जाना आवश्यक है – नियोक्ता सदैव प्रश्नपत्रों की संख्या को जोड़, संशोधित या कम कर सकता है – एक बार यदि परीक्षा में नया प्रश्नपत्र समाविष्ट किया जाता है, तब उक्त प्रश्नपत्र 'विहित परीक्षा' का भाग बन जाता है – याची को उक्त परीक्षा आरंभ में प्रदान की गई समय सीमा अर्थात दो वर्ष के भीतर उत्तीर्ण करना आवश्यक है – विभाग, परीवीक्षाधीन को उस तिथि से वरिष्ठता दे सकता है जब उसने परीवीक्षा पूर्ण की और विभागीय परीक्षा उत्तीर्ण की है। (मीनाक्षी सिंह (श्रीमति) वि. म.प्र. राज्य) ...1332

सेवा विधि – समयमान वेतन का उन्नयन नीति – याची को प्रथम क्रमोन्नति दी गई थी – समयमान वेतन के उन्नयन का लाभ इस आधार पर नहीं दिया गया कि याची विभागीय पदोन्नति समिति द्वारा प्रस्तुत मापदंडों को पूरा नहीं करता – नीति के अनुसार कर्मचारी को एक बार योजना की शर्तों के अनुसार क्रमोन्नति का लाभ दिये जाने पर, नई योजना के अंतर्गत लाभ देने के प्रयोजन हेतु उसके वार्षिक गोपनीय प्रतिवेदन का पुनः निर्धारण नहीं किया जावेगा – याची को पदोन्नतियां भी दी जा चुकी हैं – अभिनिर्धारित – वे कर्मचारी जिन्हें प्रथम या द्वितीय उन्नयन, क्रमोन्नति योजना के अंतर्गत दिया जा चुका है या वे जिन्हें पदोन्नति दी जा चुकी

employees who have been granted first or second upgradation under Kramonnati Scheme or those who have been granted promotions were entitled to be granted the second time scale pay under the new Scheme without referring their cases to any scrutiny Committee - Powers was delegated to the Head of Department - Refusal to grant second upgradation on the ground that the petitioner had not achieved the benchmark is not justified - Petition allowed. [Rajaram Patel Vs. State of M.P.] ...1319

Service Law - Transfer - Is a condition of service - Order can only be interfered if it violates any statutory provision, proved to be malafide, changes service conditions of an employee to his detriment or is contrary to law. [K.K. Arya Vs. M.P. Madhya Kshetra Vidyut Vitran Co. Ltd.] ...780

Service Law - Voluntary Retirement - Appellant in his application for voluntary retirement did not raise any specific condition for appointment of his son but simply requested to consider on humanitarian ground - In the light of Rules request for appointment of his son cannot be treated as a condition precedent for his voluntary retirement - Application for voluntary retirement which was in prescribed form was rightly accepted by the authority - Appeal dismissed. [Kamta Prasad Pandey Vs. State of M.P.] (DB)...*20

Service of Higher Pay Scale - Job Responsibility - Respondents have not clarified that any greater responsibility or a different higher technical job is required to be discharged by the Line Asstt. Grade II - Petitioner was already working as Line Attendant Grade I for a considerable long time - If the job responsibility was same, the benefit of experience of working could not have been denied to the Petitioner. [Ganesh Prasad Tiwari Vs. The Secretary/Addl. Secretary, M.P.S.E.B.] ...802

Society Registrikaran Adhiniyam, M.P. (44 of 1973), Sections 31(1) & 32(3) - If a thing is required to be done in a particular manner in a statute, it has to be done in the same manner or not at all - The other methods which are not in consonance with the statute are forbidden. [Pratap Wahini Samaj Kalyan Sansthan Vs. State of M.P.] ...*16

Society Registrikaran Adhiniyam, M.P. (44 of 1973) - Section

है, उनके प्रकरण बिना किसी छानबीन समिति के पास भेजे, वे नई योजना के तहत द्वितीय समयमान वेतनमान पाने के पात्र होंगे – विभाग प्रमुख को शक्तियां प्रत्यायोजित थी – द्वितीय उन्नयन प्रदान किये जाने से इंकार इस आधार पर करना कि याची ने गुणवत्ता अर्जित नहीं की, न्यायोचित नहीं है – याचिका मंजूर। (राजाराम पटेल वि. म.प्र. राज्य) ...1319

सेवा विधि – स्थानांतरण – सेवा की शर्त है – आदेश में हस्तक्षेप केवल तब किया जा सकता है यदि वह किसी कानूनी उपबंध का अतिलंघन करता है, दुराशय साबित होता है, कर्मचारी को हानि पहुंचाते हुए सेवा शर्तें बदल देता है या विधि विरुद्ध है। (के.के. आर्य वि. म.प्र. मध्य क्षेत्र विद्युत वितरण कं. लि.) ...780

सेवा विधि – स्वैच्छिक सेवानिवृत्ति – अपीलार्थी ने स्वैच्छिक सेवा निवृत्ति के अपने आवेदन में, अपने पुत्र की नियुक्ति की कोई विनिर्दिष्ट शर्त नहीं रखी, बल्कि केवल मानवीयता के आधार पर विचार करने का निवेदन किया – नियमों के आलोक में, उसके पुत्र की नियुक्ति का निवेदन, उसकी स्वैच्छिक सेवानिवृत्ति हेतु पुरोभावी शर्त नहीं माना जा सकता – स्वैच्छिक सेवा निवृत्ति हेतु आवेदन, जो विहित प्रारुप में था, उसे प्राधिकारी द्वारा उचित रुप से स्वीकार किया गया – अपील खारिज। (कामता प्रसाद पाण्डे वि. म.प्र. राज्य) (DB)...*20

उच्चतर वेतनमान की सेवा – कार्य का दायित्व – प्रत्यर्थीगण ने स्पष्ट नहीं किया है कि लाईन सहायक ग्रेड– II द्वारा कोई गुरुत्तर दायित्व या भिन्न उच्चतर तकनीकी कार्य का निर्वाहन अपेक्षित है – याची पहले ही लम्बे समय से लाईन अटेन्डेन्ट ग्रेड–I के रुप में कार्यरत था – यदि कार्य का दायित्व समान था, तब याची को कार्य के अनुभव का लाभ अस्वीकार नहीं किया जा सकता था। (गणेश प्रसाद तिवारी वि. द सेक्रेटरी/एडी. सेक्रेटरी, एम.पी.एस.ई.बी.) ...802

सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44), धाराऐं 31(1) व 32(3) – यदि किसी कानून में किसी कार्य को किसी विशिष्ट ढंग से किया जाना अपेक्षित है, उसे उसी ढंग से किया जाना चाहिए अन्यथा नहीं करना चाहिए – अन्य रीतियां जो कानून के अनुरुप नहीं है, निषिद्ध है। (प्रताप वाहिनी समाज कल्याण संस्थान वि. म.प्र. राज्य) ...*16

सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. (1973 का 44) – धारा 32 – जांच

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32 - Enquiry and settlement of disputes - Natural Justice - The principles of natural justice are implicit and are required to be read into section 32(4) of the Adhiniyam - In cases, whether after supplying the result of the enquiry, the Registrar receives the response of the society and if he intends to pass any order which affects the right of the society in any manner or which may entail civil consequences, the Registrar is bound to follow the principles of natural justice and fair play in action. [Central Homeopathic & Biochemic Association, Gwalior Vs. State of M.P.] ...837

Specific Relief Act (47 of 1963), Section 6 - Resistance - Plaintiff who is in possession of suit property, can resist interference of defendant who has no better title than himself and can get injunction restraining defendant from disturbing his possession. [Gulab Singh Vs. Virendra Singh] ...1474

Specific Relief Act (47 of 1963), Section 6 - Restoration of Possession - Plaintiff who was encroacher having no title over the suit property was in peaceful possession and whose possession was found in the revenue record - Defendant forcibly dispossessed him by taking law in his own hands - Plaintiff can sue the defendant/owner who has forcibly ousted him. [Gulab Singh Vs. Virendra Singh] ...1474

Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Defendant alleged to have approached the plaintiff to sell 5 acres of land on 07.03.1990 and agreement to sell was executed on the same day - Normally intending purchaser will never purchase an immovable property without examining it - Suit property is also adjacent to river and growing good crops - Evidence available on record also shows that defendant was threatened by putting him into fear of his arrest by police and under coercion and undue influence he put his signatures upon the document of agreement of sale - Circumstances available on record clearly show that the agreement to sell was suspicious document - Suit dismissed - Appeal allowed. [Kishan Lal Vs. Ashok Kumar] ...885

Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Defendant having 21 acres of land deriving profit out of it - No evidence that the defendant wanted to establish a business or was unable to manage the land or was not obtaining profit

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एवं विवादों का निपटारा – नैसर्गिक न्याय – नैसर्गिक न्याय के सिद्धांत अडिग है एवं अधिनियम की धारा 32 (4) के साथ इन्हें पढ़ा जाना अपेक्षित है – प्रकरणों में, जांच के परिणाम को प्रदाय करने के पश्चात् यदि रजिस्ट्रार, सोसायटी की प्रतिक्रिया प्राप्त करता है और यदि वह कोई आदेश पारित करना चाहता है जिससे किसी रूप में सोसायटी के अधिकार प्रभावित होते हैं या परिणामस्वरूप दीवानीवाद उत्पन्न होता है, रजिस्ट्रार उचित कार्यवाही एवं नैसर्गिक न्याय के सिद्धांत का पालन करने हेतु बाध्य है। (सेन्ट्रल होमियोपेथिक एण्ड बायोकेमिक एसोसिएशन, ग्वालियर वि. म.प्र. राज्य) ...837

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – प्रतिकार – वादी, जिसके कब्जे में वाद सम्पत्ति है, प्रतिवादी जिसका उससे (वादी से) कोई बेहतर हक नहीं, उसके हस्तक्षेप का प्रतिकार कर सकता है और अपने कब्जे में व्यवधान डालने से प्रतिवादी को रोकने का व्यादेश प्राप्त कर सकता है। (गुलाब सिंह वि. वीरेन्द्र सिंह) ...1474

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – कब्जे का प्रत्यावर्तन – वादी, जो अतिक्रमणकर्ता था, जिसका वाद सम्पत्ति पर कोई हक नहीं था, वह अनन्य रुप से कब्जाधारी था और जिसका कब्जा, राजस्व अभिलेख में पाया गया – प्रतिवादी ने कानून अपने हाथ में लेकर उसे बलपूर्वक बेकब्जा किया – वादी, प्रतिवादी/स्वामी पर मुकदमा कर सकता है जिसने उसे बलपूर्वक बेकब्जा किया। (गुलाब सिंह वि. वीरेन्द्र सिंह) ...1474

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – अभिकथित रुप से प्रतिवादी 07.03.1990 को 5 एकड़ भूमि का विक्रय करने हेतु वादी के पास गया था और उसी दिन विक्रय करार निष्पादित किया गया – सामान्यतः आशयित क्रेता किसी अचल संपत्ति का क्रय उसका निरीक्षण किये बिना कभी नहीं करेगा – वाद सम्पत्ति नदी किनारे भी है और अच्छी फसल उगा रही है – अभिलेख पर उपलब्ध साक्ष्य भी दर्शाती है कि प्रतिवादी को पुलिस द्वारा गिरफ्तारी का भय दिखाकर धमकाया गया और प्रपीड़न में एवं अनुचित प्रभाव में आकर उसने विक्रय करार के दस्तावेज पर हस्ताक्षर किये – अभिलेख पर उपलब्ध परिस्थितियां स्पष्ट रुप से दर्शाती हैं कि विक्रय का करार संदेहास्पद दस्तावेज था – वाद खारिज – अपील मंजूर। (किशन लाल वि. अशोक कुमार) ...885

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – प्रतिवादी के पास 21 एकड़ भूमि थी और वह उससे लाभ प्राप्त कर रहा था – कोई साक्ष्य नहीं कि प्रतिवादी कोई कारोबार स्थापित करना चाहता था या भूमि का प्रबंधन करने में अक्षम था या उक्त भूमि से लाभ प्राप्त नहीं कर रहा

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from the said land - Only 5 acres out of 21 acres of land was agreed to be sold - No evidence that defendant was in need of money - No explanation that why defendant agreed to sell the land to the plaintiff - Agreement of sale surrounded by heavy dark clouds. [Kishan Lal Vs. Ashok Kumar] ...885

Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Plaintiff is alleged to have agreed to purchase 5 acres of land for a consideration of Rs. 50,000/- - Rs. 45,000 were paid on the date of execution of agreement - When the 90% of the total consideration was already paid then why sale deed was not got executed by paying the entire amount - Explanation given by plaintiff that defendant was going to his village is not plausible because the agreement to sell was executed in Tehsil Kachehari - Why the sale deed was not executed in the office of sub-registrar which is situated in the same locality is an another circumstance which makes the agreement of sale highly suspicious. [Kishan Lal Vs. Ashok Kumar] ...885

Specific Relief Act (47 of 1963), Section 16 - Specific Performance of Contract - Reasonable time - Agreement was executed on 23.02.1983 - Sale deed was to be executed upto 31.05.1983 - Plaintiff gave notice on 07.08.1985 i.e. after a period of two years and three months - Suit was filed on 04.04.1986 - Suit was not filed within reasonable time [Umanarayan Vs. Sant Kumar] ...1137

Specific Relief Act (47 of 1963), Section 16(C) - Specific Performance of Contract - Readiness and willing to perform - There was no clause that the sale deed would be executed after the diversion of land - No such clause was mentioned in the notice - No averment in plaint that diversion was the condition precedent for execution of sale deed however, such averment was incorporated later on by way of amendment - Held - Plaintiff was insisting on the performance of a condition which was not a part of the agreement - Plaintiff was not ready and willing to go ahead with agreement on the terms and conditions stipulated therein - It can be safely inferred that the plaintiff was not ready and willing to perform his part of contract. [Umanarayan Vs. Sant Kumar] ...1137

Specific Relief Act (47 of 1963)] Section 34 - Declaration of title - Municipality had given the building for running the Higher

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था – 21 एकड़ में से केवल 5 एकड़ भूमि विक्रय का करार हुआ – कोई साक्ष्य नहीं कि प्रतिवादी को रुपयों की आवश्यकता थी – कोई स्पष्टीकरण नहीं कि प्रतिवादी ने वादी को भूमि का विक्रय करने का करार क्यों किया – विक्रय का करार भारी संदेह से घिरा है। (किशन लाल वि. अशोक कुमार) ...885

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – अभिकथित रुप से वादी ने 5 एकड़ भूमि रु. 50,000/– के प्रतिफलार्थ क्रय करने का करार किया – करार के निष्पादन की तिथि को रु. 45,000/– अदा किये गये – जब संपूर्ण प्रतिफल का 90 प्रतिशत पहले ही अदा किया जा चुका था तब संपूर्ण रकम अदा करके विक्रय विलेख को निष्पादित क्यों नहीं किया गया – वादी का स्पष्टीकरण कि प्रतिवादी अपने गांव जा रहा था, विश्वसनीय नहीं क्योंकि विक्रय का करार तहसील कचहरी में निष्पादित किया गया था – विक्रय विलेख को उप–पंजीयक के कार्यालय में निष्पादित क्यों नहीं किया गया जो उसी इलाके में स्थित था, जो विक्रय के करार को अधिक संदेहास्पद बनाती है, की एक और परिस्थिति है। (किशन लाल वि. अशोक कुमार) ...885

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16 – संविदा का विनिर्दिष्ट पालन – युक्तियुक्त समय – अनुबंध, 23.02.1983 को निष्पादित – विक्रय विलेख का निष्पादन 31.05.1983 तक करना था – वादी ने 07.08.1985 को नोटिस दिया अर्थात दो वर्ष और तीन माह की अवधि के पश्चात – वाद 04.04.1986 को पेश किया गया – वाद को युक्तियुक्त समय के भीतर पेश नहीं किया गया। (उमानारायण वि. संत कुमार) ...1137

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 16(सी) – संविदा का विनिर्दिष्ट पालन – पालन करने की तैयारी और रजामंदी – कोई खंड नहीं था कि विक्रय विलेख का निष्पादन, भूमि के अपयोजन के पश्चात किया जायेगा – नोटिस में ऐसा कोई खंड उल्लिखित नहीं था – वाद में कोई प्राक्कथन नहीं कि विक्रय विलेख के निष्पादन हेतु, अपयोजन की पुरोभावी शर्त थी, किन्तु उक्त प्राक्कथन को बाद में संशोधन द्वारा सम्मिलित किया गया – अभिनिर्धारित – वादी, उस शर्त के पालन करने पर जोर दे रहा था जो अनुबंध का भाग नहीं था – अनुबंध में नियत निबंधन एवं शर्तों पर वादी आगे कार्य करने के लिए तैयार और रजामंद नहीं था – यह सुनिश्चित रुप से निष्कर्ष निकाला जा सकता है कि वादी, संविदा के अपने भाग का पालन करने के लिए तैयार और रजामंद नहीं था। (उमानारायण वि. संत कुमार) ...1137

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – हक की घोषणा – नगर पालिका ने बालिकाओं के लिए उच्चतर माध्यमिक शाला चलाने हेतु भवन

Secondary School for Girls till separate building is constructed - School was subsequently shifted to newly constructed building however, respondent started claiming ownership of the building on the ground that it has vested in State Govt. - Defendants in various documents admitting the ownership of the plaintiff/Municipality - No document to show that the ownership of the building was ever transferred to the State Govt. - Plaintiff has succeeded in proving its ownership over the building. [Nagar Palika Parishad Vs. State of M.P.] ...1092

Specific Relief Act (47 of 1963), Section 34 - Suit for declaration - Consequential relief of possession - Plaintiff filed suit for declaration of her share in the property, for declaration of charge of her maintenance over disputed property and for declaration that the will is void ab-initio - Plaintiff is required to value the suit and pay court fees for every relief - However, if the plaintiff wants to keep the disputed property in joint ownership to maintain the unity of the family then even in absence of prayer for partition and separate possession, the suit could be entertained and adjudicated - Plaintiff may file a suit for possession subsequently after the declaration of her rights - Dismissal of suit for want of consequential relief of possession bad in law - Order set aside. [Jamna Devi (Smt.) Vs. Rajendra Prasad Ji] ...1004

State Administrative Service Classification Recruitment & Condition of Service Rules, M.P., 1975, Rule 13(3) - See - Service Law [Minakshi Singh (Smt.) Vs. State of M.P.] ...1332

Succession Act (39 of 1925), Sections 59 & 63, Evidence Act (1 of 1872), Sections 67 & 68 - Will - Proof - Propounder of will, apart from the statutory requirements is also required to remove all legitimate suspicions to the satisfaction of the judicial conscience of the Court and whether it is necessary or otherwise to examine the scribe or any other witness apart from the attesting witnesses of the will, would depend on the facts and circumstances of each case. [Sitaram Dubey (Since Deceased) Vs. Manaklal (Since Deceased)] ...1406

Succession Act (39 of 1925), Section 63 - Registration of Will - Registration of Will would not attach presumption as to the correctness or regularity of the attestation and a person claiming through the Will is required to specifically plead and prove through the attesting witness that the requirement of Section 63 of the Act, 1925 and 68 of Evidence

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दिया था जब तक कि पृथक भवन का निर्माण नहीं हो जाता – शाला को तत्पश्चात नव निर्मित भवन में ले जाया गया, किन्तु प्रत्यर्थी ने इस आधार पर भवन के स्वामित्व का दावा किया कि वह राज्य सरकार में निहित किया गया है – प्रतिवादीगण ने विभिन्न दस्तावेजों में वादी/नगरपालिका का स्वामित्व स्वीकार किया – यह दर्शाने के लिए कोई दस्तावेज नहीं कि भवन का स्वामित्व कभी भी राज्य सरकार को हस्तांतरित किया गया था – वादी, भवन पर अपना स्वामित्व साबित करने में सफल। (नगर पालिका परिषद् वि. म.प्र. राज्य) ...1092

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – घोषणा हेतु वाद – कब्जे का परिणामिक अनुतोष – वादी ने सम्पत्ति में अपने हिस्से की घोषणा हेतु, विवादित सम्पत्ति पर उसके अनुरक्षण के भार की घोषणा हेतु एवं इस घोषणा हेतु वाद प्रस्तुत किया कि वसीयत आरंभ से शून्य है – वादी को वाद का मूल्य करके प्रत्येक अनुतोष हेतु न्यायालय शुल्क अदा करना आवश्यक है – किन्तु यदि वादी, परिवार की एकता बनाये रखने के लिए विवादित सम्पत्ति को संयुक्त स्वामित्व में रखने का इच्छुक है तब विभाजन एवं पृथक कब्जे की प्रार्थना की अनुपस्थिति में भी वाद ग्रहण किया जा सकता है और न्यायनिर्णित किया जा सकता है – वादी अपने अधिकारों की घोषणा के पश्चात कब्जे के लिए तत्पश्चात वाद प्रस्तुत कर सकती है – कब्जे के परिणामिक अनुतोष के अभाव में वाद की खारिजी विधि अंतर्गत अनुचित – आदेश अपास्त। (जमना देवी (श्रीमति) वि. राजेन्द्र प्रसाद जी) ...1004

राज्य प्रशासनिक सेवा वर्गीकरण, भर्ती एवं सेवा शर्तें नियम, म.प्र. 1975, नियम 13(3) – देखें – सेवा विधि – (मीनाक्षी सिंह (श्रीमति) वि. म.प्र. राज्य) ...1332

उत्तराधिकार अधिनियम (1925 का 39), धाराऐं 59 व 63, साक्ष्य अधिनियम (1872 का 1), धाराऐं 67 व 68 – वसीयत – सबूत – वसीयतकर्ता को कानूनी अपेक्षाओं के अलावा, न्यायालय के न्यायिक अंतःकरण की संतुष्टि के लिए सभी समुचित संदेहों को हटाना भी अपेक्षित है और क्या वसीयत के अनुप्रमाणक साक्षियों के अलावा लेखकर्ता या किसी अन्य साक्षी का परीक्षण करना आवश्यक है अथवा नहीं, यह प्रत्येक प्रकरण के तथ्यों और परिस्थितियों पर निर्भर होगा। (सीताराम दुबे (पूर्व मृतक) वि. मानकलाल (पूर्व मृतक)) ...1406

उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत का पंजीकरण – वसीयत के पंजीयन से अनुप्रमाणन की सत्यता या नियमितता के बारे में उपधारणा नहीं निकलेगी तथा वसीयत के द्वारा दावा करने वाले व्यक्ति को अनुप्रमाणक साक्षी द्वारा विनिर्दिष्ट रुप से यह अभिवाक् कर साबित करना अपेक्षित है कि अधिनियम, 1925 की धारा 63 एवं साक्ष्य अधिनियम, 1872 की धारा 68 की अपेक्षाओं का

Act, 1872 have been complied with. [Ram Narayan Tiwari Vs. Uma Shanker Pacholi] ...858

Succession Act (39 of 1925), Section 63 - Will - Execution thereof - Will is a registered document but the Registering officer or any other personnel from the office of Registrar not examined - No endorsement by Registering officer as per Section 58 of Registration Act - No statement to the effect that testator was of sound mind and that will was read over to her and was understood by her - Person who drafted the will not examined nor any endorsement that will was drafted in accordance with the instructions of testator and was read over to her - Testator was aged about 100 years and was extremely sick - Testator also died within 10 days of execution of will - Appellants have failed to dispel the suspicious circumstances surrounding the execution of Will - Appeal partly allowed. [Sitaram Dubey (Since Deceased) Vs. Manaklal (Since Deceased)] ...1406

Succession Act (39 of 1925), Section 63 - Will - Proof - It is necessary for the propounder of the Will to prove that the testator signed it, that he understood the nature and effect of the depositions of the Will, and that he had affixed his signatures on the Will knowing what it contains. [Ram Narayan Tiwari Vs. Uma Shanker Pacholi] ...858

Succession Act (39 of 1925), Section 63 - Will - Testator was blind and apparently could not see what was written - Nothing on record to show that the Will was prepared and written on the instructions of the testator, it was typed and read out to the testator to make sure that it was in accordance with the instructions issued by her and as per her wishes, and she understood the same before affixing her thumb impression on the Will - Further after the death of her husband, the testator was never looked after or kept by the propounder of the Will - Her stay in the house of the defendant was only for a very short period - Execution of will not proved. [Ram Narayan Tiwari Vs. Uma Shanker Pacholi] ...858

Succession Act (39 of 1925), Section 63(c) - Succession - Will - Testator of will claimed herself to be the keep of Tikaram - Testator of will had no right in the property of Tikaram. [Sitaram Dubey (Since Deceased) Vs. Manaklal (Since Deceased)] ...1406

Tortuous Act - Strict liability - A person or authority undertaking

अनुपालन किया गया है। (राम नारायण तिवारी वि. उमा शंकर पाचोली) ...858

उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत – उसका निष्पादन – वसीयत एक रजिस्ट्रीकृत दस्तावेज़ है किन्तु रजिस्ट्री अधिकारी या रजिस्ट्रार के कार्यालय के किसी अन्य कर्मचारी का परीक्षण नहीं किया गया – रजिस्ट्रीकरण अधिनियम की धारा 58 के अनुसार रजिस्ट्री अधिकारी का पृष्ठांकन नहीं – इस आशय का कोई कथन नहीं कि वसीयतकर्ता स्वस्थ्यचित्त थी और यह कि उसे वसीयत पढ़कर सुनाई गई और उसके द्वारा समझी गई – जिस व्यक्ति ने वसीयत को ड्राफ्ट किया उसका परीक्षण नहीं किया और न ही कोई पृष्ठांकन कि वसीयत को वसीयतकर्ता के अनुदेशों के अनुसार ड्राफ्ट किया था और उसे पढ़कर सुनाया गया – वसीयतकर्ता करीब 100 वर्ष के आयु की थी और अत्यांतिक रुप से अस्वस्थ थी – वसीयतकर्ता की मृत्यु भी वसीयत निष्पादित करने से 10 दिनों के भीतर हुई – अपीलार्थीगण संदेहास्पद परिस्थितियों से घिरे वसीयत के निष्पादन को हटाने में असफल रहे – अपील अंशतः मंजूर। (सीताराम दुबे (पूर्व मृतक) वि. मानकलाल (पूर्व मृतक)) ...1406

उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत – सबूत – वसीयत के प्रस्तुतकर्ता के लिये यह साबित करना आवश्यक है कि वसीयतकर्ता ने उस पर हस्ताक्षर किये कि उसने वसीयत के कथनों के स्वरुप को उसके प्रभाव को समझ लिया है और यह कि उसने वसीयत की अंतर्वस्तु जानते हुए उस पर अपने हस्ताक्षर किये हैं। (राम नारायण तिवारी वि. उमा शंकर पाचोली) ...858

उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत – वसीयतकर्ता अंधा था और प्रकटरुप से जो लिखा है उसे देख नहीं सकता था – अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि वसीयत को वसीयतकर्ता के निर्देशों पर तैयार किया गया और लेखबद्ध किया गया, उसे टंकित किया और वसीयतकर्ता को पढ़कर सुनाया गया, यह सुनिश्चित करने के लिए कि वह, उसके द्वारा जारी निर्देशों के अनुसरण में तथा उसकी इच्छानुसार था और उसने वसीयत पर अपनी अंगूठा निशानी लगाने से पहले उसे समझ लिया था – इसके अतिरिक्त उसके पति की मृत्यु के पश्चात, वसीयत के प्रस्तुतकर्ता द्वारा वसीयतकर्ता की देखभाल नहीं की गई और न ही साथ रखा गया – प्रतिवादी के मकान में उसका रुकना केवल अति अल्पावधि के लिये रहा – वसीयत का निष्पादन साबित नहीं। (राम नारायण तिवारी वि. उमा शंकर पाचोली) ...858

उत्तराधिकार अधिनियम (1925 का 39), धारा 63(सी) – उत्तराधिकार – वसीयत – वसीयतकर्ता ने स्वयं को टीकाराम की उपपत्नी/रखैल होने का दावा किया – वसीयतकर्ता को टीकाराम की सम्पत्ति में कोई अधिकार नहीं। (सीताराम दुबे (पूर्व मृतक) वि. मानकलाल (पूर्व मृतक)) ...1406

अपकृत्य – कठोर दायित्व – कोई व्यक्ति या प्राधिकारी जो ऐसे किसी कार्य

an activity involving hazardous or risky exposure to human life - Liable to compensate for injury suffered irrespective of any negligence or carelessness on the part of the manager of such undertaking. [Madhya Pradesh State Electricity Board Vs. Girvan Dhakad] ...868

Transfer of Property Act (4 of 1882), Section 5 - See - Registration Act, 1908, Section 17 [Nagar Palika Parishad Vs. State of M.P.] ...1092

Transfer of Property Act (4 of 1882), Section 54 - Sale - Registration - Unless and until an immovable property having valuation of Rs. 100 or more is conveyed by a registered document, there cannot be a valid conveyance of sale. [Gulab Singh Vs. Virendra Singh] ...1474

Vishwavidyalaya Adhiniyam, M.P. (22 of 1973) - Section 12 - Reasonable opportunity of showing cause - Non Supply of the relevant documents and providing no opportunity to lead evidence amounts to denial of reasonable opportunity - Non supply of complaints and no evidence by the other side nor he was permitted to lead any evidence - Amounts to clear violation of natural justice - Impugned order directing the petitioner to relinquish the post of Vice-Chancellor quashed. [Satya Prakash (Prof.) Vs. Jiwaji University, Gwalior] ...827

WORDS AND PHRASES

- *Fraud* - Fraud is an act of deliberate deception with design of securing some unfair or undeserved benefit by taking undue advantage of another - Even most solemn proceedings stand vitiated if they are actuated by fraud - Principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants - Party who secures a decision by fraud cannot be allowed to enjoy its fruits. [Sterlite Technologies Ltd. Vs. Dhar Industries] ...1381

- *Ratio decidendi* - Ratio decidendi has the force of law and is binding on all statutory authorities when they deal with similar issues. [State of M.P. Vs. Sanjay Nagayach] (SC)...1245

Work Charged and Contingency Paid Employees Pension Rules M.P. 1979, - Rule 4A - Family Pension - Entitlement - Deceased was employed as Jeep Driver in the office of Horticulture Department, on

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में लिप्त हैं जिसमें मानव जीवन के लिए हानिकारक या जोखिम अंतर्ग्रस्त है – किसी प्रतिष्ठान के प्रबंधक की ओर से कोई उपेक्षा या लापरवाही न भी हो तब भी वह सहन की गई क्षति के लिए प्रतिकर का दायी है। (मध्यप्रदेश स्टेट इलेक्ट्रिसिटी बोर्ड वि. गिरवन धाकड़) ...868

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शब्द एवं वाक्यांश

– कपट – कपट, अन्य का असम्यक् लाभ उठाकर किसी अनुचित या अनर्ह लाभ प्राप्त करने की योजना के साथ जानबूझकर की गयी प्रवंचना है – अतिशय सत्यनिष्ठ कार्यवाहियां भी दूषित होंगी यदि वे कपट द्वारा प्रेरित हैं – 'मुकदमे की अंतिमता' का सिद्धांत इस अयुक्तता की हद तक लागू नहीं किया जा सकता कि जिसका उपयोग बेईमान एवं कपटी मुकदमेबाज दमन के तंत्र के रुप में कर पाये – पक्षकार जो कपट द्वारा निर्णय प्राप्त करता है उसे उसके फल का उपभोग करने की अनुमति नहीं दी जा सकती। (स्टरलाईट टेक्नॉलाजीस् लि. वि. धार इंडस्ट्रीज) ...1381

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daily wages, thereafter, was appointed as Jeep Driver on Regular Work Charged Establishment - Before his death, the deceased qualified the qualifying service as "permanent employee" by virtue of Rule 2(c) - Widow of the deceased would be entitled for family pension. [Sampat Bai (Smt.) Vs. State of M.P.] ...806

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Workmen's Compensation Act (8 of 1923), Section 21 - Driving License - Driver was killed by terrorists in Nepal while he was driving the truck - Whether the deceased was having valid driving license to drive the vehicle at Nepal or not makes no difference as the incident is not the outcome of the negligent driving of deceased - Appeal dismissed. [Oriental Insurance Co. Ltd. Vs. Takshashila] ...1109

Workmen's Compensation Act (8 of 1923), Section 30 - Employer admitted that the deceased was earning Rs. 4000/- per month - Insurance Company pleaded ignorance - In view of clear admission of employer, the monthly income of the deceased is assessed at Rs. 4000/ - Deceased was aged about 20 years therefore, relevant factor would be 224.00 - Compensation would come to Rs. 4,03,200/- with interest at the rate of 12% from the date of incident - Appeal allowed. [Lalman Soni Vs. Shri Rupinder Singh Gill] ...1088

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के रुप में नियमित कार्य भारित स्थापना में नियुक्त किया गया – उसकी मृत्यु से पहले, नियम 2(सी) के कारण "स्थायी कर्मचारी" के रुप में मृतक ने अर्हक सेवा अर्हित की – मृतक की विधवा, परिवार पेंशन हेतु हकदार होगी। (सम्पत बाई (श्रीमति) वि. म.प्र. राज्य) ...806

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FAREWELL

JUSTICE R.C. MISHRA

Born on June, 03, 1951. Completed B.Sc., M.A. (Eco.), LL.M. degrees. Was enrolled as an Advocate at the State Bar Council M.P., Jabalpur on November 27, 1972 and practiced as such till 1974. Worked as Lecturer (Economics) at Govt. Degree College, Ashoknagar from September. 02, 1974 to July 07, 1975. Joined as Civil Judge on July 08, 1975. Worked as Civil Judge Class-Il at Gwalior, Burhar, District Shahdol, Bhopal and Hoshangabad. Worked as Railway Magistrate at Khandwa from 1982 to 1986. Promoted as Civil Judge Class-I w.e.f. December 10, 1983 and worked as such at Shivpuri and Bhopal. Worked as ACJM and CJM at Bhopal. Promoted to Higher Judicial Services w.e.f. June 22, 1989. Worked as Additional District Judge, Presiding Judge of Designated Court (under TADA) and the Special Judge (under the Prevention of Corruption Act) at Bhopal. Worked as Additional Registrar (Judicial), High Court of M.P. at Jabalpur from June, 1994 to July, 1998. Worked as President of the District Consumer Forum at Ujjain and linked Fora at Dewas and Shajapur from August 07, 1998 to July 05, 2001. Worked as Commissioner, Departmental Enquiry, Government of M.P. at Bhopal from July 06, 2001 to September 24, 2001. Worked as Registrar. National Judicial Academy, Bhopal, from September 25, 2001 to September 24, 2004. Worked as Principal Judge, Family Court at Bhopal from September 25, 2004 to May 02, 2005. Worked as District and Sessions Judge, Jabalpur and Presiding Judge of Special Court under the POTA w.e.f. May 07, 2005 to September 09, 2006.

Elevated as Additional Judge High Court of M.P. and assumed charge of the office w.e.f. September 11, 2006. Sworn in as Permanent Judge on July 16, 2009 and demitted office on June 03, 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 Rakesh Chandra Mishra, who will be demitting office in the midst of summer vacation on 3rd June, 2013. As per tradition, this ovation has been arranged today, last working day before ensuing summer vacation.

Justice R. C. Mishra was born on 3rd June, 1951 at Mungaoli, District Ashoknagar in the illustrious family of Lawyers & Judges. His Grandfather, Late Shri Durga Prasad Mishra was a well known Advocate and his Father Late Shri Bhagwan Das Mishra had retired as Additional District Judge in the year 1968. His father was known as an efficient, devoted and strict judicial officer and was known for his hardworking, devotion, honesty and integrity. Even after retirement when he was practicing as an Advocate at Mungaoli he had never compromised with the values, ethics and professional conduct. He was very fair not only to the Court, but also to the clients and all these qualities have been inherited by Hon'ble Shri Justice R.C.Mishra from his father. Late Justice K. N. Shukla, Former Judge of this court was his father-in-law.

Justice R.C. Mishra had his education at various places like Ujjain, Mungaoli, Sehore, Bhind, Tikamgarh, Rajgarh, Indore & Bhopal. He had earned Bachelor degree in science, Post Graduate Master degree in economics and did LL.B. and was placed in Merit List for all these courses. He did his LL.M. during his posting at Bhopal. Justice R. C. Mishra was enrolled as an Advocate in the State Bar Council of M.P. on 27.11.1972 and practiced as such till 1974. In 1974, he was selected by State Public Service Commission at a time for three different posts i.e. Lecturer in Government Degree College, Ashoknagar; Civil Judge Class II and Deputy Superintendent of Police. Thereafter, he was also selected as Probationary Officer in Bank of India. Justice R.C.Mishra had worked as Lecturer of Economics at Government Degree College, Ashoknagar from 12.09.1974 to 07.07.1975. He had joined as Civil Judge Class-II on 08.07.1975, promoted as Civil Judge, Class-I on 10.12.1983. Justice R.C.Mishra, while functioning as C.J.M., Bhopal had dealt with very important matters of Bhopal Gas Tragedy and when former Chairman of Union Carbide Corporation had failed to appear before the Court inspite of summons, issued warrants of arrest to the former Chairman. and two other company officials. He was promoted to Higher Judicial Services on 22.06.1989. He had also worked as Additional Registrar (Judicial), High Court of M.P. at Jabalpur from June, 1994 to July, 1998. During this tenure, he had received six weeks' training at University of

Warwick (U.K.), sponsored by the National Judicial Academy in collaboration with the British Council Division on "Gender Law". He had also functioned as President, District Consumer Forum at Ujjain from 1998 to 2001. He had worked as Commissioner, Departmental Enquiry, Govt. of M.P. at Bhopal from 06.07.2001 to 24.09.2001. He was posted as Registrar, National Judicial Academy from 25.09.2001 to 24.09.2004. He had also worked as Principal Judge, Family Court at Bhopal from 25.09.2004 to 02.05.2005. Then from 07.05.2005 till his elevation, he was posted as District and Sessions Judge, Jabalpur. He is the first Judge who dealt with a case under TADA. Justice Mishra was elevated as Additional Judge of Madhya Pradesh High Court on 11th September, 2006 and Permanent Judge on 16th July, 2009.

During his tenure as a Judge of the Madhya Pradesh High Court, Justice Mishra has disposed of 18,480 cases. He has decided cases of all branches of law. Elections Petitions, First Appeals, Second Appeals, Miscellaneous Appeals, Writ Petitions, Writ Appeals, Miscellaneous Criminal Cases, Criminal Appeals and Criminal Revisions etc. Justice Mishra has been the member of various Administrative Committees and has contributed a lot in the Administrative function of the High Court. He was actively associated with conduction of examinations of Lower Judicial Services and Higher Judicial Services.

During his tenure, Justice Mishra has delivered several land mark judgments which adorn the Law Journal. Justice R.C.Mishra is known for his deep knowledge, courteous behaviour and respect to the Bar and Bench alike. Justice Mishra will live in our memory through his judgments. I am sure that his varied experience will be useful in future also and he will continue to render his valuable services to the legal fraternity and the society. Because of demitting office we will be losing a very efficient, prompt and illustrious judge in the High Court. We will always miss him and remember his valuable guidance in the administration of High Court.

I wish Justice RC.Mishra and Mrs.Namita Mishra best of health, prosperity and peaceful life.

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

We have assembled here to bid farewell to Mr. Justice Rakesh Chandra Mishra who is demitting the office a few days hereinafter, after a distinguished career as a judge of the MP High Court.

Your Lordship had assumed the office as a judge of the High Court on 11th of September 2006. 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 his 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. I am feeling the same agony today.

Shri R.C. Mishra was born on 3.6.1951 at Mungaoli, District Ashoknagar in Gwalior Division. Which has produced several good judges in a family of lawyers. Your grandfather was a practicing lawyer and your father retired as Addl. District Judge in April, 1968. Thus you have inherited proficiency and insight to distinguish truth from falsehood. Having completed early education got M.A. B.Sc. and LL.B degrees. As a student you were brilliant and far ahead of the people of your period. You were enrolled as an Advocate on 27.11.1972 and practiced as such till 1974. In 1974 you were selected by the State Public Service Commission and joined as lecturer in Economics in Govt. Degree College, Ashoknagar where you worked from 02.09.1974 to 07.07.1975. You were also selected for the post of Deputy Superintendent of Police as well as for Probationary Officer in Bank of India. These achievements speak volumes about your acumen as a scholar.

Shri R.C. Mishra joined judiciary as Civil Judge on 08.07.1975. During posting at Bhopal you obtained LL.M. Degree. It shows that even after joining the services you were striving to achieve excellence and perfection. You were appointed as Railway Magistrate at Khandwa from 1982 to 1986. You were promoted as Civil Judge Class-I w.e.f. 10.12.1983. You were then appointed as ACJM and CJM at Bhopal, and promoted to Higher Judicial Services w.e.f. 22.06.1989 and was appointed as Additional District Judge, Presiding Judge of Designated Court (Under TADA) and the Special Judge (Under the Prevention of Corruption Act) at Bhopal. You were appointed as Additional Registrar (Judicial) High Court of M.P. at Jabalpur from June, 1994 to July, 1998. During your tenure as Additional Registrar, you received six weeks training at University of Warwick, UK, sponsored by the National Judicial Academy in collaboration with the British Council Division on 'Gender and Law'. You worked as President of the District Consumer Forum from 07.08.1998 to 05 .07.2001 and was appointed Commissioner, Departmental Enquiry, Government of M.P. at Bhopal from 06.07.2001 to 24.09.2001. From 25.09.2001 to 24.09.2004 you held the post of Registrar, National Judicial Academy, Bhopal. From 25.09.2004 to 02.05.2005

you were appointed as Principal Judge Family Court at Bhopal. On 07.05.2005 appointed as District and Session Judge, Jabalpur and as presiding Judge, Special Court under the POTA.

As we know that every judge has his own working method and Your Lordship with the vast experience of working as a judge in different capacities has served the legal system in different capacities in a befitting method.

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.

Uprightness of Your Lordship's conduct and strict adherence to high morals were some of the qualities which you never gave up, even amidst toughest of the time. While sitting on the Bench Your Lordship treated all members of the Bar alike. Though Your Lordship were firm and devoted to the cause of justice yet Your Lordship never lost temperament while hearing cases.

Judges work at the cost of family, responsibilities and physical comfort but thereby you give splendid thoughts to the generation to come. This is what is expected also from every dignitary. Justice R.C. Lahoti referring to Henri Johns has once remarked:

> *"Generation succeeding to the gain of their predecessors gradually elevates the status of mankind, building one generation upon the work of other, gradually elevate themselves from the bottom of the sea. World always corrects itself and the mankind moves ahead."*

Your Lordships' earnest desire to do justice in the case was so great that you never trammeled by the technicalities of the law. As a judge you were industrious which could be seen from the numerous decisions you have rendered. A judge is remembered even years after retirement on account of the dominant restraint in your personalities and Your Lordship will be remembered for your deep sense of justice. Your knowledge of various aspects of the law has been profound and upto date. Sometime advocates might have felt discomfiture when they come less prepared but this quality of your Lordship will pay dividend even in the future times to come. In the words of Mr. M.C. Sitaward:

> *"When a judge retires it is not only the right but*

the privilege of the Bar to assess judge 's works and then decide about his honour"

In my estimation your judgment will provide guidance to new corners and the wealth of knowledge you have spread will be our precious treasure.

I have seen the resume relating to your student life and I have found that you were most 'brilliant student and that when people run from pillar to post for getting the job Your Lordship could get three jobs simultaneously which speaks volume about the intelligence and hard work. Your Lordships' eagerness to come in the judicial field is palpable from the fact that Your Lordship did not opt for the post in the Police Department and came to the judicial side to serve the cause of justice. I feel that this decision has benefited the law and legal world. I may also say that Your Lordship today is doing nothing more than laying down the office because even after the office is demitted by you, your desire to serve the law will infuse the spirit of worthiness in the legal fraternity. I am sure that you will be enjoying very best of health throughout your rest of life and this I am saying looking to the daily routine of Your Lordship which I happen to mark living in the neighborhood. Taking a close look at you one would hardly imagine that Your Lordship is about to complete 62 years of age. Your Lordship is about to retire from this office a few days from now but I am sure that as a scholar and voracious reader you would never retire from the pursuit of knowledge and rather this retirement will offer greater opportunity to you to go in the pursuit of many of your favorite subjects.

Though My Lord is retiring today from the Office of High Court Judge but Your Lorship 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.

Retirement is inevitable. This has always remained un-understable to me as to why one should retire on a given morning merely because the office holder has reached a particular age. As per Mr. V.P.Raman -

"Youth is not a physical affair at all, but an affair of the soul. You may be spiritually bald-headed at twenty five but natural decline of physical powers leaves the healthy spirit untouched"

and this is true about Your Lordship.

We don't know about your plans in future but I am sure that you will

take a decision which will enable the legal fraternity to avail the benefit of your experience & knowledge and the new lawyers and public at large will use it in times to come.

So far as I understand Your Lordship has always been recognized as a judge with ethics. The life of a judge is not easy. My Lord while deciding the case of Kantilal Bhuria observed that a duty is cast on every Indian citizen to respect the National Flag as enjoined under Article 51-A(a). This shows your lordship's feeling towards national feeling.

My Lord have laid down as to what is the binding force in a decision and holding obiter dictum as distinct from ratio decidandi are necessarily to be understood distinctly.

To bid farewell is always very sad and specially when you say good-by to one whom your like and admire most.

On behalf of the Government of Madhya Pradesh and Law officers of the State and on my own behalf I wish my Lord good, 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 Rakesh Chandra Mishra on your demitting the office of a Judge of this Hon'ble High Court on 3rd June, 2013, in the midst of summer vacation.

I have been privileged to offer the ovation, welcoming your Lordship while joining the sheeny galaxy of Justice in this Court and I have again been privileged to bid a farewell to your Lordship after fulfilling your great mission to carry forward through a rugged voyage of Justice Delivery System with its sharp and strange turns and stormy high waves. You have installed many mile-stones by several Judgments delivered by you, which shall be light-houses for coming generations.

Your Lordship was born on 3rd June, 1951, a month which is rated as a rare month in English literature. James Russel Lowell says :-

"What is so rare as a day in June ?
Then, if ever, come perfect days."

And really, after your birth, you have perfected each and every day of your life by your hard efforts, knowledge, values and visions. Your Lordship obtained degrees of B.Sc., M.A. and LL.M., joined the Judicial voyage on 8th July, 1975. Your learning and efforts paved the ways to opportunities and the opportunities paved your way to credentials and the credentials paved the way to excellence and perfection. You never turned back, promoted to Higher Judicial Service on 22nd June, 1989, were granted Selection Grade Scale w.e.f. 20th May 1996 and Super Time Scale w.e.f. 1st September 2002, and joined the bretherens of the Bench w.e.f. 11th September 2006.

This month of May with its hot waves, and draped with dreary and searing current of winds, has made the members of Bar down-hearted because of Your Lordship's demission from this High Office of a Judge of this Hon'ble Court.

Your Lordship have kept the resolutions for securing and serving the larger cause of humanity with due diligence, experience and honesty. Things are worth when we make them worth. David Menally says:-

> "A true commitment is a heartfelt promise to
> yourself from which you will not back down."

Your Lordship have fulfilled your commitments scaling higher levels of performance and efficiency particularly in matters of corruption, trials of Election Petitions and in both Civil and Criminal cases and have given us an excellent opportunity to learn and emulate from your vivid experience. Your Lordship have laid down precedents, which shall be remembered for a long time. When on dias Your Lordship have always been cheerful with a smiling face.

Dispensing of Justice is a relative, not an absolute value. Justice Frank Furter says :-

> "It is the quality of Justice which will establish the
> Court in the confidence of people and it is the confidence
> of the people which is the ultimate reliance of the Court."

Justice delivery system requires a humanitarian face, which can glimmer the rays of hopes in the eyes of people who knock the doors of Justice, coupled with the feeling that ultimately their tears would be wiped and they would get substantial Justice. I will say again and again that dispensing Justice does not mean mere disposal and obsession to clear the arrears. People today want Justice, not mere Judgments. There should be a proper balance struck

between liquidation of arrears and hearing of cases. It must be remembered and it can be unhesitatingly proclaimed that Justice is wedded to truth and the TRUTH must prevail, even if heavens fall. Truth should not take cognizance of any consequences. We are happy to say that Truth prevailed in Your Lordship's Judgments.

At this juncture, I want to express the enshrined feelings of the Bar towards the wisdom of Your Lordship as a Judge, for marvelous marshalling of facts in a given case, for perfect preparations, logical analysis and masterly exposition of law, by which you have spelled a new Judicial language. Your Lordship will be remembered for your pleasing Court-manners, ever smiling face and expressions, mutual respect and fragrance of your deep knowledge scattered over the entire Judicial atmosphere, which shall be marked on the pages of Golden history of this Court.

Rigveda Says :-

"न ता वशन्ति न दभाति तस्करो।
नसामामित्रो व्यधिरा दधर्षति।।
देवांश्च याभिर्यजते ददाति च।
ज्योगित्ताभिः सचते गोपतिः सह।।"

Rigved, 6.28.3

[The best donation in the world is the donation of knowledge, because a thief cannot steal it, no body can destroy it and it provides permanent happiness to millions.]

One who imparts knowledge for making other learned, virtuous and good in conduct and himself lives such a virtuous life by his character, conduct and deeds, is a real true man.

We all the members of M.P. High Court Bar Association wish you a great success in your future life and hope that Your Lordship will now dedicate your rich knowledge and experience for the betterment of society. The Almighty shall shower His all blessings upon you for your further commitments and resolutions. We pray to God :-

" जीवेद् शरदः शतम ।।"

Long live encompassing one hundred more years.

"गहन तपोमय जीवन से आलोकित होकर।
स्मृतियों के नन्दन वन में सदा रहोगे।।

जहां चलोगे सुरभित होंगी राह तुम्हारी।
दूर धरा पर नये मार्गों का सृजन करोगे।।"

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

Today we are bidding farewell to Hon'ble Shri Justice R.C. Mishra who is demiting the office on 03/06/2013 and because of the summer vacation we have assembled today in this ovation.

My lords I recollect the opening words of the epic 'Mahabharat', which was being transmitted on television long back. I quote

" मैं समय हु" I unquote. I think who so ever is present here must have heard these words. In fact it is the time who regulates this world. If we go in the past, we all have witnessed the ovation of my lord Hon'ble Shri Justice R.C. Mishra when he took oath of the office of the judge of this August institution and today the circle of time is complete and that is why this farewell. Everybody who has come in this world has to play his role and vacate the place for others to come. It depends on the particular person how he performs his role and creates the History.

My lord Hon'ble Shri Justice R.C. Mishra played his role as a Champion and must be remembered in the annuals of the history of this Honbie Court.Shri Justice Mishra possessed all the qualities of a good judge and to appear before him was always an experience of learning and knowledge.

Hon'ble Justice Mishra born on 03/06/1951 at Gana, obtained the degrees of B.Sc. M.A. and LL.M. and joined the services 08/07/1975. He got timely promotion and became the District and Sessions Judge on 22/06/1989. Also received the selection grade and Super time scale on 20/05/1996 and 01/09/ 2002 respectively served at so many place in the state and elevated to. the Bench On 11/09/2006 and contributed immensely in all this period of about 6½ years.

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 bad treatment in his court and at this juncture I must regret for the incident when we lawyers have for few hours boycotted his court but at the end all is well. I also request him from this place not to mind such incidence and carry them in memory.

My lord Hon'ble Shri Justice R.C. Mishra as a Judge delivered several landmark judgments which are published in the law journal in golden words, quite help full for the lawyers and it is sure that Hon'ble Shri Justice Mishra will always be remembered for his contribution in the legal field specifically in the field of prevention of Corruption Act.

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 Mishra 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 Radhe Lal Gupta, Member, State Bar Council of M.P., bids farewell :-

With heavy heart we all have gathered here to bid farewell to my Lord Shri Justice R.C.Mishra who will be demitting the Office on 3rd June 2013.

My Lord has joined Judicial services in the State of Madhya Pradesh in the year 1975. Thereafter your Lordship has honoured various prime positions in the state judiciary. My Lord has also graced the office of District and Session Judge, Jabalpur and thereafter due to his extensive knowledge, experience and wisdom My Lord was appointed as Additional Judge of the High Court of MP in the year 2006. Repetition of Bio Data of My Lord as already depicted by preceding orators amounts to ***"gilding the Gold and throwing scent on Jasmine"***. Hence, directly I would express my views hereinafter.

Traditionally Bar admires every outgoing Judge; but in case of My Lord Shri Justice R.C.Mishra it is not a formality rather it is a reality that his fairness, boldness, objectivity in deciding cases and commitment for justice was matchless and par excellence. I do not want to diminish the high quality and spirituality of the dispensation of justice of My Lord by confining the same in my words.

My Lord in this twilight of career a new beam of light illuminates the path of" ADHYATM" brighter than any time preceding this stage of life because the experience and knowledge acquired throughout the life open new chapter. My Lord Shri Justice R.C.Mishra having the personality like a "GREEK - GOD " and vision like a "CRICKTER" does understand this reality very well. So such a formal retirement from one career does not stop the journey of such a celestial personality. And society as well as the nation will be continuing

to be benefitted by real " KARMA" of my Lord which a man performs in this stage of life because no stage is final terminus in the life of such a Saint.

At last but not the least, I on behalf of State Bar Council and Advocates of the State and my own behalf sincerely offer my whole hearted valediction to My Lord Shri Justice RC.Mishra and we wish good health and spirit for ever to my Lord. Further I wish again all the best for the days to come and wish you very happy and prosperous life.

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

We have assembled here today to bid farewell of Justice R.C. Mishra who is completing his tenure as a Judge on 3rd of June 2013. Your Lordship was born on 3rd of June 1951, joined the State Judicial Services in the year 1975 as a Civil Judge Class II and was promoted as C.J.M on 10th of August 1987, thereafter again promoted as District Judge on 22nd of June 1989. On 11th of September 2006 your Lordship was elevated as Judge of this Court, before elevation he served at several District of Madhya Pradesh in different capacities as a Judicial Officer. Your Lordship had also served as Commissioner of Departmental Enquiries, GAD Bhopal, Registrar of National Judicial Academy, District & Session Judge Jabalpur.

There are lesser numbers of Judges who are remembered after they demit their office and Hon'ble Justice R.C.Mishra is one of them, whose memory would continue in the minds of advocates, often orthodox never controversial and believer in equitable dispensation of justice. Your Lordship has become an ideal in his own way, several controversial issues were solved by your Lordship's judgments. On every subject your Lordship interpreted the law in such a manner that the purpose and object of law maker is not frustrated.

Your Lordship always emphasized and behaved in a cool, quite and temperate manner and your Lordship never lost temper under any provocation, my Lord was the firm believer of individual freedom but not at the cost of society. Your ideas have gone too far but always within the limits of law and justice.

I am sure that his vast knowledge and experience will continue to be useful to the society even after his retirement as a judge of this court. My Lord displayed his firm conviction and commitment towards the Rule of law

and decided the cases without fear and favour. A man can't retire his experience we hope that my Lord would continue to serve the down trodden. Undoubtedly, after demitting your Lordship, we the members of the Legal Fraternity will be deprived of your Lordship's able guidance.

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, Secretary, Senior Advocates' Council, bids farewell :-

My Lords, this assembly bids farewell to Hon'ble Shri Justice R.C. Mishra, who is demitting the office of the Judge of the High Court of Madhya Pradesh in this Summer Vacations.

Born, brought up and educated in the family of lawyers and Judges, My Lord Justice Mishra acquired immense experience in the field of justice delivery institutions and ultimately shaped into a brilliant judge, adorning the seat of the Highest Court of the State.

As a Judge of this Court Your Lordship has maintained the glorious traditions of independence of judiciary, hearing patiently and delivering cautiously. The judgments pronounced by Your Lordship show the legal acumen and penetrating judicial mind.

Your Lordship has been a very good sportsman and has discharged duties gloriously. Your Lordship always maintained calmness and courteousness in the Court and would be affectionately remembered by the members of the Bar.

I on behalf of the Senior Advocates' Council and my own behalf extend good wishes to Your Lordship and the family members.

May Your Lordship have a long, smiling and active life doing yeoman service to the society.

Farewell Speech delivered by Hon'ble Mr. Justice R.C. Mishra :-

Several thoughts have converged and have been camouflaged by heartfelt emotions making myself lost for the right words. Ideas are not often hard but the words are the devil, so says Justice Holmes.

It was nearly seven years ago that I had taken the solemn oath to perform duties of a Judge of this great institution of justice without fear or favour, affection or ill-will. Life is not measured by breathes you take but by the moments that take out breath away. Action is eloquence. No legacy is so rich as honesty.

In the ovation speech on 11.9.2006, I had disclosed my credentials reflecting that I am heir of a great Judge Late Shri B.D. Mishra, who personified integrity and devotion to the cause of justice throughout his life and a grandson of Lt. Pt. Durga Prasad Mishra, a lawyer of extraordinary acumen and a man of high moral and ethical values. Their life style was very simple and strict and in a way, ascetic. "Trust in God and do the right" had remained one common motto throughout the life.

At this juncture, I must hasten to add that my father was a Judge who believed in boldness, thoroughness and speed in the administration of justice. It was, therefore, no surprise that he had been very critical of disruption of judicial work for any reason whatsoever and had always impressed upon me that I should not become a party thereto by taking leave or by granting adjournment casually for inadequate reason. He used to remind me what Dr. Rajendra Prasad said on the day the Constitution of India was passed -

> "After all, a Constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it and India needs today nothing more than a set of honest men, who will have the interest of the country before them"

Against this background, in addition to redeem the constitutional oath, I was bound to discharge a pious obligation so as to maintain the high traditions in the administration of justice. In this regard, I have been very fortunate to have received encouragement from my late mother, brothers and sisters. Credit also goes to my wife Mrs. Namita Mishra who, despite being a post graduate in Law and enrolled as an Advocate in the year 1991, had to sacrifice her career in the field and also to my children who lived in tune with the means

bestowed upon me by the Supreme Being.

I cannot resist temptation to highlight invaluable contribution of my father-in-law Late Shri Justice K.N. Shukla to my shaping and steering through as a Judge of this Court. I had also been privileged to work with most distinguished Judges and to draw scholarship support from eminent lawyers of this Court.

The maxim *"salus populi suprema lex"*, that is "the welfare of the people is the supreme law" adequately enunciates the idea of law. This can be achieved only when justice is administered lawfully, judicially, without fear or favour and without being hampered and thwarted, and this cannot be effective unless respect for it is fostered and maintained.

According to Salmond, in order to consider whether an action is just or unjust we have to take into account its effect on the well being of the mankind at large. It is right and just if it promotes public welfare, wrong and unjust if it diminishes it. This has been the guiding principle throughout my career as a Judge.

My friends and well-wishers have always supported the endeavour and rendered all possible assistance in achieving the purpose of my life.

In case of difficult and adverse situations, the poem in the English Reader textbook for Class 8th reverberated in my mind. I repeat a few lines-

God give me courage to do what is right
courage to speak, courage to fight
For honesty and goodness, justice and truth

Legal knowledge and ability form part of the criteria for judicial performance evaluation. Still, the essential qualification is that a Judge should be a good human being and as expressed by Bahadur Shah Zafar -

जफर आदमी उसको ना जानियेगा ।
हो वो कैसा ही साहबे–फहम–ओ–जका ।।
जिसे ऐश में यादे–खुदा न रही ।
जिसे तैश में खौफे–खुदा न रहा ।।

Most of you know me, through and through, as you have seen me working as Additional Registrar (Judicial) as well as District Judge at Jabalpur. I am deeply moved by the kind words spoken about my performance as a Judge.

However, I may be permitted to say that all deeds attributed to me were, in fact, done by the modes of primordial matter.

प्रकृतेः क्रियमाणानि गुणैः कर्माणि सर्वशः ।
अहंकारविमुढात्मा कर्ताहमिति मन्यते ।।

अर्थात :– वास्तव में संपुर्ण कर्म सब प्रकार के प्रकृति के गुणों द्वारा किये जाते हैं, तो भी जिसका अन्तःकरण अहंकार से मोहित हो रहा है, ऐसा अज्ञानी 'मैं कर्ता हूँ', ऐसा मानता है।

[Verse No.27 Chapter 3 of Shrimad Bhagavad Geeta)

My future plan is, therefore, also left to the wishes of the Almighty.

I would like to thank every one with whom I have been associated with or who have come into contact with me. A special word of thanks goes to my personal staff namely Vinod, Monika, Anand, Paritosh and Reader Ashish for their wholehearted support for smooth and efficient working of the Bench. I would also like to record my appreciation for the day-to-day assistance provided by the Protocol Section, more particularly by D.S. Baghel, S.L. Tiwari, Vipin Pandey and Radheshyam.

I am really glad that I met all of you and have thoroughly enjoyed each and every moment I spent here. An episode of my life and perhaps the most important one is over. If one can relive the past in imagination, one can re-collect emotions and tranquility. Daffodils can dance with inward eye and become the bliss of solitude if aesthetic approach of Wordsworth is adopted.

My recollections reach 8th July, 1975 the day I joined the judicial service. How such a long time has passed and what I feel at this moment can be expressed in no better words than those employed by Moin Ahsan Jazbi -

जाने कब पी थी, अभी तक है मये–गम का खुमार,
धुधला–धुधला नजर आता है जहाने–बेदार ।
आंधियां चलती हैं, दुनिया हुई जाती है गुबार,
आंख ता मल लुं, जरा होश में आ लुं तो चलुं ।

Wishing you all the best.

Short Note

****(23)***

Before Mr. Justice K.K. Trivedi

W.P. No. 7826/2012 (Jabalpur) decided on 10 December, 2012

BHAI LAL BURMA ...Petitioner

Vs.

FOOD CORPORATION OF INDIA & ors. ...Respondents

A. ***Service Law - Date of birth - Manipulation in entries*** **- Manipulation was not engineered by the petitioner - In such circumstances, it was the duty of the respondents No. 1 & 2 to get the age of the petitioner verified.**

क. *सेवा विधि – जन्म तिथि – प्रविष्टियों में हेरफेर* – याची द्वारा हेरफेर को अंजाम नहीं दिया गया – ऐसी परिस्थितियों में, याची के वय को सत्यापित करवाना प्रत्यर्थी क्र. 1 व 2 का कर्तव्य था।

B. ***Service Law - Date of birth - Attestation*** **- If any entry is made, there must be some attesting proof of the same available in the service record - Without there being any attesting proof, the correctness of the date of birth recorded in the service record is not acceptable.**

ख. *सेवा विधि–जन्म तिथि–अनुप्रमाणन*–यदि कोई प्रविष्टि की जाती है, तब उसका कोई अनुप्रमाणित सबूत, सेवा अभिलेख में उपलब्ध होना चाहिए–किसी अनुप्रमाणित सबूत के बिना, सेवा अभिलेख में अभिलिखित जन्म तिथि की प्रमाणिकता स्वीकार्य नहीं।

Cases referred :

2003 (3) MPHT 22, 2002 (2) JLJ 131.

Uday Kumar, for the petitioner.

Mukesh K. Agrawal, for the respondents No. 1 & 2.

Short Note

****(24)***

Before Mr. Justice U.C. Maheshwari

S.A. No. 337/2012 (Gwalior) decided on 28 February, 2013

PRABHUDAYAL & anr. ...Appellants

Vs.

BARI BAI (SMT.) & anr. ... Respondents

A. ***Civil Procedure Code (5 of 1908), Section 100*** **- The concurrent findings of the Courts below based on available evidence**

on the question of possession of agricultural land being findings of fact, could not be interfered at the stage of Second Appeal.

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – कृषि भूमि के कब्जे के प्रश्न पर, उपलब्ध साक्ष्य के आधार पर निचले न्यायालयों के समवर्ती निष्कर्ष, तथ्य के निष्कर्ष होने के नाते, द्वितीय अपील के प्रक्रम पर हस्तक्षेप नहीं किया जा सकता।

B. Lack of Substantial Question of Law **- Such appeal liable to be dismissed at the stage of motion hearing.**

ख. विधि के सारवान प्रश्न का अभाव – ऐसी अपील समावेदन की सुनवाई के प्रक्रम पर खारिज किये जाने योग्य।

Case referred :

AIR 1981 SC 1183.

Sarvesh Sharma, for the appellants.
M.L. Bansal, for the respondent No.1.
R.P. Rathi, G.A. for the respondent No.2.

Short Note
****(25)***
Before Mr. Justice Alok Aradhe
W.P. No. 12055/2009 (Jabalpur) decided on 12 March, 2013

R.P. TIWARI ...Petitioner
Vs.
THE SENIOR COMMANDANT ...Respondent

Constitution - Article 226 - Territorial Jurisdiction **- Petitioner was posted in Maharashtra - Departmental Enquiry was conducted in Maharashtra - Orders of Appellate and Revisional Authorities were served in State of Maharashtra - No part of cause of action arose within the State of Madhya Pradesh - Petitioner/Service holder cannot clothe the Court with jurisdiction because of his residence.**

संविधान – अनुच्छेद 226 – क्षेत्रिय अधिकारिता – याची महाराष्ट्र में पदस्थ था – विभागीय जांच महाराष्ट्र में की गई – अपीली और पुनरीक्षण प्राधिकारियों के आदेश महाराष्ट्र राज्य में तामील किये गये – मध्यप्रदेश राज्य के भीतर वाद कारण का कोई भाग उत्पन्न नहीं – याची/सेवा धारक अपने निवास के आधार पर न्यायालय की अधिकारिता प्रगट नहीं कर सकता।

NOTES OF CASES SECTION

Cases referred :

AIR 2007 SC 2048, AIR 2008 SC (Supp) 1553, (2001) 9 SCC 525, 2004(1) MPLJ 205, AIR 1961 SC 532, (2004) 6 SCC 254, (2006) 6 SCC 207.

P.N. Dubey, for the petitioner.
Vikram Singh, for the respondent.

I.L.R. [2013] M.P., 1245
SUPREME COURT OF INDIA
Before Mr. Justice K.S. Radhakrishnan & Mr. Justice Dipak Misra
Civil Appeal No. 4691/2013 decided on 16 May, 2013

STATE OF M.P. & ors. ...Appellants
Vs.
SANJAY NAGAYACH & ors. ...Respondents

A. ***Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53(1), Proviso 2 - Supersession of Board of Directors - Consultation with R.B.I.*** **- Consultation with R.B.I. has to be effective consultation - For effective consultation, the copy of show cause notice with other relevant materials including the copy of reply filed by the Bank to the various charges and allegations levelled against them should also be made available to R.B.I. - R.B.I. should be told of the action the Joint Registrar is intending to take. (Paras 14 to 17)**

क. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53(1), परन्तुक 2 – संचालक मंडल का अधिक्रमण – आर.बी.आई. के साथ परामर्श – आर.बी.आई. के साथ परामर्श, प्रभावकारी परामर्श होना चाहिए – प्रभावकारी परामर्श के लिए, कारण बताओ नोटिस के साथ अन्य सुसंगत सामग्री, जिसमें बैंक द्वारा प्रस्तुत उसके विरुद्ध लगाये गये विभिन्न आरोपों और अभिकथनों के जबाव की प्रतिलिपि भी समाविष्ट है, आर.बी.आई. को उपलब्ध कराना चाहिए – आर.बी.आई. को संयुक्त रजिस्ट्रार द्वारा आशयित कार्यवाही के बारे में बताया जाना चाहिए।

B. ***Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Supersession of Board of Directors*** **- Some of the charges against Board of Directors were relating to the period of the previous committee for which the subsequent committee could not be held responsible. (Para 21)**

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – संचालक मंडल का अधिक्रमण – संचालक मंडल के विरुद्ध लगाये गये कुछ आरोप पूर्वतर समिति की अवधि से संबंधित थे, जिसके लिए पश्चातवर्ती समिति को उत्तरदायी नहीं ठहराया जा सकता।

C. ***Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Supersession of Board of Directors*** **- Board of Directors were superseded in violation of provisions of Section 53 - As per the report of NABARD and RBI the charges levelled against the Board of**

Directors do not provide strong ground to supersede the Board - Board of Directors could have continued till 15.10.2012 however, the same was superseded on 30.9.2011 - The period during which the Board of Directors remained under supersession be excluded in computing the period of five year - Joint Registrar directed to put Board of Directors back in office so as to complete the period during which they were out of office.

(Paras 22,25 & 26)

ग. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – संचालक मंडल का अधिक्रमण – संचालक मंडल का अधिक्रमण, धारा 53 के उपबंधों के अतिलंघन में किया गया – नाबार्ड (एन.ए.बी.ए.आर.डी.) एवं आर.बी.आई. की रिपोर्ट के अनुसार संचालक मंडल के विरुद्ध लगाये गये आरोप, मंडल का अधिक्रमण करने का ठोस आधार उपलब्ध नहीं कराते – संचालक मंडल, 15.10.2012 तक जारी रहता किन्तु उसे 30.09.2011 को अधिक्रमित किया गया – जिस अवधि के दौरान संचालक मंडल अधिक्रमण के आधीन रहा है, उसे पांच वर्ष की अवधि की संगणना में से अपवर्जित किया जाये – संयुक्त रजिस्ट्रार को निदेशित किया गया कि संचालक मंडल को पुनः पद पर लौटाये जिससे कि वह अवधि जिसके दौरान वे पद से दूर रहे हैं, उसे पूर्ण किया जा सके।

D. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Registrar/Joint Registrar **- When an authority vested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to non-exercise of power, statutorily vested - Authorities have to form an opinion and that must be based on some objective criteria, which has nexus with final decision - Authority shall not act with pre-conceived notion and shall not speak his masters's voice - Registrar and Joint Registrar are bound to follow the Judicial precedents.**

(Paras 29, 30 & 31)

घ. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – रजिस्ट्रार/संयुक्त रजिस्ट्रार – जब प्राधिकारी जिसमें शक्ति निहित है, स्वयं से कार्यवाही करना दिखाता है किन्तु वास्तव में शक्ति का प्रयोग बाध्य मार्गदर्शन या दबाव में किया गया हो तब, यह कानूनी रुप से निहित शक्ति का प्रयोग नहीं किये जाने की कोटि में आयेगा – प्राधिकारी को अपनी राय बनानी चाहिए और वह किसी तटस्थ मानदण्ड पर आधारित होनी चाहिए जिसका अंतिम निर्णय से संबंध हो – प्राधिकारी पूर्वाग्रह के साथ कार्यवाही नहीं करेगा और अपने मालिक की भाषा नहीं बोलेगा – रजिस्ट्रार और संयुक्त रजिस्ट्रार, न्यायिक दृष्टांतों का पालन करने के लिए बाध्य है।

E. Words and Phrases - Ratio decidendi - **Ratio decidendi has the force of law and is binding on all statutory authorities when they deal with similar issues. (Para 31)**

ङ. शब्द और वाक्यांश – विनिश्चय आधार – विनिश्चय आधार को विधि का बल है और सभी कानूनी प्राधिकारियों पर बंधनकारी है जब वे समान विवाद्यकों का निपटारा करते हैं।

F. Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 53 - Supersession of Board of Directors - **Directions issued. (Para 35)**

च. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 53 – संचालक मंडल का अधिक्रमण – निदेश जारी किये गये।

Cases referred :

(2003) 2 SCC 107, (2010) 8 SCC 110, (2010) 11 SCC 622,(2009) 3 SCC 553, (2010) 5 SCC 1, 1993 Supp (1) SCC 730, (1987) 2 SCR 1, 1992 Supp(1) SCC 548, (2002) 4 SCC 524, (2008) 7 SCC 203,1972 MPLJ 796, 1982 MPLJ 46, 1986 MPLJ 567.

JUDGMENT

The Judgment of the Court was delivered by : **K.S. RADHAKRISHNAN, J. :-** Leave granted.

1. We are, in this case, concerned with the legality of an order passed by the Joint Registrar of the Cooperative Societies, Sagar Division, Sagar, M.P., superseding the Board of Directors of District Cooperative Central Bank Ltd., Panna without previous consultation with the Reserve Bank of India, as provided under the second proviso to Section 53(1) of the Madhya Pradesh Cooperative Societies Act, 1960 [for short 'the Act'].

2. The Board of Directors of the Bank challenged the above mentioned order on various grounds, including the ground of violation of the second proviso to Section 53(1) of the Act that is non-consultation with the Reserve Bank of India [RBI] before taking a decision to supersede the Board of Directors. The order was challenged by the Board of Directors by filing a writ petition before the High Court of Madhya Pradesh, Jabalpur Bench. Learned single Judge of the High Court disposed of the writ petition directing the parties to avail of the alternative remedy provided under Section 78 of the

Act. But on appeal, the Division Bench of the High Court set aside the order of supersession dated 30.9.2011 on the ground of non-compliance of the second proviso to section 53(1) of the Act. Aggrieved by the same, the State of M.P., through its Principal Secretary, Department of Co-operation, the Commissioner Cum Registrar, Co-operative Societies, Bhopal and the Joint Registrar, Co-operative Societies, Sagar, have come up with **Civil Appeal No. ..... of 2013** [arising out of SLP No. 6860 of 2012] and a private party filed **Civil Appeal No. ..... of 2013** [arising out of SLP No. 13125 of 2012] challenging the judgment of the High Court dated 13.2.2012, followed by lot of intervening applications.

3. As the question of laws involved in both the above mentioned appeals are common, we are disposing of both the appeals by a common judgment.

Facts and Arguments

4. The Board of Directors of the Bank was elected to Office on 16.10.2007 and while in office they were served with a show-cause-notice dated 2.3.2009 issued by the Joint Registrar, Co-operative Societies under Section 53(2) of the Act containing 19 charges. Detailed replies were sent by the Board of Directors on 6.5.2009 and 16.5.2011 stating that most of the charges levelled against them were related to the period of the previous Committee and the rest were based exclusively on an Audit Report dated 25.9.2008. It was pointed out that the Board of Directors on receipt of the Audit report took necessary action and a communication dated 5.12.2008 was sent to the Branch Managers of Primary Societies to take immediate follow-up action on the basis of the Audit report. After filing the detailed reply, nothing was heard from the Joint Registrar but due to political pressure and extraneous reasons after two and half years of the show cause notice, an order of supersession was served on the Board, followed by the appointment of an Administrator in gross violation of the second proviso to Section 53(1) of the Act.

5. Dr. Abhishek M. Singhvi, learned senior advocate appearing for the State, submitted that the High Court was not justified in interfering with the order of supersession passed by the Joint Registrar, while an alternative remedy was available under Section 78 of the Act by way of an appeal before the Cooperative Tribunal. Learned senior counsel placed reliance on the judgments of this Court in *Harbanslal Sahnia and Another v. Indian Oil Corpn. Ltd. and Others* (2003) 2 SCC 107, *United Bank of India v. Satyawati Tondon*

and Others (2010) 8 SCC 110 and *Om Prakash Saini v. DCM Ltd. and Others* (2010) 11 SCC 622. Learned senior counsel also submitted that the Division Bench of the High Court has not correctly appreciated the scope of the second proviso to Section 53(1) of the Act. Learned senior counsel also pointed out that the Joint Registrar has forwarded the show-cause notice dated 23.2.2009 along with other materials to RBI seeking its views on the proposed action of supersession and the RBI through its communications dated 17.4.2009, 3.6.2009 and 8.12.2009 had only directed the Joint Registrar to indicate RBI of the action taken against the Board of Directors. Consequently, the Joint Registrar was only required to inform the RBI of the action taken against the Board of Directors. Learned senior counsel also submitted that the charges levelled against the Board of Directors were of serious nature and the order of supersession was passed *bona fide* and in public interest and the Division Bench of the High Court was not justified in interfering with the order of supersession.

6. Shri V. K. Bali, learned senior counsel appearing for the appellants in **Civil Appeal No. ..... of 2013** [arising out of SLP No. 13125 of 2012], also submitted that the charges levelled against the Board of Directors were of serious nature and there was sufficient materials to establish those charges and the Joint Registrar has rightly passed the order of supersession and appointed the Collector, Panna as an Administrator of the Bank. Learned senior counsel also pointed out that the Joint Registrar had forwarded the show-cause notice as well as the connected materials to RBI and RBI had failed to respond to the show-cause-notice within 30 days of the receipt of the same and, therefore, it would be presumed that RBI had agreed to the proposed action and the Joint Registrar had rightly passed the order of supersession. Shri Mahavir Singh, learned senior counsel appearing for the Interveners also submitted that the High Court has committed an error interfering with the order of supersession and, in any view, if any of the parties were aggrieved, they ought to have availed of the alternate remedy available under the Act.

7. Shri Vivek Tankha, learned senior counsel appearing for the 1st respondent, submitted that the High Court has correctly understood the scope of the second proviso to Section 53(1) ofthe Act and rightly came to the conclusion that before passing the order of supersession, there should be a meaningful consultation with the RBI, therefore, the consultee could apply its mind and form an independent opinion as to whether the Board be superseded

or not. Learned senior counsel submitted that merely forwarding the show cause notice along with other relevant materials is not sufficient compliance of the second proviso to Section 53(1) of the Act, so held by the Madhya Pradesh High Court in several judgments. Learned senior counsel submitted that the order of supersession was passed by the Joint Registrar after a period of two and half years of the issuance of the show-cause-notice and most of charges levelled against the Board of Directors were related to the period when the previous Committee was in office and even the charges based on the Audit Report dated 25.9.2008 were also rectified by the Board of Directors by addressing the primary societies. Learned senior counsel also submitted that the order was passed at the instance of respondents 2 and 3 herein on extraneous considerations and was actuated by *mala fide* and ulterior motive. Learned counsel submitted that the Joint Registrar had acted under the political pressure and was not exercising his powers in accordance with the provisions of the Act and the order of supersession was passed to disqualify the members of the Board of Directors from contesting the ensuing election. Learned senior counsel prayed that the Board of Directors be put back in office and be allowed to continue for the period they were put out of office illegally.

8. We heard learned counsel on either side at great length. When the matter came up for hearing before us on 17.10.2012, we passed the following order, the operative portion of which reads as under:

> "We are informed that the period of the Managing Committee is already over and District Collector is acting as the Administrator of the Cooperative Bank vide this Court's order dated 23.02.2012. However, the legality of the order has to be tested. Before that we feel it appropriate to place the entire material before the Reserve Bank of India (for short, 'RBI') (Respondent NO. 7) for its opinion as per Section 53 of the Act. The RBI will take a final decision on that within a period of two months and forward the opinion to the Secretary General of this Court, who will place it before the Court."

RBI submitted its detailed report on 18.12.2012, in pursuance to the order passed by this Court. RBI, referring to the second proviso to Section 53(1) of the Act, took the view that the socalled consultation made by the Joint Registrar cannot be treated as previous consultation, as per law. RBI, after examining all the documents made available by the Joint Registrar including

the show-cause-notice, reply filed by the Board of Directors opined as follows:

(i) The JRCS has alleged that Panna DCCB has not deducted tax on the interest paid to the depositors. In terms of the CBDT circular No. 9/2002 dated 11-9- 2002 tax is deductible at source from any payment of income by way of interest other than income by way of interest on securities. Clause (v) of sub-section (3) of section 194A exempts such income credited or paid by a co-operative society to a member thereof from requirement of TDS. Clause (viia) of sub-section (3) of section 194A exempts from the requirement of TDS such income credited or paid in respect of deposits (other than time deposits made on or after 1-7-1995) with a co-operative society engaged in carrying on the business of banking. It is not clear from observation of JRCS, Panna that the interest accrued and paid was time deposit or saving bank deposit account made after 01.07.1995.

(ii) The amount collected as VAT was not remitted to the Government.

VAT is not applicable to the banking transactions. Hence collection itself is not correct.

(iii) In terms of Audit para 21 of Audit Report for the FY ended 2000-01, Panna DCCB in the year June 1997, without the approval of PACS' Committee had stored pesticides. These medicines expired on December 98 and August 99. Despite expiry, stock of medicines worth Rs.16.28 lakh was left over which could not be sold in the market. The amount should have been recovered from the employees of the bank.

As per the reply furnished by the bank, the present Board of Directors had initiated the process of recovery of dues of which the major portion of outstanding dues has already been recovered. The bank is effecting recovery from its 39 employees through monthly deductions of Rs.500 to Rs1000.

(iv) In terms of Audit para 32 of Audit Report for the FY ended 2000-01, an outstanding amount of Rs23200/- to be recovered from cashier Shri D.L. Tiwari is still pending for recovery.

It is seen from the records that the bank has initiated disciplinary proceedings against the erring employees besides filing a recovery suit with Civil Court, Powai.

(v) In terms of Audit para 16 of Audit Report for the FY ended 2000-01, Shri Jawaharlal Srivastav, Manager of Laxmipur PACs had committed fraud of Rs.20.93 lacs thereby misappropriated the bank's funds. He has been removed from services and an amount of Rs.36,637/- has been recovered from his claims. Bank vide its letter dated 15.02.2002 has written to Kotwali Police Panna to register the case. No action has been initiated by the present Board in the matter.

The Bank has already registered a case against Shri Jawaharlal Srivastav. However, it appears from the records and reply furnished by he bank that no effective steps were taken after 15.02.2002 to lodge FIR in the matter. Even the present Board of Directors apparently has not taken any effective steps after it took over during the end of 2007.

(vi) In terms of Audit para 23 of Audit Report for the FY ended 2000-01, reconciliation of entries in the books of accounts of DCCB Panna was pending and it has not been resolved.

Non-reconciliation of books by DCCB Panna is an operational risk which has also been pointed out by NABARD in its inspection reports for the FY 2008- 2009 and 2010-011. Therefore, the compliance submitted by the bank does not appear to be satisfactory.

(vii) In terms of Audit para 13 of Audit Report for the FY ended 2003-04, fraud in respect of 37 Managers to the tune of Rs.43.34 lakh was mentioned and the cases are still pending. 27 Employees have been terminated from the services. Case against only one employee has been registered with police and the bank has not registered the cases against 27 employees.

From the records made available to us, we do not observe any monitoring by JRCS, on the issue during the intervening period. It is evident that this matter was being discussed in the

Board meetings of the present Board, some amount was already recovered, disciplinary action against the erring employees have been taken and the legal proceeding initiated against them is also pending.

(viii) As mentioned in Audit Report for the FY ended 2006- 07, rectification of audit objections is not satisfactory. No action was taken on most of the audit objections and compliance submitted by the management is mere eyewash.

Compliance to Audit Report is an ongoing process which needs to be monitored on a continuous basis. The table showing the allegations of the JRCS Panna, comments of Panna DCCB and the observation of RBI is enclosed herewith and marked as Exhibit – IX.

RBI, therefore, took the view that the deficiencies pointed out in the show-cause-notice were general in nature and did not warrant the supersession of the Board of Directors. RBI, however, opined that it would be desirable that new election of the Board of Directors be conducted in accordance with the provisions of the Act and the Management of the Bank be handed over to the newly elected body by the present administrator.

Legal Framework

9. The validity of the order of supersession has to be tested under the legal framework in which the Cooperative Bank and its controlling authorities have to function under the Act read with the provisions of the Reserve Bank of India Act, 1934 (for short 'RBI Act'), the Banking Regulation Act, 1949 (for short 'Regulation Act'), the Banking Law (Application to Cooperative Societies) Act, 1965 (23 of 1976), the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (for short 'DICGC Act'), the National Bank for Agricultural and Rural Development Act, 1981 (for short 'NABARD Act') etc. Since the order impugned results in the supersession of a body elected to achieve social and economic democracy with emphasis on weaker sections of the society, as the preamble of the Act depicts, a close look at the powers of the functionaries instrumental in over-turning an elected body is of paramount importance.

10. Co-operative philosophy on society must rest on free universal association, democratically governed and conditioned by equity and personal

liberty. First legislation in India relating to cooperative societies was the Co-operative Societies Act, 1904, established for the purpose of credit only, but to extend the privilege of credit societies to other societies also a legislation with wider scope and object, that is Cooperative Societies Act 1912, was passed which was applicable to the whole of British India, which was a Central Act. Later, after independence different States enacted separate Acts of which we are in this case concerned with the 1960 Act in force in the State of Madhya Pradesh.

11. We find, until the year 1965, the Cooperative Banks were not being regulated by the RBI but it was felt necessary to bring the cooperative societies carrying on the business of banking within the purview of the Regulation Act. Since, large number of cooperative societies were carrying on the banking business, and also to ensure the growth of cooperative banking on sound banking principles, the Parliament enacted the Act 23 of 1965, called the Banking Law (Application to Cooperative Societies) Act, 1965 and Part IV was introduced into the Regulation Act w.e.f. 1.3.1966. Section 55 of Part V provides for the application of the Regulation Act to Cooperative Banks. Any existing co-operative bank at the time of the commencement of the Act 23 of 1965 was required to apply grant of license within a period of three months from the date of the commencement of the Act and obtain a license from RBI under Section 22 of RBI Act. Every co-operative bank is also obliged to comply with the provisions of the Regulation Act and directions/guidelines issued by RBI from time to time.

12. We may, in this connection, refer to certain provisions of the DICGC Act which also confers certain powers to the RBI to supersede the committee of the management of the cooperative Bank in public interest. The Act has been enacted to provide for the establishment of a Corporation for the purpose of insurance deposits and guaranteed credit facilities for allied purposes. Section 3 of the Act has empowered the Central Government to establish the Deposit Insurance Corporation, a wholly owned subsidiary of RBI. Section 2(gg)(iii) of DICGC Act states that "eligible co-operative bank" means a co-operative bank, the law for the time being governing, which provides that:

> "2(gg)(iii) If so required by the Reserve Bank of India in the public interest or for preventing the affairs of the bank being conducted in a manner detrimental to the interest of the depositors or for securing the proper management of the bank,

an order shall be made for the supersession of the committee of management or other managing body (by whatever name called) of the bank and the appointment of an administrator therefor for such period or periods not exceeding five years in the aggregate as may from time to time be specified by the Reserve Bank."

RBI never thought it necessary to invoke the above mentioned provision as against the first respondent. NABARD Act has been enacted to provide and regulate credit facilities and for other related and individual matters. Section 3 of the Act has empowered the Central Government to establish such a National Bank, i.e. NABARD. Section 35 of the Regulation Act empowers the RBI to conduct inspection of the affairs of a banking company. RBI has also got the power under Sub-section (b) of Section 35 of the Regulation Act to authorise NABARD to conduct inspection of the District Cooperative Bank.

13. Section 2(d) of the NABARD Act defines the term "Central Co-operative Bank". NABARD in exercise of the powers conferred on it, is also authorised to conduct inspection on the affairs of District Co-operative Banks.

14. We will now examine the scope of Section 53 of the Act, especially the second proviso to Section 53(1) of the Act, in the light of the above discussion. Section 53 relevant to our purpose is given below:

"**53. Supersession of Board of Directors-** (1) If in the opinion of the Registrar the Board of Directors of any society-
(a) is negligent in the performance of the duties imposed on it by or under this Act or byelaws of the society or by any lawful order passed by the Registrar or is unwilling to perform such duties; or

(b) commits acts which are prejudicial to the interests of the society or its members; or

(c) violates the provisions of this Act or the rules made thereunder or byelaws of the society or any order passed by the Registrar. The Registrar may, by order in writing remove the Board of Directors and appoint a person or persons to manage the affairs of the society for a specified period not exceeding two years in the first instance:

Provided that if in opinion of the Registrar, the Board of Directors of any Primary Agriculture Credit Cooperative Society-

(i) incurs losses for three consecutive years; or

(ii) commits serious financial irregularities or fraud is identified; or

(iii) there is perpetual lack of quorum in the meetings of the Board of Directors.

The Registrar may, by order in writing remove the Board of Directors an appoint a person or persons to manage the affairs of the society for two months which may be extended by him for such period not exceeding six months for reasons to be recorded in writing:

Provided further that in case of Co-operative Bank, the order of supersession shall not be passed without previous consultation with the Reserve Bank;

Provided further that if no communication containing the views of the Reserve Bank of India on action proposed is received within thirty days of the receipt by that bank of the request soliciting consultation, it shall be presumed that the Reserve Bank of India agree with the proposed action and the Registrar shall be free to pass such order as he may deem fit.

Provided also that if a non-official is appointed in the Board of Directors of a primary society, he shall be from amongst the members of that society, entitled for such representation and in case of central or Apex society, if a person is appointed in the Board of Directors of such society, he shall be a member of one of its affiliated societies entitled for such representation.

(2) No order under sub-section (1) shall be passed unless a list of allegations, documents and witnesses in support of charges levelled against it has been provided and the Board of Directors has been given a reasonable opportunity of showing

cause against the proposed order and representation, if any, made by it, is considered.

xxx xxx xxx

xxx xxx xxx

(7) Before taking action under sub-section (1) in respect of a financing bank or in respect of a society indebted to a financing bank, the Registrar shall consult, in the former case, the Madhya Pradesh State Co-operative Bank Limited and, in the latter case, the financing bank, counterved regarding such action. If the Madhya Pradesh State Co-operative Bank Limited or the financing bank, as the case may be, fails to communicate its views within thirty days of the receipt by such bank of the request soliciting consultation, it shall be presumed that the Madhya Pradesh State Cooperative Bank Limited or the financing bank, as the case may be, agreed with the proposed action."

Section 53 (1) confers powers on the Registrar to pass an order to remove the Board of Directors and to appoint a person to manage the affairs of the society, subject to certain conditions, of which, we are primarily concerned with the applicability of the second proviso to Section 53(1), which specifically states that in the case of a Co-operative Bank, the order of supersession shall not be passed without previous consultation with the RBI. The third proviso to Section 53 states that if no communication containing the views of the RBI on the action proposed is received within thirty days of the receipt by that bank of the request soliciting consultation, it shall be presumed that the RBI agreed with the proposed action and the Registrar shall be free to pass such order, as he may deem fit. Subsection (2) to Section 53 of the Act specifically states that no order under Sub-section (1) (order of supersession) shall be passed unless a list of allegations, documents and witnesses in support of charges levelled against it has been provided and the Board of Directors has been given a reasonable opportunity of showing cause against the proposed order and representation, if any, made by it, is considered. The second proviso to Section 53 (1) refers to the expression "order of supersession", means that the final order of supersession to be passed by the Joint Registrar after complying with sub-section (2) to Section 53. Second and third provisos, read together, would indicate that no order of supersession shall be passed

without previous consultation with the RBI. Before passing an order of supersession, the show-cause-notice along with other relevant materials, including the reply received from the bank, has to be made available to the RBI for an effective consultation.

15. We have already quoted the second proviso to Section 53(1), the meaning of which is clear and unambiguous which, in our view, calls for no interpretation or explanation. In this respect, reference to the often quoted principle laid down by Tindal, C.J. in *Sussex Peerage case* (1844) 11 CIT F.85 is useful, which reads as follows: "If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in the natural and ordinary sense." Reference may also be made to the judgments of this Court in *Lalu Prasad Yadav and Another v. State of Bihar and Another* (2009) 3 SCC 553 and *Ansal Properties and Industries Limited v. State of Haryana and Another* (2010) 5 SCC 1.

16. The mere serving a copy of the show-cause-notice on RBI with supporting documents is not what is contemplated under the second proviso to Section 53(1). For a meaningful and effective consultation, the copy of the reply filed by the Bank to the various charges and allegations levelled against them should also be made available to the RBI as well as the action proposed by the Joint Registrar, after examining the reply submitted by the Bank. On the other hand, RBI should be told of the action the Joint Registrar is intending to take. Only then, there will be an effective consultation and the views expressed by the RBI will be a relevant material for deciding whether the elected Board be superseded or not. In other words, the previous consultation is a condition precedent before forming an opinion by the Joint Registrar to supersede the Board of Directors or not.

17. This Court in *Indian Administrative Services (SCS) Association, U.P. v. Union of India* 1993 Supp (1) SCC 730, has laid down six propositions while examining the meaning of the expression 'consultation'. We may add one more proposition that when the outcome of the proposed action is to oust a democratically elected body and the expression used is "shall not be passed without previous consultation", it is to be construed as mandatory. Reference may also be made to the judgments of this Court in *Reserve Bank of India v. Peerless Company* (1987) 2 SCR 1, *State of Jammu and Kashmir v. A.R. Zakki and Others* 1992 Supp (1) SCC 548, *Gauhati High Court and Another v. Kuladhar Phkan and Another* (2002)

4 SCC 524, *Andhra Bank v. Andhra Bank Officers and Another* (2008) 7 SCC 203.

Discussion

18. District Cooperative Bank, Panna (for short 'Panna DCB"), a Bank registered under the Act, was issued a license to conduct the banking services in India by RBI on 3.6.2010 under Section 22 of the Regulation Act. Panna DCB is a Central Cooperative Bank as defined under Sub-section 2(d) of NABARD Act. NABARD had conducted an inspection of the Panna DCB under Section 35 of the Regulation Act, with reference to the financial position as on 31.3.2007, when the previous Board was in office and thirty six fraud cases at Primary Agricultural Credit Societies (PACS) involving Rs.37.05 lacs had been reported. Certain deficiencies in the bank's functioning, like non adherence to the provisions of the Income Tax Act, lack of internal checks and control systems and unsatisfactory compliance to their previous inspection report, had also found a place in their inspection report, the copy of which was forwarded to the RBI vide their communication dated 1.2.2008.

19. The Joint Registrar, Co-operative Societies, as already stated, issued a notice to Panna DCB to show cause as to why the Board of Directors be not superseded and an Administrator be appointed. The show-cause-notice was sent to the RBI, which RBI received on 4.3.2009. RBI vide its letter dated 17.4.2009 requested the Joint Registrar to inform the action being taken on the reply submitted by the Board of Directors of Panna DCB. RBI vide its letter dated 30.3.2009 forwarded the copy of the show-cause-notice to the Chief General Manager, NABARD for their comments. Since, NABARD had conducted inspection of Panna DCB under Section 35 of the Regulation Act, NABARD vide its letter dated 29.6.2009 informed the same to the RBI and also opined as follows:

> "..... We are of the view that the deficiencies mostly relating to systems and procedures are of general nature, which do not provide strong ground for supersession of the Board as far as the inspection by NABARD is concerned."

20. RBI, again, vide its letter dated 3.6.2009 wrote to the Joint Registrar to inform RBI the outcome of the reply submitted by the Bank to the show-cause-notice. RBI, then sent a reminder on 22.7.2009 to

the Joint Registrar, since no reply was received. RBI, it is seen has received a reply from the Joint Registrar on 10.8.2009. RBI, then sent a communication to the Joint Registrar vide its letter dated 8.5.2009 to know the action taken on the reply submitted by the Board of Directors. The Joint Registrar then sent a detailed reply dated 19.8.2009 to the RBI stating that in the case of a Co-operative Bank, order of supersession would not be issued without previous consultation with RBI, however, if no communication containing the views of RBI on the action was received within 30 days, it should be presumed that the RBI had agreed to the proposed action and the Registrar would be free to pass orders as might be deemed fit. It was further stated that in the case of District Co-operative Bank, the powers under Section 53(2) of the Act are vested with the Regional Joint Registrar and notice issued by the Joint Registrar was not sent for the opinion of the State Government. Further, it was also pointed out that the Bank had submitted its reply on 8.5.2009 and internal decision would be taken as per the legal provisions and RBI would be informed accordingly. Yet, another letter dated 24.12.2009 was also received by the RBI, wherein it was stated that the hearing was going on and the RBI would be informed of the final decision. Later, without informing the RBI of the proposed action and also without forwarding the reply submitted by Panna DCB to the showcause- notice to RBI, the order of supersession dated 30.9.2011 was passed by the Joint Registrar.

21. We find seven charges levelled against the Board of Directors were relating to the period of the previous Committee, for which the first respondent Board of Directors could not be held responsible. Further, even though the Board had taken charge in October 2007, the audit report was submitted before the Board only after nine months and that the Board of Directors took follow up action on the basis of the audit report dated 25.9.2008. The Joint Registrar, it seems, was found to be satisfied with the detailed replies dated 6.5.2009 and 16.5.2011submitted by the Board of Directors of the Bank, possibly, due to that reason, even though the show-causePage notice was issued on 22.3.2009, it took about two and half years to pass the order of supersession.

22. We are of the view that the order of supersession dated 30.9.2011 is not only in clear violation of the second proviso to Section 53(1) of the Act, but also the allegations raised in the show-cause-notice are deficiencies mostly relating to systems and procedures and are of general nature and not grave

enough to overthrow a democratically elected Board of Directors. Both NABARD and RBI have expressed the view that the charges levelled against the Board of Directors do not provide strong ground to supersede the Board.

23. Learned senior counsel Shri Vivek Tankha submitted that since the Board of Directors was superseded illegally, they, be put back in office and allow to continue, for the period they were put out of office. We find force in that contention, especially in view of the views expressed by NABARD as well as RBI and the fact that the Joint Registrar himself had passed the order of supersession only after two and half years of the date of issuance of the show-cause-notice.

24. The legislative intention is clear from the following statutory provisions. The statute has fixed the term of an elected Board of Directors as five years from the date on which first meeting of Board of Directors is held. Once a Board of Directors is illegally superseded, suspended or removed, the legislature in its wisdom ordained that the Board should complete their full term of five years, because electorate has elected the Board for five years. The proviso to Section 49(7A) (i) reads as follows:

> "7A(i) The term of the Board of Directors shall be five years from the date on which first meeting of the Board of Directors is held:
>
> Provided that where a Board of Directors superseded, suspended or removed under the Act is reinstated as a result of any order of any Court or authority, the period during which the Board of Directors remained under supersession, suspension out of office, as the case may be, shall be excluded in computing the period of the term aforesaid."

25. The Board of Directors, in the instant case, took charge on 16.10.2007, therefore, they could continue in office till 15.10.2012. The Board of Directors was, however, superseded illegally on 30.9.2011 and, by virtue of the judgment of the Division Bench of the High Court dated 13.2.2012, the Board should have been put back in office on 13.2.2012, but an Administrator was appointed. Going by the proviso referred to above, the period during which the Board of Directors remained under supersession be excluded in computing the period of five years. In the facts and circumstances of this case, we are of the considered opinion that the duly elected Board of Directors

should get the benefit of that proviso, which is statutory in nature.

26. In such circumstances, we direct the Joint Registrar, Cooperative Societies, Sagar to put the Board of Directors back in office so as to complete the period during which they were out of office.

27. The High Court, in our view, has therefore rightly exercised its jurisdiction under Article 226 of the Constitution and the alternative remedy of appeal is not bar in exercising that jurisdiction, since the order passed by the Joint Registrar was arbitrary and in clear violation of the second proviso to Section 53(1) of the Act.

28. We are of the view that this situation has been created by the Joint Registrar and there is sufficient evidence to conclude that he was acting under extraneous influence and under dictation. A legally elected Board of Directors cannot be put out of the office in this manner by an illegal order. If the charges levelled against the Board of Directors, in the instant case, were serious, then the Joint Registrar would not have taken two and half years to pass the order of supersession. State of Madhya Pradesh did not show the grace to accept the judgment of the Division Bench of the High Court and has brought this litigation to this Court spending huge public money, a practice we strongly deprecate.

Registrar/Joint Registrar and External Influence:

29. Statutory functionaries like Registrar/Joint Registrar of Cooperative Societies functioning under the respective Cooperative Act must be above suspicion and function independently without external pressure. When an authority invested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to non-exercise of power, statutorily vested. Large number of cases are coming up before this Court and the High Courts in the country challenging the orders of supersession and many of them are being passed by the statutory functionaries due to external influence ignoring the fact that they are ousting a democratically elected Board, the consequence of which is also grave because the members of the Board of Directors would also stand disqualified in standing for the succeeding election as well.

30. The Registrar/Joint Registrar, while exercising powers of supersession has to form an opinion and that opinion must be based on some objective

criteria, which has nexus with the final decision. A statutory authority shall not act with pre-conceived notion and shall not speak his masters' voice, because the formation of opinion must be his own, not somebody else in power, to achieve some ulterior motive. There may be situations where the Registrar/ Joint Registrar are expected to act in the best interest of the society and its members, but in such situations, they have to act *bona fide* and within the four corners of the Statute. In our view, the impugned order will not fall in that category.

Judicial Precedents

31. Registrar/Joint Registrar is bound to follow the Judicial Precedents. *Ratio decidendi* has the force of law and is binding on all statutory authorities when they deal with similar issues. The Madhya Pradesh High Court in several judgments has explained the scope of the second proviso to Section 53(1) of the Act. Reference may be made to the judgments in *Radheshyam Sharma v. Govt. of M.P. through C.K. Jaiswal and Ors.* 1972 MPLJ 796, *Board of Directors of Shri Ganesh Sahakari Vipnan (Marketing) Sanstha Maryadit and Another v. Deputy Registrar, Co-operative Societies, Khargone and Others*1982 MPLJ 46 and *Sitaram v. Registrar of Co-operative Societies and another* 1986 MPLJ 567.

32. We fail to see why the Joint Registrar has overlooked those binding judicial precedents and the ratio decidendi. Judicial rulings and the principles are meant to be followed by the statutory authorities while deciding similar issues based on the legal principles settled by judicial rulings. Joint Registrar, while passing the impugned order, has overlooked those binding judicial precedents.

33 We fail to notice why the State Government, Department of Co-operative Societies has taken so much interest in this litigation. Joint Registrar in his letter dated 19.8.2009 to RBI stated that in the case of District Co-operative Bank, the powers under Section 53(2) of the Act are vested with Regional Joint Registrar and the notice issued by the Joint Registrar is not meant for the opinion of the State Government. Assuming, the State Government has powers under Section 49-C of the Act, no report has been forwarded by the Registrar to the State Government and no direction have been issued by the State Government with regard to the supersession of the Board. Sorry so note that the State Government has spent huge public money

by litigating this matter even up to this Court, that too, without following the binding precedents of the Madhya Pradesh High Court on the scope of the second proviso to Section 53(1) of the Act.

34. In such circumstances of the case, we are inclined to dismiss both the appeals with costs directing re-instatement of the first respondent Board of Directors back in office forthwith and be allowed to continue for the period they were put out of office by the impugned order which has been quashed. We also direct the State of Madhya Pradesh to pay an amount of Rs.1,00,000/- to the Madhya Pradesh Legal Services Authority within a period of one month by way of costs and also impose a cost of Rs.10,000/- as against the Joint Registrar, Co-operative Societies, Sagar, the officer who passed the order, which will be deducted from his salary and be deposited in the Panna DCB within a period of two months from today. Ordered accordingly.

35. Further, we are inclined to give the following general directions in view of the mushrooming of cases in various Courts challenging orders of supersession of elected Committees:

(1) Supersession of an elected managing Committee/Board is an exception and be resorted to only in exceptional circumstances and normally elected body be allowed to complete the term for which it is elected.

(2) Elected Committee in office be not penalised for the short-comings or illegalities committed by the previous Committee, unless there is any deliberate inaction in rectifying the illegalities committed by the previous committees.

(3) Elected Committee in Office be given sufficient time, say at least six months, to rectify the defects, if any, pointed out in the audit report with regard to incidents which originated when the previous committee was in office.

(4) Registrar/Joint Registrar are legally obliged to comply with all the statutory formalities, including consultation with the financing banks/ Controlling Banks etc. Only after getting their view, an opinion be formed as to whether an elected Committee be ousted or not.

(5) Registrar/ Joint Registrar should always bear in mind the consequences of an order of supersession which has the effect of not only

ousting the Board out of office, but also disqualify them for standing for election in the succeeding elections. Registrar/Joint Registrar therefore is duty bound to exercise his powers *bona fide* and not on the dictation or direction of those who are in power.

(6) Registrar/Joint Registrar shall not act under political pressure or influence and, if they do, be subjected to disciplinary proceedings and be also held personally liable for the cost of the legal proceedings.

(7) Public money not to be spent by the State Government or the Registrar for unnecessary litigation involving disputes between various factions in a co-operative society. Tax payers money is not expected to be spent for settling those disputes. If found necessary, the same be spent from the funds available with the concerned Bank.

Order accordingly.

I.L.R. [2013] M.P., 1265

SUPREME COURT OF INDIA

Before Mr. Justice Dr. B.S. Chauhan & Mr. Justice Dipak Misra

Cr. A. No. 2303/2009 decided on 21 May, 2013

STATE OF MADHYA PRADESH ...Appellant

Vs.

DAL SINGH & ors. ...Respondents

A. Criminal Procedure Code, 1973 (2 of 1974), Section 378 - Appeal against acquittal - **Appellate Court for compelling reasons should not hesitate to reverse a judgment of acquittal, if the findings so recorded by the Court below are found to be perverse and if the Court's entire approach with respect to dealing with evidence is found to be patently illegal, leading to miscarriage of justice or if its judgment is unreasonable and is based on erroneous understanding of law. (Para 6)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 378 – दोषमुक्ति के विरुद्ध अपील – अपीली न्यायालय को प्रबल कारणों पर दोषमुक्ति के निर्णय को पलटाने में संकोच नहीं होना चाहिए, यदि निचले न्यायालय द्वारा इस प्रकार अभिलिखित निष्कर्ष दूषित पाये जाते हैं और यदि साक्ष्य का विचार करने के संबंध में न्यायालय का संपूर्ण दृष्टिकोण प्रत्यक्ष रुप से अवैध पाया जाता है, जिससे न्याय हानि कारित हुई है या यदि उसका निर्णय अयुक्तियुक्त है एवं विधि की त्रुटिपूर्ण समझ पर आधारित है।

B. Evidence Act (1 of 1872), Section 3 - Witness - **Exaggeration per se does not render the evidence brittle - It can be one of the factors against which the credibility of the prosecution story can be tested - Mere marginal variations in the statements of witnesses cannot be dubbed as improvements.** **(Para 7)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – साक्षी – अतिश्योक्ति अपने आप में साक्ष्य को कमजोर नहीं करती – यह उन कारकों में से एक हो सकता है जिसके विरुद्ध अभियोजन कहानी की विश्वसनीयता का परीक्षण किया जा सकता है – साक्षियों के कथनों में मात्र सीमांत भिन्नता को सुधार किया जाना नहीं कहा जा सकता।

C. Penal Code (45 of 1860), Section 302 - Medical Evidence - Evidence of Doctor - **Unless there existed some inherent and apparent defect, the court could not have substitute its opinion for that of the Doctor's.** **(Para 8)**

ग. दण्ड संहिता (1860 का 45), धारा 302 – चिकित्सीय साक्ष्य – चिकित्सक का साक्ष्य – जब तक कि कोई अंतर्निहित या प्रकट त्रुटि अस्तित्वमान न हो, चिकित्सक के अभिमत को न्यायालय अपना अभिमत प्रतिस्थापित नहीं कर सकता था।

D. Evidence Act (1 of 1872), Section 32 - Dying Declaration - **Law does not provide who can record a dying declaration - There is no prescribed form, format or procedure for the same - Person who records the dying declaration must be satisfied that the maker is in fit state of mind and is capable of making such a statement - Requirement of certificate by Doctor in respect of such state of mind is not essential in every case.** **(Para 14)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन – विधि में उपबंधित नहीं कि कौन मृत्युकालिक कथन अभिलिखित कर सकता है – इसके लिये कोई विहित प्रारुप, रुप विधान या प्रक्रिया नहीं है – जो व्यक्ति मृत्युकालिक कथन अभिलिखित करता है उसे संतुष्ट होना चाहिए कि कर्ता सक्षम मनः स्थिति में है और उक्त कथन करने में सक्षम है – उक्त मनः स्थिति के संबंध में चिकित्सक द्वारा प्रमाण पत्र की अपेक्षा प्रत्येक प्रकरण में आवश्यक नहीं।

E. Penal Code (45 of 1860), Section 302 - 100% burns - Degrees - **Deceased had suffered 100% superficial burns - Burn injuries are classified into three degrees - There may be a situation where a**

part of the body may bear upon it severe burns but a small part of the body may have none - Burns can usually be distinguished from wounds inflicted before the body was burnt by their appearance, their position in areas highly susceptible to burning and on fleshy areas by findings recorded after internal examination. (Paras 19, 20 & 21)

ङ. *दण्ड संहिता (1860 का 45), धारा 302 – 100 प्रतिशत जलना – मात्रा* – मृतक ने 100 प्रतिशत उपारिष्ठ जलने की क्षतियां सहन कीं – जलने की क्षतियां तीन मात्राओं में वर्गीकृत है – ऐसी स्थिति हो सकती है जहां शरीर के एक हिस्से पर गंभीर जलने की क्षतियां हों परंतु शरीर के छोटे हिस्से पर कुछ न हो – जलने को शरीर जलने से पहले पहुंचाई गई चोटों से उनके स्वरुप को देखकर, उनकी स्थिति को देखकर उन भागों में जो जलने के लिए अधिक संवेदनशील है एवं मांसल भाग, आंतरिक परीक्षण पश्चात अभिलिखित निष्कर्षों द्वारा सुभिन्न किया जा सकता है।

F. Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 32 - Dying Declaration - **Deceased suffered 100% superficial burn injuries - In such state of mind, one cannot expect that a person in such a physical condition would be able to give the exact version of incident - She had been suffering from great mental and physical agony - No suggestion and explanation as to why the witnesses who recorded the dying declaration would have deposed against the respondents - Appeal allowed - Judgment of acquittal set aside - Judgment of Trial Court restored. (Para 26)**

च. *दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्यु कालिक कथन* – मृतक ने 100 प्रतिशत उपारिष्ठ जलने की क्षतियां सहन कीं – ऐसी मनःस्थिति में, यह अपेक्षा नहीं की जा सकती कि उक्त शारीरिक स्थिति में कोई व्यक्ति घटना का यथार्थ विवरण दे सकेगा – वह घोर मानसिक एवं शारीरिक कष्ट से गुजर रही थी – कोई सुझाव एवं स्पष्टीकरण नहीं कि मृत्युकालिक कथन अभिलिखित करने वाले साक्षीगण, प्रत्यर्थीगण के विरुद्ध क्यों कथन दिये – अपील मंजूर – दोषमुक्ति का निर्णय अपास्त – विचारण न्यायालय का निर्णय पुनःस्थापित।

Cases referred :

AIR 2011 SC 354, AIR 2011 SC 1585, AIR 2011 SC 2302, AIR 1992 SC 2186, (2002) 8 SCC 83, AIR 2002 SC 2973, AIR 1999 SC 3695, AIR 1998 SC 2808, AIR 2001 SC 2383, (2010) 6 SCC 533, AIR 1998 SC 2809.

JUDGMENT

The Judgment of the Court was delivered by :

DR. B.S. CHAUHAN, J. :- This appeal has been preferred against the impugned judgment and order dated 30.8.2006, passed by the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.2152 of 2003, by way of which it has set aside the conviction of the respondents under Sections 498-A and 302, read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and acquitted them.

2. Facts and circumstances giving rise to this appeal are :-

A. That the deceased Kusum Rani got married to Hallu @ Chandrabhan, the 2nd respondent herein, in the year 2001. In her marital home, she was ill-treated by her parents-in-law, respondents 1 and 3 herein. They would constantly tell her that she was incapable of doing the house work properly, and her mother-in-law did not give her sufficient food to eat.

B. On 29.11.2002 at noon, when the deceased returned home after her bath in the pond, her mother-in-law hurled abuses at her and inquired what she had been doing at the pond. When she replied that she had been washing clothes there, her mother-in-law gave her few slaps, as a result of which the deceased began to cry. Her mother-in-law then directed her husband to burn her alive. Her father-in-law had thus poured kerosene on her and had asked his wife to set her on fire, as a result of which her mother-in-law lit a matchstick and threw the same at her. Since the deceased began to scream, her parents-in-law came out of the house and bolted the door from the outside. On hearing her shriek, a few villagers sent news of the same to her parents who resided in a neighboring village, at a distance of about half a kilometer. Her father, mother and uncle thus came to the place of occurrence. The door was opened by them, and the deceased was taken out.

C. The deceased Kusum narrated the said incident to her parents, and thereafter she was taken in a trolley to the Police Station, Nohta in a severely burnt condition, where she herself lodged a report narrating the incident, and at about 2 p.m., on the basis of the complaint, an FIR, Ex.P-17 was recorded.

D. The Investigating Agency made all the necessary arrangements in order to record her dying declaration and the Executive Magistrate P.K. Chaturvedi (PW.12), was called for the aforementioned purpose. Her dying declaration

was recorded by the Executive Magistrate and subsequently, the deceased was admitted to the Government Hospital, Damoh at 3.25 p.m., where she died at 3.35 p.m. Intimation of her death was communicated by the hospital officials to the Police. The Investigating Agency thus took over the dead body of the deceased, and sent it for post-mortem. They also seized all the necessary articles from the spot, prepared the panchnama, and after recording the statements of the witnesses, submitted a charge sheet before the competent court, which in turn, committed the case to the Court of Sessions. Hence, trial commenced after framing charges under Sections 498-A, 302 and 306 IPC. The accused persons abjured their guilt.

E. In order to prove the charges, the prosecution examined as many as 17 witnesses, and placed reliance on Ex.P1 to P24. The respondents-accused took the defence of an alibi in their statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C'), stating that they had been in their agricultural field at the time of the said incident and it was herethat they had received information about the incident. The deceased had committed suicide and they were being falsely been implicated.

F. The learned Additional Sessions Judge, Damoh, in Sessions Trial No.305 of 2002, vide judgment and order dated 6.12.2003, after appreciating the material on record, recorded findings of fact to the effect that the deceased had not committed suicide, and that the respondents-accused were guilty of the offences punishable under Sections 498-A and 302, r/w Section 34 IPC. They were convicted and sentenced under Section 498-A IPC for two years RI and a fine of Rs.500/- each, in default of payment of fine, to further undergo one month RI; and under Section 302/34 IPC, to undergo imprisonment for life and a fine of Rs.2,000/- each, in default of payment of fine, to suffer further RI for 6 months.

G Aggrieved by the aforesaid order of conviction and sentence, the respondents-accused challenged the same before the High Court, preferring Criminal Appeal No.2152 of 2003, which was allowed by the High Court vide its impugned judgment and order, acquitting all the accused.

Hence, this appeal.

3. Ms. Vibha Datta Makhija, learned standing counsel has submitted, that the only ground taken by the High Court for reversing the judgment and

order of the Trial Court was that conviction can be based solely upon a dying declaration, provided that the same is found to be trustworthy. However, in the instant case, as the deceased had 100 per cent burn injuries, she would not have in all probability, been in a position to make a statement. Additionally, in the absence of a certificate provided by a doctor to the extent that she had in fact been fit enough to make such a statement, the said dying declaration could not be relied upon, as she had died as a result of such injuries on her person, after traveling about 10 k.ms. from the place of occurrence to the Police Station. The High Court doubted her ability to speak and also the lodging of the FIR. There is sufficient evidence on record to show that Kusum had been ill-treated by her parents-in-law, and thus that they were responsible for causing her death. A person having 100 per cent burns can make a statement, and a certificate of fitness provided by a doctor is not a condition precedent for placing reliance upon a dying declaration. Therefore, the appeal deserves to be allowed.

4. Per contra, Ms. Nidhi, learned counsel for the respondents has submitted, that the FIR alleged to have been lodged by Kusum, deceased, bore her thumb impression and has also stated that she had narrated the entire incident, on the basis of which an FIR was lodged. The High Court has rightly reached the conclusion that a person with 100 per cent burns could neither affix a thumb impression, nor manage to speak, and therefore, the respondents have rightly been acquitted. The parameters laid down by this Court for interference against an order of acquittal by the High Court do not require interference. Moreover, the said incident took place about 12 years ago. The respondents have suffered considerably. Thus, at such a belated stage, no interference is called for. There are material contradictions in the two dying declarations, as well as in the depositions of the witnesses. The appeal is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

Appeal against acquittal :

6. It is a settled legal proposition that in exceptional circumstances, the appellate court for compelling reasons should not hesitate to reverse a judgment of acquittal passed by the court below, if the findings so recorded by the court below are found to be perverse, i.e. if the conclusions arrived at by the court below are contrary to the evidence on record, or if the court's entire approach

with respect to dealing with the evidence is found to be patently illegal, leading to the miscarriage of justice, or if its judgment is unreasonable and is based on an erroneous understanding of the law and of the facts of the case. While doing so, the appellate court must bear in mind the presumption of innocence in favour of the accused, and also that an acquittal by the court below bolsters such presumption of innocence. (Vide: *Abrar v. State of U.P.,* AIR 2011 SC 354; and *Rukia Begum v. State of Karnataka,* AIR 2011 SC 1585).

Discrepancies:

7. So far as the discrepancies, embellishments and improvements are concerned, in every criminal case the same are bound to occur for the reason that witnesses, owing to common errors in observation, i.e., errors of memory due to lapse of time, or errors owing to mental disposition, such as feelings shock or horror that existed at the time of occurrence.

The court must form its opinion about the credibility of a witness, and record a finding with respect to whether his deposition inspires confidence. "Exaggeration per se does not render the evidence brittle. But it can be one of the factors against which the credibility of the prosecution's story can be tested, when the entire evidence is put in a crucible to test the same on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements, as the same may be elaborations of a statement made by the witness at an earlier stage. *"Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions."* The omissions which amount to contradictions in material particulars, i.e. which materially affect the trial, or the core of the case of the prosecution, render the testimony of the witness as liable to be discredited.

Where such omission(s) amount to contradiction(s), raising serious doubts about the truthfulness of a witness, and other witnesses also make material improvements before the court in order to make their evidence acceptable, it cannot be said that it is safe to rely upon such evidence. (Vide: *A. Shankar v. State of Karnataka,* AIR 2011 SC 2302).

Whether 100 per cent burnt person can make a dying declaration or put a thumb impression :

8. In *Mafabhai Nagarbhai Raval v. State of Gujarat,* AIR 1992

SC 2186, this Court dealt with a case wherein a question arose with respect to whether a person suffering from 99 per cent burn injuries could be deemed capable enough for the purpose of making a dying declaration. The learned trial Judge thought that the same was not at all possible, as the victim had gone into shock after receiving such high degree burns. He had consequently opined, that the moment the deceased had seen the flame, she was likely to have sustained mental shock. Development of such shock from the very beginning, was the ground on which the Trial Court had disbelieved the medical evidence available. This Court then held, that the doctor who had conducted her post-mortem was a competent person, and had deposed in this respect. Therefore, unless there existed some inherent and apparent defect, the court could not have substitute its opinion for that of the doctor's. Hence, in light of the facts of the case, the dying declarations made, were found by this Court to be worthy of reliance, as the same had been made truthfully and voluntarily. There was no evidence on record to suggest that the victim had provided a tutored version, and the argument of the defence stating that the condition of the deceased was so serious that she could not have made such a statement was not accepted, and the dying declarations were relied upon.

A similar view has been re-iterated by this Court in *Rambai v. State of Chhatisgarh,* (2002) 8 SCC 83.

9. In *Laxman v. State of Maharashtra,* AIR 2002 SC 2973, this Court held, that a dying declaration can either be oral or in writing, and that any adequate method of communication, whether the use of words, signs or otherwise will suffice, provided that the indication is positive and definite. There is no requirement of law stating that a dying declaration must necessarily be made before a Magistrate, and when such statement is recorded by a Magistrate, there is no specified statutory form for such recording. Consequently, the evidentiary value or weight that has to be attached to such a statement, necessarily depends on the facts and circumstances of each individual case. What is essentially required, is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind, and where the same is proved by the testimony of the Magistrate, to the extent that the declarant was in fact fit to make the statements, then even without examination by the doctor, the said declaration can be relied and acted upon, provided that the court ultimately holds the same to be voluntary and definite. Certification by a

doctor is essentially a rule of caution, and therefore, the voluntary and truthful nature of the declaration can also be established otherwise.

10. In *Koli Chunilal Savji v. State of Gujarat,* AIR 1999 SC 3695, this Court held, that the ultimate test is whether a dying declaration can be held to be truthfully and voluntarily given, and if before recording such dying declaration, the officer concerned has ensured that the declarant was in fact, in a fit condition to make the statement in question, then if both these aforementioned conditions are satisfactorily met, the declaration should be relied upon. (See also: *Babu Ram & Ors. v. State of Punjab,* AIR 1998 SC 2808).

11. In *Laxmi v. Om Prakash & Ors.*, AIR 2001 SC 2383, this court held, that if the court finds that the capacity of the maker of the statement to narrate the facts was impaired, or if the court entertains grave doubts regarding whether the deceased was in a fit physical and mental state to make such a statement, then the court may, in the absence of corroborating evidence lending assurance to the contents of the declaration, refuse to act upon it.

12. In *Govindappa & Ors. v. State of Karnataka,* (2010) 6 SCC533, it was argued that the Executive Magistrate, while recording the dying declaration did not get any certificate from the medical officer regarding the condition of the deceased. This Court then held, that such a circumstance itself is not sufficient to discard the dying declaration. Certification by a doctor regarding the fit state of mind of the deceased, for the purpose of giving a dying declaration, is essentially a rule of caution and therefore, the voluntary and truthful nature of such a declaration, may also be established otherwise. Such a dying declaration must be recorded on the basis that normally, a person on the verge of death would not implicate somebody falsely. Thus, a dying declaration must be given due weight in evidence.

13. In *State of Punjab v. Gian Kaur & Anr.,* AIR 1998 SC 2809, an issue arose regarding the acceptability in evidence, of the thumb impression of Rita, the deceased, that appeared on the dying declaration, as the trial court had found that there were clear ridges **and curves, and the doctor was unable to explain how such ridges and curves could in fact be present,** when the skin of the thumb had been completely burnt. The court gave the situation the benefit of doubt.

14. The law on the issue can be summarised to the effect that law does

not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact.

15. The present case requires to be examined in light of the aforesaid settled legal propositions.

With the help of the learned counsel for the parties, i.e. Ms. Vibha Datta Makhija and Ms. Nidhi, we have gone through the entire evidence on record, and it may be necessary to provide a bird's eye view of the same, particularly of the portion provided by the magistrate, who had recorded the deceased's dying declaration.

16. P.K. Chaturvedi (PW.12), the Executive Magistrate had recorded the dying declaration of the deceased, and he deposed that no doctor had been available at Nohta at the relevant time. He had been called by the police, and despite this fact he had asked the police officer to call a doctor. He further deposed that he had recorded the dying declaration in the form of questions and answers and that he had satisfied himself that Kusumbai, had in fact been fit enough to make such a statement. While making her statement, Kusumbai had been fully conscious, and she had placed her thumb impression on the same. When her statement was recorded, she was tutored by anybody, though some other persons had been present at such time. Kusumbai, deceased, had

spoken continuously and clearly.

17. Similarly, R.S. Parmar (PW.14), the Investigating Officer has deposed, that he had recorded the report as had been narrated by Kusumbai. He had not added/omitted anything in the said report. He had read over the same to her after writing it, after which she admitted it to be true, and thus put her thumb impression upon the same. He has further deposed that he had called Naib Tehsildar Jabera to record the dying declaration of Kusumbai, and as no doctor had been available in Nohta at the said time, a doctor could not be arranged.

18. In the dying declaration recorded by P.K. Chaturvedi (PW.12), it is stated that the mother-in-law of Kusumbai had set her on fire by throwing kerosene oil on her, and that her father-in-law had also set her on fire. Her husband Chandrabhan, had closed the door. While she screamed in pain, her uncle Hakam Singh had brought her out by opening the door. While lodging the FIR, it was recorded by R.S. Parmar (PW.14), that her father-in-law Dal Singh had said, 'burn this bitch'. Her father-in-law had then lifted the kuppi of kerosene oil, and had poured the same on her, after which he had told his wife to set her ablaze. Thereafter, her mother-in-law had lit a matchstick and set her on fire. She had started to scream because of pain. Her husband Hallu had then closed the door of the room. After hearing the hue and cry raised by her, a person from the village had informed her family who lived closeby. Her father Nirpat Singh, uncle Hakam Singh and several other persons had come there, and her uncle Hakam Singh, had opened the door and had brought her out. There is thus, some discrepancy in both the dying declarations.

19. Dr. S.K. Jain (PW.8) deposed on 7.4.2003, stating that he had been the medical officer in the district hospital Damoh on 29.11.2002. Kusumbai had been brought for medical examination from the police station in an injured state and he had examined her. According to him, she had on her person, 100% superficial burn injuries, and the smell of kerosene oil had also been present in the body of the victim. She was unconscious at the time, and her pulse and blood pressure had been difficult to detect. She was able to breathe, but with great difficulty. She had died after some time. In his cross-examination, he has deposed that at the time of examination at the initial stage, Kusumbai had been unconscious, and had been unable to speak. He has further opined that if a person suffers 100% burn injuries, then he may not be able to speak.

20. Burn injuries are normally classified into three degrees. The first is characterised by the reddening and blistering of the skin alone; the second is characterised by the charring and destruction of the full thickness of the skin; and the third is characterized by the charring of tissues beneath skin, e.g. of the fat, muscles and bone. If a burn is of a distinctive shape, a corresponding hot object may be identified as having been applied to the skin, and thus the abrasions will have distinctive patterns.

21. There may also be in a given case, a situation where a part of the body may bear upon it severe burns, but a small part of the body may have none. When burns occur on the scalp, they may cause greater difficulties. They can usually be distinguished from wounds inflicted before the body was burnt by their appearance, their position in areas highly susceptible to burning, and on fleshy areas by the findings recorded after internal examination. Shock suffered due to extensive burns is the usual cause of death, and delayed death may be a result of inflammation of the respiratory tract, caused by the inhalation of smoke. Severe damage to the extent of blistering of the tongue and the upper respiratory tract, can follow due to the inhalation of smoke. (See: Modi's Medical Jurisprudence and Toxicology by Lexis Nexis Butterworths Chapter 20).

22. FIR (Ex. P-17) – It was recorded by Kusum Bai – deceased, on 29.11.2002 at about 2:00 p.m. According to the FIR, the said incident had occurred at 10.00 a.m. and the distance between the police station and place of occurrence is about 10 Kms. The deceased in the FIR, has named all the three accused. The deceased has mentioned that her mother-in-law had not been giving her adequate meals, and continuously harassed her for not working. On that fateful day, her mother-in-law had slapped her 2-3 times and she had started to cry loudly. Thereafter, her father-in-law had asked the other accused, if this bitch should be burnt alive? He had then brought a can of kerosene oil and poured its contents over her. Her mother-in-law lit a matchstick and had thrown its contents on her, setting her ablaze. She had then begun to scream owing to the pain. Her husband had locked the door. **Her parents-in-law and husband had set her on fire with the intention of causing her death.** She had burns all over her body.

There is a thumb impression on the FIR which appears to be normal. It has ridges and curves.

23. Ex.P-14 is the dying declaration recorded by the Executive Magistrate, Jabera. The original reveals that the executive Magistrate had asked the SHO

to call a doctor at 2.25 p.m., but there is an endorsement stating that there was no government doctor available at Nohta. What the deceased has said, is that her mother in law had set her on fire. Her father-in-law and husband had also been party to the same. She has also stated that they had never provided her adequate food. She, in anger, had told them not to harass her everyday and to simply kill her (set me ablaze). Her mother-in-law had poured kerosene oil on her and had then set her ablaze, (humari saas ne mitti ka tal dalkar jalaya). Her father-in-law set her on fire (Sasur ne aag lagayi). Her husband bolted the door.

There is thumb impression of the deceased on the FIR also. We have carefully seen the thumb impression of the deceased on the said dying declaration. The same has ridges and curves.

24. It is evident from the record that defence neither put any question in cross-examination to either the Executive Magistrate, or to the doctor who had examined the deceased in the hospital, or to Dr. S.K. Jain (PW.8), who had conducted the autopsy on the body of the deceased with respect to whether the skin of the thumb was also burnt, or whether the same was intact. Nor was any such question put to R.S. Parmar (PW.14), who had recorded the FIR, which can also be treated as a dying declaration.

25. The respondents in their statements under Section 313 Cr.P.C. denied their presence at home at the time of incident, taking the plea that they had been working in their agricultural field. They had rushed to the place of occurrence only after learning about the incident. They further took the defence that Kusumbai had committed suicide by burning herself, and that it was on being tutored by her parents that she had given a dying declaration against them. The trial court however, rejected the suggestion made by Mannu Singh (PW.5), to the effect that Kusumbai had caught fire while preparing food on the ground. Kerosene oil had been found on her body and in her burnt clothes and hair. Evidence has been led by the prosecution witnesses to the extent that she had died within a short span of 10 months of her marriage, and that she had been ill-treated by her parents-in-law as she was not being given proper food etc. She had been harassed and tortured by her in-laws, as she was not good looking, could not cook well, and had been unable to do household work properly. She was considered to have a temperamental nature, and thus had also been slapped. This evidence has not been challenged by the defence.

26. The contradictions raised by the defence in the two dying declarations,

as regards who had put the kerosene oil on her, and who had lit the fire have been carefully examined and explained by the trial court. Furthermore, in such a state of mind, one cannot expect that a person in such a physical condition, would be able to give the exact version of the incident. She had been suffering from great mental and physical agony. Upon proper appreciation of the evidence on record, the trial court had found the dying declarations to be entirely believable, and worth placing reliance upon, but the High Court on a rather flimsy ground, without appreciating material facts, has taken a contrary view. In our opinion, as the defence did not put any question either to the executive magistrate, or to the I.O., or to the doctors who had examined her or conducted the post-mortem, with respect to whether any part of the thumb had skin on it or not, as in both the dying declarations, ridges and curves had been clearly found to exist, we do not see any reason to dis-believe the version of events provided by the executive magistrate and the I.O., who had recorded the dying declarations. No suggestion was made to either of them in this regard, nor was any explanation furnished with respect to why these two independent persons who had recorded the dying declarations, would have deposed against the respondents accused. In the event that both of them had found the deceased to be in a fit physical and mental condition to make a statement, there exists no reason to disbelieve the same. In light of such a fact-situation, the concept of placing of a thumb impression, loses its significance altogether.

27. We cannot accept the submissions made on behalf of the respondents stating that Kusumbai had been tutored by her parents, as the evidence on record clearly reveals that the tractor had been brought at the instance of the respondents, and that they had been present in the trolley with her parents and other relatives throughout. Therefore, her parents and other relatives could have had no opportunity to implicate the respondents, or to tutor her.

28. Thus, in view of the above, the appeal succeeds and is allowed. The judgment and order impugned before us, passed by the High Court is set aside, and the judgment and order of the trial court is restored. The respondents are directed to surrender within a period of four weeks from today, failing which the learned Chief Judicial Magistrate, Damoh, Madhya Pradesh, shall take them into custody and send them to jail to serve out the remaining part of their sentence.

A copy of the order be sent to the CJM by the registry.

Appeal allowed.

I.L.R. [2013] M.P., 1279
FULL BENCH

Before Mr. Justice Shantanu Kemkar, Mrs. Justice S.R. Waghmare & Mr. Justice Prakash Shrivastava

C.R. No. 71/2012 (Indore) decided on 29 April, 2013

GULAB BAI (SMT.) & ors. ...Applicants
Vs.
SUBHASH CHANDRA ... Non-applicant

Accommodation Control Act, M.P. (41 of 1961), Section 23-J (i),(ii) - Retired employee of Municipal Corporation - Whether Landlord within the meaning of Section 23-J - (Majority View) **- Municipal Corporation is an elected body and its object is not to carry any business but to administer a particular area from where its members are elected - Corporation cannot be said to be an association of a number of individuals for the purpose of carrying out any trade or business - Corporation is not a company owned or to be controlled by State Government - Respondent is neither a retired servant of any Government nor a retired servant of a company owned or controlled by the Central or the State Government - Retired employee of Municipal Corporation does not fall within the definition of Landlord under Section 23-J of the Act - Reference answered accordingly. (Paras 6 to 17)**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23जे (i),(ii) – नगरपालिक निगम का सेवानिवृत्त कर्मचारी – क्या धारा 23–जे के अर्थान्तर्गत भूमिस्वामी है – (बहुमत का दृष्टिकोण) – नगरपालिका निगम निर्वाचित निकाय है और उसका उद्देश्य कोई कारोबार करना नहीं बल्कि उस विशिष्ट क्षेत्र का प्रशासन करना है जहां से उसके सदस्य निर्वाचित हुए हैं – निगम को, किसी व्यापार या कारोबार चलाने के प्रयोजन हेतु व्यक्तियों के समूह का संघ नहीं कहा जा सकता – निगम कोई कम्पनी नहीं जिस पर राज्य सरकार का स्वामित्व है अथवा उसके द्वारा नियंत्रित है – प्रत्यर्थी न तो किसी सरकार का सेवानिवृत्त कर्मचारी है और न ही राज्य सरकार के स्वामित्व अथवा नियंत्रण की कम्पनी का सेवानिवृत्त कर्मचारी है – नगरपालिका निगम का सेवा निवृत्त कर्मचारी, अधिनियम की धारा 23–जे के अंतर्गत भूमिस्वामी की परिभाषा में नहीं आता – निर्देश तद्नुसार उत्तरित।

Cases referred :

C.R. No. 120/2011 decided on 24.08.11, 1995 MPLJ 21, 1986 MPRCJ 341, 2000(3) MPLJ 609, 1995 JLJ 460, 1986 MPRCJ Note 11, 1998 MPACJ 128, 2000(3) MPLJ 537, AIR 1990 MP 345.

G.M. Chaphekar & B.L. Pavecha, as Amicus Curiae.
S.K. Pawanekar, for the applicants.
A.K. Sethi, with *Harish Joshi,* for the non-applicant.

ORDER

The Order of the court was delivered by : **SHANTANU KEMKAR, J:** This reference has been made before us vide order dated 07.09.2012 passed by the learned Single Judge of this High Court in Civil Revision No.71/2012 to answer the following question: -

> "Whether Section 23-J of the MP Accommodation Control Act, 1961 covers within its ambit a retired employee of the Municipal Corporation to maintain application for eviction under Chapter III A?"

2. Briefly stated, the respondent – a retired employee of the Indore Municipal Corporation filed an application before the Rent Controlling Authority (for short, RCA), Indore, under Section 23-A of the MP Accommodation Control Act, 1961 (in short, "the Act 1961"), seeking eviction of his tenant (applicants herein) for his *bona fide* requirement of the non-residential accommodation situated at Indore let out to them (claiming himself to be covered under the definition of 'landlord' given under Section 23-J of the Act 1961).

3. The applicants in their reply denied the averments made by the respondent in his application. They raised a plea that the respondent is not covered under the Special Category of 'landlord' as defined in Section 23-J of the Act 1961.

4. The RCA vide its order dated 24.02.2012 passed in Eviction Case No.A/90 (7) I-2010-11 allowed the application and ordered for eviction of applicants. It accepted the plea of the respondent that he is covered under the term 'landlord' defined under Section 23-J of the Act 1961. The Authority while taking this view relied on the decision rendered by a learned Single Judge of this High Court in Civil Revision No.120/2011 *(Ghanshyam s/o Champalal Soni v. Subhashchandra s/o Narendra Prasad Soni)* decided on 24.08.2011 who, in turn, relied upon a Division Bench judgment of this High Court passed in the case of *Ranjit Narayan Haksar v. Surendra Verma* (1995 MPLJ 21). The learned Single Judge in para 8 of the order held as under: -

> "8. This Court is not impressed with this contention because learned

Division Bench has clearly concluded that retired employee of Government owned or controlled statutory Corporation is a landlord as defined in Section 23-J (ii) of the Act. Undoubtedly, Municipal Corporation is statutory Corporation on account of its constitution by virtue of Section 7 of the MP Municipal Corporation Act, 1956. Chapter XXXIV of the Act contains various provisions of the State Government for having control on it. Thus, it cannot be denied that the Municipal Corporation is statutory Corporation and is controlled by the State Government. This being so, it is held that retired employee of Municipal Corporation is a landlord as defined in Section 23-J (ii) of the Act and law laid down by the Single Bench in the case of *Mohan Das* (supra) stands impliedly overruled in view of the aforesaid observation of division bench."

5. The applicants challenged the order dated 24.02.2012 passed by the RCA, in Civil Revision No.71/2012 under Section 23-E of the Act 1961 before this High Court. And during the course of its hearing the learned Single Judge, noticing the conflicting views having been taken by the different Benches, referred the aforesaid question for being decided by a Full Bench so that conflict may be resolved.

6. Before us, learned counsel for the parties and also the *amicus curiae* have agreed that a retired employee of the Municipal Corporation would not fall within the meaning of "retired servant of any Government" as stated in Clause (i) of Section 23-J of the Act 1961. They, therefore, confined their submissions only in respect to Clause (ii) of Section 23-J of the Act 1961; and as such, we are answering the question only to that extent. In the circumstances, reference about Clause (i) of Section 23-J is uncalled for, as none of the parties have placed reliance on Clause (i), and therefore, the question about Clause (i) of Section 23-J does not arise.

7. Shri G.M. Chaphekar, learned *amicus curiae* and Shri S.K. Pawanekar, learned counsel for the applicants have argued that the Municipal Corporation cannot be said to be a company owned or controlled either by the Central or the State Government and, therefore, the respondent is not covered within the meaning of landlord as defined under section 23-J (ii) of the Act 1961. According to them, the respondent is not a retired servant of a company owned or controlled by the Central or the State Government. The learned

counsel, in support of their submissions, have relied on the decisions *Shiv Singh v. Krishna Gopal* 1986 MPRCJ 341 and *Subhash Kumar Malviya v. Shankar Lal Mohanlal Malviya* 2000 (3) MPLJ 609. They have also argued that the law laid down by the Division Bench in the case of *Ranjit Narayan Haksar* (supra) will not be applicable to a retired employee of Municipal Corporation. According to them, the Municipal Corporation is constituted under Section 7 of the MP Municipal Corporation Act, 1956, and its composition, as provided under Section 9, is by an elected body. Thus, it cannot be said to be owned or controlled by the Central or State Government. They have also contended that some control of the State Government on the Municipal Corporation as provided under the MP Municipal Corporation Act, 1956 will not make it a "company" either owned or controlled by the State Government.

8. Shri B.L. Pavecha, learned *amicus curiae* and Shri A.K. Sethi, learned Senior Counsel, on the other hand, have argued that since the order passed by the learned Single Judge in Civil Revision No.120/2011 has been upheld by the Supreme Court in SLP No.35277/2011 vide order dated 13.04.2012 with an observation that "we find no merit in the petition", the question deserves to be answered in favour of the respondent. They have placed reliance on the judgment of the Division Bench of this High Court in *Ranjit Narayan Haksar* (supra) which was affirmed by the Supreme Court in *Surendra Verma v. Ranjit Narayan Haksar* (1995 JLJ 460) and submitted that the Municipal Corporation would be included in the expression 'company' referred to in the definition of 'landlord' in Section 23-J (ii) of the Act 1961. They have argued that as per Halsbury's Laws of England, 4th Edition Vol. 9 1201 as referred by the Division Bench, the Corporations may be Trading Corporations or Non-trading Corporations and Non-trading Corporations are illustrated by Municipal Corporations. Therefore, according to them, Municipal Corporation is also a Corporation, which will come within the sweep of word 'company' referred to in Section 23-J (ii). In support of their contention that the Municipal Corporation is controlled by State Government, they placed reliance on Sections 10, 80 (5) (ii), 417, 421, 422, 425, 426-A, 427 and 430 of the Madhya Pradesh Municipal Corporation Act, 1956. They have also cited the decision *Vipin v. Ranjit Narayan* 1986 MPRCJ Note 11, *Munnalal v. Kailash Chandra* 1998 MPACJ 128 and *Mohankrishna v. Bau Sahab* 2000 (3) MPLJ 537.

9. Before dealing with the question, we feel appropriate to reproduce

Clause (ii) of Section 23-J of the Act, 1961. It reads as under: -

> **"23-J Definition of landlord for the purposes of Chapter III-A.**
>
> For the purpose of this Chapter 'landlord' means a landlord who is -
>
> (ii) a retired servant of a company owned or controlled either by the Central or State Government."

10. Few provisions of Municipal Corporation Act, 1956, which are relevant, are also extracted below: -

> **"7. Constitution of Municipal Corporation.** – (1) There shall beconstituted a Municipal Corporation for a larger urban area in accordance with the provisions of this Act:
>
> Provided that a Corporation under this Section may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment or a group of such establishments in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township.
>
> (2) In this Section 'a larger urban area' means such area as the Governor may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as he may deem fit, specify by public notification for the purposes of this Act.
>
> (3) The Corporation shall be a body corporate having perpetual succession and a common seal and shall by the said name sue and be sued.
>
> **9. Composition of Municipal Corporation.** – (1) A Municipal Corporation shall consist of –
>
> (a) a Mayor, that is Chairperson, elected by direct election from the Municipal area:
>
> (b) Councillors elected by direct election from the wards;

(c) not more than six persons having special knowledge or experience in the Municipal administration, nominated by the State Government:

Provided that only a person residing within the Municipal area and being otherwise not ineligible for election as a Councilor, may be nominated:

(d) Members of the House of the People and the Members of the Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area;

(e) Members of the Council of States registered as electors within the municipal area:

Provided that a member of the House of the People and a Member of the State Legislative Assembly as mentioned in clause (d) or a member of Council of States, as mentioned in clause (e) may nominate his representative, who possesses such qualifications as may be prescribed in this behalf to attend the meeting of the Corporation.

(2) The persons nominated under clause (c) of sub-section (1) shall hold office during the pleasure of the State Government.

(3) Persons referred to in sub-section (1) shall be deemed to be Councillors for all purposes of this Act but the persons referred to in clauses (c), (d) and (e) of sub-section (1) shall not have the right to vote in the meetings of the Corporation.

(4) If any municipal area fails to elect a Mayor or any ward fails to elect a Councillor, fresh election proceedings shall be commenced for such municipal area or ward, as the case may be, within six months to fill the seat, and until the seat is filled it shall be treated as casual vacancy:

Provided that proceedings of election of Speaker, or any of the Committee under the Act shall not be stayed, pending the election of such seat."

11. Some more provisions of the Municipal Corporation Act, 1956, on which reliance has been placed by the respondent, we find that Section 10

confers upon the State Government the powers to determine the number and extent of the wards of the Corporation. Section 80 (5) restricts the power of the Corporation to lease, sell or otherwise convey the property without previous sanction of the State Government. Section 405 confers power on the Governor to include or exclude any area from the limit of the Corporation. Chapter 26 by its title "control" includes several provisions which confer on the State Government powers of effective control over the corporation. Section 417 confers power on the Government to depute officers specified in the section to hold enquiry in to the affairs of any corporation or to have inspection or examination of any of its department, office or service. Section 421 confers power on the Government to suspend execution of any resolution or order of the corporation. And finally Section 422 confers power on the Government to dissolve the corporation. Section 425 confers power on the Government to get its order enforced when the corporation defaults in carrying out the order passed by the Government. Section 425-A empowers the State Government to confer authority on officers of the Government to attend meetings of the Corporation and address it. Section 426 empowers the Government to make rules authorizing the inspection of the institutions and works which are under the management and control of the corporation. While Section 426- A empowers the Government to issue orders for removal of difficulties, Section 427 authorizes the corporation to frame by-laws. Section 430 provides that by-laws framed by the Corporation shall have no validity unless they are confirmed by the Government. This section further provides that the Government may modify the by-laws passed by the corporation and may also cancel its confirmation rendering such by-laws to be ineffective.

12. True it is that the decision of the Single Judge of this High Court in Civil Revision No.120/2011 (*Ghanshyam s/o Champalal Soni* (supra) related to the same landlord was assailed before the Supreme Court and the SLP was dismissed on a finding that it had no merit, but the fact remains that the Supreme Court has not dealt with the question as to whether a retired servant of Municipal Corporation shall fall within the meaning of 'landlord' as defined under Section 23-J of the Act of 1961. The order of dismissal of SLP by the Supreme Court is too brief an order to be treated as law declared under Article 141 of the Constitution of India.

13. In the case of *Ranjit Nayaran Haksar* (supra), which has been affirmed by the Supreme Court and on which strong reliance has been placed by the learned counsel for the respondent, the Division Bench has held that a

retired employee of a Government owned or controlled statutory corporation is a 'landlord' under Section 23-J (ii) of the Act of 1961. The Division Bench while taking this view has considered all the decisions of different Single Benches, which have also been referred before us, as would be clear from the following paragraph 5 of the order: -

> "5. We will first advert to the conflicting decision referred to by the learned Single Judge. In *Vipin v. Ranajitnarayan and others,* 1986 MPRCJ Note No. 11, Mulye, J. held that a retired employee of the M. P. State Road Transport Corporation is governed by Section 23- J(ii) of the Act on the ground that the petitioner's counsel was unable to point out that the Corporation was not controlled by the State Government. The next decision is *Shiv Singh v. Krishan Gopal,* 1986 MPRCJ 341, in which Shrivastava, J. held that the employee of a Municipality is not an employee of a Company. In *Sobhagyamal vs. Prakash Pharmaceuticals*, Indore, AIR 1990 MP 345, Dube, J. held that a retired employee of L.I.C. is not covered under Section 23-J(ii) of the Act, and cannot invoke the provisions of Chapter IIIA of the Act. The learned Judge indicated that the expression 'Company' has to be understood as company incorporated under the provisions of the Companies Act and as defined in the provisions of that Act. In *Mohandas v. Deven Das,* 1994 (1) MPJR 259, Issarani, J. held that Municipal Corporation is not a company and retired servant of the Municipal Corporation is not a'landlord' under Section 23-J(ii) of the Act. A reading of these decisions shows that direct conflict exists only between *Vipin v. Ranajitnarayan,* 1986 MPRCJ Note 11, and *Sobhagyamal v. Prakash Pharmaceuticals,* Indore AIR 1990 M.P. 345. The other decisions deal with Municipality or Municipal Corporation."

14. From the reading of above quoted paragraph, it is apparent that the Division Bench, after considering all the decisions, as referred to in paragraph No.5, noticed that the conflict exists only between *Vipin v. Ranjitnarayan* 1986 MPRCJ Note 11 and *Sobhagyamal v. Prakash Pharmaceuticals,* Indore, AIR 1990 MP 345. The Division Bench has further observed that the other decisions deal with the Municipality or the Municipal Corporation; meaning thereby.that while deciding the issue before it, the Division Bench excluded from its consideration the cases relating to Municipality or the

Municipal Corporation. From paragraph 3 of the order of the Division Bench, it is also very clear that it was not disputed before the Division Bench that MP State Road Transport Corporation is a statutory body, which came into existence under the provisions of Road Transport Corporation Act, 1950 and the same **is owned**, if not controlled by the State Government. **(Emphasis supplied)** In that context, the Division Bench simply proceeded to examine whether the Government owned Corporation would be covered within the meaning of word 'company', as referred to in the definition of 'landlord' in Section 23-J (ii) of the Act of 1961. The Division Bench has held that the expression 'company'-referred to in the definition of 'landlord' under Section 23-J (ii) of the Act of 1961 is not restricted to company incorporated under the Companies Act but has to be understood in the general legal sense and takes in Government owned or controlled statutory corporations.

15. It is, thus, clear that the decision of the Division Bench in *Ranjit Narayan Haksar v. Surendra Verma* (supra), which has been affirmed by the Supreme Court, was relating to the Corporation owned by the State Government and the question of Municipal Corporation or Municipality was not before it. The reliance of the learned counsel for the respondent on the passage quoted by the Division Bench from *Halsboury's law of England* (supra) is misconceived as non-trading corporations may include Municipal Corporations but it has never been held that the Municipal Corporation will be a company that too government owned or controlled. As already observed, the MPSRTC is wholly owned by the State Government and it carries on business of transport. Whereas the Municipal Corporation is an elected body and its object is not to carry any business, but to administer a particular area from where its members are elected. Also, 'company' is an association of a member of individuals for the purpose of carrying on trade, or other legitimate business (See Advanced Law Lexicon by P. Ramanatha Aiyar, 3rd Edition 2005, p.912). The Municipal Corporation cannot be said to be an association of a number of individuals for the purpose ofcarrying out any trade or business, whereas MPSRTC carries on business.

16. Thus, from the above analysis, it is clear that the judgment of Division Bench in the case of *Ranjit Narayan Haksar v. Surendra Verma* (supra) was on a totally different footing, as in that case, the landlord was a retired employee of Government owned Corporation and in the said judgment, the question relating to Municipality or Municipal Corporation was not considered. However, the present case relates to a retired employee of Municipal Corporation, which is constituted

under Section 7 of the Municipal Corporation Act, 1956. The composition of Municipal Corporation is as per Section 9 of the Municipal Corporation Act, 1956. The Municipal Corporation consists of Mayor as well as Concillors elected by the direct election from the wards. Thus, it cannot be held to be company owned or to be controlled by the State Government. It being a local elected body having its own independent existence, it can never be regarded as a 'company' or a 'statutory corporation'. It is an entity separate from the Government. On the basis of the provisions contained in Sections 10, 80 (5), 405, 417, 422, 425, 425-A, 426, 426-A, 427 and 430 of the Municipal Corporation Act, 1956, it cannot be construed that the Municipal Corporation is owned or is controlled by the State Government as a "Government Company" or "statutory corporation" owned or controlled by the Government.

17. Having regard to the aforesaid, we answer the reference in favour of the applicants and against the respondent landlord by holding that a retired employee of a Municipal Corporation will not be covered under Section 23-J (ii) of the Act to maintain application for eviction under Chapter III-A of the MP Accommodation Control Act, 1961.

18. Matter be now placed before the appropriate bench for deciding the civil revision on merits.

Per Mrs. S.R. Waghmare. J

Whereas the judgment passed by Hon'ble Shri Justice S. Kemkar presiding the Full Bench constituted to answer the reference in the present revision; has been put up before me for consideration; and in my humble opinion, I find that I do not agree with the view taken by His Lordship and answer the referred question in the affirmative that "A retired employee of the Municipal Corporation would be covered under Section 23(J) of the M.P. Accommodation Control Act 1961 and shall be eligible to maintain the application for eviction under Chapter III A of the M.P. Accommodation Control Act 1961."

2. The point of reference has settled to the question whether a retired employee of the Municipal Corporation would be covered under Section 23 (J) (ii) of the M.P. Accommodation Control Act 1961 and plunging straight into the controversy, I find that it is an admitted fact that the Municipal Corporation is creation of a statute i.e. the Municipal Corporation Act 1956 and that several provisions of Municipal Corporation Act 1956 confer the power on the State Government regarding control over the Municipal Corporation, such as :

Under Section 7 the constitution of the Municipal Corporation is constituted only by act of public notification by the Governor, who having regard to the size of the area and the municipal services being provided or proposed to be provided; by public notification, specifies the area. The composition of the Municipal Corporation is decided under Section 9 of the Act and several persons in the Government are nominated in the Corporation by the State Government such as members of the House of the People and the members of the Legislative Assembly of the State etc. and that the number of other members of the Corporation is also decided by the said provisions.

3. The other important provisions of the Municipal Corporation Act, 1956, on which reliance has been placed by the respondent, are already enumerated by His Lordship in the present judgment (they are reproduced here for convenience).

Section 10 confers upon the State Government the powers to determine the number and extent of the wards of the Corporation. Section 80(5) restricts the power of the Corporation to lease, sell or otherwise convey the property without previous sanction of the State Government. Section 405 confers power on the Governor to include or exclude any area from the limit of the Corporation. Chapter 26 by its title "control" includes several provisions which confer on the State Government powers of effective control over the corporation. Section 417 confers power on the Government to depute officers specified in the Section to hold enquiry into the affairs of any Corporation or to have inspection or examination of any of its department, office or service. Section 421 confers power on the Government to suspend execution of any resolution or order of the Corporation. And finally Section 422 even confers power on the Government **to dissolve** the Corporation. Section 425 confers power on the Government to get its order enforced when the Corporation defaults in carrying out the order passed by the Government. Section 425-A empowers the State Government to confer authority on officers of the Government to attend meetings of the Corporation and address it. Section 426 empowers the Government to make rules authorizing the inspection of the institutions and works which are under the management and control of the Corporation. While Section 426-A empowers the Government to issue orders for removal of difficulties, Section 427 authorizes the Corporation to frame by-laws. Section 430 provides that by-laws framed by the Corporation shall have no validity unless they are confirmed by the Government. This Section further provides that the Government may modify the by-laws passed by the Corporation and may also cancel its confirmation rendering such by-laws to be ineffective.

4. These provisions thus indicate thereby that there is effective control over the Municipal Corporation by the State Government and hence I find that the conclusion is inevitable that the 'Municipal Corporation' is drawn within the vortex and ambit of the term "Corporation controlled" by the State Government. However, the special class of landlords as categorized in sub-Section (ii) of Section 23(J) of the M.P. Accommodation Control Act actually reads as under:-

> **"(ii) a retired servant of a company owned or controlled either by the Central or State Government."**

And this naturally leads me to the reference in the matter of *Ranjit Narayan Haksar vs. Surendra Verma* 1995 M.P.L.J. 21. This judgment has also been referred to by Hon'ble Shri Justice S. Kemkar in some detail. The Division Bench of this Court in the said case had categorically held that:

> **"There is nothing in the language or context of Section 23 (J) (ii) indicating any intention to give a restricted meaning to the expression 'company'. The legislature did not refer to the Companies Act in Section 23 (J) (ii) and did not specifically exclude statutory corporation. The expression 'company' has been used in its general legal sense and takes in Government owned or controlled statutory Corporations. We hold that retired employee of a Government owned or controlled statutory corporation is a landlord as defined in Section 23 (J) (ii) of the Act."**

5. In the S.L.P. filed consequently challenging this judgment of the High Court, the Apex Court has categorically held that:

> **"We agree with the view taken by the Division Bench that the word 'company' in Section 23(J)(ii) would include 'Corporation' created under the special Statute which is owned or controlled by the Central or the State Government. Hence, the S.L.P. is dismissed."**
>
> *(Surendra Verma vs. Ranjeet Narayan Haksar:* 1995 J.L.J. 460)

6. Therefore, I find that the question was not open to this Court to decide whether the Municipal Corporation was a 'company' or not? The point has been settled **categorically** by the Apex Court with reference to Section 23(J) of the M.P. Accommodation Control Act itself. It is in this light essential to

refer to the contentions raised by Shri B.L. Pavecha, learned Senior Counsel and Amicus Curiae that the judicial interpretation was required to interpret the word 'Corporation' as used in Section 23(J)(ii) of the M.P. Accommodation Control Act since the term 'corporation' being a company pertained to the M.P. State Road Transport Corporation in the matter of *Ranjit Narayan Haksar* (supra). Considering the term 'employee' in context of Corporation controlled and owned by Government, it is to be interpreted to mean that the municipal employee, would be an employee of the Government. However, he clarified upon query by placing reliance on Principles of Statutory Interpretation by Justice G.P Singh in 5th Edition Pages 181 and 182 Chapter 4 that:

> **"(However), it is not a sound principle ofconstruction to interpret expressions used in one Act with reference to their use in another Act, and decisions rendered with reference to construction of one Act cannot be applied with reference to the provisions of another Act, when the two Acts are not in pari materia."**

And thus, he pacified the anxiety that an employee of the Corporation is not to be termed as a "Government servant" generally, for the purpose of all or any other Acts, but to be so interpreted for the purposes of the term landlord as used in Section23(J(ii) of the M.P. Accommodation Act, only since the matter had been successfully concluded by the Apex Court in the matter of *Surendra Verma vs. Ranjeet Narayan Haksar:* 1995 J.L.J. 460 (supra).

7. He also further urged that the word 'Government' is to be interpreted in a wider amplitude since Section 23(J)(i) refers to "any" Government and could mean local self government in reference to a municipal corporation.

8. I find that considering the term 'Municipality' as defined in Webster's New Dictionary it is termed as, 'a town, city or borough which has local self-Government'. In Black's Law Dictionary it is extended to 'legally incorporated or duly authorized **association** of inhabitants of limited area for local Government or other public purposes. A body created by the incorporation of the people of a prescribed locality invested with the subordinate powers of legislation to assist the Civil Government of the State and to regulate and administer local and internal affairs of the community."

The word 'Municipality' thus has a wide connotation. The Constitution of India also now understands it in a broad sense. The newly introduced Chapter IX-A and the Constitution (seventy fourth Amendment) Act 1992 which received

the assent of the President on 20th April 1993 deals with the Municipalities. Clause(e) of Article 243-P defines Municipality to mean 'an institution of self-Government constituted under Article 243-Q'. Whereas Article 243-Q indicates that a Corporation of a Municipal Council or a Nagar Panchayat is constituted on the strength of population and the area or place where it is constituted, namely rural or urban. But all the three are deemed to be municipality. A Municipal Corporation with a larger area is as much a municipality as a council with smaller area. The expression 'Municipality in the State' has to be read in a broad and larger sense. The constitution of such Municipalities is the mandate of the Constitution and does not depend on any law made by the Legislature.

And it is in this regard that I disagree with the conclusion drawn by Hon'ble Justice S. Kemkar that the Municipal Corporation cannot be said to be an association of a number of individuals for the purpose of carrying out any trade or business, whereas MPSRTC carries on business of transport the Municipal Corporation also carries on several businesses some even for gain and profit and it is the business of the Corporation to carry on a local self government and other public purposes.

9. Indeed learned Senior Counsel Shri G.M. Chaphekar, Amicus Curiae taking a different view stated that although Section 23(J)(ii) contained the word "company" owned or controlled by the State Government and either of the words was not to be considered to the exclusion of the other and both drew color from each other, and it would not suffice if the 'Corporation' was exclusively owned by a private entity and controlled by the State and vice versa owned by the State and controlled by another agency. He submitted that both these conditions had to co-exist. He also vehemently urged that these provisions in the Municipal Corporation Act cited above are in the nature of checks and not in nature of control and that they are only corrective measures. I find that it would be futile to make such a distinction since there is not much of a difference in the two words. However, the word "control" might be considered in contrast to "ownership". In my humble opinion interpretation word **'or'** is used specifically in Section 23(J)(ii) to mean that the Corporation can either be owned or controlled by the Government. Undoubtedly the Municipal Corporation is **not** a State owned Corporation, but as stated above the 74th Constitutional amendment was effected with a view to organize the lowest level units of self Governing and administrative units of the Government. Article 243-Q of the Constitution of India provides for the constitution of a Nagar Panchayat, a Municipal Council and a Municipal Corporation.

10. Thus there is no getting away from the fact that undoubtedly the

Municipal Corporation is an instrumentality of the State and the State Government exercises control not only over its Constitution, but also in its conduct of business and can even dissolve the Corporation i.e., it comes into existence and can be extinguished at the will of the State Government.

11. Finally, I find substance in the contentions put forth by the Senior Counsel Shri P.K. Saxena that the aims and objectives in introducing Section 23 (J)(ii) of the M.P. Accommodation Act should not be lost sight of. He has however, interpreted the legislative intent to facilitate the recovery of accommodation on the grounds of bonafide requirement from the Civil Court or the Rent Controlling Authority by providing summary procedure since the special class of landlords are entitled to acquire the possession speedily, to mean, only such retired government employee who wants to return his own premises after retirement. According to him, such a retired employee should not face hardship and hence welfare legislature was introduced in favour of the landlords, who were transfered to distinct places and on their return home should be rightly granted the accommodation which they had owned. He however, stressed the fact that the employees of the Municipal Corporation are generally not transferred out of the district; and hence, these provisions not meant for the benefit of retired employee of the Municipal Corporation. And in this sense he agreed with the contention put for by the learned Senior Counsel Shri G.M. Chaphekar.

12. In my humble opinion since the provisions of Section 23(J)(ii) of the M.P. Accommodation Control Act are meant for a special class of landlords such as a retired employees and the controversy has been set to rest in the matter of *Surendra Verma vs. Ranjeet Narayan Haksar:* 1995 J.L.J.460 (supra) regarding retired employees of the Municipal Corporation being included in the special category of under Section 23(J)(ii) and the judgment of the Apex Court had attained finality in the year 1995 itself. This judgment has not been set aside or distinguished and still holds the field and I find that the question is therefore, not justiciable whether a retired employee of the Municipal Corporation would be a retired government servant also.

13. Consequently I have already stated that I have answered the reference in the affirmative and do hereby reiterate that a retired employee of the Municipal Corporation would be eligible to make an application for eviction under Chapter III-A of the M.P. Accommodation Control Act.

Order accordingly.

I.L.R. [2013] M.P., 1294
WRIT APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
W.A. No. 1/2013 (Indore) decided on 10th January, 2013

AMAN TRADERS ...Appellant
Vs.
STATE OF M.P. & anr. ...Respondents

Contract - Reserved Price - Non-disclosure - **Elaborate mechanism for fixation of upset price which takes into account the sale rate during last five years, sale rate in the preceding year and upset price in preceding year and market trend - Upset price so fixed are approved by the Chairman prior to invitation of tenders - There is no unfairness in not disclosing the reserve price because when reserve price is disclosed, bidders often form cartels and bid at or around the disclosed price, though the market price is much higher - Non-disclosure of reserve price proper - Appeal dismissed. (Para 6)**

संविदा – आरक्षित मूल्य – अप्रकटन – अपसेट कीमत नियत करने हेतु विस्तृत तकनीक जिसमें पिछले पांच वर्षों के दौरान की विक्रय दर, पूर्व वर्ष की विक्रय दर एवं पूर्व वर्ष की अपसेट कीमत और बाजार प्रवृत्ति को ध्यान में रखा जाता है – इस प्रकार नियत अपसेट कीमत को अध्यक्ष द्वारा निविदायें आमंत्रित करने से पूर्व, अनुमोदित किया जाता है – आरक्षित मूल्य के अप्रकटन में कोई अनुचितता नहीं क्योंकि जब आरक्षित मूल्य को प्रकट किया जाता है, प्रायः बोली लगाने वाले उत्पादक संघ निर्मित कर प्रकटित कीमत पर या आसपास बोली लगाते हैं, यद्यपि बाजार मूल्य काफी अधिक होता है – आरक्षित मूल्य का अप्रकटन उचित – अपील खारिज।

Cases referred :

M.C.C. No. 326/1990 decided on 14.12.1990, AIR 2008 SC 2411.

S.H. Moyal, for the appellant.
M. Ravindran, Dy. G.A. for the respondent No.1/State.
M.S. Dwivedi, for the respondent No.2.

ORDER

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

2. This intra court appeal is directed against the order dated 17.12.2012,

passed by learned Single Judge of this Court in W.P. No.11193/2012.

3. Brief facts necessary for disposal of this writ appeal are that aggrieved by the Notice Inviting Tender (for short, the NIT) dated 18.11.2012 issued by the 2nd respondent for advance sale of 'Tendupatta' in the year 2013 the appellant had filed the aforesaid writ petition raising his grievance that in the said tender notice no upset price has been quoted. According to the petitioner, in the absence of upset price there would be no healthy competition and there would be uncertainty in the process of offering the price by the bidders. The further grievance of the petitioner is that non mention of the upset price in the NIT is contrary to the direction issued by this Court in M.C.C. No.326/1990 *State of M.P. and another vs. Raj Kumar* and others decided on 14.12.1990.

4. The learned Single Judge dismissed the writ petition noticing that no statutory provision of law making it mandatory in the case of 'tendu patta' tender to quote the upset price was shown.

5. As regards the petitioner's reliance on the order passed in the case of *State of M.P. and another vs. Rajkumar* and others (supra) we find that in the aforesaid case, the Division Bench had observed that the State should devise the procedure of norms of minimum acceptable offers before inviting the tenders so that the disposal of Tendu leaves at reasonable rates is not left to chance and speculation in future which may involve loss of public revenue inspite of retenders. From these observations, it cannot be said that the Division Bench had directed to disclose the upset price in the NIT itself. In the circumstances in our view by not disclosing the upset price in the NIT the second respondent has not violated any direction of this Court issued in the case of *State of M.P. & another vs. Rajkumar* and others (supra).

6. It has been stated by Shri M.S. Dwivedi, learned counsel appearing for the second respondent that there is an elaborate mechanism for fixation of upset price which takes into account the sale rate during last five years, sale rate in the preceding year and upset price in the preceding year. Taking into consideration these factors and market trend, the upset price is fixed on the basis of a formula every year. The upset prices so prepared prior to invitation of tenders are approved by the Chairman of the second respondent. It has been stated that mechanism of the disposal of tendu leaves is absolutely fair and transparent and there is no room for any arbitrariness and loss to the public exchequer. He has also placed reliance

on the judgment of Supreme Court in the case of *Haryana State Agricultural Marketing Board vs. Sadhu Ram* AIR 2008 SC 2411 decided on 08.04.2008 in which the Supreme Court had observed that there is no unfairness in not disclosing the reserve price as it is common knowledge that when the reserved price is disclosed, the bidders often form cartels and bid at or around the disclosed price, though the market price is much higher.

7. Having regard to the aforesaid legal position, we are of the considered view that the learned Single Judge has committed no error in dismissing the writ petition challenging the action of the second respondent in not disclosing the upset price in the NIT.

8. Accordingly, the appeal fails and is hereby dismissed. No orders as to costs.

Appeal dismissed.

I.L.R. [2013] M.P., 1296
WRIT APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
W.A. No. 273/2012 (Indore) decided on 28 January, 2013

SUSHIL KUMAR KASLIWAL & ors. ...Appellants
Vs.
STATE OF M.P. & ors. ... Respondents

Public Trusts Act, M.P. (30 of 1951), Sections 8 & 9 - Notice to affected parties **- Board of Trustees removed certain trustees and appointed new trustees by passing resolution - Application was made to Registrar to record the changes brought in trusteeship of Public Trust - Registrar accordingly recorded the changes in trusteeship - Meeting of Board of Trustees was held without giving any notice to the removed trustees - Registrar, also recorded the changes without issuing notices to the removed trustees - Registrar should have issued notices to the removed trustees about the proposed changes and then should have passed appropriate order after hearing them - Remedy of Civil Suit under Section 8 of the Act is available to the removed trustees even if changes would have been accepted by the Registrar by holding an enquiry in accordance with law after giving notice to the removed trustees - As principles of natural justice were not followed therefore,**

the order passed by Registrar is bad and rightly quashed by Single Judge - Appeal dismissed. (Paras 11 to 16)

लोक न्यास अधिनियम, म.प्र. (1951 का 30), धाराऐं 8 व 9 – प्रभावित पक्षकार को नोटिस – न्यासियों के बोर्ड ने संकल्प पारित कर कतिपय न्यासियों को हटाया और नये न्यासियों को नियुक्त किया – लोक न्यास की न्यासधारिता मे लाये गये बदलाव को अभिलिखित किये जाने के लिए रजिस्ट्रार को आवेदन किया गया – रजिस्ट्रार ने तद्नुसार न्यासधारिता में बदलाव अभिलिखित किये – न्यासियों के बोर्ड की सभा हटाये गये न्यासियों को सूचना दिये बिना कराई गई थी – रजिस्ट्रार ने भी, हटाये गये न्यासियों को नोटिस जारी किये बिना बदलाव अभिलिखित किये – रजिस्ट्रार को प्रस्तावित बदलाव के बारे में हटाये गये न्यासियों को नोटिस जारी करने चाहिए थे और उन्हें सुने जाने के पश्चात समुचित आदेश पारित करना चाहिए था – हटाये गये न्यासियों को तब भी अधिनियम की धारा 8 के अंतर्गत सिविल वाद का उपचार उपलब्ध है यदि रजिस्ट्रार द्वारा हटाये गये न्यासियों को नोटिस देने के पश्चात विधिनुसार जांच कर, बदलावों को स्वीकार किया जाता – चूंकि नैसर्गिक न्याय के सिद्धांतों का पालन नहीं किया गया, इसलिए रजिस्ट्रार द्वारा पारित किया गया आदेश अनुचित तथा एकल न्यायमूर्ति द्वारा उचित रुप से अभिखंडित किया गया – अपील खारिज।

Cases referred :

(2003) 2 SCC 107, 1976 JLJ 823, AIR 2009 SC 1159, AIR 1999 SC 22.

S.C. Bagdiya with *Vishal Verma*, for the appellants.
Mini Ravindran, Dy. G.A. for the respondents No. 1 & 2.
A.S. Garg with *Aditya Garg*, for the respondents.

ORDER

The Order of the court was delivered by :
M.C. Garg, J: This common order shall dispose of the aforesaid two writ appeals one writ appeal by appellant Sushil Kumar Kasliwal and another W.A.No.306/2012 filed by one Deepak Kasliwal. Both these writ appeals are directed against the judgment of the learned Single Judge of this Court delivered in W.P.No.676/2012, whereby the learned Single Judge has set aside the order passed by the Registrar Public Trust, Indore dated 31.12.2012 and has given the following directions:-

> "Resultantly, the impugned order dated 13/12/2012 is hereby set aside. The matter is remanded to the Registrar,

Public Trust for deciding it afresh on merits.

The Registrar, while hearing the matter afresh, shall ntice all the trustees including the petitioners. The Registrar, Public Trust, shall grant all relevant documents to the petitioners and shall also permit the petitioners to file a reply in the matter. The writ petition stands allowed. No order as to costs."

2. The appellants are the new trustees of Seth Trilokchand Kalyanmalji Digambar Jain Parmarthik Sansthayen (Trust) which is Trust registered under the Public Trust Act. The writ petitioners who are now appellants in W.A.No.273/2012 were acting trustees of the public trust and in fact were removed from the trusteeship vide resolution passed by the Board of Trustees in a meeting held on 06.11.2011. In the said meeting, while Shri Ashok Kumar Kasliwal and Dileep Kumar Kasliwal were removed from the Board of trustees, Shri Sushil Kumar Kasliwal, Veer Kumar Jain and Deepak Kasliwal were inducted as new trustees. The new trustees then filed an application before the Registrar Public Trust in Form-6 to bring on record the changes so brought in the trusteeship of the Public Trust with a prayer to record these entries in the record of the Registrar of Public Trust under the provisions of M.P.Public Trust Act.

The Registrar Public Trust, who is the second respondent in these writ appeals after holding an enquiry under Section 9 Sub Clause (2) of the Public Trust Act recorded the changes brought in the trusteeship of the Public Trust by deleting the name of the writ petitioners and taking on record the names of respondents no.3 and 4 of the writ petition who are the appellants in the writ appeal subject matter of this order.

3. Against the decision of the Registrar Public Trust, the removed trustees i.e. Ashok Kumar Kasliwal and Dileep Kumar Kasliwal (hereinafter referred to as writ petitioners) alongwith the Public Trust filed the writ petition registered as W.P.No.676/2012 assailing the order of the Registrar, Public Trust. They were aggrieved of the changes in the trusteeship of the aforesaid Trust vide resolution passed on 6.11.2011(which is alleged to be unauthorised). The petitioners no.1 and 2 were removed from the trusteeship of the Trust while respondents no.3 and 4 i.e. Deepak Kasliwal and Ravi Gangwal were inducted new trustees. It was the submission of the writ petitioners that this was done by the registrar at their back without giving them any notice of hearing and without holding a proper enquiry as is contemplated by Section 9(2) of the M.P.Public Trust Act.

4. It is a matter of record that the proposal brought by the appellant of W.A.No.273/2012 was registered by the second respondent as no.11-B/113/11-12. The intimation was also put up in the notice board of Tehsildar on 22.11.2012. However, no information was given to the petitioners about such changes brought in the trusteeship. Infact, according to the writ petitioners they had no notice of the meeting held on 06.11.2011 which meeting was held at their back. It was thus their submissions that on the basis of information given by the writ appellants and the statement of respondent no.6 recorded before the Registrar of Trust on 12.12.2011 again at the back of the petitioners, the changes could not have been made in the trusteeship of the Trust which was accepted by respondent no.2 so as to induct respondents no.3 and 4 as trustees in place of the writ petitioners It was alleged that the action of the Registrar was without jurisdiction and contrary to the provisions of Section 9 of the M.P.Public Trust Act which are reproduced hereunder:-

> ***9. Change.*** *(1) where any change occurs in any of the entries recorded in the register, the working trustee shall, within ninety days from the date of the occurrence of such change or where any change is desired in such entries in the interest of the administration of the such public trust, report in the prescribed manner such change or proposed change to the Registrar.*
>
> *(2) If, on receipt of such reort and after making such enquiry as the Registrar may consider necessary, the Registrar is satisfied that a change has occurred or is necessary in any of the entries recorded in the register in regard to a particular public trust, he shall record a finding with the reason therefor and subject to the provisions contained in sub-section (3) amend the entries in the said register in accordance with such finding.*
>
> *(3) The provisions of Section 8 shall apply to any finding under this section as they apply to a finding under section 6.*

5. According to the writ petitioners provisions contained under Section 9(2) of the Public Trust Act required the Registrar to make an enquiry which according to them had to be in accordance with the principles of natural justice and after being satisfied about the genuineness of the meeting held on

06.11.2011 which has not been done. It is submitted that the writ petitioners who were affected by the impugned changes were not given notice about the proposed changes. Infact, they should have been given notice and should have been heard during the enquiry as contemplated under Section 9(2) of the Public Trust Act but which was not done therefore, the said action on the part of the Registrar was illegal and require interference by the Writ Court as stated above.

6. The learned Single Judge accepted the submission of the writ petitioners that the change of trustees was accepted by Registrar without hearing the petitioners and without issuing any notice to them and therefore, the enquiry which was held by the Registrar was not in accordance with law. The learned Single Judge therefore had given the directions as noticed in para 1 of the order.

7. It is this order of the learned Single Judge which has been assailed in both the writ appeals by the newly brought trustees as per the changes brought in the trusteeship of the Public Trust as aforesaid.

8. The writ appeals have been contested by the writ petitioners who were removed from the trusteeship of the Public Trust. While contesting the writ appeal they had reiterated the submissions made in the writ petition. Whereas as per the learned counsel appearing for the appellants in both the writ appeals, the jurisdiction of the Registrar for the purpose of accepting the changes in the trusteeship as per the application submitted before the Registrar under Form No.6 though require holding of enquiry, Registrar was not required to hold judicial enquiry. It is also submitted that there was equal efficacious alternative remedy available to any person who was aggrieved of any such order regarding changes was entitled to file a civil suit in accordance with Section 8 of the Act by filing a civil suit. It is therefore submitted that once alternative remedy was available, the trustees who were removed by way of resolution in the meeting of the trustees of the Public Trust and which resolution was brought on record in Form No.6 to the notice of the Registrar, if at all, were not satisfied by the order passed by the Registrar should have filed a civil suit. They were not entitle to file a writ petition. It is therefore submitted that the writ petition filed before the learned Single Judge was not maintainable.

9. According to the appellants, the impugned order is not sustainable for the simple reason that as per section 8 of the M.P. Public Trust Act, alternative efficacious remedy by filing a Civil Suit was available to the writ petitioners

and by way of remedy, they were entitled to challenge the order of the Registrar. In so far as holding of inquiry under section 9 of the Act, it is submitted that such inquiry was not required to be a judicial inquiry. It is a matter of record that public notice about the changes to be brought in the trust deed in the name of trustees was put up on the notice board which fact is not even denied by the writ petitioners and thereafter, statement of respondent no. 6 was also recorded. Thus after holding such inquiry, Registrar was satisfied that the changes were brought. Now, if the writ petitioners were not happy with it, they were fully entitled to file a Civil Suit. However instead of doing that, they have file writ petition, which was not maintainable.

10. To support their contention, the appellants have relied upon the judgments delivered by the Hon'ble Supreme Court in the case of *Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd* and others reported in (2003) 2 SCC 107 and *Indradevanand Vs. State of M.P* and others reported in 1976 JLJ 823 which is the judgment delivered under the Public Trust Act by a Division Bench of this Court. In this case while referring to filing of the civil suit, the Court has discussed about the alternative efficacious remedy for filing of suit under section 8 of the Act. Relevant observations made in paragraph no. 6 are reproduced hereunder.

> *6 From a perusal of the various provisions of the Act we have no hesitation in holding that the cause of action for a civil suit contemplated under section 8 is the finding recorded by the Registrar on completion of the inquiry provided for under section 5. the cause of action being the recording of the finding by the Registrar, notwithstanding the entries being made in the register under section 7 (1) and the publishing of the same on the notice board of his office, a civil suit shall lie by any working trustee or person having interest in the the trust property aggrieved by any finding of the Registrar under section 6. the stress is not on the limitation. The period of limitation prescribed under section 8 is six months from the date of the notice published under section 7 (1). where no entry or entries have been made in the register in accordance with the findings recorded by the Registrar under section 6, the person or trustee aggrieved by such finding has cause of action to file a suit. The right to file a*

suit under section 8 does not depend upon the registrar's making the entries in the register or their publishing on the notice board in accordance with section 7. the legislature has rightly thought it fit and proper in their discretion to make the cause of action to file a suit by an aggrieved party not to depend upon the unilateral act of the registrar in causing the entry made under section 7(1). It is an independent cause of action which had accrued to the party under section 8(1). there may be cases, as in the present one, where the entries have not been made by the Registrar for some reason or other in the register in accordance with his findings recorded under section 6 and no publication on the notice board of his office of the entries made by the Registrar, still the petitioner must be held to have a right to file a civil suit under section 8 if he is aggrieved by any findings of the Registrar recorded under section 6.

11. However according to the removed trustees first of all even as per section 9 of the Act, the Registrar was required to hold an inquiry about changes, which were sought to be brought on record by following the principles of natural justice i.e. by giving a notice of hearing to the petitioners who were sought to be removed by issuing a notice to them and to hear them before accepting the changes which has not been done in this case. It is also submitted that merely because Section 8 of the Act provided for filing of a suit against the proposed changes, filing of a writ petition was very much maintainable in the facts and circumstances of this case.

12. In relation to the judgment delivered in the case of *Indradevanand Vs. State of M.P* (supra), it has been submitted that findings which can be challenged by way of suit are findings of the Registrar which are recorded after holding inquiry of registration of the trust. In this case, the issue which was before the Registrar was as to whether appropriate resolutions were passed or not, so as to bring the changes, and as such, the Registrar was obliged to issue notice about the proposed changes to the writ petitioners and then pass appropriate order after hearing them, which has not been done. It is submitted that the remedy available under Section 8 was still available to the writ petitioners even if changes would have been accepted by the Registrar after holding an enquiry in accordance with law after giving notice to the writ

petitioners and after hearing them. It is submitted that the remedy by way of civil suit do not bar the remedy by filing writ petitions as has been done.

13. In this regard, it is also submitted that even if there is efficacious remedy available by filing Civil Suit, remedy by way of writ jurisdiction is not excluded. Reference has been made to the judgment of the Apex Court in the case of *Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd* and others (supra). Relevant portion of the judgment are reproduced hereunder

> *7 So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observed that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged (See Whirlpool Corpn, Vs Registrar of Trade Marks) The present case attracts applicability of the first two contingencies. Moreover, as noted, the petitioners dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings.*

14. To the same effect, there are also judgments delivered in the case of *Committee of Management and another Vs. Vice Chancellor* and others reported in AIR 2009 SC 1159 and *Whirlpool Corporation Vs. Registrar of Trade Marks Mumbai and others* reported in AIR 1999 SC 22.

15. In the light of the law and the peculiar facts of this case, which clearly establishes that while accepting changes in the light of the resolution dated

06th of November. 2011, at the instance of appellants, the enquiry as contemplated under Section 9(2) of the M.P.Public Trust Act has not been done by the second respondent in accordance with law inasmuch as no notice was served upon the writ petitioners who were certainly affected by the proposed changes and sought to be removed from the trusteeship, issue notice to them and hearing them was very much required if one follows the principles of natural justice which was not done.

16. Considering the all the facts, we find no infirmity in the order passed by the learned Single Judge. Consequently, both the writ appeals are dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2013] M.P., 1304
WRIT APPEAL

Before Mr. S.A. Bobde, Chief Justice & Mr. Justice Rajendra Menon
W.A. No. 1038/2011 (Jabalpur) decided on 7 March, 2013

RAMENDRA PAL SINGH ...Appellant
Vs.
STATE OF M.P. & anr. ...Respondents

A. ***Forest Act (16 of 1927), Section 52(5), Evidence Act (1 of 1872), Section 64 - Photo copy of agreement*** **- Petitioner alleged that he had given the machines on hire to the contractor which were used without his knowledge or connivance - Photo copy of the agreement was filed - Proceedings under the Forest Act are governed by Evidence Act - Petitioner was bound to produce the original agreement - No application was made for permission to produce secondary evidence - Photo copy of agreement cannot be considered. (Paras 6 to 10)**

क. वन अधिनियम (1927 का 16), धारा 52(5), साक्ष्य अधिनियम (1872 का 1), धारा 64 – करार की प्रतिलिपि – याची का अभिकथन कि उसने ठेकेदार को मशीनें किराये पर दी थीं, जिसका उपयोग उसकी जानकारी एवं सहमति के बिना किया गया – करार की प्रतिलिपि प्रस्तुत की गई – वन अधिनियम के अंतर्गत कार्यवाहियां, साक्ष्य अधिनियम द्वारा शासित होती हैं – याची मूल करार पेश करने के लिए बाध्य था – द्वितीयक साक्ष्य प्रस्तुत करने की अनुमति हेतु कोई आवेदन नहीं किया गया – करार की प्रतिलिपि को विचार में नहीं लिया जा सकता।

B. ***Forest Act (16 of 1927), Section 52(1) - Confiscation of***

vehicles **- Discharge of appellant for forest offence - Proceedings under Indian Forest Act are independent proceedings - Section 52 casts duty upon the Forest Officer to satisfy himself whether any forest offence has been committed in respect of any forest produce and there is any reason to believe that such an offence has been committed - Merely because appellant has been discharged in relation to same incident under the provisions of Indian Penal Code, it cannot be said that the vehicles are not liable to be confiscated. (Paras 10 & 11)**

ख. वन अधिनियम (1927 का 16), धारा 52(1) – वाहनों का अधिहरण – वन अपराध से अपीलार्थी आरोप मुक्त – भारतीय वन अधिनियम के अंतर्गत कार्यवाहियां, स्वतंत्र कार्यवाहियां हैं – धारा 52, वन अधिकारी को कर्तव्य बाध्य करता है कि वह स्वयं की संतुष्टि करे कि क्या किसी वन उत्पाद से संबंधित कोई वन अपराध कारित किया गया है और यह विश्वास करने का कोई कारण है कि उक्त अपराध कारित किया गया है – मात्र इसलिए कि अपीलार्थी को भा.द.सं. के उपबंधों के अंतर्गत, उसी घटना के संबंध में आरोप मुक्त किया गया है, यह नहीं कहा जा सकता कि वाहन अधिहरण किये जाने योग्य नहीं।

Cases referred :

AIR 2004 SC 2088. (2008) 12 SCC 763.

A.K. Jain, for the appellants / petitioner.
K. Pathak, Dy.A.G. for the respondents/State.

ORDER

The Order of the court was delivered by :
S.A. Bobde, C.J: The appellant/petitioner has challenged the order of confiscation dated 27.1.2007 passed by the Revisional Authority i.e. District and Sessions Judge, Balaghat refusing quashment of the order dated 25.3.2006 passed by the Divisional Forest Officer and confirmed by the Appellate Authority by its order dated 10.10.2006 in the writ petition.

2. By the said orders the respondent/Forest Officer has confiscated the petitioner's machines known as Pokland Tata Machine (Hitachi- Ex-60 (chain wheel drive) as well as Dumpers bearing registration No.MP26-D/3150 and MP23-D/5004 under Section 26 (1), 30 and 33 of the Indian Forest Act, 1927 read with Section 2 (2) of the Forest Conservation Act, 1980.

3. The undisputed facts are that the petitioner's machines were seized by the Forest Officer on 24.11.2001 while they were found engaged in lifting

Manganese Ore from mines in the forest area. On a complaint made by the Beat Officer of the Forest Department one Chhotelal and two other persons were found at the spot with the aforesaid vehicles. According to the Forest Authorities the contractor, who had hired the vehicles of the petitioner/appellant, in conspiracy with the petitioner was extracting Manganese Ore from Mines, for which, the Contractor did not have a valid permission from the Forest Department and that in any case, the extraction of the Ore was being made with the consent of the Contractor as well as the petitioner. A criminal case was registered against the petitioner and the driver as well as the labourers, who were present on the spot, under Section 26 (1), 30 and 33 of the Forest Act and Section 2 (2) of the Forest Protection Act. Thereafter, the matter was investigated into by the Forest Officer. In the meanwhile a criminal complaint, which was made to the Judicial Magistrate First Class, was decided and it was held that from the evidence on record the petitioner/appellant did not have any intention to indulge in any forest offence and there was no material on record to show that petitioner could be prosecuted under Section 26 (1) read with Section 30 and 33 of Forest Act. The petitioner/appellant was thus discharged.

4. The Forest Authority however, seized and confiscated the machines as well as the dumpers. Aggrieved with the said decision an appeal was preferred by the petitioner/appellant to the Appellate Authority under Section 59 of the Act, which was dismissed and the revision challenging the order of Appellate Authority, has also been dismissed. Thus, the present writ appeal has been filed by the appellant/petitioner.

5. The main contention on behalf of petitioner is that the petitioner's property as aforesaid could not have been confiscated since the petitioner had merely given his machines on hire to the forest contractor under an agreement dated 21.11.2001 for transportation purported to have been signed at Nagpur between the parties. Thus, the petitioner's property ought not to have been confiscated, since the petitioner did not have any knowledge of the purpose for which the vehicle has been used. Shri A. K. Jain, learned counsel for the appellant/petitioner relied upon Section 52 (5) of the Indian Forest Act, 1927, which reads as follows :-

> *"52 (5) - No order of confiscation under sub-section (3) of any tools, vehicles, boats, ropes, chains or any other article (other than the timber or forest produce seized) shall be made if any person referred to in clause*

(b) of sub-section (4) proves to the satisfaction of authorised officer that any such tools, vehicles, boats, ropes, chains or other articles were used without his knowledge or connivance or, as the case may be, without the knowledge or connivance of his servant or agent and that all reasonable and necessary precautions had been taken against use of the objects aforesaid for commission of forest-offence."

6. The submission on behalf of the petitioner is that an order of confiscation could not have been passed since the appellant/petitioner has proved to the satisfaction of the Forest Officer that his vehicle etc. were used without his knowledge or connivance. Therefore, the petitioner is entitled to benefit of such provision.

7. The second submissions made on behalf of the petitioner is that the petitioner has not committed any forest offence, and that his property was not liable to be confiscated under the provisions of Indian Forest Act, since the petitioner has been discharged in respect of the said Act by the Magistrate under Section 26 (1), 30 and 33 of the Forest Act and Section 2 (2) of the Forest Protection Act.

8. Having examined the matter and giving our anxious consideration to the issue, we find that the submission made on behalf of the appellant/petitioner cannot be accepted, since the original agreement of transportation, on the basis of which the petitioner has claimed immunity of his property, could not have been produced before any Court since only photocopies thereof were submitted to the Forest Officer under Section 52 of the Indian Forest Act, 1927. It is not disputed on behalf of the appellant/petitioner that proceedings are indeed governed by Indian Evidence Act, 1872, if that is so, it is clear that the petitioner was bound to produce the original agreement in view of Section 64 of the Indian Evidence Act, which reads as follows:-

"64 – Proof of documents by primary evidence. - *Documents must be proved by primary evidence except in the cases hereinafter mentioned."*

Even before this Court the original agreement is not produced inspite of repeated opportunities being granted.

9. No application has been made for permission to produce the

secondary evidence, which is required under Section 65 of the Indian Evidence Act, 1872, which reads as follows :-

> ***"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) when the original is shown or appears to be in the possession or power -*
>
> *of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it,*
>
> *and when, after the notice mentioned in section 66, such person does not produce it;*
>
> *(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;*
>
> *(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;*
>
> *(d) when the original is of such a nature as not to be easily movable;*
>
> *(e) when the original is a public document within the meaning of section 74;*
>
> *(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in to be given in*

evidence;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

10. Suffice it to say, there was no material before the Forest Officer to come to the conclusion that the petitioner's machinery was used without his knowledge or connivance. Thus, there is also no merit in the second submission on behalf of the appellant/petitioner that the petitioner's property is not liable to be confiscated under the provisions of Indian Forest Act, since the petitioner has been discharged in relation to the same incident under the provisions of Indian Penal Code.

11. It is settled law that the proceedings under the Indian Forest Act, 1972 are independent proceedings. Section 52 (1) of the Act reads as follows:-

"52 (1) – When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-Officer or Police- Officer."

12. The aforesaid section undisputedly casts a duty upon the Forest Officer to satisfy himself whether any forest-offence has been committed in respect of any forest-produce and there is any reason to believe that such an offence has been committed. In the case of *State of M.P. Vs. S. P. Agencies* – AIR 2004 SC 2088 the Supreme Court has observed as follows:-

> *"10. In the present case, the allegations are that by committing breach of Rule 3, a forest offence withing the meaning of Section 2 (3)of the Act has been committed for which a criminal prosecution under Rule 29 of theTransit Rules as well as a confiscation proceeding under Section 52 of the Act could be initiated. From the scheme of theAct, it would appear that for contravention of Rule 3, two independent actions are postulated – one criminal prosecution and other confiscation proceeding. The power of confiscation, exercisable under Section 52 of the Act, cannot be said to be in any manner dependent upon launching of criminal prosecution as it has nowhere been provided therein that the forest produce seized can be confiscated only after criminal prosecution is launched, but the condition precedent for initiating a confiscation proceeding is commission of forest offence, which, in the case on hand is alleged to have been committed. Reference in this connection may be made to a decision of this Court in the case of Divisional Forest Officer and another Vs. G. V. Sudhakar Rao and others , (1985) 4 SCC 573, wherein it has been clearly laid down that the two proceedings are quite separate and distinct and initiation of confiscation proceeding is not dependent upon launching of criminal prosecution. In the said case, the Court observed thus:*
>
> *"The conferral of power of confiscation of seized timber of forest produce and the implements etc. on the Authorized Officer under sub-section (2-A) of Section 44 of the Act on his being satisfied that a forest offence had been committed in respect thereof is not dependent upon whether a criminal prosecution for commission of a forest offence has been launched against the offender or not. It is separate and*

distinct proceeding from that a trial before the Court for commissioner of an offence. Under sub-section (2-A) of Section 44 of the Act, where a Forest Officer makes a report of seizure of any timber or forest produce and produces the seized timber before the authorized officer alongwith a report under Section 44 (2) the authorized officer can direct confiscation to Government of such timber or forest produce and the implements etc. if he is satisfied that a forest offence has been committed, irrespective of fact whether the accused is facing a trial before a Magistrate for the commission of a forest offence under Section 20 or 29 of the Act."

11. In the case of State of West Bengal Vs. Gopal Sarkar, (2002) 1 SCC 495, while noticing the view taken in the case of G. V. Sudhakar Rao (supra) this Court has reiterated that the power of confiscation is independent of any criminal prosecution for the forest offence committed. This being the position, in our view, the High Court has committed an error in holding that initiation of confiscation proceeding relating to Kattha was unwarranted as no criminal prosecution was launched."

13. Shri Jain learned counsel for the appellant/petitioner lastly submits that the petitioner's property may be released on payment of a fine as was done in the case of *State of West Bengal and another Vs. Mahua Sarkar* - (2008) 12 SCC 763.

14. We find that the said decision is not in authority for the proposition that in all such cases whenever an offender makes an offer of compensation his property must be released instead of being confiscated. These are the matters within the discretion of the forest authorities. In fact, Shri Pathak, learned Dy. Advocate General had taken time to obtain instructions whether the imposition of fine instead of confiscation will satisfy the interest of justice. Learned Dy. Advocate General states that it is not possible to do so.

15. In the circumstances, we find no merit in the writ appeal. The same is accordingly dismissed. Rule is discharged. No order as to costs.

Appeal dismissed.

I.L.R. [2013] M.P., 1312
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 4572/1999 (Jabalpur) decided on 10 December, 2012

STATE BANK OF INDIA ...Petitioner
Vs.
CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT & anr. ...Respondents

A. ***Industrial Disputes Act (14 of 1947), Section 25-B - Continuous Service - 240 days*** **- Sundays and other holidays, by contract or statute should be treated as days on which the employee actually worked under the employer for the purposes of Section 25-F and 25-B of the Act. (Para 6)**

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25बी – सतत/निरंतर सेवा – 240 दिन – रविवार और अन्य छुट्टियां, संविदा या कानून द्वारा ऐसे दिवस समझे जाने चाहिए जैसे कर्मचारी, अधिनियम की धारा 25एफ व 25बी के प्रयोजन हेतु नियोक्ता के अधीन वास्तविक रुप से कार्यरत है।

B. ***Industrial Disputes Act (14 of 1947), Section 25-F - Re-instatement with Back wages*** **- Tribunal had directed for re-instatement of the respondent No.2 on the ground of retrenchment - Respondent No.2 can be directed to be reinstated in service even when he was put for selection for employment in bank service, he was not found fit for such employment by Selection Committee - There is material on record that the respondent No.2 after his discontinuance was unemployed through out - No material to show that the respondent No.2 was employed gainfully during the aforesaid period - Award passed by Tribunal for grant of back wages cannot be said to be bad. (Para 8)**

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25एफ – पिछले वेतन के साथ बहाल किया जाना – अधिकरण ने प्रत्यर्थी क्र. 2 को छंटनी के आधार पर बहाल किये जाने के लिए निदेशित किया – प्रत्यर्थी क्र. 2 को बहाल किये जाने के लिए निदेशित किया जा सकता है, तब भी जब उसे बैंक सेवा में नियोजन हेतु चयन के लिए चयन समिति द्वारा उसे उक्त नियोजन हेतु सक्षम नहीं पाया गया था – अभिलेख पर सामग्री है कि प्रत्यर्थी क्र. 2, अपने असतत किये जाने के बाद से लगातार बेरोजगार रहा – यह दर्शाने के लिए कोई सामग्री नहीं कि प्रत्यर्थी क्र. 2 उपरोक्त अवधि के दौरान लाभकारी रुप से नियुक्त था – अधिकरण द्वारा पिछला वेतन प्रदान करने के लिए पारित किया गया अवार्ड अनुचित नहीं कहा जा सकता।

C. ***Industrial Disputes Act (14 of 1947), Section 25-B,F,N - Continuous Service - Burden of Proof*** - **Workmen discharged his burden to prove that he has worked for more than 240 days by filing affidavit with details of working days - No question was put to him in cross examination by Bank - Nothing on record to suggest that the affidavit is erroneous - Even according to Petitioner, the respondent No. 2 had worked for a period 217 days excluding Sundays and Holidays - Respondent No. 2 had proved that he had worked for more than 240 days.** **(Para 9)**

ग. *औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25बी,एफ,एन – सतत/निरंतर सेवा – सबूत का भार* – कर्मकार ने कार्य दिवस के विवरण के साथ शपथपत्र प्रस्तुत करके अपने भार का निर्वहन किया कि उसने 240 दिनों से अधिक कार्य किया है – प्रतिपरीक्षण में बैंक द्वारा उससे कोई प्रश्न नहीं पूछा गया – अभिलेख पर यह दर्शाने के लिए कुछ नहीं कि शपथपत्र त्रुटिपूर्ण है – याची के अनुसार भी, प्रत्यर्थी क्र. 2 ने 217 दिनों की अवधि के लिए कार्य किया, रविवार और छुट्टियां छोड़कर – प्रत्यर्थी क्र. 2 ने साबित किया कि उसने 240 दिनों से अधिक कार्य किया था।

D. ***Industrial Disputes Act (14 of 1947), Section 25-B - Reinstatement or Compensation*** - **When the High Court has found that the award of re-instatement and back wages passed by Tribunal is just and proper, the same is to be affirmed and alternative relief of grant of compensation cannot be granted.** **(Para 10)**

घ. *औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25बी – बहाली या प्रतिकर* – जब उच्च न्यायालय ने पाया है कि अधिकरण द्वारा पारित किया गया बहाली और पिछले वेतन का अवार्ड न्यायसंगत एवं उचित है, उसे अभिपुष्ट किया जाये और प्रतिकर प्रदान करने का वैकल्पिक अनुतोष प्रदान नहीं किया जा सकता।

Cases referred :

AIR 1986 SC 458, (2004) 8 SCC 195, (2009) 15 SCC 327.

A.P. Shroti, for the petitioner.
Sharad Punj, for the respondent No.2.

ORDER

K.K. Trivedi, J. :- By this petition under Article 227 of the Constitution of India, the petitioner-State Bank of India has called in question the award dated 29.7.1999, passed by the Central Government Industrial Tribunal-cum-Labour Court, Jabalpur (hereinafter referred to as CGIT for

brevity). By the said award, a direction has been issued to reinstate the respondent No.2 in services of the bank with all the back wages. It is contended that the respondent No.2 was engaged for certain casual work of the Bank. He was paid wages for the period he has worked in the Bank. The respondent No.2 was not appointed on any post, but has worked in different capacities for certain days. However, the respondent No.2 was discontinued from the service as no work was available for him. When certain posts became available, the respondent No.2 was given an opportunity to appear before the Selection Committee for the purposes of his regular employment. After interview, since the respondent No.2 was not found fit for grant of employment on regular basis, the fact was brought to his notice by letter dated 13.1.1986. The proceedings were done by the respondent No.2, challenging the action of discontinuance in service alleging it to be a retrenchment, in violation of Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act for short) and when the reconciliation proceedings failed, the matter was referred to the Central Government. The dispute was referred to the CGIT by the Central Government vide reference order dated 21.9.1990. A statement of claim was filed by the respondent No.2 of which the reply was submitted by the petitioner, raising legal and valid grounds, but instead of considering the grounds so raised by the petitioner, holding that the respondent No.2 has worked for more than 240 days in a year, the award was granted in favour of the respondent No.2 by the CGIT. Since such an award could not have been granted, this writ petition is required to be filed.

2. A return has been filed by the respondent No.2 and an application for dismissing the petition for non-compliance of the provisions of Section 17-B of the Act has been filed. However, instead of considering the said application and deciding the same, the writ petition is finally heard. In the return, it is contended by the respondent No.2 that no error was committed by the CGIT in granting the relief to the respondent No.2. In fact, the respondent No.2 has worked with effect from 24.12.1983 continuously upto 31.1.1985, and thereafter his services were orally terminated, therefore, it was a retrenchment as defined in Section 2(oo) of the Act without making compliance of Section 25-F of the Act. Having failed to do so, the CGIT has rightly held that the petitioner has violated the provisions of the Act and has directed retrenchment of respondent No.2 in service. It is contended that in the given circumstances, the relief claimed by the petitioner cannot be granted.

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

4. First of all, this has to be seen what was the reference made by the appropriate Government and how the reference has been decided. The reference made by the appropriate Government reads thus :-

> "Whether the action of the State Bank of India, Region I, Bhopal in retrenching Shri Shyam Singh Chauhan, ex messenger, w.e.f. 1.2.85 without complying with the provisions of Section 25-F of the Industrial Disputes Act, 1947 is justified ? If not, to what relief the workman is entitled to and from which date?"

5. It is to be seen now what was the nature of the services rendered by the respondent No.2 and whether the same satisfied the definition of continuous service as given in Section 25-B of the Act, which read

thus :-

> **"25B. Definition of continuous service.** - For the purposes of this Chapter thus:-
>
> (1) a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike which is not illegal, or a lock-out or a cessation of work which is not due to any fault on the part of the workman;
>
> (2) where a workman is not in continuous service within the meaning of clause (1) for a period of one year or six months, he shall be deemed to be in continuous service under an employer-
>
> (a) for a period of one year, if the workman, during a period of twelve calender months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-
>
> (i) one hundred and ninety days in the case of a workman employed below ground in a mine; and
>
> (ii) two hundred and forty days, in any other case;
>
> (b) for a period of six months, if the workman, during a

period of six calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of workman employed below ground in a mine; and

(ii) one hundred and twenty days, in any other case."

6. The evidence was produced by the petitioner and respondent both before the CGIT. A statement of days of working of respondent No.2 has been produced before this Court also as Annx.P. According to the petitioner itself, the respondent No.2 has worked for about 217 days upto 23.12.1984. According to the petitioner, the respondent No.2 was not engaged after this date. An affidavit was filed by the respondent No.2 before the CGIT along with a statement of days on which he has discharged the duties. According to him for even a period of 12 calendar month just preceding the date of discontinuance he has worked for more than 240 days. The respondent No.2 was put for cross-examination before the CGIT, but not a single question is asked in this respect. It appears that the petitioner has counted only the days for which the wages was paid to the respondent No.2 on account of his working, but has not counted the days which fall in between those days as holidays. It is not clear from any statement that there were no holidays. The law is well settled in this respect. While considering the artificial breaks in service, the Apex Court has considered whether the Sundays and the holidays, which fall in between the working days for which the wages is paid could be counted for computing the period of 240 days as is provided in Section 25-B of the Act or not. In the case of *Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation* (AIR 1986 SC 458), the Apex Court has categorically held that such Sundays and other holidays, by contract or statute, should be treated as days on which the employee actually worked under the employer for the purposes of Section 25-F read with Section 25-B of the Act. As per the enunciation of law by the Apex Court, if these days are counted, it will be clear that the respondent No.2 had worked for more than 240 days and, therefore, his discontinuance from employment would amount to retrenchment and nothing else. The CGIT though has not given specific finding in this respect, but merely because of this reason, the award passed by the CGIT cannot be said to be bad in law.

7. Now the second question is whether the respondent No.2 could be directed to be reinstated in service even when he was put for selection for employment in the Bank services, but was not found fit for such employment by the Selection

Committee. Such a submission made by the learned counsel for the petitioner cannot be accepted because the reference made to the CGIT by the appropriate Government was not with respect to such selection or non-selection of respondent No.2 The question which was to be decided by the CGIT was whether there was retrenchment of respondent No.2 from the employment of the Bank or not. Once such a question is answered in affirmation, the natural consequence was direction for reinstatement of the respondent No.2.

8. When such a direction for reinstatement is given and an award is passed in that respect, it will lead to grant a benefit of back wages as well in case the CGIT is satisfied by the material available before it that the respondent No.2 was unemployed throughout after his discontinuance from employment by the petitioner Bank. To that effect, affidavits were filed by the respondent No.2 and no material was brought on record by the petitioner to show that the respondent No.2 was gainfully employed during the aforesaid period. Another aspect is that when the writ petition was filed before this Court, it was necessary on the part of the petitioner to comply with the provisions of Section 17-B of the Act in terms of the order dated 2.11.1999. By making an application, it has been complained by the respondent No.2 that such an interim direction is not being complied with in appropriate manner as the respondent No.2 was not being paid the wages or the allowances continuously. A reply has been filed by the petitioner and only this much is indicated that upto 4.8.2000 certain amounts were paid to the respondent No.2, but hence after whether the amount was being paid or not, has not been certified. This being so,the award passed by the CGIT cannot be said to be bad, with respect to the grant of back wages.

9. Learned counsel for the petitioner has heavily relied on a decision rendered by the Apex Court in the case of *Municipal Corporation, Faridabad Vs. Siri Niwas* [2004 (8) SCC 195] and has contended that the burden was on the workman to show that he has worked continuously for 240 days and since such a burden was not discharged by the respondent No.2, the finding could not have been recorded against the petitioner by the CGIT. The Apex Court was dealing with a complex question of proving the specific allegations which were made with respect to the provisions of Section 25-F and 25-N read with Section 25-B of the Act. However, the Apex Court has again categorically said in paragraph 13 of the report that the provisions of the Evidence Act, 1872, would not be applicable in the industrial adjudication, but the burden of proof lies on the workman, who claims that he has worked. However, it was not said by the Apex Court that even if that burden is discharged by the workman by placing on record his affidavit with

details of the working days, even then, it would not be taken into consideration if it goes unrebutted. Here in the case in hand, the respondent No.2 has filed his affidavit and has annexed with it the statement of working days. He was available for cross-examination by the Management of the petitioner Bank, but not a single question was asked in that respect. Nothing has been brought on record to indicate that such a statement made on affidavit by the respondent No.2 was erroneous. On the other hand, upon showing of the petitioner itself, the respondent No.2 has worked for a period of 217 days excluding the Sundays and holidays. Such a statement itself was found to be incorrect by this Court, therefore, the petitioner would not be benefited by the law laid down by the Apex Court in the case of *Municipal Corporation* (supra), which according to this Court is not applicable in the facts and circumstances available in the case in hand.

10. Lastly, learned counsel for the petitioner has placed his reliance in the case of *Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another* [(2009) 15 SCC 327] and has contended that as an alternative relief, instead of directing reinstatement of respondent No.2 and payment of back wages, the compensation may be awarded to the respondent No.2 and the award may be satisfied. The Apex Court was dealing with a situation where the award passed by the Labour Court was set aside by the High Court and such an order was challenged in an appeal before the Apex Court. The Apex Court substituted the award by grant of compensation. However, these are not the situation available here. The award was already passed by the CGIT long back. Interim stay granted by this Court was not fully complied with as complained by the respondent No.2, inasmuch as, provisions of Section 17-B of the Act were not complied with by the petitioner. In the considered opinion of this Court, it would not be justified to direct payment of compensation only to the respondent No.2 instead of allowing reinstatement in terms of the award passed by the CGIT. Even otherwise, in the case referred to by learned counsel for the petitioner, the Apex Court has considered that in all such cases where the Court has upset the award of reinstatement, the compensation was awarded. Here in the case in hand, this Court is of the opinion that award is just and proper and the same is to be affirmed, therefore, such an alternative relief claimed by the petitioner cannot be granted.

11. In view of the foregoing discussions, there is no force in the writ petition. The 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., 1319
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 20038/2011 (S) (Jabalpur) decided on 14 December, 2012

RAJARAM PATEL ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law - Time Scale of Pay Upgradation Policy **- Petitioner was granted first Kramonnati - Benefit of Upgradation in time scale pay was not granted on the ground that the petitioner did not fulfill the criteria evolved by the D.P.C. - As per Policy once the employee has been granted the benefit of Kramonnati in terms of scheme, his ACRS would not be reassessed for the purposes of granting the benefit under New Scheme - Petitioner was also granted promotions - Held - Those employees who have been granted first or second upgradation under Kramonnati Scheme or those who have been granted promotions were entitled to be granted the second time scale pay under the new Scheme without referring their cases to any scrutiny Committee - Powers was delegated to the Head of Department - Refusal to grant second upgradation on the ground that the petitioner had not achieved the benchmark is not justified - Petition allowed.** **(Paras 9-12)**

सेवा विधि – समयमान वेतन का उन्नयन नीति – याची को प्रथम क्रमोन्नति दी गई थी – समयमान वेतन के उन्नयन का लाभ इस आधार पर नहीं दिया गया कि याची विभागीय पदोन्नति समिति द्वारा प्रस्तुत मापदंडों को पूरा नहीं करता – नीति के अनुसार कर्मचारी को एक बार योजना की शर्तों के अनुसार क्रमोन्नति का लाभ दिये जाने पर, नई योजना के अंतर्गत लाभ देने के प्रयोजन हेतु उसके वार्षिक गोपनीय प्रतिवेदन का पुनः निर्धारण नहीं किया जावेगा – याची को पदोन्नतियां भी दी जा चुकी हैं – अभिनिर्धारित – वे कर्मचारी जिन्हें प्रथम या द्वितीय उन्नयन, क्रमोन्नति योजना के अंतर्गत दिया जा चुका है या वे जिन्हें पदोन्नति दी जा चुकी है, उनके प्रकरण बिना किसी छानबीन समिति के पास भेजे, वे नई योजना के तहत द्वितीय समयमान वेतनमान पाने के पात्र होंगे – विभाग प्रमुख को शक्तियां प्रत्यायोजित थी – द्वितीय उन्नयन प्रदान किये जाने से इंकार इस आधार पर करना कि याची ने गुणवत्ता अर्जित नहीं की, न्यायोचित नहीं है – याचिका मंजूर।

Praveen Verma, for the petitioner.
Vivek Sharma, P.L. for the respondents.

ORDER

K.K. TRIVEDI, J. :- This order will also govern the disposal of W.P.No.20041/2011(s), W.P.No.20043/2011(s), W.P.No. 20045/2011(s), W.P.No.20046/2011(s), W.P.No.20047/2011(s) and W.P.No.20048/2011(s), as the common question is raised in all these writ petitions and all petitions have been heard together. For the purposes of this order, the facts are taken from Writ Petition No.20038/2011(s).

2. The controversy involved in the present petition is whether the policy made by the State Government for grant of time scale pay as circulated on 24.1.2008 contemplates a condition to screen the cases of those for the purposes of grant of second upgradation afresh taking into account their last five years' ACRs or not in case they have been granted the first upgradation in the time scale pay under the very same Scheme. This particular aspect is required to be considered because by the orders impugned dated 28.2.2011 and 5.9.2011, it is communicated to the petitioner that since he has not been found fit by the Committee for grant of second upgradation in the pay scale, his claim is rejected.

3. Facts giving rise to this petition in short are that the State Government was seriously considering to grant benefit of upgradation in the time scale pay to its employees on completion of certain years of service. In view of the recommendations made by various Pay Commissions, it was felt by the State Government that if an employee is appointed initially on one post in a particular pay scale and if he remains working in particular pay scale for a long period, without any opportunity of promotion, it would not be proper as the stagnation in one post in one pay scale may kills the desire to achieve excellence in the service. In view of the law laid down by the Apex Court in several cases wherein it was held that in service career an employee must get two opportunities of upgradation or promotion and such avenues should be provided, the State Government formulated the policy of grant of Kramonnati and circulated the same on 17.3.1999/19.4.1999. There were certain changes made in the said Scheme. It was provided in the said Scheme that on completion of 12 years of service in one pay scale, the next higher pay scale would be granted to the employee concerned in case he has not been given any promotion for the aforesaid period of 12 years. A further upgradation in the pay scale was provided in case the employee completes 24 years of service without any promotion. However, looking to the fact that there were limited posts available for promotion and in number of occasions, it was seen that the lower cadre employees never gets the opportunity of promotion, the State Government formulated a new

policy commonly known as "Time Scale of Pay Upgradation Policy" and circulated the same vide circular dated 24.1.2008 issued by Government of Madhya Pradesh in Finance Department (hereinafter referred to as the New Scheme for brevity). The earlier Scheme of Kramonnati was accordingly amended. In the new Scheme, it was specifically provided that on completion of 8 years of service in one pay scale on one post, on which the direct recruitment is made, the upgradation in the next higher pay scale would be granted to the persons serving in the group 'A' of the services. Similarly, the benefit of upgradation in the pay scale was provided to those services who were put in 'B' group, on completion of 10 years of service.

4. While issuing the circular, the same was made applicable with effect from 1.4.2006. The same was made applicable for all those even for whom no specific Scheme was made by the State Government. It was specifically provided that the pay scale of the promotional post mentioned in the Service Recruitment Rules would be the first upgraded pay scale which is required to be granted either on 8 years or 10 years of services as the case may be. A further benefit of second upgradation was prescribed on completion of 16 years or 20 years of services in similar manner. The manner of consideration of cases for grant of such benefit was specifically prescribed in the circular. It was specifically said in paragraph 4 of the new Scheme that for grant of benefit under the new Scheme cases would be considered in the same manner as if the same are to be considered for grant of regular promotion to the employees concerned. A clarification was made in paragraph 12 and it was specifically provided that in case a Government servant has been granted the benefit of first or second Kramonnati under the Scheme, which were at the relevant time prevalent, his confidential reports would not be reassessed. The head of the department would be competent to grant the benefit of upgradation in the time scale pay under the new Scheme.

5. Certain clarifications were issued by the State Government on 1.4.2008 as queries were raised with respect to the consideration of the case. In paragraph 7 of the circular dated 1.4.2008, these aspects were again clarified and it was again said that in case if an employee is already found fit for grant of Kramonnati or promotion, then his ACRs are not required to be reassessed. Further clarification issued in this respect on 4.8.2008 reiterates the similar circumstances as is clear from paragraph 4 of this circular.

6. The case of the petitioner is that he was granted the first Kramonnati at the relevant time. After coming into force of the new Scheme, his case was

required to be considered for grant of upgradation in the time scale pay. However, when the order was issued, the name of the petitioner was not included in the said order. This being so, the representation was made by him. In response to the representation submitted by the petitioner, it was informed by the impugned order that the Departmental Scrutiny Committee considered the case of the petitioner, but since a criteria was evolved by the Departmental Promotion Committee that an employee must get at least 8 marks in the ACRs for the last 5 years and it was found on overall consideration of ACRs of the petitioner that he has obtained less than 8 marks, therefore, he was not found fit for grant of second upgradation. This being so, it is contended by learned counsel for the petitioner that such a consideration of the petitioner was not justified and the order was not rightly passed in respect of his claim. Subsequently, the orders were issued giving benefit of time scale pay to the persons like petitioner without even assessment of their ACRs in terms of the circular issued by the respondents, but the said benefit was not extended to the petitioner and, therefore, the writ petition was required to be filed.

7. Upon issuance of notices of the writ petition, a return has been filed. It is not disputed by the respondents that the petitioner was one who was entitled to grant of second time scale pay with effect from the date he completed 20 years of service, but it is contended that in terms of the policy made by the respondent State, the case of the petitioner was considered and it was found that in the last 5 years, ACRs of the petitioner, he could not achieve such marks, on account of which he could be placed in the list of those who were found fit by the Committee for grant of second time scale of pay. It is contended that in terms of the circular issued by the State Government since the claim of the petitioner was already considered, he was not found fit by the Committee, order was rightly passed and no injustice was caused to the petitioner. However, it is not disputed by the respondents that the petitioner was already granted the benefit of Kramonnati and a promotion way back in the year 2000 and 2003. It is contended by the respondents that the petition being misconceived deserves to be dismissed.

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

9. Now the sole question is whether it was necessary to put the case of the petitioner before any Committee for consideration in terms of the new Scheme made by the State Government. The Scheme prescribes that the benefit as prescribed under the new Scheme would be granted only if an employee fulfills

the eligibility conditions as prescribed under the statutory recruitment Rules for promotion. However, this has been further clarified in paragraph 12 of the new Scheme that in case the Government employee has been granted the benefit of Kramonnati in terms of the Scheme made by the General Administration Department of Government of Madhya Pradesh or has been granted a promotion, his ACRs would not be reassessed for the purposes of granting the benefit under the new Scheme. This has been further clarified by circular dated 1.4.2008 where it is categorically said that once the benefit is extended under the then existing Kramonnati Scheme, then it will not be necessary for rescreening the case of the employee concerned for the purposes of grant of second higher pay scale. However, despite making such a prescription, it is required to be seen whether placing the case of every such employee would be necessary before the Committee for grant of second time scale pay or not. The Kramonnat pay scales are quite different than the time scale pay prescribed under the new Scheme. In fact, the pay scale made applicable to the promotional post of any subordinate post, has been made the time scale pay under the new Scheme on first and second stages. That is how and that is why the specific prescription is made that the claims are to be considered for grant of time scale pay under the new Scheme in the same manner as if promotions are being made under the statutory recruitment Rules and same norms are to be followed.

10. Now if promotions are to be made whether any criteria is prescribed for fixing of any benchmark under the statutory Rules. No benchmark were earlier prescribed in any of the statutory Rules where the claims for promotion were to be considered. However, by making M.P. Public Services (Promotion) Rules 2002 (hereinafter referred to as 2002 Rules for short), the criterias have been laid down in all circumstances in which the cases are to be considered. The promotions up to Class-I post are to be made on the basis of seniority-cum-merit criteria. Promotion only on Class-I to Class-I posts are to be made on merit-cum-seniority criteria. The Rules prescribed the manner of fixing the benchmark. This particular aspect is required to be considered because ultimately granting of a time scale pay is virtually upgradation in the pay scale though not a regular promotion. This particular aspect is further required to be seen that though the Scheme was formulated in the year 2008 after coming into force of the 2002 Rules, but the said Rules are not inserted or made applicable in the Scheme, therefore, it is clear that while making the Scheme, it was never intended by the State Government that any benchmark be fixed for considering the cases for grant of time scale pay.

11. This being so, if the explanation extended by the State Government are

seen, it would be clear that all those who have been granted the first or second upgradation under the Kramonnati Scheme or those who have been granted promotion were entitled to be granted the second time scale pay under the new Scheme without referring their cases to any scrutiny Committee. The power was specifically delegated to the heads of departments to issue such order, for this reason only. In the present case, the petitioner was granted the Kramonnat pay scale vide order dated 3.5.2000 (Annx.P/4) and that too was done on consideration of a Committee. Similarly, he was granted a promotion in the year 2003 only after due consideration of his claim by the Departmental Promotion Committee. Again he was promoted vide order dated 23.7.2011 that too only after consideration by the Departmental Promotion Committee. If these promotion orders are taken note of, on completion of 16 years of service from the initial date of appointment, the petitioner would be entitled to grant of second time pay scale under the new Scheme. Thus, putting the name of the petitioner in the list of those who have not achieved the benchmark and on account of that refusing to grant him the second upgradation, is not justified. The orders impugned are thus not sustainable. Another aspect is that similarly situated persons working in the very same establishment have been granted the benefit of second time scale pay by issuance of order on 14.12.2010. It is not indicated in this order that their cases were required to be considered by any Committee. Simply it is said that on account of completing 10 or 20 years of service, they have been given the benefit of such time scale pay. Thus, on one hand, the claim of the petitioner is rejected on the wrong application of provisions of the new Scheme and ignoring the specific clarification issued by the State Government and on other hand, similarly situated persons in the very same department have been granted the said benefit.

12. In view of the aforesaid, the orders impugned are not sustainable. The same stand quashed. The petitioner would be entitled to grant of second time scale pay from the date he had completed requisite years of service as per the new Scheme. Let the consideration be done in this respect, appropriate orders be issued and all the monetary benefits be extended to the petitioner from the date he completed the requisite years of service. The aforesaid exercise be completed within a period of three months from the date of order.

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

Petition allowed.

I.L.R. [2013] M.P., 1325
WRIT PETITION

Before Mr. S.A. Bobde, Chief Justice & Mr. Justice K.K. Trivedi
W.P. No. 6284/2008(S) (Jabalpur) decided on 25 February, 2013

UNION OF INDIA & ors. ...Petitioners
Vs.
RADHELAL GOUD ...Respondent

A. Central Civil Services (Pension) Rules, 1972 - Rule 33 & 34 **- Petition is preferred by the petitioner on the ground that the O.A. filed by the respondent was wrongly allowed directing fixation of pay of the respondent in the higher pay scale and for payment of arrears and pensionary benefits based on such fixation - Held - Respondent officiated on a higher post and has discharged greater responsibilities than the substantive post of the respondent - Average emoluments of the respondent was to be fixed and only on the basis of the said average emoluments the pension of the respondent was required to be calculated. (Paras 8 to 10)**

क. केन्द्रीय सिविल सेवा (पेंशन) नियम, 1972 – नियम 33 व 34 – याची द्वारा याचिका इस आधार पर प्रस्तुत की गई कि प्रत्यर्थी द्वारा प्रस्तुत ओ.ए. को, प्रत्यर्थी का वेतन निर्धारण, उच्चतर वेतन मान में करने तथा उक्त वेतन निर्धारण के आधार पर बकाया एवं निवृत्ति लाभों का भुगतान करने के निदेश के साथ अनुचित रुप से मंजूर किया गया था – अभिनिर्धारित – प्रत्यर्थी उच्चतर पद पर स्थानापन्न था और प्रत्यर्थी ने अपने मूल पद से महत्वपूर्ण उत्तरदायित्वों का निर्वहन किया – प्रत्यर्थी की औसत परिलब्धियों का निर्धारण करना था और केवल उक्त औसत परिलब्धियों के आधार पर प्रत्यर्थी की पेंशन की संगणना अपेक्षित थी।

B. Service Law - Officiating Post **- Officiating posting will not mean an appointment to the post carrying higher responsibility. (Para 10)**

ख. सेवा विधि – स्थानापन्न पद – स्थानापन्न पदस्थापना का अर्थ, उच्चतर उत्तरदायित्व के पद पर नियुक्ति नहीं होगा।

Cases referred :

AIR 1999 SC 838, 2002 SCC (L&S) 9.

S.A. Dharmadhikari, for the petitioners.
Narendra Sharma, for the respondent.

ORDER

The Order of the court was delivered by :

K.K. TRIVEDI, J: By this petition under Article 227 of the Constitution of India, the petitioners have called in question the order dated 12.3.2008 passed in O.A.No.793/2007 by the Central Administrative Tribunal, Bench at Jabalpur (hereinafter referred to as the Tribunal for brevity). It is contended that the Original Application filed by the respondent was wrongly allowed directing fixation of the pay of the respondent in the higher pay scale, treating it as an appointment to a post carrying higher responsibility and pay him the arrears and pensionary benefits based on such fixation. It is contended that the respondent was only given the charge of the next higher post, since he has discharged the duty of the said post, he was entitled to grant of benefit of pay of the said post, but was not entitled to get the benefit of fixation of pensionary claims on the basis of such pay of the higher post and to that extent the order passed by the learned Tribunal is bad and is liable to be set aside. Hence, this writ petition is required to be filed.

2. Briefly stated facts of the case are that the respondent was working as Head Sorting Assistant. While discharging the duty as such, he was posted as officiating Head Record Officer vide order dated 20.1.2006. However, since the pay of the post of Head Record Officer was not granted to the respondent, he made an approach to the Tribunal by way of filing Original Application No.917/2006. The said Original Application was disposed of vide order dated 20.2.2007 by the Tribunal directing the petitioners herein to consider and decide the representation of the respondent by passing a reasoned and speaking order within three months. The representation of the respondent was decided by the petitioner on 13/16.4.2007 and since the same was rejected, the Original Application No.793/2007 was filed by the respondent seeking a direction against the petitioners to pay the salary to the respondent in the pay scale of Rs.6500-10,500/- with effect from 20.1.2006 to 31.7.2006. The respondent in fact had attained the age of superannuation and had retired on 31.7.2006. A further prayer was made by the respondent for refixation of his pensionary claim on the basis of refixation of his salary in the higher post.

3. Such a claim made by the respondent was opposed by the petitioners stating that the recruitment Rules prescribed promotion on the higher post and since the respondent was not selected for promotion, mere officiating working of

the respondent was not enough for grant of pay of the higher post. It was contended that since the respondent was not substantively holding the post of Head Record Officer which falls within the cadre of higher service Grade-I, the respondent was not entitled to the pay of the said post and was also not entitled to get the pensionary benefits fixed on the basis of such higher pay scale.

4. After hearing learned counsel for the parties at length, the Tribunal came to the conclusion that once the respondent was made to officiate on a post carrying higher responsibility and he actually discharged the duties of the higher post he was entitled to salary attached to the higher post. Mere payment of the salary of the higher post will not amount to a regular promotion on the said post if on account of officiating working on the higher post such salary of the higher post is paid. Relying on the decisions rendered by the Apex Court in the case of *Selva Raj Vs. Lt. Governor of Island, Port Blair and others* (AIR 1999 SC 838) and in the case of *Dwarika Prasad Tiwari Vs. M.P. State Road Transport Corporation and another* [2002 SCC (L&S) 9], the Tribunal reached to the conclusion that the respondent was entitled to the salary of the post on which he was made to officiate and, accordingly, if he has retired from the services, while working on the higher post, he would be entitled to grant of pensionary benefits only on the basis of calculation to be done taking into account the salary of the higher post. In view of this finding, the Original Application of the respondent was allowed, against which order this writ petition is filed.

5. Learned counsel appearing for the petitioners, vehemently, contended that even if the pay in the pay scale attached to the higher post is granted to the respondent, it cannot be treated as pay within the meaning of Fundamental Rule 9(21) for the purposes of computing and calculating the average emoluments on the basis of which the pension and pensionary claims of the retired Government servant are to be settled. It is contended that under the Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as Pension Rules for short), specific provisions are made with respect to the emoluments. Drawing attention of this Court to the provisions of Rule 33 of the Pension Rules, it is contended that the pension is required to be fixed taking into account the average emoluments which according to learned counsel for the petitioners means in terms of the provisions of Rule 34 of the Pension Rules, **with reference to the average emoluments drawn by a Government servant during the last ten months of his service.** It is contended that the expression emoluments makes it clear that only the pay

which is sanctioned for a post held by any employee substantively or in officiating capacity is to be taken into account and, thus, it was not correct on the part of the Tribunal to hold that since the respondent would be entitled to draw the salary in the pay scale of a higher post, his pension was also required to be fixed computing the said pay as emoluments defined under the Pension Rules.

6. Per contra, it is contended by learned counsel appearing for the respondent that once the pay of the higher post is ordered to be paid to the respondent, average emoluments would be calculated on the basis of whatever emoluments the respondent has drawn during the last ten months of service and in accordance to the said emoluments, the pension is required to be fixed. All other retiral dues are also to be computed taking into account the aforesaid average emoluments. Thus, if such a direction is given by the Tribunal, no wrong has been committed. It is contended that all such submissions made by learned counsel for petitioners are devoid of any substance and deserve to be rejected. The writ petition is liable to be dismissed.

7. We have heard the learned counsel for the parties at length and have carefully gone through the provisions of Rules and the findings recorded by the learned Tribunal.

8. It is not in dispute that the respondent had officiated on a higher post and has discharged the greater responsibility than the substantive post of the respondent. Thus, to us it is clear that the Tribunal was right in holding that the respondent would be entitled to payment of salary in the pay scale of the higher post. The law is well settled in this respect in the cases of *Selva Raj and Dwarika Prasad Tiwari* (supra) which have been rightly relied on by the Tribunal. To this extent, the order of the Tribunal is to be upheld.

9. However, we have to examine whether there was any justification in directing calculation of the pension of the respondent on the basis of the salary which he has drawn on the higher pay scale and whether could it be treated that the respondent was in fact appointed to a post carrying the higher responsibility. The Pension Rules 33 and 34 need to be examined and interpreted which are reproduced for the aforesaid purposes as under :-

> **"33. Emoluments.-** The expression *"emoluments"* means basic pay as defined in Rule 9 (21) (a)(i) of the Fundamental Rules which a Government servant was receiving immediately before his retirement or on the date of his death, and will also

include non-practising allowance granted to medical officer in lieu of private practice.

Explanation - Stagnation increment shall be treated as emoluments for calculation of retirement benefits.

Note 1. - If a Government servant immediately before his retirement or death while in service had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments which he would have drawn had he not been absent from duty or suspended shall be the emoluments for the purposes of this rule :

Provided that any increase in pay (other than the increment referred to in Note 4) which is not actually drawn shall not form part of his emoluments.

Note 2. - Where a Government servant immediately before his retirement or death while in service had proceeded on leave for which leave salary is payable after having held a higher appointment whether in an officiating or temporary capacity, the benefit of emoluments drawn in such higher appointment shall be given only if it is certified that the Government servant would have continued to hold the higher appointment but for his proceeding on leave.

Note 3. - If a Government servant immediately before his retirement or death while in service had been absent from duty on extraordinary leave or had been under suspension, the period whereof does not count as service, the emoluments which he drew immediately before proceeding on such leave or being placed under suspension shall be the emoluments for the purposes of this rule.

Note 4. - If a Government servant immediately before his retirement or death while in service, was on earned leave, and earned an increment which was not withheld, such increment, though not actually drawn, shall form part of his emoluments :- Provided that the increment was earned during the currency

of the earned leave not exceeding one hundred and twenty days, or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days.

Note 5. - (Deleted).

Note 6. - Pay drawn by a Government servant while on deputation to the Armed Forces of India shall be treated as emoluments.

Note 7. - Pay drawn by a Government servant while on foreign service shall not be treated as emoluments, but the pay which he would have drawn under the Government had he not been on foreign service shall alone be treated as emoluments.

Note 8. - Where a pensioner who is re-employed in Government service elects in terms of clause (a) of sub-rule (1) of Rule 18 or clause (a) of sub-rule (1) of Rule 19 to retain his pension for earlier service and whose pay on re-employment has been reduced by an amount not exceeding his pension, the element of pension by which his pay is reduced shall be treated as emoluments.

Note 9. - (Deleted).

Note 10. - When a Government servant has been transferred to an autonomous body consequent on the conversion of a Department of the Government into such a body and the Government servant so transferred opts to retain the pensionary benefits under the rules of the Government, the emoluments drawn under the autonomous body shall be treated as emoluments for the purpose of this rule.

34. Average Emoluments.- Average emoluments shall be determined with reference to the emoluments drawn by a Government servant during the last ten months of his service.

Note 1. - If during the last ten months of his service a Government servant had been absent from duty on leave for which leave salary is payable or having been suspended had been reinstated without forfeiture of service, the emoluments

which he would have drawn had he not been absent from duty or suspended shall be taken into account for determining the average emoluments :

Provided that any increase in pay (other than the increment referred to in Note 3) which is not actually drawn shall not form part of his emoluments.

Note 2. - If, during the last ten months of his service, a Government servant had been absent from duty on extraordinary leave, or had been under suspension the period whereof does not count as service, the aforesaid period of leave or suspension shall be disregarded in the calculation of the average emoluments and equal period before the ten months shall be included.

Note 3. - In the case of a Government servant who was on earned leave during the last ten months of his service and earned an increment, which was not withheld, such increment though not actually drawn shall be included in the average emoluments:

Provided that the increment was earned during the currency of the earned leave not exceeding one hundred and twenty days or during the first one hundred and twenty days of earned leave where such leave was for more than one hundred and twenty days."

A plain and simple reading of Rule 33 of the PensionRules will make it clear that the emoluments means basic pay as defined in Rule 9 (21)(a)(i) of the Fundamental Rule. Sucha definition is also important for examination and, therefore, the same is also reproduced for ready reference :-

"9(21)(a) Pay means the amount drawn monthly by a Government servant as -

(i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the President. "

10. Now if the provisions of the Pension Rules are seen, it is not in dispute that the respondent was paid the salary of the higher post with effect from 20.1.2006 to 31.7.2006 for working on the higher post though in officiating capacity. For the rest of the period, completing ten months average, the salary as was drawn by the respondent was to be taken into consideration and then the average emoluments of the respondent was to be fixed and only on the basis of the said average emoluments the pension of respondent was required to be calculated and all other retiral dues of the respondent are to be computed and payment is required to be made. However, officiating posting will not mean an appointment to the post carrying higher responsibility.

11. A plain and simple interpretation of the Rules would be that whatever actual payments were made to the respondent for the last ten months of working were to be taken into consideration while computing his average emoluments on the date of his retirement and the calculation of pension was required to be done accordingly.

12. The crux of the order passed by the Tribunal is only this much and nothing else. No other meaning of the order of the Tribunal is possible. That being so, we find no infirmity in the order passed by the Tribunal.

13. The writ petition fails and is hereby dismissed. However, there shall be no order as to cost

Petition dismissed.

I.L.R. [2013] M.P., 1332
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 8104/2003 (Gwalior) decided on 12 March, 2013

MINAKSHI SINGH (SMT.) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

Service Law - State Administrative Service Classification Recruitment & Condition of Service Rules, M.P., 1975, Rule 13(3) - **The word 'prescribed' is used in relation to 'examination' and not in relation to the word 'question papers' - An officer is required to pass the prescribed examination and the department is not bound to confine the examination only to the papers - The Employer is the best judge to**

decide as to which kind of papers are required to be introduced with a view to equip its officers with proper knowledge - Employer can always Add, Amend or Reduce the number of papers - Once new paper is inserted in the examination the said paper forms part of 'prescribed examination' - Petitioner is required to pass the said exam. within the time initially granted i.e. two years - Department can assign seniority to the probationer from the date she has completed probation and passed the departmental exam. (Para 6, 9, 12 & 13)

सेवा विधि – राज्य प्रशासनिक सेवा वर्गीकरण, भर्ती एवं सेवा शर्तें नियम, म. प्र. 1975, नियम 13(3) – शब्द " विहित" का उपयोग "परीक्षा" से संबंधित है और न कि शब्द 'प्रश्नपत्र' से संबंधित – एक अधिकारी को विहित परीक्षा उत्तीर्ण करना आवश्यक है और विभाग, परीक्षा को केवल प्रश्नपत्रों तक सीमित रखने के लिए बाध्य नहीं है –नियोक्ता ही सर्वोत्तम निर्णयकर्ता है वह विनिश्चय करने के लिए कि उसके अधिकारियों को समुचित ज्ञान के साथ तैयार करने की दृष्टि से किस प्रकार के प्रश्नपत्रों को शामिल किया जाना आवश्यक है – नियोक्ता सदैव प्रश्नपत्रों की संख्या को जोड़, संशोधित या कम कर सकता है – एक बार यदि परीक्षा में नया प्रश्नपत्र समाविष्ट किया जाता है, तब उक्त प्रश्नपत्र 'विहित परीक्षा' का भाग बन जाता है – याची को उक्त परीक्षा आरंभ में प्रदान की गई समय सीमा अर्थात दो वर्ष के भीतर उत्तीर्ण करना आवश्यक है – विभाग, परीवीक्षाधीन को उस तिथि से वरिष्ठता दे सकता है जब उसने परीवीक्षा पूर्ण की और विभागीय परीक्षा उत्तीर्ण की है।

Cases referred :

2012(I) MPJR (FB) 375, AIR 1996 SC 2396, (1999) 3 SCC 653, (2008) 1 SCC (L&S) 841, (1997) SCC (L&S) 1527, (2011) 6 SCC 725.

S.K. Sharma, for the petitioner.
Sangita Pachauri, Dy. G.A. for the respondent/State.

ORDER

SUJOY PAUL, J. :- This petition was originally filed before Madhya Pradesh State Administrative Tribunal and was registered as Original Application No. 264/2003. On abolishment of the Tribunal, the original application was transferred and re-registered before this Court as Writ Petition No. 8104/2003. The petitioner has prayed for setting aside the orders, Annexures A-1 and A-2 in this petition.

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

The petitioner appeared in examination held by M.P. Public

Service Commission (PSC) in the year 1995. The result was declared in the year 1996 The petitioner was selected for appointment on the post of Deputy Collector. The information of selection dated 16.1.1997 is Annexure A-3 and consequential appointment order is dated 12.8.1997 (Annexure A-4). The petitioner was appointed on probation for two years. In condition No.2 of the appointment order it was made clear that petitioner would be required to pass the examination conducted by administrative academy. It was also made clear that service conditions of the petitioner will be governed by M.P. Civil Services (General Conditions of Services) Rules, 1961 (for brevity, "1961 Rules") and M.P.State Administrative Service Classification Recruitment and Conditions of Service Rules, 1975 (for brevity, "1975 Rules"). The departmental examination was governed by the Government of Madhya Pradesh, Home Department's Circular dated 17th June, 1977 (Annexure A-5). The petitioner and other officers so selected were required to pass examination in following papers:-

(i) Criminal, Civil, Administrative and Revenue Law and Procedure.

(ii) Hindi

(iii) Accounts.

The petitioner's contemporaries cleared the said three papers prior to 19th March, 1999 and, therefore, they were confirmed by the department. On 19.3.1999 (Annexure A-6) the Government amended the earlier circular, Annexure A-5, and introduced another paper in the said examination, namely, "Panchayat Raj Administrative Law and Procedure". The petitioner appeared in this paper also but could qualify it only on 27.1.2001. The petitioner was confirmed on 28.1.2001 by Annexure P-1.

The respondent appended a note in Annexure P-1 mentioning that the petitioner had passed the department\al examination after two years of probation, because of which she was given extension of one year and, therefore, her seniority will not be reckoned on the basis of merit position of the select

list of PSC but would be governed by rule 12 of 1961 Rules and seniority would be reckoned with regard to passing of the departmental examination. The probation period of the petitioner was extended on 22.7.2000 (Annexure A-7) on the ground that she could not pass the departmental examination.

3. Shri S.K.Sharma, learned counsel for the petitioner raised following points:-

(i) At the time of appointment of petitioner, the examination was consisting of three papers vide Annexure A-5 dated 17th June, 1977 and, therefore, the petitioner was obliged to clear those three papers within two years. If petitioner was required to clear yet another paper as per amended circular, Annexure A-6, two years period should have been counted by the respondent from 19th March, 1999, the date from which new paper was introduced. Lastly, he relied on a recent Full Bench judgment of this Court reported in 2012 (I) MPJR (FB) 375 *(Masood Akhtar (Dr.) vs. R.K. Tripathi).*

4. Per Contra, Smt. Sangita Pachauri, learned Deputy Government Advocate, supported the order on the basis of aforesaid Full Bench judgment cited by learned counsel for the petitioner and submits that the action impugned is in consonance with 1975 Rules read with 1961 Rules. She also relied on AIR 1996 SC 2396 *(M.P.Chandoria v. State of M.P. And others).*

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

6. Before dealing with rival contentions of the parties, I deem it proper to refer to the relevant provisions of the Rules. Rule 13(3) of 1975 Rules prescribes that the probationer shall undergo the prescribed training and pass the prescribed departmental examination during the period of his probation. The word "prescribed" is used in relation to "examination". The contention of Shri S.K.Sharma, learned counsel for the petitioner is that the prescribed examination means those three papers which were prescribed at the time of appointment and, therefore, no alteration made midway will adversely affect the petitioner for the purpose of confirmation or grant of seniority. Rule 28 of 1975 Rules empowers the Government to confirm an officer if he/she passed all the prescribed departmental examinations or he/she has been exempted from it. Rule 23 of 1975 Rules borrows rule 12 of 1961 Rules for the purpose of regulating/determining seniority of the officers. Rule 12 of 1961 Rules empowers the Government to

decide the seniority on the basis of completing normal period of probation.

7. The petitioner has not doubted the power of the Government to alter the seniority position in the event of extension of probation period or passing of the examination after two years. The contention of the petitioner is that only those three papers were required to be cleared within two years which were "prescribed" in Annexure A-5. It is stated that those three papers prescribed in Annexure A-5 were cleared by the petitioner within two years. If the department added another paper, further two years should have been given to the petitioner from 19.3.1999, the date when it was added.

8. The contention of the petitioner is mainly based on the word "prescribed" employed in rule 13(3) of 1975 Rules.

9. A microscopic reading of this rule shows that the Legislature in its wisdom has used the word "prescribed" with the word "examination", It has not been used with the word "question papers". Thus, an officer is required to pass the prescribed examination and the department was not bound to confine the examination only to the papers included in Annexure A-5. It is a matter of common knowledge and settled law that the employer is the best judge to decide as to which kind of papers are required to be introduced with a view to equip its officers with proper knowledge. The employer in its wisdom can always add, amend or reduce the number of papers. The syllabi can also be modified, improved as per the need of the hour by the employer. There is no vested, statutory or fundamental right available to the petitioner to pass only those papers which were introduced in Annexure A-5. The Apex Court in (1999) 3 SCC 653 *(State of J&K vs. Shiv Ram Sharma and others),* opined as under:-

> *"It is permissible to the Government to prescribe appropriate qualifications in the matter of appointment or promotion to different posts. There is no indefeasible right in the respondents to claim promotion to a higher grade to which qualification could be prescribed. There is no guarantee that rules framed by the Government in that behalf would also be favourable to them."*

10. In the light of aforesaid analysis, in my opinion, it was well within the power of the employer to add a departmental examination and it cannot be held that officer is obliged to pass only those papers which were prescribed at the time of her appointment as Annexure A-5. The word "examination" has a

wider meaning and examination contains papers. Therefore, Legislature in its wisdom has prescribed for passing of the "prescribed examination" and not "prescribed papers". At the cost of repetition, in my opinion, the papers can be added, reduced, altered or modified but examination will remain the same. Therefore, the contention of the petitioner that the prescribed examination should be read as prescribed papers at the time of appointment is of no merit and is hereby rejected.

11. Learned counsel for the petitioner although relied on (2008) 1 SCC (L&S) 841 *(K. Manjusree vs. State of Andhra Pradesh and another),* in my opinion, the said judgment has no application in the facts and circumstances of the present case. In that case a selection criteria was prescribed and when selection process was in full swing, the rule of game was changed. The same was held to be impermissible. In the present case, the rule has not been changed. Rule only prescribes passing of "prescribed examination" and the said rule remained intact. Reliance is also placed on (1997) SCC (L&S) 1527 *(Chairman, Railway Board and others vs. C.R.Rangadhamaiah and others).* The said judgment deals with the question of retrospective amendment affecting vested or accrued right of a Government servant with regard to grant of revised pay and other benefits. The said judgment has no applicability in the facts and circumstances of this case. The petitioner has no accrued, vested or fundamental right to appear only in those papers which were prescribed by Annexure A-5. The employer can prescribe further papers in the said examination as per its administrative exigency/requirement.

12. The other contention with regard to counting of further period of two years from 19.3.1999 when another paper is inserted, in the opinion of this Court, this argument is also meritless. Once Government circular, Annexure A-5, dated 17.6.1977 is amended by Annexure A-6, the new subject aforesaid became part and parcel of the same examination. The petitioner was required to clear this examination within two years from the date of her original appointment. Two years cannot be counted from the date of insertion of a new paper. In other words, the petitioner could not pass the examination as per papers Annexure A-5 till 19.3.1999. From that date, a new paper is introduced. Such prescription of new paper cannot be found fault with. On insertion of additional paper, it became part of the examination. Thus, the petitioner was required to pass the said examination within the time initially granted to her, i.e., two years. If she did not complete the same, the probation was rightly extended for another year. She passed the examination and

considering the said date of passing examination, she was confirmed. The Apex Court in (2011) 6 SCC 725 *(Deepak Agarwal and another vs. State of Uttar Pradesh and others)* opined as under:-

> *"It is the rules which are prevalent at the time when the consideration took place for promotion, which would be applicable. A candidate has the right to be considered in the light of the existing rules, which implies the "rule in force" on the date the consideration took place. There is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises."*

13. On the basis of aforesaid analysis, in my opinion, once new paper is inserted in the examination, the said paper forms part of "prescribed examination" and the petitioner was obliged to pass it within the stipulated time failing which under the rules the employer was empowered to determine her seniority.

14. The Apex Court had an occasion to consider 1961 Rules in *M.P.Chandoria* (supra). In para 5 of the said judgment it is opined as under:-

> *"5..... Until the probation is declared and he was confirmed in the post, he does not become a member of the service (sic) successful completion of the probation and pass of the prescribed tests or conditions precedent to declare the probation. So, mere passage of time one year does not entitle a probationer to be a member of the service. He remains to be on temporarily service. On declaration of probation, the appointing authority should confirm in a pending post available or to grant quasi-permanent status. As soon as the post is available, he should be confirmed. In view of the admitted position that he did not pass the test, the appointing authority considered that his seniority would be counted w.e.f. the date of his passing the test. Rule 12 (a) (ii) clearly empowers the appointing authority to assign, in these circumstances, the seniority in lower level than the one assigned by the Public Service Commission. We do not find any illegality committed by the authorities in giving seniority from the date of his passing the test."*

15. The Full Bench of this Court in *Masood Akhtar (Dr.)* (supra) opined as under in para 11 (iii) :-

> *"(iii) Under rule 12(1)(f) an employee would be allowed to retain original seniority where extension of period of probation is not due to any fault or shortcoming of the employee. However, where extension of period of probation is on account of fault or shortcoming on the part of the employee, in such a case the probationer has to be assigned seniority from the date if that date can be ascertained i.e. the date on which he clears the departmental examination or where such date cannot be ascertained, the date on which he is considered suitable for confirmation."*

16. In view of the judgments in *M.P. Chandoria and Masood Akhtar (Dr.)* (supra), it is clear that under rule 12 of 1961 Rules the department can assign seniority to the probationer from the date she has completed the probation and passed departmental examination. In the present case the petitioner has been given seniority with regard to the date she cleared the examination and was confirmed by the department. No fault can be found in the said action of the department which is in consonance with 1961 Rules and the law laid down on the said subject.

17. Accordingly, I find no reason to interfere in this matter. Petition is meritless and is hereby dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 1339
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 1734/2004 (Gwalior) decided on 13 March, 2013

MUKESH SINGH CHATURVEDI & anr. ...Petitioners
Vs.
STATE OF M.P. & ors. ....Respondents

A. ***Constitution - Article 226/227 - Natural Justice*** **- If the respondent/Government has permitted the petitioners to obtain appropriate Nazul NOC and submit it before the department - Such an action of the Government is in consonance with the principles of Natural justice, equity and fair play. (Para 12)**

क. संविधान – अनुच्छेद 226/227 – नैसर्गिक न्याय – प्रत्यर्थी/सरकार ने याचीगण को समुचित नजूल अनापत्ति प्रमाण पत्र अभिप्राप्त करने की अनुमति दी है – सरकार की उक्त कार्यवाही नैसर्गिक न्याय के सिद्धांत, साम्या और निष्पक्ष व्यवहार के अनुरुप है।

B. Constitution - Article 226/227 - Promissory estoppel - Legality, Validity & Propriety of Govt. Orders **- Promissory Estoppels against the Government - Cannot be pressed into service against Government, when Government is fulfilling public duty as per the public policy - Government is always at liberty to examine the record with accuracy and precision and ensure that public / Govt. land is not misused or enjoyed by anybody without there being any entitlement. (Para 10 & 12)**

ख. संविधान – अनुच्छेद 226/227 – वचन विबंध – सरकारी आदेशों की वैधता, विधि मान्यता एवं औचित्य – सरकार के विरुद्ध वचन विबंध – सरकार के विरुद्ध लागू नहीं किया जा सकता जब सरकार, लोक नीति के अनुसार लोक कर्तव्यों का निर्वहन कर रही होती है – सरकार, सदैव अभिलेख का परीक्षण यथार्थता एवं सूक्ष्मता से करने के लिए स्वतंत्र है तथा यह सुनिश्चित करेगी कि लोक/सरकारी भूमि का, बिना किसी हकदारी के कोई व्यक्ति उसका दुरुपयोग या उपभोग ना करे।

Cases referred :

(1973) 2 SCC 650, (2012) 11 SCC 1.

Anil Sharma, for the petitioners.
B. Raj Pandey, G.A. for the respondents No. 3, 4 & 5.
Susheel Chaturvedi, for the respondent No.2.

ORDER

SUJOY PAUL, J. :- Petitioners have filed this petition challenging the legality, validity and propriety of the orders Annexure P-1 dated 7.6.2004, (Annexure P-14) dated 4.6.2004 and Annexure R-1 dated 26.8.2005.

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

2. The case of the petitioners is that they purchased the land in question pursuant to the sale deeds Annexure P-2 and P-3. After the said sale deeds, a mutation was done by order dated 9.10.2002 (Annexure P-9). The demarcation was made by way of Panchanama Annexure P-7. Thereafter, the petitioner prayed for change of land use and accordingly permission for diversion was sought for.

On 6.5.2003 (Annexure P-5) no objection was given by the Nazul Officer, Gwalior. The NOC was given by Traffic Police by Annexure P-6 and by P.H.E. Vide Annexure P-11. The State Government, in turn, published a notification in the Official Gazette dated 1.8.2003 and by way of this notification dated 23.7.2003 permission for diversion was given. By order dated 11.12.2003 (Annexure P-12), Town and Country Planning granted NOC. The Municipal Corporation granted NOC by order dated 24.2.2004 (Annexure P-13).

3. Shri Anil Sharma, learned counsel for the petitioner, by taking this Court to the aforesaid documents and the reply in State Assembly submits that the Govt. has taken a stand before the Vidhan Sabha that Survey No. 1259/1/1/ to 1259/1/8 is a private land. Reliance in this regard is placed on Annexure P-15 and P-16 filed with the rejoinder. On the basis of answer to question No. 5067 and 5066, Shri Anil Sharma submits that State Government has taken a clear stand that the land in question is a private land.

4. The learned counsel for the petitioners submits that onthe basis of aforesaid NOC and the notification dated 23.7.2003 (Annexure P-4), the right is accrued in favour of the petitioner. The impugned order Annexure P-1 came as a bolt from blue to the petitioner whereby the aforesaid permission was kept in abeyance and the petitioner was directed to obtain NOC from the Nazul Officer and submit it before the Joint Director, Town and Country Planning. Shri Sharma by criticizing this order submits that once the said permission was already granted to the petitioner by Annexure P-5 dated 6.5.2003, there was no occasion for the respondents to pass the aforesaid order. He submits that all the statutory authorities have granted him no objection but without considering the aforesaid, the impugned order Annexure P-1 is passed.

5. The learned counsel submits that Annexure P-14 dated 4.6.2004 is also bad in law whereby the Nazul Officer requested the Joint Director, Town and Country Planning to act in a particular manner. The learned counsel for the petitioner also assailed the order dated 26.8.2005 (Annexure R-1). He submits that in view of constant and clear stand of the Government and reflected in various documents including the stand before the Vidhan Sabha, it is clear that the land in question is a private land and, therefore, the respondents have not committed any error earlier in granting the NOC and issuing the notification dated 23.7.2003.

6. The learned counsel submits that the impugned order is assailed on two basic legal points:-

i) The respondents have taken a specific stand before the State Assembly and in Annexure P-5. They are bound by the aforesaid stand and such stand operates as 'promissory estoppal' against them. The respondents cannot be permitted to resile from the earlier stand and they cannot take a "U" turn from the earlier stand.

ii) The impugned orders entail civil consequences and before issuing the said order the petitioner should have been heard.

7. *Per contra,* Shri B.Raj Pandey, learned Govt. Advocate submits that a bare perusal of Annexure R-1 and R-2 shows that the land in question was consistently recorded as *"Raiyatwari* (Govt. land)" and the nature of land was described as *"Charnoi gair mumkin"*. He submits that later on there is some manipulation in the revenue records and, therefore, a detailed order Annexure R-1 was passed. By drawing the attention of this Court on Annexure R-1, it is stated that there is some bungling and overwriting on the strength of which later on it was shown to be a private land. He submits that when all the original records were perused by the State authorities, it was found that it was a Government land. He further submits that vendor of the sale deed Annexure P-3 is not shown as owner in the aforesaid revenue records. The learned counsel submits that Annexure P-5 and the earlier order are passed erroneously and it is a valuable Government land which cannot be given to the petitioner as per the sweet will of any other authority or as per any mistake committed by any authority. He further submits that in nutshell, petitioner is claiming title of land and on the strength of that he is claiming other benefits including demarcation etc. He submits that for this purpose, the proper remedy for the petitioner is to file a civil suit and writ petition cannot be entertained. He drew the attention of this Court on various paras of reply of the State. Lastly, he submits that this petition be dismissed.

8. Shri Susheel Chaturvedi, learned counsel for the Municipal Corporation, submits that the Corporation granted permission as per the conditions mentioned in Annexure P-13 dated 24.2.2004. By relying on condition No.2, it is stated that the petitioner was required to start the construction work within one year and if it is not done within that time, the permission stood cancelled automatically. If the petitioner succeeds and wants permission again, he has to prefer application afresh. No other point is pressed by the learned counsel for the parties.

9. I have bestowed my anxious consideration on the rival contentions of

the parties and perused the record.

10. I deem it proper to deal with the submission of learned counsel for the petitioner point wise:-

Point (i):- The learned counsel for the petitioners has vehemently argued that various statutory authorities namely Nazul Department, Town and Country Planning, Municipal Corporation and P.H.E. have issued 'No Objection Certificate' in favour of the petitioners. In view of answers to star questions before the Vidhan Sabha, it is clear that the Government has taken a specific stand that the land in question is a private land and, therefore, the Government and its authorities are bound by the said stand and cannot resile from it. He submits that the principles of 'promissory estoppal' will be applicable in the facts and circumstances of the case against the Government. Before dealing with this aspect, I deem it proper to deal with the rival stand of the parties in this regard.

On the one hand the petitioner has stated that the land in question was a private land and in support thereof relied on the various NOCs. issued by different departments. On the other hand, the Government in its return has stated that when the entire revenue records were carefully perused, it was found that there is manipulation and overwriting in the revenue records. The old original revenue records shows that from Samvat 1997, the land in question is recorded as Government land and described as *"Raiyatwari* (Govt. land) - *Charnoi gair mumkin"*. Later on it was found that there is overwriting in the revenue records. The relevant portion of Annexure R-1 reads as under:-

"उपरोक्त संदर्भित पत्र द्वारा ग्राम महलगांव के सर्वे कं. 1259/1 के संबंध में चाही गयी जानकारी जिला अभिलेखागार से प्राप्त की गई। प्राप्त अभिलेख का परीक्षण करने पर निम्न स्थिति पाई गई:–

संवत	सर्वे नं.	नाम मालिक	किस्म आराजी
1997	1259	रैयतवारी (शासकीय)	चरनोई गैर मुमकिन
2002 से 2005	1259	रैयतवारी (शासकीय)	चरनोई गैर मुमकिन
2006	1259/1	रैयतवारी (शासकीय)	चरनोई गैर मुमकिन
	1259/2	रैयतवारी (शासकीय)	रेल्वे सड़क

संवत 2007 में सर्वे नम्बर 1259/1 नाम मालिक में रैयतवारी दर्ज है, कृषक तथा उसके पिता के नाम के कालम में श्री सौभाग्यवती सहोदिराबाई दर्ज किया गया है। रिकार्ड के अवलोकन से पाया गया कि उक्त प्रविष्टि गहरी स्याही से की गई हैं। विवरण के कालम नं. 25 में पट्टा तहसील से हुआ लेख है किन्तु मिसिल नम्बर

निरंक दर्ज है। संवत 2007 के खसरा के कालम–4 में दर्ज खाता कमांक–60 (जो कि भिन्न स्याही से ओवर राईटिंग है) अनुसार सम्वत–2007 की खतौनी का अवलोकन करने पर पाया गया कि खाता कमांक–60 ग्राम महलगांव सहोदराबाई के नाम है जिसमें कुल 15 किता है, टोटल भी 15 किता का लगा है। लेकिन सर्वे नम्बर–1259/1 अंत में फर्जी दर्ज किया गया है जिसे मिलकर कुलकिता–16 होते हैं। इस प्रकार खतौनी में भी प्रविष्टि बाद में भिन्न स्याही से की गई है संवत 2007 के खसरा में पट्टा तहसील से होने का लेख किया गया है लेकिन मिसिल नम्बर नहीं है जो रिकार्ड में फर्जी प्रविष्टि होने का स्पष्ट प्रमाण है। रिकार्ड में ओवर राईटिंग एवं कांट–छांट की है। बाद में वर्ष 2008 में भी कहीं कहीं ओवर राईटिंग है। संवत–2009 में सर्वे नम्बर–1259/1 नाम मालिक खाने में व एहतमाम पब्लिक वर्क्स डिपार्टमेंट व शरह सदर दर्ज है। इस प्रकार प्रश्नगत भूमि चरनोई गैर मुमकिन व एहतमाम पब्लिक वर्क्स डिपार्टमेंट दर्ज शासकीय भूमि है।"

On the strength of aforesaid, it is pleaded in the reply that after going through the complete record and on verification of the facts, the department came to the conclusion that the land in question of survey No. 1259 is recorded as Government land. It is further stated that it is a very prime land and by way of manipulation in the revenue records, it is later on shown as a private land. It is further stated that the correct facts about the land were not brought to the notice of the Government and, therefore, because of the said misrepresentation, the NOC was issued and change of land use was permitted. It is further stated that Annexure P-5 is issued by Nazul Officer on the basis of information given by Tahsildar, Gwalior, but no information is obtained about the land from Tahsildar Nazul, which should have been obtained regarding this land being a Nazul land. By placing reliance on condition number 13 of NOC (Annexure P-12), it is stated that the permission is of no consequence because of Clause 13 which makes it clear that the said permission can be used only when the person has a valid title on the land. It is further stated that the land is very prime land and in a very well designed manner it is sought to be manipulated by overwriting in the revenue records. In para 5.8 it is pleaded as under:-

"There is no material placed on record to demonstrate the same on the contrary as isevident from the facts mentioned herein aboveand the facts which have come on record, the petitioner No.1 was President of Municipal Council, Bhind, similarly the petitioner No.2 who is brother of petitioner No.1, as has already been mentioned in this para was MLA from District Bhind and not only that the petitioner No.2 was MLA b ut was also Cabinet Minister for Housing and Environment and the manner

in which the NOC has been granted, the land use has been changed and an effort is being made to raise the construction over the Government land after purchase being made vide sale deed Annex P-2 and P-3 goes to show that without verification of the fact that whether the property in question belongs to the person from whom it is being purchased and whether they are the rightful owners of the land or not, the land was purchased and land use was changed in a very hurriedly manner and effort was made to raise the construction, thus in the circumstances, the petitioners being highly influential and holding the high offices in the Government and politically capable there is every basis of presumption that to get undue advantage the action is being taken without following due procedure and rules and now when after due enquiry the fact is established that the land in question is Government land by no stretch of imagination it can be said that the action taken is because of political rivalry or on any other extraneous basis, on the contrary on the fact being established with the land belongs to Government appropriate action has been taken and even after having the knowledge of the aforesaid facts, the Tehsildar, Gwalior has duly passed an order making correction with respect to the entires made in the Revenue record and no title or ownership of the disputed land in question can be claimed being the same as Government land."

The reply of the State shows that allegation of manipulation and fraud is made by the Government. In other words, the stand of the Government is that the revenue records were manipulated and tampered with and on the strength of such manipulation, the NOCs were obtained and therefore, such NOCs cannot operate as promissory estoppal. It is stated that the land in question is very valuable public land and it cannot be permitted to be grabbed by private parties on the basis of manipulation in the revenue records. Coupled with this, allegations are made that the petitioners were holding very high office as President of Municipal Council, Bhind and Cabinet Minister in the State Cabinet and, therefore, possibility of influencing and obtaining orders in favour without following due process of law cannot be ruled out. By placing reliance on old *Khasras,* it is stated that the land in question is in fact a Government land.

The petitioners' whole case is based on Annexure P-5 & NOCs issued

by various departments and notification whereby land use was permitted to be changed whereas the case of the respondents is based on Annexure R-1, relevant revenue entries and Annexure R-2 which contains a finding that there is a manipulation in the revenue records. In this factual back drop, the basic question is whether the stand of the Government will operate as "promissory estoppal" against it.

Before dealing with the said question, it is apt to quote para 37 from a five Judges judgment of Supreme Court reported in 1973) 2 SCC 650 *(M. Ramanatha Pillai Vs. The State of Kerala and Another)*:-

> "37..... In American Jurisprudence 2d at page 783 paragraph 123 it is stated "Generally, a state is not subject to an estoppal to the same extent as in an individual or a private corporation. Otherwise, it might be rendered helpless to assert its powers in government. Therefore as a general rule the doctrine of estoppal will not be applied against the State in its governmental, public or sovereign capacity. An exception however arises in the application of estoppal to the State where it is necessary to prevent fraud or manifest injustice". The estoppal alleged by the appellant Ramanatha Pillai was on the ground that he entered into an agreement and thereby changed his position to his detriment. The High Court rightly held that the Courts exclude the operation of the doctrine of estoppal, when it is found that the authority against whom estoppal is pleaded has owed a duty to the public against whom the estoppal cannot fairly operate."

A microscopic reading of this paragraph shows that in American Jurisprudence it is opined that generally the State is not bound by principle of estoppal to the extent and individual or private Corporation is bound by it. Taking a contrary view, as held in American Jurisprudence, will render the Government helpless in its governance. An exception is carved out against the Government for the purpose of operating estoppal by holding that it would operate against the State where it is essential to prevent fraud or manifest injustice. The Apex Court opined that the authority against whom estoppal is pleaded owes a duty to public and, therefore, in cases where a public duty is involved, the doctrine of estoppal cannot be made applicable.

In the present case, the stand of the Government is that on microscopic

scrutiny of the entire revenue record established that the stand taken by the Government earlier was not in accordance with law. In the present case, it is obligatory on the part of the respondents to examine the entire revenue record minutely before giving any finding about the nature of the land. The valuable public land is vested with the Government and it is a constitutional and legal obligation on the part of the Government to ensure that no Government land is grabbed or taken away by misrepresentation or bungling. In *Ramanatha Pillai* (supra), it was held by five Judges bench of Supreme Court that "promissory estoppal" cannot be pleaded against an authority of the Government, who owe a duty to the public and is acting fairly. In the present case, the respondents owe a duty to the public and in view of that duty they are obliged to examine the entire relevant revenue record and ensure that a valuable Government land is not grabbed or enjoyed by anybody without any legal entitlement/title.

In a recent judgment reported in (2012) 11 SCC page 1 *(Monnet Ispat Engineering Ltd. Vs. Union of India),* the Apex Court held that the doctrine of promissory estoppal can be applied against the Government where the interest of justice, morality and common fairness dictate such course. The doctrine is applicable against the State even in its governmental, public or sovereign capacity where it is necessary to prevent fraud or manifest injustice. It is made clear that the Government cannot be compelled to act in a manner it is prohibited in law under the doctrine of promissory estoppal. It is further held that in no case the doctrine of promissory estoppal can be pressed into aid to compel the Government or public authority to carry out a representation or promise which is contrary to law or which was outside the authority and power of the Government. No promise can be enforced which is against the public policy.

As per the litmus test laid down by the Supreme Court in aforesaid judgments, it is clear that "promissory estoppal" cannot be pressed into service against Government when Government is fulfilling public duty as per the public policy. In the present case, if as per the stand of the petitioners the principles of "promissory estoppal" are blindly applied, it will lead to a situation where government would be prevented from acting in public interest and would be debarred from performing public duty. At the cost of repetition, in cases of misrepresentation or fraud, no legal protection or promissory estoppal is available. Government is always at liberty to examine the record with accuracy and precision and ensure that public/Government land is not misused or enjoyed by anybody without there being any entitlement for the same. On the basis of aforesaid analysis, in my opinion, the principles of "promissory estoppal" cannot be pressed into service

against the respondents in the facts and circumstances of this case. Accordingly, this point is decided against the petitioners.

Point (ii):- Shri Anil Sharma, learned counsel for the petitioners submitted that a right was accrued in favour of the petitioners pursuant to the NOC issued by various Government departments, Gazette notification whereby land use was permitted to be changed. He submits that this could not have been taken away without affording opportunity in consonance with principles of natural justice. Before dealing with the aforesaid facet, it is apt to quote the relevant portion of impugned order which reads as under:-

> "संदर्भित पत्र द्वारा नजूल अधिकारी ग्वालियर ने इस कार्यालय को सूचित किया है कि ग्राम महलगांव के सर्वे कमांक 1259/1/1 लगायत 1259/1/1,8 तक रकवा 19 बिस्वा पर वाणिज्यिक सह आवासीय उपयोग हेतु निर्माण बावत् संयुक्त संचालक नगर तथा ग्राम निवेश ग्वालियर ने अपना पत्र कमांक 2290/03215/न.ग्रा.नि./03 ग्वालियर दिनांक 11.12.2003 के द्वारा विकास अनुज्ञा जारी की गई थी, उक्त प्रश्नाधीन स्थल झांसी रोड साइंस कॉलेज के सामने स्थित है प्रश्नाधीन स्थल के दोनों तरफ सड़क स्थित है। जिसका 24 घण्टे भारी ट्रेफिक चलता है उक्त स्थल पर किसी प्रकार का निर्माण होता है तब शासकीय स्वशासी माधवराव सिंधिया विज्ञान महाविद्यालय का पर्यावरण प्रभावित होगा व लोकेशन भी छिप जाऐगी साथ ही उनके पत्र कमांक क्यू/2003/बी–121/एन. ओ.सी./13, ग्वालियर, दिनांक 6.11.2003 के द्वारा इस कार्यालय को प्रश्नाधीन भूमि पर वाणिज्यिक सह आवासीय स्पष्ट अनापत्ति जारी न करते हुये यह सूचित किया था, कि प्रकरण में अभी परीक्षण किया जा रहा है। तथा उसी का हवाला देते हुये सूचित किया है कि उक्त सील की नजूल अनापत्ति आपको प्रेषित नहीं की गई है उपरोक्त आधार पर इस कार्यालय के पत्र कमांक 2290/03215/न.ग्रा.नि./03 ग्वालियर, दिनांक 11.12.2003 के द्वारा प्रश्नाधीन प्रकरण में इस कार्यालय द्वारा जारी विकास अनुज्ञा को तत्काल प्रभाव से सीगित करते हुये निर्देशित किया जाता है कि संबंधित प्रकरण में उठाये गये मुद्दे हेतु नजूल विभाग से अनापत्ति पत्र प्राप्त कर इस कार्यालय में प्रस्तुत करें।"

A bare perusal of the said para of the impugned order shows that the respondents have taken certain objections and have stated that the matter is under examination. It is further stated that the earlier permission granted by Town and Country Planning Department is kept in abeyance with opportunity to the petitioners to obtain NOC from Nazul department.

11. In the considered opinion of this Court, the petitioners' permission has not been cancelled by Annexure P-1. Certain objections were taken in Annexure P-1, P-14 and Annexure R-1. The basis for those objections are mentioned

in explicit in those orders. Petitioners are given liberty to satisfy the departments and obtain NOC from Nazul department. Since the earlier permission is only kept in abeyance and petitioners are given liberty to satisfy the department, in my opinion, there is no violation of principles of natural justice. It is open to the petitioners to satisfy the departments that the permission is in accordance with law and is not required to be stayed. If petitioners are able to satisfy the objections raised by the respondents in impugned orders, this Court has no doubt that the respondents will pass orders in accordance with law.

12. The respondents have permitted the petitioners to obtain appropriate Nazul NOC and submit it before the department. This action of the respondents is in consonance with the principles of natural justice, equity and fair play. Accordingly, it is open for the petitioners to satisfy the requirements of Annexure P-1, P-14 and Annexure R-1. This Court has no doubt that if the petitioners fulfill the said requirements, the respondents will deal with the matter in accordance with law and pass appropriate orders on it.

13. With the aforesaid observation, the petition stands disposed of. No cost.

Petition disposed of.

I.L.R. [2013] M.P., 1349
WRIT PETITION

Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice M.A. Siddiqui
W.P. No. 7075/2010 (Jabalpur) decided on 14 March, 2013

TEXMO PIPES & PRODUCTS LTD. (M/S) ...Petitioner
Vs.
ASSISTANT COMMISSIONER ...Respondent

Central Excise Tariff Act, 1985 (5 of 1986), Chapter 28 - Classification **- PVC resin/HDPE Resin was classified by Commissioner as a Chemical Product and not chemical - No departmental or independent expert opinion was sought to arrive the said findings - Matter remanded back to the authority to seek an opinion of expert in the field and in case no such departmental expert is available, the Commissioner may seek opinion of some independent expert in this regard - Petitions allowed. (Para 6)**

केन्द्रीय उत्पाद शुल्क अधिनियम, 1985 (1986 का 5), अध्याय 28 –

वर्गीकरण – पी.व्ही.सी. रेजिन (राल)/ एच.डी.पी.ई. रेजिन (राल) को आयुक्त द्वारा एक रासायनिक उत्पाद और न रसायन के तौर पर वर्गीकृत किया गया – उक्त निष्कर्ष पर पहुंचने के लिए किसी विभागीय अथवा स्वतंत्र विशेषज्ञ का मत नहीं चाहा गया – उस क्षेत्र के विशेषज्ञ का मत प्राप्त करने के लिए प्राधिकारी को मामला प्रतिप्रेषित और यदि ऐसा कोई विभागीय विशेषज्ञ उपलब्ध नहीं है, आयुक्त इस संबंध में किसी स्वतंत्र विशेषज्ञ का मत चाह सकता है – याचिकायें मंजूर।

Cases referred :

(2007) 4 SCC 136, (2010) 320 ITR 546, (2010) 320 ITR 665, (2012) 210 Taxman 237.

Sumit Nema with *Mukesh Agrawal,* for the petitioner.
P.K. Kaurav, Addl. A.G. with *Jaideep Singh* for the respondent.

ORDER

The Order of the court was delivered by :
K.K. Lahoti, J: This order shall decide W.P. No.7075/10 (M/sTexmo Pipes and Products Limited v. Assistant Commissioner of Commercial Tax, Khandwa & ors.), W.P. No.10941/2012 (M/s Shree Padmavati Irrigation Pvt. Limited, Burhanpur & ors.) and W.P. No.10942/2012 (M/s Shree Venkatesh Industries v. The commercial Tax Officer, Khandwa and ors.) involving similar question for consideration of this Court.

2. As the detailed return has been filed in W.P. No.7075/2010, for the convenience, we have taken facts from the aforesaid petition.

3. The dispute in all the cases is whether the PVC Resin or HDPE Resin falls within the purview of chemical or chemical products. The Commissioner, Commercial Tax, Madhya Pradesh, Indore by order dt.20.4.2010 has held that it is a chemical product and not a chemical, but, from the perusal of the aforesaid, we find that no departmental or independent expert opinion was sought to arrive the aforesaid finding, that the item in question falls within the purview of chemical or chemical products.

4. Respondents in the reply, in para 10 and 11, have raised the following pleas :

> "10. Even in terms of chemical properties, there is a clear distinction between chemical substance and **'chemical products'**. As per technical opinion being relied upon by the

petitioner itself, copy of which is placed on record at page 50 of the petition, the definition of **'chemical'** clearly conveys that a chemical means a chemical substance with a specific chemical composition and with distinct molecular composition that is produced by a chemical process and a substance composed of chemical element or obtained by chemical process. The definition of **'petrochemical'** is distinctly given in the said opinion that petrochemicals are **'chemical products'** made from raw material of petroleum or other hydrocarbon resins. Although some of chemical compounds that originate from the petroleum may also be derived from other sources (such as coal or natural gas), petroleum is major source. Thus the petrochemicals are chemical product not being included specifically in Schedule II, the entry tax on the raw materials being used by the petitioner have rightly been assessed to be taxed under Schedule III. The petitioner is trying to unnecessarily confuse itself by giving chemical composition of the raw material used by it, although admitting that raw materials used by it are petrochemicals.

11. Looking into all the aforementioned facts and circumstances the claim of the petitioner regarding the classification of PVC granules and resins as chemicals the matter was decided that these goods can not be classified as chemicals. The petitioner cited one judgment of the Hon'ble Gujrat High Court wherein resins were classified within the polymer family of the chemicals. The petitioners also produced a report from the MSME, an organization dealing with small industries, which classified resins as chemicals. It is stated in the aforesaid report that petrochemicals are **'chemical products'** made from raw material of petroleum or other hydrocarbon origin. Thus, the report itself speaks of **'chemical product'** and not **'chemical'**. The two terms, chemical and chemical products are not one and the same, they convey different meanings. The classification of goods as made by the Central Excise Department of the GOI in Central Excise Tariff Act, 1985 has one chapter which includes organic chemicals (Chapter 28) and other chapter including inorganic chemicals

(Chapter 29). PVC resins and granules do not find place in either of these two chapters but have been included in chapter 39 having the heading **'plastics and articles thereof.** Thus the heading of the chapter itself suggests that the goods included in the chapter are **plastic goods and not chemicals.** PVC resins/granules being included in this chapter are therefore plastic goods and not chemical. With this interpretation the representation of the petitioner was decided and his claim was rightly rejected by Commissioner of Commercial Tax."

5. But, from perusal of the aforesaid, it is apparent that no expert opinion either of the department or some independent was obtained by the department and the aforesaid reply has been filed merely on the basis of general observation. The Apex Court in *Commissioner, Sales Tax, U.P. v. Bharat Bone Mill,* (2007) 4 SCC 136, considering the similar controversy held that the question as to whether a commodity would be exigible to sales tax or not must be considered having regard to its identity in common law parlance. If one commodity is not ordinarily known as another commodity, normally, the provisions of taxing statute in respect of former commodity which comes within the purview of the taxing statute would be allowed to operate. In any event, such a question must be determined having regard to the expert opinion in the field. Similar view has been taken in the following judgments :

(1) *Commissioner of Income Tax Vs. Oracle Software India Ltd.* (2010)_320 ITR 546.

(2) *Commissioner of Income Tax Vs. Emptee Poly-Yarn P.Ltd.* (2010) 320 ITR 665.

(3) *Morinda Co-operative Sugar Mills Ltd. Vs. Commissioner of Income-Tax, Chandigarh* (2012) 210 Taxman 237.

6. In this case, it is not in dispute that no expert opinion was obtained by the department before deciding the question involved in the matter and the authority merely on the basis of their own interpretation has determined that the aforesaid both the commodities are chemical products. Before arriving such a finding the authority ought to have obtained an expert opinion in this regard. Though it is submitted by the petitioner that an opinion of expert was filed before the Commissioner, Commercial Tax, Madhya Pradesh, Indore,

but, it was not accepted while in view of the expert opinion, the commodities were chemicals. At present, as we are proposing to remand the matter so, we are not expressing any opinion in this regard. It is for the authority to seek an opinion of expert in the field and in case no such departmental expert is available for the respondents then they may seek opinion of some independent expert in this regard, as has been held by the Apex Court in *Bharat Bone Mill* (supra).

7. In view of the aforesaid, we set aside the impugned order holding that the PVC Resin and HDPE Resin are chemical products with a direction to the Commissioner, Commercial Tax, Madhya Pradesh, Indore to re-determine the question after obtaining an opinion of departmental expert if any or of independent expert in the subject. Parties shall appear before the Commissioner, Commercial Tax, in this regard on 15.4.2013, for which date no fresh notice shall be required. On the aforesaid date, the Commissioner, Commercial Tax shall restore all the files and to decide the matter in accordance with the directions issued hereinabove. Considering the facts of the case, there shall be no order as to costs.

Order accordingly.

I.L.R. [2013] M.P., 1353
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 4357/2013 (Jabalpur) decided on 21 March, 2013

BHARAT HEAVY ELECTRICALS ...Petitioner
Vs.
RATANLAL & ors. ...Respondents

A. ***Industrial Disputes Act (14 of 1947), Section 110, Industrial Relations Act, M.P. (27 of 1960), Section 62*** **- Respondent dismissed from service on 25.09.2004 - Had the right vested in him to bring an action provided under 1960 Act, merely because the action could not be brought within the limitation prescribed in 1960 Act and that the forum for redressal of the grievance having changed where no limitation is prescribed - Held - The right to take action is not lost to the respondent who rightly availed the same under 1947 Act and the Central Government was well within its jurisdiction to entertain and refer the dispute for adjudication to CGIT by the impugned order. (Para 6)**

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 110, औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धारा 62 – प्रार्थी को 25.09.2004 को सेवा से पदच्युत किया गया – उसे अधिनियम, 1960 के अंतर्गत उपबंधित कार्यवाही करने का अधिकार उसमें निहित है, मात्र इसलिए, क्योंकि अधिनियम 1960 को विहित परिसीमा के भीतर कार्यवाही को नहीं लाया जा सकता और यह कि शिकायत निवारण का मंच बदल जाने से जिसमें कोई परिसीमा विहित नहीं – अभिनिर्धारित – प्रत्यर्थी का कार्यवाही करने का अधिकार समाप्त नहीं होगा जिसने उचित रुप से अधिनियम 1947 के अंतर्गत उसका प्रयोग किया और आक्षेपित आदेश द्वारा विवाद ग्रहण करना और सी.जी.आई.टी.को न्यायनिर्णित करने हेतु निर्देशित करना, भलीभांति केन्द्र सरकार की अधिकारिता में था।

***B. Interpretation of Law - Right of Action* - Right of action is a vested right and the law relating to forum is procedural in nature - Held - It is a law on the date of trial of the suit which is to be applied - It is well settled that all procedural laws are retrospective in nature unless the legislature expressly states to the contrary. (Para 4)**

ख. कानून का निर्वचन – कार्यवाही का अधिकार – कार्यवाही का अधिकार निहित अधिकार है और मंच से संबंधित विधि, प्रक्रियात्मक स्वरुप की है – अभिनिर्धारित – वह वाद के विचारण की तिथि की विधि है जिसे लागू किया जाना चाहिए – यह सुस्थापित है कि सभी प्रक्रियात्मक विधि भूतलक्षी स्वरुप की होती हैं जब तक कि विधायिका अभिव्यक्त रुप से इसके विपरीत नहीं बताती।

Cases referred :

AIR, 2006 SC 351, (1996) 4 SCC 652.

A. Mishra with *Gaurav Tiwari,* for the petitioner.

ORDER

SANJAY YADAV, J. :- Heard.

1. Order dated 5.11.2012 whereby, the Central Government in exercise of the powers conferred by clause (d) of Section (1) and sub section (2 A) of Section 10 of Industrial Dispute Act, 1947 referring the dispute of legality of dismissal of services of the respondent w.e.f, 25.9.2004 for adjudication to Central Government Industrial Tribunal cum Labour Court is being assailed vide this petition.

2. Contentions are that the petitioner Unit in the State of Madhya Pradesh at Bhopal being engaged in manufacture and sale of Electrical

Goods and Machinery was governed by the provisions of M.P. Industrial Relations Act, 1960 because of entry No.3 of Schedule notified under Section 1(3) of 1960 Act vide Gazette Notification No.9952-XVI dated 31/12/1960, till it was omitted vide notification No.F-6-15/04/A/16 dated 10/10/2005. That the services of respondent was dispensed with by an order of dismissal on 25/9/2004, which could have been agitated within the period of limitation prescribed under Section 62 of the M.P. Industrial Relations Act, 1960 only and the remedy under the Industrial Dispute Act, 1947 was barred as per Section 110. It is urged that having not agitated his dismissal within the limitation period under 1960 Act the respondent could not have raised the dispute, under Industrial Disputes Act 1947 after 10.10.2005 and that the entertainment of a dispute and reference thereof to the CGIT for its adjudication is beyond the powers of Central Government.

3. The proponent as culled out from pleadings and the submissions is propounded on a proposition that a forum provided for redressal of a grievance under a statute is a substantive right and if such a right is not exercised under the very statute as per its provision when the cause of action ha accrued , the right of action in future is lost irrespective of fact that the forum for redressal of grievance have changed and different statue is applicable whereunder the right of action survives.

4. Right of action is a vested right and the law relating to forum is procedural in nature (see chapter 6 title 2(a) (iii) page 537 Principles of Statutory Interpretation Justice G.P.Singh: 13 th Edition).

5. In *Sudhir G.Angur and others V. M.Sanjeev and others:* AIR 2006 SC 351 it is held:

> "12.In our view, Mr. G.L. Sanghi is also right in submitting that it is a law on the date of trial of the suit which is to be applied. In support of this submission, Mr. Sanghi relied upon the Judgment in the case of *Shiv Bhagwan v. Onkarmal,* reported in A.I.R. (1952) Bombay 365, wherein it has been held that no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied

at the date when the suit or proceeding comes on for trial or disposal. It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repelled. It could not be denied that now the Court has jurisdiction to entertain this suit....."

6. Respondent being dismissed from service on 25.9.2004, had the right vested in him to bring an action in a forum provided under 1960 Act, merely because the action could not be brought within the limitation prescribed in 1960 Act and that the forum for redressal of grievance having changed where no limitation is prescribed the right to take action is not lost to the respondent who rightly availed the same under 1947 Act and the Central Government was well within its jurisdiction to entertain and refer the dispute for adjudication to CGIT by impugned order.

7. In this context reference can also be had of a decision in *Dhannalal V. D.P. Vijayvargiya :* (1996) 4 SCC 652, wherein while considering the consequences of deleting of Section 166 (3) by Motor Vehicle (Amendment) Act 1994 w.e.f 14.11.1994 whereby, period of limitation for a claim petition was deleted and despite of the deletion being not made effective from retrospective date, it was applied to pending (at any stage) claims and claims in respect of accidents occurring prior to 14.11.1994 but not filed till than even though they had become barred under Section 166 (3). IT has been held:

"7.In this background, now it has to be examined as to what is the effect of omission of sub-section (3) of Section 166 of the Act. From the Amending Act it does not appear that the said sub-section (3) has been deleted retrospectively. But at the same there is nothing in the Amending Act to show that benefit of deletion of sub- section (3) of Section 166 is not to be extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub-section (3) from Section 166 of the Act can be tested by an illustration. Suppose an accident had taken

place two years before 14.11.1994 when sub-section (3) was omitted from Section 166. For one reason or the other no claim petition had been filed by the victim or the heirs of the victim till 14.11.1994. Can a claim petition be not filed after 14.11.1994 in respect of such accident? Whether a claim petition filed after 14.11.1994 can be rejected by the Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub-section (3) of Section 166 was in force having expired the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub-section (3) of Section 166 w.e.f. 14.11.1994? According to us, the answer should be in negative. When sub-section (3) of Section 166 has been omitted, then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The claim petitions cannot be thrown out on the ground that such claim petitions were barred by time when sub-section (3) of Section 166 was in force....."

8. In view of above analysis the impugned order cannot be faulted with.

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

Petition dismissed.

I.L.R. [2013] M.P., 1357
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 4529/2013 (Jabalpur) decided on 21 March, 2013

SANYOGITA THAKUR (SMT.) & ors. ...Petitioners

Vs.

STATE OF M.P. & ors. ...Respondents

Panchayat Samvida Shala Shikshak (Employment and Condition of Contract) Rules, M.P., 2005 - Appointment - Qualification **- Petitioners are having B.Ed. degree whereas the qualification required is D.Ed. Degree - Recruitment in public services should be strictly in accordance with terms of advertisement and recruitment rules, if any - If a deviation is made from the Rules, the same would allow entry of in-eligible persons and it deprives many others who could not have competed for the posts -**

It is equally well settled that fixation of qualification for a particular post is a matter of recruitment policy - Merely because petitioners are over qualified, therefore, the contention that they cannot be excluded from the consideration cannot be accepted. (Para 7)

पंचायत संविदा शाला शिक्षक (रोजगार तथा संविदा की शर्तें) नियम, म.प्र. 2005 – नियुक्ति – अर्हता – याचीगण के पास बी.एड. की डिग्री है जबकि अपेक्षित अर्हता डी.एड. डिग्री की है – लोक सेवाओं में भर्ती कठोर रुप से विज्ञापन एवं भर्ती नियम, यदि हो तो, की शर्तों के अनुसार होनी चाहिए – यदि नियमों से हटकर किया जाए तो इससे अनर्ह व्यक्तियों के प्रवेश को मंजूरी मिलेगी और इससे कई अन्य वंचित होते हैं, जो पदों के लिये प्रतिस्पर्धा नहीं कर सके – समान रुप से यह भी भलीभांति स्थापित है कि विशिष्ट पद हेतु अर्हता निश्चित करना, भर्ती नीति का मामला है – मात्र इसलिए कि याचीगण अधिक अर्हता रखते हैं, इसलिए यह तर्क कि उन्हें विचार में लिये जाने से अपवर्जित नहीं किया जा सकता, स्वीकार नहीं किया जा सकता।

Cases referred :

2008 AIR SCW 1850, (2003) 3 SCC 541, (2003) 3 SCC 548.

Praveen Verma, V.K. Soni, R.K. Thakur, Rajesh Soni, Narendra Sharma, Rajesh Dubey, Vijay Shukla & Niranjan Pathak, for the petitioners.

P.K. Kaurav, Addl. A.G. *Rajesh Tiwari & Piyush Dharmadhikari,* G.A. for the respondents.

ORDER

ALOK ARADHE, J. :- In this petition, the petitioners who are candidates for appointment to the post of Samvida Shala Shikshak Grade-III and hold B.Ed. degrees inter alia seek a direction to the respondents to permit them to participate in the counselling for the post of Samvida Shala Shikshak Grade - III and to appoint them on the said post.

2. The facts, necessary for adjudication of the controversy involved in the instant petition are that the petitioners qualified the Teacher Eligibility Test held for Samvida Shala Shikshak Grade-III. The petitioners have obtained Bachelor degree in Education. However, when the petitioners appeared in the counselling they were informed by the authorities that they do not have requisite qualification as prescribed under the M.P. Panchayat Samvida Shala Shikshak (Employment and Condition of Contract) Rules, 2005 (in short 'the Rules').

In the aforesaid factual background, the petitioners have approached this Court.

3. Learned counsel for the petitioners while inviting the attention of this Court to Schedule -II of the Rules have submitted that initially the qualification prescribed in the Rules for appointment on the post of Samvida Shala Shikshak Grade-III was Higher Secondary Examination or its equivalent. In pursuance of the advertisement issued by the respondents, the petitioners appeared in the Teacher Eligibility Test conducted by the respondents. The petitioners were declared successful in the aforesaid examination. However, subsequently, the Rules were amended w.e.f. 27.6.2011 and the qualification prescribed for the post of Samvida Shala Shikshak Grade-III has been altered due to which the petitioners have become ineligible for appointment on the post of Samvida Shala Shikshak Grade-III. It is further submitted that initially in the 2005 Rules, there was no condition with regard to passing of D.Ed. examination. It is also urged that once the process of selection has started, the eligibility criteria cannot be altered to disadvantage of the petitioner. It is further contended that the amendment made in the Rules which came into force on 27.6.2011 does not apply to the cases of the petitioners. It is also submitted that the petitioners cannot be held to be disqualified on the ground that they are overqualified and the petitioners who hold the B.Ed. degree are being subjected to discrimination. In support of their submissions, learned counsel for the petitioners have placed reliance on the decision in *Madan Mohan Sharma v. State of Rajasthan and Others,* 2008 AIR SCW 1850.

4. On the other hand, learned Additional Advocate General submitted that there are two separate sets of Rules framed for rural areas as well as urban areas, namely, Madhya Pradesh Nagreeya Nikay Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005. The aforesaid Rules came into force with effect from 6.5.2005. The Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as 'the 2009 Act') which came into force w.e.f. 26.8.2009. It is further submitted that in exercise of power under Section 23 (1) of the 2009 Act, the National Council for Teacher Education by notification dated 23.8.2010 prescribed the qualification for the post of teachers. Accordingly, the corresponding amendment in the Rules was made by the State Government with effect from 25.6.2011. It is pointed out that the amendment in the Rules was incorporated prior to issuance of the advertisement and the advertisement

was issued in accordance with the amended Rules.

5. While inviting the attention of this Court to clause 7.2 of the advertisement issued for Teacher Eligibility Test it is contended that as per aforesaid clause separate merit lists of the candidates who possess the requisite qualification and the candidates who do not possess the requisite qualification were prepared. In view of the relaxation granted by the Central Government in exercise of power under Section 23 (1) of the 2009 Act vide notification dated 21.11.2011 even the candidates who do not have requisite qualification were allowed to appear in the Teacher Eligibility Test. In view of the aforesaid notification the State Government has to give priority in the matter of appointment to the eligible candidates who have requisite qualifications as per the notification dated 25.8.2010 issued by the National Council of Teacher Education and thereafter to consider other candidates as per relaxation granted by the aforesaid notification. It is also submitted that there are more than 49,000 posts of Samvida Shala Shikshak Grade- III, out of which only 25,000 candidates having requisite qualifications have applied for counselling. Remaining 24,000 posts of Samvida Shala Shikshak Grade -III shall be filled up from the eligible candidates under the notification dated 21.11.2011 issued by the Central Government. Learned Additional Advocate General further submitted that the State Government shall obtain extension from the Central Government to fill up the remaining posts of Samvida Shala Shikshak Grade - III and shall hold a separate counselling for the candidates who are eligible in view of the notification dated 21.11.2011 issued by the Central Government and shall prepare a separate merit list based on inter se merit of such candidates.

6. I have considered the respective submissions made by learned counsel for the parties. Madhya Pradesh Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005 came into force with effect from 6.5.2005. Thereafter the Parliament enacted the Right of Children to Free and Compulsory Education Act, 2009 which came into force w.e.f. 26.8.2009. Section 23 (1) of the aforesaid Act provides that any person possessing such minimum qualifications as laid down by an academic authority, authorised by the Central Government by notification, shall be eligible for appointment as a teacher. Under Section 23 (1) of the 2009 Act, the National Council for Teacher Education has been authorised by the Central Government. By notification dated 23.8.2010 the National Council for Teacher Education in exercise of power under Section 23 (1) of the 2009 Act prescribed the qualifications. By an order dated 11.2.2011 the National Council for Teacher Education issued guidelines for conducting the Teacher Eligibility Test.

The Government submitted a proposal to the Central Government on 3.5.2011 under Section 23 (2) of the 2009 Act. Thereafter the Central Government under Section 23 (2) relaxed the minimum qualifications prescribed by the National Council of Teacher Education under Section 23 (1) of the 2009 Act vide notification dated 25.8.2010 in respect of the State of Madhya Pradesh and the requirement of possessing two year Diploma in Elementary Education was relaxed. The State Government thereafter amended the 2005 Rules by notification dated 27.6.2011 and prescribed the eligibility conditions for recruitment on the post of Samvida Shala Shikshak Grades I, II and III in conformity with the conditions prescribed by the National Council for Teacher Education as required under the notification dated 21.11.2011 issued by the Central Government under Section 23 (2) of the 2009 Act. Thereafter an advertisement was issued for Teacher Eligibility Test by which the applications were invited from 27.9.2011 to 27.10.2011. The examination was held on 22.1.2012 and the result was declared on 31.7.2012 which was modified on 4.8.2012. Thus, it is apparent that the Rules were amended prior to issuance of the advertisement by notification dated 27.6.2011. The advertisement itself was issued in accordance with the amended Rules. Therefore, the contention of learned counsel for the petitioners that after the process of recruitment, the Rules have been amended and eligibility criteria has been changed, cannot be accepted.

7. At this stage, I may advert to the contention raised on behalf of the petitioners that they cannot be declared ineligible on account of possessing over qualifications. It is well settled in law that recruitment in public services should be strictly in accordance with the terms of the advertisement and recruitment rules, if any. If a deviation is made from the Rules, the same allows entry of ineligible persons and it deprives many others who could not have competed for the posts. It is equally well settled that fixation of qualification for a particular post is a matter of recruitment policy. [See: *P.M. Latha and Another v. State of Kerala and Others,* (2003) 3 SCC 541 and *Yogesh Kumar and Others v. Government of NCT, Delhi and Others,* (2003) 3 SCC 548] Admittedly, in terms of the advertisement issued for Teacher Eligibility Test, the B.Ed. was not prescribed qualification. Samvida Shala Shikshaks Grade- III have to impart education to the students of class I to class VIII. In D.Ed. course the teachers are specially trained to teach small children in primary classes whereas in B.Ed. course the training is imparted to the teachers to teach the students of higher classes. Therefore, it cannot be said that teachers who hold the B.Ed. degree are suitable for

appointment as teachers to impart education to the students of class I to class VIII. It is open for the recruiting authority to frame a policy of recruitment and to decide the source from which such recruitment is to be made. It is also not disputed that the petitioners did not have the requisite qualification therefore, the contention that merely because the petitioners are overqualified and, therefore, they cannot be excluded from the consideration, cannot be accepted.

8. Paragraph 2 of notification dated 21.11.2011 provides for conditions subject to which relaxation was granted. The relevant extract of the aforesaid paragraph reads as under:

> "2. The relaxation granted under this notification shall be valid for a period up to the 31st March, 2013, subject to fulfilment of following conditions, namely,
>
> (i) The State Government of Madhya Pradesh shall conduct the Teacher Eligibility Test as specified in the said Notification as amended from time to time, of the Council in accordance with the Guidelines for conducting Teacher Eligibility Test, dated the 11th February, 2011 issued by the Council and those persons who pass the Teacher Eligibility Test be considered for appointment as a teacher in classes I to VIII;
>
> (ii) the State Government and other school managements shall amend the recruitment rules to provide for the minimum qualifications required for appointment of teachers laid down by the said notification and the amended notification of the Council;
>
> (iii) the State Government shall in the matter of appointment give priority to those eligible candidates who passes the minimum qualifications specified in the said notification dated the 25th August, 2010 as amended from time to time and thereafter, consider other candidates eligible with the relaxed qualifications under this notification."

In pursuance of the aforesaid notification the candidates who have passed the Higher Secondary Examination and had B.Ed. degrees were permitted to appear in the examination. However, the State Government under the said notification is under an obligation to provide preference to the candidates having requisite qualification. In view of the preceding analysis,

candidates having B.Ed. degree do not have any right to claim parity with the candidates having requisite qualification and to seek participation in counselling along with the candidates having requisite qualification.

9. At this stage, I may advert to the statement which has been made by learned Additional Advocate General. Learned Advocate General submitted that in all there are more than 49,000 posts of Samvida Shala Shikshak Grade-III. In response to the counselling, only 25,000 candidates who are having the Diploma in Education have applied for the post in question. It is further submitted that the State Government would seek extension from the Central Government for filling up the remaining posts of the teachers from the candidates having qualification as per notification dated 21.11.2011 issued by the Central Government as period of relaxation is expiring on 31.3.2013 and a separate counselling shall be held for the aforesaid candidates after obtaining the permission from the Central Government.

10. In view of the aforesaid submission made by learned Additional Advocate General and taking into account clause 10 inserted in Schedule II to the Rules which provides that State Government shall initially appoint such teachers as Samvida Shala Shikshak who are having minimum qualification and in case trained persons are not available the State Government may appoint untrained persons on the post of Samvida Shala Shikshak as per the notification issued under Section 23 (2) of the Right of Children to Free and Compulsory Education, 2009, I deem it appropriate to direct that proposal for extension of time for filling up the posts of Samvida Shala Shikshak Grade- III from the candidates having qualifications as per notification dated 21.11.2011 issued by the Central Government shall be forwarded by the State Government to the Central Government within a period of ten days from the date of receipt of certified copy of this order. This Court has no doubt that on receipt of the proposal for extension of period by the State Government, the Central Government shall take a decision on the aforesaid proposal expeditiously. As soon as the order of extension is received by the State Government, thereafter the State Government shall initiate the process of counselling for recruitment for remaining posts of Samvida Shala Shikshak Grade-III within a period of three weeks. After completion of the counselling a select list based on the merits shall be prepared and appointment letters shall be issued to the eligible candidates.

11. With the aforesaid directions, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2013] M.P., 1364
ELECTION PETITION
Before Mr. Justice R.C. Mishra
E.P. No. 20/2009 (Jabalpur) decided on 10 April, 2013

RAM LAL KOL ...Petitioner
Vs.
MOTI KASHYAP @ MOTILAL ...Respondent

A. Representation of the People Act (43 of 1951), Section 100 - Election Petition - Caste Certificate - **Election petition is intended to focus any illegality attached to the election - Scrutiny as to the authenticity of the caste certificate furnished by the returned candidate before the returning officer is not beyond the scope of an election dispute. (Paras 11 & 12)**

क. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100 – निर्वाचन याचिका – जाति प्रमाण पत्र – निर्वाचन याचिका का आशय निर्वाचन से जुड़ी किसी अवैधता को दर्शित करना है – निर्वाचित प्रत्याशी द्वारा चुनाव अधिकारी के समक्ष प्रस्तुत जाति प्रमाण पत्र की प्रमाणिकता के बारे में संविक्षा, निर्वाचन विवाद की परिधि से परे नहीं।

B. Evidence Act (1 of 1872), Sections 106, 114 - Presumption - **Adverse inference has to be drawn if evidence regarding fact specially within the knowledge of any person, is not produced by such person - Non-examination of officer to prove the authenticity of the contents of certificate is sufficient to draw an adverse inference under Section 114 of Evidence Act. (Paras 19, 23)**

ख. साक्ष्य अधिनियम (1872 का 1), धाराऐं 106, 114 – उपधारणा – प्रतिकूल निष्कर्ष निकालना होगा यदि किसी व्यक्ति की विशेष जानकारी में के तथ्यों से संबंधित साक्ष्य को उक्त व्यक्ति द्वारा प्रस्तुत नहीं किया गया है – प्रमाण पत्र की अंतर्वस्तु की प्रमाणिकता साबित करने के लिए अधिकारी का परीक्षण नहीं किया जाना, साक्ष्य अधिनियम की धारा 114 के अंतर्गत प्रतिकूल निष्कर्ष निकालने के लिए पर्याप्त है।

C. Representation of the People Act (43 of 1951), Section 100 - Election Petition - Caste Certificate - **The fact that the returned candidate was permitted to contest the earlier elections to the seat reserved for S.T. is of no consequence as the authenticity of the caste certificate was never examined on judicial side. (Para 35)**

ग. लोक प्रतिनिधित्व अधिनियम (1951 का 43), धारा 100 – निर्वाचन

याचिका – जाति प्रमाण पत्र – तथ्य कि निर्वाचित प्रत्याशी को पूर्व के चुनावों में एस. टी. के लिए आरक्षित सीट पर लड़ने की अनुमति दी गई थी, का कोई महत्व नहीं क्योंकि जाति प्रमाण पत्र की प्रमाणिकता की न्यायिक रुप से जांच कभी नहीं की गई थी।

Cases referred :

AIR 1972 SC 515, AIR 1973 SC 2158, (1994) 6 SCC 241, AIR 2006 SC 543, (2003) 8 SCC 204, (2003) 8 SCC 673, (2008) 8 SCC 590, AIR 2005 SC 688.

Arvind Shrivastava, for the petitioner.
G.S. Baghel, for the respondent.

JUDGMENT

R.C. MISHRA, J. :- In this petition, election of the returned candidate viz. the respondent to Badwara Legislative Assembly Constituency No.91 has been called in question on the grounds mentioned in clause (a) and sub-clause (i) of clause (d) of sub-section (1) of Section 100 of Representation of the People Act, 1951 (hereinafter referred to as 'the Act').

2. Following facts are not in dispute –

(i) In Part VIII of the Constitution (Scheduled Tribes) Order, 1950, Majhi was shown at Serial No.29 as one of the Scheduled Tribes in relation to the erstwhile State of Madhya Pradesh and by virtue of Entry 9 to the Schedule to the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1956, *Majhi* was recognized as a Scheduled Tribe in the State of Vindhya Pradesh which, ultimately, became part of a new State of Madhya Pradesh formed by the State Reorganisation Act, 1956. However, it was with effect from 27th July 1977, that *Majhi* was notified, under the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act 1976, as a Scheduled Tribe throughout the new State.

(ii) In the years 1980, 1985, 1990, 1993 and 2003, the respondent contested the election to Panagar Legislative Assembly Constituency as a member of *Majhi* [wrongly spelt as *Manjhi* in the pleadings] Scheduled Tribe and was also declared elected to the Legislative Assembly in the elections held in 1990, 1993 and 2003.

(iii) In the Assembly Election of 2008, the Badwara Constituency was notified as reserved for Scheduled Tribes. Along with his nomination paper, the respondent had submitted a caste certificate dated 11.6.1993 (Ex.D-7), said to have been issued by the Tahsildar, Jabalpur, showing that he belonged to Majhi Scheduled Tribe.

(iv) A similar petition, registered as Election Petition No.4/94, laying challenge to the validity ofrespondent's election to Panagar Legislative Assembly Constituency No.193 in the year 1993, was filed by his nearest rival namely Shankar Arakh. It was dismissed,vide order-dated 4.7.1995 passed by a co-ordinate Bench of this Court, as having abated.

3. According to the petitioner, the election deserves to be declared as void simply because the respondent was not having requisite qualification within the meaning of Section 5(a) of the Act, for being chosen to the seat, that was reserved for the Scheduled Tribes of Madhya Pradesh. Alleging categorically that the caste certificate submitted by the respondent in support of his candidature was a fake and fabricated document, he has further pleaded that result of the election was materially affected by an improper acceptance of the nomination. To substantiate the charge, he has averred that –

(i) Respondent belongs to *Dheemar* caste, which is notified as an Other Backward Class (OBC) in the State of Madhya Pradesh.

(ii) During the period from 29.5.53 to 30.4.60, the respondent had studied in Kasturchand Hitkarni Sabha Bahu Uddeshiya Uchchtar Madhyamik Shala, Jabalpur and in the School Record, his caste was written as *Dheemar.*

(iii) On 22.12.1993, Education Department of Municipal Corporation, Jabalpur had issued a copy of the Transfer Certificate reflecting that caste of the respondent was *Dheemar.*

(iv) Deeptibala, the daughter of respondent and a student of Bengali Kanya Higher Secondary School Marhatal, Jabalpur, received scholarship from the Tribal Welfare Department as member of an OBC only.

(v) In the record of the Municipal Corporation, name of the

respondent, the owner of a house, located in Phootatal Ward, Jabalpur, has been mentioned as Motilal, son of Mewalal Kashyap and the surname viz. *Kashyap* is one of the surnames commonly used by members of *Dheemar* caste.

(vi) The caste certificate dated 11.6.1993 said to have been issued by the Tahsildar, Jabalpur is apparently a fake and fabricated document for the reason that it does not bear any case number.

(vii) By way of the Order No.F-21-6/25-5/92 dated29.8.1992, *Majhi* was deleted from the list of socially and economically backward classes in relation to the State of M.P. Taking an undue advantage of the situation, members of *Dheemar* caste, who were using surnames like Raikwar, Batham, Nishad, Mallah, Kashyap etc., started claiming themselves to be members of *Majhi* Scheduled Tribe. A Writ Petition filed by Radhavallabh Choudhary in the nature of Public Interest Litigation and numbered as M.P. No.4639/1989, was dismissed by a Division Bench of this Court, vide order-dated 25.9.1990, holding that Kewat, Mallah, Dhimar, Nishad, Bhoi and Kahar etc. were not included in the Scheduled Tribe *Majhi*.

4. In his written statement, the respondent, whil specifically denying petitioner's averments as to his caste, has asserted that he belongs to *Majhi* caste, recognized as a Scheduled Tribe of the State and, therefore, was eligible and qualified to contest the election. In support of the assertion, he has set out the following particulars -

(i) Being a *Majhi*, he has been contesting Assembly Elections since 1980 from the seats reserved for Scheduled Tribes of the State.

(ii) His surname *Kashyap* does not denote his caste and has been adopted by members of several other castes.

(iii) Initially, on 1.5.1948, showing his caste to be *Majhi*, he was admitted to Class 1 in the Government Primary School (Boys), Phootatal, Jabalpur, where he had studied up to 16.12.1948. His caste was not recorded as *Dheemar* in Kasturchand Hitkarini Sabha Bahu-uddeshiya Uchchatar

Madhyamik Shala, Jabalpur also.

(iv) His daughter Deeptibala also pursued her studies at M.B. Bengali Higher Secondary School, Jabalpur as a member of *Majhi* Tribe. The document reflecting thatshe had obtained scholarship meant for an OBC student, is not a genuine one.

(v) Scrutiny of his nomination paper was conducted by the Returning Officer in accordance with the summary procedure prescribed under Section 36 of the Act. Amongst the objectors to his nomination, Rajesh Nayak, who had also withdrawn his objection, and Vishnu Bajpai were not present at the time of scrutiny whereas Balwan Singh and Suresh Kol had submitted their objections after the scrutiny was over. In such a situation, his nomination paper supported by the caste certificate-dated 11.6.1993 issued by the competent authority, that was valid and still in force, was rightly accepted.

5. In addition to these factual aspects of the matter, the respondent has also raised the legal plea to the effect that the election petition is liable to be dismissed –

(a) for want of compliance with the statutorily mandatory provisions of Section 81(a) and Section 83(1)(a) of the Act inasmuch as the un-amended petition did not disclose petitioner's elector number and particulars of relevant part of the electoral roll and the corresponding amendment, though permitted to be incorporated, was barred by limitation and

(b) simply because genuineness of the caste certificate cannot be examined under the provisions of the Act.

6. On the basis of the pleadings, the following issues have been framed. The respective finding is noted against each one of them -

No.	Issues	Finding
1	Whether the caste certificate submitted by the respondent in support of his nomination form was a forged document ?	Yes
2	Whether the respondent, who was not entitled to	

	contest the election from 91, Badwara Constituency, is a member of Scheduled Tribe namely Majhi ?	No
3	Whether the election, in so far it concerns the respondent, has been materially affected by the improper acceptance of his nomination ?	Yes
4	Whether this Court has no jurisdiction to examine genuineness of the caste certificate ?	No
5	Whether the petition is liable to be dismissed for want of compliance with the mandatory provisions of the Act ?	No
6	Relief and Costs ?	Petition allowed with no order as to costs.

REASONS FOR THE FINDINGS

ISSUE NO.5

7. Placing reliance on the following precedents -

(i) *Hardwari Lal v. Kanwal Singh* AIR 1972 SC 515

(ii) *Manphul Singh v. Surinder Singh* AIR 1973 SC 2158

- learned counsel for the respondent has submitted that the petition deserves dismissal due to non-compliance with the mandatory provision of Section 83(1)(a) of the Act, requiring the petition to state all the material facts. According to him, since omission of a single material fact tends to an incomplete cause of action, absence of electoral number and other relevant details in the petition was sufficient to dismiss the same and the defect was not curable after expiry of the period prescribed for filing an election petition. However, this aspect of the matter has already been dealt with while considering the amendment application moved by the petitioner. Relevant part of the order-dated 6.10.2009, whereby the petitioner was permitted to incorporate his electoral number etc. may be reproduced as under -

> *"... the fact of the matter is that in the Para 1 of the election petition, the petitioner has already averred that he was an*

elector. The criteria for distinguishing material facts from material particulars has been explained in a series of decisions including the one rendered in Shri Udhav Singh v. Madhav Rao Scindia (1977) 1 SCC 511. Accordingly, it can safely be concluded that, by way of the proposed amendment, only material particulars relating to the petitioner's identity as an elector named in the electoral rolls prepared for the Assembly as well as corresponding Parliamentary Assembly have been sought to be included.

However, taking into consideration the legislative mandate contained in Section 86(7) of the Representation of the People Act, 1951 and the fact that the amendment has been proposed in light of the objection raised by the respondent in his application (I.A. No.75/2009), under Order VII Rule 11 and Order VI Rule 6 of the Code of Civil Procedure read with 86(1) of the Act, the I.A. No.81/2009 is allowed subject to payment of cost of Rs.200/-.

Necessary amendment be carried out within a period of 3 days from today."

8. Thereafter, this Court, by way of the order-dated 25.1.2010, also proceeded to dismiss the respondent's application, under Order VII Rule 11 of the Code of Civil Procedure, wherein the following contraventions of procedural requirements were highlighted –

(i) Copy of the election petition furnished to him contained names of 18 other respondents.

(ii) The copy of the election petition, which was served upon him, was not properly attested as required under Section 81(3) of the Act.

(iii) The verification of the pleadings was not in conformity with the requirements of Order VI Rule 15 of the Code of Civil Procedure.

9. Since correctness of the order-dated 6.10.2009 (above) was not challenged by the respondent, it has already attainted finality. As such, he cannot be permitted to raise the issue. This apart, the Special Leave Petition

preferred against the order-dated 25.1.2010 (supra) wherein note of the amendment to incorporate the voter number and part number of the voter list was also taken, has already been dismissed by the Apex Court vide order dated 26.2.2010 passed in SLP(Civil) No.5068/2010.

10. For the reasons assigned in the both the orders i.e. 6.10.2009 and 25.1.2010, the Issue No.5 is answered in the negative.

ISSUE NO.4

11. Making reference to the decision of the Supreme Court in *Kumari Madhuri Patil v. Addl. Commr., Tribal Development* (1994) 6 SCC 241, learned counsel for the respondent has contended that the genuineness of the caste certificate can only be examined by the State Level Scrutiny Committee and therefore, the same cannot form subject matter of an election petition. However, the contention is apparently misconceived for the reason that an election petition is intended to bring into focus any illegality attached to an election. Dealing with this aspect of the matter, in *Satrucharla Vijaya Rama Raju v. Nimmaka Jaya Raju* AIR 2006 SC 543, the Supreme Court has made the under-mentioned illuminating observations -

> *"An election petition under Section 80 of the Representation of the People Act, 1951 cannot be held to lead to an adjudication which declares, defines or otherwise determines the status of a person or a jural relation of that person to the world generally. It is merely an adjudication of a statutory challenge on the question whether the election of the successful candidate is liable to be voided on any of the grounds available under Section 100 of the Representation of the People Act, 1951. It is not an action for establishing the status of a person. ...*
>
> *The purpose of reservation of constituencies is to ensure representation in the legislatures to such tribes and castes, who are deemed to require special efforts for their upliftment. The person seeking election from such constituencies must be the true representative of that tribe".*

12. In this view of the matter, scrutiny as to authenticity of the caste certificate furnished by the returned candidate before the Returning Officer is not beyond scope of an election dispute. The issue no.4 is, accordingly,

answered in the negative.

ISSUE NOS.1 AND 2

13. Stating emphatically that the respondent is a *Dheemar* by caste and does not belong to *Majhi* Tribe and that the caste certificate in question was not issued by Tahsildar, the petitioner Ramlal (PW1) has proposed to rely on certain documents, filed by Shankar Arakh (since dead) in support of his petition (Election Petition No.4/1994), calling in question respondent's election to Panagar Legislative Assembly Constituency No.193 held on 27th of November, 1993. These documents are –

(i) Certified copy of the Transfer Certificate (Ex.P-1) said to have been issued by Education Department of Municipal Corporation upon leaving the school on 11.4.1952 wherein the respondent was shown as *Dheemar* by caste.

(ii) Certified copy of the entry of Tax Assessment Register (Ex.P-2), reflecting that as owner of the House No.1219/A, name of the respondent was shown as Motilal, son of Mewalal Kashyap.

(iii) The certificate (Ex.P-3) given by Tahsildar (Nazul) to the effect that the caste certificate-dated 11.6.1993 (Ex.D-7) was not issued by any court concerning Nazul.

14. Learned counsel for the respondent has strenuously contended that the documents (Ex.P-1C to P-3C), being photocopies, are not admissible in evidence. However, as rightly pointed out by learned counsel for the petitioner, he was not in a position to obtain certified copies as none of the documents could be exhibited in evidence in *Shankar Arakh's* case. According to him, the photocopies can easily be compared with the originals forming part of the record of the Election Petition No.4/1994.

15. In order to support the assertion that the caste certificate is not a genuine document, the petitioner has also examined –

(a) P.K. Sen Gupta (PW4) who came forward to depose, on the basis of record of case no.441/13/12/9-10, registered upon an application for an enquiry into the authenticity of the certificate, that amongst the Readers of the Revenue Courts, two had informed that the corresponding case was not found

registered whereas another Reader had intimated that even the register was not available.

(b) Deepak Kumar (PW5), working as Head Copyist in the Collectorate, who clearly stated that the advance deposited in connection with application, presented by Ayodhya Prasad, Advocate for copy of the respondent's caste certificate dated 11.6.1993 said to have been issued in Case No.2956/93 had to be returned as the related case was not found deposited in the Record Room.

(c) Satish Namdeo (PW2), a practising Advocate, who categorically affirmed that the certificate (Ex.P-3) indicating that the caste certificate dated 11.6.1993 was not issued by any Nazul Court was obtained by him only by filing an application on 15.12.1993 as per instructions given by his client Late Shankar Arakh.

(d) Vishnu Vajpayee (PW6), an Advocate by profession, who testified that he had raised objection to nomination form submitted by the respondent before the Returning Officer on the ground that the Caste Certificate and School Transfer Certificate filed therewith were forged and fabricated documents.

(e) Chandrakant Singh (PW3), an Assistant Commissioner in the Tribal Welfare Department, who testified that record corresponding to grant of scholarship to Deeptibala has already been eliminated in accordance with the relevant rules.

16. Satish Namdeo has further deposed that upon instructions given by his client Late Shankar Arakh, he has also obtained a certificate (Ex.P-4) from Tribal Welfare Department to the effect that in the year 1988-89, Deeptibala had received scholarship as an OBC student.

17. Even though Vishnu Vajpayee (PW6) has clearly deposed that Ravi, the son of co-brother of the respondent, has been able to secure job in a Bank as member of an OBC yet, in absence of corresponding evidence, his statement does not assume any significance. Nevertheless, the other evidence brought on record by the petitioner was sufficient to cast a doubt as to the

veracity of the caste certificate relied upon by the respondent.

18. Law regarding burden of proof in an election petition based on any disqualification of the returned candidate as on date of nomination is well settled. There are other such decisions, but the following two will suffice -

(i) *P unit Rai v. Dinesh Chaudhary* (2003) 8 SCC 204, which concerned disqualification as to the caste.

(ii) *Sushil Kumar v. Rakesh Kumar* (2003) 8 SCC 673, which related to disqualification as to the age.

19. In *Punit Rai's* case, while considering the effect of Section 106 and illustration (g) appended to Section 114 of the Evidence Act, it was observed that adverse inference has to be drawn if evidence regarding fact especially within the knowledge of any person, is not produced by such person. As elucidated further in *Sushil Kumar's* case, -

> *"It is no doubt true that the burden of proof to show that a candidate who was disqualified as on the date of the nomination would be on the election petitioner.*
>
> *It is also true that the initial burden of proof that nomination paper of an elected candidate has wrongly been accepted is on the election petitioner.*
>
> *In terms of Section 103 of the Indian Evidence Act, however, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*
>
> *Furthermore, in relation to certain matters, the fact being within the special knowledge of the respondent, the burden to prove the same would be on him in terms of Section 106 of the Indian Evidence Act. However, the question as to whether the burden to prove a particular matter is on the plaintiff or the defendant would depend upon the nature of the dispute. (See Orissa Mining Corpn. v. Ananda Chandra Prusty AIR 1997 SC 2274)".*

However, a note of caution was also sounded in the following terms –

"The election Tribunal while determining an issue of this nature has to bear in mind that Article 173(b) of the Constitution of India provides for a disqualification. A person cannot be permitted to occupy an office for which he is disqualified under the Constitution. The endeavour of the court shall therefor should be to see that a disqualified person should not hold the office but should not at the same time, unseat a person qualified therefor. The court is required to proceed cautiously in the matter and, thus, while seeing that an election of the representative of the people is not set aside on flimsy grounds but would also have a duty to see that the constitutional mandate is fulfilled".

20. Items of evidence adduced by the respondent which seem to have bearing on the question may be appreciated under the following heads -

SURNAME

21. No serious dispute has been raised as to the statement made by the respondent Moti *Kashyap* (DW1) that surname *Kashyap* is common to various castes. To bring home the point, he has also examined Prashant Kashyap (DW2) and Rakesh Kumar Kashyap (DW3), who belong to Lodhi and Kushwaha caste respectively and exhibited the magazine Kushwaha Vikas (Ex.D-4) wherein name of Rakesh figures with his photograph. All this evidence is sufficient to establish that surname Kashyap, by itself, cannot give rise to presumption that the respondent belongs to a caste other than *Majhi.*

REPORT OF CENSUS OF INDIA, 1901

22. The report (Ex.D-6) authored by R.V. Russell, I.C.S., the then Superintendent of Census Operations, and sought to be exhibited by calling Jai Shahdadpuri (DW4), the Assistant Director, contains reference to *Manjhi* as a caste at Sl. No.626 included Dhimar of Balaghat, Raipur, Bilaspur, Bastar and Kewat in Sakti. It only indicated that *Manjhi* (not *Majhi*) was one of the castes of Central Provinces, classified for the purpose of census.

INSTITUTIONAL RECORD AND CERTIFICATES OTHER THAN THE CASTE CERTIFICATE IN QUESTION

23. While denying that he is a *Dheemar* by caste, the respondent (DW1) has made reference to –

(a) Copy of the School Leaving Certificate (Ex.D-3), said to have been issued by the Head Master, Govt. Primary School, Phootatal on 16.12.1948.

(b) Copy of Scheduled Tribe Certificate (Ex.D-1) issued by the Naib Tahsildar/Executive Magistrate dated 26.9.1989 and

(c) Copy of order-sheet-dated 12.8.1998 (Ex.D-2) scribed by the then Naib Tahsildar, Jabalpur in Case No.18519/B/21/97-98 reflecting that upon the application moved by him, a temporary certificate indicating his caste as *Majhi* was issued on the basis of earlier caste certificate and the Revenue Records for the years 1977-78 and 1978-79, showing his caste as *Majhi*.

24. Copy of the certificate (Ex.D-3) only shows that it was issued on 30.12.2007 by the then Head of the institution, whose evidence was utmost essential not only to prove that in the aforesaid certificate, respondent's caste was wrongly spelt as *Manjhi* [which as per the Census Report (Ex.D-6) includes *Dheemar* also] in place of *Majhi* but also to disprove contents of the School Leaving Certificate (copy of which was brought on record as Ex.P-1) suggesting that in the school record, his caste was mentioned as *Dheemar*. It is relevant to note that in both the documents (Ex.P-1 and D-3), date of birth of the respondent was written as 1.4.1940 only. In *Madhuri Patil's* case (ibid), the Supreme Court observed that caste is reflected in relevant entries in the public records or school or college admission register at the relevant time and certificates are issued on its basis. In this view of the matter, non-examination of the official concerned to prove authenticity of the contents of the certificate (Ex.D-3) is sufficient to draw an adverse inference under illustration (g) of Section 114 of the Evidence Act.

25. Copy of the certificate (Ex.D-1) reflecting that the respondent is a member of *Majhi* Tribe could not be a proof of his caste and as indicated already, contents of the ordersheet 12.8.1998 (Ex.D-2) clearly discloses that the temporary caste certificate was issued on the basis of the Revenue Record as well as earlier caste certificate-dated 11.6.1993 viz. the certificate in question. Still, the fact that the revenue records pertaining to the years 1977-78 and 1978-79 were produced in support of the application was suggestive of the inference that it was only after the year 1976 *(in which by virtue of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976,*

'Majhi' was recognized as a Scheduled Tribe in respect of the whole State of Madhya Pradesh) that the respondent had started claiming status of a member belonging to Majhi Scheduled Tribe.

26. For these reasons, I am inclined to hold that the respondent has not been able to produce any authentic document to show that he belongs to Majhi Scheduled Tribe.

CASTE CERTIFICATE

27. S.D. Dwivedi (DW6), who remained posted as Tahsildar, Jabalpur during the period from 29.2.1992 to 3.7.1993, has not accepted the suggestion that the caste certificate-dated 11.6.1993 (Ex.D-7) was issued by him only. As per his statement, he is not able to say with certainty that the initials on the certificate above the seal of Tahsildar, Jabalpur were put by him. After being declared hostile, he was cross-examined at length by learned counsel for the respondent but nothing favourable could be elicited. He categorically denied the suggestion that the caste certificates were being issued even without registration of corresponding cases. According to him, as per the prescribed procedure, any case based on application for issuance of caste certificate had to be registered in Revenue Register No.B-121. Besides this, he has clearly admitted that in the light of the guidelines issued by the State Government by way of Circular No.F-7-1/1/191 dated 20th of February, 1991, the Authority issuing caste certificate was required to –

(a) indicate his full name, date of issuance and the despatch number.

(b) preserve the record of the case.

It also came in his evidence that no officer other than him was posted as Tahsildar, Jabalpur on 11.6.1993, the date of issuance of caste certificate in question.

28. Statement of S.D. Dwivedi gathered ample support from the evidence of Shahid Khan (DW5), the Tahsildar, who had the occasion to inquire into the genuineness of the caste certificate. According to Shahid Khan, he had found that no case was registered on 11.6.1993 in the Register No.B-121 for issuance of caste certificate in favour of the respondent. While admitting that in the report suggesting that the short signature on the certificate appeared to be that of the then Tahsildar, he had not mentioned that any register was checked by him. As pointed out earlier, genuineness of the caste certificate

(Ex.D-7) has been challenged inter alia on the ground that it does not bear any case number.

29. On being shown the copies of the entries (Ex.D-9) in the Register, Shahid Khan has further admitted that –

(a) Entries relating to the Month of July, 1993 were made on 7.7.1993 from Sl. No.762 onwards.

(b) Entries at Sl. No.772 and 774 were recorded on 21.7.1993.

(c) Entry at Sl. No. 773, seen by him for the first time regarding issuance of certificate on 11.6.1993, appears to have been made on 19.6.1993.

30. A bare perusal of the abovementioned entries would reveal that they were not recorded by the same person and the dates of registration as well as disposal of the case were interpolated to make the dates falling within 16th and 21st of July, 1993 as 19.6.93 and 11.6.1993 respectively with a view to causing it to be believed that the caste certificate (Ex.D-7) was issued on 11.6.1993 but the corresponding entry was made in the register on 19.6.1993. In the light of these glaring features of the fabrication of the public record, anybody would say that Entry at Sl. No.773 is not genuine. This finding lends assurance to the conclusion that the caste certificate in question does not bear initials/short signature of S.D. Dwivedi and the same is a forged and fabricated document.

OTHER EVIDENCE

31. The criteria for determining tribal character of a community as laid down by the Ministry of Tribal Affairs are as follows -

(a) Indications of primitive traits

(b) Distinctive culture

(c) Geographical isolation

(d) Shyness of contact with the community at large

(e) Backwardness

32. The respondent, all along, had knowledge as to (a) his native place (b) caste of his parents (c) birth register and school record and (d) points of

distinction between *Majhi* and *Dheemar* Caste in relation to trade, deity, ritual, custom, mode of marriage, death ceremonies and mode of burial etc. but he failed to lead cogent evidence regarding these facts.

33. Thus, the other evidence led by the respondent is also not sufficient to trace out his anthropological and ethnological history in accordance with the method prescribed in *Madhuri Patil's* case (supra).

34. In *Geeta v. State of M.P.* (2008) 8 SCC 590, cancellation of caste certificate by the Screening Committee on the ground that no documents whatsoever could be produced to show that the appellant belonged to Majhi Tribe was upheld by the Supreme Court with the observation that reliance could not be placed on documents not prepared by the competent authority.

35. To sum up, neither the documentary evidence produced by the respondent nor the oral evidence adduced by him is sufficient to substantiate his claim that he is a member of Majhi Scheduled Tribe. The fact that he was permitted to contest the earlier elections to the seat reserved for Scheduled Tribe is of no consequence as the authenticity of the caste certificate has not been examined on the judicial side so far. Even otherwise, as explained by the Apex Court in *Satrucharla Vijaya Rama Raju's* case (above) -

> *"An adjudication in an election petition does not operate as res judicata. Every election furnishes a fresh cause of action for a challenge to that election. Res judicata is nothing but the merger of a cause of action in a decree, transit in rem judicatum. So, even if the cause of action in the earlier election petition merged in the final adjudication therein, since the subsequent election furnishes a fresh cause of action, the merger of the earlier cause of action with the decision therein cannot bar the trial of the fresh cause of action arising out of subsequent election. An election petition filed, though it abates on the death of the petitioner therein, could be pursued by another person coming forward to prosecute that election petition as enjoined by S. 112 of the Act. But that does not make an election petition a representative action in the sense in which it is understood in law. Therefore, normally, the adjudication in an election petition, not inter-parties, cannot operate as res judicata in a subsequent election*

petition challenging that subsequent election.

36. To conclude, on one hand, the petitioner has been able to establish his case by a preponderance of probability indicating that the respondent is a *Dheemar* by caste as well as that the caste certificate (Ex.D-7) is not a genuine document and on the other, the respondent has not been able to discharge the onus shifted on him in view of the fact that he had special knowledge in respect of the caste to which he claims to belong. It is trite that election petition is not a suit between two persons but is a proceeding in which Constituency itself is the principal party interested.

37. Since the certificate showing caste of the respondent as Majhi has been found to be a forged document, it is held that he was not qualified to be chosen to fill seat in the constituency reserved for the Scheduled Tribes. Accordingly, the Issue No.1 is answered in the affirmative whereas Issue No.2 is decided in the negative.

ISSUE NO.3

38. As explained by R.C. Lahoti, C.J., speaking for the majority on the Constitution Bench in *K. Prabhakaran v. P. Jayarajan* AIR 2005 S C 688, though in a different context -

> *"The question of qualification or disqualification of a returned candidate within the meaning of S. 100(1)(a) of the Representation of the People Act, 1951 has to be determined by reference to the date of his election which date, as defined in S. 67-A of the Act, shall be the date on which the candidate is declared by the returning officer to be elected. Whether a nomination was improperly accepted shall have to be determined for the purpose of S. 100(1)(d)(i) by reference to the date fixed for the scrutiny of nomination, the expression, as occurring in S. 36(2)(a) of the Act.*
>
> *... Under sub-Cl. (i) of Cl. (d) of sub-sec. (1) of S. 100 of the RPA the improper acceptance of any nomination is a ground for declaring the election of the returned candidate to be void. This provision is to be read with S. 36(2)(a) which casts an obligation on the returning officer to examine the nomination papers and decide all objections to any nomination made, or on his own motion, by reference to the*

date fixed for the scrutiny of the nominations. Whether a candidate is qualified or not qualified or is disqualified for being chosen to fill the seat, has to be determined by reference to the date fixed for the scrutiny of scrutiny of nomination".

39. As the genuineness of the caste certificate filed by the respondent along with the nomination paper was questioned, the returning officer ought to have verified as to whether such a certificate was at all issued. Needless to say that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the petitioner but where the person whose nomination has been improperly accepted is the returned candidate himself, such would be the obvious conclusion. This issue is, therefore, also answered in the affirmative.

ISSUE NO.6

40. For the reasons aforementioned, the petition stands allowed and the election of the respondent from Badwara Legislative Assembly Constituency No.91 is declared as void. Consequently, the same is set aside.

41. A copy of this judgment be forwarded to the Election Commission as well as to the Speaker of the State Legislative Assembly. There shall be no order as to costs.

Petition allowed.

I.L.R. [2013] M.P., 1381
REVIEW PETITION
Before Mr. Justice Sanjay Yadav
R.P. No. 34/2013 (Jabalpur) decided on 24 April, 2013

STERLITE TECHNOLOGIES LTD. ...Petitioner
Vs.
DHAR INDUSTRIES ...Respondent

A. Constitution - Article 226 - Review - Scope - **Power to review an order passed in writ petition under Article 226 of Constitution of India is not confined to examine as to error on the face of record but it would be within the jurisdiction to examine the case in its entirety when a review is sought on the ground of fraud being committed. (Para 12)**

क. संविधान – अनुच्छेद 226 – पुनर्विलोकन – व्याप्ति – भारत के

संविधान के अनुच्छेद 226 के अंतर्गत रिट याचिका में पारित किये गये आदेश के पुनर्विलोकन की शक्ति, अभिलेख पर प्रत्यक्ष त्रुटि के परीक्षण तक सीमित नहीं बल्कि जब पुनर्विलोकन को कपट कारित होने के आधार पर चाहा गया है, तब प्रकरण का परीक्षण उसकी संपूर्णता से करना अधिकारिता के भीतर होगा।

B. Words and Phrases - Fraud **- Fraud is an act of deliberate deception with design of securing some unfair or undeserved benefit by taking undue advantage of another - Even most solemn proceedings stand vitiated if they are actuated by fraud - Principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants - Party who secures a decision by fraud cannot be allowed to enjoy its fruits. (Paras 14, 16)**

ख. शब्द एवं वाक्यांश – कपट – कपट, अन्य का असम्यक लाभ उठाकर किसी अनुचित या अनर्ह लाभ प्राप्त करने की योजना के साथ जानबूझकर की गयी प्रवंचना है – अतिशय सत्यनिष्ठ कार्यवाहियां भी दूषित होंगी यदि वे कपट द्वारा प्रेरित हैं – 'मुकदमे की अंतिमता' का सिद्धांत इस अयुक्तता की हद तक लागू नहीं किया जा सकता कि जिसका उपयोग बेईमान एवं कपटी मुकदमेबाज दमन के तंत्र के रुप में कर पाये – पक्षकार जो कपट द्वारा निर्णय प्राप्त करता है उसे उसके फल का उपभोग करने की अनुमति नहीं दी जा सकती।

C. Constitution - Article 226 - Review **- Order was obtained by respondent No.1 under the Micro Small and Medium Enterprises Development Act, 2006 on the basis of a forged order by which he succeeded by letting the Council to believe that he has been penalized to the tune of Rs. 36,32,508/- and is entitled to recover the same from applicant with interest as it was the applicant who did not submit the form C - Whereas in fact only a penalty of Rs. 500/- was imposed on the respondent No. 1 by the Commercial Tax Department - The order of the Council is set aside as well as the order of the High Court is recalled - Application allowed. (Paras 17 to 22)**

ग. संविधान – अनुच्छेद 226 – पुनर्विलोकन – सूक्ष्म, लघु एवं मध्यम उद्यम विकास अधिनियम, 2006 के अंतर्गत प्रत्यर्थी क्र. 1 द्वारा कूटरचित आदेश के आधार पर आदेश अभिप्राप्त किया जिसके द्वारा वह परिषद को यह विश्वास कराने में सफल रहा कि उसे रु. 36,32,508/– की रकम के साथ दण्डित किया गया और उक्त को ब्याज के साथ आवेदक से वसूलने के लिए हकदार है, क्योंकि वह आवेदक ही था जिसने प्रपत्र–सी प्रस्तुत नहीं किया – जबकि वास्तव में वाणिज्यिक कर

विभाग द्वारा प्रत्यर्थी क्र. 1 पर केवल रु. 500/– का अर्थदण्ड अधिरोपित किया गया था – परिषद का आदेश अपास्त और साथ ही उच्च न्यायालय के आदेश को वापस लिया गया – आवेदन मंजूर।

Cases referred :

W.A. No. 123/2006 decided on 13-4-2009 (M.P.), (2006) 7 SCC 416, (2007) 4 SCC 221, (2008) 12 SCC 481, (2009) 13 SCC 600, (1995) 1 SCC 421.

Brian D'Silva with *V. Bhide*, for the petitioner.
A.P. Shroti, for the respondent.

ORDER

SANJAY YADAV, J. :- Review of order dated 12.4.2012 passed in Writ Petition No. 8653/2011 is being sought vide this Review Petition.

1. Writ Petition No. 8653/2011 filed by the petitioner was directed against the order dated 31.7.2010 passed by the Council on an application under Section 17 of the Micro Small And Medium Enterprises Development Act, 2006 Act (referred to as Act of 2006) preferred by the respondent for claim of Rs.36,32,508/- along with Rs.26,15,605/- towards interest.

2. The claim by respondent was for recovery in lieu of the penalty allegedly imposed by the Commercial Tax Department for late submission of 'C' form. The said C Form was in lieu of goods supplied during 2005-06 to the tune of Rs.87,99,332/- supplied by the petitioner, a manufacturer of Optical Fiber Jelly Filled Copper Telecom Cables and Power Conductors and Galvanized Steel Tapes used for packing by manufacturing industries. This would be evident from paragraph 3 of the order dated 31.7.2010 which states the facts in following term:

> 3. वादी द्वारा प्रतिवादी को दिनाक 9.1.09 एवं 30.1.2009 से "सी" फार्म भिजवाने हेतु निवेदन किया गया किंतु प्रतिवादी द्वारा "सी" फार्म की राशि रू. 36,52,308/– एवं इस पर ब्याज राशि रू. 26,15,605 (Interest calculated @ of 24% p.a upto 31-3-2009 payable to commercial tax department) की वसूली हेतु वाद दायर किया है ।

3. The claim in turn was based on order dated 27.12.2008 allegedly issued by Assistant Commissioner, Commercial Tax Indore, directing recovery of Rs.60,29,963/-. The Council while discarding the objections raised by the

petitioner, allowed the claim of respondent in following terms:

> 3. वादी द्वारा काउन्सिल में वाद दायर करने के पश्चात, प्रतिवादी द्वारा दिनांक 15.04.09 को "सी" फार्म वादी को विलंब से भेजना प्रमाणित एवं स्वीकार्य है ।
>
> अतएव, पूर्व विचारोपरान्त, निर्णय लिया जाता है कि प्रतिवादी द्वारा क्रयादेश की शर्तानुसार समय–सीमा में "सी" फार्म वादी को उपलब्ध नहीं कराने से, वादी, अन्तर्राज्यीय विकय कर में, प्रतिवादी को दी गई छूट के लाभ हेतु वाणिज्यिक कर विभाग मे "सी" फार्म प्रस्तुत कर, कर का निर्धारण नहीं करा सके, जिससे वादी पर राशि की अदायगी का भार आया है । अतः प्रतिवादी दावा राशि के देनदार है ।
>
> अतः "मध्यप्रदेश सूक्ष्म और लघु उद्यम फेसिलिटेशन काउंसिल नियम 2006" के नियम चार के अंतर्गत काउंसिल को प्रदत्त शक्तियों का प्रयोग करते हुए, काउंसिल निर्णय देती है कि प्रतिवादी M/s Sterlite Technologies Ltd (Formerly M/s Sterlite Optical Technologies Ltd.) Survey No. 209, Piparia Industrial Estate, Silvassa-396230 (UT of D&NH) द्वारा मूलधन राशि रू0 36,32,508/– (रू0 छततीस लाख बत्तीस हजार पांच सौ आठ केवल) एवं इस पर वादी द्वारा दिनांक 31.03.09 तक की संगणित ब्याज राशि रू0 26.16.405/– (रू0 छब्बीस लाख सोलह हजार चार सौ पांच केवल) तथा भुगतान दिनांक तक का ब्याज अथवा 02 अक्टूबर 2006 के पूर्व स्टेट बैंक ऑफ इण्डिया के पीएलआर का डेढ़ गुना की दर से एवं 02 अक्टूबर 2006 से रिजर्व बैंक ऑफ इण्डिया द्वारा अधिसूचित बैंक की ब्याज की दर का तीन गुना की दर से भुगतान दिनांक तक के वास्तविक ब्याज का भुगतान वादी मेसर्स धार इण्डस्ट्रीज लिमिटेड, प्लॉट न0 3,5,7 भागीरथपुरा औद्योगिक क्षेत्र इन्दौर म.प्र. को आदेश प्राप्ति दिनांक से तीस दिवस में किया जावे ।

4. The petitioner being aggrieved preferred an appeal under Section 34 of the Arbitration and Conciliation Act, 1996 before XIth Additional District Judge (Fast Tract Court) Bhopal, wherein petitioner was directed to deposit 75% of the amount awarded. Aggrieved whereof petitioner filed a writ petition W.P. No. 8653/2011 which was disposed of on 12.4.2012 with an observation that on compliance of provisions of Section 19 of the Act, 2006, the petitioner would be at liberty to raise all the grounds.

5. It is contended that abiding by the directions the petitioner deposited 75% with the Appellate Court. It is urged that subsequent to disposal of writ petition, petitioner came in possession of an order dated 17.3.2009 passed in

the Case No. 40/2006 (Central) being the assessment case of respondent No. 1 for the period 1.4.2006 to 31.3.2006 whereby the penalty of Rs.500/- was imposed on the respondent. It is urged that a doubt cropped up in the mind of the petitioner as to whether the order dated 27.12.2008 ever existed. This led the petitioner to seek shelter under Right to Information Act, 2005 by filing an application before Public Information Officer, Commercial Tax Department, seeking specific information as to whether the competent authority vide assessment order dt. 27.12.2008 under Central Sale Tax Act had called upon the respondent No. 1 to deposit tax and whether tax was recovered and if the order dated 27.12.2008 is not passed then the information regarding relevant order which was passed. It is contended that the application was opposed at by the respondent which resulted in rejection of application. However, the appellate authority vide order dated 29.9.2012 directed for supplying of required information, which was supplied to the petitioner in the following term on 9.10.2012 along with copy of order dated 17.3.2009.:

Regarding the querry No. 1 that :

1. इस प्रार्थना पत्र के साथ संलग्न आदेश पत्र दिनांक 27.12.2008 जो केन्द्रीय विकय कर अधिनियम के अंतर्गत कर निर्धारण वर्ष 2005–06 के संबंध में जारी किया गया है को सत्यापित करें तथा इस पत्र में मांग किये गये रूपये 60,30,963/– के बारे में यह बताये कि मेसर्स धार इण्डस्ट्रीज लि. (टेलीटेप डिविजन) के द्वारा यह राशि आपके कार्यालय में जमा कर दी गई हे या आपके द्वारा वसूली गई है क्या?

The answer given by the Commercial Tax Department was:

बिन्दु कमांक 1 के संबंध में जाही गई जानकारी इस कार्यालय में उपलब्ध रिकार्ड से संबंधित नहीं होने से जानकारी निरंक प्रदाय की जा रही है ।

Whereas regarding querry No. 2 that :

2. अगर उक्त कर निर्धारण आदेश पत्र आपके कार्यालय द्वारा जारी नहीं किया गया है तो केन्द्रीय विकय कर अधिनियम के अंतर्गत करनिर्धारण वर्ष 2005–06 मेसर्स धार इण्डस्ट्रीज लि. (टेलीटेप डिविजन) पंजीयन क्रं. 23481101379 के लिये जो मूल आदेश पत्र आपके कार्यालय के द्वारा जारी किया गया है, उसकी सत्यापित प्रति प्रदान करें ।

The answer given

बिन्दु कमांक 2 के संबंध में इस कार्यालय में उपलब्ध व्यवसायी मेसर्स धार

इण्डस्ट्रीज 3,5,7 भागीरथपुरा इण्डस्ट्रीयल एरिया इन्दौर टिन 23481101379 के वर्ष 2005–06 के केन्द्रीय प्रकरण कमांक 40/06 में पारित आदेश दिनांक 17/3/2009 की प्रमाणित प्रतिलिपि इस ज्ञाप के संलग्न प्रेषित की जा रही है ।

6. It is further contended for ascertaining further as to whether the information divulged was certain, one more application was filed on 2.8.2012; whereby following details were sought:

(i) Kindly confirm whether the enclosed Assessment order is passed by Assistant Commissioner, Commercial Tax Department Indore or not ?

(ii) If yes, kindly confirm the details of payment (if any), finally paid by/recovered from Dhar Industries Ltd. towards the enclosed Assessment order;

(iii) In case the enclosed Assessment order is passed by Assistant Commissioner, Commercial Tax Department, Indore whether an appeal against the same was made (is pending) before any appellate authority?

7. Responding to above query the Public Relation Officer, Office of Assistant Commissioner, Indore Circle II gave the following reply:

1. आवेदन पत्र के साथ संलग्न कर निर्धारण आदेश दिनांक 27.12.2008 मेसर्स धार इण्डस्ट्रीज लि0 (टेलीटेप डिविजन) 3,5,7 भागीरथपुरा इण्डस्ट्रीयल ऐरिया इन्दौर टिन 23481101379 प्रकरण कमांक 40/06 केन्द्रीय अवधि 2005–06 क्या सहायक आयुक्त वाणिज्यिक कर इन्दौर द्वारा पारित किया गया है ।

जानकारीः– नहीं ।

2. यदि हॉ तो क्या कर निर्धारण में निकाली गई अतिरिक्त मांग मेसर्स धार इण्डस्ट्रीज लि0 द्वारा जमा कर दी गई है या उससे वसूली की गई है ।

जानकारीः– लागू नहीं ।

3. यदि संलग्न कर निर्धारण आदेश इस विभाग के सहायक आयुक्त द्वारा पारित किया गया हो तो इसके विरूद्ध दायर अपील, अपील अधिकारी के समक्ष लंबित है ।

जानकारीः– लागू नहीं ।

8. It is contended on behalf of the petitioner that armed with these facts that the order dated 27.12.2008 did not exist nor the respondent No. 1 was subjected to a penalty of Rs.36,32,508/- and interest thereon of Rs.26,15,605/- and that the penalty imposed on the respondent for the year 2005-06 was Rs.500/- only, petitioner approached the Council for review of its order dated 31.7.2010 as the same was obtained by playing fraud, i.e., on the basis of a forged order dated 27.12.2008. The Council vide communication dated 12.12.2012 informed the petitioner that since the matter is sub-judice in an appeal under Section 19 of 2006 Act the review cannot be entertained. It is urged that left with no alternative the petitioner has filed this review petition seeking review of order dated 12.4.2012.

9. In nutshell the contention of the petitioner is that the respondent No. 1 having obtained the order dated 31.7.2010 from the Council on the basis of forged document dated 27.12.2008 and has thus played fraud, the order, therefore, deserves to be quashed as it is no order in the eyes of law.

10. The respondent No. 1 despite of repeated opportunity has chosen not to counter the contentions, however, the respondent No. 1 who is represented through the Counsel has been granted opportunity to put forth the submission. Learned counsel for respondent raised an objection as to maintainability of the review petition on the ground that it was the Council who had passed an order and the order being sub-judice in appeal under Section 19 of 2006 Act, it is the Appellate Authority which will have the jurisdiction to dwell upon the issue raised vide this Review Petition. It is further contended that the Commercial Department having not been impleded it cannot with certitude be asserted that the order dated 27.12.2008 on the basis whereof the claim was put-forth before the Council is a forged order. It is accordingly contended that the Review Petition deserves to be dismissed.

11. Regarding scope of review petition, following verdict by a Division Bench of this Court in *High Court of Madhya Pradesh v. State of M.P. and others* : Writ Appeal No. 123/2006 decided on 13.4.2009 can profitably be taken note of:

> "So far as the first challenge to the maintainability of this appeal as noted hereinabove is concerned, we are unable to hold that the appeal would not be maintainable against order dated 02/09/2004 passed in a clarification proceeding akin to

a review proceeding. It would be apt to quote the observations of the Apex Court in the matter of *Shivdeo Singh and others v. State of Punjab and others* AIR 1963 SC 1909 wherein their Lordships have held as follows:

> "(At page 1911 of AIR para 8) It is sufficient to say that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it."

The Apex Court had clearly laid down that a review of an order passed in a writ petition under Article 226 would not be a proceeding initiated U/O 47 R 1 of the Civil Procedure as was sought to be contended by Shri Shrivastava, learned Counsel for respondent No. 4. We are unable to hold that the order dated 02/09/2004 would fall in the realm of an order passed U/O 47 R 1 of the Code rather it would be an order passed in exercise of powers under Article 226 of the Constitution of India but we may hasten to add that the scope of review inherent under Article 226 would be guided by the principles embodied U/O 47 R 1 of the Code. In other words one may say that in review proceeding the High Court must be guided by the parameters prescribed U/O 47 R 1 of Code but to say that a review proceedings per se is a proceeding emanating from Order 47 would be wholly incorrect. Accordingly we hold that a writ appeal would lie against an order passed in review proceeding. Thus, the first preliminary objection raised by the learned Senior Counsel for respondent No. 4 must be rejected."

12. In view whereof, in the considered opinion of this Court the exercise of power in a petition whereby the review of order passed in a writ petition under Article 226 of the Constitution of India is sought is not confined to examine as to error on the face of record but it would be within the jurisdiction to examine the case in its entirety. Moreso, when a review is sought on the ground of fraud being committed.

13. Regarding contention that the order dated 27.12.2008 on the basis

whereof the proceedings were initiated before the Council was non-existing and was forged and that the respondent No. 1 was not penalised by the Commercial Tax Department to the extent of Rs.36,52,308/- and interest thereon of Rs.26,15,605/- in respect of the transactions entered into between the petitioner and the respondent No. 1 and the penalty imposed was only to the tune of Rs. 500/-, there is no denial of these facts which are well supported by the documents on record, which leaves no iota of doubt that the respondent No. 1 has pressed in service a non-existing order by forging the same with a motive to have illegitimate gain.

14. It has come to be settled that the party who secures a decision by fraud cannot be allowed to enjoy its fruits.

15. In *Hamza Haji v. State of Kerala and another* [(2006) 7 SCC 416], it has been held:

> "25. Thus, it appears to be clear that if the earlier order from the Forest Tribunal has been obtained by the appellant on perjured evidence, that by itself would not enable the Court in exercise of its power of certiorari or of review or under Article 215 of the Constitution of India, to set at naught the earlier order. But if the Court finds that the appellant had founded his case before the Forest Tribunal on a false plea or on a claim which he knew to be false and suppressed documents or transactions which had relevance in deciding his claim, the same would amount to fraud. In this case, the appellant had purchased an extent of about 55 acres in the year 1968 under Document No. 2685 of 1968 dated 2.6.1968. He had, even according to his evidence before the Forest Tribunal, gifted 5 acres of land to his brother under a deed dated 30.1.1969. In addition, according to the State, he had sold, out of the extent of 55.25 acres, an extent of 49.93 acres by various sale deeds during the years 1971 and 1972. Though, the details of the sale deeds like the numbers of the registered documents, the dates of sale, the names of the transferees, the extents involved and the considerations received were set out by the State in its application for review before the High Court, except for a general denial, the appellant could not and did not specifically deny the transactions. Same is the case in this Court, where in the counter affidavit, the details of these

transactions have been set out by the State and in the rejoinder filed by the appellant, there is no specific denial of these transaction or of the extents involved in those transactions. Therefore, it stands established without an iota of doubt as found by the High Court, that the appellant suppressed the fact that he had parted with almost the entire property purchased by him under the registered document through which he claimed title to the petition schedule property before the Forest Tribunal. In other words, when he claimed that he had title to 20 acres of land and the same had not vested in the State and in the alternative, he bona fide intended to cultivate the land and was cultivating that land, as a matter of fact, he did not have either title or possession over that land. The Tribunal had found that the land was a private forest and hence has vested under the Act. The Tribunal had granted relief to the appellant only based on Section 3(3) of the Act, which provided that so much extent of private forest held by an owner under a valid registered document of title executed before the appointed day and intended for cultivation by him and that does not exceed the extent of the ceiling area applicable to him under Section 82 of the Kerala Land Reforms Act, could be exempted. Therefore, unless, the appellant had title to the application schedule land and proved that he intended to cultivate that land himself, he would not have been entitled to an order under Section 3(3) of the Act. It is obvious that when he made the claim, the appellant neither had title nor possession over the land. There could not have been any intention on his part to cultivate the land with which he had already parted and of which he had no right to possession. Therefore, the appellant played a fraud on the Court by holding out that he was the title holder of the application schedule property and he intended to cultivate the same, while procuring the order for exclusion of the application schedule lands. It was not a case of mere perjured evidence. It was suppression of the most vital fact and the founding of a claim on a non-existent fact. It was done knowingly and deliberately, with the intention to deceive. Therefore, the finding of the High Court in the judgment under appeal that the appellant had procured the earlier order from the Forest Tribunal by playing a fraud on it, stands clearly established. It was not a case of the appellant merely putting forward a false

claim or obtaining a judgment based on perjured evidence. This was a case where on a fundamental fact of entitlement to relief, he had deliberately misled the Court by suppressing vital information and putting forward a false claim, false to his knowledge, and a claim which he knew had no basis either in fact or on law. It is therefore clear that the order of the Forest Tribunal was procured by the appellant by playing a fraud and the said order is vitiated by fraud. The fact that the High Court on the earlier occasion declined to interfere either on the ground of delay in approaching it or on the ground that a Second Review was not maintainable, cannot deter a Court moved in that behalf from declaring the earlier order as vitiated by fraud.

(emphasis supplied)

28. In *Hip Foong Hong vs. H. Neotia and Company* (1918 Appeal Cases 888) the Privy Council held that if a judgment is affected by fraudulent conduct it must be set aside. In *Rex vs. Recorder of Leicester* (1947 (1) K B 726) it was held that a certiorari would lie to quash a judgment on the ground that it has been obtained by fraud. The basic principle obviously is that a party who had secured a judgment by fraud should not be enabled to enjoy the fruits thereof. In this situation, the High Court in this case, could have clearly either quashed the decision of the Forest Tribunal in OA No.247 of 1979 or could have set aside its own judgment in MFA No.328 of 1981 dismissing the appeal from the decision of the Forest Tribunal at the stage of admission and vacated the order of the Forest Tribunal by allowing that appeal or could have exercised its jurisdiction as a court of record by invoking Article 215 of the Constitution to set at naught the decision obtained by the appellant by playing a fraud on the Forest Tribunal. The High Court has chosen to exercise its power as a court of record to nullify a decision procured by the appellant by playing a fraud on the court. We see no objection to the course adopted by the High Court even assuming that we are inclined to exercise our jurisdiction under Article 136 of the Constitution of India at the behest of the appellant.

(emphasis supplied)

16. In *A.V. Papayya Sastry and others v. Govt. of A.P. and others* [(2007) 4 SCC 221], it has been held:

> "21. Now, it is well settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed;
>
> "Fraud avoids all judicial acts, ecclesiastical or temporal".
>
> 26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of 'finality of litigation' cannot be stretched to the extent of an absurdity that it can be utilized as an engine of oppression by dishonest and fraudulent litigants.
>
> 39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every Court, superior or inferior."
>
> {See *K.D. Sharma v. Steel Authority of India Ltd.* : [(2008) 12 SCC 481]; *State of Chhattisgarh and others v. Dhirjo Kumar Sengar* [(2009) 13 SCC 600}.

17. In the case at hand various documents filed by the petitioner including the information given under Right to Information Act, 2005 by the office of Assistant Commissioner, Commercial Tax, Indore and being not denied by respondent No. 1 goes to establish the fact that the order dated 27.12.2008 was non existence and the respondent No. 1 forged for illegitimate gain which

he succeeded by letting the Council to believe that he has been penalized to the tune of Rs.36,32,508/- and interest thereon of Rs.26,16,405/- because of the failure on the part of the petitioner to furnish 'C' form in time in respect of the transaction which took place between the petitioner and respondent in financial year 2005-2006.

18. The question would be as to what relief the petitioner would be entitled for besides the quashment of order dated 31.7.2010.

19. In *Chandra Shashi v. Anil Kumar Verma* : [(1995) 1 SCC 421] it has been held:

> "1. The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.
>
> 2. Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice.
>
> 8. To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. People would have faith in courts when they would find that सत्यमेव जयते (truth alone triumphs) is an achievable aim there; or यतो धर्मस्ततो जय" (it is virtue which ends in victory) is not only inscribed in emblem but really happens in the portals of courts."

20. In view of above pronouncement of law and the given facts of present case, this Court is of considered opinion that the order dated 12.4.2012 passed in W.P. No. 8653/2011 deserves to be and is hereby recalled and the order

dated 31.7.2010 passed by the Council having been obtained by committing fraud being non est in the eyes of law is hereby quashed.

21. The Council who has been led to believe the existence of order dated 31.7.2010 ought to have taken up application filed by the petitioner seeking review on the ground of fraud and ought not have rejected the same stating that the impugned order has been appealed at. Be that as it may.

22. Furthermore, the Council is directed to take up the matter with the Commercial Tax Department in respect of the forgery committed by respondent No. 1 by forging an order dated 27.12.2008 for launching a criminal prosecution against him.

23. In the result the Review Petition as also the writ petition No. 8653/2011 are allowed with cost of Rs.20,000/-on respondent No. 1 of which Rs.15,000/- be deposited with High Court Legal Aid for the poor and Rs.5,000/- be paid to the petitioner. Besides, the cost of Rs.5,000/- which was imposed on 20.3.2013 shall also be deposited by the respondent No. 1 with the High Court Legal Aid for the Poor.

24. That, the petitioner would be entitled to withdraw 75% of the amount awarded deposited with the Appellate Court under Section 19 of 2006 Act.

Review petition allowed.

I.L.R. [2013] M.P., 1394
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 3732/2012 (Jabalpur) decided on 7 February, 2013

SUSHILA BAI (SMT.) & ors. ...Appellants
Vs.
UNION OF INDIA ...Respondent

Railways Act (24 of 1989), Sections 123, 124-A - Compensation **- Deceased was a bonafide passenger and fell down from the train - Respondents opposed the petition alleging that the train had no scheduled stoppage and after it passed the station, alarm chain was pulled and the co-passenger got down however before the deceased could get down the train started again and the deceased got down from the running train as a result of which he sustained injuries-Co-passenger controverted the statement recorded by police - Respondents did not**

examine the person who had recorded the statement of co-passenger - Since the death was not suicide or his own criminal act, Tribunal wrongly dismissed the petition - Respondents directed to pay the amount of compensation as prescribed in death case along with interest from the date of application as prescribed. (Para 6)

रेल अधिनियम (1989 का 24), धाराएँ 123, 124ए – प्रतिकर – मृतक वास्तविक यात्री था और ट्रेन से नीचे गिरा – प्रत्यर्थीगण ने यह अभिकथित करते हुए याचिका का विरोध किया कि ट्रेन का कोई निर्धारित ठहराव नहीं था और स्टेशन पार करने के पश्चात, खतरे की जंजीर खींची गयी और सह यात्री उतर गया, परन्तु इससे पहले कि मृतक उतर पाता, ट्रेन पुनः चल पड़ी और मृतक चलती ट्रेन से नीचे उतरा जिसके परिणामस्वरुप उसे चोटें आयीं – सह यात्री ने पुलिस द्वारा अभिलिखित कथन का खंडन किया – प्रत्यर्थीगण ने उस व्यक्ति का परीक्षण नहीं किया जिसने सह यात्री का कथन अभिलिखित किया था – चूंकि मृत्यु, आत्महत्या नहीं थी या उसका स्वयं का आपराधिक कृत्य नहीं था, अधिकरण ने अनुचित रुप से याचिका खारिज की – प्रत्यर्थीगण को मृत्यु प्रकरण में यथा विहित प्रतिकर, आवेदन की तिथि से ब्याज के साथ जैसा कि विहित किया गया है, अदा करने के लिए निदेशित किया गया।

Cases referred :

2008 ACJ 1921, (2010) 12 SCC 443, 2012 ACJ 2507.

M. Shafiqullah, for the appellants.
Govind Patel, for the respondent.

ORDER

N.K. Mody, J. :- Being aggrieved by the judgment dated 18/10/12 passed by Railway Claims Tribunal, Bhopal in Case No.OA/IIu/118/08 whereby claim petition filed by appellants for compensation was dismissed, present appeal has been filed.

02. Short facts of the case are that the appellants filed a claim petition for compensation alleging that on 06/01/08 Raj Prakash Vyas was travelling with his friend Dhan Singh Lodhi after purchasing a second class super fast train ticket bearing No.53975334 on 06/01/08 in train No.2621 (Tamil Nadu Express) from Bhopal to Bina. It was alleged that because of heavy rush Raj Prakash Vyas and co-passenger were standing near to the door of general compartment. it was alleged that near Bina Railway Station deceased Raj Prakash fell down from running train and died on spot. It was prayed that the

claim petition be allowed and compensation be awarded. The claim petition was contested by respondent on various grounds including on the ground that the deceased was not a victim of an untoward incident as defined in Section 123 (c) (2) of the Railways Act, 1989. It was alleged that the train passed through Bina Station without stopping there because the train has no schedule halt at Bina Station. It was alleged that after passing of the station, deceased and co-passenger Dhan Singh pulled the alarm chain and the train stopped near gate No.308. It was alleged that Dhan Singh co-passenger got down, but since the train staff set right the alarm chain apparatus and the train started again, therefore, deceased god down from the running train, as a result he sustained injuries and died. On the basis of pleadings of parties learned Court below framed the issues and recording the evidence and dismissed the claim petition, against which present appeal has been filed.

03. Learned counsel for the appellants argued at length and submits that the impugned judgment passed by the learned Tribunal is illegal, incorrect and deserves to be set aside. It is submitted that the death occurred because of untoward incident, therefore, there was no justification on the part of learned Tribunal in dismissing the claim petition. Learned counsel placed reliance on a decision in the matter of *Thomas Vs. Union of India,* 2008 ACJ 1921 wherein the passenger was attempting to get off the train as he had boarded a wrong train when he fell down and his legs were crushed under the wheels and the defence was that the accident occurred due to his own negligence, and the question for consideration before Hon'ble Kerala High Court was whether negligence of injured can dis-entitle him from claiming compensation under Section 124-A of Railways Act, Divisional Bench of Kerala High Court held that negligence of either the railway administration or that of the injured is not relevant. It was further held that since the passenger has not suffered injuries due to any of the reasons stated in exceptions (a) to (e) of proviso to Section 124-A, therefore, he is entitled for compensation. Further reliance is placed on a decision in the matter of *Jameela Vs. Union of India,* (2010) 12 SCC 443 wherein deceased was standing at open door of compartment of running train and falling to his death, Hon'ble Apex Court held that since the death of said passenger was neither a case of suicide nor as a result of self-inflicted injury and also due to his own criminal act nor was he in a state of intoxication or insanity, nor any natural cause or disease, therefore, the claimants are entitled for compensation. Further reliance is placed on a decision in the matter of *Mohan Lal Vs. Union of India,* 2012 ACJ 2507 wherein passenger boarded

a wrong train and as soon as she realized that it is a wrong train she tried to dc-board the said train and in that process she fell and died on spot, Punjab and Haryana High Court held that the deceased was a bonafide passenger and she died in an untoward incident, hence entitled for compensation.

04. Chapter XIII of the Railways Act deals with liability of Railway Administration for death and injuries to passengers due to accident. Section 123 of the act deals with the definitions. Sub-section C of Section 123 lays down the definition of untoward incidents, which reads as under :-

> "**123 Definitions.**- In this Chapter.....
>
> (iv) the paternal grandparent wholly dependant on the deceased passenger.
>
> (c) "untoward incident' means -
>
> (1) (i) the commission of a terrorist act within the meaning of sub-section (1) of section 3 of the terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or
>
> (ii) the making of a violent attack or the commission of robbery or dacoity; or
>
> (iii) the indulging in rioting, shoot-out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak-room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or
>
> (2) the accidental falling of any passenger from a train carrying passengers."

05. Section 124A deals with compensation on account of untoward incident, according to which when in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger, who has been injured or the dependant of a passenger who has been killed to maintain an action and recover damages in respect thereof. This section further lays down that the Railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed as a result of such

unwarranted incident. Proviso of this section lays down the circumstances in which no compensation shall be payable if the passenger dies or suffers injury, which ar as under. -

(a) suicide or attempted suicide by him;

(b) self-inflicted injury;

(c) his own criminal act;

(d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

06. In the present case learned Tribunal has found that the deceased was a bonafide passenger travelling in Tamilnadu Express but dismissed the claim on the ground that Train No.2621 Tamilnadu Express was not having a schedule stoppage at Bina and the place of occurrence was immediately after Bina railway station, therefore, learned Tribunal presumed that the incident must have taken place as described in the statement recorded by Dhansingh. The statement was controverted by Dhansingh, who has stated that the police did not read out the statement to him and obtained his signature. Since Dhansingh controverted the statement recorded by the police, therefore, learned Tribunal was not justified in believing on the statement recorded by the police without getting it to be proved by the respondent by calling the person, who recorded the statement. Even if it is assumed that deceased was travelling in a train, which was not having a schedule halt, then too since it was not a suicide or attempted suicide by him, self inflicted injury, his own criminal act, act committed by him in a state of intoxication, insanity or any natural cause or disease, therefore, learned Tribunal was not justified in dismissing the claim petition filed by the appellants. In view of this appeal filed by the appellants stands allowed, the impugned judgment passed by the learned Tribunal stands set aside with a direction to the respondent to pay the amount of compensation as prescribed in the death case alongwith interest from the date of application as prescribed under the law.

07. With the aforesaid observations appeal stands disposed of.

Appeal disposed of.

I.L.R. [2013] M.P., 1399
APPELLATE CIVIL
Before Mr. Justice U.C. Maheshwari
M.A. No. 578/2008 (Gwalior) decided on 1 March, 2013

ORIENTAL INSURANCE CO. LTD. ...Appellant
Vs.
MANORAMA (SMT.) & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 173 **- Unless the requisite sum is deposited, the appeal against award allowing claim could not be entertained for setting aside such award - The provisions are mandatory and are equally applicable on entertaining and hearing of cross objections filed by respondents. (Para 12)**

मोटर यान अधिनियम (1988 का 59), धारा 173 – जब तक कि आवश्यक रकम जमा नहीं की जाती, दावा मंजूरी के अवार्ड के विरुद्ध अपील उक्त अवार्ड को अपास्त किये जाने हेतु ग्रहण नहीं की जा सकती – उपबंध आज्ञापक हैं और ग्रहण करने पर एवं प्रत्यर्थीगण द्वारा प्रस्तुत प्रत्याक्षेपों की सुनवाई पर समान रुप से लागू होते हैं।

Cases referred :

2003 ACJ Vol. 3 1550, MACD 2010(2) (MP) 820, 2009 ILR Vol.1, 806, MACD 2012 (2) 1182, AIR 2005 SC 2337, AIR 2008 MP 1.

B.K. Agrawal, for the appellant.
Pramod Babu Seth, for the respondent No.1.
None for the respondent No. 2.
O.P. Singhal, for the respondent No.3.

ORDER

U.C. MAHESHWARI, J. :- The appellant/Insurance Company has filed this appeal being aggrieved by the award dated 6.2.2008 passed by Motor Accident Claims Tribunal Gwalior, in Claim Case No.58/2007, whereby the claim of the respondent no.1 regarding death of her husband in a vehicular accident by exonerating the appellant-insurer of offending vehicle, has been awarded against the predecessor of the respondent no.3 for the sum of Rs. 3 Lacs along with interest at the rate of 8% per annum from the date of filing the claim petition with a direction to the appellant to pay such sum to the respondent no.1/claimant first and recover the same from the respondent no.3. As such the appellant has come with this appeal to exonerate the condition to pay the

awarded sum to the claimant and then recover from the respondent no.3.

2. The facts regarding death of the husband of the respondent no.1 in the alleged vehicular accident and the aforesaid quantum of compensation decided by the Tribunal, is not under dispute between the parties in this appeal so, mentioning the entire facts of the case in this order is not necessary, hence this order is being passed only by stating the facts necessary for adjudication of this appeal.

3. Besides the aforesaid factual matrix according to the claim petition of respondent no.1, on the date of the incident the offending vehicle bearing registration no. MP06-B-6122 registered in the name of the predecessor in title of the respondent no.3 namely; Haricharan Lal Gupta, was duly insured with the appellant.

4. In reply of the respondent no.3 it was stated that he being registered owner of said vehicle was duly insured with the appellant hence, in any case, such liability be saddled against the appellant.

5. In reply of the appellant besides the other avermetns, it is specifically stated that the above mentioned vehicle was insured with it covering the risk of 36 to 60 passengers, along with the risk of driver for which the additional premium of Rs.25/- was taken from the respondent no.3. It is also stated that the deceased-Ramjilal, the husband of the respondent no.1 was not travelling as passenger in the bus, in fact he was Cleaner of the bus, whose risk was not covered under the Insurance Policy, therefore, the liability of the impugned claim could not be saddled on the appellant/Insurance Company.

6. After framing the issues and recording the evidence on appreciation of the same the claim of the respondent no.1 was awarded against the respondent no.3 Haricharan Lal Gupta, the predecessor in title of respondent no.3 with a direction to the appellant/Insurance Company to pay the awarded sum to the respondent no.1/claimant and recover the same from the respondent no.3. The same is under challenge in this appeal at the instance of appellant.

7. After service of the notice of this appeal on behalf of the respondent No.3 under Order 41 Rule 22 of CPC, the cross objection/appeal for saddling the liability of the impugned award against the appellant was also filed and the same is pending for adjudication. In that respect, Court has to consider first whether without depositing the requisite sum of Rs.25,000/- as per requirement of Section 173 of the Act, such cross objection could be entertained in the

present appeal and subject to answer of this question, the Court has to answer whether the liability of the impugned award could be saddled jointly and severally against the respondent no.3 as well as the Insurance Company.

8. Appellant's counsel after taking me through record of the Tribunal including the insurance policy (Ex.D-1) and the deposition of Shankarlal (NAW-1), the witness of the Insurance Company argued that as per policy, the offending bus was duly insured with the appellant for covering the risk of 36 to 60 passengers along with one driver, for which Rs.25/- additional premium was taken and the risk of third party, in continuance he said that, risk of Cleaner was neither covered nor any premium in this regard was taken. In such premises, prayed that if the risk of Cleaner was not covered under the Policy, then after exonerating the appellant from the liability of the impugned award, the Tribunal has committed grave error in directing it to pay the sum of the award to the respondent no.1 first and recover the same from the respondent no.3, and by placing his reliance on the decided cases in the matter of *Ramashray Singh vs. New India Assurance Co. Ltd. and others* reported in 2003 ACJ Volume 3 1550 so also on a decision in the matter of *Chandrakanta Bhandari (Smt.) W/o Nageen Lal Bhandari vs. Mahohar Lal* reported in MACD 2010 (2) (M.P.) 820 and of this Court in the matter of *Mangal vs Manusukhrani* reported in 2009 ILR Volume 1 806 and in the matter of *Oriental Insurance Company Ltd., vs. Joseph and Ors reported* in MACD 2012 (2) 1182 (Full Bench) (Kerala High Court), and prayed for setting aside the condition imposed by the Tribunal with a further prayer to dismiss the cross objection of the respondent no.3 on account of non-depositing the requisite sum as per requirement of Section 173 of the Act for entertaining the cross appeal.

9. The counsel of the respondent no.1/claimant made his limited submission for saddling the liability of the awarded sum jointly and severally against the appellant and respondent no.3.

10. The counsel of the respondent no.3 by referring the Insurance Policy (Ex.D.1) said that according to it, besides the premium to cover the risk of passengers and third party Rs. 25/- additionally to cover the risk of only driver as well as of employee. In such premises, the Tribunal has committed grave error in exonerating the appellant to afford the liability of the awarded sum. In continuance he said that, the offending vehicle being insured with the appellant in the available circumstances it could not have been exonerated

from the liability of the awarded sum by the Tribunal. In support of his contention he also placed his reliance on a decision of the apex Court in the matter of *National Insurance Co. Ltd., Vs. Prembai Patel and Others* reported in AIR 2005 SC 2337 and of this Court *Bhav Singh vs. Smt. Savirani & Ors* reported in AIR 2008 MP 1 (Full Bench). So far as the entertainability of his cross objection is concerned, he said that after depositing the requisite sum as per requirement of Section 173 of the Act by the Insurance Company, with whom the vehicle of the respondent no.3 was insured, for entertaining the appeal, then the respondent could not be insisted or directed again to deposit such sum for entertaining his cross objection and prayed to entertain his cross objection without depositing any sum under Section 173 of the Act and also prayed for allowing such cross objection and saddled the liability of the impugned award against the appellant Insurance Company.

11. Having heard the counsel, I have carefully gone through the record of the Tribunal along with the impugned award so also the aforesaid case cited by the counsel of the parties.

12. Before considering the question raised by the appellant's counsel to exonerate the Insurance Company from the liability to pay the awarded sum and recover the same from the respondent No.3, I deem fit to consider and decide the question regarding entertainability of the cross-appeal/ cross objection of respondent No.3 filed under Order 41 rule 22 of the CPC. As per provisions Section 173 of the Act unless the requisite sum as per requirement of this Section is deposited, the appeal against the award allowing claim could not be entertained for setting aside such award of the Tribunal. It is undisputed fact on record that the Insurance Company has filed this appeal after depositing the requisite sum with the tribunal and, in such premises, its appeal was entertained and admitted for final hearing. But the respondent No.3 has filed the cross-objection without depositing such requisite sum in compliance of section 173 of the Act. Such provision of section 173 of the Act being mandatory, respondent No.3 was also bound to deposit the requisite sum for entertaining and hearing of his cross-objection in the present appeal. In the lack of such deposit, the aforesaid cross-objection could not be entertained contrary to the mandatory provision of the aforesaid section. My approach is fully fortified by the decision of the division Bench of this court in the matter of *Chandrakanta Bhandari (Smt) W/o NageenLal Bhandari Vs. Manohar Lal S/o Shankar Lal Soni and others*- MACD 2010(2) (MP) 820 in which it was held as under :-

"18. We also find support to out reasoning and conclusion from the decision of Supreme Court reported in (2000) 9 SCC 223 (*Trilochan Singh Vs. Kanta Devi*). In this case also, the High Court had dismissed the appeal filed by owner of offending vehicle on the ground of non-compliance of Sec.173(1) proviso despite the fact that Insurance Company had paid the full awarded sum to claimants thereby satisfying the award passed in favour of claimants. Feeling aggrieved by this dismissal, the owner filed SLP before the Apex Court. Their Lordship took note of the fact of deposit made by the Insurance Company and yet declined to grant exemption to owner of offending vehicle from making deposit of sum specified in section 173(1) ibid. Their Lordships, however, directed the owner to deposit a sum of Rs.10,000/- as a pre-condition for entertainment of his (owner's) appeal filed under section 173(1) ibid and accordingly, remanded the case to the High Court for its disposal on merits. As observed supra, the issue involved in the present case is similar to the one decided by the Apex Court in the case of *Trilochan Singh* (supra).

19. In view of foregoing discussion, we hold that appellant (owner of offending vehicle cannot take any benefit of deposit made by Insurance Company of the awarded sum in the Tribunal and is required to ensure compliance of the provisions of Sec.173(1) ibid as a precondition for entertainment of the appeal filed by her under section 173(1) of the Act.

13. In the aforesaid premises, the cross-objection of respondent No.3 deserves to be and is hereby dismissed on the ground of non-depositing the requisite sum for entertaining the same in compliance of section 173 of the Act.

14. Coming to consider the question whether in the available scenario of the case the liability to pay the awarded sum to the respondent No.1/claimant was rightly saddled on the Insurance Company with a direction to recover the same from respondent No.3 after making the payment of such sum to respondent No.1.

15. It is undisputed fact on record that the above-mentioned offending vehicle of the predecessor-in-title of respondent No.3 was duly ensured with

the appellant/ insurance company and as per policy Ex.D/1, the vehicle was insured covering the risk of 36 to 60 passengers for which the premium of Rs.8760/- was charged and Rs.100/ was charged for personal accident. Besides this, the additional premium of Rs.25/- was charged with respect of the liability of employee/ driver and for extra loading, the premium of Rs.2628/- was charged. In such premises from the policy, it is apparent that besides the passengers, the risk of personal accident, driver and with respect of extra loading was covered and besides this, in any case, the risk of person specified in section 147(b) and its proviso was covered. According to the provision of section 147 in a public service vehicle, the risk of driver, conductor or ticket examiner are covered. Besides the other person like cleaner in the case at hand was not covered. So, in such premises, the court has to answer the question whether after exonerating the appellant/ insurance company to bear the liability of the sum of impugned award the direction of the Tribunal to the appellant to pay such sum to the respondent no. 1 and recover the same from the respondent no. 3 is sustainable under the law.

16. Before proceeding further to examine the aforesaid question, I deem fit to reproduce some relevant abstract of the decision of the Apex Court announced in the matter of *Ramashray Singh Vs. New India Assurance Co. Ltd. and others*- 2003 ACJ -1550. The same is read as under :-

> "10. The appellant's first submission was that Shashi Bhushan Singh was a passenger. The appellant's submission that the phrases `any person' and `any passenger in clauses (I) and (ii) of sub-section(b) of section 147(1) are of wide amplitude, is correct. However, the proviso to the sub section carves out an exception in respect of one class of persons and passengers, namely,employees of the insured. In other words, if the person or passenger is an employee, then the insurer is required under the statute to cover only certain employees. As stated earlier, this would still allow the insured to enter into an agreement to cover other employees, but under proviso to section 147(1)(b), it is clear that for the purpose of section 146 (1), a policy shall not be required to cover liability in respect of the death arising out of and in the course any employment of the person insured unless- first; the liability of the insured arises under Workmen's Compensation Act, 1923 and second- if the employee is engaged in driving the vehicle and if it is a public service vehicle,

> is engaged as conductor of the vehicle or in examining tickets on the vehicle. If the concerned employee is neither a driver nor conductor nor examiner of tickets, the insured cannot claim that the employee would come under the description `any person' or `passenger'. If this was permissible, then there would be no need to make special provisions for employees of the insured. The mere mention of the word `cleaner' while describing the sitting capacity of the vehicle does not mean that the cleaner was therefore a passenger. Besides the claim of the deceased employee was adjudicated upon by the Workmen's Compensation Court which could have assumed jurisdiction and passed an order directing compensation only on the basis that the deceased was an employee. This order cannot now be enforced on the basis that the deceased was a passenger".

In view of the aforesaid dictum of the Apex Court, on examining the case at hand then it is apparent that the deceased Ramjilal the cleaner was traveling in the Bus neither as passenger nor driver, conductor or ticket examiner. So, accordingly the risk of cleaner was not covered under the aforesaid Policy. In such premises, the tribunal has not committed any error in exonerating the appellant from the liability of the impugned claim.

17. In the aforesaid premises when the risk of the cleaner was neither covered nor additional premium in this regard was charged by the appellant then after exonerating the appellant from the liability of the impugned claim, there was no occasion with the tribunal to give the direction to pay the awarded sum to the respondent No.1/claimant first and recover the same from the respondent No.3. So, in such premises, the tribunal has committed grave error in giving such direction. The same is not sustainable at this stage. Consequently, till this extent, the impugned award of the tribunal is hereby held to be perverse.

18. In view of the aforesaid discussion, by allowing this appeal, the direction given by the tribunal to the appellant to pay the awarded sum to the claimant/ respondent No.1 first and recover the same from respondents No.2 and 3 is hereby set aside. Till this extent, the impugned award is modified while the remaining findings of the same are hereby affirmed. In such premises, it is made clear that respondent/claimant shall be entitled to recover the sum

of the impugned award from respondents No.2 and 3 by executing the award. It is also made clear that if any amount is paid by the appellant/ insurance company in compliance of the impugned award or interim award then the appellant/ insurance company shall be entitled to recover such sum from respondent No.2 and 3 on the basis of this order by filing the executing proceedings before the tribunal. There shall be no necessity to file any separate proceedings by the insurance company in this regard.

19. In the facts and circumstances of the case, there shall be no order as to the cost.

-Appeal allowed.

I.L.R. [2013] M.P., 1406
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
S.A. No. 111/1996 (Jabalpur) decided on 2 May, 2013

SITARAM DUBEY (SINCE DECEASED) & ors. ...Appellants
Vs.
MANAKLAL (SINCE DECEASED) & ors. ...Respondents

A. Evidence Act (1 of 1872), Section 114 - Long Cohabitation - Presumption of marriage - **In absence of assertion of a legal marriage, presumption of a legally valid marriage cannot be drawn on the basis of long cohabitation. (Paras 10 &11)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 114 – दीर्घ सहवास – विवाह की उपधारणा – वैध विवाह के प्राख्यान की अनुपस्थिति में, दीर्घ सहवास के आधार पर वैध रुप से मान्य विवाह की उपधारणा नहीं की जा सकती।

B. Succession Act (39 of 1925), Section 63(c) - Succession - Will - **Testator of will claimed herself to be the keep of Tikaram - Testator of will had no right in the property of Tikaram. (Para 12)**

ख. उत्तराधिकार अधिनियम (1925 का 39), धारा 63(सी) –उत्तराधिकार – वसीयत – वसीयतकर्ता ने स्वयं को टीकाराम की उपपत्नी/रखैल होने का दावा किया – वसीयतकर्ता को टीकाराम की सम्पत्ति में कोई अधिकार नहीं।

C. Succession Act (39 of 1925), Sections 59 & 63, Evidence Act (1 of 1872), Sections 67 & 68 - Will - Proof - **Propounder of will, apart from the statutory requirements is also required to remove all**

legitimate suspicions to the satisfaction of the judicial conscience of the Court and whether it is necessary or otherwise to examine the scribe or any other witness apart from the attesting witnesses of the will, would depend on the facts and circumstances of each case. (Para 20)

ग. उत्तराधिकार अधिनियम (1925 का 39), धाराऐं 59 व 63, साक्ष्य अधिनियम (1872 का 1), धाराऐं 67 व 68 – वसीयत – सबूत – वसीयतकर्ता को कानूनी अपेक्षाओं के अलावा, न्यायालय के न्यायिक अंतःकरण की संतुष्टि के लिए सभी समुचित संदेहों को हटाना भी अपेक्षित है और क्या वसीयत के अनुप्रमाणक साक्षियों के अलावा लेखकर्ता या किसी अन्य साक्षी का परीक्षण करना आवश्यक है अथवा नहीं, यह प्रत्येक प्रकरण के तथ्यों और परिस्थितियों पर निर्भर होगा।

***D. Succession Act (39 of 1925), Section 63 - Will - Execution thereof* - Will is a registered document but the Registering officer or any other personnel from the office of Registrar not examined - No endorsement by Registering officer as per Section 58 of Registration Act - No statement to the effect that testator was of sound mind and that will was read over to her and was understood by her - Person who drafted the will not examined nor any endorsement that will was drafted in accordance with the instructions of testator and was read over to her -Testator was aged about 100 years and was extremely sick - Testator also died within 10 days of execution of will - Appellants have failed to dispel the suspicious circumstances surrounding the execution of Will - Appeal partly allowed. (Paras 21 to 28)**

घ. उत्तराधिकार अधिनियम (1925 का 39), धारा 63 – वसीयत – उसका निष्पादन – वसीयत एक रजिस्ट्रीकृत दस्तावेज है किन्तु रजिस्ट्री अधिकारी या रजिस्ट्रार के कार्यालय के किसी अन्य कर्मचारी का परीक्षण नहीं किया गया – रजिस्ट्रीकरण अधिनियम की धारा 58 के अनुसार रजिस्ट्री अधिकारी का पृष्ठांकन नहीं – इस आशय का कोई कथन नहीं कि वसीयतकर्ता स्वस्थ्यचित्त थी और यह कि उसे वसीयत पढ़कर सुनाई गई और उसके द्वारा समझी गई – जिस व्यक्ति ने वसीयत को ड्राफ्ट किया उसका परीक्षण नहीं किया और न ही कोई पृष्ठांकन कि वसीयत को वसीयतकर्ता के अनुदेशों के अनुसार ड्राफ्ट किया था और उसे पढ़कर सुनाया गया – वसीयतकर्ता करीब 100 वर्ष के आयु की थी और अत्यांतिक रुप से अस्वस्थ थी – वसीयतकर्ता की मृत्यु भी वसीयत निष्पादित करने से 10 दिनों के भीतर हुई – अपीलार्थीगण संदेहास्पद परिस्थितियों से घिरे वसीयत के निष्पादन को हटाने में असफल रहे – अपील अंशतः मंजूर।

Cases referred :

AIR 2005 SC 800, AIR 2008 SC 1193, AIR 1959 SC 443, AIR 1964 SC 529, AIR 1982 SC 133, (2001) 7 SCC 503, (2006) 13 SCC 449, (2010) 5 SCC 274, (2010) 5 SCC 770.

T.S. Ruprah with *Harpreet Ruprah,* for the appellants.
Manoj Sanghi & Sankalp Sanghi, for the respondents.

JUDGMENT

R.S. JHA, J. :- The appellants/defendants have filed this appeal being aggrieved by the judgment and decree dated 25.11.1995 passed by the IXth Additional Judge to the Court of District Judge, Jabalpur in Civil Appeal No.20-A/95 whereby the judgment and decree dated 31.07.1984 passed by the Civil Judge Class-II, Patan, District Jabalpur, in Civil Suit No.15-A/1983 has been set aside and reversed and the suit filed by the respondent no.1/plaintiff has been decreed.

2. The brief facts, relevant for deciding this appeal, are that one Mannu (since deceased) had three sons; Nathuram, Tikaram and Udaylal. Udaylal died before he could get married while Nathuram had two sons, Manaklal, the plaintiff/respondent no.1 (since deceased) and Gokul Prasad. Gokul Prasad died long back leaving behind his son Rameshwar Prasad Dubey, defendant no.11, the present respondent no.10. Tikaram, the second son of Mannu, though unmarried, had kept one Kaushalya Bai, widow of Ramdhani, with him.

Manaklal, plaintiff/respondent no.1, Rameshwar Prasad Dubey, defendant/respondent no.10 and Tikaram were jointly in possession of Khasra No.50, Area 3.994 Heactares of village Khairi. After the death of Tikaram about 20-25 years prior to filing of the suit, the plaintiff/respondent no.1 Manaklal, Rameshwar Prasad Dubey, defendant no.11/respondent no.10 and Kaushalya Bai continued to remain in possession of separate portions of the land comprising Khasra No.50 Area 3.994 Heactares of village Khairi and in addition Kaushalya Bai also retained possession of Khasra No.92 Area 1.817 Hectares of Village Hirapur Bandha which she got from her husband Ramdhani as well as part of the house of Tikaram. Kaushalya Bai was staying in the said house alone when she fell down and suffered serious injuries pursuant to which the present appellants/defendants, who are the sister of Kaushalya Bai and the children of Hira Bai, her sister, took her to their house whereafter it is alleged that she executed a registered Will on 27.1.1983 at Jabalpur

bequeathing the land bearing Khasra No.92 Area 1.817 Hectares of Village Hirapur Bandha and the other land situated in village Khairi alongwith her house to her sister Hira Bai.

Plaintiff Manaklal, being aggrieved, filed a suit for declaration to the effect that they be declared the owner of Khasra No.50 Area 3.994 Heactares of village Khairi and the land situated at Khasra No.92 Area 1.817 Hectares Patwari Halka No.56 of Village Hirapur Bandha as well as the house situated in Village Hirapur Bandha belonging to Tikaram and a declaration to the effect that the Will executed by Kaushalya Bai on 27.1.1983 was fraudulent. The respondents/plaintiffs also sought permanent injunction in respect of the properties in question.

The trial court dismissed the suit in toto but the First Appellate Court has allowed the appeal filed by the respondents/plaintiffs by the impugned judgment by recording a finding to the effect that Kaushalya Bai was not the legally wedded wife of Tikaram and had no right or interest in his property and, therefore, could not have executed a Will and that the Will, Exhibit D-1, was fraudulent and did not confer any right on the appellants, being aggrieved by which the appellants have filed the present appeal before this Court.

3. This appeal, filed by the appellants, was admitted by this Court on the following substantial questions of law:-

> "1. Whether the Court below wrongly held that in order to prove the Will dated 27/1/83, the appellants should have compulsorily examined the scribe of the Will even though the Will was a registered document ?
>
> 2. Whether the lower appellate Court wrongly refused to consider the cross-objection filed by the appellants and not notice the fact tahat Smt. Kaushalya Bai was living as wife of Tikaram for considerable years ?
>
> 3. Whether under the facts and circumstances of the case, the respondents should claim the property inherited by Kaushalya Bai from her first husband ?
>
> 4. Whether the Will dated 27.1.83 was made in suspicious circumstances as held by the lower appellate Court?"

4. The learned Senior Counsel for the appellants, on the strength of the decisions of the Supreme Court rendered in the cases of *Sibha Hymavathi Devi vs. Setti Gangadhara Swamy and others,* AIR 2005 SC 800 and *Tulsa & Others vs. Durghatiya & Others*, AIR 2008 SC 1193, submits that as it is an admitted and undisputed fact that Kaushalya Bai lived with late Tikaram as his wife for quite a long period of time, therefore, on the basis of the said long cohabitation she had acquired the status of a wife and was, therefore, entitled to inherit the entire property of Tikaram and was also entitled to Will it to her sister Hirabai and her children, the present appellants.

5. The learned counsel for the appellants, by relying on the decision of the Supreme Court rendered in the cases of *H. Venkatachala Iyengar vs. B. N. Thimmajamma and others,* AIR 1959 SC 443; *Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee and others,* AIR 1964 SC 529; *Smt. Indu Bala Bose and others vs. Manindra Chandra Bose and another*, AIR 1982 SC 133; and *N. Kamalam (dead) and Another vs. Ayyasamy and Another,* (2001) 7 SCC 503, further contended that the First Appellate Court has grossly erred in law in decreeing the suit only on the ground that the appellants failed to examine the scribe of the Will totally overlooking the fact that the law does not require that the scribe be examined and has also not taken into consideration the fact that the Will executed by Kaushalya Bai on 27.1.1983 was a registered Will and was duly proved by the two attesting witnesses, D.W-2 Sharda Prasad and D.W-3 Kishan Singh, as required by the statutory provisions of Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Succession Act') and Section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as 'the Evidence Act') and in such circumstances the Will executed by Kaushalya Bai having been proved, could not have been set at knot on the basis of extraneous consideration.

6. The learned Senior Counsel for the appellants has further submitted that Kaushalya Bai was in possession of the property from two different sources; firstly from her first husband Ramdhani she had inherited Khasra No.92 Area 1.817 Hectares Patwari Halka No.56 of Village Hirapur Bandha and secondly, from her second husband Tikaram she had inherited Khasra No.50 Area 3.994 Heactares of village Khairi. It is submitted that the plaintiff Manaklal could at best claim right to the property that Kaushalya Bai received from Tikaram but he had no claim to the property received by her from her first husband Ramdhani as it is specifically contended by him that she was not

the wife of Tikaram, but the appellate Court, without taking into consideration the aforesaid aspect, has decreed the suit filed by the respondents in toto therefore the impugned judgment suffers from perversity and deserves to be set aside.

7. The learned Senior Counsel for the appellants submits that the First Appellate Court has also committed illegality in allowing the appeal filed by the respondents without taking into consideration the cross-objection filed by the appellants against the finding recorded by the court below to the effect that Kaushalya Bai was not the wife but the keep of Tikaram.

8. The learned counsel for the respondents, per contra, submits that the First Appellate Court has properly appreciated the evidence of the witnesses and has arrived at a finding that the Will was executed in suspicious circumstances and that Kaushalya Bai had no right to execute the same and, therefore, no substantial question of law arises for adjudication in the present appeal which deserves to be dismissed.

9. I have heard the learned counsel for the parties at length. From a perusal of the judgment of both the courts below as well as the oral and documentary evidence on record it is evident that there is no evidence on record to indicate or establish that Kaushalya Bai had ever married Tikaram and on the contrary from a perusal of the Will, Exhibit D-1, produced by the appellants/defendants themselves, it is clear that Kaushalya Bai has herself proclaimed and stated that she is the widow of Ramdhani and the keep of Tikaram. This fact has been reiterated by all the witnesses of both the plaintiff and the defendants. In the circumstances it is evident and clear that there is no evidence, proof or assertion on the part of the appellants that Kaushalya Bai was the legally married wife of Tikaram and that the claim of the appellants is based only on the assertion of long cohabitation of Kaushalya Bai with Tikaram. Thus, it is clear and undisputed that Kaushalya Bai was the widow of Ramdhani, her only husband, and that she was never married to Tikaram and, therefore, did not acquire the status of a legally married wife.

10. The contention of the learned Senior Counsel for the appellants to the effect that Kaushalya Bai should be presumed to be the legally married wife of Tikaram on the basis of the undenied and undisputed long cohabitation, cannot be accepted in the absence of any assertion of a legally valid marriage. The decisions of the Supreme Court in the cases of *Sibha Hymavathi Devi*

(supra) and *Tulsa & Others* (Supra) relied upon by the learned Senior Counsel for the appellants also do not render any assistance to the appellants as the said decisions lay down the law that in cases where there is a clear and emphatic assertion of marriage followed by long cohabitation, treatment as husband and wife, giving birth to children out of the relationship and proof of the fact that the spouses had no subsisting earlier marriage, then it would give rise to a presumption under section 114 of the Evidence Act, of a valid marriage.

11. In the instant case, in the absence of any assertion of a legal marriage with Tikaram and on the contrary a clear admittance on the part of Kaushalya Bai herself in the Will that she is the widow of Ramdhani and the keep of Tikaram, a presumption of a legally valid marriage with Tikaram, on the basis of long cohabitation as claimed by the appellants cannot be made and, therefore, the judgments of the Supreme Court relied upon by the appellants do not come to their aid as admittedly Kaushalya Bai was not the legally married wife of deceased Tikaram.

12. In view of the aforesaid undisputed facts, I am of the considered opinion that as Kaushalya Bai had no right in the property of Tikaram i.e. Khasra No.50 Area 3.994 Hectares of village Khairi, therefore, she could not have executed a Will in that respect in favour of the appellants. On the basis of the aforesaid analysis, it is also clear that as Kaushalya Bai was not related to the respondent no.1 as asserted by Manaklal himself, therefore, the property inherited by Kaushalya Bai from her husband Ramdhani i.e. Khasra No.92 Area 1.817 Hectares Patwari Halka No.56 of Village Hirapur Bandha was her own property and that Tikaram had no right or share in the same and in such circumstances the claim of respondent Manaklal in the said property on the strength of an assertion that it was his ancestral property or the property of Tikaram was and is misplaced and, therefore, the judgment of the First Appellate Court as far as it relates to decreeing of the suit filed by the respondent Manaklal in respect of Khasra No.92 Area 1.817 Hectares Patwari Halka No.56 of Village Hirapur Bandha suffers from perversity and non-application of mind.

13. In view of the aforesaid finding recorded by me, substantial question of law nos.2 & 3 framed by this Court are answered accordingly.

14. It is next contended that the Will was duly proved by the two attesting witnesses D.W-2 Sharda Prasad and D.W-3 Kishan Singh, as required by Section 63 of the Succession Act and, therefore, the First Appellate Court

could not have reversed the well reasoned finding recorded by the trial court dismissing the claim of the respondents/plaintiffs in that regard.

15. The learned counsel for the respondents, per contra, has pointed out several suspicious circumstances and relied upon the decision of the Supreme Court rendered in the case of *B. Venkatamuni vs. C. J. Ayodhya Ram Singh and Others,* (2006) 13 SCC 449, to contend that mere proof of execution in terms of Section 63 of the Succession Act and Sections 67 and 68 of the Evidence Act, is not sufficient as the courts cannot ignore and, on the contrary, have to take into consideration any suspicious circumstances pointed out by the parties with regard to the genuineness or otherwise of the Will.

16. Before I proceed to decide this question, it is necessary to consider the law in this regard. The law in respect of proof of Wills has been discussed and laid down in detail by the Supreme Court in the case of *H. Venkatachala Iyengar* (supra) in the following terms:-

> "18. What is the true legal position in the matter of proof of wills ? It is well known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose

of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when

the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent

part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of thé satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson* 50 Cal WN 895 : (AIR 1946 PC 156) "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion,

a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

17. This decision of the Supreme Court has been referred with approval by the Five Judges Bench of the Supreme Court in the case of *Shashi Kumar Banerjee* (supra) and has been summarized in para-4 as under:-

"4. The principles which govern the proving of a will are well settled; (see *H. Venkatachala Iyengar v. B. N. Thimmajamma,* 1959 Supp (1) SCR 426; (AIR 1959 SC 443) and *Rani Purnima Devi v. Khagendra Narayan Dev*, (1962) 3 SCR 195; (AIR1962 SC 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the

> will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested."

18. This legal preposition has again been reiterated by the Supreme Court in the case of *B. Venkatamuni* (supra), after taking into consideration several judgments of the Supreme Court including *H. Venkatachala Iyengar* (supra), in the following terms:-

> "24. The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance of legal formalities as regards proof of the Will would subserve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance.
>
> 25. The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the record. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said courts. It applied a wrong legal test and thus, came to an erroneous decision."

19. Similar view has also been taken by the Supreme Court in the case of *S. R. Srinivasa and Others vs. S. Padmavathamma,* (2010) 5 SCC 274 and on taking the same view has further observed in the case of *Balathandayutham and Another vs. Ezhilarasan,* (2010) 5 SCC 770 as follows:-

> "19. The law, thus, laid down in *H. Venkatachala* is still holding the field and this Court has followed the same in various other judgments. (See. *Madhukar D. Shende v. Tarabai Aba Shedage,* (2002) 2 SCC 85; *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao*, (2006) 13 SCC 433 and *Savithri v. Karthyayani Amma*, (2007) 11 SCC 621."

20. In view of the law laid down by the Supreme Court in the aforecited decisions it is clear that while generally a Will is required to be proved in accordance with the provisions of Sections 59 and63 of the Succession Act and Sections 67 and 68 of the Evidence Act, apart from being required to be proved like any other ordinary document, however in cases where the execution of the Will is surrounded by suspicious circumstances, the propounder, apart from the statutory requirements is also required to remove all legitimate suspicions to the satisfaction of the judicial conscience of the court and whether it is necessary or otherwise to examine the scribe or any other witness apart from the attesting witnesses of the Will, would depend on the facts and circumstances of each case.

21. This Court is required to examine the facts of the present case in the light of the aforesaid parameters and principles of law. In the instant case there are several suspicious circumstances surrounding the execution of the Will which have been taken into consideration by the First Appellate Court and have been highlighted by the respondents before this Court. From a perusal of the record it is clear that the Will dated 27.1.1983 is a registered Will but the Registering Officer or any other personnel from the office of the Registrar has not been examined. There is no endorsement in the Will by the Registering Officer as required by Section 58 of the Registration Act nor is there any statement to the effect that Kaushalya Bai was of sound mind and that the Will was read out to and was understood by her. The Advocate, who is said to have drafted the Will Shri Chunnilal Soni has also not been examined nor has he made any endorsement in the Will to the effect that it was drafted in accordance with her instructions and it was read out to Kaushalya Bai who was of sound mind and that she understood and approved it. In fact, the only endorsement on the Will is to the effect that the Will is drafted in the office of the said Advocate. It is also clear from the statement of D.W-1 Hirabai that Kaushalya Bai was about 100 years old and extremely sick and the statement of defendant no.11/respondent no.10 Rameshwar Prasad Dubey that when he went to visit Kaushalya Bai who had suffered injuries on account of her fall, she was not in a fit mental state. It is also clear that though D.W-1 Hirabai has stated that Kaushalya Bai was examined by a doctor at the village and that she was extremely sick, the statement of the doctor who examined her locally or the doctor who subsequently examined her at Jabalpur to whom Kaushalya Bai was taken for treatment, have not been recorded to establish that she was of sound mind or in a fit mental state and was able to understand things at the time when the Will was executed. The facts also establish that Kaushalya Bai died within 10 days of execution of the Will.

22. On a perusal of the statements of D.W-1 Hirabai and D.W-2 Sharda Prasad, it is also clear that while D.W-1 Hirabai states that she had sent her sister Kaushalya Bai to Jabalpur only for treatment, D.W-2 Sharda Prasad has stated that he took her to Jabalpur for execution of the Will after informing some persons in the village but no such person has been examined. There is material contradiction in the statement of the two attesting witnesses D.W-2 Sharda Prasad and D.W-3 Kishan Singh to the extent that while D.W-2 Sharda Prasad stated that he called D.W-3 Kishan Singh to his house and he accompanied them to Jabalpur in the tractor to execute the Will, D.W-3 Kishan Singh in his statement has specifically and categorically denied this assertion and on the contrary has stated that he had gone to Jabalpur on his own with one Mahesh on a motorcycle where he came to know that Sharda Prasad had brought Kaushalya Bai to Jabalpur for treatment and on that count he visited the clinic of the doctor concerned from where they took Kaushalya Bai for execution of the Will to the Advocate and, thereafter for registration. It is also clear from a perusal of the statement of D.W-3 Kishan Singh that though he states that the Will was dictated by Kaushalya Bai and was read out to her and was signed after she approved it, before him but he does not know as to when and who purchased the stamp paper, which incidentally is said to have been purchased on the same day by Kaushalya Bai herself, or as to where the Will was typed. From a perusal of the Will, Exhibit D-1, it is also clear that while Khasra No.92 Area 1.817 Hectares Patwari Halka No.56 of Village Hirapur Bandha has been mentioned in the Will, surprisingly and unusually, there is no mention of Khasra No.50 Area 3.994 Heactares of village Khairi except for identifying it as the land situated in village Khairi, which in the surrounding suspicious circumstances indicates that the person drafting the Will was someone other than Kaushalya Bai and was someone who did not know the particulars of the land situated in village Khairi belonging to Tikaram as this fault of having a selective memory of remembering the details of the land situated in village Hirapur Bandha, which Kaushalya Bai got from her erstwhile husband Ramdhani and forgetting the details of the land situated in village Khairi belonging to Tikaram, could not in normal circumstances be attributed to Kaushalya Bai, and had the Will been prepared on her dictates this discrepancy and omission would not have occurred.

23. From an analysis of the evidence on record it is also undisputed that Kaushalya Bai was about 100 years of age at the time of execution of the Will and was living alone; that she was extremely sick on account of her injuries and though there is assertion by both the parties that they were looking after her however it is also admitted that it is only after her accident and injury that

the appellants took her away and thereafter within 2-3 days got the Will executed by bringing her to Jabalpur and that she died within 10 days thereafter.

24. In view of the aforesaid analysis of the oral and documentary evidence on record, it is clear that while the two attesting witnesses have stated that the Will was prepared on the instructions of Kaushalya Bai, that it was read out to her and that she affixed her thumb impression on the same in front of the attesting witnesses who thereafter signed it, there is total absence of any evidence to the effect that she was in a sound state of mind at the time of execution of the Will inspite of the fact that she was extremely sick and more than 100 years of age nor has any person been examined to explain the absence of any endorsement in the Will either by the Registering Officer or by the Advocate to the effect that the Will was read out to Kaushalya Bai who was of sound mind; that she understood it and thereafter signed it. It is also clear that the appellants did not get the evidence of the doctor who examined Kaushalya Bai locally or the doctor who examined her at Jabalpur recorded to establish that she was in a sound state of mind and that they have not even produced the medical prescription of Kaushalya Bai prepared by the doctor at Jabalpur which in itself could have indicated her state of mind and her physical condition.

25. It is, therefore, apparent that there is no evidence of any independent witness clearly stating that Kaushalya Bai was of sound mind at the time of execution of the Will, that she dictated the Will which on being drafted was read out to her and was understood by her or that she affixed her thumb impression with full comprehension of what she was doing. Surprisingly, though the doctors, the Advocate and the officers and other persons of the Registrar's office who could all have clarified this aspect, were all available and would have been the best witnesses, they have not been examined nor has any explanation for the same been furnished.

26. The aforesaid circumstances when considered with the fact that Kaushalya Bai inspite of being 100 years of age lived in her own house alone and that she was shifted to the house of the appellants only after she suffered the injury and that within 3 days of shifting the Will was executed and that she died within 10 days thereafter, establish the existence of several suspicious circumstances surrounding the execution of the Will which were required to be dispelled but have not been satisfactorily explained by the appellants/ propounders.

27. In view of the aforesaid analysis of the evidence and the law laid down

by the Supreme Court in the above cited cases, I am of the considered opinion that the appellants have failed to dispel the suspicious circumstances surrounding the execution of the Will and, therefore, the finding recorded by the First Appellate Court in respect of the aforesaid issue cannot be found fault with as it does not suffer from any perversity and is based on proper analysis of the evidence on record.

28. As a result, the appeal filed by the appellants is partly allowed only to the extent that the judgment and decree of the First Appellate Court and the claim of the respondents/plaintiffs in respect of Khasra No. 92 Area 1.817 Hectares of Village Hirapur Bandha which was the property acquired by Kaushalya Bai from her erstwhile husband Ramdhani is set aside and stands rejected, while the remaining claims made by the respondents/plaintiffs, as decreed by the First Appellate Court by the impugned judgment and decree dated 25.11.1995, i.e. in respect of Khasra No.50, Area 3.994 Hectares of village Khairi and the house of Tikaram and the finding regarding the Will, are hereby upheld and affirmed. The judgment and decree of the First Appellate Court stands modified accordingly to the extent stated above.

29. In the facts and circumstances, there shall be no order as to the costs.

Appeal partly allowed.

I.L.R. [2013] M.P., 1422
APPELLATE CIVIL
Before Mr. Justice M.K. Mudgal
F.A. No. 206/2002 (Gwalior) decided on 27 June, 2013

GAJANAND & anr. ....Appellants
Vs.
GORDHAN & ors. ... Respondents

A. Civil Procedure Code (5 of 1908), Order 6 Rule 4 - **Pleadings regarding property of Joint Hindu Family - Plaintiff claiming suit property to be of Joint Hindu Family - Not clarified in pleading as to how the property was acquired by the plaintiffs and his brother defendant - Plaintiffs are five brothers but out of them two brothers are not shown as the members of Joint Hindu Family, and their shares are not defined in the suit property - It can be inferred that the entire plaintiff's case is based on baseless and bogus facts. (Paras 13 & 18)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 4 – संयुक्त हिन्दू कुटुम्ब की सम्पत्ति से संबंधित अभिवचन – वादी ने वाद सम्पत्ति, संयुक्त हिन्दू कुटुम्ब की होने का दावा किया – अभिवचन में स्पष्ट नहीं कि सम्पत्ति को वादीगण एवं उसके भाई प्रतिवादी द्वारा कैसे अर्जित किया गया था – वादीगण पांच भाई हैं, परन्तु दो भाईयों को संयुक्त हिन्दू कुटुम्ब का सदस्य नहीं दर्शाया गया और वाद सम्पत्ति में उनका हिस्सा परिनिश्चित नहीं – यह निष्कर्ष निकाला जा सकता है कि वादी का प्रकरण, आधारहीन एवं मिथ्या तथ्यों पर आधारित है।

B. Evidence Act (1 of 1872), Sections 17 & 18 - Admission - **Written statement by L.Rs. of one defendant (seller of suit property), admitting the facts of the plaint, does not affect the right of another defendant (buyer of the property). (Para 16)**

ख. साक्ष्य अधिनियम (1872 का 1), धाराऐं 17 व 18 – *स्वीकृति* – एक प्रतिवादी (वाद सम्पत्ति का विक्रेता) के विधिक प्रतिनिधिगण के लिखित कथन में वाद पत्र के तथ्यों की स्वीकृति से अन्य प्रतिवादी (सम्पत्ति के क्रेता) का अधिकार प्रभावित नहीं होता।

Cases referred :

AIR 1978 SC 484, 2004(2) MPHT 360, 2011(II) MPJR 211, 1963 JLJ SN 14, 2003 MPWN SN 38, 2003 (II) MPJR SN 11, 2003 SAR (CIVIL) 929, 2001 (I) MPJR 113.

R.P. Singh, for the appellants.
Neeraj Shrivastava, for the respondent No.1.
S.K. Sharma, for the respondent No.2.
Bhagwan Raj Pandey, G.A., for the respondent No.3/State.

JUDGMENT

M.K. Mudgal, J. :- The appellants/plaintiffs have filed the appeal under Section 96 of Civil Procedure Code, being aggrieved by the judgment and decree dated 13.09.02, passed by the Court of First Additional District Judge, Guna (Shri J.S. Varma) in Civil Suit No.47A/2000 dismissing the suit for declaration of title and permanent injunction. In this appeal appellants are referred as "plaintiffs" and the respondents as "defendants".

2. The following admitted facts have come on record:-

The plaintiff No.1 Gajanand, plaintiff No.2 Babulal and the defendant No.1 Gordhan are real brothers and are sons of Gyasiram. As plaintiff No.1

Gajanand and defendant No.1 Gordhan have died during pendency of the suit and their legal representatives have already been brought on record. The disputed survey No. 1425/2 area 1.254 hectares in the Khasra Ex-P/1 was entered in the name of defendant No.1 Gordhan as Bhumiswami who had executed the sale deed on 15.1.92 in favour of defendant No.2. Validity of the sale deed was not challenged by the vendor Gordhan in his life time.

3. The facts in brief of the plaint are that the plaintiffs Gajanand, Babulal and defendant No.1 Gordhan were members of the joint Hindu family. After the death of Gyasiram (father) defendant No.1 Gordhan used to look after agricultural operation of the family. Plaintiffs have further alleged that after the death of Gyasiram the disputed property was equally distributed among the three sons of Gyasiram i.e. plaintiffs and defendant No.1. Though the disputed property was in the name of defendant No.1, yet the whole disputed property was managed by the plaintiffs. The disputed agricultural land was divided among the plaintiffs and defendant No.1 orally in presence of Panch before 25 years and subsequently a memo of partition was reduced to writing in the year 1970 between the plaintiffs and defendant No.1. The plaintiffs have further alleged that they are in possession of their respective shares after the oral partition as well as acknowledgment of deed reduced to writing. Defendant No.1 had no right to sell the disputed land to the respondent No.2. The sale deed dated 15.1.92 executed by defendant No.1 in favour of defendant No.2 is not only illegal but also null and void. The disputed property is the joint Hindu family property which was given to the plaintiffs share in the partition. On the basis of the above allegations, the suit for declaration of title and permanent injunction was filed on 9.5.92. By way of amendment additional relief was sought to declare the sale deed dated 15.1.92 executed in favour of the defendant No.2 as null and void.

4. After the death of defendant No.1 during pendency of the suit, his legal representatives filed written statement admitting the entire allegations of the plaint and requested to pass a decree in favour of the plaintiffs as stated in the plaint.

5. The defendant No.2 denying all the allegations made in the plaint has filed written statement that the disputed land is not the property of joint Hindu family of plaintiffs and defendant No.1 Gordhan. On the contrary defendant No.1 Gordhan was the recorded Bhumiswami of the property and he was in possession, owing to which, the defendant No.2 purchased the property from the defendant No.1 after paying entire consideration to him. Defendant No.1 did not challenge the legality of the sale deed. Plaintiffs have no right and title to the disputed land which

was in possession of defendant No.1. After execution of the sale deed, the defendant No. 2 has been in possession of the land as owner. The plaintiffs have filed the suit with the connivance of the defendant No.1 and document of memorandum of partition is a fabricated and a concocted document, on the basis of which, the plaintiffs could not get any right in the property. Submitting the written statement defendant No. 2 has requested to reject the suit.

6. The learned trial Court after framing nine issues and having considered the evidence produced by both the parties has dismissed the suit as the disputed property was not found joint Hindu family property. The learned lower Court has further held that the property was not in possession of the plaintiffs. Defendant No.2 had purchased the disputed land from the Bhumiswami defendant No.1 vide registered sale deed. Hence, the plaintiffs are not entitled to get any relief in the suit. The suit filed by the plaintiffs was rejected vide impugned judgment.

7. The following questions crop up for consideration in this appeal -

A. Whether the disputed agricultural land was joint Hindu family property of plaintiffs and defendant No.1?

B. Whether the plaintiffs are Bhumiswami of the disputed land?

C. Whether the sale deed executed by defendant No.1 Gordhan in favour of defendant No.2 is null and void?

D. Whether the findings of the lower Court are not based on proper reasonings?

8. Heard the arguments of both the parties and perused the record.

9. Learned counsel for the appellant after taking me through the record of the trial Court alongwith the impugned judgment by referring the evidence available on record has submitted that the impugned judgment passed by the learned subordinate Court is illegal and deserves to be set aside as no proper appreciation of evidence has been made by the same. The learned counsel has further argued that the statement of the plaintiffs' witnesses in respect of plaintiffs possession have not been properly appreciated and considered by the trial Court. Besides, the defendant No.1 has admitted the entire claim of the plaintiffs alleged in the plaint, and so the lower Court has committed error in dismissing the suit. The counsel has further contended that the decree for permanent injunction to protect the possession of the plaintiff ought to have been granted by the trial Court in favour of the plaintiff. Learned counsel has

cited the few judgments to buttress his argument.

10. Counsel for respondent No.1 has supported the argument of the plaintiffs.

11. Learned counsel for respondent No.2 opposing the argument advanced by the appellants counsel has submitted that the entire case is based on false and concocted story. The document as alleged the memorandum of partition (Ex-P/5) is a fabricated document which has been prepared by the plaintiffs with the connivance of his brother defendant No.1 after execution of the sale deed dated 15.1.92 by him in favour of defendant No.2. Learned counsel for the respondent No.2 has further submitted that the impugned judgment is based on proper reasonings and appreciation of evidence. Moreover, no legal possession was handed over to the plaintiffs by defendant No.1 who was Bhumiswami of the disputed land. Learned counsel has further submitted that the appeal filed by the appellants is merit less and no sufficient grounds have been made out by the appellants to interfere in the impugned judgment.

12. In civil cases, the pleadings have great importance in deciding the dispute. The object of pleadings is to enable the parties on each side to be fully aware of the issue involved and bringing forward the appropriate evidence. In *M/s Ganesh Trading Co. Vs. Moji Ram*, AIR 1978 SC 484 following observations made in the said decision are relevant in this context :

> "provisions relating to pleadings in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable Courts to determine what is really at issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take".

In absence of pleadings, evidence, if any, produced by parties cannot be properly evaluated.

13. Before adverting to the evidence produced by the plaintiffs, first of all we have to look into the pleading of the plaintiffs. In paras 1 and 2 of the plaint, the plaintiffs have alleged that the disputed property was in the joint ownership of the joint Hindu family. After death of father Gyasiram, defendant no.1 became head of the family. However, it has not been clarified by the plaintiffs as to how the disputed property was acquired by the plaintiffs and defendant no.1 as joint Hindu family property. The plaintiffs have not claimed that the disputed land was earlier owned by their father Gyasiram or it was purchased by the nucleus of joint Hindu

family in the name of defendant no.1. In Mulla Hindu Law (ninth addition at page 218), following property has been defined and stated as follows :

> "joint Hindu family property may be divided according to the source from which, it comes into :
>
> (I). ancestral property and as separate property of coparceners thrown into the common coparcenary stock.
>
> A property jointly acquired by the members of a joint family with the aid of ancestral property, is joint family property. The property jointly acquired by the members of a joint family without the aid of ancestral property may or may not be joint family property,whether, it is so or not, is a question of fact in each case. Joint family property is a creation of Hindu Law and those who owned it, are called coparcerners.
>
> As stated earlier, the plaintiffs have not disclosed source of joint Hindu family property in respect of the disputed land.

14. Indisputably, the disputed land in Khasra Ex.P/1 Samvat 2035 to 2049 was recorded in the name of defendant no.1 Gordhan. As per para 6A and relief clause Para 12 (2) of the plaint, the defendant no.1 executed the registered sale deed on 15.1.1992 in favour of defendant no.2. Admittedly, the disputed land had never been recorded in the name of plaintiffs or their father Gyasiram before execution of the sale deed dated 15.1.1992.

15. As alleged in para 3 of the plaint, the acknowledgment deed of partition was executed between the plaintiffs and the defendant no.1 Gordhan in the year 1970. Moreover, no specific date has been mentioned in the pleadings. The document is unregistered. It is true that the memorandum of partition does not require any registration as held in the cases cited by appellants' counsel namely *Amarnath and others Vs. Nathuram and others* 2004 (2) MPHT 360 and *Suresh Kumar Agrawal and others Vs. State of M.P and another* 2011 (II) MPJR 211. But in this case, Ex.P/5 has been written on a plain paper in a house hold transaction book and as to why the document was not prepared on the stamp paper, no explanation has been given by the plaintiffs. Any document can be easily prepared on a plain paper in the back date where all the parties figuring in the document are agreed about preparation of the same.

16. Learned counsel for the appellants has submitted that the legal heirs of defendant no.1 have admitted the contents of memorandum of partition as well as

allegations of the plaint. In such premises, the plaintiffs were not required to prove the execution of memorandum of partition Ex.P/5 and on that basis it ought to have been concluded by the trial Court that the disputed property is joint Hindu family property. The contention raised by learned counsel does not appear to be correct. Though the legal heirs of defendant no.1 submitting written statement have admitted entire contents of the plaint and requested to pass a decree in favour of the plaintiffs but it has been done by them after execution of sale deed by their father. Under these circumstances, it is inferred that the defendant no.1 and his L.Rs have colluded with the plaintiffs in this suit, whereas, the defendant no.1 had never challenged the legality of the sale deed dated 15.1.1992 executed by him in favour of the defendant no.2 before filing of the suit on 9.5.1992 by the plaintiffs. So far as admission made by the L.Rs of defendant no.1 in the written statement is concerned, has no significance as it is settled law that after parting with the interest by a seller any contrary assertion is not an admission against a buyer. In *Shafiullah Khan Vs. Abdul Wahab* 1963 JLJ SN 14, the Hon'ble High Court has held that the statement of a person could be an admission only if it was made during the continuance of his interest. But once he has parted with his interest and property, his admission is not admissible under Section18 of the Evidence Act. It would be manifestly unjust that a person who has parted with his interest and property should be empowered to divest the right of another claiming under him by any statement which he may choose to make subsequently. The same view has been taken in *Smt. Ahilya Bai Vs. Sardar Bhagat Singh* 2003 MPWN SN 38. In the case in hand, the defendant no.1 had executed the sale deed to the defendant no.2 on 15.1.1992 and thereafter, written statement having admitted, the facts of the plaint filed by the L.Rs of defendant no.1 on 11.8.1999 does not affect the right of defendant no.2.

17. Nemichand (PW1) S/o deceased plaintiff no.1 Gyasiram and the plaintiff Babulal (PW2) both have not stated a single word in their statements in respect of Ex.P/5 which shows that agreement Ex.P/5 was prepared by the plaintiffs with the connivance of defendant no.1 Gordhan who was their real brother. If Ex.P/5 had been in existence since 1970, it would have been acted upon for mutation of title in the name of plaintiffs also but that was not done. The statement of Heeralal (PW5) who has claimed himself to be scribe of Ex.P/5 has no substance to prove Ex.P/5.

18. In paras 4 and 5 of the plaintiff no.2 Babulal's statement, it has come on record that the plaintiffs are five brothers. Why other two brothers have not been shown as the member of joint Hindu family and why their share have

not been defined in the alleged disputed property. Similarly in the said paras, it has also come on record that 60 Bighas land is owned by the five brothers. However, that land has not been pleaded as the property of joint Hindu family and why the land was not partitioned by the plaintiffs vide Ex.P/5. Why all these facts were suppressed in the pleadings. Why only the disputed land which was actually sold by the defendant no.1 to the defendant no.2 has been claimed as the property of joint Hindu family. In view of the facts, it is inferred that the entire plaintiffs' case is based on baseless and bogus facts.

19. The plaintiffs have produced Ex.P/3 certified copy of the report dated 22.3.1992 submitted by Patwari village Aron Halka No.20 Tehsildar in which, possession of the plaintiffs on the disputed land has been stated but the statement of said Patwari has not got been recorded by the plaintiffs and so, Ex.P/3 has no value to prove the plaintiffs' possession. Similarly, Ex.P/4 is a panchnama. The persons signing the panchnama Ex.P/4 have not been examined. Both the documents are created evidence which has no importance. Besides other document Ex.P/5 report submitted by the Revenue Inspector regarding demarcation of the disputed property and panchanama Ex.P/6 have also been produced on record by the plaintiffs, but neither statement of Revenue Inspector nor panch witnesses mentioned in panchnama Ex.P/6 have been got been examined on behalf of the plaintiffs. Therefore, both the documents have no relevance for proving possession of the plaintiffs.

20. Learned counsel for the appellants has further submitted that the findings of lower court regarding possession are also perverse to the recorded evidence as all the plaintiffs witnesses have deposed in their statements and proved possession of the plaintiffs. In spite of that, the suit for injunction was rejected by learned subordinate court erroneously. The plaintiffs witnesses have deposed in their statements regarding the plaintiffs being in possession of the disputed property since more than 20 years ago but the oral statements of witnesses are not credible because, no entry regarding possession has been made in Khasra in the name of plaintiffs till filing of the suit. Indisputably, name of defendant no.1 Gordhan has been recorded as Bhumiswami in the Khasra, hence, presumption under Section 117 of the Land Revenue Code is drawn in favour of the defendant no.1 to this effect that he was in possession of the disputed land till it was sold by him to the defendant no.2. Learned trial Court having discussed the plaintiffs' witnesses' statements in paras 11 and 16, have given the finding that the plaintiffs are not in possession of the disputed property. On perusal of the judgment, it appears that

the findings are based upon proper reasonings. The defendant no.2 Prakash Cahndra purchaser of the property has rebutted the plaintiffs evidence regarding possession of the disputed property. Besides, the possession of the defendant no.2 is based on registered sale deed which was executed by the defendant no.1 in his favour. Consequently, it is held that possession of the defendant no.2 is legal possession.

21. Learned appellant's counsel placing reliance on the decision rendered by this Court in *Pooran Vs. Shakuntala and Another* 2003 (II) MPJR SN 11 has submitted that even title of the plaintiffs was not proved in this case, a decree of permanent injunction ought to have been granted in favour of the plaintiffs on the basis of possession. This judgment does not help to the plaintiffs as the possession of the plaintiffs has not been found proved as discussed earlier. Similarly, the appellants' counsel has placed reliance on the judgment rendered in *Ram Gowda (D) by L.Rs. Vs. M.Varadappa Naidu (D) by L.Rs and another* 2004 SAR (Civil) 107 and RVE *Venkatchala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and another* 2003 SAR (Civil) 929. The aforesaid judgments also do not help in this case to the plaintiffs as the cited judgments are totally based on different facts and circumstances from the case in hand.

22. Learned counsel for the appellants further placing reliance on the judgment rendered in *Bhagwan Das Vs. State of M.P and another* 2001 (I) MPJR 113 has argued that the defendant no.2 has not produced original sale deed in this case, owing to which, possession and title of the defendant no.2 cannot be held. This judgment is also on different facts because, the suit was filed by coparceners of joint Hindu family whereas, in the case in hand, the plaintiffs right have not been found proved as discussed earlier.

23. Going through the entire recorded evidence, this Court comes to the conclusion that finding given by the learned lower Court dismissing the suit are neither perverse nor contrary to the recorded evidence. No flaw has been found in the impugned judgment to interfere with it. Consequently, affirming the impugned judgment and decree, the appeal filed by the appellants is hereby dismissed.

24. Costs of this appeal for respondents be borne out by the appellants. Advocate fees be included, if certified as per rules.

Decree be drawn up accordingly.

Appeal dismissed.

I.L.R. [2013] M.P., 1431
APPELLATE CRIMINAL
Before Mr. Justice U.C. Maheshwari
Cr.A. No.1163/1996 (Jabalpur) decided on 20 June, 2012

BETA ALIAS RAM KINKER ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 42 - **Intimation regarding information from the informer about having possession of contraband not sent to superior officer - No Rojnamcha Sanha produced to prove that telephonic message was given to the C.S.P. - Provisions of Section 42 of Act, 1985 not complied. (Para 7)**

क. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 42 – विनिषिद्ध पदार्थ का कब्जा होने की मुखबिर की सूचना के बारे में वरिष्ठ अधिकारी को प्रज्ञापना नहीं भेजी गयी – यह साबित करने के लिए रोजनामचा सान्हा पेश नहीं किया कि सी.एस.पी. को दूरभाष संदेश दिया गया था – अधिनियम 1985 की धारा 42 के उपबंधों का अनुपालन नहीं हुआ।

B. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 50 - Option - **On search of body, key was recovered by which suitcase was opened and contraband was found - Prosecution had to comply with the mandatory provisions of Section 50 - Mere consent letter of the appellant prepared by seizing officer to carry out his search by said police officer does not fulfill the requirement of Section 50. (Para 8)**

ख. स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 50 – विकल्प – शरीर की तलाशी लेने पर, चाबी बरामद हुई जिससे सूटकेस खोला गया और विनिषिद्ध पदार्थ पाया गया – अभियोजन को धारा 50 के आज्ञापक उपबंधों का अनुपालन करना चाहिए – अपीलार्थी का मात्र सहमति पत्र जिसे जब्ती अधिकारी ने उक्त पुलिस अधिकारी द्वारा उसकी तलाशी लिये जाने हेतु तैयार किया गया था, धारा 50 की अपेक्षाओं को पूरा नहीं करता।

C. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8 & 20 - Identification of Contraband - **There is no averment in the seizure memo that on what basis the alleged substance was stated to be the Ganja - It is not stated that either by tasting or by**

smelling it was found to be Ganja - It is also not mentioned that by whom and by which instrument, the substance was weighed - How the contraband was handled after its seizure is also not explained - Possibility of tampering the substance is also not ruled out. **(Paras 9 & 10)**

ग. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धाराएँ 8 व 20 – विनिषिद्ध पदार्थ की पहचान – जब्ती मेमो में कोई प्राक्कथन नहीं कि किस आधार पर अभिकथित पदार्थ को गांजा कहा गया – यह नहीं कहा गया कि या तो चखकर या सूंघकर उसे गांजा होना पाया गया – यह भी उल्लिखित नहीं कि किसके द्वारा तथा किस यंत्र से पदार्थ को तौला गया – जब्ती पश्चात विनिषिद्ध पदार्थ को कैसे संभाला गया यह भी स्पष्ट नहीं किया गया – पदार्थ के साथ छेड़छाड़ की संभावना से भी इंकार नहीं।

D. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 55 - Safe Custody - **Entry of Malkhana Register neither produced nor proved - It cannot be assumed that the substance was kept in safe custody.** **(Para 11)**

घ. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 55 – सुरक्षित अभिरक्षा – मालखाना रजिस्टर की प्रविष्टि न तो प्रस्तुत की गई और न ही साबित की गई – यह उपधारणा नहीं की जा सकती कि पदार्थ को सुरक्षित अभिरक्षा में रखा गया था।

E. Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20 - **Person who took the samples to F.S.L. not examined - Rojnamcha entries pertaining to the departure of police officer taking samples to F.S.L. not produced - It cannot be assumed that same samples were sent to F.S.L.** **(Para 12)**

ङ. स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20 – उस व्यक्ति का परीक्षण नहीं किया गया, जो नमूनों को एफ.एस.एल. ले गया था – नमूना लेकर पुलिस अधिकारी की एफ.एस.एल. को रवानगी से संबंधित रोजनामचा प्रविष्टियों को प्रस्तुत नहीं किया गया – यह अवधारणा नहीं की जा सकती कि वही नमूने एफ.एस.एल. भेजे गये थे।

Cases referred :

(2011) 5 SCC 123, AIR 1980 SC 1314.

Surendra Singh with *Manish Mishra*, for the appellant.
Umesh Pandey, G.A. for the respondent.

JUDGMENT

U.C. MAHESHWARI, J. :- This appeal is preferred by the appellant/ accused being aggrieved by the judgment dated 9.7.96 passed by the Special Judge (Constituted under the Narcotic Drugs and Psychotropic Substances Act, 1985) in Special Case No.88/95 convicting the appellant under section 8/20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') with a direction to undergo for RI 2 years with fine of Rs.5000/-, in default of payment of fine, further RI one year. As per findings of the above mentioned judgment, the appellant was found in possession of 1.950 Kg of the contraband substance the Ganja.

2. The facts giving rise to this appeal in short are that on dated 10.8.95 Shri Phool Singh Tekam, Sub Inspector of Police, being posted as Incharge of Social Security Scott (Samajik Suraksha Dasta) Satna, received information from the informer that some unknown person, in a attachi, carrying contraband substance the Ganja, is standing at Dhawari Square. He apprised such information through telephone to City Superintendent of Police Satna and also endorsed the same in the Rojnamcha Sanha Ex.P/10 at police station Kotwali. Subsequent to it, accompanied with the staff member ASI N.P.Shrivastav, Head Constable Ramdev and four constables proceeded towards the aforesaid square where near the Girls School, he found the appellant with a attachi. At the same time City Superintendent of Police also reached there. In presence of such senior police officer and the independent witnesses, namely, Munna Singh alias Gopal (PW 2) and Prem Lal (PW 3), he took the consent of the appellant to carry-out his search and pursuant to that the same was carried out. In such search from the possession of the appellant a key was found by which the attachi was opened in which two packets covered with paper were found. Out of them, in one packet one k.g and in another packet 950 gram of contraband substance the Ganja was found. The same was seized and out of aforesaid both the seized packets, the sample of 30 grams were taken out. The samples and the remaining substance was sealed, Dehati Nalishi was drawn-up and thereafter the appellant was arrested. Subsequent to the aforesaid proceedings, he accompanied with accused and alleged substance came to the Police Station Kotwali, Satna where he endorsed his arrival in the Rojnamcha Sanha of such Police Station. He also informed about the arrest of the appellant and the seizure of the substance and Dehati Nalishi to the City Kotwali, on which, the FIR for the offence of section 20 of the Act was registered against the appellant. Thereafter the

aforesaid samples of the seized substance were sent to the FSL Sagar for its chemical examination from where the report was received according to which the same was found to be the contraband substance the Ganja. After holding the investigation on establishing the prima facie circumstance against the appellant for the aforesaid offence, he was charge sheeted for his prosecution under the aforesaid section.

3. On evaluation of the charge-sheet, the charge of section 20 of the Act was framed against the appellant. He abjured the guilt, on which, the trial was held, after recording the evidence of the prosecution as well as the defence, on appreciation, after holding guilty to the appellant, he was punished with the sentence as mentioned above. The same is under challenge in this appeal.

4. Shri Surendra Singh, learned Senior counsel of the appellant after taking me through the record of the trial court along with the impugned judgment said that the investigating agency had utterly failed to comply the mandatory provisions of sections 42 and 55 of the Act. In the lack of such mandatory compliance, the impugned conviction of the appellant is not sustainable. Besides this, he also assailed the impugned judgment on other grounds saying that from the place of seizure of the substance in which manner it was handled by the investigating officer and his companions upto the Police station and after reaching to the Police Station in which manner it was dealt with or was kept in whose safe custody, have not been proved. Even in this regard neither any Rojnamcha entry nor any register of Malkhana of the concerning Police station has either been produced or proved on the record. In the lack of it, it could not be deemed that after seizing the substance the same was properly handled and kept in some safe custody from where the sample was sent to the FSL for its chemical examination. According to him, unless the chain of keeping the seized substance and its sample in the safe custody and handled by the responsible person properly upto reaching the samples to the FSL is proved, the appellant could not be convicted mere on the basis of FSL report. Because in the lack of such material evidence it could not be assumed or deemed that the sample of the same substance, as alleged seized from the appellant, was sent to the FSL. He further said that except the Rojnamcha Sanha Ex.P/10 in which the entry regarding information of the informer was endorsed and the entry of the Rojnamcha (Ex.P/13) regarding arrival of said Police Officer from the place of seizure to the Police Station after seizing the substance, no other relevant Rojnamcha entries has neither been produced nor proved on the record. The entry in the Rojnamcha regarding departure of the aforesaid police

officer Phool SinghTekam (PW 4) accompanied with the other police officials and the independent witnesses to the alleged place of the seizure, has neither been produced nor proved on the record. In the lack of it, it could not be assumed that on the date of the incident such police officials visited the place of incident shown by the informer. In continuation he said that the search memo of the appellant as well as the seizure memo of the alleged substance and the other papers, as alleged prepared during the course of investigation in presence of the witnesses, have not been supported by the alleged witnesses Munna alias Gopal (PW 2) and PremLal (PW 3). In the available scenario of the case, mere on the basis of the testimony of the Investigating Officer Phool SinghTekam (PW 4), the appellant could not be convicted. He also said that by which process and person the alleged substance was weighed on the spot, the same has not been stated in the seizure memo of the substance or the memo prepared for preparing the samples (Ex.P/5 and P/6). In addition it was also argued that the entire seized substance was neither produced before the trial court nor marked the articles and in the lack of it, in view of the principle laid down by the Apex Court in the matter of *Ashok Vs. State of M.P.*- (2011) 5 SCC 123, the impugned conviction could not be sustained. With these submissions, he prayed for extending the acquittal to the appellant by setting aside the impugned judgment by allowing the appeal.

5. On the other hand, Shri Umesh Pandey, learned Govt. Advocate, by justifying the impugned conviction and the sentence of the appellant said that the same is based on sound appreciation of the evidence and also is in conformity with law. It does not require any interference at this stage for extending the acquittal to the appellant. He further said that in the course of the investigation, the aforesaid mandatory provision of the Act has been duly complied with by the investigating agency so on such count also the appellant does not deserve for acquittal. He fairly conceded that the alleged entire substance was neither produced nor marked as article in the trial court but no such objection was taken by the appellant in the trial court nor any demand to produce the same was made on behalf of the appellant, therefore, the appellant is not entitled to get any benefit on this count and prayed for dismissal of the appeal.

6. Having heard the counsel at length, keeping in view their arguments, after perusing the record, I am of the view that the impugned conviction of the appellant under the aforesaid section, due to following reasons, is not sustainable.

7. It is apparent on record that on receiving the information from the

informer about having the possession of contraband substance Ganja with the appellant after recording the same in the Rojnamcha Sanha Ex.P/10 at P.S City Kotwali, Satna, its intimation in compliance of section 42 of the Act, was not sent to the senior police officials. Although, in this regard, an explanation has been putforth by the prosecution that such information was given through telephonic message from PS Kotwali to the office of City Superintendent of Police but in that regard the concerning Rojnamcha is neither produced nor proved on the record. In the lack of such Rojnamcha, it could not be assumed or deemed that such information was given to the City Superintendent of Police, Satna. It is also not proved that in which manner the independent witnesses were called at the Police Station before leaving the Police Station for the place of incident. In this regard neither any Rojnamcha nor the panchnama has been produced or proved on the record. This makes the presence of independent witnesses with the police party doubtful.

8. Besides the aforesaid, I have not found any panchnama showing that the appellant was informed in writing about his right to be searched in presence of some Gazetted officer or through Magistrate. It is undisputed fact that initially on carrying out the search of the appellant some key was found from his possession by which the attachi was opened. In that circumstance, in order to prove that the key was recovered from the pocket of the appellant, the prosecution has to carryout the search of the appellant after apprising him the right to be searched in the manner provided under the law. In the lack of it, mere on the basis of the consent letter of the appellant prepared by the seizing officer with the signatures of the above named independent witnesses giving consent by the appellant to carry out his search by said police officer does not fulfill the legal requirement of search in accordance with the section 50 of the Act or the concerning provision of the Cr.P.C.. Whenever the search of the person is required and there is no time with the police officer to get the search warrant from the concerning Magistrate or the Authority then he could have been searched only after preparing the panchnama stating the reasons to carry-out the search without getting the search warrant from the Magistrate or the concerning Authority. So, in such premises also the initial search was not carried out by the investigating agency in accordance with the procedure prescribed under the aforesaid provisions of the law.

9. On further examination of the matter, I have found that before taking the search of the appellant, the police officials and other witnesses were given their search to the appellant by Ex.P/3 in which no implicating thing was found

in their possession. Thereafter, on carrying out the search of the appellant, a key of the attachi was found in his pocket for which panchnama Ex.P/3 was prepared. Such key was also seized by Ex.P/4 and on opening the attachi, the alleged substance in two different packets of 1 kg and 950 grams, as stated above, were found in such attachi. The same was seized by Ex.P/5. I have not found any averment in the aforesaid seizure memo Ex.P/5 showing that on what basis the alleged substance was stated to be the Ganja because it is not stated that either by tasting by tongue or by smelling through nose it was found to be the Ganja. So in such way also the seizure memo appears to be incomplete on material count. It is also apparent that by which person and in which manner and by which instrument it was weighed on the spot. The same has not been mentioned in the panchnama. Even on perusing the panchnama Ex.P/6, I have not found in which manner the sample of 30 grams of such substance was weighed and sealed separately because no person has been examined in this regard to show that such substance was weighed by him. Even the panchnama of weighing the substance has not been prepared. So, in such premises both seizure panchnama and the sample panchnama Ex.P/5 and P/6 become suspicious.

10. Besides the aforesaid after seizing the alleged substance and arresting of the appellant from the place of seizure upto the police station and further till sending the sample to the FSL Sagar, in which manner the seized substance and the samples were handled by the investigating agency, the same has neither been explained nor proved on the record by examining the concerning witnesses by whom the same was handled. In such circumstance, the inference could be drawn that from the place of incident the sample was handled by various persons at different places without preparing any panchnama or making any entry in the Rojnamcha or in other record kept for this purpose. In the lack of such material evidence and deposition of concerning witnesses, it could not be assumed that the sample and the seized substance was safely and properly handled by the prosecution agency till sending the sample to the FSL Sagar and also subsequently. The Rojnamcha entries in this regard have also neither been filed nor proved on the record. In such circumstances the possibility to temper the substance and its sample could not be ruled out. The benefit of this lacuna left by the prosecution should be given to the appellant as laid down by the Apex Court in the matter of *The State ofRajasthan Vs. Daulat Ram*-AIR 1980 SC 1314 in which it was held as under :-

"Where the samples of opium changed several hands before reaching the public analyst and yet none of those in whose custody the samples remained were examined by the prosecution to prove that while in their custody the seals on the samples were not tampered with, the inevitable effect of the omission was that the prosecution failed to rule out the possibility of the samples being changed or tampered with during the period in question- a fact which had to be proved affirmatively by the prosecution. Consequently, the accused could not be convicted under S.9A. In such a case, the prosecution could not be allowed to fill-up the gaps in the prosecution story at the appellate or revisional stage."

.....Placitum

11. Apart the above from the place of seizure, on reaching the seizing officer to the Police Station the seized substance was kept in the safe custody in this regard, the Rojnamcha entry and the entry of the malkhana register has neither been produced nor proved on the record. In the lack of it, it could not be assumed that the entire substance and the sample were kept in the safe custody in compliance of the provision of section 55 of the Act till sending the same to the FSL.

12. It is also apparent that the person who took the samples as carrier to the FSL has neither been examined nor any explanation in this regard has been putforth on the record. Even the concerning Rojnamcha entries the departure of the police official taking the sample to FSL, has neither been produced nor proved on record. In order to prove that the same sample prepared on the spot were sent to FSL, the prosecution was bound to produce and prove the concerning entries of the Rojnamcha whereby the same was kept in the Malkhana of the Police Station and also by which the samples were taken-out from such Malkhana for sending the same to FSL. In the lack of such positive and admissible evidence, mere on the testimony of the Investigating Officer, it could not be assumed that the same sample was sent to the FSL and pursuant to it, it could not be said that the prosecution has proved beyond reasonable doubt that the seized alleged substance from the possession of the appellant was contraband substance the Ganja.

13. In the aforesaid premises, it is apparent that the prosecution has failed to prove the compliance of section 42 and 55 of the Act.

14. It is also apparent that even after arrival to the Police station any information

regarding the seized substance from the appellant with all relevant requisite particulars has not been sent to the senior officials in writing. No document in this regard has been produced on record. If such information was sent through telephonic message even then in the lack of proving the concerning Rojnamcha entries such version of the prosecution could not be relied on.

15. Apart the above, it is apparent fact on record that the independent witnesses of all the aforesaid panchnama including the seizure memo, namely, Munna alias Gopal (PW 2) and Prem Lal (PW 3) have not supported to the prosecution case. On the contrary on recording their deposition they turned hostile. Thus, in the lack of independent supporting evidence and in the light of the aforesaid lacunas in the case left by the prosecution, mere on the testimony of the Investigating Officer Phool SinghTekam (PW 4) the impugned conviction of the appellant could not be sustained.

16. In view of the aforesaid discussion, there is no option with the Court except to hold that the trial court has committed grave error in holding guilty to the appellant for the alleged offence of the Act for having possession of 1 kg and 950 grams contraband substance the Ganja. Pursuant to it, the appellant deserves to be acquitted from the alleged charge.

17. After coming to the conclusion that the trial court has committed error in holding guilty to the appellant for the alleged offence, taking into consideration that the alleged substance was neither produced nor marked an article before the trial court, I do not find fit to consider such question or in any case to remand the matter to the trial court under section 386 of the Cr.P.C to extend such opportunity to the prosecution in the matter as even after producing and marking the same as article, the aforesaid technical lacunas left by investigating agency could not be cured by the prosecution. Therefore, this question raised by the appellant's counsel does not require any consideration in the present matter.

18. In view of the aforesaid discussion, this appeal is allowed and the impugned judgment of conviction and sentence of the appellant is hereby set aside. Pursuant to it, he is acquitted from the charge of section 8/20 of the Act. Consequently, his awarded punishment is also set aside. His bail bonds are hereby discharged. The amount of fine, if deposited, be refunded to him after due verification.

19. The appeal is allowed as indicated above.

Appeal allowed.

I.L.R. [2013] M.P., 1440
APPELLATE CRIMINAL
Before Mr. Justice J.K. Maheshwari
Cr.A. No. 433/1997 (Indore) decided on 24 January, 2013

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

Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act (33 of 1989), Sections 2(c), 3(1)(v) - Caste Certificate - **Prosecution has to prove by cogent and an impeachable evidence that complainant falls within castes, races or tribes or parts of or groups within such castes, races or tribes which have been notified as Scheduled Castes or Tribes - Caste certificate issued by competent authority ought to be produced to discharge such burden - Mere saying of complainant that he belongs to Scheduled Caste or Tribe is not sufficient - Prosecution has failed to prove that complainant belongs to Scheduled Caste - Consequently charge under Section 3(1)(v) of the Act is also not found proved. (Paras 7 to 14)**

अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धाराऐं 2(सी), 3(1)(v)– जाति प्रमाण पत्र – अभियोजन को तर्कपूर्ण एवं संदेह से परे साक्ष्य द्वारा साबित करना चाहिए कि शिकायतकर्ता ऐसी जाति, वर्ण या जनजाति अथवा उक्त जाति, वर्ण या जनजाति के भीतर के भाग या समूह के अंतर्गत आता है, जिसे अनुसूचित जाति या जनजाति के रुप में अधिसूचित किया गया है – उक्त भार के उन्मोचन हेतु सक्षम प्राधिकारी द्वारा जारी किया गया जाति प्रमाण पत्र प्रस्तुत किया जाना चाहिए – शिकायतकर्ता का मात्र यह कहना कि वह अनुसूचित जाति या जनजाति का है, पर्याप्त नहीं – अभियोजन साबित करने में असफल रहा कि शिकायतकर्ता अनुसूचित जाति का है – परिणामस्वरुप अधिनियम की धारा 3(1)(v) के अंतर्गत आरोप भी साबित नहीं पाया।

Cases referred :

2006 Cri.L.J. 2234, 2006(4) MPLJ 17, 2003(2) MPWN 79, 2012 C.L.R. (M.P.) 765, 2013 Cr.L.J. 76 (CG).

Vivek Singh with *K.K. Gupta,* for the appellants.
Manish Joshi, P.L. for the respondent.

JUDGMENT

J.K. MAHESHWARI, J. :- This appeal is directed against the judgment of conviction dated 23.4.1997 passed in Sessions Trial No.6/93 by the Second Additional Sessions Judge, Neemuch whereby the appellants were held guilty for the charge under Section 147 of IPC and also for the charge under Section 3(1)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short 'Prevention of Atrocities Act') and sentenced to undergo one year RI with fine Rs.1000/- and six months RI with fine Rs.1000/-,in default three months and one month additional RI for each charges respectively, and both the sentences were directed to run concurrently.

2. The prosecution story as alleged is that on 9.1.1991 at about 3.00 P.M. the incident has taken place in village Guthlai. It was alleged that complainant-Shankar ploughing the disputed fields since last 10-12 years though mortgaged with the accused persons. On the date of incident, he was grazing the cattle along with his sons, namely, Bagdiram and Shivnarain. At that time, accused Mohan asked to leave possession and come out from the field purchased by them. On being said by complainant that the fields were merely mortgaged and they are in possession, then all the accused persons hurled abuses for taking possession and assaulted by means of lathi thereby the complainant and other persons received injuries whereupon the offence under Sections 147, 148, 323, 341 and 325 of IPC and Section 3(1)(v) of the Prevention of Atrocities Act was registered.

3. On filing charge sheet before the Chief Judicial Magistrate it was committed to the Court of Session. The charges were framed for the offence under Sections 147, 148, 323, 325 and 341 of IPC as well as Section 3(1)(v) of the Prevention of Atrocities Act. The accused persons have abjured their guilt and took a defence of false implication with a view to create pressure and to restrain them from cultivation of land. The Trial Court recorded the finding proving the charge under Section 3(1)(v) of the Prevention of Atrocities Act because complainant-Shankarlal in his statement described himself to be of sub-caste 'Jatia' which falls in 'Jatav' caste, and no cross-examination has been made however considering the uncontroverted testimony, held that the complainant belong to the Scheduled Caste community. It has further been held that the accused persons were trying to wrongfully dispossess the complainant interfering with the enjoyment of the right of use over the land, therefore the charge under Section 3(1)(v) of the Prevention of Atrocities Act

was found prove. Similarly, as per the evidence brought on record it was observed that the accused persons have tried for rioting by constituting unlawful assembly in prosecution of the common object, however they were found guilty of the said charge, however held guilty for the said charges also. It is made clear here that the charges framed under Sections 148, 323, 325 and 341 of IPC were not found prove however for the said charges accused persons were acquitted.

4. Shri Vivek Singh with Shri K.K.Gupta, learned counsel representing the appellants has assailed the finding of conviction for the charge under Section 147 of IPC and submitted that without having the assistance of any substantive charge to commit the offence finding of conviction cannot be recorded. In the present case, the charges under Section 323, 325 and 341 of IPC have not been found prove though the charge of Section 147 was with the aid of Section 323 and 325 of IPC, however merely for rioting, the accused person cannot be convicted under Section 147 of IPC. So far as the conviction under Section 3(1)(v) of the Prevention of Atrocities Act is concerned, it is submitted by him that the prosecution by unimpeachable evidence has failed to prove that the complainant belongs to scheduled caste community, however mere testimony of the complainant is not sufficient to prove them the members of scheduled caste community. In support of such contention, reliance has been placed on a judgment of the Bombay High Court in the case of *Ashok K. Chintawar Vs. State of Maharashtra,* 2006 Cri I.J.2234 and urged that in absence of certificate of a scheduled caste to which complainant belongs, the conviction cannot be allow to stand, therefore, prayed that the impugned Judgment may be set aside, allowing this appeal.

4. Per contra Shri Manish Joshi, learned Panel Lawyer appearing on behalf of the respondent/State contends that as per the statement of Shankarlal (PW-1), it is clear that he is of 'Jatia' sub caste which falls within 'Jatav' caste and no effective cross-examination has been made by the defence on the said testimony, however relying upon such testimony the conviction has rightly been directed for the charge under Section 3(1)(v) of the Prevention of Atrocities Act while for offence under Section 147 of IPC, it is submitted that after appreciation of evidence to prove the said charge has rightly been recorded, however this Court may look into the matter and pass appropriate order.

6. After hearing learned counsel appearing on behalf of the parties, first of all the issue with respect to poving of the charge under section 147 of IPC is required to be dealt with. Section 147 of IPC specifies the punishment for rioting. The rioting has been defined under Section 146

whereby it is clear that whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly then every member is guilty of the offence of rioting. As per the prosecution, it is alleged that in furtherance to the common object, accused persons reached on the field and asked to deliver the possession of the land and assaulted to the complainant side by means of lathi, kicks and fists. It is true that charge under Section 323 and 325 framed against the appellants were not found prove in absence of cogent evidence but by the presence of the appellants causing unlawful assembly has been fully established by the statement of Shankarlal (PW-1), Bagdiram (PW-2), Ramesh alias Rameshwar (PW-3) along with lathi and they reached on the field and asked from Complainant to deliver possession. Thus ingredients of rioting specified under Section 146 making unlawful assembly by five or more persons has been fully established from the evidence. In such circumstances, trial Court has not committed any error to prove the charge under Section 147 of IPC against the appellants.

7. Now it is to be examined that to prove the charge under Section 3(1)(v) of the Prevention of Atrocities Act, the sufficient material is available on record or not. In this context the definition of scheduled caste and scheduled tribe enumerated under Section 2(1)(c) of the Act requires consideration, however it is reproduced as under:-

> 2. Definition.-(1) In this Act unless the context other wise requires,-
>
> (c) "Scheduled Castes and Scheduled Tribes" shall have the meaning assigned to them respectively' under clause (24) and clause (25) of article 366 of the constitution.

8. The provision of Section 3(1)(v) of the Act is also required to be seen which is reproduced as under. :-

> 3. Punishments for offences of atrocities.- (1) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe,-
>
> (v) wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights over any land, premises or water;

9. In view of the foregoing facts, It is apparent that if a person of a scheduled caste or scheduled tribe falls under clause (24) and (25) of Article 366 of the Constitution of India and has been wrongfully dispossessed from his land or premises or interfered with the enjoyment of his rights over the land, premises or water, by the persons not being the member of the scheduled caste or scheduled tribe shall be deemed to have committed the offence of prove the said charge. Clause (24) and (25) of Article 366 specifies the definition of scheduled caste and scheduled tribe which are reproduced as under:-

> "366. Definitions.- In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say -
>
> (24) "Scheduled Caste" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purposes of this Constitution;
>
> (25) "Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purposes of this Constitution;"

10. In view of the foregoing. it is clear that such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under Article 341 and 342 be called as scheduled castes or scheduled tribes for the purpose of Constitution of India. Article 341 makes it clear that the President with respect to any State or Union territory and where it is a State after consultation with the Governor by public notification specify the castes, races or tribes or parts of or groups within castes, races or tribes shall be called to be the scheduled castes or scheduled tribes in relation to that State or Union territory as the case may be. In the said context, it is required to be seen that the prosecution has established a case that the complainant belongs to a particular caste or parts of groups or races within the caste which falls within the notified scheduled castes or scheduled tribes to prove the charge under Section 3(1)(v) of the Prevention of Atrocities Act at home. In this respect, after going through the record it can safely be observed that the prosecution has not submitted any caste certificate to prove that complainant belongs to the scheduled caste community. As per the statement of Shankar Lal (PW-l) and Bagdi Ram (PW-2) and the Investing officer, it is nowhere described that the complainant is of 'Jatia' sub caste which falls within 'Jatav' caste notified

by the Presidential notification. In the present case, only evidence is of the complainant indicating that he is of 'Jatia' sub-caste which is in 'Jatav' caste is on record. It can safely be observed that while putting a defence by the accused under Section 313 of Cr.P.C., they had denied the said fact on having no knowledge and the allegation of hurled abuse is incorrect. In view of the foregoing discussion and the evidence brought in the present case, it can safely be held that merely saying by the complainant to state that he belongs to Jatia sub caste is not enough, it is required to be prove by the prosecution by the cogent and unimpeachable evidence that the complainant falls within the castes, races or tribes or parts of or groups within such castes, races or tribes which has been notified as Scheduled Castes or Scheduled Tribes. In absence thereof, a caste certificate issued by competent authority ought to be produced by the prosecution discharging such burden, therefore the offence as alleged under Section 3(1)(v) of the SC/ST Act has not been made out. In this regard it can safely be observed that while specifying the offences under sub-section (1) to (xvi) of Section 3 of the Act, it is clear that different act indicating commission of offence has been described and in every sub-section it has been made clear that the action relates to atrocities of a member not being a scheduled castes or scheduled tribes with the member of the scheduled castes and scheduled tribes is punishable. In such circumstances, it is incumbent upon the prosecution to prove that the complainant belongs to scheduled caste or scheduled tribe community and the member not being scheduled caste or scheduled tribe committed any of the offence specified in Section 3(1) to (xvii) of the Act. In such circumstances, it can be observed that filing of caste certificate is sine-qua-non, or the legal or cogent oral unimpeachable evidence specifying the said ingredients ought to be produced to prove the offences of Atrocities Act. My view fortifies from the judgment of this Court in the case of *Bharat Singh Vs. State of M.P.* reported in 2006 (4) MPLJ 174. Para 4 of the said judgment is relevant which is reproduced as under :-

> "4. After hearing the learned counsel for the parties and perusing the entire record, this Court is of the considered view that the conviction of the appellants is not sustainable because the prosecution has failed to establish by adducing cogent and reliable evidence that the complainant (PW-1) Remeshwar belonged to the Scheduled Caste or Scheduled Tribe community. In the court statement Rameshwar (PW-1) has deposed that he belongs to BALAI caste but no-where he has stated that his caste falls within the

> category of scheduled caste or scheduled Tribe. None of the prosecution witnesses has stated so though the apellants have admitted that the complainant belong to BALAI community but that itself is not sufficient to establish that the complainant belonged to the scheduled caste community. Learned trial Court, without any evidence on record, has held in para 8 of the judgment that the complainant Rameshwar (PW-1) and Sobalsingh (PW-2) belong to the Scheduled caste community. The prosecution has not filed any caste certificate issued by the duly competent authority to prove that the caste of the complainant Rameshwar falls within the category of Scheduled caste. Filing of caste certificate is sine-qua-non."

11. In the case of *Hukum Singh Vs. State of M.P,* 2003 Vol (2) MPWN (79) it has been held that the victim must belong either to a scheduled caste or scheduled tribe ought to be established by unimpeachable evidence. On failing to prove by the prosecution, the said charge cannot be found established. In the said context, the judgment of the Bombay High Court in this case *Ashok K. Chintawar* (supra) is also relevant. In para 6 of the said judgment, the court has observed as under.:

> 6. For this purpose the learned counsel for the appellant relied on a judgement of this Court in *Ashabai Ganeshrao Vs. State of Mah.* Reported at 1999(2) Mah. L.J. 36. In that case too the complainant's Statement that he belonged to Matang Community had not been challenged. Yet the Court held that prosecution ought to have brought on record cast certificate of the complainant. In the instant case, the accused had specifically denied that the complainant belonged to Madia tribe and had specifically alleged that the complainant belonged to Gowari caste. In view of this, since it was incumbent on the prosecution to establish that the complainant belonged to Scheduled Tribe by unimpeachable evidence, which the prosecution failed to do the conviction under section 3(1) (xi) of the Atrocities Act cannot be sustained."

12. Recently this Court in the case of *Tulsiram Vs. State of Madhya Pradesh* reported in 2012 C.L.R. (M.P.) 765 has held that the victim ought to have prove her caste by producing the caste certificate, mere oral evidence is not sufficient to

assume that her caste covered under the Act. Similarly, Chhatisgarh High Court in a recent judgment in the case of *Ashraf Khan Vs. State of Madhya Pradesh*, reported in 2013 Cr.L.J. (CG)76 has observed that filing and proving the caste certificate is a sine qua non to prove the offence under the Act.

13. In view of the foregoing legal position, and looking to the prosecution evidence so brought on record, this court is having no hesitation to hold that the statement of complainant is not sufficient to prove that he belongs to the scheduled caste community and the atrocities regarding offence under Section 3(1)(v) of the Prevention of Atrocities Act has been committed with him. It is to be held that mere oral evidence that appellants belong to 'Jatia' sub-caste, which is in the 'Jatav' caste is not enough. It is required to be proved that 'Jatia' caste falls within the castes, races or parts of or groups within the caste specified in the presidential notification issued under Article 341 of the Constitution of India for the purpose of State or Union Territory as the case may be. In the present case prosecution has not filed any caste certificate issued by the competent authority proving the fact that the complainant belongs to sub-caste Jatia which falls within the Jatav caste notified by the presidential notification. Prosecution has also not brought unimpeachable, cogent, oral evidence of the Investigating Officer to prove the fact that the Jatia sub-caste falls within the caste Jatav, which is notified as a Scheduled Caste for the purpose of State or Union territory. In absence of the aforesaid legal evidence charge under Section 3(1) (v) of Prevention of Atrocities Act is not found prove, even on having the evidence of reaching the appellants on spot and by using hurled abuse for delivery of possession to the complainant. Thus, for the charge under Section 3(1)(v) of Prevention of Atrocities Act, the appellants are acquitted.

14. Accordingly the appeal filed by the appellants is hereby allowed in part. The appellants are acquitted for the charges under Section 3(1)(v) of Prevention of Atrocities Act and for the charge under Section 147 of IPC, the finding of conviction is hereby maintained. On the point of sentence, it is seen from the record that all the appellants have undergone the sentence for six days and the sentence under Section 147 of IPC is not mandatory. Considering the aforesaid, sentence already undergone by the appellants is sufficient. Thus, the bail bonds of the appellants shall stand discharged.

Appeal Partly allowed.

I.L.R. [2013] M.P., 1448
APPELLATE CRIMINAL
Before Mr. Justice R.C. Mishra
Cr.A. No. 2500/2011 (Jabalpur) decided on 14 March, 2013

PANKAJ SHAH ...Appellant
Vs.
STATE OF M.P. ...Respondent

A. ***Penal Code (45 of 1860), Section 307 - Attempt to murder - Medical Evidence*** - **Complainant asserted that the bullet had passed through and through his right thigh - No exit wound was found - No bullet or pellets embedded inside thigh were found - No bony injury was noticed in x-ray - Evidence of complainant incompatible with the medical evidence.** **(Para 7)**

क. दण्ड संहिता (1860 का 45), धारा 307 – हत्या का प्रयत्न – चिकित्सीय साक्ष्य – शिकायतकर्ता का प्राख्यान कि गोली उसकी दांयी जांघ के आर पार हो गई थी – निकासी की कोई चोट नहीं पाई गई – जांघ के अंदर धंसी कोई गोली या छर्रा नहीं पाया गया – कोई अस्थि चोट, एक्स रे में दर्शित नहीं – शिकायतकर्ता का साक्ष्य, चिकित्सीय साक्ष्य से असंगत।

B. ***Evidence Act (1 of 1872), Section 9 - Test Identification Parade*** - **Complainant has admitted that the appellants were shown to him in the hospital prior to the T.I.P. - Test Identification is of no consequence.** **(Para 9)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 9 – पहचान परेड – शिकायतकर्ता ने स्वीकार किया कि पहचान परेड से पूर्व उसे अपीलार्थीगण को चिकित्सालय में दिखाया गया था – पहचान परेड निष्फल।

C. ***Penal Code (45 of 1860), Section 307 - Recovery of Weapon*** - **Independent seizure witnesses did not support prosecution - Act of showing the accused to the complainant prior to holding of T.I.P. shows the interestedness of the Investigating officer - Recovery not proved.** **(Para 12)**

ग. दण्ड संहिता (1860 का 45), धारा 307 – शस्त्र की बरामदगी – स्वतंत्र जब्ती साक्षियों ने अभियोजन का समर्थन नहीं किया – शिकायतकर्ता को पहचान परेड करने से पूर्व, अभियुक्त को दिखाने का कृत्य, अन्वेषण अधिकारी की हितबद्धता दर्शाता है – बरामदगी साबित नहीं की गई।

Case referred :

AIR 2008 SC 904.

A. Usmani, for the appellant.
Puneet Shroti, P.L. for the respondent/State.

JUDGMENT

R.C. MISHRA, J. :- These appeals are interlinked as preferred against the judgment dated 19/10/2011 passed by Additional Sessions Judge, Waidhan, District Singrauli in S.T. No.250/2010, whereby appellant Pankaj Shah was convicted and sentenced as under -

Convicted under Section	sentenced to
307 of the IPC	undergo R.I. for 10 years, and to pay a fine of Rs.500/-, in default to suffer R.I. for 1 month.
394 of the IPC	undergo R.I. for 7 years, and to pay a fine of Rs.500/-, in default to suffer R.I. for 1 month.
3 read with 25(1-A) of the Arms Act, 1959	undergo imprisonment for 3 years, and to pay a fine of Rs.300/- in default to suffer imprisonment for 1 month.
7 read with 27(2) of the Arms Act	undergo imprisonment for 7 years, and to pay a fine of Rs.500/- in default to suffer imprisonment for 1 month.

with the direction that the custodial sentences shall run concurrently.

whereas appellant Sunil Kumar Soni was convicted and sentenced as under-

Convicted under Section	sentenced to
307 of the IPC	undergo R.I. for 10 years, and to pay a fine of Rs.500/-, in default to suffer R.I. for 1 month.
394 of the IPC	undergo R.I. for 7 years, and to pay a fine of Rs.500/-, in default to suffer R.I. for 1 month.

with the direction that the custodial sentences shall run concurrently.

2. Prosecution story, in short, may be narrated thus -

(i) On 4.7.2009, after withdrawing an amount of Rs.30,000/- from his account with Waidhan Branch of Union Bank of India, complainant Dinesh Kumar Verma (PW4), who was working as Fitter in the NCL Project at Vindhya Nagar, Singrauli, started for Jayant on a bicycle. As about 1:00 p.m., as he reached near the boundary wall of NCL near village Harrai, two unknown persons, who had covered their faces with Gamchhas, came from behind on a motorcycle and stopped in front of the bicycle to intercept the same. One of them, while giving threat to kill by showing a Katta asked to handover the money and on being bitten on cheek, fired a shot that landed on Dinesh's right thigh. Immediately thereafter, both the offenders fled away on the motorcycle.

(ii) Upon the FIR (Ex.P-11) lodged by Dinesh Kumar at the Police Outpost Jayant of P.S. Waidhan, a case under Sections 307 and 393 of the IPC was registered. Dinesh was immediately sent to Nehru Shatabdi Chikitsalay, Jayant. Dr. Amrit Kumar Tiru (PW2), characterizing the thigh injury as gunshot wound, advised X-ray examination and referred the case to Dr. Rajendra Prasad Sahu (PW10). Dinesh Kumar remained admitted to the Hospital till 16.7.2009 for treatment of the injury.

(iii) During investigation, appellants were apprehended and on 10.7.2009, weapon of offence viz. Katta and the motorcycle used for commission thereof, were recovered from the house of appellant Pankaj. Thereafter, on 12.8.2009, at the Test Identification Parade conducted by B.L. Biharia (PW9), the Executive Magistrate, in Sub-jail, Waidhan, Dinesh was able to identify the appellants as the persons involved in the incident. The seized Katta along with underwear and trousers said to have been worn by Dinesh Kumar at the relevant point of time, were forwarded to FSL, Sagar for chemical examination. Corresponding report indicated that the bullet holes found on the clothes could be caused by a shot fired from the seized Katta.

3. The appellants pleaded false implication by the police.

4. Legality and propriety of the impugned convictions have been challenged on the ground of what has been termed as mis-appreciation of the evidence on record. In response, learned Panel Lawyer, while making reference to the incriminating pieces of evidence on record, has submitted that the convictions are justified on merits.

5. In the light of the rival contentions, the evidence brought on record may be re-appreciated, for the sake of convenience, under the following sub-heads -

(A) VERACITY OF ALLEGATIONS AS RECORDED IN THE FIR

6. Although, complainant Dinesh Kumar (PW4) substantially reiterated the recitals in the FIR (Ex.P-11) yet, no documentary evidence to show that he had withdrawn a sum of Rs.30,000/- from his bank account was tendered. His assertion that the appellant Pankaj had even tried to take out the money, kept in the back pocket, by putting hand in the side pocket of the trousers also did not find place in the FIR or his case-diary statement (Ex.D-1). Further, his conduct of not shouting for help and moving towards his office on the bicycle after sustaining the gunshot injury on the right thigh even when the miscreants had fled away, was apparently unnatural. Moreover, Mohd. Tariq Farooqui (PW3) who, as per the statement of Dinesh, had met him near Abhedya Ashram and on being apprised of the incident, had taken him on his motorcycle to the Police Outpost leaving the bicycle in a nearby hut, has not claimed to have seen the money sought to be looted. However, as per his statement, story narrated by Dinesh Kumar suggested involvement of as many as three persons in the incident. This apart, as the obvious object for the incident was to rob the complainant of money and the injury was allegedly caused upon his refusal to part with the same, the assertion that the miscreants had left the spot leaving the money in the pocket of the complainant, was also improbable.

7. Treating Surgeon Dr. Rajendra Prasad Sahu (PW10) clearly admitted that he had not found any bullet or pellets embedded inside thigh injury, characterized by Dr. Amrit Kumar Tiru (PW2), who had the first occasion to examine Dinesh Kumar, as the entry wound by cartridge. According to him, in the X-ray examination also, no bony injury was noticed. As no exit wound was noticed, the statement made by Dinesh to the effect that the bullet had passed through and through his right thigh was also incompatible with the medical evidence.

8. Under these circumstances, the prosecution version, as reflected in

the FIR, with regard to the origin of the incident and the manner in which it had taken place, was not acceptable.

(B) TEST IDENTIFICATION PARADE

9. In view of a candid admission made by Dinesh Kumar that both the appellants had already been shown to him in the Hospital where he had remained admitted till 16.7.2009, the so-called test identification conducted by Executive Magistrate B.L. Biharia (PW8) on 12.8.2009 was of no consequence. Moreover, the assertion made by the Magistrate that he had conducted two different T.I. parades separately also ran contrary to contents of the corresponding Memo (Ex.P-8).

10. Shri A. Usmani, learned counsel appearing for appellant Pankaj, has also tried to highlight the omission, as brought on record in Paragraph 14 of Court Statement of Dinesh with regard to his act of biting Pankaj, who had allegedly caused the gunshot injury, on cheek. However, while allowing the corresponding question, learned trial Judge had overlooked that this fact was clearly reflected in the FIR (Ex.P-11) as well as his case diary statement (Ex.D-1). But, in none of these previous statements, Dinesh had asserted that on being shown, he would be able to identify at least one of the offenders, whose cover on the face had slipped down while being bitten on the cheek. Further, in the Arrest Memo (Ex.P-3), that was prepared on 10.7.2009 i.e. 5 days after the incident in question, no bite mark on Pankaj's cheek was shown. In such a situation, Dinesh's claim that he was able to identify Pankaj on the basis of the teeth mark on the cheek did not inspire confidence.

11. For these reasons, on one hand, evidence of complainant Dinesh as to identification of the appellants at the T.I. parade was totally valueless and on the other, in absence of corresponding details as to their appearance and identities, his sworn testimony suggesting that both the appellants had tried to rob him and in the course of robbery, Pankaj had authored the thigh injury, was not worthy of credence:

(C) RECOVERY OF FIREARM AND MOTORCYCLE

12. Manoj Kumar Soni (PW13), the Investigating Officer, claimed to have recovered a Yamha motorcycle, a Katta (Article A1) and a cartridge (Article A2) from the house of appellant Pankaj on the basis of information furnished by him only but none of the panch witnesses viz. Abdul Rahim (PW1) and Mohd. Yunus (PW3) supported the contents of corresponding memo (Ex.P-

1) and list of seizure (Ex.P-2). An apparently false denial of the fact that the appellants were shown to Dinesh (PW4) in the hospital, as admitted by him and his friend Mohd. Tariq (PW5), was sufficient to indicate interestedness of the Investigating Officer in the matter. This apart, since the case of attempt of robbery by using a firearm failed, the prosecution for the offences under the Arms Act also failed (*Sumersinbh Umedsinh Rajput v. State of Gujarat* AIR 2008 SC 904 referred to).

13. To sum up, in the light of serious infirmities in the prosecution evidence, the appellants were entitled to benefit of doubt. As such, none of the convictions in question deserves to be affirmed.

14. In the result, the appeals are allowed. The impugned convictions and consequent sentences are hereby set aside. Instead, the appellants are acquitted of the respective offences. The fine amount, if deposited, be refunded.

15. The appellants are in custody. They shall be released forthwith if not required in any other case.

16. A copy of this judgment be retained in the connected appeal.

Appeals allowed.

I.L.R. [2013] M.P., 1453
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr. A. No. 1783/2007 (Jabalpur) decided on 17 May, 2013

MAHENDRA @ MOTA & ors. ...Appellants
Vs..
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 149 - Unlawful Assembly **- Deceased and his sons were cutting grass in their field when two accused persons came there and asked the deceased about his village - The deceased was attacked by appellants - It cannot be said that the appellants had not formed an unlawful assembly within the meaning of Section 141 of I.P.C. - Use of force by members of unlawful assembly gives rise to offence of rioting which is punishable under Section 147 or 148 of I.P.C. (Para 29)**

क. दण्ड संहिता (1860 का 45), धारा 149 – विधिविरुद्ध जमाव – मृतक व उसका पुत्र अपने खेत में घास काट रहे थे जब दो अभियुक्त वहां आये और मृतक से उसके गांव के बारे में पूछा – मृतक पर अपीलार्थीयों द्वारा हमला किया गया – यह नहीं कहा जा सकता कि अपीलार्थीगण ने धारा 141 भा.द.सं. के अर्थान्तर्गत विधिविरुद्ध जमाव निर्मित नहीं किया – विधिविरुद्ध जमाव के सदस्यों द्वारा बल का प्रयोग, बलवा के अपराध को उत्पन्न करता है जो भा.द.सं. की धारा 147 या 148 के अंतर्गत दण्डनीय है।

B. Penal Code (45 of 1860), Sections 149, 302, 325 - Unlawful Assembly - Liability **- Liability of each assailant under any other provision of I.P.C. would depend on the role played by them and their object during unlawful assembly - Appellants No. 2 and 3 caused injuries on the hands and legs of deceased - It is clear that their object during unlawful assembly was not to cause murder of deceased - Appellants No. 2 and 3 are guilty of offence under Sections 325/149 of I.P.C. (Paras 30 & 31)**

ख. दण्ड संहिता (1860 का 45), धाराऐं 149, 302, 325 – विधिविरुद्ध जमाव – दायित्व – भा.द.सं. के किसी अन्य उपबंध के अंतर्गत प्रत्येक हमलावर का दायित्व विधिविरुद्ध जमाव के दौरान उनके द्वारा निभाई गई भूमिका और उनके उद्देश्य पर निर्भर होगा – अपीलार्थी क्र. 2 व 3 ने मृतक के हाथों और पैरों में चोटें कारित की – यह स्पष्ट है कि विधिविरुद्ध जमाव के दौरान उनका उद्देश्य मृतक की हत्या कारित करना नहीं था – अपीलार्थी क्र. 2 व 3 भा.द.सं. की धाराऐं 325/149 के अपराध के दोषी हैं।

Cases referred :

AIR 1981 SC 1392, AIR 1983 SC 289, AIR 2011 SCW 5295, AIR 1982 SC 70, (2006) 10 SCC 297, 2006 AIR SCW 2987.

S.C. Datt with *Siddharth Datt,* for the appellants.
Amit Pandey, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :

VIMLA JAIN, J. :- Appellants preferred this appeal under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment dated 10.8.2007 passed by Special Judge, (Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Harda, in Sessions Trial No.61/2007, whereby each of the appellants has been convicted and sentenced as under with the direction to run both the jail sentences concurrently :-

Conviction	Sentence
Under Section 302/149 of IPC	Life imprisonment and fine of Rs.1000/- each, in default of payment of fine, rigorous imprisonment for one year each.
Under Section 148 of IPC	Rigorous imprisonment for one year with fine of Rs.500 each, in default of payment of fine, R.I. for three months to each appellant.

2. The charges against the appellants for offences under sections 148, 302, 302/149, 294, 506 of the I.P.C. and 3(2)(5) of the S.C. and S.T. (Prevention of Atrocities) Act that on 8.9.2005 the appellants armed with deadly weapons like axe and butts of GENTI etc. and with an intention to commit murder of deceased Shivnarayan, formed an unlawful assembly and entered into the field of Santosh situated at village Bajniya and in furtherance thereto abused him by referring to his caste and assaulted deceased Shivnarayan and committed his murder.

3. The prosecution story in brief is that on 8.9.2005 at about 6:00 pm deceased Shivnarayan was cutting grass in his field along with his son Santosh (PW1). At that time two persons came and asked Shivnarayan as to where he lives. Shivnarayan replied that he lives in village Bajniya, then the said two persons inflicted blows of butts of GENTI on his legs, Shivnarayan tried to run, but the said persons continued inflicting him and as a result of such blows Shivnarayan fell down. Then accused Mahendra @ Mota armed with axe, his brother Kallu @ Lokendra armed with butt of GENTI, two other persons armed with butts of GENTI, all six with common object and with intention to kill the deceased, assaulted him. Accused Mahendra inflicted butt of axe blow on the head of deceased and others also inflicted butts of GENTI blows on the deceased due to which he sustained injuries on both of his legs and hands. Santosh, son of deceased, tried to rescue his father. Accused Mahendra threatened to assault him with axe but he ran away from there and shouted. Then accused persons anticipating the deceased to be dead, fled away. On hearing the shout of Santosh, Premnarayan (PW4) and Safi Chacha, working in nearby fields, reached the spot. Then Santosh carried his father Shivnarayan on a bullock-cart to Police Station Timarni and lodged the FIR, Ex.P/3. The then Station House Officer Shri G.L.Ahirwar (PW2) registered the report, Ex.P/1.

4. Thereafter, injured Shivnarayan was sent to Community Health Center,

Timarni, for medical examination along with Constable No.32. Dr.Govind Kushwaha, (PW13) medically examined the injured and prepared MLC, Ex.P/39. Nayab Tahsildar, Jeewanlal Thakur (PW7) recorded the dying declaration of deceased vide Ex.P/29 and referred the injured to District Hospital, Harda, for further treatment where during treatment injured Shivnarayan succumbed to his injuries. The intimation of death was given by Dr.V.K.Khandelwal (PW16) to Police Station, Harda, vide Ex.P/30 on the basis of which Head Constable Dalpat Singh (PW.8) registered Marg vide Ex.P/31 and as the crime was of Police Station Timarni, Mahesh Jat (PW9) registered the Marg at Police Station Harda vide Ex.P/32.

5. During investigation the then Dy. S.P. (AJAK) Suresh Thakur (PW17) prepared the spot map, Ex.P/2, and seized 'chappal' from the spot vide seizure memo, Ex.P/13. Rakesh Tiwari (PW14) issued the Safina form, Ex.P/3 and issued notices to the witnesses. Thereafter, he prepared Panchnama (Ex.P/4) of the body of Shivnarayan and sent the dead body for postmortem vide Ex.P/34. At Govt. Hospital, Harda, Dr.R.B.Patel, (PW12) examined the dead body of the deceased on 9.9.2005 and submitted postmortem report vide Ex.P/35. Suresh Thakur, PW17, the then Police Sub Inspector (AJAK) P.S. Harda, has arrested accused Mahendra, Lokendra, Vijay Chouhan, Shyam Yadav, Mangal and Jitendra vide Ex.P/14 to P/19 and accused Narendra and Krishna Kumar vide Ex.P/40 and 41. On the basis of memorandum of Mahendra, Vijay Chouhan, Shyam and Mangal, Ex.P/20 to P/23, axe was seized vide seizure memo, Ex.P/24, butts of GENTI were seized vide seizure memo, Ex.P/25 and P/26 and a LATHI was seized vide seizure memo, Ex.P/27 and vide memorandum of Krishna, Ex.P/42, butt of GENTI was recovered vide seizure memo, Ex.P/43. Thereafter, seized 'chappal' was identified by Shivshankar, (PW18). Bloodstained clothes of deceased Shivnarayan were brought by Constable Vishal from Hospital vide Ex.P/33. Seized axe and butts of GENTI were sent to Dr.R.B.Patel, vide Ex.P/36 who gave his query report, Ex.P/37. Test Identification Parade of the arrested accused was conducted by Smt.Farida Khan, Naib Tahsildar, PW19, vide Ex.P/5 to P/8. During the investigation, Nazri Naksha (Ex.P/47) was prepared by Patwari Panchamlal (PW15). The seized articles were sent to Forensic Science Laboratory, Gwalior, vide Ex.P/44 for their analysis and a report was received from FSL Gwalior vide Ex.P/46.

6. After investigation, charge sheet was filed under Sections 148, 302, 302/149, 294, 506 of the IPC and 3(2)(v) of the S.C. /S.T. (Prevention of

Atrocities) Act against the appellants and other three accused persons before the Court of Chief Judicial Magistrate, Harda, who committed the case to the Court of the learned Special Judge (S.C./S.T. Act) Harda. On being charged with the offences under the aforesaid sections, the appellants/accused pleaded not guilty and complete innocence and claimed to be tried with the prayer that they had been falsely implicated in the case.

7. In order to bring home the charges against the appellants, the prosecution has examined twenty witnesses and proved the documents (Ex.P/1 to P/49) on record. The appellants did not examine any witness in support of their defence.

8. The learned Court below, after scanning the evidence on record did not find the charges proved against three accused persons namely Jitendra, Narendra and Mangal, but it found the charges proved against the appellants and convicted them and sentenced them, as stated at the outset.

9. This appeal has been filed by the appellants assailing the said judgment of conviction and order of sentence.

10. Learned counsel for the appellants has urged that the entire evidence on which the prosecution relied consists of evidence of interested persons, who are related with the deceased Shivnarayan, therefore, it is not reliable. He further submitted that the identification parades of appellant no.2 Shyam and appellant no.3 Krishna Kumar were conducted after 20 days of their arrest, therefore, TIP should not be accepted. Learned counsel for appellants further submitted regarding appellants no.2 and 3 that even if it is assumed that an unlawful assembly had been formed by six accused persons, it cannot be said that common object of the said assembly was to cause murder of deceased Shivnarayan, inasmuch as even according to the prosecution story, appellants no.2 and 3, who were armed with butts of GENTI, hit on the legs of deceased Shivnarayan and not on vital part of the deceased. In such circumstances, according to the learned counsel, the appellants no.2 and 3 cannot be made liable for the offence of murder with the aid of section 149 of I.P.C.

11. On the other hand, learned Government Advocate for the State has supported the finding of the trial Court.

12. We have considered the arguments advanced by learned counsel for the parties and perused the record.

13. PW.13 Dr.Govind Singh Kushwaha, who examined Shivnarayan on 8.9.2005 at 8:45 pm, proved his MLC report (Ex.P/39), and found following injuries on his person:-

"1. Swelling over left arm 8 x 6 cm size.

2. Swelling over left forearm 6 x 4 cm size near waist.

3. Swelling over right arm 8 x 4 cm with laceration.

4. Swelling over left forearm 4 x 4 cm size

5. Swelling over chest backside right thoraco lumber area 10 x 4 cm size.

6. Swelling over right leg below knee joint 4 x4 cm size.

7. Swelling over left leg 7 x 6 cm size near knee joint.

8. Swelling over left thigh 8 x 4 cm size laterally.

9. Lacerated wound over head frontal area".

General condition not fair, conscious, oriented and able to give oral statement. B.P. 100/60 mmHg, Pulse 60 per minute. Opinion :- "Injuries were caused within 24 hours, may be caused by hard and blunt object. X-ray was advised".

14. PW.12 Dr.R.B.Patel conducted the postmortem of deceased Shivnarayan vide Ex.P/35 and found following injuries on dead body:-

EXTERNAL INJURIES

1. "Lacerated wound on mid parietal region 3" x 1/2" x bone deep.

2. Deformity right upper arm with diffuse swelling 6" x4" with fracture of bone.

3. Deformity of right forearm above wrist joint, 4" x 2" with possibility of fracture of radius and ulna bone.

4. Deformity left upper arm with diffuse swelling 6" x 4" with possibility of fracture in bone.

5. Diffuse swelling right knee joint and lower limb upper half

6. Contusion lateral aspect right thigh 4" x 2".

7. Swelling left knee joint".

On internal examination, the doctor found following injuries :-

"1) Fracture of both parietal bones, membrane torn and brain matter damaged with local haemorrhage.

2) Internal organs of chest were healthy. Right chamber of heart was filled with blood, left was empty.

3) Stomach was filled with large amount of fluid. Semi digested meal was present in small intestine while digested meal was present in large intestine.

4) Liver, pleaha, were healthy.

5) Both humerous bones were broken, right radius and ulna bones were also broken".

In his opinion, cause of death of Shivnarayan is shock due to injury to the vital organs, i.e. brain and haemorrhage. All injuries were antemortem in nature. Period between death and postmortem examination would be 24 hours.

15. There is no challenge from any side to the fact that death of deceased Shivnarayan was homicidal. Therefore, looking to the nature of injuries, death of deceased Shivnarayan appears to be homicidal.

16. In this case, sole eye witness is Santosh (PW1) who is son of the deceased. The law is well settled that merely because the witness is related, it is not a ground to discard his evidence. The Apex Court has held in many cases that the relatives are only available for giving evidence having regard to the trend in our present society where independent witnesses are rarely available. It is of course true that the evidence of related witness has to be carefully analysed and scrutinised. Santosh (PW.1), son of deceased has stated that on the date of incident he along with his father had gone to cut grass. When they were cutting grass, at around 4 PM, two persons came inside their fields and asked his father about his village. His father replied that he lives in village Bajniya. They started assaulting his father after his reply. He deposed that they assaulted his father with the butts of GENTI. His father ran 2-3 steps then Mahendra @ Mota armed with axe and his brother Lokendra @ Kallu and two others armed with butts of GENTI, also assaulted his father. He tried to rescue his father then Mahendra @ Mota ran behind him with axe. He further deposed that Mahendra caused injury with the blunt side of axe on the head of his father and others inflicted blows by butts of GENTI on hands and legs of his father. They had broken both the hands and had assaulted on

his legs. While assaulting his father, the accused persons were abusing by referring to their caste. Then accused persons fled away from the spot. The accused persons had broken both the hands of his father and there were 9 injuries on the legs and back of his father.

17. He further stated that when accused persons fled away, Premnarayan and Safi Chacha of nearby fields reached the spot. His father was carried to Timarni on a bullock-cart. At police Station Timarni FIR was lodged by his father. His father put thumb impression on the FIR. Thereafter, his father was sent to CHC, Timarni. His father was referred to Harda Hospital. On the way he became unconscious and expired at Harda Hospital. Evidence of Santosh (PW1) finds substantial corroboration from the first information report (Ex.P/1) lodged soon after the occurrence and dying declaration. On careful scrutiny of his deposition, it was found trustworthy. The version given by the witness appears to be clear, cogent and credible, therefore, there is no reason to discard his statement. It does not appear as to why the witness would falsely rope in the appellants in such a heinous crime and spare the real culprits to go scot free.

18. Now we come to the next submission of the counsel for the appellants about reliability of identification parade. The learned senior counsel has placed reliance on the decisions in the case of *Wakil Singh and others Vs. State of Bihar,* AIR 1981 SC 1392 and *Bali Ahir and others Vs. State of Bihar,* AIR 1983 SC 289.

19. Santosh (PW1) has deposed that during the TIP, he identified accused Krishna, Mangal and Shyam. In his cross examination, he clearly replied that he had identified accused persons in jail. Before identification he did not see them anywhere after the incident. Suresh Thakur (PW17) Dy.S.P. (AJAK) in his cross examination, stated that accused persons were produced in the court in covered (BAPARDA) condition. This fact was also mentioned in case diary. Thus, there is no substance in the contention that the eyewitness had seen the accused/appellants no.2 and 3 before they were put up for T.I. Parade. Smt.Farida Khan, Executive Magistrate (PW19) himself appeared as a witness and stated that she has taken all the precautions and complied with relevant legal formalities at the time of identification parade. Therefore, the TIP is fully reliable. Thus, we are satisfied that the evidence of identification parade is unimpeachable and we see no reason to discard the same. The facts and circumstances of both precedents (supra) are clearly distinguishable from those

of the case in hand. Therefore, both these authorities do not help the appellants.

20. Naib Tahsildar recorded the dying declaration of deceased Shivnarayan at CHC Timarni vide Ex.P/29, which reads as under :-

मरणासन कथन

नाम– शिवनारायण – स्थान – शास0 चिक0 टिमरनी

पिता का नाम – बाबू लाल – दिनांक – 08–09–2005

उम्र – 40 वर्ष – समय – 9:45 रात्रि

जाति – मेहरा

व्यवसाय – चौकीदारी (कोटवार)

पता – ग्राम बाजनिया तह0 टिमरनी जिला हरदा

मैं शपथ पूर्वक सत्य कथन करता हूँ कि मैं उपरोक्त पते का स्थायी निवासी हूँ। यह कि आज दिनांक 8–09–2005 को लगभग 4:30 बजे सांय मुझे ग्राम बाजनिया के दो व्यक्ति नाम मोटा उर्फ महेन्द्र वल्द हुकुम सिंह तथा कल्लू वल्द हुकुम सिंह तथा बाहर के चार व्यक्ति जिनका नाम मुझे मालूम नहीं मारने आये, उन सभी व्यक्तियों ने मुझे गैटी का दस्ता एवं कुल्हाड़ी के मुदाल से मारे, मेरा पुत्र संतोष साथ में था जब मुझे मारने लगे तो लड़का संतोष साथ छोड़कर भाग दिया, मारने वाले मुझे दुपर के खेत में पटक कर चले गये । इसके पश्चात मेरा पुत्र मेरे पास आकर मुझे देखकर ग्राम वासियों को चिल्लाया मुझे बचाने हेतु प्रेम सिंह एवं सफी मेरे पास पहुंचे। उन्हीं लोगों के द्वारा मुझे शासकीय अस्पताल टिमरनी में लाया गया है। मुझे चोट दोनों हाथों तथा दोनों पैरों तथा सिर में आयी है। मेरे द्वारा किये गये उपरोक्त कथन सत्य है।

पढ़कर सुनाया स्वीकार किया ।

तहसीलदार

21. We have examined the dying declaration contained in Ex.P/29. On its perusal, it is manifest that Dr.Govind Kushwaha (PW13) had given the certificate that the deceased was in a state of total consciousness during her dying declaration. His statement had been recorded by Jeewanlal Thakur (PW7) Naib Tahsildar. The thumb impression of the deceased had also been taken on his dying declaration. He (PW7) had maintained immense equanimity during dying declaration and stood embedded to his version before the trial court. PW13 Dr.Govind Kushwaha and PW7 Jeewanlal Thakur, Naib Tahsildar are public officers. Nothing has been shown that they had any axe to grind against the accused persons.

22. Thus, we are of the considered opinion that the dying declaration had

been recorded correctly and there is nothing to persuade us to disbelieve or discard the same. The dying declaration is free from any kind of reproach and there is no trace of doubt. Therefore, the same can be accepted and on its foundation the conviction can be recorded.

23. Now coming to the contention relating to the motive. Shivdayal (PW3) stated that his sister Kshamabai and Prembai, mother of appellant no.1 Mahendra, quarreled due to pipeline of water. Prembai abused Kshamabai by filthy language. At that time deceased Shivnarayan pacified the matter. The above statement of witness does not prove any motive. However, it is also true that in the absence of motive, case of prosecution cannot be thrown out in view of assertion of eyewitness coupled with medical evidence. We found support from judgment in the case of *State of Rajasthan Vs. Anjum Singh and another,* AIR 2011 SCW 5295.

24. As regards appellant no.1 Mahendra, learned counsel submits that the trial court has committed an error of law in holding that the offence under section 302/149 of the I.P.C. has been made out against him. According to him, the offence deserves to be converted under section 304 Part I of the I.P.C. In support of his contention, learned counsel has placed reliance on two decisions of the Supreme Court in the cases of *Jarnail Singh Vs. State of Punjab,* AIR 1982 SC 70 and *Palanisamy @ Sembattayan Vs. State of T.N.,* (2006)10 SCC 297.

25. In *Rajinder Vs. State of Haryana* (2006 AIR SCW 2987), the Apex Court discussed about the culpable homicide and murder as well as distinction between the aforesaid two offences. In para-16 of the said judgment, the Apex Court held as under:-

> "16. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the Legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences:-

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done.	Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.
	INTENTION
(a) With the intention of causing death; or	(1) With the intention of causing death; or
(b) With the intention of causing such bodily injury as is likely to cause death; or	(2) With the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or
	(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
	KNOWLEDGE
(c) With the knowledge that the act is likely to cause death.	(4) With the knowledge that the act is so imminently dangerous that it must in all probability cause death. death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death of such injury as is mentioned above."

26. The question with regard to nature of offence has to be determined in the facts and circumstances of the case, the nature of the injury whether it is on vital or non-vital part of the body, the weapon used, the circumstances in which the injuries are caused and manner in which the injuries are inflicted. All these are relevant factors, which determine the intention, role or knowledge

of the offenders and the nature of offence committed by them.

27. In this case, there was no quarrel between deceased and the appellants/ accused. Two accused persons had inflicted injuries on the legs of the deceased and he ran 2-3 steps in helpless condition, then appellant Mahendra dealt blow with axe on the vital part of his head. This shows that appellant/accused Mahendra inflicted injury to deceased without any cause or provocation and with intention to murder him. On internal examination of deceased, Dr.R.B.Patel (PW12) found that "fracture of both parietal bones, membrane torn and brain matter damaged with local haemorrhage". He opined that cause of death is shock due to injury to the vital organs, i.e. brain and haemorrhage. All injuries were antemortem in nature and period between death and postmortem examination is within 24 hours. In view of the aforesaid reasons, the contention advanced on behalf of appellant no.1 cannot be accepted. Therefore, we find that the learned trial Judge committed no error in holding him guilty under section 302 of the Indian Penal Code. His conviction under sections 302 and 148 of the Indian Penal Code is, therefore, affirmed.

28. Next question is that whether the appellants/accused had formed an unlawful assembly within the meaning of Section 141 of the Indian Penal Code, which is defined as an offence under section 149 of the Code. Section 149 of the Code reads thus :-

> 149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.-- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

On perusal of the above-said section, it is clear that this section has two parts. Its former part makes a person guilty of such offence if he commits such offence as a member of the assembly in prosecution of the common object of that assembly. Its latter part makes a person guilty if he commits an offence which is not by itself the common object of the unlawful assembly but members of such assembly knew that the same is likely to be committed in prosecution of the common object of the assembly.

29. From the evidence of Santosh (PW1), son of deceased, as well as dying declaration of deceased Shivnarayan, it is found that when the deceased and his son were cutting grass in their field, two persons came inside their field and asked the deceased about his village. When deceased replied, they assaulted him with the butts of GENTI, still the deceased could run 2-3 steps. In the meantime, appellant Mahendra @ Mota assaulted him with axe and his brother Lokendra @ Kallu and two others also assaulted him with butts of GENTI. If this is the manner in which the accused persons had come to the spot and assaulted the deceased, it cannot be said that accused/appellants had not formed an unlawful assembly within the meaning of the expression appearing in Section 141 of the Indian Penal Code while membership of an unlawful assembly itself is an offence under section 143, I.P.C. The use of force by members of the unlawful assembly gives rise to the offence of rioting which is punishable either under section 147 or section 148 I.P.C. Membership of the six accused persons in the unlawful assembly and use of force with weapons is borne out by the evidence on record. The said facts would make the appellants liable for the offence under section 148 of the Indian Penal Code. However, their liability under any other provision of the I.P.C. would depend on the role played by them and their object during the unlawful assembly which can reasonably be understood in the present case.

30. Appellants no.2 and 3, Shyam and Krishna Kumar caused injuries with the butts of GENTI on the hands and legs of the deceased. Therefore, it is clear that their object during the unlawful assembly was definitely not to cause the murder of deceased Shivnarayan. However, from the evidence on record it is clearly established that deceased had suffered several injuries due to number of assaults made on him by the members of the unlawful assembly.

31. Having regard to the injuries suffered by the deceased, which are evident from the evidence of Dr.Govind Singh Kushwaha (PW13) and on finding that accused/appellants had formed an unlawful assembly, we are of the view that appellants no.2 and 3 should be held guilty under section 325 read with section 149 I.P.C. and not under section 302 read with section 149 I.P.C. Hence, we set aside the impugned conviction and sentence of imprisonment for life of appellants no.2 Shyam and No.3 Krishna read with section 149 I.P.C., but we convict both of them under sections 325 read with section 149 I.P.C. and sentence them to rigorous imprisonment for the period of five years. Therefore, the order of suspension of sentence of appellant no.2 Shyam and No.3 Krishna Kumar @ K.K. @ Banti by granting ad-

interim bail on 12.12.2007 during pendency of this criminal appeal stands vacated. Appellants no.2 Shyam and No.3 Krishna Kumar are directed to surrender before the trial court for undergoing remaining part of the jail sentence.

32. Accordingly, appeal in respect of accused/appellant no.1 Mahendra @ Mota is dismissed and appeal in respect of accused/appellant no.2 Shyam and No.3 Krishna is partly allowed to the extent indicated above.

Order accordingly.

I.L.R. [2013] M.P., 1466
ARBITRATION APPEAL
Before Mr. Justice Ajit Singh & Mr. Justice T.K. Kaushal
Arb. A. No. 9/2013 (Jabalpur) decided on 9 May, 2013

YOGRAJ INFRASTRUCTURE LTD. ...Appellant
Vs.
SSANGYONG ENGINEERING & CONSTRUCTION CO. LTD ....Respondent

Arbitration and Conciliation Act (26 of 1996), Section 34 - Jurisdiction **- Interim award passed by arbitrator in arbitration proceedings held in Singapore under Singapore International Arbitration Centre Rules - Appellant can challenge the validity of interim award by making application before Courts in Singapore - Once the appellant has surrendered to SIAC Rules for arbitration proceedings, all issues including challenge to the validity of awards will have to be taken before that Court to whose jurisdiction the appellant surrendered - Courts of India have no jurisdiction.. (Para 14)**

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 34 – अधिकारिता – सिंगापुर अंतर्राष्ट्रीय माध्यस्थम केन्द्र नियमों के अधीन सिंगापुर में संचालित की गई माध्यस्थम कार्यवाही में मध्यस्थ द्वारा अंतरिम अवार्ड पारित किया गया – अपीलार्थी, सिंगापुर के न्यायालयों के समक्ष आवेदन प्रस्तुत करके अंतरिम अवार्ड की वैधता को चुनौती दे सकता है – एक बार जब अपीलार्थी ने माध्यस्थम कार्यवाहियों हेतु एसआईएसी (SIAC) नियमों को स्वीकार किया है, सभी विवाद्यकों को जिसमें अवार्ड की वैधता को चुनौती शामिल है, उस न्यायालय के समक्ष उठाये जाने होंगे जिसकी अधिकारिता को अपीलार्थी ने स्वीकार किया है – भारत के न्यायालयों को अधिकारिता नहीं।

Cases referred :

(2011) 9 SCC 735, (2002) 4 SCC 105, (2012) 9 SCC 552, (2008) 4 SCC 190.

Siddharth Khattar, for the appellant.
Anoop Nair, for the respondent.

ORDER

The Order of the court was delivered by :

AJIT SINGH, J: This appeal is directed against the order dated 12.2.2013 passed in M.J.C.No.6/2011 by the First Additional District Judge, Narsinghpur, whereby he has rejected the appellant's application for setting aside an interim award.

2. The essential facts giving rise to this appeal are that the appellant is an infrastructure company registered under the Companies Act. The appellant is engaged in the business of construction, development and execution of projects like road, civil works etc. The respondent is also Foreign Company of Korea and it too is engaged in the construction of road etc.

3. On 12.4.2006, the National Highway Authority of India awarded a contract to the respondent for the rehabilitation and up-gradation to four-laning of the Jhansi-Lakhnadon section from kms. 297 to 351 on National Highway in the State of Madhya Pradesh. The total contract amount for the project was Rs.2,19,01,16,805/-. On 13.8.2006 the respondent entered into a sub-contract with the appellant for carrying out the project. The agreement contained an arbitration Clause 27 for resolution of dispute arising out of the contract. Clause 28 of the agreement provided for governing law.

4. A dispute arose between the appellant and respondent with regard to the performance of the agreement. The respondent, therefore, on 22.9.2009 terminated the agreement dated 13.8.2006 on various grounds including delay in performing the work under the agreement. Aggrieved, the appellant filed an application before the District Judge, Narsinghpur under section 9 of the Arbitration and Conciliation Act, 1996 (in short "the Act 1996") praying for interim reliefs. A similar application was also filed by the respondent for interim reliefs in the same Court. Finally on 20.5.2010 the dispute between the appellant and respondent was referred to arbitration in terms of the agreement and a sole arbitrator, Mr. G. R. Easton, was appointed by the Singapore

International Arbitration Centre.

5 On 4.6.2010, the appellant filed an application under section 17 of the Act 1996 before the arbitrator in Singapore praying to restrain encashment of Bank guarantees, direction for release of Rs.1,44,42,25,884/- along with interest, restrain removal, shifting etc. of plant machinery. The respondents also filed an application on 5.6.2010 before the arbitrator seeking interim measures in furnishing of securities etc. The arbitrator by his order dated 29.6.2010 dismissed the appellant's application but allowed the application of respondents in respect of certain interim reliefs. The appellant challenged the order dated 29.6.2010 before the District Judge, Narsinghpur, under section 37(2)(b) of the Act 1996 for setting aside the same. The District Judge, however, dismissed the application vide order dated 23.7.2010 on the ground that it was not maintainable because the arbitration proceedings were being held in Singapore and the same were governed by the laws of Singapore. Aggrieved, the appellant challenged the order dated 23.7.2010 in Civil Revision No.304/2010 before the High Court which was dismissed vide order dated 31.8.2010. Undeterred, the appellant filed Civil appeal No.7562/2011 before the Supreme Court and it too was dismissed by judgment dated 1.9.2011which is also reported in Supreme Court Cases *Yograj Infrastructure Limited Vs. Ssang Yong Engineering and Construction Company Limited* (2011) 9 SCC 735. The Supreme Court, while dismissing the appeal, has held that its earlier decision in Bhatia *International Vs. Bulk Trading* (2002) 4 SCC 105 regarding applicability of the provisions of Part-I of the Act 1996 even when the seat of arbitration was not in India, was not applicable in the appellant's case because it had specifically agreed for the arbitration proceedings being conducted in accordance with the Singapore International Arbitration Centre Rules (SIAC Rules) which includes Rule 32.

6. The arbitration proceedings between the appellant and respondent continued in Singapore and the arbitrator passed the interim award on 30.6.2011. Dissatisfied with the interim award, the appellant challenged its validity before the Additional District Judge, Narsinghpur, by filing an application under section 34 of the Act 1996. The respondent objected to the maintainability of the application. The Additional District Judge agreed with the objection and by the impugned order dated 12.2.2013 has dismissed the application. The District Judge, while dismissing the

application, has relied upon the above mentioned decision of the Supreme Court between appellant and respondent i.e. *Yograj Infrastructure Limited Vs. Ssang Yong Engineering and Construction Company Limited* (2011) 9 SCC 735 and also a five Judge Bench decision of the Supreme Court in *Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services* (2012) 9 SCC 552. It is in this background, the appellant has filed the present appeal.

7. The learned counsel for the appellant has mainly argued that the Additional District Judge committed an illegality in relying upon the decision of the Supreme Court in *Bharat Aluminium Company* (supra) because according to the judgment itself the same shall apply prospectively to all the arbitration agreements executed hereafter i.e. 6.9.2012 whereas the agreement in question was executed on 13.8.2006. It has also been argued that SIAC Rules were applicable only during the subsistence of arbitration proceedings and these rules ceased to apply after passing of the interim award. The learned counsel has further argued that the earlier decision of the Supreme Court between the appellant and respondent *Yograj Infrastructure Limited* (supra) related to issues raised during arbitration proceedings and, therefore, after passing of the partial award it was not applicable for holding that the Indian Courts shall have no jurisdiction for setting aside the award. In reply, the learned counsel for respondents has defended the order passed by the Additional District Judge.

8. The main question which calls for our consideration is whether the Additional District Judge, Narsinghpur, has the jurisdiction to set aside the interim award passed by the arbitrator in arbitration proceedings which were held in Singapore.

9. To answer the issue we deem it proper to first examine Clauses 27 and 28 of the agreement which provide for arbitration and governing law. The clauses read as under:

> **27. Arbitration**
>
> 27.1 All disputes, differences arising out of or in connection with the agreement shall be referred to arbitration. The arbitration proceedings shall be conducted in English in Singapore in accordance with the Singapore International

Arbitration Centre (SIAC) Rules as in force at the time of signing of this agreement. The arbitration shall be final and binding.

27.2 The arbitration shall take place in Singapore and be conducted in English Language.

27.3. None of the party shall be entitled to suspend the performance of the Agreement merely by reason of dispute and/or dispute referred to Arbitration.

28. Governing law

This Agreement shall be subject to the laws of India. During the period of Arbitration, the performance of this Agreement shall be carried on without interruption and in accordance with its terms and provision.

A bare reading of the above quoted Clause 27.1 makes it clear that the arbitration proceedings were to be conducted in Singapore in accordance with the SIAC Rules which were in force at the time of signing of the agreement. Likewise, Clause 27.2 also makes it clear that the seat of arbitration shall be Singapore. There is, therefore, no doubt that the procedural law with regard to the arbitration proceedings is the SIAC Rules and the substantive law as per Clause 28 quoted above governing the agreement shall be the Law of India i.e. the Act 1996.

10. The SIAC Rules also includes Rule 32 and it reads as under:

32. Law of the Arbitration

Where the seat of arbitration is Singapore, the law of the arbitration under these Rules shall be the international Arbitration Act (Chapter 143A, 2002 Ed. Statutes of the Republic of Singapore) or its modification or re-enactment thereof.

The aforesaid rule, without any ambiguity, states that where the seat of arbitration is Singapore, the law of the arbitration under SIAC Rules shall be the International Arbitration Act (Chapter 143A, 2002 Ed. Statutes of the Republic of Singapore).

11. The International Arbitration Act (Chapter 143A) (in short, "the

IA Act") has been enacted to make provision for the conduct of international commercial arbitration based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) and conciliation proceedings and to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and for matters connected therewith. This Act has the force of law in Singapore. According to its section 2(1) "award" means a decision of the arbitral tribunal on the substance of the dispute and includes any interim or partial award. The same section also states that "Model Law" means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21st June 1985, the text in English of which is set out in the First Schedule.

12. Article 34 of the First Schedule to the IA Act provides for an exclusive recourse against arbitral award which is making of an application for its setting aside before a specified Court. It reads as under:

ARTICLE 34.- APPLICATION FOR SETTING ASIDE AS EXCLUSIVE RECOURSE AGAINST ARBITRAL AWARD

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

(2) An arbitral award may be set aside by the court specified in Article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the

submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State;

or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33 from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

According to this Article, recourse to a court against the arbitral award can be made only by making an application for setting aside in accordance with its paragraphs (2) and (3) and as per para (2) an arbitral award can be set aside by the court specified in Article 6 only on conditions enumerated therein.

13. Thus, the award, which includes an interim award, passed under SIAC Rules can be set aside only by a court specified in Article 6 of the First Schedule

which is as follows:

> **Article 6.- COURT OR OTHER AUTHORITY FOR CERTAIN FUNCTIONS OF ARBITRATION ASSISTANCE AND SUPERVISION.**
>
> The functions referred to in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by.....(Each State enacting this Model Law specifies the court, courts or, where referred to therein, other authority competent to perform these functions).

14. Admittedly, the Indian Parliament has not enacted Model Law and at the time of enactment of the Act 1996 it had only taken into account the UNCITRAL Model Law. Therefore, the courts in India have no jurisdiction to set aside an award passed by the arbitrator under SIAC Rules. The appellant can challenge the validity of an interim award only by making an application under Article 34 before the courts in Singapore specified in Article 6 of First Schedule to the IA Act. This we also say because there cannot be any partial selection of forum. Once the appellant surrendered to SIAC Rules for arbitration proceedings, all the issues including challenge to the validity of award will have to be taken before that court to whose jurisdiction the appellant surrendered.

15. In *Bhatia International* (supra) a three-Judge Bench of the Supreme Court had decided that in cases of international commercial arbitration held even out of India, provisions of Part I of the Act 1996 would apply unless the parties by agreement, express or implied, exclude all or any of its provisions and in such a situation the laws or rules chosen by the parties would apply and any provision of Part I, contrary to or excluded by that law or rules, will not apply. This decision was also followed by a two-Judge Bench of the Supreme Court in *Venture Global Engineering v. Satyam Computer Services Limited* (2008) 4 SCC 190. Both these decisions were then later considered by a five- Judge Bench of the Supreme Court in *Bharat Aluminium Company* (supra). In that case, the Supreme Court, after extensively examining the provisions of the Act 1996 disagreed with the conclusions recorded in *Bhatia International and Venture Global Engineering* (supra) and held that Part I of the Act 1996 is applicable only to all the arbitrations which take place within the territory of India. However, the Supreme Court in the concluding paragraph has also observed that since the judgment in *Bhatia International* was rendered on 13.3.2002 and it was followed by all the High Courts as well as by the Supreme Court on numerous occasions, including in *Venture Global Engineering* which was rendered on 10.1.2008, in order to do

complete justice the law now declared by it shall apply prospectively to all the arbitration agreements executed hereafter i.e. 6.9.2012. In our considered view, the law declared in *Bharat Aluminium Company* does not upset earlier final decision taken by the Indian courts following the decision in *Bhatia International.* It is only in this context the law declared by the judgment in *Bharat Aluminium Company* is prospective.

16. In the instant case, the Supreme Court in *Yograj Infrastructure Limited* (supra) has already held that having regard to the nature of agreement between the appellant and respondent the case of *Bhatia International* was not applicable because the appellant had specifically agreed for the arbitration proceedings being conducted in accordance with SIAC Rules which includes Rule 32. Though in Yograj Infrastructure Limited the issue related to filing an appeal under section 37(2)(b) of the Act 1996 for setting aside of the order dated 29.6.2010 passed by the arbitrator in respect of certain interim reliefs, the ultimate conclusion was that the decision of *Bhatia International* did not apply. The decision being inter-parties still stands and cannot be said to have been affected by the observation of the Supreme Court in *Bharat Aluminium Company* that the law declared by it now shall apply prospectively. For these reasons, we are unable to agree with the submissions made by the learned counsel for appellant.

17. The appeal has no merit. It fails and is dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 1474
CIVIL REVISION
Before Mr. Justice A.K. Shrivastava
C.R. No. 1054/2003 (Jabalpur) decided on 6 March, 2013

GULAB SINGH ...Applicant
Vs.
VIRENDRA SINGH ...Non-applicant

A. ***Specific Relief Act (47 of 1963), Section 6 - Restoration of Possession*** **- Plaintiff who was encroacher having no title over the suit property was in peaceful possession and whose possession was found in the revenue record - Defendant forcibly dispossessed him by taking law in his own hands - Plaintiff can sue the defendant/owner who has forcibly ousted him. (Para 6)**

क. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – कब्जे का प्रत्यावर्तन – वादी, जो अतिक्रमणकर्ता था, जिसका वाद सम्पत्ति पर कोई हक नहीं था, वह अनन्य रुप से कब्जाधारी था और जिसका कब्जा, राजस्व अभिलेख में पाया गया – प्रतिवादी ने कानून अपने हाथ में लेकर उसे बलपूर्वक बेकब्जा किया – वादी, प्रतिवादी/स्वामी पर मुकदमा कर सकता हैं जिसने उसे बलपूर्वक बेकब्जा किया।

B. Specific Relief Act (47 of 1963), Section 6 - Resistance - **Plaintiff who is in possession of suit property, can resist interference of defendant who has no better title than himself and can get injunction restraining defendant from disturbing his possession.** **(Para 7)**

ख. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 6 – प्रतिकार – वादी, जिसके कब्जे में वाद सम्पत्ति है, प्रतिवादी जिसका उससे (वादी से)कोई बेहतर हक नहीं, उसके हस्तक्षेप का प्रतिकार कर सकता है और अपने कब्जे में व्यवधान डालने से प्रतिवादी को रोकने का व्यादेश प्राप्त कर सकता है।

C. Transfer of Property Act (4 of 1882), Section 54 - Sale - Registration - **Unless and until an immovable property having valuation of Rs. 100 or more is conveyed by a registered document, there cannot be a valid conveyance of sale.** **(Para 9)**

ग. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 – विक्रय – पंजीकरण – जब तक कि अचल सम्पत्ति को जिसका मूल्यांकन 100 रुपये या उससे अधिक है, पंजीकृत दस्तावेज द्वारा हस्तांतरित नहीं किया जाता, कोई वैध विक्रय का हस्तांतरण नहीं हो सकता।

Cases referred :

AIR 1937 Nagpur 281, AIR 1972 SC 2299.

P.R. Bhave with *Bhanu Yadav,* for the applicant.
None, though served for the non-applicant.

ORDER

A.K. Shrivastava, J. :- Feeling aggrieved by the judgment and decree dated 22.8.2003 passed by learned First Additional District Judge, Sidhi in Civil Suit No. 17-A/2003 whereby the suit of respondent-plaintiff under Section 6 of the Specific Relief Act has been decreed, the defendant-applicant has come up in this revision under Section 115 of the CPC.

2. No exhaustive statements of fact are required to be narrated for the purpose of disposal of this revision application. Suffice it to say that a suit for

possession by taking aid of Section 6 of the Specific Relief Act, 1963 (for short, the Act of 1963) has been filed by the plaintiff in respect to the open land which is the subject matter of the suit and the description whereof is mentioned in the plaint. According to the plaintiff he was in possession of the property but the defendant-applicant by taking the law in his own hands has dispossessed him. The date of dispossession is 13.9.1996 and the suit has been filed within six months since it was filed on 13.12.1996. In the plaint it has been pleaded that because plaintiff has been illegally dispossessed, the possession be restored to him.

3. Defendant-applicant has refuted the plaint averments by filing written-statement and specifically pleaded that plaintiff was an encroacher and he encroached upon the suit land which is owned by the State Govt. and, therefore, possession cannot be restored to him. It has also been pleaded by him that the property in question was sold to him for a consideration of ₹45,000/- and the possession was also delivered to him on 2.9.1996 in pursuance to the said sale deed hence according to the stand taken by the defendant he is the title holder and the suit cannot be decreed.

4. The learned Trial Court framed necessary issues and after recording the evidence of the parties decreed the suit directing defendant to deliver possession to the plaintiff. In this manner, this revision application has been filed by the defendant-applicant.

5. The contention of Shri Bhave, learned senior counsel is that defendant cannot be said to be an encroacher because on the basis of the sale deed the property in question has been conveyed to him and hence learned trial Court has erred in law in decreeing the suit.

6. Considered this submission.

7. On bare perusal of the impugned judgment this Court finds that defendant was an encroacher upon the Govt. land and he was fined with a penalty of ₹ 250/- and in that regard document Ex. P/2 is on record. On the basis of the revenue record of the year 1995-96 the land in question is found to be owned by the State Govt. upon which the plaintiff has been shown to be an encroacher. To me, merely because plaintiff is an encroacher, the defendant by taking law in his own hands cannot dispossess him and if he has dispossessed him certainly he is legally bound to deliver the possession. This Court in *Pannalal Bhagirath Marwadi Vs. Bhaiyalal Birndraban Pardeshi Teli* AIR 1937 Nagpur 281 has held that Section 9 of the Specific Relief Act of 1877 (which is equivalent to Section 6 of the

present Act of 1963) the plaintiff can bring a suit for possession under this provision. This Court in the same judgment has further held that one who entered into peaceful possession though having no legal title can defend his title against one who forcibly ousted him. If the decision of this Court in *Pannalal* (supra) is tested on the touchstone and anvil of the present factual scenario it would reveal that the plaintiff who has entered into a peaceful possession and whose possession has also been found in the revenue record though he may be an encroacher and having no title over the suit property, can sue the defendant who has forcibly ousted him. The view which was taken up by this Court long back near about 83 years ago was affirmed by the Apex Court in *M. Kallappa Setty Vs. M.V.Lakshminarayana Rao* AIR 1972 SC 2299 in which the same principle has been reiterated that plaintiff is in possession of the suit property on the strength of his possession can resist interference from defendant who has no better title than himself and get injunction restraining defendant from disturbing his possession.

8. The decision of Supreme Court *M.K. Setty* (supra) can be applied in the present case in the manner that if the plaintiff would have in possession of the suit property and if would have filed a suit for injunction timely restraining the defendant not to interfere in his possession, certainly he was entitled for that relief, but, merely because he has been ousted by the defendant by taking law in his own hands it cannot be said that his right has been ruined or buried.

9. So far as the plea of defendant that he the owner of the suit property on account of sale deed is concerned, rightly the learned Trial Court did not permit to exhibit the document of sale because it is not a registered document and has not been properly written on the stamp paper although in this document passing a consideration of ₹45,000/- has been mentioned and in the document it has been stated that it has been sold to the defendant. According to me, under Section 54 of the Transfer of Property Act, unless and until an immovable property having valuation of ₹100/- or more is conveyed by a registered document there cannot be a valid conveyance of sale and therefore, according to me the defendant cannot be said to be a valid title-holder.

10. I have gone through the reasonings assigned by learned Trial Court decreeing the suit of plaintiff and I do not want to deviate from those reasonings since they are based upon correct appreciation of law and are pure findings of fact which cannot be interfered in this revision application.

11. Resultantly, this revision application is hereby dismissed. However, time to

vacate the suit property is granted to defendant-applicant on the condition that if he submits an undertaking to vacate the suit property on or before 28.2.2014 and he will handover peaceful possession to the plaintiff, he may remain in possession upto that date. But, the defendant shall deposit the cost of the suit as awarded by learned Trial Court in the Court below. Let the undertaking and the cost be deposited on or before 30.4.2013, failing which the plaintiff shall be entitled to file execution application even earlier to 28.2.2014. The plaintiff-respondent shall be free to withdraw the amount of cost. Since nobody is appearing for the respondent-plaintiff in this revision, therefore, the cost of this revision shall be borne by the parties.

Revision dismissed.

I.L.R. [2013] M.P., 1478
CIVIL REVISION
Before Mr. Justice A.K. Shrivastava
C.R. No. 332/2004 (Jabalpur) decided on 7 March, 2013

HARI SINGH & ors. ...Applicants
Vs.
SUDHIR SINGH & ors. ...Non-applicants

A. Civil Procedure Code (5 of 1908), Section 47 & Order 22 Rule 2 - Joint decree of Possession & injunction - **Where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. (Para 12)**

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 व आदेश 22 नियम 2 – कब्जे एवं व्यादेश की संयुक्त डिक्री – जब सहदायिक का हित अनिश्चित, अनिर्धारित तथा संपत्ति के किसी एक हिस्से से संबंधित होना विनिर्दिष्ट रुप से नहीं कहा जा सकता, तब पक्षकारों के अधिकारों को, विभाजन वाद में समुचित डिक्री द्वारा सुनिश्चित करने से पहले, डिक्री को प्रभावशील नहीं किया जा सकता।

B. Joint Possession - **Purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in Joint Possession of that property with all the other coparceners, hence, a joint decree can be satisfied only if it is executed as a whole and therefore, the learned executing Court has acted illegally with material irregularity in exercise of its jurisdiction by dismissing the execution application in its full satisfaction. (Para 12)**

ख. संयुक्त कब्जा – अचल सम्पत्ति में सहदायिक के अविभाजित हित का क्रेता, सभी अन्य सहदायिकों के साथ उक्त सम्पत्ति में संयुक्त कब्जे का दावा नहीं कर सकता, अतः संयुक्त डिक्री की संतुष्टि केवल तब हो सकती है यदि उसे पूर्णतः निष्पादित किया जाता है और इसलिए विद्वान निष्पादन न्यायालय ने निष्पादन आवेदन को इसकी संपूर्ण संतुष्टि में खारिज कर, अपनी अधिकारिता के प्रयोग में तात्विक अनियमितता के साथ अवैध रुप से कार्यवाही की है।

Cases referred :

AIR 1999 SC 1694, 1966 MPLJ SN 19, AIR 2004 SC 1321.

Umesh Trivedi, for the applicants.
G.S. Ahluwalia, for the non-applicants No. 1 & 2.
None for other non-applicants though served.

ORDER

A.K. SHRIVASTAVA, J. :- This revision application under Section 115 of the Code of Civil Procedure has been filed by the applicants against the order dated 30.4.2004 passed by learned Executing Court dismissing the execution application being satisfied in its full satisfaction.

2. Gopal Singh (respondent No.3), Harisingh (applicant No.1) and Smt. Kusum Bai (respondent No.4) filed a suit for possession in respect to certain immovable property on the basis of title and also for injunction. This suit was filed against Suresh Singh, Sudhir Singh and Smt. Ahilya Bai. The suit was decreed on 12.4.1988 and a joint decree of possession and injunction was passed against all the defendants. In appeal the said decree was affirmed and second appeal No.341/1996 was also dismissed by this Court on 19.8.1996. Thereafter, the decree was put to execution. In the execution proceedings the name of judgment debtor No.2 Ahilya Bai widow of Narayan was deleted and in her place names of present applicants No.2 to 5 were added as judgment debtors.

3. An application under Order XXI Rule 2 CPC was submitted by judgment debtors Sudhir Singh (respondent No.1) and Shashikala Bai (respondent No.2) that they have handed over the vacant possession of Block No.1 and 2, Well, Badi and open courtyard to the decree holders Gopal Singh and Kusum Bai and now the judgment debtors Sudhir Singh and Shashikala are not required to hand over possession of any portion of the decreetal immovable property to decree holders Gopal Singh and Kusum Bai and therefore, it has been prayed that because decree has been fully satisfied

the same be dismissed in its full satisfaction.

4. The decree holders Gopal Singh and Kusum Bai (respondents 3 and 4) admitted the contents of the application filed on behalf of the aforesaid judgment debtors and stated that they have received the possession of the Block No.1 and 2 and also that of Well, Badi and open courtyard from Sudhir Singh and Shashikala. They also submitted their acknowledgment dated 15.9.1996 in this regard indicating therein that they have received the possession from the aforesaid judgment debtors Sudhir Singh and Shashikala.

5. However, the aforesaid application was opposed by one of the decree holder Harisingh (applicant No.1) and other applicants No.2-a to 5 and it has been specifically averred in the reply that the possession has not been handed over to aforesaid decree holder and therefore, it has been prayed that this application be dismissed.

6. The learned Executing Court after hearing the learned counsel for the parties dismissed the execution application since it has been satisfied fully. In this manner this revision application has been filed by the applicants.

7. The contention of Shri Umesh Trivedi, learned counsel for the applicants is that since a joint decree of immovable property and injunction has been passed against the judgment debtors, therefore, even if two decree-holders out of three have admitted the contents of the application of the judgment debtors by saying that they have obtained the possession of the decreetal portion mentioned in the application, the execution application cannot be dismissed in full satisfaction because there is no admission of the third decree holder Harisingh (applicant No.1) in this regard. Learned counsel submits that when a joint decree is passed it should be satisfied in full satisfaction only if the application is submitted by all the decree holders. Learned counsel submits that in the decree the interest of the decree holders is not defined and therefore, it cannot be said that decree has been satisfied in full satisfaction. In support of his contention, learned counsel has placed heavy reliance upon the decision of Supreme Court *Jagdish Dutt and another vs. Dharam Pal and others*, AIR 1999 SC 1694 and single Bench decision of this Court *Mst. Kunjbala vs. Mst. Annapurna*, 1966 MPLJ SN 19.

8. On the other hand, Shri G.S. Ahluwalia, learned counsel appearing for the respondents 1 and 2 argued in support of the impugned order and submitted that because the applicant No.1 Hari Singh himself has sold his share to

applicants 2 to 5, therefore, the possession of remaining portion of the decreetal property has been handed over to other two remaining decree holders namely, Gopal Singh and Kusum Bai and thus, the decree is fully satisfied. In support of his contention, learned counsel has placed heavy reliance on the Supreme Court decision *M/s India Umbrella Manufacturing Co. and others vs. Bhagabandei Agarwalla (dead) by L.Rs and others,* AIR 2004 SC 1321.

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

10. Before considering the rival contentions of learned counsel for the parties it would be relevant to mention that a suit was filed by Gopal Singh, Harisingh and Smt. Kusum Bai praying therein that a joint decree for the property described in the plaint be passed in their favour. Learned Trial Court on 12.4.1984 decreed the suit by passing the following decree:-

अ. यह कि प्रतिवादीगण वादपत्र नक्शे में वर्णित तीनों ब्लाक जिसे त, ई, ठ, न से अंकित किया गया है, का आधिपत्य वादीगण को सौंपे।

ब. यह कि प्रतिवादीगण ना तो स्वयं और ना ही किसी अन्य एजेंसी के मार्फत वादीगण के आधिपत्य वाले मकान तथा स्थान जिसमें कोठा, हाता, कुंआ शामिल है और जिन्हें वादपत्र नक्शे में न, ठ, छ, च एवं छ, च, ज, स तथा फ, त, ज, ह से अंकित किया गया है, पद वादीगण के आधिपत्य में किसी प्रकार से दखल नहीं देंगे।

स. प्रतिवादीगण अपना एवं वादीगण का वाद व्यय वहन करेंगे। अभिभाषक शुल्क नियमानुसार प्रमाणित होने पर स्वीकृत।

This decree had attained finality upto this Court since the second appeal filed on behalf of the defendants was dismissed.

11. On bare perusal of the decree it is gathered that the decreetal portion consists of three blocks which has been denoted as (त, ई, ठ, न) in the plaint map. The possession of the decreetal portion shown therein has been directed to be handed over to plaintiffs and further a decree of injunction has been passed in regard to the immovable property the description whereof has been mentioned in Clause (b) of the decree. On bare perusal of the record of the executing Court it is gathered that all the decree holders sold a part of the decreetal portion to Smt. Swarajrani. By executing another sale deed on the same date they also sold the part of the decreetal portion to Sanjeev Kumar; by executing third sale deed the part of the suit property was sold to Rakesh

Kumar; the decree holders also sold a part of suit property to Brajesh Kumar and they also sold the part of the decreetal portion to Sudhir Singh. Thus, by executing five sale deeds to different persons on 15.7.1988 and 16.7.1988 the entire suit property and the decreetal portion was sold to applicants 2 to 5. On bare perusal of aforesaid sale deeds this Court finds that the factum that the decree holders are the owners of the entire suit property by virtue of judgment dated 12.4.1988 has been mentioned in all the sale deeds. Hence, the applicants 2 to 5 have been added as party in the execution application.

12. Since a joint decree of possession and injunction has been passed in favour of all the three decree holders, unless and until the possession of the entire decreetal suit property is given to all the three joint decree holders it cannot be said that the decree has been satisfied in full satisfaction even if the possession of the decree of part of the suit property has been given to two decree holders i.e. respondents No.3 and 4, namely, Gopal Singh and Kusum Bai respectively. From the impugned order it is gathered that as per the averment made in the application by the judgment debtors Sudhir Singh and Shashikala that decree holders Hari Singh has already handed over his share to the purchaser and therefore, now because the judgment debtors 3 and 4 have delivered the possession of remaining portion of the decreetal property to the decree holders Gopal Singh and Kusum Bai, therefore, decree has been fully satisfied. According to me, whether there was a partition in the family of decree holders or not and if there was a partition whether decree holder Hari Singh handed over the possession of his share in the year 1994, as stated by the judgment debtor in their application are disputed questions of fact and therefore, when it is denied by the decree holder Hari Singh and other applicants 2 to 5 it cannot be said that the possession of his share has been delivered by Hari Singh to the applicants 2 to 5. The Supreme Court in *Jagdish Dutt* (supra) has categorically held that where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. The Supreme Court further held that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. Hence, according to me, a joint decree can be satisfied only if it is executed as a whole and therefore, the learned Executing Court has acted illegally with material irregularity in exercise of its jurisdiction by dismissing the execution application in its full satisfaction. The decision of *M/s India Umbrella Manufacturing Co.* (supra) placed reliance by learned

counsel for the respondents 1 and 2 is not against the applicants because in this decision also it has been decided that unless and until the share is defined and partition has taken effect the execution cannot be dismissed in full satisfaction.

13. Resultantly, this revision application succeeds and is hereby allowed with costs. The impugned order is hereby set aside and the learned Executing Court is hereby directed to proceed with the execution. The respondents 1 and 2 shall bear the cost of the applicants. Counsel fee Rs.2,000/-, if precertified.

Revision allowed.

I.L.R. [2013] M.P., 1483
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice R.C. Mishra
M.Cr.C. No. 3549/2008 (Jabalpur) decided on 21 February, 2013

DUNCANS INDUSTRIES LIMITED & ors. ...Applicants
Vs.
JAI RAMDAS PANJWANI & anr. ...Non-applicants

***A. Criminal Procedure Code, 1973 (2 of 1974), Section 251 - Summons Case* - It is impermissible for Magistrate to reconsider his decision to issue process in absence of any specific provision to recall such order. (Para 10)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 251 – समंस प्रकरण – यह मजिस्ट्रेट के लिए अननुज्ञेय है कि वह आदेशिका जारी करने के अपने निर्णय पर पुनर्विचार करे, जबकि उक्त आदेश को वापस लेने का कोई विनिर्दिष्ट उपबंध विद्यमान नहीं।

***B. Criminal Procedure Code, 1973 (2 of 1974), Section 245(2) - Discharge* - Magistrate has discretion to discharge the accused at any stage previous to recording of any evidence for prosecution - Formation of opinion before issuance of process in a warrant case does not preclude the Magistrate from exercising this discretion judicially if there are adequate reasons for doing so. (Para 10)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 245(2) – आरोपमुक्त – अभियोजन का कोई साक्ष्य अभिलिखित किये जाने से पूर्व किसी भी प्रक्रम पर अभियुक्त को आरोप मुक्त करने का मजिस्ट्रेट को विवेकाधिकार है – वारंट प्रकरण में आदेशिका जारी किये जाने से पूर्व, अभिमत बना लेने से मजिस्ट्रेट इस

विवेकाधिकार का प्रयोग न्यायिक रुप से करने से मजिस्ट्रेट प्रवारित नहीं यदि ऐसा करने के लिए पर्याप्त कारण है।

C. Penal Code (45 of 1860), Sections 409, 418, 420/34 - Civil Nature - **Same transaction relating to breach of contract, can give rise to civil as well as criminal liability - Magistrate rightly did not discharge the petitioners.** **(Para 12)**

ग. दण्ड संहिता (1860 का 45), धाराऐं 409, 418, 420/34 – सिविल स्वरुप – संविदा के भंग से संबंधित समान संव्यवहार सिविल तथा दाण्डिक उत्तरदायित्व को उत्पन्न कर सकता है – मजिस्ट्रेट ने उचित रुप से याचीगण को आरोपमुक्त नहीं किया।

Cases referred :

(2004) 7 SCC 338, AIR 2004 SC 4711, AIR 2009 SC 2282, AIR 1971 SC 834, (1973) 76 Bom.L.R. 270, (2001) 2 SCC 17, AIR 2000 SC 1869, AIR 2001SC 3846.

Manish Datt with *Pushpendra Dubey*, for the applicants.
Surendra Singh with *Manish Mishra*, for the Non-applicant No.1.
R.P. Tiwari, G.A. for non-applicant No.2/State.

ORDER

R.C. Mishra, J. :- This is a petition, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). The petitioners are aggrieved by the order-dated 27.1.2005 passed by Shri Sharad Bhamkar, Judicial Magistrate First Class, Katni in Criminal Case No.513/04, rejecting their application for discharge that was moved in pursuance of the order-dated 17.12.2004 passed in an earlier petition, registered as MCrC No.9206/04 and filed under Section 482 of the Code, for quashing the complaint made by respondent no.1. Upon the complaint, cognizance of the offences punishable under Sections 409, 418, 420 read with 34 and 120B of the IPC was taken against the petitioners.

2. Relevant allegations, as made in the complaint, may be summarized thus -

(i) At the relevant point of time, the petitioner nos.2 to 5 were working as Chairman, Vice President, Vice President (Assistant) and General Manager of the petitioner no.1, which is a Tea Company, registered under the provisions of

Companies Act, 1956. The Company had appointed M/s Jairam Suresh Kumar, a proprietary firm as the authorized dealer for Katni region at the time when the respondent no.2 was the proprietor thereof.

(ii) Initially, the petitioner no.1 had agreed to supply tea to the Firm on credit basis, subject to certain terms and conditions. Accordingly, within 15 days from the date of receipt of the consignment, the Firm was required to pay the entire price and forward the debit note for being processed in the office of the Company that had agreed to make payment of commission etc. by issuing corresponding credit note.

(iii) In pursuance of a conspiracy to cheat the Firm and misappropriate the outstanding amount of Rs.16,17,859/- in violation of terms of the contract, a sum of Rs.21,53,463/- was deducted by the Company against a total amount claimed by the Firm by raising debit notes from time and time and even after deliberations with reference to repeated requests, the petitioner nos.2 to 5 had failed to pay the same.

3. For a ready reference, the operative part of the order-dated 17.12.2004 (supra) passed by a co-ordinate Bench of this Court may be reproduced thus -

"In the circumstance of the case, it is directed that the non-bailable warrant issued by the trial Court against the petitioner shall not be executed. The petitioner shall make an application before the trial Court for their discharge. The application shall be decided on merit by the trial Court. Till the disposal of the application, the personal appearance before the trial Court shall be dispensed with. If the application is rejected, the trial Court shall proceed against the petitioner in accordance with law."

4. A bare perusal of the order in question would reveal that learned Magistrate, while making reference to the decision of the Supreme Court in *Adalat Prasad v. Rooplal Jindal* (2004) 7 SCC 338, proceeded to dismiss the application inter alia for the reason that he had no jurisdiction to review his earlier order directing issuance of process.

5. The case registered against the petitioners is a warrant case that attracts the provisions of Section 244 to 246 of the Code. Sub-section (2) of Section 245 of the Code reads -

> *(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.*

6. Although, *Adalat Prasad's* case was a warrant case yet, in a subsequent decision rendered in *Subramanium Sethuraman v. State of Maharashtra* AIR 2004 SC 4711, a three-Judge Bench, while refusing to reconsider the decision in *Adalat Prasad's* case, proceeded to explain that it is the summon procedure that does not complete a stage of discharge. The relevant excerpts are set out below -

> *"Having considered the argument of the learned counsel for the parties, we are of the opinion that the argument of the learned counsel for the appellant that the decision of this Court in Adalat Prasad's case requires reconsideration cannot be accepted. It is true that the case of Adalat Prasad pertained to a warrant case whereas in Mathew's case the same pertained to a summons case. To this extent, there is some difference in the two cases, but that does not, in any manner, make the law laid down by this Court in Adalat Prasad's case a bad law".*

7. Still, as the effect of sub-section (2) of Section 245 of the Code did not come up for consideration in *Adalat Prasad's* case, the decision cannot be understood to mean that the provision carves out a redundant exception. This view is fortified by the following observations made by the Apex Court in *Ajoy Kumar Ghose v. State of Jharkhand* AIR 2009 SC 2282 -

> *"The Magistrate has the power to discharge the accused under Section 245(2) Cr.P.C. at any previous stage, i.e., before the evidence is recorded under Section 244(1) Cr.P.C., which seems to be the established law, particularly in view of the decision in Cricket Association of Bengal v. State of West Bengal 1971 (3) SCC 239, as also the subsequent decision of the Bombay High Court in Luis de Piedade Lobo v. Mahadev in 1984 CriLJ 513. The same*

decision was followed by Kerala High Court in Manmohan Malhotra v. P.M. Abdul Salam in 1994 CriLJ 1555 and Hon'ble Justice K.T. Thomas, as the learned Judge there was, accepted the proposition that the Magistrate has the power under Section 245(2) Cr.P.C. to discharge the accused at any previous stage. The Hon'ble Judge relied on a decision of Madras High Court in Mohammed Sheriff v. Abdul Karim AIR 1928 Madras 129, as also the judgment of Himachal Pradesh High Court in Gopal Chauhan v. Smt. Satya in 1979 CriLJ 446. We are convinced that under Section 245(2) Cr.P.C., the Magistrate can discharge the accused at any previous stage, i.e., even before any evidence is recorded under Section 244(1) Cr.P.C."

8. However, sub-section (2) of Section 245 of the Code corresponds to sub-section (2) of Section 253 of the Old Code, 1898 and the guideline for invoking the provision was laid down by a three-judge Bench in *Mahant Abhey Dass v. S. Gurdial Singh* AIR 1971 SC 834. Accordingly, when on allegations made against the accused prima facie case is made out, he should not be discharged under Section 253(2).

9. As explained further in *Ajoy Kumar Ghose's* case -

"The very heading of Section 246 Cr.P.C. viz., "Procedure where accused is not discharged" even indicates that it would come into play only after the matter is examined in the light of Section 245 Cr.P.C. and the accused is not discharged thereunder. Therefore, it is incumbent upon the Magistrate to examine the matter for purposes of considering the question whether the accused could be discharged under Section 245 Cr.P.C. and it is only when he finds it otherwise, he could have resort to Section 246 Cr.P.C."

10. Principles which can easily be deduced from the plethora of precedents cited above may be summed up as under -

(i) In a summons case, it is impermissible for the Magistrate to reconsider his decision to issue process in absence of any specific provision to recall such order.

(ii) By virtue of sub-section (2) of Section 245 of the Code, in a complaint case, the Magistrate has discretion to discharge the accused at any stage previous to recording of any evidence for prosecution, if he is satisfied that the charge is groundless. As an obvious corollary, the formation of opinion before issuance of process in a warrant case that there is sufficient ground for proceeding against the accused does not preclude the Magistrate from exercising this discretion judicially if there are adequate reasons for doing so. Otherwise, it has bearing upon the duty of the Magistrate to take some evidence, though not all (See. *Jethalal v. Khimji* (1973) 76 Bom. L.R. 270).

11. Accordingly, the Magistrate could have discharged the petitioners under sub-section (2) [supra] only after arriving at a finding that the allegations made in the complaint were absurd and inherently improbable or did not constitute any offence.

12. Adverting to the factual aspect of the case, it may be observed that while placing reliance on the following precedents of the Supreme Court -

(i) *Lalmuni Devi v. State of Bihar* (2001) 2 SCC 17

(ii) *Medchl Chemicals and Pharma Pvt. Ltd., M/s. v. M/s. Biological E. Ltd.* AIR 2000 SC 1869

(iii) K*amaladevi Agarwal v. State of West Bengal* AIR 2001 SC 3846

- learned Magistrate had refused to allow the application on the ground that the dispute was purely of a civil nature. In this view of the matter, his decline to discharge the petitioners without recording any evidence was justified in the facts and circumstances of the case as the same transaction relating to breach of contract, can give rise to civil as well as criminal liability. However, looking to nature of dispute, for considering the question of charge, the trial Magistrate would not be required to take down the entire evidence.

13. The petition, therefore, stands disposed of with the direction that the trial Magistrate shall decide the application after recording material evidence within a period of 3 months from the receipt/production of certified copy of this order. Till disposal of the application, exemption of the petitioner nos.2 to 5 from personal appearance before the trial Court shall continue.

Petition disposed of.