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THE HIGH COURT OF MADHYA PRADESH

Year-5 **Vol.2**

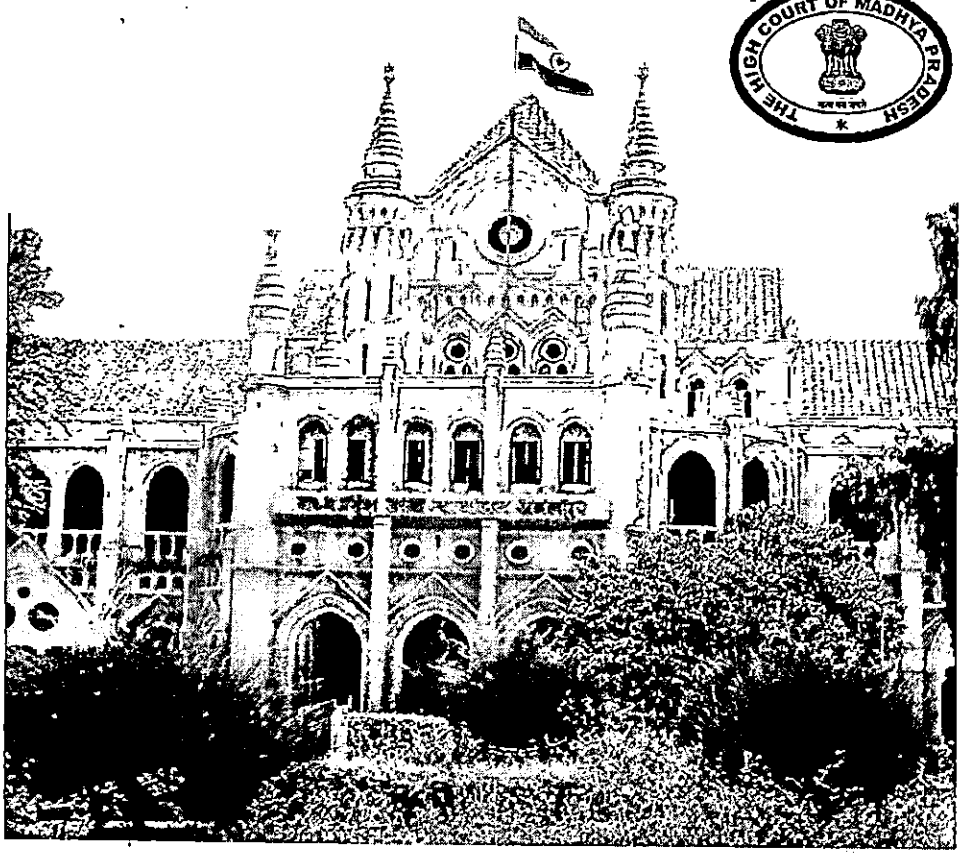

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TABLE OF CASES REPORTED

(Note : An asterisk (*) denotes Note number)

..*.*.*.*.*.*.*.

INDEX

(Note An asterisk (*) denotes Note number)

INDEX

(Note An asterisk (*) denotes Note number)

INDEX

INDEX

INDEX

INDEX

INDEX

INDEX

INDEX

INDEX

INDEX

INDEX

INDEX

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

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 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

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**

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 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**

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किया कि मृतक रु. 4,000/– प्रति माह अर्जित कर रहा था – बीमा कम्पनी ने अनभिज्ञता का अभिवाक् किया – नियोक्ता की स्पष्ट स्वीकृति को दृष्टिगत रखते हुए, मृतक की मासिक आय रु. 4,000/– निर्धारित की गई – मृतक करीब 20 वर्ष की आयु का था इसलिए, सुसंगत कारक 224.00 होगा – घटना की तिथि से 12 प्रतिशत ब्याज की दर से प्रतिकर रुपये 4,03,200/– बनेगा – अपील मंजूर। (लालमन सोनी वि. श्री रूपिन्दर सिंह गिल) ...1088

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Short Note (DB)

****(20)***

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

W.A. No. 1254/2006 (Jabalpur) decided on 6 February, 2013

KAMTA PRASAD PANDEY ...Appellant

Vs.

STATE OF M.P. & ors. ...Respondents

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.**

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।

The judgment of the Court was delivered by : VIMLA JAIN, J.

Rajesh Dubey, for the appellant.
Jaideep Singh, Dy. G.A. for the respondents/State.

Short Note

****(21)***

Before Mr. Justice U.C. Maheshwari

S.A. No. 206/2011 (Gwalior) decided on 15 February, 2013

PAHALWAN SINGH & ors. ...Appellants

Vs.

SWAROOP @ RAMSWAROOP & ors. ...Respondents

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.

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।

Cases referred :

AIR 1981 SC 1183, 2010 (2) MPLJ 636.

S.K. Sharma, for the appellants.
Sameer Shrivastava, for the respondents No. 1 & 2.
R.P.Rathi, G.A. for the respondent No.3/State.

Short Note

****(22)***

Before Mr. Justice Sujoy Paul

W.P. No. 4223/2011 (S) (Gwalior) decided on 30 January, 2013

PREM CHAND YADAV ...Petitioner
Vs.
MADHYA PRADESH POORVA KSHETRA
VIDYUT VITRAN CO. LTD. & ors. ...Respondents

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.**

NOTES OF CASES SECTION

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।

Cases referred :

(2006) 2 SCC 315, (2002) 2 SCC 712, (1991) 1 SCC 212.

N.S. Kirar, for the petitioner.
Vivek Jain, for the respondents No. 1 to 3.
Vinod Sharma, for the respondent No.4.

I.L.R. [2013] M.P., 989
WRIT APPEAL
Before Mr. S.A. Bobde, Chief Justice & Mr. Justice R.S. Jha
W.A. No. 317/2013 (Jabalpur) decided on 8 April, 2013

K.K. SINGH CHOUHAN ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. 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. (Para 9)**

क. 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।

B. 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. (Paras 12 to 18)**

ख. 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।

Cases referred :

1965 MPLJ 934, (1989) 2 SCC 505, AIR 1995 SC 2390, (2008) 7 SCC 117.

Shobha Menon with *Rahul Choubey*, for the appellant.
Kumaresh Pathak, Dy. A.G. for the respondents No. 1 & 2.
Sanjay K. Agrawal, for the respondents No. 3 & 4.

ORDER

The Order of the court was delivered by :

R.S. JHA, J:- The appellant has filed this appeal under Section 2(1) of the M.P Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005, being aggrieved by order dated 13.02.2013 passed by the learned Single Judge in W.P No.2345/2012 whereby the order dated 10.9.2007 and 29.6.2011 passed by the Commissioner, Municipal Corporation, Bhopal and the State Government respectively suspending the appellant, have been quashed while the charge sheet issued to the appellant on 18.10.2007 has been upheld.

2. The undisputed facts of the case are that action had been taken against the appellant on account of the fact that an Income Tax raid for search and seizure was made in his premises on 5.4.2007 during which cash worth Rs.4.82 lacs and several documents relating to investments were seized which indicated that the appellant had relations with several builders. The State Government, on receiving the aforesaid information, issued an order on 10.9.2007 directing the Municipal Corporation, Bhopal to suspend the appellant and to initiate a departmental enquiry against him pursuant to which the Commissioner, Municipal Corporation, Bhopal passed the order of suspension of the appellant on the same day i.e. on 10.9.2007 with information of the same to the Mayor-in-Council. The order of the Commissioner was placed before the Mayor-in-Council who ratified it by granting approval to it in its meeting held on 12.9.2007.

The Writ Petitions, earlier filed by the appellant against the order of his suspension, were disposed of with a direction to the Appellate Authority to decide his appeal which was ultimately decided by the Appellate Authority of the State Government on 29.6.2011 and the matter was sent back to the Municipal Corporation, Bhopal for reconsideration.

The appellant, thereafter, being aggrieved filed W.P No.2345/2012 which has been partly allowed and the impugned order of suspension dated 10.9.2007 and the order passed by the Appellate Authority dated 29.6.2011 have been quashed granting liberty to the competent authority to take fresh action against the appellant to place him under suspension. The prayer made by the appellant for quashing the charge-sheet dated 18.10.2007 has been rejected. The appellant, being aggrieved by the order of the learned Single Judge, has filed the present appeal before this Court.

3. The learned Senior Counsel for the appellant has assailed the order passed by the learned Single Judge on the ground that in view of the provisions of the M.P. Municipal Corporations (Appointment and Conditions of service of officers and servants) Rules 2000 (hereinafter referred to as 'the Corporation Rules') and the M.P. Civil Services (Classification, Control & Appeal) Rules, 1966 (hereinafter referred to as 'the Civil Service Rules') and the admitted fact that the appointing authority of the appellant is the Mayor-in-Council the charge-sheet issued on 18.10.2007 by the Commissioner, Municipal Corporation, Bhopal, who is not the appointing authority of the appellant, deserves to be quashed on the ground that it was issued without power, authority or jurisdiction. It is submitted that the learned Single Judge should have quashed the impugned charge sheet on the same grounds on which the order of suspension was quashed as the impugned charge sheet has been issued on the directions of the State Government and, therefore, the impugned order of the learned Single Judge, upholding the charge sheet while quashing the order of suspension which suffers from the same illegality, deserves to be set aside.

4. The learned counsel appearing for the respondent Corporation, on advance copy, submits that on search and seizure proceedings being conducted at the appellant's premises several incriminating documents relating to property as well as cash were seized from the premises of the appellant and as the conduct of the appellant was negligent in the discharge of his duties, therefore, the State Government issued an order on 10.9.2007 directing the Municipal

Corporation to suspend the appellant and to initiate a departmental enquiry against him. It is submitted that the State Government is competent to issue such a direction under section 420 of the Madhya Pradesh Municipal Corporation Act, 1956 (hereinafter referred to as 'the Act') and even though the said provision has not been mentioned in the order, the power of the State Government to issue such a direction flows from Section 420 of the Act.

5. It is submitted that pursuant to the direction of the State Government, the matter was taken up urgently and in compliance of the order of the State Government, the appellant was immediately placed under suspension by the Commissioner on the same date i.e. on 10.9.2007 and, thereafter the matter was placed before the Mayor-in-Council, who is the appointing authority of the appellant, who in turn granted ex-facto approval to the action of the Commissioner taken in compliance of the direction of the State Government, in its meeting held on 12.9.2007 and thereafter the impugned charge sheet has been issued on 18.10.2007.

6. It is submitted by the respondents that the Mayor-in-Council granted approval to the action of the Commissioner in taking steps in compliance of the order passed by the State Government dated 10.9.2007 which also directed initiation of a departmental enquiry and, therefore, as the Mayor-in-Council granted approval for suspension as well as for initiating a departmental enquiry, the Commissioner issued a charge sheet to the appellant on 18.10.2007. In the circumstances, it is submitted that in view of the clear and specific provision of Section 420 of the Act and the approval of the Mayor-in-Council in its meeting held on 12.9.2007, the contentions of the appellant are totally misconceived and deserves to be rejected.

7. The learned Dy. Advocate General appearing for the State has reiterated and adopted the arguments of the learned counsel for the Corporation.

8. We have heard the learned counsel for the parties at length. Section 420 of the Act, reads as under:-

> **"420. Power to demand punishment or dismissal.-** Notwithstanding anything contained in this Act, if in the opinion of the Government any officer or servant of the Corporation is negligent in the discharge of his duties, the Corporation shall, on the requirement of the Government, suspend, fine or

otherwise punish him, and if in the opinion of the Government he is unfit for his employment, the Corporation shall dismiss him."

9. From a perusal of the aforesaid section, it is clear that it contains a non-obstane clause giving it an over riding effect on all other provisions of the Act as well as sub-ordinate legislation including the rules and empowers the State Government to direct the Corporation to suspend, fine or otherwise punish any officer or servant of the Corporation who is negligent in the discharge of his duties and also further stipulates that if in the opinion of the Government he is unfit for employment, the Corporation shall dismiss him. It is also clear from a perusal of Section 420 of the Act, that it does not confer or vest any discretion in the Corporation to sit over the directions issued by the Government.

10. Apparently, the power and authority of the Government to issue the order dated 10.9.2007 can be traced to and is contained in section 420 of the Act, even if there is no mention of the provision in the order. It is further clear that in view of the order issued by the State Government under section 420 of the Act, the appellant was placed under suspension on 10.9.2007 by the Commissioner and, thereafter the Mayor-in-Council in its meeting held on 12.9.2007 has granted ex-facto approval to the action being taken by the Commissioner in compliance of the direction issued by the State Government subsequent to which the charge sheet has been issued on 18.10.2007.

11. At this stage, it is pertinent to note that the Mayor-in-Council, who is the appointing authority and the competent authority, in its meeting held on 12.9.2007, has granted ex-facto approval and sanction to the action being taken by the Commissioner in compliance of the order issued by the Urban Administration and Development Department of the State of M.P. dated 10.9.2007 whereby the State has directed the Corporation to suspend the appellant as well as to initiate a departmental enquiry against him and, therefore, the Mayor-in-Council, who is the competent authority, has not limited or confined its sanction and approval to the order of suspension alone but has infact approved all the steps taken by the Commissioner in compliance of the directions of the Government including initiating a departmental enquiry against the appellant.

12. In view of the aforesaid facts and circumstances of the present case, it is manifestly clear that the impugned order of suspension dated 10.9.2007

and the impugned charge-sheet dated 18.10.2007 have been issued by the Commissioner in compliance of the order issued by the State Government under Section 420 of the Act, and the appointing authority i.e. the Mayor-in-Council has also approved the same, therefore, the contention of the appellant based on other provisions of the Act and the provisions of the Corporation Rules and the Civil Services Rules, which are both sub-ordinate legislation, have no merit and deserve to be rejected as it is settled law that the statutory provisions of Section 420 of the Act, which starts with a non-obstante clause, will prevail over the other provisions of the Act and the Rules which are in the nature of sub-ordinate legislation.

13. We are also of the considered opinion that as the action taken by the Commissioner against the appellant has been approved and affirmed by the Mayor-in-Council, who is the competent authority, in its meeting held on 12.9.2007, therefore, the contention of the appellant that the impugned orders issued by the Commissioner lack authority, is also misplaced and misconceived. A similar view has been taken by a Division Bench of this Court in the case of *Shankerlal Choube vs. Shri L. P. Tiwari, Commissioner, Municipal Corporation, Jabalpur and Others*, 1965 MPLJ 934.

14. We are also of the considered opinion that in view of the specific statutory provisions of Section 420 of the Act which empowers the Government to issue direction to the Corporation or its officers to suspend or initiate departmental proceedings against an employee thereby leaving them with no discretion in the matter the general principle of administrative law which prohibit abdication or exercise of discretionary powers by an authority on the dictates of a superior authority would not be applicable to the present case in view of the specific power to issue directions conferred by Section 420 of the Act, upon the Government, as application of the said principle to the present case by ignoring the provisions of Section 420 of the Act, would lead to an absurd and unwanted situation which would render the statutory provisions of Section 420 of the Act, otiose and redundant.

15. We are, therefore, of the considered opinion that the reasoning to the contrary, given by the learned Single Judge by relying upon the cases of the Supreme Court rendered in the cases of *State of U.P and Others vs. Maharaja Dharmander Prasad Singh,* (1989) 2 SCC 505; *Anirudhsinhji Karansinhji Jadeja and another vs. State of Gujarat,* AIR 1995 SC 2390; and *Pancham Chand and Others vs. State of Himachal Pradesh*

and Others, (2008) 7 SCC 117, cannot be sustained and deserves to be set aside as the said judgments of the Supreme Court are not applicable to the facts and circumstances of the present case specifically in view of the existence of a statutory provision like Section 420 of the Act.

16. The reasoning of the learned Single Judge, contrary to what we have stated above, is accordingly set aside. However, as the respondents have not assailed the order of the learned Single Judge, we think it appropriate not to interfere in the conclusion recorded by the learned Single Judge of quashing the order of suspension. It is clarified that while the reasons given by the learned Single Judge for quashing the order of suspension are set aside, the result is not disturbed only on account of the fact that it has not been assailed or challenged by the respondents.

17. In the facts and circumstances of the present case, for the aforementioned reasons, i.e. the statutory provisions of Section 420 of the Act, and the approval granted by the Mayor-in-Council on 12.9.2007, we uphold the order of the learned Single Judge dismissing the petition relating to the challenge to the charge sheet dated 18.10.2007.

18. With the aforesaid observation the appeal, filed by the appellant, stands dismissed. There shall be no order as to the costs.

Appeal dismissed.

I.L.R. [2013] M.P., 995
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 5269/2012 (Gwalior) decided on 7 December, 2012

SHAKUNTALA BAI (SMT.) ...Petitioner
Vs.
CHATUR SINGH & ors. ...Respondents

***A. Land Revenue Code, M.P. (20 of 1959), Section 110* - Section 110 provides the decision making process of the Tehsildar - Intimation of mutation should be duly published by the beat of drums in the village to which they relate and its copy is required to be affixed at the Choupal, gudi or any other place of public resort in the village and a copy should also be sent to the gram panchayat. (Para 7)**

क. 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।

B. Land Revenue Code, M.P. (20 of 1959), Sections 110 & 111 - Interested person **- Petitioners are the original owner - Mutation was sought on the basis of sale deed executed by Power of Attorney - Notice of mutation to petitioners was necessary as they are necessary parties. (Para 9)**

ख. 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।

C. Land Revenue Code, M.P. (20 of 1959), Sections 110 & 111 - Mutation Proceedings **- Words "all person appearing to him to be interested" does not mean that there is any unfettered and uncontrolled discretion on the Tehsildar to notice any person as per his whims and fancies - This power is to be exercised diligently and all such persons who may be interested should be noticed. (Para 9)**

ग. 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।

D. 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". (Para 13)**

घ. 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 प्राधिकारियो द्वारा पारित आदेशों को चुनौती देने का याची का अधिकार समाप्त नहीं होगा – याची को "डोमिनस लिटिस" समझा गया।

Cases referred :

(2008) 4 SCC 451, (2009) 5 MPHT 282, (2002) 6 SCC 16.

H.D. Gupta with *N.K. Gupta,* for the petitioner.

K.S. Tomar with *Sanjay Tomar*, for the respondent No.1.

V.K. Bhardwaj with *Anand V. Bhardwaj,* for the respondents No. 3 & 4.

Praveen Newaskar, Dy. G.A. for the State.

ORDER

SUJOY PAUL, J.:- In this petition filed under Article 226 of the Constitution, the case of the petitioner is as under:-

The petitioner is the owner of land along with other family members. The land is in Survey No. 697/02 min area 10141 hectare. A power of attorney was executed by the petitioner in favour of Hemsingh, whereby he was authorised to look after the land but no authority for alienating the land was given to him. This power of attorney was also subsequently cancelled. Hemsingh alienated the land in the name of his own son and some other persons. The son of Hemsingh i.e. Balveer Singh (respondent No. 3) and other persons got their names mutated in the revenue record. No information is given to the petitioner in the mutation proceedings before recording the names of respondents in the revenue record. The petitioner feeling aggrieved with the said action of the Tahsildar preferred an appeal before the Sub Divisional Officer (SDO) bearing appeal No. 99/05. The appeal aforesaid was filed by all the owners of the land and the SDO after hearing the parties by order dated 24.05.2006 allowed the appeal and set aside the mutation order made in favour of respondents No. 1 to 4. The matter was remitted back for affording opportunity of hearing to the parties and enquiry was directed to be conducted. Against the SDO's order dated 24.05.2006 (Annexure P-4), a revision was filed by respondent No. 1 Chatur Singh. The other respondents did not file any revision. The Additional Collector by order dated 30.08.2007 dismissed the revision with a direction to the Tahsildar to afford opportunity to the parties and pass a fresh and reasoned order. Against the order of Additional Collector

a revision was filed by respondent No. 1. This revision was allowed and orders of SDO and Additional Collector were set aside. The petitioner preferred a revision against this order of Additional Commissioner before the Board of Revenue. The Board of Revenue by impugned order Annexure P-1 dated 05.07.2012 dismissed the revision of petitioner. This petition is filed against the orders Annexure P-1 and and P-2, whereby the revision of respondent No. 1 was allowed by Additional Commissioner and the revision of the petitioner is rejected by the Board of Revenue.

2. Shri N.K. Gupta, learned counsel for the petitioner, submits that as per section 110 of Madhya Pradesh Land Revenue Code, 1959, it was obligatory on the part of Tahsildar to issue notices to all person who may be interested in the matter. He submits that as per rules made under the Code also, the advertisement and notices are required to be issued/published in a particular manner. The petitioner was a necessary party and was very much interested being the owner of the land but he was not heard by the Tahsildar, which vitiates the entire proceedings. By placing heavy reliance on Page 8 of the rejoinder, it is stated that the document makes it crystal clear that in the record of the Tahsildar only one document i.e. advertisement is enclosed and no other document finds place, which shows that no notices have been issued to the person interested. He further submits that no material is available to show that advertisement was fixed in the places it is required to be fixed as per the provisions of MPLRC and rules made thereunder. By relying on various documents he submits that power of attorney is given to Hemsingh for a limited purpose and no right was given to him to sell the property.

3. *Per Contra, Shri K.S. Tomar*, learned senior counsel for respondent No. 1 and Shri V.K. Bhardwaj, learned senior counsel for respondent No. 3 and 4, supported the orders Annexure P-1 and P-2. Learned senior counsel appearing for the respondents submit that as per section 111 of MPLRC, the remedy for the petitioner is to file a civil suit. The petitioner has already chosen to file a civil suit and accordingly, no case is made out for interference by this Court. They relied on section 115 and 116 of the MPLRC and judgments of Supreme Court reported in (2008) 4 SCC 451 [*B.K. Muniraju Vs. State of Karnataka and others*] and (2009) 5 MPHT 282 [*Sakhi Gopal Dixit Vs. Board of Revenue and another*].

4. Shri Newaskar, learned Dy. Government Counsel produced the relevant record of Tahsildar as per the earlier direction of this Court.

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

6. The case of the petitioner is that he gave power of attorney for a limited purpose to Hemsingh and that power of attorney did not give authority to Hemsingh to sell the property. Hemsingh without any authority of law had sold the property and alienated the same. The power of attorney was also cancelled and, therefore, it was obligatory on the part of Tahsildar to hear the petitioner in the mutation proceedings. The main emphasis of Shri N.K. Gupta is for following "due process" which is allegedly violated by the Tahsildar.

7. *Per Contra*, Shri K.S. Tomar and Shri V.K. Bhardwaj, learned senior counsel submitted that proper remedy for the petitioner is to file a civil suit. Before dealing with these aspects, it is apt to quote the relevant provision in this regard. Section 110(3) of MPLRC reads as under:-

> "110. Mutation of acquisition of right in Field Book and other relevant land records.--
>
> (1) xxx xxx xxx
>
> (2) xxx xxx xxx
>
> (3) On receipt of the intimation from patwari under sub-section (2), the Tahsildar shall have it published in the village in the prescribed manner and shall also give written intimation thereof to all person appearing to him to be interested in the mutation and also to such other person and authorities as may be prescribed."

A bare perusal of this section shows that the Tahsildar is under a legal obligation to publish the advertisement in the prescribed manner in the village and is also required to give written intimation of the same to all person who are interested in the mutation. Note 27 made under section 110 aforesaid reads as under:-

> "27. On receipt of the intimations from the Patwaris, or from the Registering Officers under Section 112, the Tahsildar shall have the intimations duly published by beat of drum in the village to which they relate and shall get a copy of the intimation posted at the chaupal, gudi or any other place of public resort in the village and shall also send a copy thereof

to the Gram Panchayat of the village. He shall also give written intimation of the same to all persons appearing to him to be interested in the mutation."

Rule 28 and 32 also reads as under:-

"28 On a date and place to be specified in the intimation the Tahsildar shall hear the parties concerned and certify the mutation entry, provided that, where a party remains absent after having been duly served with a notice, the entry will be certified ex parte.

32. Disputes shall be decided summarily by the Tahsildar on the basis of title and not possession. Any transfer by a person whose name is not recorded in the Khasra shall not be admitted in mutation by the Tahsildar. The order shall contain the names of the parties and witnesses and a brief summary of the evidence produced by either side together with the Tahsildar findings thereon."

A conjoint reading of section 110(3) and aforesaid rules will make it clear that the Tahsildar is required to act in a particular manner. He is required to publish an advertisement, beat of drum is to be used for the purpose of said publication in the concern village, copy of intimation is required to be posted at chaupal, gudi and other place of public resort in the village and copy of the same is required to be sent to Gram Panchayat of the village. In addition thereto, the Tahsildar is required to give written intimation of the publication to all persons who may be interested in mutation. Thereafter, by fixing a date in the intimation, the Tahsildar is obliged to hear the parties concern and then certify the mutation.

8. The twin questions at this stage emerge for consideration are:-

(i) Whether the present petitioners can be treated as interested person and whether they were required to be noticed.

(ii) Whether, the Tahsildar has followed the aforesaid procedure.

9. The mutation was claimed on the strength of a sale deed which was executed on the basis of power of attorney. The petitioners were original owners of the land and, therefore, in the opinion of this Court, they should have been treated as person interested by the Tahsildar. It was obligatory on

the part of the Tahsildar to issue notice to the petitioners as well. The language used section 110(3) and Note 27 aforesaid which employed the words *"all person appearing to him to be interested"* does not mean that there is any unfettered and uncontrolled discretion on the Tahsildar to notice any person as per his whims and fancies. This power is to be exercised diligently and all such persons who may be interested should be noticed. In my opinion, the petitioners should have been noticed being the original owner of the property. This first question is answered in favour of the petitioners.

10. The second question is about the decision making process adopted by the Tahsildar. The original record is also produced for the perusal of this Court. The original record does not contain any indication as to where the advertisement was affixed. There is no mention that it was affixed in chaupal, gudi and other relevant places where it was required to be affixed. It is also not clear as to when this advertisement was actually affixed. The record also does not contain any indication that any notices were issued to the interested person including the petitioners. This is one of the reasons on which the SDO interfered in appeal and gave his finding that the appellants/present petitioners were not noticed. The date of notice and advertisement and the place where it was allegedly affixed etc. is not clear. The said finding of the SDO were not disturbed by the Commissioner or by the Board of Revenue.

11. In the considered opinion of this Court, the finding of the SDO to the extent indicated above is in accordance with law. The main thrust of the argument of learned senior counsel for the respondents is that the proper remedy for the petitioners is to file a civil suit. Heavy reliance is placed on sections 111, 115 and 116 of the MPLRC in this regard. By placing reliance on the judgment of *Sakhi Gopal Dixit* (supra), it is argued by Shri Bhardwaj that the proper remedy for the petitioner is to file a civil suit and in fact on a later stage, petitioner has already filed a civil suit. In such circumstances, this petition is not tenable and the Board of Revenue and the Commissioner have not committed any error of law.

12. Section 111 of the Code deals with the jurisdiction of the civil courts to decide any dispute in which State Government is not a party and it is relating to any right which is recorded in the record-of-rights. Section 115 deals with power of Tahsildar to correct the entry, if it is found to be incorrect and made by an officer subordinate to him.

13. In the considered opinion of this Court, it cannot be disputed as per

the scheme of MPLRC that a mutation order can be challenged by filing an appeal under the provisions of MPLRC. This is settled in law that it is the choice of the litigant to decide the forum. When more than one forums are available to him. I am unable to hold that petitioner's appeal under section 44(1) of MPLRC was not tenable against mutation order of the Tahsildar. The Apex Court in (2002) 6 SCC 16 [*Dhannalal Vs. Kalawatibai and others*], held as under:-

> "The plaintiff is *dominus litis*, that is, master of, or having dominion over the case. He is the person who has carriage and control of an action. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of the plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law."

The respondents have also filed an appeal under section 44 before the Commissioner, which was decided by Annexure P-2 dated 15.11.2010. Resultantly, petitioner filed revision which was decided by the Board of Revenue on 05.07.2012 (Annexure P-1). Thus, even assuming that jurisdiction was also vested with the civil court, it cannot be held that the petitioner's appeal before the SDO was incompetent under section 44 aforesaid. Section 115 is erroneously relied by the respondents which has no application in the facts and circumstances of this case. In this case admittedly entry is made by the Tahsildar and not by his subordinate employee/officer and, therefore, section 115 has no application. In the facts and circumstances, section 116 also has no application. Apart from this, civil suit was filed in 2012 for declaring the sale deed dated 14.02.2005 as null and void whereas order of mutation was challenged before SDO on the basis of flaw in decision making process. Thus, subsequent filing of said suit for a different relief will not wipe out the right of petitioners to challenge orders passed by authorities under the MPLRC arising out of order of Tahsildar.

14. At the cost of repetition, it may be mentioned that the petitioner's appeal under section 44 is tenable and, therefore, no fault can be found regarding maintainability of appeal before the SDO. Merely because some other remedy is also available, the petitioner cannot be deprived from the fruits of the decision of the SDO.

15. In Annexures P-1 and P-2, the competent authorities have failed to see whether the Tahsildar has followed the "due process". The decision of SDO was not interfered with on that ground. This is settled in law that if a thing is required to be done in a particular manner, it has to be done in the same manner or not at all. In other words, the due process has to be followed and other methods are forbidden. The interference by the Commissioner was mainly on the ground that the power is only vested with the civil courts. This order is affirmed by the Board of Revenue. I am unable to uphold this reason for the simple reasons that decision making process was subject to judicial review by the SDO under section 44 of MPLRC. Therefore, on the ground that a civil court may also have jurisdiction, the order could not have been interfered with. In the judgment of *Sakhi Gopal Dixit* (supra), this Court recorded that the petitioner was noticed and he did not file any objection pursuant to proclamation issued by the authority in accordance with the procedure prescribed by section 110 of the Code and, therefore, the authority after recording the statement of respondent No. 2 and his witnesses recorded a finding and allowed the application for mutation. That was a case where despite service of notice, the petitioner therein did not file any objection and did it after a period of one-and-half-months. That too before the appellate authority. In para 6, 9 and 10 of the judgment of *Sakhi Gopal Dixit* (supra), this Court has given a specific finding that the due procedure prescribed by law was followed. On the basis of said reason, interference was declined. On the contrary in the present case, as analyzed above, the "due process" is not followed and the entire proceedings before the Tahsildar are polluted and vitiated.

16. Consequently, judgment of *Sakhi Gopal Dixit* (supra) is of no assistance to the respondents. This is settled in law that a judgment is precedent on the basis of facts and circumstances of a particular case. The principle of law/ratio decidendi is to be derived on the basis of relevant facts and the principles cannot be applied in vacuum or as a thumb rule without considering the fact situation of a particular case. The respondents have also relied on the judgment of *B.K. Muniraju* (supra). In my opinion, the said judgment is of no help to the respondents. In the judgment of *B.K. Muni Raju* (supra), the scope of interference by this Court is restated by the Supreme Court, which shows that the interference may be made when the Court/authority below has acted in flagrant disregard of law or rules of procedure or acting in violation of principle of natural justice. On the basis of this judgment also, the interference

needs to be made because the due procedure has been grossly violated by the Tahsildar.

17. Accordingly, in the opinion of this Court, Annexures P-1 and P-2 cannot be permitted to stand and are accordingly set aside. The order of the SDO is affirmed to the extent, he remitted the matter back to the Tahsildar to hear both the parties, peruse the relevant material and pass appropriate orders. It is made clear that it will be open for the Tahsildar to take a decision in accordance with law on the basis of material on record and any finding on merits in the order of SDO will not bind him.

Consequently, Petition is allowed. No costs.

Petition allowed.

I.L.R. [2013] M.P., 1004
WRIT PETITION
Before Mr. Justice U.C. Maheshwari

W.P. No. 12910/2009 (Jabalpur) decided on 12 December, 2012

JAMNA DEVI (SMT.) ...Petitioner
Vs.
RAJENDRA PRASAD JI ...Respondent

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. (Paras 5 and 8)**

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।

Case referred :

AIR 1958 SC 245

Devesh Khatri, for the petitioner.
Vivek Rusia, for the respondent.

ORDER

U.C. MAHESHWARI, J.:- Looking to the nature of question involved in this petition, instead to hear on the question of admission, with the consent of the parties, the same is heard for final disposal.

Heard.

1. The petitioner/plaintiff has filed this petition for quashment of the order dated 15.9.09 Annex.P/5 passed by the IV ADJ (FTC) Khandwa in COS No.2-A/09 whereby allowing the application of the respondent filed under Order 7 rule 10 r/w 11 of the CPC in part, the petitioner has been directed to pay the requisite court fees in accordance with the prayer made in the plaint. In addition to it, the petitioner was also directed to amend the pleadings for consequential relief of possession because even on decreeing the suit the decree could not be executed for obtaining the possession of the property by the petitioner.

2. Petitioner's counsel after taking me through the averments of the petition as well as the papers placed on the record along with the impugned order said that in view of the settled proposition of the law, the parties like the petitioner/ plaintiff has a right to to get the decree of declaration only with respect of her share in the disputed property along with the prayer of perpetual injunction restraining the respondent/defendant to interfere in her right and share in the disputed property and, in such premises, she could not be insisted

to amend the plaint for the prayer of separate possession of the property if she wants to keep the property in the joint ownership to maintain the unity of the family and, in such premises, the direction of the trial court to amend the plaint for the purpose of separate possession is not sustainable under the law. In continuation, he said that although in the plaint three different declarations with respect of the disputed property has been made by the petitioner i.e (a) declaration regarding charge over the disputed house of her maintenance ;(b) declaration of her share in the house/plot and (c) declaration to declare the alleged Will as ab initio void. And as a consequence of such relief, the prayer for perpetual injunction has been made. So, in such premises, the valuation of single declaration and the court fees paid accordingly, is sufficient. It does not require any more valuation or the court fees and prayed for setting aside the impugned order and quashment of the aforesaid application of the respondent by allowing this petition.

3. The aforesaid prayer is opposed by the respondent's counsel Shri Vivek Rusia contending that the impugned order being based on the proviso of section 34 of the Specific Relief Act and also taking into consideration that three different reliefs of declaration have been made by the petitioner , is in conformity with law. It does not require any interference at this stage. He prayed that in view of the proviso of the aforesaid section 34, the suit of the petitioner could not be decreed because the available consequential relief has not been prayed in the plaint and prayed for dismissal of this petition. He also placed his reliance on a decision of the Apex Court in the matter of *S.Ram Ar.S.Sp. Sathappa Chettiar Vs. S. Rm. Ar. Rm. Ramanathan Chettiar*- AIR 1958 SC-245.

4. Having heard the counsel keeping in view their arguments, I have carefully perused the papers placed on the record along with the impugned order. It is apparent from the prayer clause of the plaint Annex.P/1 that the impugned suit has been filed by the petitioner with the prayer of three declarations; (a) is to declare the charge of her maintenance over the disputed property; (b) declaring her share in such property and (c) declaring the Will dated 5.7.96, as alleged, executed by Late Ram Prasad projected and filed by respondent to be ab initio void and as a consequence the prayer for perpetual injunction is also prayed. It is apparent fact from the plaint that the suit has been valued only for the relief of one declaration and court fees was also paid accordingly. True it is that the prayer of perpetual injunction, the valuation is

separately made and the court fees was paid accordingly.

5. In the available scenario when herself, according to her plaint, has filed the suit for giving three different declaration then even in the absence of any objection of the other side, in view of the law laid down by the Apex court in the aforesaid cited case, the petitioner is bound to pay the court fees separately in the suit on every declaration and undisputedly, the petitioner neither valued nor paid the court fees on all the aforesaid prayer of three declarations. So, in such premises, till this extent the order impugned is hereby affirmed and the petitioner is directed to value the suit of three different declaration and pay the court fees accordingly otherwise the suit cannot proceed further for adjudication. Such exercise be carried out by the petitioner within thirty days from today by filing the appropriate application in this regard before the trial court, failing which the suit shall stand dismissed automatically without further order either by this court or the trial court.

6. So far the valuation of the suit for the purpose of jurisdiction, which is made by the petitioner Rs.300000/- in view of the stated price of the disputed house does not appear to be contrary to law, hence on such question, on the ground of valuation for the purpose of jurisdiction, the impugned suit could not be dismissed. The same was rightly entertained by the trial court.

7. So far the question raised by the respondent's counsel that in view of the proviso of section 34 of the Specific Relief Act in the absence of the consequential relief of separate possession, the impugned suit could not be entertained and adjudicated by the trial court as such the same could neither entertained nor decreed.

8. In the available scenario of the matter, such argument has not appealed me because as per the settled position, the person like the petitioner could not be insisted to file the suit for separate possession if she wants to keep the disputed property in joint ownership to maintain the unity of the family and on arising the occasion, subject to decree of the impugned suit for which the same has been filed, the petitioner may file the separate suit for possession of her share after declaring her rights in the present suit. So, in such premises, it is held that even in the absence of prayer for partition and separate possession of the disputed property, the suit could be entertained and adjudicated in accordance with the procedure prescribed under the law. So, in such premises, the findings of the trial court holding that the impugned suit in the lack of

consequential available relief of partition and separate possession, is not entertainable or the decree which may be passed in the suit could not be executed, is hereby set aside.

9. In view of the aforesaid, by allowing this petition in part, the impugned order Anenx.P/5 is hereby modified till the extent as stated above along with the observation and direction made in the foregoing paras of this order.

10. It is made clear that this order has been passed taking into consideration the averments of the plaint. Pursuant to it, it is observed that the respondent/ defendant shall be at liberty to raise all the available defence and objections in his written statement and same shall be considered by the trial court in accordance with the procedure prescribed under the law without being influenced from any observation or findings given by this court in this order or by the trial court in the order impugned.

C.C as per rules.

Petition partly allowed.

I.L.R. [2013] M.P., 1008
WRIT PETITION

Before Mr. Justice Ajit Singh & Mr. Justice Sanjay Yadav
W.P. No. 7135/2008 (Jabalpur) decided on 17 December, 2012

UNION OF INDIA & ors. ...Petitioners
Vs.
RAJENDRA PRASAD YADAV & ors. ...Respondents

A. 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.** **(Paras 13-15)**

क. 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।

B. ***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. (Paras 19 & 20)**

ख. *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।

Cases referred :

(2011) 6 SCC 725, (2011) 7 SCC 789.

Atul Choudhary, for the petitioners.
Akash Choudhary, for the respondents No. 1 to 4.

O R D E R

The Order of the court was delivered by : **SANJAY YADAV, J:-** What should be the criteria for fixing seniority of the incumbents brought from different seniority group in a newly created cadre, is the issue which crops up for consideration in the writ petition directed against the order dated 30.11.2007 passed by the Central Administrative Tribunal, Jabalpur Bench Jabalpur in Original Application No. 656/2005; (i) Whether the seniority should be from the date the incumbent held the substantive post in the parent cadre; (ii) whether the seniority should be from the date when the incumbent reports the joining in new cadre, or (iii) Whether the seniority should be from the date the cadre is closed; are the off shoots of the main issue.

2. The facts relevant are that with the formation of Traction Rolling Stock (for Short TRS) in Electrical Loco Shed ,New Katni Junction presently West Central Railway (previously Central Railways) need arose to fill in 216 group D posts, for that applications were invited from eligible group D employees of Jabalpur Division, Central Railway (presently West Central Railway), vide letter dated 11.7.1996 on the following terms:

2. शर्तें:– (क) कर्षण बल स्टाफ संवर्ग के लिये उपयुक्तता हेतु स्क्रीनिंग

कमेटी द्वारा उम्मीदवारों की स्क्रीनिंग ली जाएगी ।

(ख) उम्मीदवार वेतनमान रू. 750–940 पु.वे.मा. खलासी के पद हेतु निचली वरीयता के पात्र होंगे । उनकी वरीयता की गणना टी. आर. एस. संगठन में कार्यभार ग्रहण करने की तारीख से की जाएगी ।

(ग) उम्मीदवारों को कनवर्शन ट्रेनिंग/ऑन जॉब ट्रेनिंग करना होगा । यदि वे योग्य नहीं पाए गए और प्रशासन को उनका कार्य संतोषजनक प्रतीत नहीं होता तो उन्हें उनके मूल इकाई/विभाग में वापस कर दिया जाएगा।

(द) नये संवर्ग में आने के बाद वे अपने मूल इकाई/विभाग पुनः सीनान्तरण के पात्र नहीं होंगे ।

3. That, with formation of TRS in Electric Loco shed, the Railway Administration decided to close the steam Loco Shed and further decided to absorb the employees of steam loco shed in the Electric loco shed. The terms and condition remained the same as was stipulated vide letter dated 11.7.1996.

4. That, before closure of cadre, decision was taken by the Railways in the Joint meeting with the recognized Unions viz, Central Railway Majdoor Sangh and National Railway Majdoor Union held on 18.7.2002; whereby, besides other issues (not relevant for the present, therefore, not spelt out), following principles were laid down for determining seniority of the non-gazetted staff of TRS cadre of new Katni Junction Jabalpur, circulated vide circular No.HRD/228/EI/ELS/NKJ/Jabalpur dated 30/7/2002 that:

> "1.5.1: All promotion order issued for this cadre prior to the date of closure of cadre i.e. 20.8.2002 are deemed fortuitous and purely ad hoc without any prescriptive right for the staff for any such posting, promotion in the grade.
>
> 1.5.2 The seniority of staff transferred from different units of Central Railway on or before 20.8.2002 shall be based on rules applicable to inter se seniority depending upon the length of substantive post held by these staff in their parent cadre as on 20.8.2002.
>
> 1.5.3 Staff who have come on transfer on their own request from other Railway shall come on bottom seniority in the recruitment grade.
>
> 1.5.4 The seniority of the staff directly recruited for ELS/NKJ."

5. The TRS cadre was subsequently closed on 20.8.2002. Material on record reveals that before closure of the TRS cadre, the exigency of services warranted certain promotion to the post of Technician Trade such as Technician Grade III and Grade II. As such promotions were made from amongst the incumbents who had joined in pursuance to letter dated 11.7.1996. But since the TRS cadre was open these promotion were treated as purely adhoc. Apparently, no substantive right was conferred on such posts on which they were promoted on adhoc basis.

6. That, with the implementation of policy as circulated vide letter dated 30.7.2002 ,i.e, with the drawing of seniority list in the TRS Department after closure of cadre (20.8.2002) grievance arose amongst the group D staff and in the Artisan Cadre in respect of fixation of seniority which led to filing of Original Application in the Tribunal (O.A.No.1049/2004 Babulal and others V. Union of India and others) by certain employees. The application was disposed of with direction to the Railway to decide representation. This direction led to passing of order dated 19.1.2005; whereby, it was stated that the respondents/ applicants and similarly situated other employees were regularized as Helper in grade Rs.2650-4000 and that they were working as ad hoc technician grade Rs.3050-4590 (except one Harkesh Bahadur Yadav). It was further stated that these employees since were promoted as Technician Grade III in pay scale 3050-4590 prior to closure of cadre, i.e., 20.8.2002. After its closure, their promotions were treated as ad hoc and, therefore, their name was not included in the seniority list of regular Technician Grade III. It was further informed that by order No. 12/2002 dated 16.10.2002, 9 helpers, i.e., respondent Nos. 12 to 20 were regularly promoted on the post of Technician Grade III. It was further informed that steps are being taken to regularize 10 employees as Technician Grade III in grade Rs.3050-4590 under restructuring scheme effective from 1.11.2003. These employees were S/Shri Madhukar Rao, Yogi Prasad, Suresh Kumar, Dineshwar Prasad, Babulal, Shrikant, Murlidharan, Jagdish Prasad, Ramlakhan and Mahesh Prasad. In respect of others, it is stated that because of non-availability of the post in Technician Grade III they could not be regularized. Respondent Nos. 1 to 11 still aggrieved for not being regularized as Technician Grade III in T.R.S cadre and by order dated 19.1.2005, preferred O.A. No. 656/2005 before the Central Administrative Tribunal, Jabalpur Bench, Jabalpur seeking the quashment of order dated 19.1.2005 and for setting aside the seniority list dated 30.5.2003 and 5.4.2004.

7. Apparently, the order dated 16.10.2002; whereby, respondent Nos. 12 to 20 who were regularly promoted as Technician Grade III was not challenged.

8. Tribunal, after taking into consideration rival contentions quashed the order dated 19.1.2005 as well as the seniority list dated 30.5.2003 and 5.4.2004 so far as it related to Technician Grade III in respect of respondent Nos. 12 to 20 with a direction to the Railways to consider the case of respondent Nos. 1 to 11 (applicants in original application) and respondent Nos. 12 to 20 (respondents in original application) for regularization as Technician Grade III as and when they are found eligible as per their seniority position and subject to fulfillment of eligibility criteria, treating them on equal footing and maintaining the seniority in the T.R.S cadre on the basis of their joining the cadre. The respondent Railways were further directed to draw fresh seniority list of Technician Grade III after regularization of the applicants and respondents as Technician Grade III. The Tribunal further directed that revised seniority of Helper Khalasi/Khalasi be prepared including the name of respondents on the basis of joining the T.R.S cadre and that since the private respondents have already cleared the written test and viva voce required for regularization, they may not be subjected to these tests/examination again for regularization.

9. The above conclusion has been arrived at by Tribunal by construing that the circular dated 30.7.2002 which laid down the policy regarding the fixation of seniority of Group D and the Artison Cadre in the newly T.R.S Department is applicable from the prospective date and, therefore, will not have an overriding effect on the letter dated 11.7.1996 issued at Divisional level inviting applications for posting in the T.R.S Department and that their seniority will be counted in the Department from the date of assuming the charge.

10. The Tribunal ignores following aspects which makes its reasonings vulnerable. Firstly, that, till closure of cadre in a newly constituted department the entire cadre is open and does not attain permanency. The cadre means the strength of a service or a part of service sanctioned as a separate unit. In the case at hand, the phasing out of steam engines and introduction of electric engines led to formation of new department, viz., Traction Rolling Stock (T.R.S). To man the same employees from different departments were given the opportunity to opt for Group 'D' post in the T.R.S Organization vide letter

dated 11.7.1996 issued by the Divisional Railway Manager, the Divisional Head. The letter no doubt contains the stipulation that the candidates will be placed lower in the seniority in grade Rs.750-940 and their seniority shall be counted from the date of their joining the organization. Since the cadre was not made permanent, promotions within the T.R.S. Organization to higher post of Artisan Grade III and Artisan Grade II was regulated by taking into the seniority from the date of joining the organization. This practice was rightly not faulted with as the promotion within organization were purely temporary and did not confer any substantive right in favour of promotees. However, since the establishment of T.R.S was of permanent nature, policy decision in consultation with the recognized Union was taken at Zonal Level for closure of cadre, i.e., restraining free inflow of personnels from different departments/ sections; leading to issuance of circular dated 30.7.2002.

11. Under Section 2 (32) of Indian Railways Act, 1989 "railway administration" has been defined to mean that in respect of a Government railway, the General Manager of a Zonal Railway; under whom is vested the general superintendence and control of zonal railway (Section 4 (2) of the Railways Act, 1989). Since the policy decision as circulated on 30.7.2002 was taken at level of zonal railway, it will have overriding effect over the decision which was taken at the divisional railway. Thus, the circular dated 30.7.2002 supersedes the letter issued by the Divisional Railway Manager on 11.7.1996.. Since the service conditions of the incumbents in T.R.S Organization are governed by Rules and Regulations framed by the Railway Administration, the employer, the employees are governed by all such Rules and Regulations framed during their service tenure from time to time. It cannot be said that since they were brought in the organization with a stipulation that their seniority would be reckoned from the date of their joining the cadre it would prevent the Railway Administration from laying down a policy on the closure of cadre to determine inter se seniority of the incumbent who forms part of the permanent cadre after the closure.

12. Tribunal in our considered opinion was, therefore, not justified in holding that the circular dated 30.7.2002 is prospective in nature and will not be applicable to the respondents (applicants in O.A. No. 656/2005).

13. Secondly, the Tribunal has ignored the fact, which makes the decision by the Tribunal directing for construing the seniority from the date of joining T.R.S organization is vulnerable for the reason that ignores the fact that

employees from different departments were carved out for their posting in newly constituted T.R.S organization. These employees though carried their respective seniority; however, the date of their relieving from parent department varied; therefore, an employee though senior and opted for his transfer to T.R.S organization from other section/department, will be required to take a position in the seniority list below him. This would create an enormous position as the senior for no fault of his would be placed to the below his service junior. The anomaly would further be (unfounded if the service junior on the basis of the seniority in T.R.S organization is further promoted in the Artisan Grade.

14. It was to rule out these anomalies the Zonal Headquarter in consultation with the recognized Union decided that after closure of cadre in the T.R.S department the seniority of staff transferred from different units of Central Railway on or before 20.8.2002 shall be based on rules applicable to inter se seniority depending upon the length of substantive post held by these staff in their parent cadre as on 20.8.2002.

15. In view whereof the direction by the Tribunal for maintaining seniority in the T.R.S cadre on the basis of joining the cadre cannot be given the stamp of approval. Instead we direct that seniority in the T.R.S cadre would be strictly in accordance with the policy decision as contained in the circular dated 30.7.2002.

16. Next question which arises for consideration is whether in absence of challenge to promotion order dated 16.10.2002; whereby, respondents No. 12 to 20 were promoted as Artisan Grade III, the Tribunal is justified in setting at naught such promotions by dislocating the seniority prepared as per the policy decision dated 30.7.2002.

17. It is contended on behalf of respondent Nos. 1 to 11 (applicants in Original Application No. 656/2005) that the entire proceedings for promotion of Group D staff in the T.R.S Organization to Artisan Grade III was initiated before closure of the cadre and it was only that, the promotion orders were passed on 16.10.2002 after the closure of T.R.S cadre (which was on 20.8.2002); therefore, these promotions as per the policy decision dated 30.7.2002 ought to have been treated as fortuitous and purely ad hoc.

18. Paragraph 1.5.1 of the circular dated 30.7.2002 stipulates that, "All promotion order issued for this cadre prior to the date of closure of cadre i.e. 20.8.2002 are deemed fortuitous and purely ad hoc without any prescriptive

right for the staff for any such posting, promotion in the grade".

19. It is a settled principle of law that the promotion is not a right though the consideration is. {For an authority please see *Deepak Agrawal v. State of U.P.* : (2011) 6 SCC 725 *and Jagdish Prasad v. State of Rajasthan* : (2011) 7 SCC 789..

20. In view whereof the initiation of proceedings for promotion will not create any right in the incumbent for promotion, nor the promotions made at the later dated can be treated from the date of initiation of proceedings. The promotion comes into existence from the date of order.

21. In the case at hand the promotion of respondent Nos. 12 to 20 since was by virtue of order dated 16.10.2002, i.e after 20.8.2002, the date from which the T.R.S Cadre was closed, paragraph 1.5.1 of the circular dated 30.7.2002 does not get attracted as would cause any dent to the order dated 16.10.2002. And in absence of a direct challenge to such order the same ought not have been tinkered with by the Tribunal indirectly.

22. In view of above analysis we uphold the challenge to the order dated 30.11.2007 passed by the Tribunal in Original Application No. 656/2005. We accordingly set aside the same and dismiss the original application O.A. 656/2005.

23. In the result, petition is allowed. However, no costs.

Petition allowed.

I.L.R. [2013] M.P.,1015
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 7116/2008 (S) (Jabalpur) decided on 8 January, 2013

SANJEEV KUMAR JAIN ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

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. (Paras 12 to 14)

संविधान – अनुच्छेद 226 – न्यायिक पुनर्विलोकन – याची की नियुक्ति, सहायक परियोजना अधिकारी के रुप में आईसीडीएस परियोजना में की गई जिसे बाद में राज्य सरकार के आदेशों के अंतर्गत महिला एवं बाल विकास विभाग द्वारा अधिकार में लिया गया – याची को तब भी परियोजना कर्मचारी माना गया – जहां राज्य प्राधिकारी का कोई आदेश अवैध या मनमाना, अयुक्तियुक्त एवं असंगत पाया जाता है, वह न्यायिक पुनर्विलोकन के लिए खुला है – किन्तु, उच्च न्यायालय अपने स्वयं के निर्णय को प्रतिस्थापित करने की कार्यवाही नहीं करेगा क्योंकि यह स्वयं प्राधिकारी की शक्ति के प्रयोग की कोटि में आयेगा – याची के संविलयन के दावे पर विचार करने के निदेश के साथ याचिका का निपटारा किया गया – याचिका निराकृत।

Cases referred :

1995 Supp (2) SCC 611, 1995 Supp (3) SCC 152, (1999) 7 SCC 499, (2009) 3 SCC 68, W.P. No. 2584/2005 (*Dr. Premiata Purohit & ors. Vs. State of Rajasthan & ors.*), AIR 1992 SC 789, (2009) 6 SCC 611, 2011(1) MPLJ 410, (2006) 3 SCC 674.

Sanjay Agrawal, for the petitioner.

Prashant Singh, Addl. A.G. with *V.P. Tiwari,* P.L. for the respondents No. 1 to 4.

Om Namdeo, for the respondent No.5.

Mohan Sausarkar, for the respondent No. 6.

ORDER

ALOK ARADHE, J.:- In this writ petition, the petitioner who was appointed as assistant project officer in Integrated Child Development Scheme Project (ICDS), Tendukheda by Janpad Panchayat, Tendukheda inter alia seeks a direction to the respondents to absorb his services in Women and Child Development Department of Government of Madhya Pradesh. The facts, necessary for adjudication of the controversy involved in the writ petition are narrated hereunder.

2. The ICDS project was introudced by the Government of India through the Department of Human Resources Development for integrated delivery of

certain services of pre-school children, pregnant and lactating women. The object of the scheme was to improve the health and nutritional status of children and women and to reduce the incidences of school dropouts and physical and social welfare and development of the child. Paragraph 47 of the scheme provides that even though funds will be provided by the Central Government, the staff will be borne on the appropriate cadres of the State and therefore, the State should sanction the posts (as per appendix) in the appropriate corresponding State pay scale. The anganwadi workers and their helpers will be honorary workers.

3. The State Government by order dated 2.6.1995 handed over the ICDS project at Tendukheda, district - Damoh to Janapad Panchayat, Tendukheda and sanctioned the staffing pattern. An advertisement dated 15.12.1995 was issued by the Janpad Panchayat, Tendukheda. The petitioner in response to the aforesaid advertisement submitted an application. By communication dated 6.1.1996, the petitioner was asked to appear for interview on 17.1.1996. Thereafter by order dated 15.3.1996, the petitioner was appointed temporarily on the post of Assistant Project Officer. The order of appointment contained a stipulation that the petitioner would be required to complete the period of probation of two years and the post on which the petitioner is appointed is temporary and the petitioner shall not be treated as government servant. The order of appointment further contained a stipulation that services of the petitioner can be terminated any time without assigning any reason.

4. Thereafter vide resolution dated 23.7.1998 passed by the Janpad Panchayat, Tendukheda the services of the petitioner were regularised on successful completion of the period of probation in anticipation of approval by the State Government. It has been averred in the writ petition that from time to time, the petitioner not only performed the duties of the post of Assistant Project Officer but he was assigned various duties which are performed by the employees of the State Government. The petitioner, in support of the aforesaid submission has annexed copies of such orders as Annexures P-12 to P-22.

5. A meeting of the district level departmental advisory committee was held on 17.3.1999 in which the resolution was passed to confer the status of government servants on the employees working in ICDS project, Tendukheda and the same was forwarded for approval to the State Government. Similarly Janpad Panchayat, Tendukheda and Zila Panchayat, Damoh passed the

resolutions dated 22.6.2000 and 31.1.2004 respectively for treating the employees in ICDS project as government servants and the same were forwarded for approval to the State Government. It has further been averred in the writ petition that services of the employees in Denida Health and Family Welfare Scheme and the Tilhan Sangh as well as the services of the employees working in Overseas Development Administration Project were absorbed in the State Government. In support of the aforesaid stand, the petitioner has annexed copies of the orders dated 4.8.2005, 25.1.2006 and 17.11.1998 as Annexures P-30, P-7 and P-6 respectively. It is also asserted that all the ICDS projects in the State Government are run by the State Government except in the Janpad Panchayat, Tendukheda and Sihawal. It is stated in the rejoinder that on 18.4.2010 the project has been taken over by the State Government and by an order dated 4.8.2010 passed by the State Government the ICDS project in Tendukheda has been transferred to Women and Child Development Department. In pursuance of the aforesaid order, vide order dated 5.8.2010, the project was taken over by the Project Officer, Women and Child Development Department Tendukheda. It is also averred that vide order dated 27.5.2009 in district - Damoh, eight ICDS projects have been launched including one in Tendukheda and number of posts are lying vacant in new projects. In the aforesaid factual backdrop, the petitioner has approached this Court.

6. Learned counsel for the petitioner submitted that though the petitioner was appointed under a particular project against the vacant sanctioned post after going through the process of selection, yet over a period of time he has been treated as employee of the State Government inasmuch as various duties which are performed by the employees of the State Government were entrusted to the petitioner. In this connection, learned counsel for the petitioner has invited the attention of this Court to Annexures P-12 to P-22. It is also submitted that resolutions have been passed by the district level departmental advisory committee, Janpad Panchayat, Tendukheda and Zila Panchayat, Damoh to confer the status of government servants on the employees working in ICDS project, Tendukheda. It is further submitted that the project is perennial in nature and the petitioner has been performing the duties in the project for past 17 years. It is further submitted that the ICDS project was launched in the year 1975 by the Central Government and the same is continuing and in future also the same would continue. It is also contended that since the project has already been taken over by the State Government, therefore, action of the

State Government in treating the petitioner as project employee is absolutely unjustified. In support of his submissions, learned counsel for the petitioner has placed reliance on the decisions in *Parimal Chandra Raha and Others v. Life Insurance Corporation of India and Others*, 1995 Supp (2) SCC 611, *National Federation of Railway Porters, Vendors and Bearers v. Union of India and Others*, 1995 Supp (3) SCC 152, *Government of T.N. and Another v. G. Mohamed Ammenudeen and Others*, (1999) 7 SCC 499 and *State of West Bengal and Others v. Kaberi Khastagir and Others*, (2009) 3 SCC 68 as well as order dated 13.4.2010 passed by learned single Judge of High Court of Judicature for Rajasthan in W.P. No.2584/2005 (*Dr. Premiata Purohit and Others v. State of Rajasthan and Others*).

7. On the other hand, learned Additional Advocate General submitted that the petitioner was appointed on contract basis as is evident from the order of appointment. It is urged that no service rules have been framed governing the service conditions of the petitioner. The petitioner has been appointed on contract basis and a project employee has no right to seek regularisation. It is further submitted that in pursuance of the directions issued by the Central Government to change the staffing pattern in the year 2003, the strength of the employees working in ICDS project has been reduced. It is also contended that reliance placed by the learned counsel for the petitioner on decision in *Kaberi Khastagir* (supra) is of no assistance to the petitioner in the facts of the case, as the order of appointment of the employees in the aforesaid case contained a stipulation that their service conditions will be the same as that of the government employees whereas in the instant case, the order of appointment of the petitioner clearly stipulates that the services of the petitioner are temporary and the petitioner shall not be treated as government servant. In support of his submissions, learned Additional Advocate General has placed reliance on the decisions in *Delhi Development Horticulture Employees' Union v. Delhi Administration*, AIR 1992 SC 789, *Mohd. Abdul Kadir and another v. Director General of Police, Assam and others*, (2009) 6 SCC 611 and *Vijay Kumar Bajpayee v. M.P. Urja Vikas Nigam Ltd. and another*, 2011 (1) MPLJ 410.

8. Learned counsel for the respondent No.5 supported the stand of the petitioner.

9. On the other hand, learned counsel for the respondent No.6 has submitted that ICDS project is a centrally sponsored scheme which has been

implemented by the States all across the country on a sharing pattern of 90:10 for all components including supplementary nutrition programme. It has further been submitted that 90% of the operating cost for implementation of ICDS project is borne by the Central Government and the salary and allowances of the staff appointed for implementation of the project is borne on appropriate cadre of the State and in the appropriate corresponding State pay scales sanctioned by the State Government. It is also contended that guidelines on the staffing pattern and the recruitment rules for appointment of the staff under ICDS project are framed by the State Government and the State Government is responsible for recruitment of officers and staff and their service conditions under the ICDS scheme.

10. I have considered respective submissions made by learned counsel for the parties. Admittedly the ICDS scheme was promulgated by the Central Government on 2.10.1975 through the Department of Human Resource Development with the object of integrated delivery of certain services such as supplementary nutrition, immunisation, health check-up, referral service, non-formal education and health and nutrition education to pre-school children and pregnant and nursing women. The Scheme was aimed at reduction of the incidence of school dropouts and laying the foundation for proper psychological, physical and social development of the child. Paragraph 47 of the Scheme reads under:

> "Even though funds will be provided by the Central Government, the staff will be borne on the appropriate cadres of the State and therefore, the State should sanction the posts (as per appendix) in the appropriate corresponding State pay scale. The Anganwadi workers and their helpers will be honorary workers."

11. Paragraph 47 of the Scheme was considered by the Supreme Court in *Kaberi Khastagir* (supra) and in paragraph 31 of the decision, the Supreme Court by taking into account paragraph 47 of the Scheme, held that it is difficult to accept the case of the State Government that employees of the project were project employees and not the employees of the State Government. The relevant extract of paragraph 31 of the aforesaid decision reads as under:

> "..... In fact, Para 47 of the Scheme, which has been extracted hereinabove, in no uncertain terms makes it very clear that even though funds for the Scheme would be provided by the

Central Government, the staff would be borne on the appropriate cadres of the States which would sanction the posts in the appropriate corresponding State pay scale. In the face of such provision it is difficult to accept that the writ petitioners were project workers and not the employees of the State Government."

12. Initially the petitioner was employed by the Janpad Panchayat. However, subsequently, by an order dated 18.4.2010 passed by the State Government, the ICDS project in Tendukheda has been taken over by the State Government and by an order dated 4.8.2010 the same has been transferred to Women and Child Development Department. In compliance of the aforesaid order, the project has been taken over by the Project Officer of the Women and Child Development Department. In view of the stand taken by the Central Government in paragraph 4 of its reply, which has not been controverted by the State Government, the State Government was under an obligation to frame Rules for appointment of the functionaries in respect of the posts in the Project. The State Government, therefore, ought to have framed the rules in respect of the service conditions of the employees working in the Project. Merely because the State Government has not framed the Rules under the Scheme, the contention made by learned Additional Advocate General that the decision in *Kaberi Khastagir* (supra) is distinguishable, cannot be accepted.

13. The petitioner in this writ petition has prayed for a direction to the respondents to absorb his services in Women and Child Development Department of Government of Madhya Pradesh. It is well settled that where an order or an action of State Authority is found to be illegal or in contravention of prescribed procedure or is arbitrary, unreasonable or irrational, the same is open to judicial review. In such a case, when the High Court finds that the action requires interference in exercise of power of judicial review, the High Court will not proceed to substitute its own decision in the matter as that would amount to exercise of power of the authority itself, but shall require the authority to consider the matter. It is equally well settled that the Court to direct an authority to 'consider' only requires the authority to apply its mind to the facts and circumstances of the case and to take decision in accordance with law. [See. *A.P SRTC and Others Vs. G. Srinivas Reddy and Others,* (2006) 3 SCC 674].

14. In the light of aforesaid well settled legal position, I am inclined to

dispose of the writ petition with a direction to the State Government to consider the claim of the petitioner for absorption in Women and Child Development Department taking into account all the aspects of the matter more particularly in the light of the findings recorded by the Supreme Court in paragraph 31 of decision in *Kaberi Khastagir* (supra). The State Government, while deciding the claim of the petitioner, shall also bear in mind that petitioner has been working in the project for past more than 17 years and is performing the duties which have been assigned to him by the State Government from time to time and the fact that the State Government has already taken over the project and the same is being run by Women and Child Development Department. Needless to state, the claim of the petitioner shall be decided by a speaking order within a period of three months from the date of production of certified copy of the order passed today.

Petition disposed of.

I.L.R. [2013] M.P.,1022
WRIT PETITION

Before Mr. Justice Alok Aradhe

W.P. No. 12980/2004 (S) (Jabalpur) decided on 22 January, 2013

URMILA KOSHTI (SMT.) ...Petitioner
Vs.
SECRETARY, M.P. STATE ELECTRICITY BOARD, JABALPUR & ors. ...Respondents

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. (Paras 5 & 6)**

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।

Cases referred :

AIR 2001 SC 393, AIR 2004 SC 1469, 2005(4) MPLJ 303, (2007) 5 SCC 336, (2008) 14 SC 545, (2012) 8 SCC 430, 2003(1) MPLJ 513, (2008) 5 SCC 652, AIR 2009 Bom. 122.

Anshuman Singh, for the petitioner.
Anoop Nair, for the respondent No.1.
D.K. Bohrey, P.L. for the respondents No. 2 & 3.

ORDER

ALOK ARADHE, J.:- In this petition, the petitioner who was employed as a Stenographer in the erstwhile M.P. State Electricity Board, has assailed the validity of the order dated 16.4.2004 by which the services of the petitioner have been terminated. In order to appreciate the petitioner's grievance, few facts need mention, which are stated infra.

2. The petitioner obtained a caste certificate on 8.10.1984 on the ground that she is a member of the Scheduled Tribe community being "Halba". On the basis of the aforesaid caste certificate, the petitioner was given the appointment on the post of Stenographer on 12.2.1990 in the erstwhile M.P. State Electricity Board. It appears that several complaints were received by the respondent-Board from time to time with regard to procurement of employment on the basis of false caste certificates. Accordingly, the respondent-Board took a decision on 19.12.1996 to verify the caste certificates, pursuant to which 43 cases were referred for scrutiny. The Joint Director of the Board thereafter issued a notice to the petitioner by which she was asked to produce evidence with regard to her status as person belonging to Scheduled Tribe category. However, the petitioner failed to adduce any evidence. Thereupon, a charge-sheet was issued to the petitioner and a departmental enquiry was held in which the caste certificate issued in favour of the petitioner was found to be false. Accordingly, vide order dated 16.11.2004, the services of the petitioner were terminated. The petitioner filed a writ petition namely W.P. No.11107/06(s) in which the petitioner challenged the action of the respondents in cancelling the caste certificate issued to the petitioner. The aforesaid writ petition was disposed of by a Bench of this Court vide order dated 5.9.2007 with a direction to examine

the validity of the caste certificate by High Power Scrutiny Committee which was constituted in view of the law laid down by the Supreme Court in *Madhuri Patil's* case. Thereupon, the matter was referred to the High Power Scrutiny Committee which also vide order dated 6.1.2009 recommended the cancellation of the caste certificate. Thereafter, the petitioner obtained certain additional documents and filed an application for review before the High Power Scrutiny Committee however, the application submitted by the petitioner failed to evoke any response. Thereupon, the petitioner approached this Court by filing another writ petition namely W.P. No.5059/2009 which was disposed of by a Bench of this Court vide order dated 15.6.2009 with the direction to the respondents therein to take into consideration the documents which were obtained by the petitioner. In compliance of the directions issued by this Court, the High Power Scrutiny Committee once again examined the case of the petitioner and vide order dated 18.7.2011 upheld its previous decision and found that the caste certificate has wrongly been issued to the petitioner. In the aforesaid factual background, the petitioner has approached this Court.

3. Learned counsel for the petitioner while inviting the attention of this Court to paragraph 38 of the judgment in the case of *State of Maharashtra Vs. Milind and others*, AIR 2001 SC 393, submitted that all the admissions and appointments which have attained finality were protected by the Supreme Court and the Supreme Court itself had given prospective effect to the law laid down by it in the case of *Milind* (supra). It is further submitted that the Supreme Court in the case of *R. Vishwanatha Pillai Vs. State of Kerala and others*, AIR 2004 SC 1469, was not dealing with the case of person belonging to "Halba" community, whereas cases of *Bank of India and another Vs. Avinash Mandivikar*, 2005(4) MPLJ 303 and *Additional General Manager, Human Resource, BHEL, Ltd., Vs. Suresh Ramkrishna Burde*, (2007) 5 SCC 336 were cases where the appointments were obtained by producing forged documents which is not the case here. It was further submitted that a Bench of two Judges of the Supreme Court in the case of *Punjab National Bank and Another Vs. Vilas, S/o. Govindrao Bokade and another*, (2008) 14 SCC 545 has extended the benefit of the ratio laid down in *Milind's* case to a case of appointment. It is also submitted that in somewhat similar facts, the benefit of law laid down by the Supreme Court has been

extended by the Supreme Court in the case of *Kavita Solunke Vs. State of Maharashtra and others,* (2012) 8 SCC 430. Learned counsel for the petitioner while placing reliance on the decisions in the case of *Jabalpur Bus Operators Association Vs. State of M.P. and others,* 2003 (1) MPLJ 513, has urged that the ratio laid down in *Milind's* case which is a decision rendered by the Constitution Bench of the Supreme Court, has not been explained by the Co-ordinate Bench and, therefore, the directions issued in paragraph 38 of the judgment would apply to the case of the petitioner as well. It is further urged that the direction issued by the Supreme Court that the admissions and appointments which have attained finality will not be affected by the law laid down by the Supreme Court in the case of *Milind,* supra, has not been issued under Article 142 of the Constitution of India. Alternatively, learned counsel for the petitioner submits that the petitioner be granted the liberty to challenge the reports submitted by the High Power Scrutiny Committee dated 6.1.2009 and 18.7.2011 by way of separate writ petition.

4. On the other hand, Shri Anoop Nair, learned counsel for respondent No.1 submitted that in view of the recommendations of the High Power Scrutiny Committee, the petitioner is not entitled to the benefit of continuance of service. It is further submitted that petitioner does not belong to Scheduled Tribe and, therefore, she is not entitled to benefit of the law laid down by the Supreme Court in the case of *Milind*, supra. Learned Panel Lawyer for respondents No.2 and 3 has placed reliance on the recommendations of the High Power Scrutiny Committee and has submitted that petitioner is not a member of Scheduled Tribe community and, therefore, she is not entitled to benefit of law laid down by Supreme Court in *Milind's* case.

5. I have considered the respective submissions made by learned counsel for the parties. In the case of *Milind* (supra), the question which arose for consideration was whether the respondent who belonged to "Koshti" caste could claim the benefit of Scheduled Tribe reservation on the ground that it was a sub-tribe of "Halba". The Supreme Court held that "Koshti" was not a part of Scheduled Tribe of "Halba" and the entries in the Scheduled Tribes Order could not be amended or expanded by any authority. However, while allowing the appeal preferred by the State Government, the Supreme Court moulded the relief by permitting the respondent therein to retain the benefits of his degree. In the case of

Yogesh Ramchandra Naikwadi Vs. State of Maharashtra and others, (2008) 5 SCC 652, the Supreme Court while considering the ratio laid down in *Milind's* case, supra, inter-alia held as follows:-

> "The benefit extended in Milind and Vishwanatha Pillai cannot obviously be extended uniformly to all such cases. Each case may have to be considered on its own merits. Further what has precedential value is the ratio decidendi of the decision and not the direction issued while moulding the relief in exercise of power under Article 142 on the special facts and circumstances of a case. We are therefore of the view that Milind and Vishwanatha Pillai cannot be considered as laying down a proposition that in every case where a candidate's caste claim is rejected by a Caste Verification Committee, the candidate should invariably be permitted to retain the benefits of the admission and the consequential degree, irrespective of the facts."

6. Similar view has been taken by the Full Bench of Bombay High Court in the case of *Ganesh Rambhau Khalale Vs. State of Maharashtra and others*, AIR 2009 Bombay 122, and it has been held that directions issued by the Supreme Court in paragraph 38 of its judgment is not the law declared by the Supreme Court under Article 141 of the Constitution of India and the directions have been issued in exercise of powers under Article 142 of the Constitution of India. The Supreme Court in the case of *Kavita Solunke*, supra, has also extended the benefit of the law laid down by Supreme Court in the case of *Milind* in exercise of powers under Article 142 of the Constitution of India. The powers under Article 142 of the Constitution of India are not available to this Court, therefore, the benefit of the directions issued by the Supreme Court contained in paragraph 38 of the judgment in the case of *Milind,* supra, cannot be extended to the petitioner.

7. However, the petitioner would be at liberty to challenge the validity of the recommendations of the High Power Scrutiny Committee dated 6.1.2009 and 18.7.2011 in accordance with law.

Accordingly, the writ petition is disposed of.

Petition disposed of.

I.L.R. [2013] M.P.,1027
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 7319/2011 (Gwalior) decided on 30 January, 2013

MADHYA PRADESH MADHYA KSHETRA
VIDYUT VITRAN CO. LTD. ...Petitioner
Vs.
SMT. SAVITRI DEVI ...Respondent

A. ***Electricity Act (36 of 2003), Section 126*** **- Cases of excess load of consumption of electricity are squarely covered under Explanation (b) (iv) of Section 126. (Para 10)**

क. *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. ***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. (Para 20)**

ख. *विद्युत अधिनियम (2003 का 36), धाराएं 126, 135 तथा म.प्र.वि.नि. कंपनी (फोरम 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।

C. ***Interpretation of Statute*** **- A statute has to be interpreted in the context it is drafted along with the aim and object. (Para 12)**

ग. *कानून का निर्वचन* – कानून का निर्वचन, लक्ष्य और उद्देश्य के

साथ उस संदर्भ में किया जाना चहिए जिस संदर्भ में उसे ड्राफ्ट किया गया है।

Cases referred :

ILR (2008) MP 1599, (2010) 4 SCC 539, (2012) 2 SCC 108, AIR 1956 SC 340, (2005) 7 SCC 791, (2007) 2 SCC 355, (2007) 6 SCC 382, 2012(2) MPHT 249(DB).

Vivek Jain, for the petitioner.
A. V. Bhardwaj, for the respondent.

ORDER

SUJOY PAUL, J.: In these batch of petitions similar questions are involved, and therefore, with the consent of parties, matters are analogously heard and decided by this common order.

2. The facts are taken from W.P.No.7319/2011. The Madhya Pradesh Madhya Kshetra Vidyut Vitaran Company Limited (the Company) has filed this writ petition against the order of Electricity Consumer Grievances Redressal Forum (the Forum) dated 26.9.2011. The respondent/consumer filed an application under Section 42(5) of the Electricity Act, 2003 before the Forum. The respondent stated that she is a consumer and her electricity meter is placed outside her shop. On 25.4.2011 the Vigilance Team of the Company checked the said electricity connection/meter and prepared a provisional bill. By communication dated 30.4.2011 (Annexure P/6), an amount of Rs.66,584/- was provisionally assessed and the respondent was directed to either accept this amount or file her objection.

3. Shri Vivek Jain, learned counsel for the petitioner, submits that in these batch of petitions in certain matters, objections were taken about jurisdiction and maintainability of the complaint/proceedings before the Forum and in certain cases, those objections were not taken. He submits that the Forum had inherent lack of jurisdiction, and therefore, interference be made by this Court. He relied on certain provisions of the Electricity Act and the regulations by which the Forum was constituted. The regulation is known as MPERC (Establishment of Forum and Electricity Ombudsman for Redressal of Grievances of the Consumers) (Revision-I) Regulations, 2009 (hereinafter called as 'Regulations').

4. Per contra, Shri A.V.Bhardwaj, Shri J.P.Kushwah, Shri B.D.Jain, Shri K.K.Shrivastava, Shri Abhishek Parashar and Shri Rajesh Mittal, learned counsel for the respondents, supported the order passed by the Forum. In

cases where no objection about maintainability of the proceedings before the Forum is taken by the Company, learned counsel for the respective respondent submit that once the Company has submitted to the jurisdiction of the Forum, it is no more open for the Company to state for the first time before this Court that the Forum was lacking jurisdiction. The main contention of learned counsel for the respondents is that it was obligatory on the part of the Company to establish their specific case under Section 126 of the Electricity Act, 2003 before the Forum. Only when the said case was established to the hilt before the Forum, a conclusion can be drawn that the Forum had no jurisdiction. In absence thereof, it cannot be said that Forum had no jurisdiction. By drawing the attention of this Court on the language of Section 126 of the Electricity Act, the learned counsel for the respondents stated that when it is not in dispute that respondents had an authorized electricity connection, mere overdrawl of electricity beyond permissible limit will not amount to unauthorized use of electricity within the meaning of Section 126 of the Electricity Act.

5. Shri A.V.Bhardwaj, learned counsel for one of the respondent, submits that in I.L.R. (2008) M.P. 1599 (*Dr. Hari Singh Gaur Vishwavidyalaya Sagar (M.P.) & anr. Vs. Rajeshwar Yadav*), this Court interpreted Section 2(2) Explanation of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 and opined that the word 'petitioner' used in the Explanation does not mean that petitioner who files a writ petition, but to understand as a party who files the Writ Appeal. He submits that the provisions of the Regulations are to be interpreted in the same manner, and therefore, it will be open for both the parties to prefer appeal against the order of the Forum.

6. In rejoinder submission, Shri Vivek Jain, learned counsel for the petitioner submits that against an order passed under Section 126, appeal lies under Section 127 to the statutory appellate authority and as per the Regulations, there was a specific bar to deal with the matters which are arising out of certain provisions of certain chapters mentioned in the Regulations. In view of this specific bar, there was an inherent lack of jurisdiction on the part of the Forum and the Forum has erred in entertaining the matters. Lastly it is stated that there is a difference between pecuniary jurisdiction and jurisdiction with regard to subject matter. He submits that in the present case, the lack of jurisdiction is with regard to subject matter which amounts to inherent lack of jurisdiction, and therefore, whether or not such objection is taken, interference can be made at any stage. He cited certain judgments in this regard.

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

8. The first contention of the consumers/respondents is that under the Regulations the Forum had jurisdiction. Another limb of the argument is that the case of over-drawl of electricity beyond authorized limit does not fall within the ambit of Section 126 of the Electricity Act. It is apt to quote the relevant provisions to deal with this facet. The relevant portion of Section 126 of the Electricity Act, 2003 reads as under:-

> 126. Assessment.-(1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorised use of electricity, he shall provisionally assess to the best of his judgment the electricity charges payable by such person or by any other person benefited by such use.
>
> (2).....
>
> (3).....
>
> (4).....
>
> (5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorised use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve months immediately preceding the date of inspection.
>
> (6) The assessment under this section shall be made at a rate equal to twice the tariff applicable for the relevant category of services specified in sub-section (5).
>
> Explanation.-For the purpose of this section,-
>
> (a) "assessing officer" means an officer of a State Government or Board or licensee, as the case may be, designated as such by the State Government;

(b) "unauthorised use of electricity" means the usage of electricity-

(i) by any artificial means; or

(ii) by a means not authorised by the concerned person or authority or licensee; or

(iii) through a tampered meter; or

(iv) for the purpose other than for which the usage of electricity was authorised; or

(v) for the premises or areas other than those for which the supply of electricity was authorised."

9. It is not in dispute that against a final order made under Section 126, an appeal lies to prescribed authority under Section 127 of the Electricity Act. The first question is whether over-drawl of electricity amounts to unauthorised use of electricity ? The basic contention of the respondents is that under Section 126 (6) (b) of the Electricity Act, over-drawl of electricity is not covered.

10. In the opinion of this Court, the curtains are finally drawn on this issue by the Supreme Court in the case reported in (2010) 4 SCC 539 (*Punjab State Electricity Board Vs. Vishwa Caliber Builders Private Limited*). Following this judgment, in its recent judgment reported in (2012) 2 SCC 108 (*Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another Vs. Sri Seetaram Rice Mill)* the Apex Court opined in para 76 as under :-

"76. The consistent view of this Court would support the proposition that the cases of excess load of consumption would be squarely covered under Explanation (b) (iv) of Section 126 of the 2003 Act. Once this factor is established, then the assessing officer has to pass the final order of assessment in terms of Sections 126(3) to 126(6) of the 2003 Act."

(Emphasis Added)

Thus, it can be safely concluded that cases of excess load of consumption are squarely covered under Explanation (b)(iv) of Section 126 of the Electricity Act, 2003. Thus, this contention raised by the respondents is

rejected.

11. Coming to the question whether the Forum had jurisdiction, it is profitable to quote certain definitions from the Regulations. Clause 2.4 (d) defines complainant as under :-

> "(d) "Complainant" means-
>
> (i) a consumer as defined under clause (15) of Section 2 of the Act; or
>
> (ii) an applicant for new connection ; or
>
> (iii) any registered consumer association; or
>
> (iv) any unregistered association of consumers, where the consumers have similar interest; or
>
> (v) in case of death of a consumer, his legal heirs or representatives;

Clause 2.4 (e) defines complaint as under :-

> "(e) "Complaint" means any representation in writing made by a complainant regarding redressal of Grievance."

Clause 2.4 (m) which deals with grievance reads as under :-

> (m) "Grievance" shall mean a dissatisfaction of the Consumer arising out of the failure of the Licensee to register or redress a Complaint and shall include any dispute between the Consumer and the Licensee with regard to any Complaint or with regard to any action taken by the Licensee in relation to or pursuant to a complaint filed by the affected person. However, the matters falling within the purview of any of the following provisions of the Act will not form a grievance under these Regulations:
>
> (i) Unauthorised use of electricity as provided under Section 126 of the Act;
>
> (ii) Offences and penalties as provided under Sections

135 to 139 of the Act;

(iii) Compensation related to accident in the distribution, supply or use of electricity as provided under Section 161 of the Act; and

(iv) Recovery of arrears where the bill amount is not disputed."

12. A bare perusal of the aforesaid definitions, makes it crystal clear that Regulation making authority has consciously dealt with the aspect as to who can prefer a complaint. A minute reading of the aforesaid definitions will show that such grievance or complaint can be made by the consumer. Clause 2.4 (e) and (m) i.e. complaint and grievance are interwoven. By way of complaint, the complainant has to seek redressal of his grievance and grievance is a written note of dissatisfaction of the consumer arising out of the failure of the Licensee, and therefore, the Regulations are worded in a manner which specifies that the complaint can be preferred only by an aggrieved consumer. Thus, the judgment cited by *Shri A.V.Bhardwaj* in *Dr. Hari Singh Gaur Vishwavidyalaya Sagar* (supra) has no role to play in the context regulations are drafted, it cannot be compared with the *M.P. Uchcha Nyayalaya* (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005. This is settled principle of interpretation of statute that a statute has to be interpreted in the context it is drafted alongwith the aim and object. The aforesaid consideration would show that the said judgment in *Dr. Hari Singh Gaur Vishwavidyalaya Sagar* (supra) is of no assistance to the respondents.

13. The definition of "grievance" excludes the problems arising out of unauthorised use of electricity under Section 126 of the Electricity Act and certain other provisions. Thus, consciously the Regulation making authority has excluded the complaint arising out of action under Section 126 of the Electricity Act. The document, Annexure P/6, dated 30.4.2011 on its forehead clearly shows that the action was taken under Section 126/135 of the Act. Both the grievances arising out of those sections are excluded from the purview of "grievance". Thus, consciously a separate Forum was prescribed for problems arising out of Sections 126 and 135 etc.

14. Clause 3.35 deals with the jurisdiction of the Forum which reads as under :-

"3.35 Notwithstanding the above, the Forum shall not entertain

> any representation in regard to the matters which are subject matters of existing or proposed proceedings before the Commission or before any other authority including those under part X, XI, XII, XIV, XV and XVI of the Act."

The said provision makes it crystal clear that no proceedings can be entertained by the Forum which are arising out of certain Chapters of the Electricity Act. It includes Chapter XII and XIV of the Electricity Act. Thus, there is a specific bar about jurisdiction of the Forum with regard to proceedings/orders arising out of certain sections and Chapters of Electricity Act. The question of lack of jurisdiction is to be examined in the context of the aforesaid provisions of the Regulations.

15. Shri B.D.Jain, learned counsel for the respondent in one matter, stated that it was not established before the Forum that a case under Section 126 of the Electricity Act is made out. In absence thereof, the Forum cannot be precluded to examine the action of the Company. In my opinion, this argument is misconceived and lacks substance. The order Annexure P/6 clearly shows that action was initiated under Section 126/135 of the Electricity Act. The definition of "complaint" read with "grievance" clearly shows that such action is beyond the judicial review of the Forum under the Regulations. Clause 3.35 makes it clear like noon day that there is a specif bar regarding certain subject matters for the Forum and with regard to certain Chapters which includes Chapter XII and XIV. Thus, in the opinion of this Court, the Forum had no jurisdiction even to examine whether a clinching case under Section 126 of the Electricity Act is made out. Undoubtedly, Sections 126/135 fall within those chapters which are beyond the jurisdiction of the Forum.

16. The second question is related to those cases where admittedly the Company had not taken objection regarding maintainability of the matter before the Forum. The question is whether in those cases the judicial review of this Court is barred or whether the Forum's order can be upheld ?

17. The Apex Court way back in A.I.R. 1956 SC 340 (*Kiran Singh and others v. Chaman Paswan and others*) opined in para 6 as under :-

> "6. The answer to these contentions must depend on what the position in law is when a court entertains a suit or an appeal over which it has no jurisdiction, and what the effect of Section 11 of the Suits Valuation Act is on that position. It is a

> fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties. If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities. The question is what is the effect of Section 11 of the Suits Valuation Act on this position."

18. A bare perusal of this para shows that where the Court/Forum lacks inherent jurisdiction, this objection can be taken at any stage and even at the stage of execution. The ratio of this case is consistently followed by Supreme Court in catena of judgments. In (2005) 7 SCC 791 (*Harshad Chiman Lal Modi v. DLF Universal Ltd. And Another*), the Apex Court has followed this view. In (2007) 2 SCC 355 (*Hasham Abbas Sayyad Vs. Usman Abbas Sayyad and others*), the Apex Court held as under:-

> 22. The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non judice, being a nullity, the same ordinarily should not be given effect to. [See *Chief Justice of A.P. v. L.V.A. Dixitulu and MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*]
>
> 23. This aspect of the matter has recently been considered by this Court in *Harshad Chiman Lal Modi v. DLF Universal Ltd.* in the following terms: (SCC pp. 803-04, para 30)

> "30. We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity."
>
> (Emphasis Added)

19. In (2007) 6 SCC 382 (*S.Sethuraman v. R. Venkataraman and Others*) Apex Court held that jurisdiction of this Court under Article 226 with regard to maintainability of a matter is not hit by estoppel. Despite having submitted to the jurisdiction of appellate Authority, the petitioner could not be estopped from challenging the final order of the appellate authority through a writ petition. The Division Bench of this Court in the case reported in 2012(2) M.P.H.T. 249 (DB) (*Qutubuddin v. M.P.Pashchim Kshetra Vidyut Vitran Co. Ltd. and others*) opined as under in para 7:-

> "The definition of the term 'Grievance' specifically excludes from its ambit the 'unauthorised use of electricity', as provided under Section 126 of the Act. In the circumstances, the Forum established under Section 42(5) of the Act is not empowered to deal with the grievances of the consumers regarding 'unauthorised use of electricity', as provided under Section 126 of the Act."

20. In the light of the aforesaid judgments read with the provisions of the Regulations makes it clear that there was a specific method by which a

complaint can be preferred for a grievance. If a problem does not fall within the ambit of 'complaint' and 'grievance' under the Regulations, the Forum cannot entertain it. Bar created under clause 3.35 also excludes jurisdiction of the Forum in certain matters. Thus, if beyond the aforesaid, the Forum had exceeded jurisdiction and entertained the matters, in my opinion, it is a case of inherent lack of jurisdiction on the part of the Tribunal, and therefore, whether or not such objection is taken before the Forum, this Court can interfere in the matter. This objection arising out of cases where the Company has not taken the objection before the Forum is also of no assistance to the respondents.

21. On the basis of aforesaid analysis, it is clear that the Forum had no jurisdiction to entertain and deal with the matters. Hence, the orders of the Forum impugned herein are without authority of law and cannot be upheld. Consequently, the orders impugned (Annexure P/1) are set aside. The Writ Petitions are allowed. However, it is made clear that the consumers/ respondents herein are at liberty to avail the remedy available to them under the law and if they avail the said remedy promptly, time consumed before the Forum and this Court will not be taken into account for the purpose of counting limitation under any law. No costs.

Petition allowed.

I.L.R. [2013] M.P.,1037
WRIT PETITION

Before Mr. Krishn Kumar Lahoti, Acting Chief Justice & Mr. Justice M.A. Siddiqui

W.P. No. 13832/2005 (Jabalpur) decided on 7 February, 2013

WESTERN COAL FIELD LTD. ...Petitioner

Vs.

ADDL. COMMISSIONER, COMMERCIAL & ors. ...Respondents

***Entry Tax Act, M.P. (52 of 1976), Section 4(1), Entry Tax Rules, (M.P.), 1976, Rule 4(1)(iii) - Concessional Rate - Coal* - Petitioner supplied coal to M.P.E.B. for the use as raw material - Declaration in that regard was accepted and concessional rate of 1% was applied - However, the assessment was reopened on the orders of the Divisional Commissioner - Held - Concessional rate on coal was on declaration when entry was effected in local area by registered dealer for use of**

raw material in manufacture of other goods - Assessing officer had rightly accepted the declaration - Order reopening the assessment quashed. **(Para 7)**

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 4 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।

H.S. Shrivastava, for the petitioner.
Rahul Jain, Dy. A.G. for the respondents.

ORDER

The Order of the court was delivered by :
K.K.Lahoti, J:- This petition is directed against the order Annexure P-8, dated 4.2.2005, by which the respondents have imposed entry tax @ 2.5% on the petitioner for sale of the goods namely coal (not for cooking purposes). The aforesaid goods was sold to M.P. Electricity Board, Sarni to be used for the production of electricity, upon filing a declaration in Form I Rule 4(1)(iii) of the Rule namely Entry Tax Rules, 1976.

2. The contention of the petitioner is that as per the notification Annexure P-9, which was made effective from 1.5.1997, the petitioner was liable to make payment of entry tax at the rate of 1% on the coal as the entry was effected into local areas by the registered dealer for use as raw material in the manufacture of other goods and the due declaration was filed by the Board in this regard.

It is also submitted that earlier vide Annexure P-1 dated 12.4.2001, the declaration was accepted and the petitioner was imposed entry tax at the rate of 1% on the coal but the matter was wrongly reopened by the respondents and higher rate of tax was imposed for which petitioner was not liable.

3. Shri Rahul Jain, Dy.A.G. supported the order and submitted that as per the rules the entry tax was payable @2.5% and rightly the earlier order

was recalled and subsequent order was passed.

4. We have perused the record and find that vide order Annexure P-1 dated 12.4.2001, the Assessing Officer had accepted the declaration furnished by the petitioner under Rule 4(1) (iii) of M.P. Entry Tax Rules, 1976. Though the coal sold to M.P. Electricity Board, was purchased for the use as raw material and relying on the declaration, concessional rate of 1% was applied on the petitioner. It appears that thereafter vide Annexure P-2 dated 17.5.2004 the Divisional Commissioner, Commercial tax, Chhindwara directed the Assessing Officer to reassess the petitioner. The Divisional Commissioner had also directed the Assessing Officer that under Section 4 and Rule 4 under the Entry Tax Act there was no provision for sale of goods namely coal at the rate of 1% under declaration, the declaration was wrongly accepted, whereas it appears that because of the aforesaid letter matter was reopened and Assessing Officer vide order P-6 reassessed the entry tax and directed payment of entry tax at the rate of 2.5%.

5. To appreciate the rival contentions of the parties it would be appropriate if the relevant provisions are referred. Section 4(1) of the Entry Tax Act, 1976 reads thus:

> "The entry tax payable by a dealer under this Act, shall be charged on his taxable quantum relating to goods specified in Schedule-II and Schedule-III at the rates mentioned in the said Schedules:
>
> Provided that notwithstanding anything contained in this sub section and subject to such conditions and restrictions as may be prescribed."
>
> (i) the entry tax payable in respect of goods specified in Schedule -II other than iron and steel as specified in Serial No.3 of the said Schedule which are consumed or used as raw material for the manufacture of other goods shall be one per cent, if the rate of tax specified in Schedule -II exceeds one per cent;
>
> (ii) Where the dealer contravenes any of the conditions or restrictions or has not consumed or used the goods as raw material for the manufacture of other goods

in any local area in Madhya Pradesh. he shall be liable to pay as entry tax amount equal to the difference between the entry tax payable at the full rate as mentioned in Schedule-II, and concessional rate of such tax mentioned in clause (i) above:

Provided further that where the goods specified in Schedule -II, other than iron and steel as specified in Serial No.3 of the said Schedule which have already suffered entry tax at a rate exceeding one percentum or purchased by a registered dealer from another such dealer for consumption or use by him as raw material for the manufacture of other goods, he (the purchasing registered dealer) shall, subject to such restrictions and conditions as may be prescribed, be entitled to a set off or refund, as the case may be, of an amount equal to the difference between the amount of tax computed at the full rate of tax mentioned in Schedule -II and the amount of tax at one per cent, on such proportion of the price at which he had purchased the goods, as may be prescribed."

The aforesaid provisions specifically provides that entry tax payable in respect of goods specified in Schedule-II which are consumed or used as raw material in the manufacture of other goods shall be 1%., if the rate of tax specified in Schedule II exceeds 1%. Schedule -II of the Entry Tax Act provides 2% of tax on coal including coke in all its forms but because of the aforesaid provision, coal was chargeable @1%, if it was to be consumed as raw material in the manufacture of other goods. Rule 4(1) (i) and (iii) of the Entry Tax Rules 1976 provides thus:

(i)"The entry tax at the concessional rate shall be charged only if the entry goods specified in Schedule II or Schedule III, as the case may be, is effected by a dealer registered under the (Vanijyik Kar Adhiniyam)

(iii) entry tax at the concessional rate shall be charged by the selling registered dealer who sells good specified in the Schedule II to another. registered dealer for use as raw material in the certificate of registration under the (Vanijyik Kar Adhiniyam) of purchasing registered dealer and

produce at the time of assessment a true declaration in Form I duly filled in and signed by the transaction of sale if the total sale price covered by the declaration does not exceed [rupees ten thousand.]

The aforesaid provisions specifically provides that entry tax on the concessional rates shall be charged only if the entry of goods specified in Schedule -II is effected by the registered dealer. Sub Section (iii) provides that if the goods specified in Schedule-II is sold to another registered dealer as raw material, the declaration in Form I is required to be furnished by the registered dealer. In this case it is not in dispute that on furnishing such declaration, concessional rate of 1% was made applicable on the petitioner in respect of entry tax. Notification has also been issued by the State Government on 4.5.1999 which reads thus:

In exercise of the power conferred by Section 10 of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No.52 of 1976), the State Government hereby exempts the class of goods specified in column (2) of the Schedule below from payment of entry tax under the said Adhiniyam to the extent specified in column (3) subject to the restrictions and conditions specified in column (4) of the said Schedule for the period from 1St May, 1997 to 30th September, 1997. This exemption shall not affect the tax liability created by any notification issued under Section 4-A of the said Adhiniyam:

SCHEDULES & NOTIFICATION (VOL-II)

S.No	Class of goods	Extent of exemption	Restrictions and Conditions subject to which exemption is granted.
1	2	3	4
8	Coal excluding cooking coal.	Partly so as to reduce the rate.	When the entry is effected into a local area by a registered dealer

6. This notification also provides that the concessional rate of 1% was

applicable for the goods excluding the cooking coal when entry was affected into local areas by registered dealers for use of raw material in the manufacture of other goods. This notification was made effective by another notification dated 5.7.1999 which reads thus:-

> In exercise of the power conferred by Section 10 of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No.52 of 1976), the State Government hereby makes the following amendment in this department Notification No.A-3-80-98-CT-V-(49) dated 4th May, 1999 namely:-

AMENDMENT

1	2	3	4
8	Coal excluding cooking coal.	Partly so as to reduce the rate tax to 1 percent	When the entry is effected into a local area by a registered dealer for use as raw material in the manufacture of other goods.

7. On the perusal of the aforesaid, it is apparent that from 1.5.1997, concessional rate on coal (excluding coal for cooking purpose), when entry was effected in local area by registered dealer for use of raw material in manufacture of other goods, was 1% and accordingly on the basis of the declaration submitted by M.P. Electricity Board, which was filed by the petitioner before the Assessing Officer, Assessing Officer vide order Annexure P-1 had rightly directed payment of entry tax @ 1% on the petitioner. Respondents wrongly reopened the matter, misconstruing the provisions, while by an earlier order dated 12.4.2001 correct rate was made applicable and petitioner was rightly assessed.

8. In view of the aforesaid submission, order Annexure P-8 in so far as it relates to imposition of 2.5% entry tax on the petitioner in respect of the coal sold to the M.P. Electricity Board is hereby quashed and earlier order dated 12.4.2001 in that regard is maintained. Considering the facts of the case there shall be no order as to costs.

Order accordingly.

I.L.R. [2013] M.P., 1043
WRIT PETITION
Before Mr. Justice Rajendra Menon
W.P. No. 5045/1998 (Jabalpur) decided on 8 March, 2013

PRAMOD SINGH ...Petitioner
Vs.
THE SECRETARY, DEPARTMENT OF HOUSING & ors....Respondents

A. Land Acquisition Act (1 of 1894), Section 48 - Actual Possession - Withdrawal from acquisition - **Possession of 43.22 acres of land was taken on 31.08.1967 - No possession of 1.22 acres of land was taken on the same day - Possession certificate in respect of 1.22 acres of land was prepared on next day in absence of witnesses nor the possession was handed over to B.D.A. - State has also denied the possession certificate in respect of 1.22 acres of land - Even as per award, area measuring 1.22 acres of land was not included - No compensation was paid - Buildings existing on the said land are still in existence and petrol pump is also functioning - As possession of 1.22 acres of land was never taken, therefore, the State was within its right to release the said land from acquisition. (Paras16 to 20)**

क. भूमि अर्जन अधिनियम (1894 का 1), धारा 48 – वास्तविक कब्जा – अर्जन से वापसी – 43.22 एकड़ भूमि का कब्जा 31.08.1967 को लिया गया – 1.22 एकड़ भूमि का उसी दिन कब्जा नहीं लिया गया – 1.22 एकड़ भूमि के संबंध में प्रमाण पत्र अगले दिन साक्षियों की अनुपस्थिति में तैयार किया गया और न ही बी.डी.ए. को कब्जा सौंपा गया – 1.22 एकड़ भूमि के संबंध में राज्य ने भी कब्जा प्रमाण पत्र से इंकार किया – यहां तक कि अवार्ड के अनुसार 1.22 एकड़ नाप की भूमि को समाविष्ट नहीं किया गया – कोई प्रतिकर अदा नहीं किया गया – उक्त भूमि पर विद्यमान भवन अभी तक अस्तित्व में है और पेट्रोल पंप भी कार्यरत है – चूंकि 1.22 एकड़ भूमि का कब्जा कभी नहीं लिया गया इसलिए, उक्त भूमि को अर्जन से मुक्त करना राज्य के अधिकार में था।

B. Land Acquisition Act (1 of 1894), Section 48 - Actual Possession or Symbolic Possession - **Actual possession should be taken and mere symbolic possession is not enough. (Paras 25 to 27)**

ख. भूमि अर्जन अधिनियम (1894 का 1), धारा 48 – वास्तविक कब्जा अथवा प्रतीकात्मक कब्जा – वास्तविक कब्जा लिया जाना चाहिए और मात्र प्रतीकात्मक कब्जा पर्याप्त नहीं है।

Cases referred :

AIR 1966 SC 3377, (1996) 7 SCC 269, (2005) 6 SCC 745, (2011) 5 SCC 394, (2007) 8 SCC 705, AIR 1983 Punjab and Haryana 147, AIR 1975 SC 1767, AIR 1981 Gujarat 107, (2000) 9 SCC 376, AIR 1987 SC 2421, AIR 1983 SC 1303, (1979) 2 SCC 492.

Anil Khare with Ms. Namrata Kesharwani, for the petitioner.
Samdarshi Tiwari, G.A. for the respondents No. 1 & 2.
R.N. Singh with *Arpan Pawar*, for the respondents No. 5 to 9.

ORDER

RAJENDRA MENON, J.: Even though in this writ petition challenge is made to four orders namely : Annexures P/3, P/4, P/5 and P/14, but during the course of hearing, learned counsel for the petitioner submitted that challenge to order-dated 13.2.1996 – Annexure P/4, in the matter of release of land under the Urban Land Ceiling Act; and, the order-dated 3.8.1998 – Annexure P/14, passed in the revision are not pressed and they are being withdrawn.

That being so, in this petition for the present, challenge is only made to order-dated 29.12.1995 – Annexure P/3, passed by respondent No.1, whereby land measuring 1.22 Acres situated in Survey No.1519/2 is released from acquisition in accordance to the provisions of Section 48 of the Land Acquisition Act, 1894 and challenge is also made to an order-dated 17.7.1996 – Annexure P/5, passed by respondent No.2, whereby sanction for construction of a commercial complex has been granted under section 30 of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973.

2- Brief facts, necessary for disposal of this writ petition, are that petitioner claims to be a resident of Bhopal and engaged in the business of establishing Hotels and managing them. It is stated that respondent No.2 – the Director of Town and Country Planning, formulated a Zoning Plan for Bhopal, which was known as MP Nagar, Zone II, and the petitioner on the basis of the said plan purchased a plot bearing No.256, which was allotted to him by the Bhopal Development Authority. He is said to have constructed a Hotel on the plot which is known as 'Hotel Ganpati'. It is said that this Hotel is constructed in Plot No.256 and is in front of the main road. The petitioner is said to have purchased the plot and constructed the hotel on being satisfied with regard to necessary approach road and other infrastructural facilities being available. It is further stated that a Notification was issued on 7.1.1960 by the State

Government – Annexure P/1 under section 6 of the Land Acquisition Act, 1894 for the purpose of acquiring certain land for development of Bhopal. Even though various lands are notified for acquisition in the Notification, for the purpose of the present petition, the land bearing Survey No. 1519/1 area 34.72 acres and land bearing Survey No.1519/2 area 8.50 acres, are only relevant. The said land belongs to respondent Nos. 5 to 11. The land was acquired and vide Annexure P/2, on 31.8.1967, possession of the land with regard to both these survey numbers, total area 43.22 acres, was taken over by the Government through the Land Acquisition Officer, Bhopal and it was transferred to the Bhopal Improvement Trust. However, while taking over possession of this land as per this possession certificate – Annexure P/2, certain area was left out, which is indicated in the certificate as a petrol pump, a store, cattle shed, residential building. This area i.e.... 1.22 acres, is situated in Survey No.1519/2. The dispute and controversy in this writ petition is with regard to this area measuring 1.22 acres, of which possession is not shown to be taken vide Annexure P/2. Be that as it may, after the possession and acquisition proceedings were held, it is said that exercising the powers available under section 48(1) of the Land Acquisition Act, an order was passed by the State Government vide Annexure P/3, on 29.12.1994, whereby this land measuring 1.22 acres and consisting of a petrol pump situated in 0.2 acres; two sheds situated in 0.05 acres; a residential house situated in 0.06 acres; and, open land measuring 1.09 acres was denotified and released from acquisition. It was held that possession of this area has not been taken over and, therefore, the denotification was issued and there is withdrawal from acquisition of this area and one of the conditions imposed for denotification was that certain area, which is required for construction of a 62' wide road, shall not be released. It is stated that the respondents 5 to 11 have agreed for this.

3- After release of this area, it is said that respondents 5 to 11 prepared a scheme for construction of a commercial complex and submitted their plan/ map, in accordance to the provisions of section 30 of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973, their map has been sanctioned vide Annexure P/5 dated 17.7.1996. It is averred by the petitioner that for constructing the commercial complex, respondents 5 to 11 started digging the road, as a result the 12 meter road, which was existing in front of the petitioner's hotel is being reduced to a 8 meter road and, therefore, this writ petition is filed challenging the denotification – Annexure P/3, the permission granted for construction –

Annexure P/5 and a direction is sought to respondents 1 to 5 either to restore the width of the road to 12 meters or to make arrangement for appropriate approach to the petitioner.

4- Shri Anil Khare, learned Senior Advocate, ably assisted by Ms. Namrata Kesharwani, took me through the documents and other material available on record, invited my attention to a document filed during the pendency of the writ petition alongwith I.A. No. 1910- W/2003, and submitted that vide Annexure P/26, which is filed alongwith this application, possession of the petrol pump, store, cattle shed and residential area, which forms 1.22 acres of land denotified, was taken over on 1.9.1967 by the Land Acquisition Officer, Bhopal and as the possession of this area is taken over immediately after acquisition on 1.9.1967, the first and foremost argument is that the land of which possession has been taken cannot be denotified by exercising the powers conferred under section 48(1) of the Land Acquisition Act.

5- Inviting my attention to the first possession certificate – Annexure P/2 dated 31.8.1967; the second possession certificate – Annexure P/26, as indicated hereinabove, issued on the next day i.e... 1.9.1967 and further referring to certain communications available on record, particularly, a letter dated 8.3.1982 – Annexure P/19 issued by the Chairman, Bhopal Vikas Pradhikaran and a document – Annexure P/20 – a reply, which was given in the floor of the Vidhan Sabha, learned Senior Advocate tried to emphasize that these documents go to show that possession of the land was taken over and once possession is taken over, it is argued that the denotification under section 48 is not permissible. It was emphasized by Shri Anil Khare, learned Senior Advocate, and Ms. Namrata Kesharwani, that the documents – Annexures P/2 and P/26, do establish that possession was taken over and the contention of the respondents that possession is not taken over is refuted by them mainly by referring to the documents. It was submitted by them that there is no specific mode of taking over of possession laid down under the Land Acquisition Act and, therefore, if possession is taken over by making of a Panchnama, even without the presence of the land owners, the possession is deemed to have been taken over and once the possession is taken over, no further denotification under section 48 of the Land Acquisition Act is permissible.

6- It is argued by learned counsel for the petitioner on the basis of certain judgments relied upon by them, that it is a settled principle that one of the

accepted mode of taking possession of an acquired land is by recording a memorandum or Panchnama by the Land Acquisition Officer in the presence of witnesses, it would be impossible always to take physical possession of the acquired land and, therefore, taking over of possession by Panchnama is the appropriate mode. Accordingly, contending that the documents and material available on record in this case does show that the possession has been taken over and placing reliance on the following four judgments, it was argued that once possession is taken over, as is apparent in the present case, the action for denotification under section 48(1) is not permissible. The judgments relied upon by learned counsel for the petitioner are: AIR 1966 SC 3377; *State of TN and another Vs. Mahalakshmi Ammal and others*, 1996(7) SCC 269; *Mandir Shree Sita Ramji @ Shree Sita Ram Bhandar Vs. Land Acquisition Collector and others,* 2005(6) SCC 745; and, *Banda Development Authority, Banda Vs. Moti Lal Agarwal and others*, 2011 (5) SCC 394.

7- Thereafter, with regard to permitting the respondents to make construction of the commercial complex and granting them liberty to do so by sanction accorded under section 30, it is argued that a Zoning Plan for the area in question has been issued, maps have been filed to show that in the Zoning Plan, the area is reserved for certain activities like green belt, widening of road etc, and as the sanction accorded for construction by the respondents is contrary to the Zoning Plan, the same is unsustainable. It is submitted that the sanction for construction of commercial complex to the respondents is contrary to the requirement of section 53, of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973, which prohibits and restricts land use and development once a scheme and Zoning Plan is approved and contending that contrary to the statutory provisions, the sanction is accorded, it is argued that issuance of sanction vide Annexure P/5 under section 30 is unsustainable. In support thereof reliance is placed on the case reported in *Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Coke & Chemicals Limited and others,* 2007 (8) SCC 705.

8- Shri Samdarshi Tiwari, learned Government Advocate appearing for the State, has produced the entire original record pertaining to the acquisition process and taking over possession and by taking me through the award, it is argued by him that in paragraph 28 of the award, it is specifically mentioned that no compensation has been assessed or paid for the land in question i.e... with regard to the area where petrol pump, store, cattle shed, residential building is situated. It is submitted by learned counsel for the State Government

that for this area measuring 1.22 acres no compensation is assessed. Learned counsel thereafter referred to certain reports of the Revenue Inspector and the Collector to submit that possession of this area measuring 1.22 acres is not taken over and as possession is not taken over the action taken under section 48(1) is proper. As far as the possession certificate – Annexure P/26 dated 1.9.1967 is concerned, Shri Samdarshi Tiwari refers to the note-sheet available, prepared by Collector, Bhopal to say that the Collector has categorically stated that no such document of taking over possession is available on record and the finding recorded is that even on the date when the note-sheet is prepared, just before according permission for denotification on 29.12.1994, it is found that the possession is with the land owners. Accordingly, Shri Samdarshi Tiwari submits that possession has not been taken over and, therefore, the action taken is proper.

9- As far as sanction of the map and the action taken for granting permission under section 30 of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973 – Annexure P/5 is concerned, Shri Samdarshi Tiwari submits that no Zoning Plan as contended is sanctioned, petitioner has not filed any such Zoning Plan with regard to the area in question and merely by referring to a lay-out map filed as Annexure, it cannot be said that the indication shown in this lay-out map is the Zoning Plan. It is argued that the lay-out plan was only a proposal, it was not converted into any statutory scheme or Zoning Plan after following the requirement, statutory in nature, as contemplated under the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973 and, therefore, in the absence of any statutory Zoning Plan, there is no illegality in according sanction under section 30, of the Act of 1973.

10- Shri R.N. Singh, learned Senior Advocate appearing for respondent Nos. 5 to 9, apart from adopting the submissions already made by Shri Samdarshi Tiwari, took me through the documents available on record – Annexure P/14, Annexure P/2 and Annexure P/26, and vehemently argued that possession has not been taken over. Learned Senior Advocate invited my attention to the report submitted by the Collector dated 23.3.1990, filed alongwith I.A. No. 5999/2010. The report of the Revenue Inspector – Annexure B dated 19.7.1990 also filed alongwith I.A. No. 599/2010; the documents Annexure P/19 and P/20, relied upon by Shri Anil Khare, and tried to demonstrate before this Court that the contentions of taking over of possession is not correct, the document itself did not establish taking over of possession and as possession has not been taken over, in accordance to

the requirement of law, and as no compensation is paid, learned Senior Advocate appearing for the respondents argues that the petitioner cannot have any grievance. That apart, with regard to taking over of possession, learned Senior Advocate submits that actual physical possession has to be taken over and even if for a moment it is assumed that Annexure P/26 is the document evidencing taking over of possession, but as actual physical possession is not taken and it is only a paper arrangement, the same cannot be accepted.

11- It is submitted by learned Senior Advocate for the respondents that the word 'possession' as used in section 48 of the Land Acquisition Act has a very narrow meaning and concept, therefore, actual permanent and physical possession is required to be taken. In support thereof, learned counsel invites my attention to the judgment of the Punjab and Haryana High Court in the case of *Agya Ram Vs. State of Haryana and others*, AIR 1983 PUNJAB & HARYANA 147; Supreme Court judgment in the case of *Balwana Narayan Bhagde Vs. M.D. Bhagwat*, AIR 1975 SC 1767, to say that the possession as referred to under section 48(1) is actual physical possession and not symbolic possession. Further reliance in this regard is placed on a judgment of the Gujarat High Court in the case of Trustees of *Bai Smarth Jain Shvetambar Murtipujak Gyanoddhaya Trust and others Vs. State of Gujarat and another*, AIR 1981 GUJARAT 107.

12- That apart, Shri R.N. Singh raised a preliminary objection with regard to the locus standing and right of the petitioner to file this writ petition. It was argued by learned Senior Advocate that petitioner is a stranger to the entire proceeding for acquisition and as he is a strange to the acquisition proceedings, he does not have any right to file this writ petition. In support of the aforesaid contention, learned counsel invites my attention to the judgment rendered in the case of *Coats Viyella India Limited Vs. India Cement Limited and another,* (2000) 9 SCC 376, and argues that when the land belonging to the respondents are acquired and when it is notified, a person like the petitioner, who is a stranger, has no right to challenge the action taken under section 48(1).

13- As far as granting sanction under section 30 of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973 is concerned, it is submitted by Shri R.N. Singh, learned Senior Advocate, that there is no statutory scheme or Zoning Plan either filed by the petitioner or shown to be existing and, therefore, in the

absence of the same, no interference can be made. Apart from relying on the judgments as indicated hereinabove, learned Senior Advocate also placed reliance on the following judgments in support of his contentions: *The Special Land Acquisition Officer, Bombay and others Vs. M/s Godrej and Boyce*, AIR 1987 SC 2421 (1); and , *State of UP and others Vs. L.L. Johnson and another,* AIR 1983 SC 1303.

14- Ms. Namrata Kesharwani refuted the contention with regard to locus standing of the petitioner to file the writ petition and submits that when the petitioner purchased the plot and constructed the Hotel, he was made to believe that the Zoning Plan available will be given effect to, but now when it is being violated, there is breach of the promise made to him, which amounts to promissory estoppel and, therefore, in the light of the law laid down by the Supreme Court in the case of *Mahindra and Mahindra Limited Vs. Union of India and another,* 1979(2) SCC 492, argued that the petitioner has a right to challenge the act. As far as issuance of the document – Annexure P/26 with regard to possession is concerned, it is submitted by her that the contention of Shri Samdarshi Tiwari that no such document is available is wholly incorrect, because reference to these documents are made in Annexures P/19 and P/20. She refers to Annexure P/19, a communication made by the Chairman, Bhopal Vikas Pradhikaran on 3.3.1982, wherein reference is made to this document; and, certain queries and answers in the floor of the Vidhan Sabha – Annexure P/20, to refute the contentions of Shri Samdarshi Tiwari to the effect that possession is not taken over. Accordingly, learned counsel seeks for interference into the matter.

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

16- Section 48 of the Land Acquisition Act permits withdrawal from an acquisition already undertaken but the withdrawal is subject to the condition that possession of the acquired land has not been taken. In this regard, the words used in the statute are "withdrawal from the acquisition of any land of which possession has not been taken".

17- In this case admittedly the State Government has passed the impugned order – Annexure P/3, on 29.12.1994, and by this order there is withdrawal from acquisition so far as land measuring 1.22 acres situated in Survey No.1519/2 is concerned. The question, therefore, would be as to whether possession of this area has been taken over after acquisition. If possession is

taken over, withdrawal is not permissible and, therefore, the moot question for consideration is as to whether possession of the area in question has been taken over or not?

18- After the land has been acquired, it is seen that possession was taken over, on 31.8.1967, possession certificate in this regard is Annexure P/2 and this possession certificate shows that on behalf of the Bhopal Improvement Trust one Shri K.N.S. Iyengar, Trust Engineer, was handed over possession and the Land Acquisition Officer Shri D.N. Singh took over the possession and then handed over the possession to the Bhopal Development Trust, the possession certificate – Annexure P/2 bears the signature of both Shri K.N.S. Iyengar and Shri D.N. Singh, it is attested by two witnesses and it speaks of taking over of possession of land bearing 43.22 acres situated in village Bhopal, Tehsil Huzur bearing Khasra No.1519/1 and 1519/2. However, it is also indicated in this possession certificate that possession is taken except of petrol pump, store, cattle shed (situated just near road side) and residential building. It is, therefore, clear that when initially possession was taken over on 31.8.1967, possession of the area in question measuring 1.22 acres is not taken over and according to the petitioner, it is taken over vide Annexure P/26 on 1.9.1967. This possession certificate is not filed alongwith the writ petition. It does not form part of the petition nor is it part of the pleadings in the writ petition. The writ petition was filed on 15.10.1998 and in the averments made in the writ petition, there is no mention of this possession certificate dated 1.9.1967 nor is it stated that possession of this area was taken over by this possession certificate. Infact this document is brought on record vide I.A. No. 1912-W/2003, an application for taking document on record, which is filed on 6.11.2000 alongwith affidavit of the petitioner. Even though it is shown to be certified copy issued from the Collectorate, Bhopal there is no averment made in the writ petition as to how and in what manner this document came into possession of the petitioner and why it was not filed alongwith the petition. Be it as it may be, this possession certificate – Annexure P/26 is of the very next date after possession was taken over on 31.8.1967. It is executed on 1.9.1967 at 11.10 AM and it only says that on behalf of the Government of Madhya Pradesh Shri D.N. Singh, the Land Acquisition Officer, has taken possession of the land and he refers to the award which has been passed in Case No.109/LA/59 to say that he is taking over possession for which the award has been passed. Surprisingly, this possession is not taken over in the presence of the witnesses who were present on the previous day when

Annexure P/2 was issued nor is the possession handed over by Shri D.N. Singh to the Bhopal Improvement Trust or its representative as was done on the previous day. Therefore, the question is as to whether possession was actually taken over as indicated in the certificate or this certificate is a manufactured document, which does not exist as canvassed by the respondents.

19- According to the return filed by the respondents namely – the State Government, the Bhopal Development Authority and the Director of Town and Country Planning, no such document is available and no such taking over of possession is recorded. Even in the original records produced by Shri Samdarshi Tiwari and in the award itself, it is indicated that the award is passed with regard to the land acquired, but it is not with regard to the petrol pump, store, cattle shed and the residential building. It is, therefore, clear that the award passed does not relate to this area of which possession is said to be taken over by this document – Annexure P/26. On the contrary, the overwhelming note-sheets and other documents available in the original file prepared in the office of the Collector, Bhopal goes to show that no such document of taking over of possession is available. The note-sheet consists of the report dated 1.6.1997, spot inspection and various other documents and it also refers to award passed to say that even in the award this area is not included. That apart, in the documents available on record – Annexures A and B, filed alongwith I.A. No. 5999/2010 by the respondents, it is seen that the Collector Bhopal was directed to conduct an inquiry and in his report submitted to the Secretary, Government of MP, Revenue Department on 23.3.1990 and again on 19.7.1990, the report is that in the award passed, this area is not included, no compensation for this area is paid and the possession is not even taken over. It is specifically mentioned in this report that a spot inspection has been done of the area and it is found on such inspection that in this area a petrol pump is still in existence, it is functioning; a building is available where occupants are staying; a shed and a Godown and certain area are available, which are in the physical possession of the owners. Both these reports – Annexures A and B, submitted by the Collector clearly shows that possession is not taken over.

20- Petitioner tries to refute these findings in the original file and the documents – Annexures A and B, by relying on Annexures P/19 and P/20. Apart from the aforesaid, there is nothing in rebuttal produced by the petitioner. As far as Annexure P/19 is concerned, it is a communication made on 3.3.1982 by the Chairman, Bhopal Development Authority, Bhopal to the Additional

Director, Chief Town Planner, Town and Country Planning Department, Bhopal and the subject of the communication is release of the land in question, reference is made to a letter dated 3.9.1981 and in paragraph 1 of the letter, the Chairman says that total 43.22 acres of land, which was acquired from Shri Sajjad Hussain by the State Government and was transferred to the Bhopal Vikas Pradhikaran through the Collector, Bhopal. Thereafter, he says as under:

> " .... except the area covered by the petrol pump, store and cattle shed (situated just near road side) and residential building only, vide the possession certificate enclosed herewith."

Thereafter, he says that possession of the property situated above has been taken over by the Land Acquisition Officer on behalf of the State Government on 1.9.67, copy of certificate enclosed. Thereafter, he again goes to say in paragraph 3 that since Pradhikaran has not taken over possession of these structures, they have been excluded, he has no objection if denotification is done and the layout plan approved by the department.

A complete reading of this document goes to show that Chairman, Bhopal Vikas Pradhikaran refers to taking over of possession of total 43.22 acres of land and he specifically says that the area consisting of petrol pump, store, cattle shed, residential building etc is not included in the possession certificate. Merely because he is referring to copy of a certificate enclosed as 1.9.67, without the enclosure being there and without any other material to show that this certificate is the same certificate – Annexure P/26, I am not inclined to accept the contention of the petitioner. The communication – Annexure P/19 relied upon does not show that the possession of the present area was given to the Bhopal Vikas Pradhikaran. On the contrary, in paragraph 1 of the said communication, as quoted hereinabove, it specifically says that possession of this area was not taken and Bhopal Vikas Pradhikaran has no objection if layout plan for this area is sanctioned.

21- As far as Annexure P/20 - the question and answer submitted in the Vidhan Sabha is concerned, this is a typed document, it does not bear the signature of anybody, it is not known as to who has issued it, it is neither a certified nor signed as an authentic true copy or a certified copy, it is only a typed material in a plain paper without any particulars and this cannot be used for the purpose of holding that possession is taken over. If the overwhelming evidence and documents available on record, as indicated hereinabove, is

taken note of, it would be clear that in the case in hand taking over of possession is not established. On the contrary it is a case where possession of the area is found to be still with the land owners and, therefore, as the possession of the area is not taken over, I see no reason to hold that the area cannot be denotified.

22- Once such a finding is recorded, it is not necessary now to go into the question of actual possession, physical possession or the manner of taking possession as canvassed by Shri Anil Khare, learned Senior Advocate, as on a close scrutiny of the documents as discussed hereinabove, this Court is satisfied that possession of the area in question, which has been denotified vide Annexure P/3 has not been taken over and, therefore, if for the area possession of which is not taken over is released from acquisition or the Government withdraws from the acquisition, no error is committed warranting interference. However, as parties made detailed submission during the course of hearing with regard to the fact that actual possession is not taken over, I deem it appropriate to consider this question also as an alternate submission made by the parties.

23- The matter can also be considered in the light of the submissions made by the parties with regard to actual possession being taken over or the effect of only taking symbolic possession in a matter of withdrawal from acquisition under section 48(1). Learned counsel for the petitioner says by relying upon various judgments as are indicated hereinabove that possession of the land can be taken over by any manner even by recording of a Panchnama by the Land Acquisition Officer and no specific procedure for this is laid down. That being so, if for a moment it is assumed that Annexure P/26 is the document by which possession is taken over, the question would be, in the facts and circumstances of the present case whether it can be said that actual physical possession in the case has been taken over.

24- Even though in the judgments relied upon by Shri Anil Khare, learned Senior Advocate, and Ms. Namrata Kesharwani, it is held that possession can be taken over and for the same no specific procedure or rule is laid down, but when it comes to considering the question of possession as is contemplated under section 48 of the Land Acquisition Act, the High Court of Punjab and Haryana and the High Court of Gujarat have dealt with the matter.

25- The Punjab and Haryana High Court has dealt with the matter in the case of *Agya Ram* (supra) and has held that the word 'possession' as is used

in section 48 does not mean only symbolic taking over of possession, but it means actual taking over of possession. It is held that the word 'possession' used in section 48 has a narrower concept and its meaning is 'permanent actual physical possession' of the land. Mere deprivation of use of the land for a particular purpose by a landowner does not mean that he is dis-possessed.

26- The Supreme Court has also considered the matter in the case of *Balwana Narayan Bhagde* (supra), and after taking note of the provisions of sections 16, 17 and 48 of the Land Acquisition Act, it was held that when the government proposes to take possession of the land acquired under the Land Acquisition Act, it must take actual possession of the land since an interest in the land is sought to be acquired by it. The Supreme Court says that there is no question of taking symbolic possession as understood by various judicial decisions under the Code of Civil Procedure, nor would possession merely on paper be enough. It is held by the Supreme Court in the aforesaid case that what the Land Acquisition Act contemplates as a necessary condition of vesting of land in the government is the taking of actual possession of the land and such possession would have to be taken as the nature of land admits of. The Supreme Court says that there cannot be any hard and fast rule with regard to the procedure to be followed after taking over possession, but actual physical possession should be taken and mere symbolic possession is not enough.

27- If the aforesaid judgments in the cases, as relied upon and referred to hereinabove, are applied in the facts and circumstances of the present case, it would be seen that in this case only a symbolic possession is seen to have been taken vide the Land Acquisition Officer vide Annexure P/26, because inspite of the same having been taken over on 1.9.67, the overwhelming document and reports available on record, do show that the petrol pump is still functioning, the cattle shed and the store are occupied by the owners namely the respondents and possession of the area is still with the original owners. If that be so, it is a case where even if the document – Annexure P/26 is admitted, it only indicates taking over of symbolic possession, but as actual physical possession is not taken over as is evident from the documents available on record and the discussions made hereinabove, it is a case where this Court has to hold that for the purpose of section 48 in this case, possession has not been taken over and, therefore, the government can still withdraw from acquisition.

28- As for granting permission to make construction and sanction of the layout plan for constructing a commercial complex under section 30 of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973 is concerned, records indicate that against the aforesaid, petitioner did not file any appeal, but a revision was filed under section 32 and this revision has been dismissed vide Annexure P/9 with a slight modification that the sanction accorded is subject to the condition that a 8 meter wide road is left open.

29- Contention of the petitioner is that this sanction is contrary to the Zoning Plan and, therefore, it is illegal. However, no Zoning Plan or documents to show that an approved and duly notified Zoning Plan in accordance to law is available. Only some maps are filed, which are nothing, but a proposed layout maps/plans.

30- A Zoning Plan is prepared in accordance to the requirement of section 20 of the MP Nagar Tatha Gram Nivesh Adhiniyam, 1973. It is contemplated in this provision that the local authority may on its own motion and after publication of a development plan or thereafter if so required, prepare a Zoning Plan. The contents of the Zoning Plan has to be as contemplated under section 21, thereafter it is held in section 22 that for the purpose of preparing, publication approval and bringing into operation a Zoning Plan, the provisions of section 18 and 19 would apply. Sections 18 and 19 contemplate a detailed provision for preparation, sanction and publication of a development plan and these contemplates publication in the Gazette, inviting objections, sanction etc. The detailed procedure for publication of the draft approved, sanction and Gazette Notification is contemplated under sections 18 and 19. Nothing is brought to the notice of this Court to show that in the matter of preparation of the Zoning Plan, which is said to have been violated in sanctioning the commercial complex vide Annexure P/5. In the absence of any material or document available to show that a Zoning Plan as required under the statute has been published and in force, I am not inclined to interfere into the matter as statutory violation of a Zoning Plan is not made out. Even existence of a Zoning Plan is not borne out from the material available on record.

31- Taking note of the totality of the circumstances and the material available on record, I see no reason to interfere into the matter.

32- Before parting, it may be indicated that Shri Umesh Trivedi, Advocate, appeared and submitted that he is appearing for certain interveners, who have filed an application for intervention being I.A. No. 9311/2009. This application

is filed on 7.9.2009 i.e... after 11 years of filing of this writ petition. This application has not been allowed and there is nothing to show as to how and in what manner the interveners are aggrieved. However, the fact remains that the interveners are trying to challenging the Notification dated 29.12.1994. They have slept over the matter for more than 15 years and now their intervention at this stage cannot be permitted. Therefore, the interveners were not heard.

33- Accordingly, finding no ground to interfere into the matter, the petition stands dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 1057
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 7036//2013 (Jabalpur) decided on 18 April, 2013

URMILA RAJAK (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***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 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. (Para 10,11,12)**

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 70, पंचायत संविदा शाला शिक्षक (रोजगार एवं संविदा की शर्तें), नियम, म.प्र., 2005, नियम 14 – अधिकतम वय – भर्ती हेतु न्यूनतम एवं अधिकतम वय विहित करना तथा उसे कार्यपालिक आदेश जारी कर संशोधित करना भी राज्य सरकारों की शक्तियों के भीतर है – परिपत्र दिनांक 03.11.2012 द्वारा सीधी भर्ती हेतु अधिकतम आयु सीमा 45 वर्ष है – मात्र इसलिए कि याची ने पात्रता परीक्षा उत्तीर्ण कर ली है, उसके पक्ष में कोई निहित अधिकार का सृजन नहीं होता – यह उचित

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।

Ankit Agrawal, for the petitioner.
Piyush Dharmadhikari, G.A. for the respondent/State.

ORDER

SANJAY YADAV, J.:- Respondents in view of the issue raised does not wish to file reply, instead rely upon circular No. सी 3-11/12/1/3, dated 03-11-2012.

1. With consent therefore, heard finally.

2. Being aggrieved by the action of respondents in denying the petitioner to participate in the counselling for appointment as Samvida Shala Shikshak Grade I on the ground that she is over age present writ petition has been filed seeking direction to the respondents to consider her for appointment by extending relaxation as per Rules.

3. Facts uncontroverted are that petitioner belongs to other Backward Class, presently working as Samvida Shala Shikshak Grade III under women's quota appointed since 16-09-2006 at Primary Schools, Bhita, Janpad Panchayat Shahpura (Bhitoni). That being a graduate and Post Graduate in Commerce and having the degree of Bachelor in Education, petitioner applied and participated in the eligibility test for appointment to the post of Samvida Shala Shikshak Grade I and secured 186 rank in reserved open category (There is no material on record to suggest that the merit position obtained by the petitioner is under women category). That after having successfully passed the eligibility test the petitioner was called for verification and scrutiny of the requisite documents; whereon, she was informed that having crossed 35 years of age she is not eligible for appointment as Samvida Shala Shikshak Grade I because of her being overage. Petitioner is 48 years of age. Controversy starts here.

4. Contentions on behalf of petitioner are that being an other Backward Class Category woman candidate and having the experience of seven years as Samvida Shala Shikshak Grade III, the petitioner is entitled for the relaxation of 17 years in age. Circular dated 10-01-2012 which stipulates the procedure and format for appointment of Samvida Shala Shikshak has been placed

reliance on. The relevant clause relied upon is clause 2 and 3 of the format of advertisement for appointment of Samvida Shala Shikshak Grade I, stipulating the educational qualification and age in the following terms :-

"2 शैक्षणिक योग्यता एवं आयुः–

(1) .....

(2) .....

(3) न्यूनतम आयु 21 वर्ष अधिकतम आयु 35 वर्ष

3 अर्हताएं :–

(1) .....

(2) अनुसूचित जातियों, अनुसूचित जनजातियों तथा अन्य पिछड़े वर्गों या किन्ही अन्य वर्गों के लिये उच्चतर आयु सीमा में छूट, सरकार के ऐसे नियमों के अनुसार होगी जो नियोजन के समय प्रवृत्त हो,

(3) महिला अभ्यर्थी के लिये अन्य छूट के अतिरिक्त उच्चतर आयु में 10 वर्ष की छूट रहेगी।

(4) सरकारी स्कूलों के लिए नियुक्त किए गये मानसेवी शिक्षकों तथा व्यावसायिक शिक्षा के अंशकालिक शिक्षक को 35 वर्ष की अधिकतम आयु सीमा में पन्द्रह वर्ष की छूट दी जाएगी। परन्तु व्यावसायिक शिक्षा के ऐसे अंशकालिक शिक्षक जिन्होंने अंशकालीन शिक्षक के रूप में कार्य किया है एवं उनका कार्य असंतोष जनक पाये जाने के आधार पर उनको नियुक्ति समाप्त की गई है। उन्हें यह छूट प्राप्त नहीं होगी।

(5) ऐसे अभ्यर्थी जिन्होंने संविदा शाला शिक्षक के रूप में कार्य किया है और जो संविदा शाला शिक्षक के नियोजन के लिए नए सिरे से आवेदन करेंगे, वे उच्चतम आयु में उतनी कालावधि की छूट के हकदार होंगे जितनी कालावधि के लिए उनके द्वारा पूर्व मे संविदा शाला शिक्षक के रूप में कार्य किया गया हो इस आधार पर यह छूट अधिकतम नौ वर्ष के लिए होगी बशर्ते उनकी संविदा उनके कार्य को असंतोषजनक पाये जाने पर समाप्त नहीं कर दी गई हो।

(6) दैनिक वेतन भोगी कर्मकारों को, जो या तो कार्यरत हो अथवा जिनको राज्य सरकार द्वारा छटनी हो गई हो, उनके द्वारा की गई सेवा की कालावधि के बराबर उच्चतर आयु सीमा में इस शर्त के

अध्यधीन रहते हुए छूट की जाएगी कि अभ्यर्थी ने 40 वर्ष की आयु पूरी नहीं की है।

(7) विधवा अथवा तलाकशुदा अभ्यार्थी की अधिकतम आयु सीमा मे, अन्य छूट के अतिरिक्त पांच वर्ष की छूट रहेगी।

(8) ऐसे अभ्यर्थी जिन्होंने अतिथि शिक्षक के रूप में सरकारी स्कूल में न्यूनतम तीन शैक्षणिक सत्र तक कार्य किया है, वे उच्चतम आयु सीमा में पांच वर्ष की छूट के हकदार होंगे।

(9) संविदा शाला शिक्षकों के नियोजन के लिए कालम (7) – अनुसूची दो की अभ्यूक्तियों में उल्लेखित शैक्षणिक अर्हताएं संविदा शाला शिक्षकों के अन्य तत्स्थानी पदों के लिए भी स्वीकार्य होगी।

5. Placing reliance on clauses 3(3) and 3(5) of the Circular dated 10-01-2012 it is contended on behalf of the petitioner that being a woman candidate she is entitled for relaxation in age by 10 years and further having satisfactorily worked as Samvida Shala Shikshak Grade III since 16-09-2006, petitioner is entitled for further relaxation of seven years (2006 to 2013). Thus, it is urged that the petitioner is entitled for total 17 years of relaxation, i.e. till she attains 52 years of age she is entitled for appointment as Samvida Shala Shikshak Grade I.

6. The respondents on their turn have denied the contentions raised on behalf of petitioner that the petitioner is entitled for relaxation of 17 years for appointment of Samvida Shala Shikshak Grade I. It is urged that a maximum limit of 45 years have been laid down by the circular issued vide No. सी 3-11/ 12/1/3 dated 03-11-2012 whereby a person seeking employment through direct recruitment with all relaxation would be entitled for appointment upto 45 years and not beyond the same. It is contended that since the petitioner is 48 years she is not entitled for an appointment.

7. Considered rival submissions.

8. The Madhya Pradesh Panchayat Samvida Shala Shikshak (Employment and Conditions of Contract) Rules, 2005 framed by the State Government in exercise of the powers conferred by sub-section (1) of Section 95 read with sub-section (2) of Section 70 of the Madhya Pradesh Panchayat Raj Avam Gram Swaraj Adhiniyam. These Rules govern recruitment and condition of service of Samvida Shala Shikshak employed by Janpad Panchayat or Zila Panchayat as the case may be.

9. Sub Rule (4) and (8) (c) of Rule 6 provides for educational qualification, age and other requirements for appearing in the eligibility examination of Samvida Shala Shikshak to be as specified in Schedule II. Note (a) appended with Schedule II lays down following qualification :-

"Note.-(a) Qualification :-

(1) Any candidate, who have obtained minimum marks in the eligibility examination of Samvida Shala Shikshak as per sub-rule (5) of Rule 6, may apply to Panchayat for the employment as Samvida Shala Shikshak.

(2) The relaxation in maximum age limit in respect of Scheduled Caste, Scheduled Tribe and Other Backward Classes or any other class shall be according to Government rules in force at the time of employment.

(3) Women candidates shall have ten years relaxation in maximum age limit in addition to other relaxations.

(4) The Instructors/Supervisors of erstwhile Government Non Formal Education Centres, the Honorary Teachers appointed for Government schools, Guruji of Education Guaranty School and part time teacher of Vocational Education shall be given twelve years relaxation in maximum age limit (35 years).

(5) The candidate who have worked as Samvida Shala Shikshak and who apply fresh for employment as Samvida Shala Shikshak, shall be entitled to relaxation in maximum age limit to the extent of the period, they have worked previously as Samvida Shala Shikshak. On this basis, the relaxation shall be to a maximum of nine years, Provided their contract was not terminated due to their work being found unsatisfactory.

(6) Daily Wage Workers who are either working or retrenched by Government, shall have relaxation in maximum age limit equivalent to the period of service rendered by them subject to the condition that the candidate shall not have attained 40 years of age.

(7) The minimum and maximum age shall be counted with reference to 1st January of the calendar year in which the vacancies are advertised.

(8) The educational qualification for the employment of Samvida Shala Shikshak mentioned in column (7) Remarks of Schedule II, shall be acceptable also for other corresponding posts of Samvida Shala Shikshak."

10. Rule 14 of 2005 Rules provides for that the "power to "prescribe", wherever provided under these rules, shall be exercised by the Government by issuing executive orders."That sub-section (2) of Section 70 of 1993 Act provides for that "The qualification, method of recruitment, salaries, leave, allowance and other condition of service including disciplinary matters of such officer and servants shall be such as may be prescribed." Thus it is within the powers of the State Government to prescribe for minimum and maximum age of recruitment and even to amend the same by issuing executive order. These orders are issued by the State Government in the name of Governors as postulated under Article 166 of the Constitution that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. The State Government in exercise of the powers so conferred issued circular dated 03-11-2012 fixing the maximum age limit in direct recruitment in service in the following terms :-

मध्यप्रदेश शासन
सामान्य प्रशासन विभाग
मंत्रालय
वल्लभ भवन, भोपाल – 462004

कमांक सी 3.11/12/1/3, भोपाल, दिनांक 03 नवम्बर 2012

प्रति,

शासन के समस्त विभाग,
अध्यक्ष, राजस्व मण्डल, ग्वालियर
समस्त विभागाध्यक्ष
समस्त संभागायुक्त
समस्त जिला कलेक्टर
समस्त मुख्य कार्यपालन अधिकारी, जिला पंचायत
मध्यप्रदेश

"विषय : राज्य शासन की सेवाओं में सीधी भरती से भरे जाने वाले पदों पर नियुक्ति के लिए अधिकतम आयु.सीमा का निर्धारिण"

संदर्भ :- 1. सा.प्र.वि. का परिपत्र क. सी/3.5/2001/3/1, दिनांक 17.08.2004

2. सा.प्र.वि. का परिपत्र क. सी/3.5/2001/3/1, दिनांक 5.10.2004

3. सा.प्र.वि. का परिपत्र क. एफ. सी/3.12/2010/3/1, दिनांक 04.06.2010

4. सा.प्र.वि. का परिपत्र क. एफ. सी/3.10/2012/3/1, दिनांक 30.08.2012

उपर्युक्त विषयक इस विभाग के संदर्भित परिपत्रों द्वारा राज्य शासन की सेवाओं में सीधी भरती से भरे जाने वाले पदों पर नियुक्ति के लिए विभिन्न प्रवर्गों, शासकीय सेवकों, निगम, मण्डल, आयोग, स्वायत्त संस्थाएं तथा नगर सैनिकों एवं महिलाओं के लिए अधिकतम आयु.सीमा के निर्देश समय समय पर जारी किये गये हैं।

2/ राज्य शासन द्वारा बेरोजगारों के हित में यह निर्णय लिया गया है कि राज्य शासन की सेवाओं में सीधी भरती के लिए निर्धारित अधिकतम आयु सीमा 35 वर्ष कों बढ़ाकर स्थायी रूप से 40 वर्ष निर्धारित की जाए। इस वृध्दि के फलस्वरूप अनुसूचित जाति, अनुसूचित जनजाति, अन्य पिछड़ा वर्ग, शासकीय सेवकों, निगम,मण्डल, आयोग, स्वायत्त संस्थाएं तथा नगर सैनिकों एवं महिलाओं के लिए अधिकतम आयु.सीमा 45 वर्ष होगी।

3/ उक्त अधिकतम आयु.सीमा में की गई वृध्दि गृह (पुलिस), वन, आबकारी एवं जेल विभाग के कार्यपालिक पदों पर लागू नहीं होगी। इन विभागों के कार्यपालिक पदों पर नियुक्ति के लिए अधिकतम आयु.सीमा उनके भरती नियमों के प्रावधान के अनुसार ही लागू होगी। अर्थात् इन पदों पर नियुक्ति के लिये अधिकतम आयु.सीमा 40 वर्ष का लाभ प्रांप्त नहीं होगा।

4/ उपर्युक्त परिप्रेक्ष्य में शासकीय सेवाओं में सीधी भरती में नियुक्ति के लिए अधिकतम आयु.सीमा की गणना निम्नानुसार होगी :

1	पुरुष आवेदक (अनारक्षित वर्ग)	40 वर्ष
2	पुरुष आवेदक (शासकीय/निगम/मण्डल/स्वशासी संस्था के कर्मचारी तथा नगर सैनिक)	40 वर्ष
3	पुरुष आवेदक (अनारक्षित वर्ग. अनुसूचित जाति/ अनुसूचित जनजाति/अन्य पिछड़ा वर्ग)	45 वर्ष

4	पुरुष आवेदक (अनारक्षित वर्ग. शासकीय/निगम/मण्डल/स्वशासी संस्था के कर्मचारी तथा नगर सैनिक)	45 वर्ष
5	महिला आवेदक (अनारक्षित वर्ग)	45 वर्ष
6	महिला आवेदक (शासकीय/निगम/मण्डल/स्वशासी संस्था के कर्मचारी तथा नगर सैनिक) (अविधवा/परित्यक्ता/तलाकशुदा)	45 वर्ष
7	महिला आवेदक (आरक्षित वर्ग. अनुसूचित जाति/अनुसूचित जनजाति/अन्य पिछड़ा वर्ग)	45 वर्ष

5/ सभी प्रकार की छूट को शामिल करते हुए किसी भी स्थिति में किसी भी प्रवर्ग के लिए अधिकतम आयु.सीमा 45 वर्ष से अधिक नहीं होगी।

6/ उक्त अधिकतम आयु.सीमा निर्धारण के फलस्वरूप संदर्भित परिपत्र दिनांक 17.08.2004 एवं 05.10.2004 एतद् द्वारा निरस्त किये जाते हैं।

7/ उक्त अधिकतम आयु.सीमा परिपत्र जारी होने के दिनांक से प्रभावशील होगी।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार
सही/.
(आर. के. गजभिये)
उप सचिव
मध्यप्रदेश शासन
सामान्य प्रशासन विभाग

11. It is thus clear from above circular that for direct recruitment the maximum age till which a person can get an employment under the State including appointees in Janpad Panchayats, Zila Panchayats is 45 years. Though it is contended that the circular which lays down the maximum age limit for direct appointment issued on 03-11-2012 is not effective from a retrospective date, the submissions have been noted to be rejected. Merely because the circular effect those who have crossed the age limit prescribed for appointment on the date of issuance of circular, the same cannot be termed as retrospective. Furthermore that, there is no right to appointment. In view whereof the petitioner having earlier passed the eligibility test no vested right is created in her favour. As such the contention that the circular dated 03-11-2012 has adversely effected her right for appointment has no substance.

12. Thus, there being maximum age limit prescribed for direct recruitment, the petitioner having crossed the age limit of 45 years, has rightly been held not entitled for counselling for appointment to the post of Samvida Shala Shikshak Grade I.

13. In view whereof petition fails and is dismissed. No costs.

Petiton dismissed.

I.L.R. [2013] M.P., 1065
WRIT PETITION
Before Mr. Justice R.C. Mishra
W.P. No. 21711/2012 (Jabalpur) decided on 22 April, 2013

BABULAL ...Petitioner
Vs.
TARACHAND & anr. ...Respondents

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.**

(Paras- 3, 4, 6 and 8)

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।

Cases referred :

AIR 2003 SC 189, AIR 2005 SC 3353.

Pranay Verma, for the petitioner.
G.S. Baghel, for the respondents.

ORDER

R.C. MISHRA, J.:- With consent, the matter is finally heard.

1. This is a petition, under Article 227 of the Constitution of India, for issuance of a writ in the nature of certiorari quashing the order-dated 7/11/2012 (Annexure P-11) passed by Second ADJ, Gadarwara, Distt. Narsinghpur in Civil Suit No.12-A/10, whereby respondents' application dated 16/10/2012 was allowed and accordingly, petitioner's right to lead further evidence was closed.

2. The suit has been filed by the petitioner for declaration of title in respect of a house and permanent injunction restraining the respondents from alienating/transferring the house or from interfering with his possession thereon in any manner. Upon his request, vide order dated 12/10/2011, Shri T.S. Thakur, Advocate was appointed as Commissioner for recording of cross-examinations and re-examinations of his witnesses, whose chief-examinations were furnished by way of affidavits. However, this exercise is yet to be completed.

3. Observing that delay is attributable to the petitioner inasmuch as he had failed to keep the witnesses present before the Commissioner, vide order dated 18/1/2012, the trial Judge closed petitioner's right to adduce evidence. This order was interfered with by way of an order passed in W.P. No.1833/12

on 16/3/2012 (that was modified vide order-dated 19/4/2012 in Review Petition No.336/2012) and in the interests of justice, last opportunity was granted to the petitioner for the purpose subject to payment of costs of Rs.750/- with a further direction that he shall keep present all his witnesses on 26/4/2012.

4. According to the petitioner, summons to one of the witnesses namely Jagdish could not be served as he had gone out of station whereas the other witnesses namely Manoj Dubey, the Document Writer and Sheikh Raheem, one of the Attesting Witness of the Will relied on by him, failed to appear despite service of respective summons. However, fact of the matter is that the order dated 12/10/2011 casted an obligation on the petitioner to produce the witnesses before the Commissioner. Even otherwise, as explained in *Salem Advocate Bar Association, Tamil Nadu v. Union of India* AIR 2003 SC 189–

> "Reading the provisions of O.16 and O.18 together, it is evident that O. 18, R. 4(1) will necessarily apply to a case contemplated by O. 16, R. 1A i.e. where any party to a suit, without, applying for summoning under R. 1 brings any witness to give evidence or produce any document. In such a case, examination-in-chief is not to be recorded in Court but shall be in the form of an affidavit.....
>
> Whether a witness shall be directed to file affidavit or be required to be present in Court for recording of his evidence is a matter to be decided by the Court in its discretion having regard to the facts of each case".

5. The Rule i.e. O. 18, R. 4(1) providing inter alia for filing of chief-examination of every witness in the form of an affidavit; for recording of his cross-examination and re-examination by a Commissioner to be appointed by the Court was introduced with a view to reducing consumption of judicial hours in the process of recording of oral evidence but experience shows that the hope is wholly belied.

6. Further, in *Salem Advocate Bar Association, T.N. v. Union of India* AIR 2005 SC 3353, the Supreme Court, while declaring that the amendments brought into effect by the Amending Act of 2002 were constitutionally valid, proceeded to lay down various guidelines for streamlining the new procedure to be followed for recording of evidence in civil cases. The relevant excerpt reads as under –

"The power under Order 18 Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint a Commissioner to record the cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases, which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex questions of title, complex questions in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of Wills, etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses and the prayer for recording evidence by the Commissioner may be declined by the court."

(Emphasis supplied)

7. Accordingly, the order-dated 12/10/2011 also deserves to be nullified in view of the aforesaid facts and circumstances of the case including performance of the Commissioner and conduct of the petitioner and his witnesses.

8. The petition, accordingly, succeeds but in addition to the order in question, the order-dated 12/10/2011 (supra) appointing Shri T.S. Thakur as Commissioner is also set aside. Instead, it is directed that the trial Court itself shall record cross-examinations and re-examinations of the remaining witnesses of the petitioner on the next date of hearing.

9. Needless to say that – (a) the witnesses shall be produced by the petitioner himself without applying for summons (b) no further opportunity shall be granted to him and (c) payment of costs shall be a pre-condition to further prosecution of the suit.

10. Now, the parties are directed to appear before the trial Court on 14/5/2013 at 11 a.m. positively.

C.C. as per rules.

Order accordingly.

I.L.R. [2013] M.P., 1069
WRIT PETITION
Before Mr. Justice R.C. Mishra
W.P. No. 2553/2013 (Jabalpur) decided on 22 April, 2013

BIHARI DAS ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

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. (Para 5 and 6)**

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।

Pradeep Naveriya, for the petitioner.
Puneet Shroti, P.L. for the respondent/State.

ORDER

R.C. Mishra, J.:- Arguments heard.

1. This is a petition, under Article 226 of the Constitution of India. The petitioner, who was duly elected to represent as a Member in Ward No.9 of the Janpad Panchayat Baihar, Distt. Balaghat, is aggrieved by acceptance of his resignation (Annexure P/1) tendered on 26/12/2012. He has, therefore

prayed for - (a) *certiorari* quashing of letter-dated 28/12/2012 (Annexure P/6) authored by the President, Janpad Panchayat, intimating recommendation for acceptance of his resignation and (b) *mandamus* directing respondent nos.2 and 3 to accept withdrawal thereof, communicated through letter dated 29/12/2012 (Annexure P/2).

2. The prayer has been opposed *primarily* on the ground that the resignation submitted voluntarily has already been accepted in accordance with the provisions of Section 37 of M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (hereinafter referred to as "Adhiniyam") and consequently, the office of the member from Ward No.9 has been declared as vacant.

3. According to the petitioner, the resignation could not be accepted without affording him an opportunity to reconsider the decision. For this, he has made reference to Rules 3 and 4 of M.P. Panchayat (Resignation by Office Bearers) Rules, 1995 (for short "the Rules").

4. Relevant excerpts of the provisions of Section 37 of the Adhiniyam and Rules 3 and 4 of the Rules may be reproduced as under -

S.37. Resignation by office bearer of Panchayat

(1) A Panch of a Gram Panchayat or a member of Janpad Panchayat or a member of Zila Panchayat may resign his office by giving notice in writing to that effect to the Sarpanch or President as the case may be.

(2) ...

(3) The manner of giving notice and procedure for tendering resignation and its becoming effective shall be as may be prescribed -

Provided that a person tendering resignation may withdraw his resignation before it becomes effective.

Rules 3 & 4

3. Manner of giving notice -

(1) Any member who desires to resign his office shall give notice, thereof in writing in Form 'A' duly signed by him to the Sarpanch or president as the case may be either in

person or through his representative authorized by him in writing in this behalf, a copy of the said notice shall also be sent to the Secretary or Chief Executive Officer, as the case may be.

(2) On receiving the notice under sub-rule (1) the Secretary or Chief Executive Officer as the case may be, shall record on the notice the date on which and the time at which the notice was given to him and give a receipt thereof in Form 'B'.

4. Acceptance of Resignation -

(1) On receipt of the notice under rule 3, the Secretary or Chief Executive Officer shall forward such notice immediate to the District Deputy Director, Panchayat and Social Welfare and the Collector.

(2) The notice of resignation given by the member shall be considered by the Panchayat at its next meeting. Notice of the meeting shall also be given to the member who has submitted the resignation.

(3) The Panchayat shall in its meeting may ascertain from the member concerned whether he desires to withdraw his resignation and if the member desires to withdraw the resignation, he shall give in writing to that effect in Form 'C'

(4) If the member concerned furnishes the statement in Form 'C' his resignation shall become infructuous. If the member does not withdraw his resignation, then his resignation shall be accepted by the Panchayat.

(5) .....

(6) .....

(7) .....

5. These Rules have been framed in exercise of powers conferred by sub-section (1) of Section 95 read with sub-section (3) of Section 37 of the Adhiniyam. Accordingly, the resignation could be accepted under sub-rule

(4) only after a full and complete compliance with the provisions of preceding two sub-rules, contemplating consideration thereon by Panchayat at its next meeting under notice to the petitioner.

6. A bare perusal of the record would reveal that the resignation has been accepted by circumventing the procedure prescribed therefor. Apparently, non-compliance with the mandatory provisions of sub-rules (2) and (3) is sufficient to hold that the resignation was not validly accepted. The corresponding order, therefore, deserves to be quashed.

7. The petition, therefore, stands allowed and the letter dated 28/12/2012 (Annexure P/6) is hereby set aside. The obvious consequence is that the petitioner shall be deemed to continue as the elected member representing Ward No.9 of Janpad Panchayat Baihar, Distt. Balaghat.

Petition allowed.

I.L.R. [2013] M.P., 1072
ELECTION PETITION
Before Mr. Justice R.C. Mishra

Election Petition No. 7/2009 (Jabalpur) decided on 18 April, 2013

RAJESH KUMAR ...Petitioner

Vs.

DEVENDRA SINGH ... Respondent

A. 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.** **(Para 11)**

क. 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।

B. 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. (Paras 17)

ख. 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 मंलिमांति प्राप्त है।

C. 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. (Paras 19 to 28)**

ग. 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।

Cases referred :

AIR 1999 SC 935, AIR 1956 SC 593, AIR 1964 Punjab 231, AIR 1966 SC 1626, AIR 1959 SC 422, (2011) 7 SCC 721, AIR 2000 SC 256,

AIR 1969 SC 395.

Manoj Sharma with *Rajmani Mishra,* for the petitioner.
Imtiyaz Husain with *R.B. Patel*, for the respondent.

J U D G M E N T

R.C. MISHRA, J. :- In this petition, election of the returned candidate viz. the respondent to the M.P. Legislative Assembly Constituency No.143, Silwani has been called in question on the ground of improper rejection of the nomination paper, as contemplated in clause (c) of sub-section (1) of S.100 of the Representation of the People Act, 1951 (for short 'the Act'). The petitioner has sought declarations to the effect that (a) the order dated 8.12.2008 passed by the Assistant Returning Officer was illegal and (b) election of the respondent to the Constituency is void.

2. The corresponding calendar was notified as under -

(1)	Last date for filing of nomination papers	: 07.11.2008
(2)	Scrutiny of nomination papers	: 08.11.2008
(3)	Withdrawal of nomination papers	: 10.11.2008
(4)	Date of election	: 27.11.2008
(5)	Declaration of results	: 08.12.2008

3. Indisputably, on 11.8.2008, the petitioner's nomination paper, a copy of which has been tendered in evidence as Exhibit P-1, was rejected for the reason that he, being an elector of a different constituency namely M.P. Legislative Assembly Constituency Udaipura No.140, had failed to submit a copy of the electoral roll of that constituency or certification from ERO of that constituency, as per requirement of sub-section (5) of Section 33 of the Act.

4. According to the petitioner, rejection of the nomination paper was wholly arbitrary, illegal and against the relevant provisions of the Act, as contained in Sections 33(4), 33(5), 36(2)(b), 36(4) and 39(2)(c) thereof. In support of the assertion, he has further pleaded that -

(A) the nomination form, in the prescribed format, filed in support of his candidature as an independent candidate, was -

(i) duly completed by him in all respects and

(ii) signed by himself

(iii) subscribed by 10 proposers, who are electors of the constituency as required by Section 33(1) of the Act.

(B) Since he was an elector of a different constituency, he had also filed a copy of the relevant part of the electoral roll of that constituency as required by sub-section (5) of Section 33 of the Act.

(C) Letter of Tahsildar (Annexure P-2) clearly reflected that he had annexed a copy of the relevant part of the electoral roll in compliance with provision of sub-section (5) of the S.33 of the Act and even otherwise, in view of the decision in *Rakesh Kumar v. Sunil Kumar* AIR 1999 SC 935, the Assistant Returning Officer should have afforded an opportunity of hearing to him before rejecting the nomination paper.

5. While raising preliminary objections to the effect that the petition deserves to be dismissed at the threshold for -

(a) want of compliance with the provision of Section 81(3) of the Act.

(b) non-compliance with the requirements of Section 83(1)(c) of the Act.

(c) absence of a common authorship in signatures on the nomination paper as well as on the petition.

- the respondent, in his written statement, has submitted that rejection of the petitioner's nomination paper was justified in view of the facts that despite grant of opportunity, he did not furnish certified copy of the electoral roll of the constituency which he belonged to and that the photocopy of the electoral roll submitted on his behalf, was not sufficient to establish his identity. According to him, the nomination form was liable to be rejected for other reasons also namely -

(i) It did not bear signature of the petitioner.

(ii) Provision of Article 173(a) of Constitution of India was not complied with.

(iii) The petitioner had made contradictory statements regarding his caste.

6. In the light of these pleadings, the following issues have been framed and amongst them, issue nos.3(a) and 3(b), based on legal objections, have already been decided vide order dated 11.1.2010 as preliminary issues -

No.	Issues	Finding
1	Whether the nomination of the petitioner was improperly rejected.	No
2	Whether the nomination form also deserved rejection for the reasons that-	
	(i) it did not bear signature of the petitioner.	No
	(ii) for want of compliance with Article 173(a) of the Constitution of India.	No
	(iii) the petitioner has made contradictory statements regarding his caste	No
3	Whether the petition is liable to be dismissed at the threshold for-	
	(a) want of compliance with the provision of Section 81(3) of the Representation of the People Act, 1951 (for short 'the Act').	No
	(b) non-compliance with the requirements of S.83 (1) (c) of the Act.	No
	(c) absence of a common authorship in signatures on the nomination paper as well as on the petition.	No
4	Whether the election of the returned candidate deserves to be set aside on the ground mentioned in Section 100(1)(c) of the Act.	No
5	Reliefs and costs?	Petition dismissed with no order as to costs

ISSUE Nos.2(i) and 3(c)

7. The petitioner (PW2) has clearly asserted that the nomination paper (Ex.P-1), though filled by Neeraj Shrivastava (PW3), an Advocate practicing at Udaipura, bears his signatures only. His statement has drawn ample support not only from evidence of Neeraj Shrivastava but also from a candid admission made by respondent Devendra Singh (DW1) in his chief examination recorded on 2.2.2012 to the effect that the form was submitted before the Returning Officer by the petitioner only. From the tenor of his deposition, it is evident that his objection to the genuineness of signatures of the petitioner on the nomination form is based on the allegation that the same are dissimilar to his admitted signatures on the petition. In such a situation, his application, under Section 45 of the Evidence Act, for summoning an handwriting expert to compare the signature was rejected vide order-dated 20.6.2012 while endorsing the contention raised by the petitioner that it is not uncommon to find difference in the signatures of the same person even after a short interval of time. The relevant excerpt of the order may be reproduced as under -

> *20. However, fact of the matter is that in accordance with Section 81(1) of the Act, an election petition has to be presented in person before the Registrar of the Court and the corresponding report of the Registry raises a presumption, though rebuttable, that the petition was filed by the petitioner himself. Moreover, for establishing that while filing the nomination paper, someone else has impersonated himself as the petitioner, the Returning Officer would be the best witness. The well-settled position of law on the comparison of disputed signature/writing with the admitted signature/writing has already been discussed. This apart, it is trite that the effect of an alleged admission depends upon the circumstances in which it was made. For this, the following illuminating observations made by the Supreme Court in* ***Nagubai Ammal v. B. Shama Rao*** *AIR 1956 SC 593 may usefully be quoted -*
>
> *"an admission is not conclusive as to the truth of the matters started therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to*

be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel."

21. To sum up, it is neither expedient in the interests of justice nor desirable to summon the Handwriting Expert for opinion on the aforesaid point. This I.A. also deserves rejection with costs.

8. It is relevant to note that for the reasons recorded in the same order, respondent's yet another application for summoning the Returning Officer as a Court Witness was dismissed with liberty to call the officer in evidence as his own witness. But, the respondent has not preferred to do so.

9. In the light of the oral evidence brought on record as well as the presumption attached to the correctness of the report of the Registry, it is not possible to hold that signatures of the petitioner either on the nomination form or on the election petition were not genuine. Both the issues, therefore, deserve to be and are answered in the favour of the petitioner.

ISSUE No.2(ii) AND 2(iii)

10. Even though, respondent Devendra Singh (DW1) has been emphatic in stating that during his presence from 1 p.m. to 2 p.m. in the election office, the petitioner, despite being asked by the Returning Officer to do so, had failed to make and subscribe the requisite oath, as enjoined by Article 173(a) of the Constitution of India yet, he has not been able to explain his own conduct in not making any complaint before the Returning Officer as well as in not incorporating the corresponding pleading in the written statement. Moreover, as concluded already, none of the signatures on the nomination form purporting to be appended by the petitioner including the one available on the form of oath can be treated as an ingenuine one. Thus, there is nothing on record to doubt correctness of the contents of the form of oath, duly signed by the authorized person, suggesting that the petitioner had subscribed the oath on 7.11.2008 at 1.20 p.m.

11. Coming to the issue no.2(iii), it may be observed that, admittedly, Silwani Seat in the Legislative Assembly Constituency was declared reserved for the Scheduled Castes of the State. The nomination form (Ex.P-1) read as a whole clearly reflects that the petitioner had sought to contest the election as a member of Scheduled Caste 'Mehra'. As such, the error crept in showing

him as a candidate belonging to General Category on one of the pages of the form was not sufficient to reject the same on the ground of disqualification.

12. For these reasons, both the issues are decided in the negative.

ISSUE No.1

13. At the outset, it may be observed that in absence of corresponding pleadings, the statement on oath made by petitioner Rajesh Kumar to the effect that neither at the time of presentation nor at the time of scrutiny, he was informed about any defect in the nomination form cannot be accepted. Further, contents of the letter (Ex.P-2) dated 12.1.2009 authored by Aditya Sharma, the then Tahsildar, Begumganj, clearly indicates that the petitioner had filed only a photocopy of the relevant extract of electoral roll of Udaipura Constituency.

14. As pleaded by the petitioner, he has substantially compiled with the requirement of sub-section (5) of Section 33 of the Act by annexing copy of the relevant part of the electoral roll. In order to show that copy [Ex.P-1A] is a true copy of the relevant extract of the electoral roll, the petitioner, while placing reliance on decision of the Punjab High Court in *Bansi Ram v. Jit Ram* AIR 1964 PUNJAB 231, has sought to bring on record a certified copy of the electoral roll (Ex.P-3). The objection taken by the respondent on the ground that the covering page of the certified copy containing description of the document to be copied, was not filed along with the election petition, was kept reserved for being decided on merits.

15. To fortify the objection that the document (Ex.P-3) cannot be taken into consideration, reliance has been placed to the following observations made by a Constitution Bench in *Ranjit Singh v. Pritam Singh* AIR 1966 SC 1626 -

> *"Section 33 (5) requires that it is the copy produced by the candidate which should show whether he is qualified or not and for that purpose a copy produced by the candidate should be complete whether it is of the roll or of the relevant part thereof. To such a case S.36 (4) has no application.*

16. Before proceeding further, it would be necessary to advert to the relevant provisions as contained in sub-section (5) of Section 33 and sub-

sections (1) and (4) of Section 36 of the Act. The provisions read -

> ***Section 33. Presentation of nomination paper and requirements for a valid nomination***
>
> *(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.*
>
> ***Section 36. Scrutiny of nominations***
>
> ***36. Scrutiny of nominations.-****(1) On the date fixed for the scrutiny of nominations under Section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorised in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have been delivered within the time and in the manner laid down in Section 33.*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) The returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character.*

17. A bare perusal of the judgment rendered in *Bansi Ram's* case (ibid) would reveal that it is based on a three-judge Bench decision of the Supreme Court in *N. T. Veluswami Thevar v. G. Raja Nainar* AIR 1959 SC 422 propounding that -

> *"..evidence can be adduced before the Election Tribunal on the point of the nomination paper having been improperly rejected; the Election Tribunal is not confined only to the material actually placed before the Returning*

Officer, Section 36 unequivocally lays down that the Returning Officer has only to hold such summary enquiry as he thinks necessary. The statute does not lay down anywhere that the Election Tribunal trying the issue relating to improper rejection of a nomination paper in an election petition is bound to confine itself only to the material available to the Returning Officer at the time of scrutiny. Keeping in view the paramount importance of the election of the representatives of the people to our Legislatures the right to seek election could not have been intended by the Parliament to depend on summary enquiry of the Returning Officer as contemplated by Section 36. The Election Tribunal is therefore well within its power in considering the question of the propriety and legality of the order of rejection of nomination papers on the evidence produced in the course of the trial of the election petition.

18. Accordingly, the objection is overruled and the document (Ex.P-3) is admitted in evidence. However, the fact remains that the copy (Ex.P-1A) is an incomplete copy of the part of the electoral roll of which Ex.P-3 is a certified copy. Apparent defects are -

(i) it is a photocopy and, as such, there was no possibility of the document being compared with original, which, at the relevant point of time, was in the office of Returning Officer for Udaipura Constituency.

(ii) it is not attested even by the petitioner himself.

(iii) copy of the covering page containing description or the receipt comprising particulars of copying application, if any, made by the petitioner is not annexed thereto.

(iv) details of the part of the electoral roll are not reflected.

(v) it included details of most of the other voters as mentioned in the electoral roll along with his/her photograph but the space for photograph of the petitioner is left blank.

19. In *Ranjit Singh v. Pritam Singh* AIR 1966 SC 1626, a Constitution Bench had the occasion to consider the purport and object of sub-section (5) of Section 33 of the Act. K.N. Wanchoo, J. (as his Lordship then was), speaking for the Court, observed -

> *7. The object of this provision obviously is to enable the returning officer to check whether the person standing for election is qualified for the purpose. The electoral roll of the constituency for which the returning officer is making scrutiny would be with him, and it is not necessary for a candidate to produce the copy of the roll of that constituency. But where the candidate belongs to another constituency the returning officer would not have the roll of that other constituency with him and therefore the provision contained in S. 33 (5) has been made by the legislature to enable the returning officer to check that the candidate is qualified for standing for election. For that purpose the candidate is given the choice either to produce a copy of the electoral roll of that other constituency, or of the relevant entries in such roll before the returning officer at the time of the scrutiny, if he has not already filed such copy with the nomination paper.....*
>
> .....
>
> *12. ....That provision [sub-section (4) of S.36] is to the effect that the returning officer shall not reject any nomination paper on the ground of any defect which is not of a substantial character. But the non-production of a complete copy of the relevant part in our opinion is a defect of a substantial character for it makes it impossible for the returning officer to decide whether the candidate is qualified or not. Qualification for standing for election is a matter of substantial character".*

20. Still, making extensive reference to Paragraphs 19 to 21 of a three-judge Bench decision in *Rakesh Kumar's* case, learned counsel for the petitioner has strenuously contended that principles of natural justice could not be excluded from the election process. According to him, non-grant of

opportunity of hearing by the returning officer to meet the objection before rejecting the nomination form, by itself, is sufficient to render the rejection as illegal.

21. However, a close analysis of the factual aspects in *Rakesh Kumar's* case (supra) would show that -

(a) the last date of filing nominations was 20-1-1997 and the date of polling was 6-2-1997 and, therefore, the case related to a period prior to the amendment of the Symbols Order on 20-5-1999 by which para 13-A has been added. Two persons, namely, Sunil Kumar and Veer Abhimanyu had submitted Forms A and B claiming to be candidates of the Bhartiya Janta Party. At the time of scrutiny, the Returning Officer suo motu raised an objection to the effect that since BJP had set up more than one candidate, none could be treated as a candidate of the said political party and rejected the nomination papers of both Sunil Kumar and Veer Abhimanyu. Sunil Kumar made an application stating that he was the official candidate of the party and he requested for twenty-four hours' time to produce an official confirmation of his candidature but the application was rejected and no time was given, though no other candidate (including Veer Abhimanyu) had raised any objection.

(b) Since the political party in question had not rescinded the earlier Form B notice, the Returning Officer after declining the request made by one of the candidates for time to produce the official confirmation of his candidature by the party, proceeded to reject the nomination of both the candidates set up by the party as well as the nomination of the substitute candidates.

22. It was in the context of the aforesaid facts that the Apex Court proceeded to hold that the Returning Officer ought to have granted him time to meet the objection in the interest of justice and fair play as he was not expected to reject nomination paper without giving an opportunity to the candidate or his representative present at the time of scrutiny to meet an objection capable of being made, particularly, where such an opportunity is sought for by the candidate or his representative. For a ready reference, the

relevant observations may be reproduced thus -

"..The legislature in its supreme wisdom did not amend the proviso to Section 36 (5) of the Act after Section 33 (1) was amended in 1996, thereby clearly exhibiting its intention that the said proviso was required to be given its full effect, more particularly because the duty which a returning officer performs while scrutinising the nomination papers is quasi judicial in character, even after Section 33 (1) had been amended.

The proviso to Section 36(5) of the Act lays down :

Provided that in case (an objection is raised by the returning officer or is made by any other person) the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.

Through the proviso, the legislature has provided that in case an objection is raised during the scrutiny, to the validity of a nomination paper of a candidate, the Returning Officer, may, give an opportunity to the concerned candidate to rebut the objection by giving him time "not later than the next day". This is in accord with the principles of natural justice also. Since, no other candidate had raised any objection to the claim of the respondent of being the official candidate of BJP, and the objection had been raised by the Returning Officer suo motu, the mandate of the proviso to Section 36 (5) of the Act warranted the holding of a summary enquiry, to determine the validity of the nomination paper by the returning officer, while exercising his quasi-judicial function. In the present case, the respondent had sought an opportunity to meet the objection, but even if he had not sought such an opportunity, the returning officer ought to have granted him time to meet the objection in the interest of justice and fair play.

23. *This apart, as pointed out further -*

> *"The Returning Officer would have been justified in rejecting the nomination paper of the respondent, had the respondent either not sought an opportunity to rebut the objection raised by the Returning Officer or was unable to rebut the objection within the time allowed by the returning officer....*
>
> *Having raised the objection suo motu, the request of the respondent who was present and sought time in writing to seek clarification from the BJP as to who was its oficial candidate, the Returning Officer in all fairness was obliged to grant time to the respondent as prayed for by him and postponed the scrutiny to the next day but he ought not to have rejected his nomination paper in hot haste. The Returning Officer, obviously, failed to exercise his jurisdiction under Section 36(5) of the Act properly and thereby fell into a grave error in rejecting the nomination paper of the respondent."*

24. However, the facts of the instant case are distinguishable as it has nowhere been pleaded by the petitioner that he or his authorized representative had remained present at the time of scrutiny of the nomination paper and had requested for postponing the scrutiny to the next day so as to enable him to file a complete copy of the relevant extract of the electoral roll.

25. It is trite that if an election petitioner wants to put forth a plea that a nomination was improperly rejected to declare an election to be void it is necessary to set out the averments for making out the said ground. The reason given by the Returning Officer for refusal to accept the nomination and the facts necessary to show that the refusal was improper is required to be set out in the election petition. In the absence of the necessary averments it cannot be said that the election petition contains the material facts to make out a cause of action (See *Nandiesha Reddy v. Kavitha Mahesh,* (2011) 7 SCC 721). In this view of the matter, the petitioner's assertion that he himself had remained present at the time of scrutiny, not being in line or consistent with the pleadings, cannot be looked into or relied upon and as an obvious consequence, the principle laid down in *Rakesh Kumar's* case is of no avail to the petitioner.

26. The other provisions relevant to the present discussion and contained in sub-sections (6), (7) & (8) of Section 36 of the Act, may also be extracted thus:-

> *(6) The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.*
>
> *(7) For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in Section 16 of the Representation of the People Act, 1950 (43 of 1950).*
>
> *(8) Immediately after all the nomination papers have been scrutinized and decisions accepting or rejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.*

27. As indicated already, the so called copy of relevant part of the electoral roll (Ex.P/1A) pertaining to Udaipura Constituency was not a complete copy and in terms of Sub-Section (5) of Section 33, the requisite copy of the Electoral Roll could be produced only either with the nomination paper or at the time of scrutiny. While pointing out that the statute does not contemplate any other time for production of such copy, a three Judge Bench of the Supreme Court in *Jeet Mohinder Singh v. Harminder Singh Jassi* AIR 2000 SC 256, following to the Constitution Bench judgment in *Ranjit Singh's* case (above) has restated the settled legal position in the following words -

> *"..... Where the candidate is an elector of a different constituency, Section 33(5) prescribes the 'manner' of proving the factum of the candidate being an elector of a different constituency in one of the three modes : (i) by producing a copy of the electoral roll of that constituency*

or (ii) a copy of the relevant part thereof or (iii) a certified copy of the relevant entries in such roll. Any other mode of proof is excluded. This has been explained by the Constitution Bench of this Court in Ranjit Singh v. Pritam Singh, AIR 1966 SC 1626. So far as the time is concerned, as we will deal with shortly hereinafter the earliest and outer limits of time are prescribed. The requisite document has to be produced either with the nomination paper which is the earliest point of commencement of time limit or at the scrutiny of the nomination papers which is the outer limit. It is pertinent to note that Section 33(5) does not specifically provide who shall produce the requisite document before the returning officer. All that it provides for is that one of the three the documents must be produced."

28. Taking into consideration all these factual and legal aspects of the matter, it is also not possible to hold that the Returning Officer had committed any impropriety in rejecting the petitioner's nomination form. The conclusion can be summed up in no better words than the following used by the Apex Court in *Narbada Prasad v. Chhagan Lal* AIR 1969 SC 395 -

"There was no compliance with the provisions of Section 33 (5) of the Representation of the People Act and there was no power in the court to dispense with this requirement. It is a well-understood rule of law that if a thing is to be done in a particular manner it must be done in that manner or not at all. Others modes of compliance are excluded.

..... non-compliance with Sec. 33 (5) is a defect of a substantial character and is not covered by Section 36 (4) of the Act. The Returning Officer in this case rightly rejected the nomination paper of Jivabhai and the rejection cannot be held to be improper."

Accordingly, the issue no.1 is decided in favour of the respondent.

ISSUE No.4

29. In the light of the findings of issue nos.(1), (2) and (3), no case is

made out for interference with the result of the election in question. The issue is, accordingly, answered in the negative.

ISSUE No.5

30. Consequently, the election petition is dismissed. There shall be no order as to costs.

31. A copy of this judgment be forwarded to the Election Commission as well as to the Speaker of the State Legislative Assembly.

Petition dismissed.

I.L.R. [2013] M.P., 1088
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
M.A. No. 516/2005 (Jabalpur) decided on 7 November, 2012

LALMAN SONI & anr. ...Appellants
Vs.
SHRI RUPINDER SINGH GILL & anr. ...Respondents

A. 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. (Para 9)**

क. 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।

B. 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.(Para 10)**

ख. कर्मकार प्रतिकर अधिनियम (1923 का 8), धारा 30 – नियोक्ता ने स्वीकार किया कि मृतक रु. 4,000/– प्रति माह अर्जित कर रहा था – बीमा कम्पनी

ने अनभिज्ञता का अभिवाक् किया – नियोक्ता की स्पष्ट स्वीकृति को दृष्टिगत रखते हुए, मृतक की मासिक आय रु. 4,000/– निर्धारित की गई – मृतक करीब 20 वर्ष की आयु का था इसलिए, सुसंगत कारक 224.00 होगा – घटना की तिथि से 12 प्रतिशत ब्याज की दर से प्रतिकर रुपये 4,03,200/– बनेगा – अपील मंजूर।

Cases referred :

M.A. 1234/2005 decided on 02.02.2012, 2009 ACJ 147, 2011 ACJ 1749, 2010 ACJ 2828, AIR 1974 SC 471, (2009) 11 SCC 545, 2012 (134) FLR 1064.

Narendra Chouhan, for the appellants.
None for the respondent No.1.
Gulab Sohane, for the respondent No.2.

ORDER

A.K. Srivastava, J.:- By filing this appeal under Section 30 of the Workmen's Compensation Act, 1923 (in short "W.C. Act") the claimants have knocked the doors of this Court by preferring this appeal for enhancement of the amount of compensation.

2. In brief the case of claimants who are parents of deceased/workman namely Rakesh Soni is that he was employed under the employment of respondent no.1 Rupinder Singh Gil and was Cleaner upon the Truck No.MP20-G/4971. The said truck was coming from Ludhiana to Jabalpur however on the way near Badagaon, District Jalon on 12.09.2003 there was a traffic-jam and deceased was removing the ballast stuck beneath the tyre so that the truck may be made moveable at that juncture one car which was coming towards Jhansi dashed the workman, as a result of which he had died. It has also been pleaded that accident has arisen during the course of employment. According to claimants at the time of death age of deceased was 20 years and he was earning Rs.4000/- per month. After having served requisite and statutory notice prescribed under Section 10 of the W.C. Act since no compensation was paid, the appellants filed an application for grant of compensation before the Commissioner.

3. In the application it has been pleaded by the appellants that deceased/ workman was earning a sum of ₹4000/- per month. His age at the time of accident was 20 years and the accident has arisen during the course of his employment.

4. The written-statement filed on behalf of employer. In para 6 of the written-statement the accident as well as it arose during the course of employment of the deceased has been admitted. Specifically it has been admitted by employer/respondent no.1 that salary ₹1600 per month + ₹80/- per day towards dearness allowance was being paid to the deceased workman, which comes to ₹ 4000/- per month as pleaded by claimant/appellant. In the written-statement filed on behalf of Insurer/respondent no.2 it has been pleaded that whatever the income employer has stated it is admitted to the insurer.

5. Learned Commissioner framed necessary issues and after recording the evidence of the parties allowed the claim of the appellants and it was directed to pay compensation to the tune of ₹ 2,49,984/- alongwith interest @9% per annum to the employer as well as to the insurer.

6. In this manner, this appeal has been filed by the claimants for enhancement of the award. The contention of learned counsel for appellants is that learned Commissioner has fixed the income of the deceased (workman) according to minimum wage which is on lower side. It has also been put-forth by him that no evidence in rebuttal has been adduced either by Insurer or by employer. In the claim application it has been specifically stated by claimants that their son was earning ₹ 4000/- per month and if that would be the position the compensation should have been awarded by fixing the wage ₹ 4000/- per month and therefore the amount of award be enhanced. In support of his contention, learned counsel has placed heavy reliance on a Single Bench decision of this Principal Seat in M.A. No.1234/2005 (*Smt. Rehna Begum vs. Sama Khan & Ors.*) decided on 2.2.2012.

7. On the other hand, learned counsel for Insurer/respondent no.2 argued in support of the impugned order and submitted that merely on the basis of bald statement without having any support of the document, the income as stated by claimant should not be accepted. Learned counsel placed heavy reliance upon the Single Bench decision of this Court *Oriental Insurance Co. Ltd. v. Heerabai and others* 2009 ACJ 147, *Shankar v. Chief Engineer, KPTCL and others* 2011 ACJ 1749 (Karnataka High Court) and *Oriental Insurance Co.Ltd. v. Bashaboina Bakkamma and another* 2010 ACJ 2828 (Andhra Pradesh High Court).

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

9. On bare perusal of the written-statement filed on behalf of employer it is gathered that specifically it has been pleaded that deceased workman was earning ₹ 4000/- per month although it has been pleaded by him that throughout for whole month he was not assigned the duty. In the written-statement of Insurer ignorance has been pleaded in regard to actual income of deceased/ workman. Thus, according to me, there is clear admission of the employer admitting the fact that deceased was earning Rs.4000/- per month. According to me, the admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On this proposition I may profitably place reliance on the decision of Supreme Court *Nagindas Ramdas v. Dalpatram Iccharam alias Brijram and others* AIR 1974 SC 471 para 26. There is a later decision of Supreme Court *Seth Ramdayal Jat v. Laxmi Prasad,* (2009) 11 SCC 545 para 26 on the same point. In the present case, the employer has categorically admitted in the written-statement that deceased workman was earning ₹ 4000/- per month and therefore clear admission of employer is having on higher footing and as per decision of Supreme Court it requires no proof. Thus, I am of the view that instead of fixing the minimum wage in order to calculate the compensation it ought to have been calculated @ ₹ 4000/- per month. Learned Commissioner has thus erred in substantial error of law in passing the impugned award on lesser side ignoring the material admission made in the pleadings which makes the foundation of the parties to determine their rights. In this backdrop the decision of this Court in *Heerabai* (supra) and that of *Karnataka High Court and Andhra Pradesh High Court Shankar and Bashaboina Bakkamma* (supra) are distinguishable.

10. In the written-statement of employer/respondent no.1 it has been pleaded that the workman was not being employed throughout the month for 30 days. Certainly after completing a trip the deceased workman must have been taking rest for few days and therefore by fixing it to be 5 days in a month I am of the view that income of deceased workman should be computed @ ₹ 4000/- per month for 25 days in a month. Since the age of deceased admittedly at the time of accident was 20 years, therefore, according to Schedule-IV of W.C. Act the relevant factor would be 224.00. Since in the present case workman has died therefore 50% of total wages is to be fixed and if it is

multiplied by factor 224.00 the compensation would come to ₹ 4,03,200/-. The interest @12% per annum should be calculated upon this amount and it should be paid from the date of accident. In this regard in the recent decision *Oriental Insurance Co. Ltd. v. Siby George and others* 2012 (134) FLR 1064, the Supreme Court has directed to pay the interest from the date of accident. Therefore, I am of the view that because W.C. Act is a beneficial legislation therefore the rate of interest @12% per annum should be paid from the date of accident. The substantial questions of law are thus answered in favour of appellant.

11. Resultantly, this appeal succeeds to the extent indicated hereinabove. The amount of award passed by learned Commissioner is enhanced to the extent indicated hereinabove. Let balance amount alongwith interest be deposited before the Commissioner within a period of three months as agreed by learned counsel for respondent no.2. No costs.

Appeal succeeds.

I.L.R. [2013] M.P., 1092
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
F.A. No. 100/1996 (Jabalpur) decided on 22 November, 2012

NAGAR PALIKA PARISHAD ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

A. Specific Relief Act (47 of 1963)] Section 34 - Declaration of title - **Municipality had given the building for running the Higher 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.**
(Paras 15 to 19)

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

***B. Registration Act (16 of 1908), Section 17, Transfer of Property Act (4 of 1882), Section 5 - Transfer of Property* - Registration - There 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/-. (Paras 20 to 21)**

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

Case referred :

AIR 2004 Bom. 64.

D.K. Dixit, for the appellant.
Akhilesh Shukla, Dy. G.A. for the respondents.

JUDGMENT

A.K. Shrivastava, J.: Feeling aggrieved by the judgment and decree dated 7.11.1995 passed by learned Second Additional District Judge, Hoshangabad in Civil Suit No.10-A/1994 (old number)108-A/1992, this appeal under Section 96 has been filed by the plaintiff-Municipality.

2. Initially, the suit was filed by the plaintiff for declaration having possession over the disputed property, which is a building, the description whereof is mentioned in the plaint and which is the subject matter of the suit; and for injunction restraining the defendants-State of M.P. and its functionaries (respondents herein) from interfering with the plaintiff's possession and the other ancillary reliefs. However, during the pendency of the suit, the plaint as well as the relief clause has been amended and further it was prayed that

possession of the suit property be delivered to the plaintiff.

3. During the course of arguments, this has not been disputed by learned counsel for the parties that later on the possession of the property in question has been delivered to the plaintiff.

4. In brief, the plaintiff's case is that plaintiff-Municipality is the owner having possession of the disputed property. Till the year 1961 in the township of Seoni-Malwa there was a separate building for Girls School and there was a great demand for upgrading the Middle School by the general public of the said vicinity. The plaintiff-Municipality was also under pressure of the public to pursue the Govt. to concede the demand of public regarding upgrading of the said Girls Middle School. During those days, there was a Scheme of the State Govt. to upgrade the School, therefore, the plaintiff-Municipality offered to give the disputed building for running the Higher Secondary School classes for girls till a separate building is constructed. A resolution to that effect was also passed in the said meeting of the Council on 23.9.1962. From time to time as per the directions of the State Government, necessary repairs in the disputed building were carried out by the plaintiff. The State Govt. started Higher Secondary School classes in the disputed building since 1964. Thereafter, a new building has been constructed by the State Govt. and now the State Govt. is running the School in its new building since 1991.

5. After Government shifted the School in the new building, the plaintiff wrote a letter to the Head Master of the Institution/defendant no.3 to vacate the disputed building because plaintiff needed the said building to shift its office in the said building because the building in which presently the office is being run is insufficient and is very old and further is in dilapidated condition.

6. It is the further case of plaintiff that on 4.11.1992 the Incharge of the School informed the plaintiff that the disputed building has been vacated, eventually the plaintiff's officer inserted the lock. However, in the morning of 6.11.1992, the plaintiff learnt that the Joint Director (Education) (defendant no.2) has authorized the fourth defendant, Principal of the Govt. Naveen High School vide letter dated 29th September, 1992 to take possession of the building in question to hold the classes of the Govt. School. According to the plaintiff, the students of the said School at the instance of 2nd and 4th defendant are creating nuisance to the building in question and, therefore, the plaintiff is in apprehension that they may now break the lock and take illegal possession of the building. Hence, looking to the urgency by taking aid of Section 80(2)

CPC for obtaining immediate relief of temporary injunction, the present suit was filed. By amending the plaint it has been pleaded that in pursuance to the letter of defendant no.2 dated 29.2.1992 the defendants have taken illegal possession of the suit building and are possessing the building in question illegally although the title of the suit property vest in the plaintiff. Hence, in this manner the present suit has been filed for possession and injunction.

7. The defendants by refuting the plaint averments have denied the plaintiff's possession over the suit property, as well as its ownership. The main stand of the defendants in the written statement which has also been elaborated in the additional pleadings is that vide order No. D/27/36/2776/ 70J. 3/81 dated 21.11.1981 of the School Education Department of the Govt. of M.P. and also vide order no. 6911/18/12/81 dated 27.11.1981 of the Local Self Government it has been directed that the Schools which were being run in the building of the Municipality or Corporation have been transferred to the Education Department of the Madhya Pradesh and accordingly the disputed building is also transferred to the State of M.P. and now the said building is in the ownership of State of M.P. which is being possessed by the State/defendants since 1964. Hence, it has been prayed that the suit be dismissed.

8. On the basis of the averments made in the plaint and denial in the written statement, the learned Trial Court framed issues on 21.12.1994 which reads thus:-

(i) Whether plaintiff is the owner of the disputed land?

(ii) Whether possession of the fourth defendant is illegal on the suit building?

(iii) Whether the letter dated 29.9.1992 written by the second defendant to fourth defendant is without jurisdiction, Its effect?

(iv) Whether defendants are entitled for damages of Rs. 10,000/-?

(v) Relief and Costs.

9. On behalf of plaintiff-Municipality, Chief Municipal Officer Ramesh Kumar Pandey (PW-1) has been examined who also proved the documents Ex.P/1 t P/10. On behalf of defendants two witnesses namely Shri Surya

Kant Awasthy(PW-1) who was earlier serving as Principal of the said Institution was examined and Shri M.A. Khan (PW-2) Principal of the said Middle School has been examined. The defendants have also proved two documents Ex.D/1 and D/2 which are letter dated 5.11.1992 and an order of the State Government, Director, Public Education.

10. The learned Trial Court by the impugned judgment while deciding issue no.2 has held that the possession of the building in question has already been delivered to the plaintiff, however dismissed the suit of plaintiff holding that it had failed to prove its ownership. In this manner, this appeal has been filed by the plaintiff against that part of the impugned judgment by which it has been held by learned Trial Court that the plaintiff is the owner of the suit building is not proved.

11. The contention of Shri Dixit, learned counsel for the appellant is that several documents have been filed by the plaintiff-Municipality in order to prove the ownership of the plaintiff. In these documents, the defendants have expressly and impliedly admitted its ownership. Thus, even though the title deed of the disputed building has now been filed by the plaintiff, it would not weaken its case on account of clear admission of the defendants. It has also put forth by him that merely by passing an order Ex.D/2 directing that the building in which the Govt. Schools are being run shall vest in the State, cannot be said to be a valid transfer because the valuation of the property in question is admittedly more than Rs.100/- and, therefore, registration is compulsory. Learned counsel submits that simply by passing a bald order by Assistant Director of Public Education Department of M.P., the immovable property cannot be transferred and it cannot be said to be a valid conveyance. In this context, learned counsel has placed reliance upon Section 17 of the Indian Registration Act, 1908 and also on the decision of Bombay High Court *Gango Co-operative Housing Society Ltd. Mumbai Vs. Municipal Corporation of Greater Bombay and another* AIR 2004 Bombay 64.

12. On the other hand Shri Mishra, learned Government Advocate argued in support of the impugned judgment and submitted that because defendants denied the plaintiff's ownership over the suit property, therefore, the burden of proof was upon the plaintiff to prove ownership and having failed to prove such ownership by filing any document of title of ownership, the learned Trial Court has rightly dismissed the suit and, therefore, this appeal has no substance and the same be dismissed.

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

14. I have already referred hereinabove the pleadings of the parties. According to the plaintiff-Municipality, the suit building is owned by it although this has been denied in the written statement. The stand of the defendants disowning the plaintiff's ownership is the order of the Joint Director, Public Education dated 10.10.1991 (Ex. D/2). For better understanding it would be appropriate to quote para 10 of the written statement which reads thus:-

> (10) यह कि म0प्र0 शासन के स्कूल शिक्षा विभाग पृष्ठ कमांक डी/27/ 36/2776/70जे, 3/81 दिनांक 21–11–81 तथा स्थानीय शासन विभाग म0प्र0 के आदेश क्रमांक 6911/18/12/ 81 दिनांक 27–11–81 में यह स्पष्ट निर्देशित है कि पूर्व नगर निगम नगरपालिका तथा जनपद द्वारा संचालित सभी संस्थायें शिक्षा विभाग को (शासन) हस्तांतरित हो चुकी है इस आदेश के अनुसार भी विवादित मकान भी अपने आप ही म0प्र0 शासन को हस्तांतरित हो चुका है व इस भवन पर इसी दिनांक से ही म0प्र0 शासन की स्वत्व भी प्राप्त हो चुका है वा विवादित भवन पर म0प्र0 शासन का सन् 1964 से ही अधिपत्य है।

Thus, on the basis of the aforesaid orders of the School Education Department and Local Self Government, the defendants are claiming their ownership right in the suit property. However, these orders have not been placed on record and are not proved. But, it would not mean that by not filing the aforesaid orders, the plaintiff would be deemed to be the owner of the suit property. Thus, this Court is required to see how far the plaintiff has proved its ownership over the suit property. Indeed, the plaintiff has not filed any title deed in order to prove its ownership but it is equally true that defendants have admitted the ownership of the plaintiff and several documents and, therefore, there is an admission of the defendants admitting the ownership of the plaintiff over the suit property.

15. The letter of the District Education Officer dated 16.6.1978 (Ex.P/4) is the document which is addressed to the President of the Plaintiff-Municipality. On bare perusal of this letter of defendant, it is gathered that the plaintiff- Municipality is keen enough to get the Govt. School transferred in the disputed building. In the document it is also mentioned that in absence of relevant documents, the Govt. Girls School cannot be transferred in the disputed building and, therefore, the Government is unable to carry out the necessary repairs in the suit building. By this letter it has been requested to

the plaintiff to carry out necessary repairs so that school building shall remain intact. Another important document is Ex. P/5 which is a letter of the Director, Local Self Government of the State of M.P. addressed to the Chief Municipal Officer of the plaintiff- Municipality. By this letter it has been asked to the State Government that what is the valuation of the disputed building and whether the building in question was given free of cost? If yes, then why it was given free of cost and if not what is the rent and whether Municipality has made any demand to realize the rent?. Thus defendants themselves are impliedly admitting the ownership of the plaintiff.

16. The letter dated 5.11.1977 (Ex.P/6) is another important document which is issued from the office of Divisional Education Superintendent of the Government of M.P. to the President of the Plaintiff-Municipality. In this document, again it has been requested to the plaintiff that till the building in question is not transferred to the State Govt., necessary repairs cannot be carried out by the State Govt. In this document it has been requested to the plaintiff- Municipality that for a valid transfer, a gift deed may be executed. It has further been requested to the plaintiff that necessary correspondence be made through the Principal of the Govt. School so that after the suit building is transferred to the State Govt., necessary repairs etc. may be carried out from the Government side.

17. In the minutes of the meeting dated 24.6.1995 which was presided over by the Collector of the District Hoshangabad, it was resolved that the suit building which is owned by the plaintiff and in which the Boarding house is also situated, in the inspection certain deficiencies were found by the Sub Divisional Officer O.P. Shrivastava and it was resolved that those deficiencies be cured by the Municipality so that in the suit building the Central School may be opened. A copy of said resolution Ex.P/8 was sent vide covering letter Ex.P/7 by Collector, Hoshangabad to the plaintiff-Municipality. Thus, by keeping the documents Ex. P/4 to P/8 in juxtaposition to each other, it is gathered that not only once but every time and throughout, the defendants have admitted the ownership of the plaintiff since in several documents it has been categorically admitted expressly and impliedly by the defendants that plaintiff is the owner of the suit property and hence, the plaintiff is the owner of the suit property, this has been proved.

18. Apart from the aforesaid documents wherein the defendants have admitted the plaintiff's ownership there is one more important document Ex.

P/1 which is the resolution of the Municipality dated 23.9.1962 in which it has been resolved that in pursuance to the letter of the State Government No. I.M.P.L.E./A/62-63/11/820 dated 6.2.1962, Govt. Middle School, Seoni is to be upgraded and, therefore, in order to upgrade the Govt. school not only monetary contribution of Rs. 10,000/- shall be given by the plaintiff but its building shall also be given to the State Govt. to start the School in the disputed building.

19. So far as the oral evidence is concerned, Ramesh Kumar Pandey the then Chief Municipal Officer of the plaintiff-Municipality has categorically proved the aforesaid documents and thus has proved the ownership of the plaintiff. The evidence of Surya Kant Awasthy (DW-1) who was the earlier Principal of the Govt. School has categorically admitted in para 5 of his cross examination that he has not seen any document in regard to ownership of the disputed building of the State Govt. nor he tried to gather any information in this regard and similar type of statement is of another witness M.A. Khan (DW-2) who is also the Principal and has said that ownership of the suit building has been transferred to the State Govt. in this regard, he has not seen any document. Thus, the stand which has been taken by the defendants in the written statement which I have already quoted hereinabove not at all has been proved. According to me, when by several documents wherein the defendants have admitted the plaintiff's ownership have been proved by the plaintiff. After having discharged its burden that the plaintiff is the owner of the said property, the burden of proof shifts upon the shoulders of the defendants to disprove the case of plaintiff by filing the orders referred in para 10 of the written statement. In the Trial Court as well as before this Court, the defendants are banking upon the document Ex.D/2 which is a letter written by the Assistant Professor, Public Education to Joint Director, Education Department. In this letter, it has been written to the Joint Director that the schools which are being run by the Municipality and Municipal Corporation, they are transferred to the State Govt. but the ownership of the buildings in which the schools were being run, were still being with the said local bodies. The Education Department has not given any rent to those Institutions. The ownership of those buildings have already been given to the Education Department and now these buildings shall be deemed to be the buildings of the Education Department and, therefore, the necessary repairs are to be carried out by the State Govt. According to me, even if the Assistant Director in its letter addressed to the Joint Director has opined such a factual aspect, it would not mean that indeed the building in

question has been vested in the State Govt. or the Education Department. It is only the opinion expressed by the Assistant Director in this letter. Thus, by this document Ex.D/2 it cannot be said that the ownership right has been vested in the State Government.

20. Even otherwise, admittedly the valuation of the suit building is more than Rs.100/- and if that would be the position, in terms of Section 17(b) of Indian Registration Act, the registration of the documents is mandatory. It is not the case of the defendants that the building in question has been acquired or there is any conveyance deed in its favour. On the contrary, in the document Ex.P/6 it has been requested by the Divisional Education Officer to the President of the plaintiff to execute the gift deed in favour of the State Government. It is not the case of defendants that in pursuance to the document, Ex. P/6 any gift deed has been executed by the plaintiff and, therefore, the State Govt. is the owner of the suit property. The documents and the orders referred in the written statement are not proved. Even otherwise, by the said orders it cannot be said that a valid conveyance has been made in favour of the State Govt. by the plaintiff. Hence, according to me, the learned Trial Court contrary to the plaintiff's proved documents Ex. P/4 to P/8 has held that plaintiff has not proved its ownership over the suit property. According to me, the plaintiff has proved its ownership.

21. According to me, there cannot be a valid transfer of the ownership of the building in question to the State Govt. in absence of a valid conveyance deed. The term "Transfer of Property" has been defined in Section 5 of the Transfer of Property Act, 1882 and it would be appropriate to quote Section 5 which reads thus:-

> **5. "Transfer of Property"** defined.- In the following sections, "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more living persons, or to himself and one on more other living persons; and "to transfer property" is to perform such act."

If the definition of the term "Transfer of Property" is tested on the touchstone and anvil of the present factual scenario, it would reveal that by executing any conveyance deed by the plaintiff, to one or more defendants or any of its functionaries, the plaintiff is not bound by any order of the State Govt. which are not even proved and filed.

22. Resultantly, for the reasons stated hereinabove, this appeal succeeds

and is hereby allowed. The impugned judgment of learned Trial Court is hereby set aside and suit of plaintiff is decreed. The possession of the suit property has already been delivered to the plaintiff and this has been so held by learned Trial Court while deciding issue no.2 and learned counsel for the parties also did not dispute to this factual aspect. No costs.

Appeal allowed.

I.L.R. [2013] M.P., 1101
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 4383/2009 (Jabalpur) decided on 5 March, 2013

SARASWATI KUSHWAHA ...Appellant
Vs.
BADRI SINGH & ors. ...Respondents

A. Motor Vehicles Act (59 of 1988), Sections 166 & 173 - Rash and Negligent Driving - **Accident occurred because of felling of bridge when the Offending Vehicle was passing - There may be some fault on the part of the concerned department however, if the driver would have been fully conscious, then the accident could have been avoided - Tribunal rightly held the owner and driver liable to pay compensation. (Para 8)**

क. मोटर यान अधिनियम (1988 का 59), धाराऐं 166 व 173 – उतावलेपन से और उपेक्षापूर्ण वाहन चलाना – दुर्घटना घटी क्योंकि पुल गिर गया जब आक्षेपित वाहन गुजर रहा था – संबंधित विभाग की ओर से कुछ त्रुटि हो सकती है, किन्तु यदि ड्रायवर पूर्णतः होशोहवास में होता तो दुर्घटना को टाला जा सकता था – अधिकरण ने उचित रुप से स्वामी एवं वाहन चालक को प्रतिकर का भुगतान करने के लिए दायी ठहराया।

B. 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. (Para 10)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का

दायित्व – पॉलिसी का उल्लंघन – बीमा कंपनी का अभिकथन कि आक्षेपित वाहन को अधिभोगियों द्वारा किराये पर लिया गया था जबकि कंपनी द्वारा इस संबंध में परीक्षित साक्षी केवल अनुश्रुत साक्षी हैं जिसका कोई साक्ष्यिक मूल्य नहीं – अभिलेख पर यह साबित करने के लिए कुछ नहीं कि वाहन का उपयोग वाणिज्यिक प्रयोजन हेतु किया जा रहा था – बीमा कंपनी उत्तरदायी।

***C. 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. (Para 11)**

ग. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का दायित्व – एक्ट पॉलिसी – लिखित कथन में कोई अभिवाक् नहीं उठाया गया कि पॉलिसी जिसे जारी किया गया था वह एक्ट पॉलिसी थी – लिखित कथन, साक्ष्य व प्रत्याक्षेप में किसी अभिवाक् को उठाये जाने के अभाव में, दावाकर्ताओं का दावा ऐसे आधार पर समाप्त नहीं किया जा सकता जिसे प्रथम बार तर्क के दौरान उठाया गया है।

Cases referred:

2008(2) TAC 691(MP), 2011(1) DMP 204 (Raj), (2006) 4 SCC 404, C.A. No. 8163/2012.

Akhilesh Singh, for the appellant.
Amrit Ruprah, for the respondent No.3.

ORDER

N.K. Mody, J.:- This order shall also govern disposal of M.A.Nos.4384/09, 4385/09, 4387/09, 4388/09 filed by the appellants and also M.A.Nos.1292/10, 1294/10, 1296/10, 1302/10 and 1303/10 filed by respondent No.3 as in all the appeals parties are one and the same except the claimants and also the award is dated 23.7.2009 passed by MACT, Rewa, whereby various claim petitions filed by the claimants were allowed and compensation was awarded.

2. Short facts of the case are that appellants filed a claim petition alleging that on 22.5.2006 deceased Ravendra Kushwah, Ramnaresh Kushwah, Ku.Krishna Kushwah, Ashish Kushwah and Dayaram Kushwah were travelling in the offending Marshal Jeep, which was owned by respondent No.1, driven

by respondent No.2 rashly and negligently and insured with respondent No.3. It was alleged that because of rash and negligent driving in all five persons, out of which three were minor, passed away. It was prayed that claim petitions be allowed and compensation be awarded. The claim petitions were contested by respondent No.3 on various grounds including on the ground that respondent No.3 was not liable for payment of compensation. It was alleged that offending vehicle was a private vehicle and could not be used for hire and reward. It was alleged.that the accident occurred because of falling of the bridge and the Jeep fell down in the river. It was alleged that because of negligence on the part of the Government accident took place for which appellants were already compensated by the State Government. It was prayed that claim petitions be dismissed. After framing of issues and recording of evidence learned Tribunal allowed the claim petitions and awarded the compensation against which appellants and respondent No.3 has filed the appeals.

3. Learned counsel for appellants argued at length and submits that out of the five, three were minor namely Krishna, Ashish and Ravendra aged 10, 8 and 12 years respectively. It is submitted that in all the three cases learned Tribunal assessed the compensation to the tune of Rs. 1,80,000/- and deducted Rs. 1,00,000/- on account of ex-gratia paid to the appellants by the Government. It is submitted that amount awarded is on lower side. Similarly the deduction of the amount paid to the appellants under ex-gratia is illegal. Learned counsel further submits that in other two cases deceased were Ramnaresh & Dayaram and learned Tribunal assessed the income @ Rs...3,000/- per month and after deducting 1/3rd towards personal expenses applied the multiplier of 16 and 13 respectively. It is submitted that income assessed is on lower side and deduction towards personal expenses is on higher side and application of multiplier is on lower side. It is submitted that appeals be allowed and the amount of compensation be enhanced.

4. Learned counsel for respondent No.3 supports the award so far as it relates to the amount is concerned. Learned counsel further submits that the offending vehicle was being driven by respondent No.2 on whose part there was no negligence, therefore, learned Tribunal committed error in holding the respondent No.3 liable for payment of compensation. Learned counsel further submits that since offending vehicle was private vehicle and was being used for carrying passengers in violation of terms of the policy, therefore, learned

Tribunal committed error in holding the respondent No.3 liable for payment of compensation. It is submitted that since the policy does not cover the risk of passengers for hire or reward as it was a act policy, therefore, learned Tribunal was not justified in holding respondent No.3 liable. Learned counsel further submits that since accident occurred because of negligence on the part of the PWD, who constructed the bridge, which fell down for which the ex-gratia payment was made by the State Government, therefore, learned Tribunal committed error in holding respondent No.3 liable. It is submitted that amount awarded is otherwise on higher side. It is submitted that appeals filed by the appellants be dismissed and appeals filed by the respondent No.3 be allowed and the impugned award so far as it relates to respondent No.3 is concerned, be set aside.

5. From perusal of the record it is evident that out of the five cases, three cases are of child death. Accident is of the year 2006 in the facts and circumstances in each of the cases amount is enhanced by Rs.20,000/-.

6. So far as the appeals which are filed by the dependents of deceased Dayaram (MA.no.4385/09) and Ramnaresh (MA.No.4384/09) are concerned, it appears that the income has been assessed @ Rs.3,000/- per month and after deducting 1/3rd towards personal expenses multiplier of 16 has been applied. In the matter of deceased Ramnaresh a sum of Rs.4,51,000/- was assessed, out of which Rs. 1,00,000/- was deducted on account of ex-gratia. So far as deceased Dayaram is concerned, multiplier of 13 has been applied and after deduction a sum of Rs.2,35,000/- was awarded.

7. In the opinion of this Court, in both the cases appellants are further entitled for a sum of Rs.50,000/- in each of the case. In the matter of *Bhanwri Bai Vs. Union of India*, 2008(2) TAC 691 (MP.) wherein ex-gratia payment was made as Rs.5,00,000/- and compensation was assessed as Rs.9,25,000/-, Divisional Bench of this Court has held that keeping in view the statutory provisions of the Act the amount of compensation has to be determined as per principles of the Act and the amount paid as ex-gratia cannot be deducted. Similar view has been taken by Rajasthan High Court in the matter of *Rajesh Kanwar Vs. Munna Ram*, 2011(1,) DMP 204 (Raj.). In view of this this Court is also of the view that the learned Tribunal was not justified in deducting the amount paid to the claimants/appellants by the Government as ex-gratia.

8. So far as question of liability of respondents is concerned, undoubtedly the accident occurred because of felling down of the Bridge, at the relevant time offending vehicle was passing from pentoon bridge. There may be some fault on the part of the concerned department of the Government who has constructed the bridge. If the respondent No.2 would have fully conscious then the accident could have been avoided. Therefore, this Court is of the view that learned Tribunal committed no error in holding the respondent Nos. 1 & 2 liable for payment of compensation.

9. So far as liability of respondent No.3 is concerned, submission made by Mrs. Amrit Ruprah, advocate on behalf of respondent No.3 are in two folds, firstly since the occupants were fare paying passengers, therefore, respondent No.3 is not liable and secondly since the policy which was issued was an act policy, therefore, also even if the risk of passenger was covered, then too, respondent No.3 is not liable for payment of compensation for the death on account of occupants. For this contention reliance is placed on a decision in the matter of *United India Insurance Co. Ltd. Vs. Tilak Singh*, (2006) 4 SCC 404 wherein Hon'ble Apex Court has held that risk of death or injury to gratuitous passenger carried in a private vehicle, does not cover such a risk under Section 147 of Motor Vehicles Act. Learned counsel further placed reliance on a decision in the matter of *National Insurance Co. Ltd. Vs. Balakrishnan* passed in Civil Appeal No.8163/12 arising out of SLP (Civil) No.1232/12 wherein Hon'ble Apex Court has observed that act policy cannot cover a third party risk of an occupant in a car.

10. From perusal of the record it is evident that to avoid the liability respondent No.3 has examined VK. Pandey (Investigator) who has stated that the offending vehicle was hired by the occupants, who passed away. In his cross-examination he has stated that he was informed by Rajkumar that the vehicle was hired. The statement of Rajkumar was not recorded by the investigator. Rajkumar was also not examined by respondent No.3. Statement of VK. Pandey is based on hearsay evidence, which is having no evidentory value. Similar is the position of the statement of Dwarikaprasad Tiwari who is clerk of respondent No.3 and has stated that the offending vehicle was insured for personal purpose, while the vehicle was being used for commercial purpose, for which no premium was charged. For proving the fact that the vehicle was being used for commercial purpose, except this, nothing is on record on the

basis of which it can be said that the offending vehicle was being used for commercial purpose.

11. Coming to the second contention that the policy which was issued was an act policy, therefore, respondent No.3 was not liable is concerned, the plea was not raised in the written statement. On the contrary the plea raised by respondent No.3 was to the effect that photocopy of the policy which has been filed by the appellants has yet to be verified, hence it is denied that offending vehicle was insured. Similarly it was also pleaded that since the vehicle was being used for carrying passengers, therefore, respondent No.3 was not liable for payment of compensation. Thus in the written statement it was not the case of respondent No.3 that since it was an act policy, therefore, respondent No.3 is not liable for payment of compensation. In evidence no cross-examination is made on the witness examined by the appellant to the effect that since it was an act policy, therefore, respondent No.3 is not liable for payment of compensation. The investigator Mr. VK. Pandey and the clerk of respondent No.3 Mr. DP. Tiwari have also not stated that because of act policy respondent No.3 is not liable for payment of compensation. In the award passed by the learned Tribunal also the learned Tribunal has examined whether the respondent No.3 can be exonerated on the ground that vehicle was being used for carrying passengers and the driver was not possessing valid driving license. This aspect was not examined by the learned Tribunal that whether liability can be avoided on account of act policy. In the appeal filed by the appellant no cross-objection has been filed by respondent No.3. In absence of plea raised in the written statement, evidence and cross-objection, claim of the appellants cannot be defeated on the ground which is raised for the first time during course of arguments. Otherwise also ground raised by the respondent No.3 has no basis.

12. In view of this appeals filed by the appellants stand allowed. Amount enhanced as indicated above shall carry interest @ 8% P.A. Findings regarding deduction of amount on account of payment of ex-gratia stands quashed. Copy of the order be placed in the connected appeals.

No order as to costs.

Appeal allowed

I.L.R. [2013] M.P., 1107
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 79/2013 (Jabalpur) decided on 6 March, 2013

M. PEETAMBER ...Appellant
Vs.
UNION OF INDIA ...Respondent

Railway Claims Tribunal Act, (54 of 1987), Section 17(1)(b)(2) - Condonation of delay **- After deletion of Section 166(3) of Motor Vehicles Act, the Claims Tribunal should have adopted liberal approach and should not have dismissed the claim petition merely on the ground of delay of five years - Appeal allowed and matter remitted back to Tribunal for decision on merits. (Para 5)**

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।

Manoj Patel, for the appellant.
Govind Patel, for the respondent.

ORDER

N.K. Mody, J.: Being aggrieved by the order dated 09/10/12 passed by Railway Claims Tribunal, Bhopal in Case No.0038/12 whereby the application for condonation of delay and consequently the petition filed by the appellant for compensation was dismissed on the ground of delay, present appeal has been filed.

2. Short facts of the case are that the appellant filed a claim petition for compensation on account of injuries sustained in railway accident which took place on 28/08/05. In the claim petition it was alleged that the appellant was travelling in Puri-Ahmedabad Express for coming to Durg. It was alleged that because of heavy rush appellant fell down, with the result right hand of the appellant was amputated above the elbow and right leg of the appellant was amputated above the knee. It was further alleged that because of heavy bleeding appellant was brought to Durg and from where he was referred to Jawaharlal

Nehru Hospital, Bhilai. It was prayed that the claim petition be allowed and compensation be awarded. This claim petition was filed on 13/01/2012, while alleged incident took place on 28/08/05. Since there was delay of five years four months and 15 days in filing the claim petition, therefore, an application for condonation of delay was filed, which was dismissed by the impugned order, hence this appeal.

3. Learned counsel for the appellant argued at length and submits that the impugned order passed by the learned Court below is illegal, incorrect and deserves to be set aside. It is submitted that in the facts and circumstances of the case the approach of the learned Tribunal ought to have been liberal and application for condonation of delay ought to have been allowed. It is submitted that the appeal filed by the appellant be allowed and impugned order passed by the learned Tribunal be set aside.

4. Learned counsel for respondent supports the order and submits that the plea taken by the appellant for condoning the delay that the appellant was unaware about the position of Law is not available to the appellant as ignorance of law is no ground to condone the inordinate delay. It is submitted that no illegality has been committed by the learned Tribunal in dismissing the application, hence appeal filed by the appellant has no merits and the same be dismissed.

5. From perusal of record, it appears that there is an inordinate delay in filing the claim petition which is more than five years. Under the Railway Claims Tribunal Act, 1987 claim petition is being filed under Section 13 of the Act and in case the claim petition is filed for compensation on account of injuries or death the limitation is prescribed under Section 17 (1) (b) of the Act which is of one year and claim petition can be filed after expiry of one year alongwith the application for condonation of delay under Section 17 (2) of the Act for which the appellant has to show the bonafide ground for the delay. In Motor Vehicles Act, 1988 as per Section 166 (3) claim application was to be filed within six months and as per the proviso delay can be condoned on sufficient grounds which prevented the claimant to file the claim petition in the prescribed time. Provisions of Section 166 (3) of Motor Vehicles Act was borrowed from Section 110-A(3) of Motor Vehicles Act, 1939. Section 166 (3) of Motor Vehicles Act, 1988 was deleted by way of amendment w.e.f. 14/11/1994, with the result in case of injuries or death in a motor accident claim petition can be filed at any point of time while it is not possible relating to

Railway Claims. However, keeping in view the aims and objects for deleting sub clause 3 of section 166 of Motor Vehicles Act whereby limitation for filing the claim petition for compensation on account of injuries or death was deleted, it is expected from the Railway Claims Tribunal to consider the application for condonation of delay liberally as by allowing the application for condonation of delay the claim petition is not being allowed as the claimants have to prove their case for getting the compensation. The whole idea for deleting Section 166 (3) of Motor Vehicles Act, 1988 was that no claim petition filed by claimant for compensation on account of injuries or by the dependents on account of death should not be dismissed on the ground of delay. Same principles applies when learned Railway Claims Tribunal deals with the application for condonation of delay. In view of this, this Court finds that learned tribunal was not justified in dismissing the application for condonation of delay specially in a death case where appellant is only surviver and lost her son. Thus, appeal filed by the appellant is allowed and the impugned order passed by the learned tribunal stands set-aside and case is remanded back to the learned tribunal to decide the case on merits. Parties are directed to remain present before the learned tribunal on **09/04/2013.**

6. With the aforesaid observations, appeal stands disposed of C C as per rules.

Appeal disposed of.

I.L.R. [2013] M.P., 1109
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 3350/2012 (Jabalpur) decided on 7 March, 2013

ORIENTAL INSURANCE CO. LTD. ...Appellant
Vs.
TAKSHASHILA & ors. ...Respondents

A. Workmen's Compensation Act (8 of 1923), Section 21 - Claim Petition - Territorial Jurisdiction - **Appellant did not bring it to the notice of the Commissioner that it has no territorial jurisdiction - On the contrary it submitted the jurisdiction of the Court below by submitting the written statement and by leading evidence - As appellant has led evidence, therefore, no prejudice has been caused to the appellant - Claim of claimants cannot be defeated only on the ground**

of lack of territorial jurisdiction. **(Para 11)**

क. कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 21 – दावा याचिका – क्षेत्रिय अधिकारिता – अपीलार्थी ने कमिश्नर को जानकारी नहीं दी कि उसे क्षेत्रिय अधिकारिता नहीं – इसके विपरीत उसने लिखित कथन पेश करके और साक्ष्य प्रस्तुत करके निचले न्यायालय की अधिकारिता प्रस्तुत की – चूंकि अपीलार्थी ने साक्ष्य पेश किया इसलिए अपीलार्थी को कोई न्याय हानि नहीं कारित हुई है – दावाकर्ताओं का दावा मात्र क्षेत्रिय अधिकारिता के अभाव के आधार पर समाप्त नहीं किया जा सकता।

B. 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.** **(Para 12)**

ख. कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 21 – चालक अनुज्ञप्ति – चालक को नेपाल में आतंकवादियों द्वारा मारा गया जब वह ट्रक चला रहा था – क्या उसके पास नेपाल में वाहन चलान के लिए वैध चालक अनुज्ञप्ति थी अथवा नहीं इससे कोई फर्क नहीं पड़ता क्योंकि घटना, मृतक के उपेक्षापूर्ण वाहन चलाने के परिणामस्वरुप घटित नहीं हुई – अपील खारिज।

Case referred :

(2007) 11 SCC 616.

Amrit Ruprah, for the appellant.
Sanjay Verma, for the respondents No. 1 to 4.

ORDER

N.K. Mody, J.: Being aggrieved by the order dated 25/11/2011 passed by Commissioner for Workmen's Compensation Cum Labour Court, Jabalpur in case No.128/2006 whereby claim petition filed by the respondents No.1 to 4 was allowed and compensation of Rs.3,98,800/-was awarded alongwith interest @ 12% p.a. w.e.f. 20/02/2005, present appeal has been filed. This appeal was admitted on the following substantial questions of law :-

(1) "Whether in the facts and circumstances of the case, learned Court below was justified in holding the appellant liable for payment of compensation while deceased was

driving the vehicle for which neither offending vehicle was having the valid permit nor the deceased was having the valid license ?"

(2) "Whether in the facts and circumstances of the case, learned Court below was justified in passing the award against the appellant while learned Court below was having no territorial jurisdiction ?"

2. Short facts of the case are that respondents No.1 to 4 file a claim petition before the learned Court below alleging that deceased/Nirpat Singh was driver on a truck bearing registration No.M.P.-23/DA/9185 which was owned by respondent No.5 and insured with the appellant. It was alleged that when the deceased was in the said truck at Nepal he was murdered by terrorist. It was alleged that since deceased was in the employment of respondent No.5 and death took place during course of the employment, therefore, claim petition be allowed and compensation be awarded. The claim petition was contested by the appellant on various grounds including on the ground that offending vehicle was having no permit on the date of incident and also deceased was having no valid license on the date when the incident took place to drive the offending vehicle at Nepal. It was alleged, that since the accident took place out of India, therefore, Court at Jabalpur is having no jurisdiction to decide the claim petition. It was prayed that claim petition be dismissed. After framing of issues and recording of evidence, learned Court below allowed the claim petition filed by the respondents No.1 to 4 and awarded the compensation against which the present appeal has been filed.

3. Learned counsel for the appellant argued at length and submits that the impugned order passed by the learned Court below is illegal, incorrect and deserves to be set-aside. It is submitted that as per proviso to Section 21 of Workmen's Compensation Act, 1923 learned Court below was not justified in allowing the claim petition filed by the respondents No.1 to 4. It is submitted that undisputedly incident took place at Nepal. It is submitted that since the incident took place during the course of employment, therefore, liability to pay the compensation is on the employer as the offending vehicle was being driven in violation of terms of policy. It is submitted that appeal filed by the appellant be allowed and the impugned order passed by the learned Court below be set-aside.

4. Learned counsel for the respondents No.1 to 4 submit that ordinarily claimants are residing at Seoni, therefore, claim petition was filed at Jabalpur and the Court at Jabalpur is having the jurisdiction to decide the same. For this contention reliance is placed on a decision in the matter of *Morgina Begum Vs. Md. Hanuman Plantation Ltd.* (2007) 11 SCC 616 wherein Hon'ble Apex Court had an occasion to dealt with the Section 21 (1) (b) of Workmen's Compensation Act, 1923 and it was held that application for compensation could be filed at location where the claimant parents had moved after death of their son. It was also held that Section 21(1) (b) permits filing of claim petition in case of death where the dependent ordinarily resides. It is submitted that learned Court below committed no error in allowing the claim petition filed by the respondents No. 1 to 4 and awarding compensation. It is submitted that appeal filed by the appellant has no merits and the same be dismissed.

5. From perusal of record, it appears that to prove the case respondents No.1 to 4 has filed the documents which are Ex.P/1 to P/6. Apart from this, appellant has filed the documents Ex.D/1 and D/2. Respondents No.1 to 4 has examined Takshashila as AW/1. Appellant has examined P. Nagarajan NAW/1, Babulal Arya NAW/2 and Paramjeet Singh NAW/3.

6. Section 21 of Workmen's Compensation Act deals with venue of proceedings and transfer, which reads as under:

21. Venue of proceedings and transfer. (1) Where any matter under this Act is to be done by or before a Commissioner, the same shall, subject to the provisions of this Act and to any rules made hereunder, be done by or before the Commissioner for the area in which-

(a) the accident took place which resulted in the injury; or

(b) the workman or in case of his death, the dependent claiming the compensation ordinarily resides; or

(c) the employer has his registered office:

Provided that no matter shall be proceeded before or by a Commissioner, other than the Commissioner having jurisdiction over the area in which the accident took place, without his giving notice in the manner prescribed by the Central Government to the Commissioner having jurisdiction over the area and the State Government concerned:

Provided further that, where the workman, being the master of a ship or a seaman or the captain or a member of the crew of an aircraft or a workman in a motor vehicle or a company, meets with the accident outside India any such matter may be done by or before a Commissioner for the area in which the owner or agent of the ship, aircraft or motor vehicle resides or carries on business or the registered office of the company is situated, as the case may be.

(1A) If a commissioner, other than the Commissioner with whom any money has been deposited under Section 8, proceeds with a matter under this Act, the former may for the proper disposal of the matter call for transfer of any records or moneys remaining with the latter and on receipt of such a request, he shall comply with the same.

(2) If a commissioner is satisfied [that any matter arising out of any proceedings pending before him] can be more conveniently dealt with by any other Commissioner, whether in the same State or not, he may, subject to rules made under this Act, order such matter to be transferred to such other Commissioner either for report or for disposal, and, if he does so, shall forthwith transmit to such other Commissioner all documents relevant for the decision of such matter and, where the matter is transferred for disposal, shall also transmit in the prescribed manner any money remaining in his hands or invested by him for the benefit of any party to the proceedings:

[Provided that the Commissioner shall not, where any party to the proceedings has appeared before him, make any order of transfer relating to the distribution among dependents of a lump sum without giving such party an opportunity of being heard:]

(3) The Commissioner to whom any matter is so transferred shall, subject to rules made under this Act, inquire thereinto any, if the matter was transferred for report, return his report thereon or, if the matter was transferred for disposal, continue the proceedings as if they had originally commenced before him.

(4) On receipt of a report from a Commissioner to whom

any matter has been transferred for report under sub-section (2), the Commissioner by whom it was referred shall decide the matter referred in conformity with such report.

(5) The State Government may transfer any matter from any Commissioner appointed by it to any other Commissioner appointed by it.

7. From perusal of the record it is evident that earlier also claim petition was filed by respondent Nos. 1 to 4 for compensation under the provisions of Motor Vehicles Act as is alleged by respondent No.2 in its written statement, of which copy is not on record. In the written statement the plea which has been raised by appellant for avoiding the liablity is that MACT, Seoni has already held that death of Nirpat Singh was not during course of employment, therefore, claim petition is not maintainable. The other ground which was taken was that the deceased Nirpat Singh was not possessing valid driving license to drive the offending vehicle at Nepal. The permit which is filed by the appellant is valid to ply the vehicle within the territory of India and there was no permit to take the vehicle abroad. It was alleged that since the vehicle was without permit, fitness certificate and deceased was not possessing valid license, therefore, the vehicle was being driven in violation of terms of policy. So far as jurisdiction is concerned, it is alleged that since the accident occurred at Kathmandu and respondent Nos. 1 to 4 are not resident of Jabalpur, therefore, Jabalpur Court is having no jurisdiction. It was also alleged that if the claim petition would have been filed at Nagpur, then full facts could have been brought on record by respondent No.5 who is having the office at Nagpur.

8. No issue was framed by the learned Court below relating to territorial jurisdiction of the Court. No effort was made by appellant by moving an appropriate application to frame additional issue relating to jurisdiction. To prove the case respondent Nos. 1 to 4 have examined respondent No.1. In cross-examination on behalf of appellant, respondent No.1 has stated that she is resident of Seoni. Appellant has examined P. Nagrajan Administrative Officer of Insurance Company, who has stated that as per policy Ex.D/1 driver should have possess the license of the place where he is driving the vehicle and also the vehicle must be having a permit of the place where accident occurred. He has further stated that the deceased was having license to drive the vehicle in India and the offending vehicle was also having a permit of four States, while accident took place at Nepal, therefore, there was violation of

terms of policy, hence appellant is not liable for payment of compensation.

9. Thus, neither any issue was framed in this regard that the tribunal has no jurisdiction to hear and decide the claim petition, nor any evidence was led in that regard. Even respondent No.1 was not cross-examined in connection to territorial jurisdiction.

10. As per Section 21 of Workmen's Compensation Act the claim petition is maintainable where the accident took place which resulted in injury or in case of death the dependent claiming the compensation ordinarily resides or employer has his registered office. As per second proviso of Section 21 if a workman in a motor vehicle meets with the accident outside India, the matter can be dealt with before Commissioner for the area in which owner of motor vehicle resides or carries on business, but as per Clause (2) of the proviso of Section 21 of the Act if the Commissioner before whom the claim petition is filed, is satisfied that the matter can be dealt with more conveniently by any other Commissioner he may transfer the matter to Comissioner either for report or for disposal. Keeping in view the amendment in Section 21 of Workmen's Compensation Act and the law laid down by the Hon'ble Apex Court in the matter of *Morgina Begum* (Supra) wherein it was observed that the idea behind introductionof this amendment is that migrant labourers all over the country often go elsewhere to earn their livelihood. When an accident takes place then in order to facilitate the claimants they may make their claim not necessarily at the place where the accident took place but also at the place where they ordinarily reside. This amendment was introduced in the Act in 1995. This was done with a very loudable object, otherwise it could cause hardship to the claimant to claim compensation under the Act. It is not possible for poor workmen or their dependents who reside in one part of the country and shift from one place to another for their livelihood to necessarily go to the place of the accident for filing a claim petition. Labour statutes are for the welfare of the workmen.

11. In the present case since no issue was framed in that regard and appellant also did not bring it to the notice of Commissioner that it has no territorial jurisdiction to hear and decide the claim petition, on the contrary appellant submitted the jurisdiction of the learned Court below by submitting the written statement and by cross-examining AW/1, who was examined by appellant and also adduced the evidence, this Court finds that at this stage the order passed in favour of respondent Nos. 1 to 4 cannot be defeated only on

the ground that learned Court below was having no territorial jurisdiction. Since the appellant has led the evidence, therefore, it appears that no prejudice has caused to the appellant.

12. So far as other ground which has been raised by the appellant that the deceased was not possessing valid driving license to drive the vehicle at Nepal is concerned, undoubtedly policy was issued for India and for Nepal as well, while at the time of issuance of policy the offending vehicle was having permit of all the four States in India and not for Nepal. No evidence has been adduced by the appellant to prove that the deceased was having no license to drive the vehicle at Nepal. Since the plea was raised by the appellant that the deceased was not having license to drive the vehicle at Nepal, therefore, heavy burden was on the appellant to prove this fact. No effort was made by the appellant by issuing notices to the employer who is respondent No.5 to produce the license of deceased. Though the fact that the deceased was not having license to drive the offending vehicle at Nepal, was not proved by the appellant, then too, if for the sake of arguments it is assumed that the deceased was not having license to drive the vehicle at Nepal, then too, it makes no difference in the present case as the incident is not outcome of negligent driving of deceased, but the incident took place when the deceased was killed by terrorist. In the facts and circumstances of the case claim petition filed by respondent Nos. 1 to 4 cannot be defeated on this ground also.

13. In view of this, appeal filed by the appellant has no merits and the same stands dismissed.

No order as to costs.

Appeal dismissed.

I.L.R. [2013] M.P., 1116
APPELLATE CIVIL
Before Mr. Justice M.C. Garg
M.A. No. 644/2004 (Jabalpur) decided on 14 March, 2013

RAM MILAN GUPTA & anr. ... Appellants
Vs.
DASHRATH SINGH GOND & anr. ...Respondents

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. (Para 5)

मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कंपनी का उत्तरदायित्व – बीमा पॉलिसी का उल्लंघन – ट्रेक्टर को कृषि प्रयोजनों हेतु बीमित किया गया था जबकि उसमें पत्थर ले जाये जा रहे थे – चूंकि ट्रेक्टर का उपयोग बीमा पॉलिसी के उल्लंघन में किया जा रहा था, बीमा कंपनी उत्तरदायी नहीं।

Case referred :

2008(1) MPLJ 72.

Neeraj Ashar, for the appellants.
Rohit Jain, for the respondent No.2/Insurance Company.

ORDER

M.C. GARG, J.: Appellant No. 2 is the owner of the tractor bearing No. MP-17/6572 which met with an accident inasmuch as, while carrying some stones in the aforesaid tractor it turned which caused injures to the persons who were sitting in the tractor and also to the injured on account of turning of the tractor.

2. The claim petition was objected to by the insurance company on the ground that in this case, insurance company could not have been fastened with the liability for two reasons i.e. (I) tractor could not have been used for other purpose except agriculture for which it was insured, carrying stones could not have been said to be agricultural purpose and (ii) passengers are not allowed to sit on the tractor.

3. Motor Accident Claims Tribunal accepted the pleas taken by the insurance company and while granting compensation to the injured has exonerated the insurance company but fastened the liability on the owner. Relevant discussion appears in paras 17 to 20 of the impugned award which reads as under:-

वाद प्रश्न क्र–3 की विवेचना–

17. अनावेदक साक्षी क्र.1 गल्लू ने अपने परीक्षण में व्यक्त किया है कि उसका वाहन ट्रेक्टर क्र.–एम.पी.17/6572 दुर्घटना दिनांक को विधिवत् बीमित था। अनावेदक पक्ष की ओर से ओरिएंटल इंश्योरेंस कंपनी द्वारा एच.एम.टी. ट्रेक्टर क्र–एम.पी.17/6572 के दिनांक 14.12.96 से 13.12.97 तक ओरिएंटल इंश्योरेंस कंपनी लिमिटेड में बीमित होने संबंधी सर्टीफिकेट–पॉलिसी जिसका कवर नोट क्र 102390 है फोटो कॉपी प्रस्तुत किया है। इस बीमित दस्तावेज

के अवलोकन से यह प्रकट होता है कि ट्रेक्टर वाहन क्र–एम.पी.17/6572 दिनांक 14.12.96 से 13.12.97 तक के लिए अना. क्र–3 के यहां बीमित रहा है। अनावेदक साक्षी क्र.1 गल्लू के प्रदर्श डी–2 की बीमा पालिसी जो दिनांक 14.12.98 से 13.12.99 तक है प्रस्तुत की है, जिसमें ट्रेक्टर ट्राली के उपयोग की सीमा कृषि कार्य हेतु अंकित हैं। अना. क्र.–3 बीमा कंपनी की ओर से इस तथ्य के खंडन के संबंध में की दुर्घटना दिनांक 13.5.97 को उक्त ट्रेक्टर उनकी बीमा कंपनी के कवर नोट क्र–102390 में बीमित नहीं था। इस संबंध में कोई साक्ष्य या दस्तावेज प्रस्तुत नहीं किया गया है। अतः ऐसी स्थिति में तो प्रकरण में प्रस्तुत साक्ष्य एवं बीमित दस्तावेज की फोटोकापी जिसका खंडन अना. क्र.–3 बीमा कंपनी की ओर से नहीं किया गया है से तो यही परिलक्षित है कि दुर्घटना दिनांक 13.5.97 को एचएमटी ट्रेक्टर क्र–एम.पी.17/6572 अना. क्र.–3 बीमा कंपनी के कार्यालय में बीमित था। अतः वाद प्रश्न क्र–3 का निराकरण सकारात्मक रूप से "हां" में किया जाता है।

वाद प्रश्न क्र–5 की विवेचना–

18/– प्रकरण में प्रस्तुत अना क्र.–3 द्वारा जारी किये गये बीमित दस्तावेज के अवलोकन से यह प्रकट है कि उक्त ट्रेक्टर क्र–एम.पी.17/6572 कृषि कार्य के लिए बीमित रहा है, लेकिन (आ.सा.1) दशरथ, (आ.सा. 2) इंद्रभान सिंह के परीक्षण से यह बात प्रकट है कि दुर्घटना के समय यह ट्रेक्टर सतरना से बहेरा पत्थर ढोका लेने जा रहा था। (आ.सा.1) दशरथ ने अपने परीक्षण की कंडिका–16 में इस बात को स्वीकार किया है कि घटना दिनांक को खदान से पत्थर लेकर उक्त ट्रेक्टर से वह लोग पत्थर ला रहे थे, जिसमें वह मजदूरी कर रहा था। घटना दिनांक को खदान से पत्थर उक्त ट्रेक्टर में लादकर वह लोग तीरथ सिंह चौहान के घर, ग्राम बहेरा पत्थर गिराने के लिए ले जा रहे थे, सभी रास्ते में ट्रेक्टर पलट गया, जिससे उसे चोंट आई। एक ट्रिप में करीब 250 पथर वह लोग ट्रेक्टर ट्राली में लादकर ढलाई करते थे। घटना के पूर्व घटना दिनांक को ही 2–3 ट्रिप तीरथ सिंह के यहां पत्थर वह लोग ट्रेक्टर से गिरा चुके थे। पत्थर ढुलाई का पैसा ट्रेक्टर मालिक गल्लू गुप्ता लिया करता था। (आ.सा.2) इंद्रभान सिंह जो दुर्घटना के समय आवेदक दशरथ सिंह के साथ वह अन्य मजदूरों के साथ दुर्घटना कारित करने वाले गल्लू गुप्ता के ट्रेक्टर में मजदूरी करने हेतु बैठा था, उसके परीक्षण से भी यह बात प्रकट होती है कि घटना दिनांक को यह ट्रेक्टर ढोका– पत्थर ढुलाई के लिए किराये पर ग्राम बहेरा के तीरथ सिंह ने लिया था और दुर्घटना के समय ट्रेक्टर में उसे आवेदक दशरथ सिंह व अन्य मजदूरों को बिठाकर तीरथ सिंह चौहान के सिंचाई के लिए कूप निर्माण हेतु पत्थर की ढुलाई का कार्य किया जा रहा था।

19/– (आ.सा.1) आवेदक दशरथ सिंह ने अपने परीक्षण मे व्यक्त किया है कि उक्त ट्रेक्टर में वह दुर्घटना के पूर्व से मजदूरी का काम किया करता था। इस

ट्रेक्टर में कभी मुरम, कभी ईटा, कभी अनाज ढुलाई का काम वह किया करता था। उन लोगों ने इस ट्रेक्टर से मुरम ढुलाई का कार्य घटना के पूर्व किया था, जो बाबूला यादव के यहां बड़ा कुआं बनाने के लिए मुरूम गिराई थी। दुर्घटना के पूर्व ईंटा बाउन्ड्रीवाल बनवाने के लिए रामधारी यादव के यहां उक्त ट्रेक्टर से ईटा ढुलाई कर ईटें गिराई गई थी। सतनरा गांव के ही गुप्ता के यहां उक्त ट्रेक्टर में गल्ला लदवाकर सीधी मंडी में लाये थे, जिसमें भी मजदूरी का काम किया था। घटना दिनांक को भी खदान से पत्थर उक्त ट्रेक्टर में लादकर वह लोग तीरथ सिंह चौहान के घर ग्राम बहेरा ढोका पत्थर गिराने के लिए ले जा रहे थे, तभी रास्तें में ही ट्रेक्टर पलट गया, जिससे उसे चोंट आई (आ.सा.2) इंद्रभान सिंह ने भी अपने परीक्षण में इस बात की पुष्टि की है कि दुर्घटना दिनांक के पूर्व भी वह गल्लू गुप्ता के उक्त ट्रेक्टर में मजदूरी करता था। दुर्घटना दिनांक को इस ट्रेक्टर में ढोका ढुलाई के कार्य के लिए किराये पर ग्राम बहेरा के तीरथ सिंह ने लिया हुआ था। इस साक्षी का कहना है कि गल्लू के उक्त ट्रेक्टर से ईटा, मुरम आदि ढुलाई का कामकिया जाता था, जिसमें वह मजदूरी करता था। यह ईटा, मुरूम गल्लू के घर खुद नहीं ले जाकर अन्य व्यक्तियों के यहां ले जाते थे। गल्लु गुप्ता के यहां ईटा, मुरूम गिराने के लिए तय किया जाता था, उसी के यहां वह लोग ईटा, मुरूम ले जाकर गिराते थे। दुर्घटना के समय वह लोग तीरथ सिंह चौहान के घर पर सिंचाई के लिए कूप निर्माण के लिए मजदूरों की हैसियत से पत्थर ढुलाई कर रहे थे। (आर.सा.5) बाबूलाल यादव ने भी अपने परीक्षण में इस बात को स्वीकार किया है कि जिस दिन ट्रेक्टर पलटा था, उस दिन ट्रेक्टर से पत्थर ढोया जा रहा था। इस साक्षी ने इस बात को सही बताया है कि दुर्घटनाग्रस्त ट्रेक्टर से कभी ईटा तो कभी मुरूम की ढुलाई का काम किया जाता था। इस ट्रेक्टर के मालिक गल्लु गुप्ता ने अपना जो जवाब अधिकरण के समक्ष प्रस्तुत किया है, उसकी कंडिका–12 में भी यह इंगित है कि ट्रेक्टर में लदे ढोका व ट्राली की बाड़ी की चपेट में आवेदक दशरथ फंस गया और हाथ जख्मी हो जाने से वह ट्राली के पीछे गिर गया।" अतः ऐसी स्थिति में स्वयं गल्लू गुप्ता के क्लेम आवेदन के जवाब से यह प्रकट है कि दुर्घटना के समय ट्रेक्टर में ढोका–पत्थर लदे हुए थे।

20/– उपरोक्त विवेचना से यह बात प्रकट है कि गल्लू गुप्ता, जिसकी ट्रेक्टर ट्राली कृषि कार्य हेतु बीमित है वह अपने ट्रेक्टर ट्राली में ढोका–पत्थर ईटा मुरूम ढुलाई का काम किराये लेकर करता है। दुर्घटना के समय भी उसके ट्रेक्टर में आवेदक दशरथ व अन्य मजदूरों को बिठाकर तीरथ सिंह चौहान के कूप निर्माण हेतु पत्थर ढुलाई का कार्य किया जा रहा था। अतः ऐसी स्थिति में यह प्रकट है कि उक्त ट्रेक्टर का संचालन दुर्घटना के समय ट्रेक्टर रजिस्ट्रेशन व बीमा शर्तों के विपरीत कृषि प्रयोजन से अन्यथा पत्थर ढुलाई का कार्य करने हेतु किया जा रहा था। अतःबाद प्रश्न क्र.–5 का निराकरण सकारात्मक रूप से "हा" में किया जाता है और इसका प्रभाव यह पड़ता है कि

अना. क्र.–3 बीमा कंपनी उक्त दुर्घटना में आई आवेदक दशरथ को पहुंची चोटों की क्षतिपूर्ति हेतु उत्तरदायी नहीं है, क्योंकि बीमाशर्तों के विपरीत कृषि प्रयोजनों से अन्यथा ढोका पत्थर ढुलाई का कार्य तीरथ सिंह चौहान के सिंचाई के लिए कूप निर्माण के लिए किया जा रहा था, जिसमें दुर्घटना के समय आवेदक दशरथ अन्य मजदूरों के साथ उक्त ढोका ढुलाई के कार्य हेतु नियोजित था। अतः वाद प्रश्न क्र–5 का निराकरण सकारात्मक रूप से "हां" में किया जाकर निर्धारित किया जाता है कि उक्त दुर्घटना में आवेदक दशरथ को आई चोंटों की क्षतिपूर्ति हेतु अना.क्र.–3 बीमा कंपनी उत्तरदायी नहीं है।

4. Learned counsel appearing on behalf of the insurance company has supported the aforesaid finding with judgment of the Full Bench of this Court in the case of *Bhav Singh v. Savirani and others* reported in 2008 (1) M.P.L.J. 72 wherein it has been held as under:

> "9. This position of law has been clarified by Supreme Court in *National Insurance Co. Limited v. Prembai Patel,* AIR 2005 SC 2337. The relevant portion of the judgment of the Supreme Court in *Prembai Patel* (supra) from paragraph 12 of the judgment as reported in the AIR is extracted below:
>
> > "Clause (b) of Sub-section (1) of Section 147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2) against any liability which may be incurred by him in respect of death of, or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of Clause (b) are comprehensive in the sense that they cover both 'any person' or 'passenger'. An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words 'any person' occurring in Sub-clause (i). However, the proviso (i) to Clause (b) of Sub-section (1) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by

such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Act if the employee is such as described in Sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in Sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act.

10. Sub-section (5) of Section 147 of the Act, however, provides that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under Section 147 of the Act shall be liable to indemnify a person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or classes of persons. Thus, if the policy of insurance covers any liability in addition to the liability under Section 147(1) of the Act, the insurer will be liable to indemnify the insured in case of any liability not because of the provisions of Sub-section (1) of Section 147 but because of the terms and conditions of contract of insurance between the insurer and the insured. Therefore, if the contract of insurance provides for a liability to a passenger or to an employee other than the liabilities provided under Sub-section (1) of Section 147 of the Act, the insurer would be liable to indemnify the insured against such liability."

5. Considering the aforesaid judgment given by the Full Bench of this Court, conditions of the policy and admitted fact that the tractor was used for carrying stones which were brought for the purpose of putting tube well, in which owner brought number of persons which were carrying stones probably work of the owner was for the purpose of getting tube well fixed, the owner apparently violated conditions of the policy, therfore, there is no infirmity in the impugned award passed by the tribunal in exonerating the insurance company.

6. In view of the aforesaid, this appeal is dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 1122
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
S.A. No. 440/1996 (Jabalpur) decided on 2 April, 2013

JAGDISH PRASAD ...Appellant
Vs.
KANHAIYALAL @ KANDHAI & ors. ...Respondents

A. 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.** **(Para 19)**

क. 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।

B. 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.** **(Para 20)**

ख. 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।

Cases referred :

AIR 1966 SC 405, AIR 1974 SC 117, AIR 1977 SC 409, AIR 1977 SC 1724, (1999) 3 SCC 722, (2006) 1 SCC 729, (2009) 5 SCC 264, AIR 1971 SC 1865, AIR 1977 SC 1712, AIR 2000 SC 1779, (2007) 15 SCC 529, 2010 AIR SCW 1900, (2012) 8 SCC 148, 2013 AIR SCW 949, AIR 1998 MP 73, ILR XXXVI Bombay 138, ILR XL Allahabad 178.

Ravish Agrawal with *Abhishek Singh*, for the appellant.
N.S. Ruprah, for the respondents.

JUDGMENT

R.S. JHA, J. :- The appellant has filed this appeal being aggrieved by the judgment and decree dated 2.4.1996 passed by the District Judge, Panna in Civil Appeal No.19-A/86 affirming and confirming the judgment and decree dated 24.10.1986 passed by the Civil Judge Class-I, Panna in Civil Suit No.1-A/79-85 thereby dismissing the suit of the appellant claiming a decree for declaration as owner in possession of house No.53/6 situated in Mohalla Raniganj, Panna as well as for a permanent injunction prohibiting the respondents from demolishing the wall of his house.

2. The brief facts, leading to the filing of the present appeal, are that the house in question initially belonged to Gokul Prasad who had two sons, Narmada Prasad and the original respondent Kanhaiyalal @ Kandhai. The original plaintiff Gulab Dulaiya was the wife of Narmada Prasad who died on 15.3.1949. The suit was filed by the original plaintiff Gulab Dulaiya on 26.6.1979 alleging that she was in possession of and is residing in House No.53/6, Mohalla Raniganj, Panna since the death of her husband but when she approached the local Municipal Authorities for sanction of the map as well as for a water connection in the year 1979, she came to know that the house was recorded in the name of the original defendant Kanhaiyalal pursuant to which she raised an objection on which a notice was issued to Kanhaiyalal and thereafter the Municipal Authorities dropped the proceedings by permitting the plaintiff to get her rights decided by the competent civil court.

It was alleged that subsequent to the aforesaid decision of the Municipal Council, Gulab Dulaiya issued a notice to the original defendant Kanhaiyalal

on 3.4.1979 which was replied to on 16.5.1979 denying the claim of Gulab Dulaiya which led to filing of the suit on 26.6.1979.

The claim of the original plaintiff Gulab Dulaiya was based on the contention that the property of late Gokul Prasad, who had two sons, her late husband Narmada Prasad and Kanhaiyalal, was divided between them through a regular partition and House No.53/6 fell in the share of Narmada Prasad. It was contended that since the very beginning Gulab Dulaiya was residing in House No.53/6 Mohalla Raniganj, Panna and continued to do so even after the death of her husband Narmada Prasad on 5.3.1949. It was alleged that the original defendant Kanhaiyalal tried to break an opening in the partition wall between the two properties and install a door/window in the same which led to a dispute between the parties and filing of the suit on 26.6.1979. The suit was vehemently opposed by Kanhaiyalal who alleged that Gulab Dulaiya had become unchaste during the life time of Narmada Prasad and continued to remain so even after his death as a result of which one son Jagdish, the present appellant, was born in 1957 and on that count Gulab Dulaiya had been thrown out of the house after the death of Narmada Prasad and had lost all rights in the property and that Kanhaiyalal had become the sole owner.

The present appellant is the son born to Gulab Dulaiya in the year 1957 who was brought on record as the legal representatives on the strength of a Will executed by Gulab Dulaiya. The present respondent nos.1(a) to (g) are the legal representatives of the original defendant Kanhaiyalal who died during the pendency of the appeal.

The suit, as filed by Gulab Dulaiya, was initially dismissed on 11.7.1983 against which an appeal was filed by her and by judgment dated 23.12.1985 the matter was remanded back to the trial court. Pursuant to the remand, the suit was again decided and dismissed by judgment and decree dated 24.10.1986 and the First Appeal, filed against the said judgment and decree, has also been dismissed by the impugned judgment dated 2.4.1996, being aggrieved by which the appellant has filed the present appeal before this Court.

3. This Second Appeal was admitted by this Court on the following substantial questions of law:-

> "1. Whether on the facts and in the circumstances of the case, the Courts below were justified in holding that after the death of one coparcener, the sole surviving coparcener would

become absolute owner of the joint hindu family property and the widow of deceased coparcener shall not have any right in the property even after the enforcement of the Hindu Women Rights Property Act, 1937 ?

2. Whether the finding that deceased Gulab Dulaiya had become unchaste during the life time of her husband is perverse and contrary to record as according to Ex.P/2, she had become unchaste after the death of the husband ?

3. Whether the findings that no partition was effected between Kanhaiyalal and Narbada Prasad is contrary to record and is vitiated because of non-consideration of Ex.C/1-A ?

4. Whether, the finding recorded by the Courts below that the suit filed by the appellant was barred by limitation is perverse ?"

4. The learned Senior Counsel for the appellant submits that Gulab Dulaiya acquired rights in the property of Narmada Prasad on his death on 15.3.1949 which got crystallized in view of the provisions of the Hindu Women's Rights to Property Act, 1937 (hereinafter referred to as 'the Property Act') and the Hindu Succession Act of 1956 (hereinafter referred to as 'the Succession Act') and in such circumstances the claim made by her in the suit could not have been dismissed by the courts below by ignoring the aforesaid aspect.

5. It is further submitted that the respondents/defendants, in the initial written statement filed by them, did not make any statement regarding the unchastity of Gulab Dulaiya during the life time and at the time of the death of her husband Narmada Prasad. It is submitted that the written statement was amended for the first time on 12.3.1981 and a plea that the original plaintiff Gulab Dulaiya was unchaste during the life time of her husband, was added by way of amendment. It is submitted that this fact assumes importance in view of document Exhibit P-2, filed by the appellant, which is the reply to the notice issued by the appellant to the respondent Kanhaiyalal dated 16.5.1979 in which he has stated that Gulab Dulaiya had become unchaste after the death of her husband and that he came to know about this fact, for the first time, when he came to know that she was carrying a child 6 to 7 years after the death of her husband Narmada Prasad. It is submitted that in Exhibit P-2 the respondent defendant Kanhaiyalal had also stated that Gulab Dulaiya had

limited rights in the property which ceased to exist on her becoming unchaste.

6. It is submitted by the learned Senior Counsel for the appellant that the subsequent amendment in the written statement, the reply to the notice given by Kanhaiyalal vide Exhibit P-2 and para-9 of the written statement make it abundantly clear that the plea of unchastity of Gulab Dulaiya, the original plaintiff, during the life time of her husband Narmada Prasad is an after thought and was only taken up to defeat the claim of Gulab Dulaiya. It is submitted that in view of the specific and clear statement of Kanhaiyalal in Exhibit P-2, which has totally been ignored and not considered by any of the courts below, the findings regarding unchastity recorded by the courts below is perverse and contrary to the evidence on record.

7. The learned Senior Counsel for the appellant has submitted that the document Exhibit P-2 is a piece of substantive evidence against the defendant and even if he was not confronted with the same during his oral evidence, it is a conclusive evidence and admission of the fact that the deceased plaintiff Gulab Dulaiya was not unchaste during the life time of her husband and for that purpose the learned Senior Counsel for the appellant has relied upon the decision of the Supreme Court rendered in the cases of *Bharat Singh and Others vs. Mst. Bhagirathi,* AIR 1966 SC 405; *Biswanth Prasad and Others vs. Dwarka Prasad and Others,* AIR 1974 SC 117; *Union of India vs. Moksh Builders and Financiers Ltd. and others,* AIR 1977 SC 409; and *Thiru John and Others vs. The Returning Officer and Others*, AIR 1977 SC 1724

8. The learned Senior Counsel has further submitted that the court below has also not considered the document Exhibit C-1(A), produced by the appellant before the Commissioner, by which the defendant Kanhaiyalal had himself mortgaged the property on 29.9.1955, Exhibit C-1(A) with one Singhai Lalchand Jain, PW-6, in which the defendant Kanhaiyalal had himself stated and mentioned that the property of his brother Narmada Prasad was situated towards the South, which clearly establishes that a partition had taken place between the two brothers and, therefore, Kanhaiyalal the original defendant had no right or title to claim the property of Gulab Dulaiya which devolved upon her on the death of Narmada Prasad.

9. It is submitted by the learned Senior Counsel for the appellant that the courts below have committed perversity in not taking into consideration Exhibit P-2 and Exhibit C-1(A) while deciding the suit and in such circumstances the

impugned judgment and decree deserves to be set aside. It is also urged that the finding regarding limitation, recorded by the courts below against the appellant, is also perverse inasmuch as the courts below have failed to take into consideration the fact that the cause of action for filing the suit accrued to the original plaintiff Gulab Dulaiya in the year 1978, when she came to know that the house in question was recorded in the name of of Kanhaiyalal in the record of the Municipal Council, as well as in the month of May 1979 when the respondents tried to demolish the intervening wall and, therefore, the suit filed by her on 26.6.1979 was within the limitation prescribed by law.

10. The learned counsel for the respondents, per contra, submits that the claim of the appellant has been decided against him by as many as three courts as the suit filed by the appellant, was initially dismissed on 11.7.1983 and was again dismissed after remand by judgment and decree dated 24.10.1986 which has been affirmed in the first appeal by judgment and decree dated 2.4.1996 and in such circumstances there is a concurrent finding of fact against the appellant which does not deserve to be disturbed in view of the law laid down by the Supreme Court in the cases of *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and Others,* (1999) 3 SCC 722; *Saraswati Devi Gupta (Smt.) vs. Har Narain Johari and Others,* (2006) 1 SCC 729; and *Narayanan Rajendran and Another vs. Lekshmy Sarojini and Others,* (2009) 5 SCC 264.

11. The learned counsel for the respondents contends that the this appeal cannot be permitted to be prosecuted by the present appellant after the death of the original plaintiff Gulab Dulaiya as the right to sue on her behalf does not survive on her death and the present appellant cannot step into her shoes as he is admittedly not the legitimate or illegitimate son of Narmada Prasad and has no right in the property having been born 7 to 8 years after his death and whose share is being claimed by Gulab Dulaiya.

12. The learned counsel for the respondents further submits that the plea of unchastity was taken up by the respondents by amending the written statement on 12.3.1981 shortly after filing the written statement and thereafter on account of conclusive evidence led by the defendants, specifically the statement of D.W-1 Kanhaiyalal, the suit was dismissed by the court below. It is submitted that the first appellate court again remanded the matter to the trial court for framing an issue and permitting the parties to lead additional evidence on the issue of unchastity of Gulab Dulaiya pursuant to which the

court below permitted the parties to adduce additional evidence and thereafter, on the basis of the statements of D.W-1 Kanhaiyalal, D.W-4 Mahesh Narayan, D.W-5 Faiz Mohammed and D.W-6 Mangal Prasad, the court below again recorded a finding against the appellant regarding unchastity of Gulab Dulaiya and dismissed the suit.

13. It is submitted by the learned counsel for the respondents that the finding recorded by the courts below is based on proper appreciation of evidence and merely on account of an assertion that another view was possible, the said finding of fact cannot be interfered by this Court in this Second Appeal. It is further submitted that the appellant was given two chances to prove and establish his case regarding the unchastity of Gulab Dulaiya, initially in the first round as well as after remand but the appellant failed to establish his claim and in fact did not confront D.W-1 Kanhiayalal at any point of time with the reply to the notice dated 16.5.1979 document Exhibit P-2 and in such circumstances, and in the absence of confronting D.W-1 Kanhaiyalal with the document Exhibit P-2, the reliance being placed by the learned Senior Counsel for the appellant, for the first time before the Second Appellate Court on the document Exhibit P-2, is misplaced and misconceived and in fact in the absence of D.W-1 Kanhaiyalal being confronted with the said document, no substantial question of law in that regard arises for adjudication before this Court in view of the decision of the Supreme Court rendered in the cases of *Sait Tarajee Khimchand and others vs. Yelamarti Satyam and others,* AIR 1971 SC 1865; *Sita Ram Bhau Patil vs. Ramchandra Nago Patil (dead) by Lrs. and another,* AIR 1977 SC 1712; *Rajendra Singh and others vs. State of Bihar,* AIR 2000 SC 1779; *Udham Singh vs. Ram Singh and Another,* (2007) 15 SCC 529; *L.I.C of India and Another vs. Ram Pal Singh Bisen,* 2010 AIR SCW 1900; and *Union of India vs. Ibrahim Uddin and Another,* (2012) 8 SCC 148.

14. The learned counsel for the respondents has vehemently urged and alleged that on the dismissal of the suit by the trial court on the ground that it was barred by limitation, the appellant did not at any point of time assail or challenge the aforesaid finding either before the first appellate court or raise any issue in that regard before this Court and in fact the fourth substantial questions of law has been framed by this Court only prior to the final hearing of this appeal on 19.3.2013 and in such circumstances, in the absence of the appellant raising any issue in this regard or assailing the finding regarding limitation as recorded by the courts below, the substantial question of law

regarding limitation framed by this Court need not be answered.

15. It is further urged that as per the averment of the original plaintiff Gulab Dulaiya herself, her husband died in the year 1949 and in case she was claiming any right on the basis of an alleged partition between the brothers, she should have filed a suit or approached the competent court within three years from that date itself or at best within three years from 1950 when she was thrown out of the house on account of her unchastity but she did not do so and in such circumstances both the courts below have rightly held that the suit, as filed by the original plaintiff Gulab Dulaiya, was barred by limitation.

16. I have heard the learned counsel for the parties at length and have also extensively perused and examined the oral and documentary evidence on record. Before I advert to the issue regarding unchastity of Gulab Dulaiya, it would be appropriate to address the contention of the learned Senior Counsel for the appellant regarding substantial question of law no.2 which is based on Exhibit P-2 dated 16.5.1979, which is the reply to the notice issued by Gulab Dulaiya to Kanhaiyalal, as it is urged by the learned Senior Counsel for the appellant that a bare reading of this document, which cannot be ignored, the claim of the appellant stands established as Kanhaiyalal in the said document has himself stated that he came to know about the unchastity of Gulab Dulaiya for the first time when she was carrying a child 6 to 7 years after the death of her husband which clearly indicates and establishes that Kanhaiyalal had no knowledge about the unchastity of Gulab Dulaiya prior to that date. In the said document Exhibit P-2, Kanhaiyalal has also stated that Gulab Dulaiya had limited rights in the property which got extinguished on her becoming unchaste and this statement in itself clearly establishes that Gulab Dulaiya had limited rights in the property on the date the reply to the notice Exhibit P-2 dated 16.5.1979 was given by Kanhaiyalal. It is submitted that even if all other evidence is ignored, Exhibit P-2 in itself is sufficient to decree the claim of the appellant as the said document is substantive evidence and is admissible in view of the provisions of Section 21 of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act) as has been held by the Supreme Court in the cases of *Bharat Singh* (supra), *Dwarka Prasad* (supra), *Moksh Builders* (supra) *and Thiru John* (supra).

17. It is also urged that the decision of the Supreme Court rendered in the case of *Sita Ram Bhau Patil* (supra) which is relied upon by the learned counsel for the respondents deserves to be ignored as it is per-incuriam and

is not a binding precedent on the issue involved in the present case on account of the fact that it has been rendered without considering the judgment in the case of *Biswanth Prasad* (supra) and *Moksh Builders and Financiers Ltd.* (supra). It is submitted that in the aforesaid judgment of the Supreme Court it has clearly been held that an admission made in writing by a party is substantive evidence under section 21 of the Evidence Act and, therefore, there is no requirement or necessity to confront or contradict the party which had made it under section 145 of the Evidence Act as it is evidence *pro-prio vigore.*

18. It is submitted that in view of the law as laid down by the Supreme Court in the aforesaid judgments, even if D.W-1 Kanhaiyalal was not confronted with the reply to the notice that was sent by him during his evidence, the court below could not have ignored Exhibit P-2 and in case the court below had done so and considered Exhibit P-2, the claim of the appellant would have and is required to be decreed on account of the admission contained therein.

19. From a perusal of the judgment of the Supreme Court relied upon by the learned Senior Counsel for the appellant as well as by the learned counsel for the respondents, it is clear that the Supreme Court, in the aforesaid judgments, has clearly held while considering and interpreting the provisions of Sections 21 and 145 of the Evidence Act, that such admissions are substantive evidence by themselves in view of the provisions of Section 17 and 21 of the Evidence Act, though they are not conclusive proof of the matter admitted. It is also clear from a perusal of the other provisions of the Evidence Act, namely; Sections 138 and 146, that even otherwise the witness must be asked questions which would test his veracity moreso where there is a direct contradiction and conflict between his statements before the court and the alleged previous admission.

20. In the instant case, Kanhaiyalal in his statement recorded before the court below has clearly stated that Gulab Dulaiya was unchaste during the life time of her husband and continued to be so even after his death as a result of which Jagdish was born sometime in the year 1957 several years after the death of Narmada Prasad and that on account of her unchastity she was turned out from the house by her mother-in-law Sundaria Bai. In such circumstances, as Exhibit P-2 even if admitted in evidence is not conclusive proof of the matter stated therein, as has been held by the Supreme Court in the aforesaid cited cases and as D.W-1 Kanhaiyalal has made clear and specific statements

before the court below which are directly in conflict with the statement in Exhibit P-2, therefore, the appellant were required to and should have confronted Kanhaiyalal, D.W-1, with the same during his cross-examination to test his veracity. Apparently, the appellant did not do so either at the first instance or when they were given a second chance after remand. Quite apart from the above, it is also observed that the issue regarding Exhibit P-2 was never raised by the appellant either before the trial court or before the first appellate court and in fact the issue is being raised by him for the first time before this Court.

21. The Supreme Court, in the case of *Laxmibai (Dead) Through Lrs. And another vs. Bhagwantbuva (Dead) through Lrs. and others*, 2013 AIR SCW 949, while considering the provisions of Sections 138 and 146 of the Evidence Act, in this regard have held in para-31 as under:-

> "31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit.
>
> Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give

a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: *Khem Chand v. State of Himachal Pradesh,* AIR 1994 SC 226; *State of U.P. v. Nahar Singh (dead) & Ors.,* AIR 1998 SC 1328; *Rajinder Pershad (Dead)* by *L.Rs. v. Darshana Devi* (Smt.), AIR 2001 SC 3207; and *Sunil Kumar & Anr. v. State of Rajasthan,* AIR 2005 SC 1096).

22. In such circumstances, in view of the law laid down by the Supreme Court in the aforementioned judgments and the provisions of Section 136 and 146 of the Evidence Act, I am of the considered opinion that the contention of the appellant, to the effect that the findings recorded by the courts below are perverse and that the entire claim as made in the suit should have been decreed only on the basis of Exhibit P-2 by ignoring the entire oral and documentary evidence to the contrary even if Kanhaiyalal, D.W-1, was not confronted with Exhibit P-2 or asked any question in that regard to contradict him or to test his veracity, cannot be accepted.

23. From a perusal of the statement of the plaintiffs' witnesses, i.e. P.W-1 Gulab Dulaiya, P.W-7 Kashi Prasad, P.W-8 Badri Prasad Gupta and P.W-9 Hiralal Gupta, it is clear that the aforesaid witnesses have stated that Gulab Dulaiya was not unchaste during or after the life time of her husband Narmada Prasad who died in the year 1949, whereas a perusal of the statement of the defendant's witnesses D.W-1 Kanhaiyalal, D.W-4 Mahesh Narayan, D.W-5 Faiz Mohammed and D.W-6 Mangal Prasad, it is clear that the aforesaid witnesses have clearly and emphatically stated that Gulab Dulaiya was unchaste during the life time of Narmada Prasad himself as well as after his death as she was having an illicit relation with one Ram Khilawan and Ram Kumar and that she continued to remain unchaste even after his death as a result of which Jagdish, the present appellant was born sometime in the year 1957, eight years after the death of her husband Narmada Prasad.

24. It is also apparent that the fact of birth of Jagdish 7 to 9 years after the death of Narmada Prasad, the husband of Gulab Dulaiya is not disputed and is in fact admitted. However, as far as the issue regarding unchastity of Gulab Dulaiya, during the life time of her husband Narmada Prasad, is concerned there is conflict between the oral evidence adduced by the parties but the courts below, on the basis of the attending circumstances, have accepted the evidence of D.W-1 Kanhaiyalal, D.W-4 Mahesh Narayan, D.W-5 Faiz

Mohammed and D.W-6 Mangal Prasad and recorded a concurrent finding against the appellant.

25. As the learned Senior Counsel for the appellant has urged that the aforesaid finding, recorded by the courts below, is perverse on account of the attending circumstances, I have also examined the aforesaid aspect. The respondents/defendants witnesses have clearly stated that Gulab Dulaiya, the original plaintiff was turned out of the house on account of her unchastity in the year 1950. These witnesses have also stated that she was enjoying illicit relations with one Ram Khilawan and Ram Kumar even during the life time of Narmada Prasad and on that count there was serious conflict between them though she was not turned out of the house by Narmada Prasad himself. From a perusal of the evidence it is also clear that the defendant's witnesses stated above have clearly stated that she was turned out of the house and during this period she was running a sweet shop as well as living in the shop situated in Jain Mandir. The plaintiff's witnesses P.W-8 Badri Prasad Gupta and P.W-9 Hiralal Gupta have also stated that after the death of Narmada Prasad, Gulab Dulaiya was operating a sweet shop from Jain Mandir and not from the house which is in dispute. It is also clear that the defendants have alleged and brought evidence on record through their witnesses to state that the original plaintiff Gulab Dulaiya was staying in the shop situated in Jain Mandir from where she was operating the sweet shop till the year 1979 when she was evicted by the landlord pursuant to which the defendant Kanhaiyalal, on humanitarian ground, had permitted her to stay in the house in question from 27.1.1979 onwards for a short period of time till alternative arrangement was made. The appellant, on the other hand, has failed to prove and establish that Gulab Dulaiya was staying in the disputed house from 1949 till 27.1.1979. The fact that she was admittedly and undisputedly running her sweet shop in a tenanted premises in the Jain Mandir also establishes the fact that she was not residing in the disputed house, as had she been doing so, she would most certainly have started running the shop in the disputed house instead of a rented premises as was being done by Kanhaiyalal, D.W-1. The courts below, on the basis of the analysis of the evidence of the witnesses, have recorded a concurrent finding of fact to the effect that Gulab Dulaiya had been ousted on account of unchastity and was living separately till 1979 when she was permitted to occupy the house of Kanhaiyalal and for that reason was found in occupation of the same at the time when the Commissioner appointed by the court below examined the premises.

26. In view of the aforesaid facts and circumstances, as the appellant has failed to prove and establish possession and in fact the evidence on record establishes the contrary, as analysed above, therefore, the attending circumstances are also established against the appellant which support and affirm the findings recorded by the courts below and, therefore, mere conflict in some oral evidence would not give rise to a substantial question of law or justify interference in the concurrent findings recorded by the courts below against the appellant in the present Second Appeal.

27. The learned Senior Counsel for the appellant has alleged that there is no pleading or proof regarding unchastity of Gulab Dulaiya at the time of the death of Narmada Prasad which is material for deciding her rights. It is submitted that a bare reading of the written statement itself, even if accepted as it is, indicates that the plea only relates to chastity prior to the death of Narmada Prasad and after his death but there is no plea and in fact a total absence of any plea to the effect that Gulab Dulaiya was unchaste at the time of the death of Narmada Prasad.

28. I am of the considered opinion that in view of the evidence on record and the findings recorded by the courts below regarding unchastity of Gulab Dulaiya prior to the death of Narmada Prasad and the undisputed fact of her subsequent unchastity and the birth of Jagdish 7 to 9 years after the death of her husband Narmada Prasad, clearly leads to only one conclusion that Gulab Dulaiya was unchaste at the time of the death of Narmada Prasad as there is no pleading or proof to establish that she suddenly became chaste only at the time of the death of her husband Narmada Prasad for a very short intervening period and in such circumstances I do not find any perversity in the findings recorded by the courts below that Gulab Dulaiya was unchaste for the entire period which extended from a point of time prior to the death of Narmada Prasad to the birth of Jagdish in the year 1957.

29. The learned Senior Counsel for the appellant has next contended that the finding regarding partition recorded by the First Appellate Court is vitiated on account of non-consideration of Exhibit C-1(A). It is submitted that the said document clearly establishes that there was a partition between Kanhaiyalal, D.W-1, and Narmada Prasad. It is submitted that as the property had already been partitioned, the house in dispute fell in the share of Narmada Prasad and on his death upon Gulab Dulaiya.

30. To appreciate the aforesaid contention of the learned Senior Counsel

for the appellant, Exhibit C-1(A) is perused. The said document is not a document envisaging partition but is in fact a mortgage executed by Kanhaiyalal, D.W-1 with one Singhai Lalchand Jain, PW-6, by which he had mortgaged part of his house and had indicated the existence of Narmada Prasad's house towards the south. This document is dated 29.9.1955, i.e., it was executed after the death of Narmada Prasad. The contention of the learned Senior Counsel for the appellant cannot be accepted in view of the fact that the mention of Narmada Prasad's house has been clarified, clearly denied and explained by Kanhaiyalal, D.W-1 in his statement. Quite apart from the above, on the date of execution of the document, Narmada Prasad had already died and as held above, Gulab Dulaiya was not occupying the same for, had she been occupying it, this fact would have been mentioned in Exhibit C-1(A). In view of the aforesaid, it is clear that the mention of the name of Narmada Prasad was only for the purposes of identification and does not prove or establish any partition between Kanhaiyalal, D.W-1 and Narmada Prasad, moreso as the said fact has not been established by the appellant on the basis of any cogent evidence being adduced in this regard.

31. From a perusal of the undisputed facts on record, it is further clear that the claim in respect of declaration was made by Gulab Dulaiya 30 years after the death of her husband. It is also an admitted fact that the house in question was never recorded in the name of the original plaintiff Gulab Dulaiya and even at the time of filing of the suit, the house was recorded in the name of Kanhaiyalal in the Municipal records and Gulab Dulaiya objected to the same for the first time in the year 1979. From a perusal of the findings regarding possession recorded by the courts below, which have been affirmed in the preceding paragraphs, it is also clear that the courts below have recorded a finding that she was ousted on account of unchastity in 1950 and was permitted to occupy the house only for a short period of time from 27.1.1979 onwards on account of her eviction, on humanitarian grounds and in such circumstances the suit, filed by her for declaration as owner of the property, was barred by limitation. In the light of the above, it is clear that the right to claim and seek declaration in respect of the house accrued to Gulab Dulaiya after the death of Narmada Prasad in 1949 or at best from the day of her ouster whereas the present suit has been filed in 1979 and is therefore barred by limitation. From a perusal of the records, it is also clear that this issue or question of law regarding limitation has in fact not been raised in the memo of appeal but has only been raised during arguments.

32. Having heard the learned counsel for the parties and in view of the aforementioned finding of facts recorded by the courts below which do not suffer from any perversity or illegality, I am of the considered opinion that the concurrent findings of the courts below that the suit is barred by limitation, does not call for any interference in this Second Appeal as has been held by this Court in the case of *Smt. Saraswatidevi and another vs. Krishnaram Baldeo Bank Limited and another,* AIR 1998 MP 73.

33. The learned Senior Counsel for the appellant, on the strength of the decision reported in *Gangadhar Parappa Alur (Original Plaintiff) vs. Yellu Kom Viraswami Shirawale (Original Defendant),* ILR XXXVI Bombay 138 *and Radhe Lal vs. Bhawani Ram and Musammat Bidya*, ILR XL Allahabad 178, has submitted that even if Gulab Dulaiya was unchaste during the life time of her husband Narmada Prasad, the unchastity was condoned by him by not taking any action against her and in such circumstances her unchastity would not disqualify her from acquiring rights in the property of Narmada Prasad.

34. The aforesaid contention of the appellant needs to be heard only to be rejected on account of the fact that the appellant has not set up such a defence in the plaint nor is it her case that her unchastity was condoned by Narmada Prasad and, therefore, she was not disqualified to inherit his property. It is also apparent that apart from the absence of any pleading or assertion in that regard, the appellant/plaintiff has also not lead any evidence to plead or establish the condonation of unchastity. The records also indicate that no issue to this effect was framed by the trial court as this issue was neither raised by the appellant/plaintiff in the suit or in the first appeal at the time of its remand nor was this issue raised when the suit was again tried after remand. There is no pleading or assertion in this regard even in the first appeal. In fact there is no pleading, assertion or claim in this regard in the entire proceedings even before this Court nor has any substantial question of law been framed and it is, for the first time, at the time of final arguments that the contention is being raised before this Court. I am of the considered opinion that in view of the aforesaid undisputed facts and circumstances of the present case and in the absence of any pleading or assertion in this regard, this contention of the appellant deserves to be and is hereby rejected.

35. The above discussion clearly indicates that the courts below have examined and re-examined the evidence on record and have duly considered

and applied their mind while arriving at a finding against the appellant to the effect that Gulab Dulaiya lost all rights in the property on account of unchastity in view of the provisions of Hindu Law and no rights accrued to her under the Property Act and the Succession Act. It is also clear from the discussion made in the preceding paragraphs that the findings recorded by the courts below do not suffer from any perversity as they are based on proper appreciation of oral and documentary evidence by the courts below. In view of the aforesaid facts and circumstances, to re-appreciate the entire evidence and arrive at a contrary conclusion, only on the basis of an emotional appeal being made before this Court, is not permissible in a Second Appeal. As the findings recorded by the courts below do not suffer from any manifest irregularity or apparent illegality, nor do they suffer from any perversity, I find no reason to interfere or set aside the concurrent findings recorded by the courts below on all the issues.

36. In view of the aforesaid discussion, the substantial questions of law framed by this Court are answered against the appellant. The appeal, filed by the appellant, being meritless is accordingly dismissed. There shall be no order as to the costs.

Appeal dimissed.

I.L.R. [2013] M.P., 1137
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 325/2004 (Jabalpur) decided on 2 April, 2013

UMA NARAYAN & ors. ...Appellants
Vs.
SANT KUMAR ...Respondent

A. 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. (Para 7)

क. 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।

***B. 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. (Para 11)**

ख. 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।

Cases referred :

1976 MPLJ 518, 2006(1) MPLJ 221, (2011)12 SCC 18, AIR 1965 SC 1405, AIR 2000 SC 2408, 2007(1) MPLJ 589, AIR 2010 SC 3025, AIR 1915 PC 83, AIR 1967 SC 868, AIR 1977 SC 1005, AIR 1988 SC 1074, (1997) 3 SCC 1, (2002) 1 SCC 134.

Pranay Verma, for the appellants.
P.R. Bhave with *B.P. Yadav*, for the respondent.

JUDGMENT

ALOK ARADHE, J. :- This appeal is by the defendants, which was admitted on following substantial questions of law :

"(i) Whether the absence of readiness and willingness on the part of the plaintiff, is liable to be inferred on account the plaintiff putting an additional burden of diversion on the defendant (prospective vendor) ?

(ii) Whether the lower appellate Court has acted illegally in holding that time was not the essence of the contract ?"

2. Facts giving rise to filing of the appeal briefly stated are that on or about 4.4.1986, the plaintiff filed a suit seeking the relief of specific performance of the contract. The claim in the suit was based on the ground that the plaintiff had entered into an agreement with the defendant No.1 dated 23.2.1983 (Ex.P/1) for purchase of 0.028 hectare of land for a consideration of Rs.7,500/- and a sum of Rs.1,500/- was paid as earnest money on 23.2.1983. It was agreed that on payment of remaining amount of sale consideration, the sale-deed would be executed upto 31.5.1983. It was pleaded by the plaintiff that he was ready and willing to perform his part of the contract, however, the defendants did not execute the sale-deed. Accordingly, the suit seeking the relief as aforesaid was filed.

3. The defendant No.1 filed the written statement, in which *inter-alia* it was pleaded that the defendant No.1 was ready and willing to perform his part of the contract and the time was essence of the contract. However, the sale-deed could not be executed as the plaintiff was not in possession of sufficient funds.

4. The trial Court by the judgment and decree dated 29.1.1994 *inter-alia* held that the plaintiff has failed to prove readiness and willingness to perform his part of the contract and that the time was essence of the contract as the sale-deed was to be executed on or before 31.5.1983. It was further held that the suit suffers from mis-joinder of parties. Accordingly, the relief of specific performance of contract was denied. However, the claim of the plaintiff for refund of the amount paid by way of earnest money along with the interest at the rate of 6% p.a. with effect from 1.6.1983 was decreed. The appellate Court vide impugned judgment dated 7.1.2004 *inter-alia* held that time was not the essence of the contract and the plaintiff was ready and willing to perform his part of the contract. It was further held that defendants have failed to establish that the plaintiff was not in possession of sufficient funds to perform his part of the contract. Accordingly, the claim of the plaintiff was decreed.

5. Learned counsel for the appellants submitted that the agreement was executed on 23.2.1983 and the sale-deed was to be executed upto 31.5.1983. However, after a period of nearly two years and three months, notice dated 7.8.1985 (Ex.P/2) was sent by the plaintiff to the defendants asking them to execute the sale-deed. Thereafter, the suit was filed on 4.4.1986. It was further submitted that the sale-deed was not executed, as the plaintiff was not in possession of sufficient funds. It was also submitted that neither the agreement dated 23.2.1983 (Ex.P/1) nor the notice dated 7.8.1985 (Ex.P/2) contains a stipulation that the sale-deed was to be executed after the land was diverted. However, by way of amendment in the plaint, which was allowed by the trial Court on 20.4.1988, the plaintiff incorporated the plea that the sale-deed was to be executed after diversion of land, which is after thought and was not a condition of the agreement. It was further submitted that if a date is specified for execution of the sale-deed, some sanctity has to be attached to it. In support of his submissions, learned counsel for the appellants has placed reliance on the decisions in cases of *Damroolal Harchan and others Vs. Laxminarayan Ramanujdas Brijpuria and others,* 1976 M.P.L.J. 518, *Gyaneshwar Vs. Smt. Moongabai @ Muneshwaribai and another,* 2006 (1) M.P.L.J. 221, *Saradamani Kandappan Vs. S. Rajalakshmi and Others,* (2011) 12 SCC 18.

6. On the other hand, learned Senior Counsel for the respondent submitted that the Lower Appellate Court has rightly found that the plaintiff was ready and willing to perform his part of the contract. It is further submitted that in the facts of the case, the time was the essence of the contract. The findings recorded by the Lower Appellate Court are based on material available on record. In support of his submissions, learned Senior Counsel for the respondent has placed reliance on the decisions of the Supreme Court in the cases of *Mademsetty Satyanarayan Vs. G. Yelloji Rao and others*, AIR 1965 SC 1405, *Motilal Jain Vs. Smt. Ramdasi Devi and others,* AIR 2000 SC 2408, *Parmanand Soni and Others Vs. Radhakrishna Dharmartha Pvt. Trust and Others,* 2007 (1) MPLJ 589 *and Laxman Tatyaba Kankate & Another Vs. Smt. Taramati Harishchandra Dhatrak,* AIR 2010 SC 3025.

7. I have considered the respective submissions made by learned counsel for the parties and have perused the record. From the perusal of the agreement (Ex.P/1), it is evident that it does not contain a stipulation that the sale-deed would be executed only after the land in question is diverted. Similarly, in the notice (Ex.P/2), which was sent on behalf of the respondent/plaintiff, there is

no mention that the defendants are under an obligation to get the land diverted. It is also pertinent to mention here that when a suit was filed on 4.4.1986, there was no averment made in the plaint that diversion was a condition precedent for execution of the sale-deed. However, subsequently by way of an amendment which was allowed on 20.4.1988, the plea with regard to diversion of the land before the execution of the sale-deed was incorporated for the first time, which is obviously an after-thought. The plaintiff was insisting on the performance of a condition which was not a part of the agreement. The plaintiff was not ready and willing to go ahead with the agreement on the terms and conditions stipulated therein. Therefore, it can safely be inferred that the plaintiff was not ready and willing to perform his part of the contract. Accordingly, the first substantial question of law framed by this Court is answered.

8. In *Jamshed Kodaram Irani Vs. Burjorji Dhunjibhai,* AIR 1915 PC 83, it has been held that under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.

9. The aforesaid decision was referred to with approval by the Supreme Court in the case of *Gomathinayagam Pillai and others Vs. Palaniswami Nadar,* AIR 1967 SC 868 and it was held that fixation of period within which contract is to be performed does not make stipulation as to time essence of contract. In case of *Govind Prasad Chaturvedi Vs. Hari Dutt Shastri and another,* AIR 1977 SC 1005, it was held that if the contract relates to sale of immovable property, it will normally be presumed that the time is not the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which should be sufficiently strong to displace the normal presumption that in a contract of sale of immovable property stipulation as to time is not the essence of the contract. Similar view has been expressed in case of *Smt. Indira Kaur and others Vs. Shri Sheo Lal Kapoor*, AIR 1988 SC 1074.

10. In the case of *Chand Rani (Smt.) [dead] by Lrs. Vs. Kamal Rani (Smt.) [dead] by Lrs.*, (1993) 1 SCC 519, it has been held that even if time is not the essence of the contract, the Court may infer that it is to be performed

in a reasonable time, if the conditions are evident from the express terms of the contract, from the nature of the property and from the surrounding circumstances for example the object of making the contract. Similar view has been taken in the cases of *K.S. Vidyanadam and others Vs. Vairavan*, (1997) 3 SCC 1. and in *Veerayee Ammal Vs. Seeni Ammal* (2002) 1 SCC 134.

11. In the backdrop of aforesaid well settled legal position, facts of the case may be seen. The agreement (Ex.P/1) was executed on 23.2.1983. As per the terms and conditions of the agreement, the sale deed was to be executed upto 31.5.1983. However, the plaintiff gave a notice to the defendants after a period of two years and three months i.e. on 7.8.1985 and thereafter filed a suit on 4.4.1986. Thus, the suit has not been filed within the reasonable time. The conduct of the plaintiff, itself shows that time was not the essence of the contract as the plaintiff did not file the suit within reasonable time. Accordingly, the second substantial question of law framed by this Court is answered.

12. In view of preceding analysis, the judgment and decree passed by the Lower Appellate Court is set aside and that of the trial Court is restored. In the result, the appeal succeeds and is hereby allowed. However, there shall be no order as to costs.

Appeal allowed.

I.L.R. [2013] M.P., 1142
APPELLATE CIVIL
Before Mr. Justice Sanjay Yadav
S.A. No. 1112/2011 (Jabalpur) decided on 12 April, 2013

UDAY CHAND JAIN ...Appellant
Vs.
SMT. SHARDA JAIN ...Respondent

***A. 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. (Para 6,7)**

क. 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।

***B. Accommodation Control Act, M.P. (41 of 1961), Section 12(1)(f) - Bonafide Requirement* - Plaintiff has specifically pleaded that she requires suit accommodation as his son who is unemployed wants to open a jewellery shop and has no alternative accommodation - Held - Nothing more is required to be pleaded as to bonafide need - Evidence led by Plaintiff is not in variance but in consonance with the pleadings - Appeal dismissed (Para 11)**

ख. स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 12(1)(एफ) – वास्तविक आवश्यकता – वादी ने विनिर्दिष्ट रुप से अभिवाक किया है कि उसे वाद स्थान की आवश्यकता है क्योंकि उसका पुत्र जो बेरोजगार है, गहनों की दुकान खोलना चाहता है और उसके पास कोई वैकल्पिक स्थान नहीं है – अभिनिर्धारित – वास्तविक आवश्यकता के रुप में और अधिक अपेक्षित नहीं – वादी द्वारा प्रस्तुत साक्ष्य, अभिवचनों से बेमेल नहीं बल्कि एकरुप है – अपील खारिज।

Cases referred :

AIR 1976 SC 461, AIR 1976 SC 744, (1999) 6 SCC 337, AIR 1980 SC 193.

Ravi Rajan Shrivastava with *Amit Shrivastava,* for the appellant.

ORDER

SANJAY YADAV, J.: Heard on admission.

1. Having lost from both the Courts, the defendant tenant being aggrieved by the judgment and decree dated 9.9.2011 passed in Civil Appeal No.01-A/2011 affirming the Judgment and Decree dated 11.10.2010 in Civil Suit No.43-A/2009, has preferred this second appeal.

2. Suit Property is a house bearing No.1008 situated at Andherdeo being owned by the plaintiff after the death of her husband who received the same vide partition. One portion of the suit property, marked as ABCD in the suit map was given on rent to the defendant on 17.10.1985 under

Rent Agreement for a period of twenty years which having expired and being not vacated despite of its being required for the purpose of establishing gem and jewellery shop by plaintiffs' son led her to file a suit for eviction on the ground of bonafide need under section 12 (1) (f) of M.P. Accommodation Control Act 1961 Defendant contradicted the claim and denied the bonafide requirement stating that suit accommodation is only required to be re-rented on a higher premium and rent. It was also pleaded that there is no specific pleadings in the plaint as to bonafide need.

3. Trial Court framed seven issues on the basis of pleadings of which issue no.4 pertain to bonafide need as to whether the suit premises is required bonafide to establish the gem and jewellery business for the son and issue no.5 as to whether there is no alternative suitable accommodation available in the town. 'These issues has been answered in favour of plaintiff in paragraphs 18 and 19 of the judgment by trial Court which as apparent therefrom is on the basis of the pleadings and the evidence led in commensurate therewith. These findings are even affirmed by the first appellate Court.

4. Though attempt has been made on behalf of the defendant by hair splitting the pleadings to substantiate that there is no specific pleadings regarding the bonafide need and that an evidence led in absence of pleadings ought not to have been looked into.

5. True it is that variance between pleadings and the evidence looses significance. Equally it is settled that the Court should not scrutinies the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial ground.

6. In *Madan Gopal V Mamraj* : AIR 1976 SC 461 it has been held that "26.....It is well-settled that pleadings are loosely drafted in the Courts and the Courts should not scrutinise the pleading with such meticulous care so as to result in genuine claims being defeated on trivial grounds....."

7. Furthermore, it has also come to be settled that the pleadings has to be read as whole to ascertain its true import and not to cull out a passage to read the same in isolation (See *Udhav Singh V. M.R.Scindia:* AIR 1976 SC 744 wherein it is observed "30. We are afraid, this ingenious method of construction after cornpartmentalization, dissection, segregation and inversion

of the language of the paragraph, suggested by Counsel, runs counter to the cardinal canon of interpretation, according to which, a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention' of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole.")

8. In *Syed Datagir* V. *T.R. Gopalakrishna Shetty:* 1999 6 SCC 337 it has been held:

> "9.....In construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of ones case for a relief. Such an expression may be pointed, precise, some times vague but still could be gathered what he wants to convey through only by reading the whole pleading, depends on the person drafting a plea. In India most of the pleas are drafted by counsels hence aforesaid difference of pleas which inevitably differ from one to other. Thus, to gather true spirit behind a plea it should be read as a whole....."

9. In the present context reference can be had of the decision in *S.B. Noronah V. Prem Kumari :* AIR 1980 SC 193 wherein it is held:

> "6. Pleadings are not statutes and legalism is not verbalism. Common sense should not be kept in cold storage when pleadings are construed. It is too plain for words that the petition for eviction referred to the lease between the parties which undoubtedly was in writing. The application, read as a whole, did imply that and we are clear that law should not be stultified by courts by sanctifying little omissions as fatal flaws. The application for vacant possession suffered from no verbal lacunae and there was no need to amend at all. Parties win or lose on substantial questions, not 'technical tortures' and courts cannot be 'abettors'.

10. In the case at hand in paragraph 6 and 7 of suit plaint it is categorically

stated that the suit premises is required for the purpose establishing business for younger son. To have a glimpse of the pleadings the same are reproduced:

> 6. यह कि, वादिनी को वादग्रस्त भवन भाग की सद्भाविक आवश्यकता अपने छोटे पुत्र सचिन जैन को व्यवसाय कराने बावत् है जो कि वर्ष 1995–96 में बी.कॉम की परीक्षा उत्तीर्ण करने के उपरांत कोई भी नौकरी न मिलने के कारण जेम्स एवं ज्वेलरी का व्यवसाय शोरूम वादग्रस्त भाग पर खोलना चाहता है व आत्म निर्भर होना चाहता है जिसके लिए ऐसे व्यवसायिक स्थल पर उपयुर्क्त जगह वादिनी के पार जबलपुर शहर में नहीं है। वादिनी के पुत्र को वादग्रस्त भाग पर अपना जेम्स एण्ड ज्वेलरी का शोरूम शुरू कर व्यापार करने में किसी भी प्रकार की कोई परेशानी अथवा असुविधा नहीं होगा। अतः वादिनी अपने पुत्र के वास्ते सद्भावी आवश्यकता के आधार पर प्रतिवादी से धारा 12 (1) (एफ) म.प्र. स्थान नियंत्रण अधिनियम 1961 के तहत् निष्कासन पाने की अधिकारी है।
>
> 7. यह कि, प्रतिवादी को इस बात का पूर्ण रूप से भली भांति ज्ञान है कि वादिनी के पुत्र सचिन के पास कोई नौकरी नहीं है तथा उसके द्वारा वादग्रस्त दुकान के पीछे स्थित दुकान/कमरा जो कि अत्यंत छोटा होकर व्यवसाय हेतु व्यवसायिक स्थान नहीं है। उसके द्वारा भविष्य में किये जाने वाले व्यापार जेम्स एण्ड ज्वेलरी के शोरूम के लिए उपर्युक्त जगह नहीं है तथा वादिनी के पुत्र हेतु विवादित दुकान निर्विवाद रूप से सद्भावना पूर्वक आवश्यकता है साथ ही प्रतिवादी द्वारा समय–समय पर वादिनी एवं उसके पुत्र को वादग्रस्त भाग को समयावधि पश्चात खाली करने का आश्वासन भी प्रतिवादी ने इस वादिनी को दिया गया था किन्तु जान बूझकर अपने आश्वासन का पालन नहीं किया है व अकारण वादी की वास्तविक सद्भागी आवश्यकता को जानने के उपरांत भी परेशान कर रहा है। इस तरह उपरोक्त कारण से वादिनी, प्रतिवादी से अपनी सद्भावना पूर्वक आवश्कता के आधार पर निष्कासन पाने की अधिकारिणी है।

11. Nothing more is required to be pleaded as to bonafide need. The evidence led by the plaintiff is not in variance but in consonance with the pleadings. Both the courts therefore are well within their right in construing that the plaintiff has proved that the premises is required for bonafide need and that there is no alternative premises available. There being no perversity with findings, no interference is caused.

12. In view whereof second appeal fails and is dismissed at admission stage. Costs as incurred.

Appeal dismissed.

I.L.R. [2013] M.P., 1147
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr.A. No. 985/2001 (Jabalpur) decided on 14 February, 2013

MOHAMMAD HUSSAIN ANSARI ...Appellant
Vs.
STATE OF M.P. ...Respondent

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. (Paras 21 to 23)**

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।

Cases referred :

(1996) 10 SCC 193, (2006) 10 SCC 681, (2003) 11 SCC 271, (1944) AC 315.

Raman Patel with *Sangeeta Sharma,* for the appellant.
Umesh Pandey, Dy. G.A. with *Amit Pandey,* P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by :
VIMLA JAIN, J. :- Appellant Mohammad Hussain Ansari preferred this appeal under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment dated 16.5.2001 passed by Additional Sessions Judge, Rewa in Sessions Trial No.147/2000, whereby he has been convicted and sentenced as under:-

Provision	Sentence
Under Section 302 of IPC	Imprisonment for life.
Under Section 201 of IPC	Rigorous imprisonment for three years.

2. Brief facts of the case are that Rehana Bano (since deceased) was the wife of accused Mohammad Hussain.Ansari. On the basis of telephonic information, PW.8 Mustaque Ahmad, brother of deceased, went to the house of the accused and found her sister Rehana Bano to be dead. He gave information of the incident to Police Station Tyonthar (Ex.P/15). On the basis of the marg intimation, it was found that in the night of 28.5.2000, accused had committed murder of his wife Rehana Bano by overlaying pillow on her mouth. As a result of the incident, gold nose-pin (PHULIA) had come out from her nose. The accused had buried the pillow and gold nose-pin (PHULIA) in his house but the same were recovered later on. It was alleged that the accused had illicit relationship with Asmat Anjum, who was sister-in-law of his younger brother and on being objected to such illicit relationship by the deceased, the accused had committed her murder. On the basis of these facts, the accused was charged under Section 302 of IPC for committing murder of his wife and was also charged under Section 201 of IPC for causing disappearance of evidence used in commission of the offence i.e. pillow and gold nose-pin (PHULIA). On the basis of the information given by PW.8 Mustaque Ahmad at Police Station Tyonthar (Ex.P/15), the police party reached the spot and investigation commenced. Spot map was prepared (Ex.P/7). Panchnama of the dead body was prepared (Ex.P/9). The dead body of Rehana Bano was sent for postmortem. Statements of witnesses were recorded. On the basis of the statement on memorandum (Ex.P/2), pillow and gold nose-pin (PHULIA) used in commission of the offence were recovered vide seizure memo Ex.P/3 at the instance of accused and he was arrested.

3. After investigation, charge sheet was filed under Sections 302 and 201 of IPC against the appellant before the Court of Judicial Magistrate First Class, Rewa, who committed the case to the Court of Sessions and ultimately it was transferred to the learned Additional Sessions Judge, Rewa. On being charged with the offence under Sections 302 and 201 of IPC, the appellant/ accused pleaded not guilty, complete innocence and claimed to be tried with the prayer that he had been falsely implicated in the case. On examination under Section 313 of Cr.P.C, he stated that when the incident occurred, he was not at his home. He was sewing clothes in his shop.

4. In order to bring home the charges against the appellant, the prosecution examined fifteen witnesses and proved the documents (Ex.P/1 to P/17). The appellant did not examine any witness in support of his defence.

5. The learned Court below, after scanning the evidence found the charges proved against the appellant, convicted and sentenced him as stated hereinabove.

6. This appeal has been filed by the appellant assailing the said judgment of conviction and order of sentence.

7. Learned counsel for the appellant submitted that the Court below has committed an error of law in holding the appellant/accused guilty for the offence under Sections 302 and 201 of IPC. He also submits that the learned trial Court had erred in relying on the testimony of child witness Shahnaj (PW.14). He has prayed that appeal of appellant/accused deserves to be allowed by setting aside the finding of conviction and order of sentence.

8. On the other hand, learned counsel for the State has supported the finding of the trial Court.

9. We have considered the arguments advanced by learned counsel for the parties and perused the record.

10. PW.10 Dr.Anand Mahendra conducted the postmortem (Ex.P/12) of deceased Rehana Bano and opined that she died due to asphyxia within one hour after taking her night meal and within twelve hours from autopsy. Her death was homicidal in nature.

11. There is no challenge from any side to the fact that death of deceased Rehana Bano was homicidal in nature. According to PW.10 Dr.Anand Mahendra, she died as a result of asphyxia. Therefore, it is apparent that injury caused on her person was fatal in nature and sufficient to cause her death in due course. Looking to the nature of injuries, death of Rehana Bano appears to be homicidal.

12. PW.14 Shahnaj, a minor girl of 7 years of age and daughter of the accused and deceased, has stated in her deposition that the appellant/accused is her father. His name is Mohammad Hussain. Her mother's name is Rehana and she had been expired. Shahnaj further stated that she had one brother, who was younger to her. She used to call her brother 'LALA'. She stated that on seeing her mother, she shrieked but her mother did not wake up. At that time, her father was present but later on he went away somewhere. Her mother was sleeping on a cot (KHATIA). On the night of the incident, she and her brother Lala had also slept on the cot (KHATIA) alongwith her mother. She

tried to wake up her mother but as she was not responding, she had gone to the house of Bermain Aunty to call her and she came there. When she was asked to identify witness Kusum, she stated that yes it is Bermain Aunty, who had come to her house and Bermain Aunty had seen her mother and after the incident, her mother did not speak to her. In cross-examination of PW.14 Shahnaj, she stated that her father had a shop and he used to go there. It is true that on the day when her brother Lala was crying and her mother did not wake up, her father had gone to his shop after taking meals. She was sleeping alongwith her mother and brother Lala. On hearing the scream of Lala, when her mother did not wake up, she opened the door and alongwith her brother Lala went to the house of Bermain Aunty. She did not know whether her mother was dead or alive but she could not meet her mother from that day. She also stated that her father never beat her mother. He used to give food and clothes to her mother. Her mother used to take some medicines but she did not know the reason of taking such medicines.

13. Rabbulnisha (PW.1) and Kusumbai (PW.2) had corroborated the statement of Shahnaj (PW.14). Kusumbai (PW.2) stated that Shahnaj (PW.14) had come with her brother aged two months. Her brother was crying. Shahnaj told her that her mother did not wake up. Then she had called her neighbour Rabbulnisha (PW.1) and went to appellant's house with torch. She saw that Rehana was dead. They also stated that appellant was present at 10 O'clock in the night but when they reached his home, he was not present there.

14. The Apex Court in *C.Chenga Reddy and others Vs. State of A.P* (1996) 10 SCC 193, observed thus :-

> "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.....".

15. In the case of *Trimukh Maroti Kirkan Versus State of Maharashtra* (2006) 10 CCC 681, the Apex Court took the view that where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime, they

were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram vs State of H.P*, it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra,* the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.

16. In the case of *State of Punjab Vs. Karnail Singh* reported in (2003) 11 SCC 271, the Apex Court quoted with approval from *Stirland Vs. Director of Public Prosecutions* [(1944) AC 315)] thus:-

> "If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty main does not escape. Both are public duties.

17. There is no dispute that deceased was the wife of the appellant/accused and she had been living with her minor daughter Shahnaj (PW.14) and son. Dr.Anand Mahendra (PW.10) stated that he found contents of Khichdi about 200 grams in her abdomen. It appears that she took food before sometime of the incident. Shahnaj (PW.14) also stated in her cross-examination that her father had taken food and he had gone to shop.

18. The contention of learned counsel for the appellant is that statement of Shahnaj (PW.14) shows that when her father (appellant) had gone to his shop, they had locked the door from inside and slept. When her younger brother had cried, she opened the door and went out. Learned counsel submits that it shows that the appellant had not come to home before the incident.

19. We do not find any substance in the submission made by the learned counsel for the appellant because there was no evidence on record that the appellant remained whole night in the shop.

20. Shahnaj (PW.14) is a child witness aged 7 years. In her cross-examination, she stated that "मैं और मेरी मम्मी तथा लाला दरवाजा बंद करके सो गए थे।" It does not mean that all the three persons locked the door including two months' old child.

21. The medical evidence disclosed that the deceased died of strangulation during late night hours or early morning. The evidence showed that the accused and his wife were seen together in the house at night and they took food. There cannot be any hesitation to hold and to come to the conclusion that it was the accused (husband), who was the perpetrator of the crime.

22. The appellant in his statement under Section 313 Cr.P.C did not offer any plausible explanation as to how his wife received injury, which was found on her body. Recovery of pillow and gold nose-pin of deceased was made at the pointing out of the appellant. In the absence of any explanation by the appellant about the circumstances in which his wife died coupled with the fact that no-one else had entry in the house where appellant was living with his wife and children, the circumstances enumerated above unerringly point to the guilt of the accused/appellant, which are inconsistent with his innocence.

23. As discussed above, in our opinion there is no merit in this appeal. The judgment of the trial Court cannot be faulted. Therefore, the appeal fails and the conviction and sentence awarded to appellant is hereby confirmed.

Appeal is dismissed.

Appeal dismissed.

I.L.R. [2013] M.P.,1153
APPELLATE CRIMINAL

Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain

Cr.A. No. 1647/2004 (Jabalpur) decided on 26 February, 2013

SURAJ CHANDRAWANSHI & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

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. (Paras 29-34)**

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।

Cases referred :

(1996) 10 SCC 193, (2006) 10 SCC 681, (2003) 11 SCC 271, 1944 AC 315, AIR 2011 SC 1017, AIR 1994 SC 2420, AIR 2008 SC 533, AIR 2009 SC 712, 2012 CR.L.J. 1214, AIR 2012 SC 2123, AIR 2012 SC 2248.

Madan Singh, for the appellants.
Umesh Pandey, G.A. 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 6.8.2004 passed by 1st Additional Sessions Judge, Shahdol in Sessions Trial No.43/2004, whereby each of the appellants has been convicted and sentenced as under:-

Provision	Sentence
Under Section 302 of IPC	Imprisonment for life and fine of Rs.1000/-, in default of payment of fine, rigorous imprisonment for one year each.

2. It is not in dispute that Chandrawati (since deceased) was married to accused/appellant No.1 Suraj. Accused/appellant No.2 Kedarnath is her father-in-law whereas Balakdas (PW.4), Shankarlal (PW.5) and Amardas (PW.6) are her brothers.

3. Brief facts of the case are that on 18.6.2003 at about 6:30 pm, accused Kedarnath had given an oral information at Police Station Amarkantak, District Shahdol that he is a resident of Village Karondi of Police Station Rajendragram. His son Suraj Chandrawanshi (accused/appellant No.1) was serving in Kalyan Ashram and was living in Van Udyan, Amarkantak alongwith his wife Chandrawati. As he was unwell, he had come to the house of his son Suraj at Amarkantak in connection with his treatment before 10–12 days. His daughter-in-law Chandrawati, wife of accused Suraj, was also suffering with fever for about 3–4 days and her treatment was going on at Kalyan Ashram, Amarkantak. On 10.6.2002, his son Suraj had gone to the hospital to perform his duty whereas her daughter-in-law Chandrawati was at home. He (Kedarnath) was feeding his younger grand son in an other room whereas Chandrawati was sleeping next to the room of his daughter and son-inlaw. He had seen Chandrawati sleeping at about 11 am and after about one hour, when he again saw Chandrawati, she was not there. When accused Suraj returned from the duty at12 pm, he also tried to search his wife. In the evening at about 4:30 pm, he went to the well in connection with her search, put the KANTA with rope in the well and pulled out the dead body of the deceased from the well. On the basis of the information, Head Constable Mangal Prasad (PW.3) had registered Marg Intimation (Ex.P/4) and the investigation commenced by Station House Officer Ashok Kumar Mishra (PW.10). He immediately alongwith staff proceeded towards the spot. He had found dead body in PARCHHI of room of appellants. He prepared Inquest Panchnama (Ex.P/6) in presence of the witnesses. As the death of Chandrawati was suspicious, her dead body was sent for postmortem to Primary Health Centre, Amarkantak. Spot map (Ex.P/11) was prepared. Postmortem of dead body was performed vide Ex.P/1 by Dr.S.K.Singh (PW.1), who opined that the deceased died due to asphyxia resulting from compression of chest and

blockage of air passage. During investigation, it had come in the evidence that Suraj and Kedarnath (husband and father-in-law of deceased) used to make demand of Motorcycle and compensation amount received on her father's death from Chandrawati and when she could not fulfill their demand, they committed her murder and with intention to disappear the evidence threw her dead body into a well of Shaskiya Udyan. Crime under Sections 302, 201/34 of IPC and Section 3/4 of Dowry Prohibition Act was registered against the accused persons and first information report Ex.P/13 was reduced in writing. Statements of witnesses were recorded. Copy of FIR was sent to the Judicial Magistrate First Class, Rajendragram, District Anuppur. The accused persons were arrested.

4. After investigation, charge sheet was filed under Sections 302, 201, 304-B read with Section 34 of IPC and Section 3/4 of Dowry Prohibition Act against the appellants before the Court of Judicial Magistrate First Class, Rajendragram, District Anuppur, who committed the case to the Court of District and Sessions Judge, Shahdol and ultimately it was transferred to the Court of 1st Additonal Sessions Judge, Shahdol for trial.

5. On being charged with the offence under Sections 498-A,306, 304-B, 302 of IPC and Section 3/4 of Dowry Prohibition Act, the appellant/accused pleaded not guilty, complete innocence and claimed to be tried with the prayer that they had been falsely implicated in the case.

6. In order to bring home the charges against the appellants, the prosecution examined twelve witnesses and proved the documents (Ex.P/1 to P/17) on record. The appellants did not examine any witness in support of their defence.

7. The learned Court below, after scanning the evidence found the charges proved against the appellants under Section 302 of IPC and convicted and sentenced them as hereinabove stated. However, the Court below did not find the charges proved against the appellants under Sections 498-A, 306, 304-B of IPC and Section 3/4 of Dowry Prohibition Act and acquitted them from the aforesaid charges.

8. This appeal has been filed by the appellants assailing the said judgment of conviction and order of sentence.

9. Learned counsel for the appellant submits that the Court below has committed an error of law in holding the appellants/accused guilty for the

offence under Section 302 of IPC. He has prayed that appeal of accused/ appellants deserves to be allowed by setting aside the finding of conviction and order of sentence.

10. On the other hand, learned Government Advocate for the State has supported the finding of the trial Court.

11. We have considered the arguments advanced by learned counsel for the parties and perused the record.

12. PW.1 Dr.S.K.Singh conducted the postmortem of deceased Chandrawati vide Ex.P/1 and found following injuries on her person:-

EXTERNAL INJURIES

"Rigor mortis was gone. Face, neck and chest were bluish in colour. Dependant part back of the body was slight bluish in colour and echymosed. Eyes were closed. Both eyes congested and hemorrhage blood present over right eye. Antemortem abrasion present over supra orbital region 1 cm X ½ cm. Another antemortem abrasion present over infra orbital left side region 1 cm X 1 cm with clotted blood. There was P.M abrasion over right side zygomatic region about 1cm X 1 cm. There was clotted blood present over both nasal cavity and over upper lip. Both lips were slight bluish in colour. Mouth was half opened and upper teeth seen. Tongue was bitten. Anterior 1/3 lateral margin of tongue and kept inside oral cavity. Slight smelling present. Slight brownish colour abrasion present over iliac crest right side 5 cm X 3 cm.

No other external injury seen over body. Fingers of both hands were flexed, congested at carpal joint. Nails were caganosed of both hands and rest NAD.

INTERNAL INJURIES

Congested dark colour blood present over lower part of trachea. Right lung pale and congested. Left lung pale and congested. Small amount of blood present over right and left side chamber of the heart.

Opinion:- The cause of death asphyxia resulting from

compression of chest and blockage of air passage. It is homicidal in nature. Period between death and postmortem examination 24–48 hours."

13. There is no challenge from any side to the fact that death of deceased Chandrawati was homicidal in nature. PW.1 Dr.S.K.Singh found injuries on her person and she died due to asphyxia resulting from compression of chest and blockage of air passage. Therefore, it is apparent that injuries caused on her person were fatal in nature and sufficient to cause her death in due course. Therefore, looking to the nature of injuries, death of deceased Chandrawati appears to be homicidal in nature.

14. The prosecution version essentially rested on circumstances. The trial Court found that the circumstances were sufficient to hold the accused/ appellants guilty.

15. The Apex Court in *C.Chenga Reddy and others Vs. State of A.P* (1996) 10 SCC 193, observed thus :-

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.....".

16. In the case of *Trimukh Maroti Kirkan Versus State of Maharashtra* (2006) 10 SCC 681, the Apex Court took the view that where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime, they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram vs State of H.P*, it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence

of any cogent explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra*, the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.

17. In the case of State of *Punjab Vs. Karnail Singh* reported in (2003) 11 SCC 271, the Apex Court quoted with approval from *Stirland Vs. Director of Public Prosecutions* [(1944) AC 315)] thus:-

> "If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty main does not escape. Both are public duties."

18. There is no dispute that deceased was the wife of appellant No.1 Suraj Chandrawanshi and she had been living with him. It is also not disputed that appellant No.2 Kedarnath is father-in-law of deceased and he had been there at the time of incident. On his information, Marg Intimation (Ex.P/4) had been registered by Head Constable Mangal Prasad (PW.3).

19. Learned counsel for the appellants submits that the death of deceased was accidental. He submits that there is possibility that when deceased fell down in the well, her Sari and Petticoat would have wrapped around her mouth, nose and ears. In such a situation, she died as a result of asphyxia and thus water could not be found in her abdomen.

20. We are not impressed by the argument advanced by learned counsel for the appellants because in this case there is nothing on record to show that the dead body of deceased was pulled out from the well. Even appellant

No.2 Kedarnath in his statement under Section 313 Cr.P.C denied this fact that he had pulled out the dead body of deceased. PW.12 S.C.Raikwar, SDOP had proved Inquest Panchnama (Ex.P/6) where it is mentioned that "मृतिका के रहायली कमरे की परछी में शव रखा गया था।" It is only a conjecture that the deceased died because her Sari and Petticoat were wrapped over her mouth, nose and ears in the well.

21. Appellant No.2 Kedarnath had informed the Police Station, Amarkantak that "घर में मैं व पुतऊ चंद्रवती थी मैं ऊपर कमरे में छोटे नाती को लेकर खाना खिला रहा था चंद्रवती बेटी दामाद वाले क्वाटर के बाहर वाले कमरा में सोई थी 11 बजे तक उसे वही पड़े देखा था करीब एक घंटे बाद अपने लड़के के कमरे से बाहर निकलकर देखा तो पुतऊ चंद्रवती जहां सोई थी वहां नहीं थी तब इधर उधर तलाश किया नहीं मिली लडका सूरज भी दोपहर 12 बजे ड्यूटी से वापस आया उसे बताया वह भी तलाश कराया शाम 4.30 बजे मैं क्वाटर से थोड़ी दूर पर बने कुँआ में जाकर रस्सी में कांटा फंसाकर पानी में अंदर कांटा घुमाया तो चंद्रवती की लाश पानी के अंदर से कांटा में फंसकर ऊपर आ गई है। गार्डन में काम करने वाले तीन लोग देखे हैं।" There is no evidence where they were searching the deceased. There is also nothing on record to show that appellant No.2 Kedarnath knew that the deceased was in the well. This conduct of appellants and the cumulative effect of the circumstances, in our opinion, indicate the guilt of the appellants.

22. Next submission of learned counsel for the appellants is that in the case based on circumstantial evidence, motive for committing the crime assumes great importance but in the present case, prosecution did not prove motive for committing the crime. Learned counsel for the appellants relied upon the judgment in the case of *State Through CBI Vs. Mahender Singh Dahiya* {AIR 2011 SC 1017}, wherein Their Lordships were pleased to observe thus:-

> "Where the case of the prosecution has been proved beyond reasonable doubt on the basis of the material produced before the Court, the motive loses its significance. But in cases based on circumstantial evidence, motive for committing the crime assumes great importance. In such circumstances, absence of motive would put the Court on its guard to scrutinize the evidence very closely to ensure that suspicion, emotion or conjecture do not take the place of proof."

23. Learned counsel for the appellants has further relied upon the judgment in the case of *Suresh Chandra Bahri Vs. State of Bihar* {AIR 1994 SC 2420}, wherein Their Lordships were pleased to observe thus:-

"Sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the Court that the accused was guilty for the offence charged with. But the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime."

24. Coming to the contention relating to the motive; Balakdas (PW.4), who is a brother of deceased Chandrawati, in paragraph 2 of his examination-in-chief, has stated that his father had expired in an accident as a result of fall at the time when he was working in a Dam and Rs.30,000–35000 was awarded by the Labour Court by way of compensation for his death. In paragraph 3 of his statement, he deposed that his sister Chandrawati was married 3-4 years' prior to the death of his father. He used to go outside and whenever he used to return home, he always got a news that in-laws of Chandrawati were not allowing her to come to her father's house. He did not know as to why her in-laws were not allowing her to come to her father's house. He further stated that 2–3 marriages have been performed in his uncle's house and invitations have been sent to her in-laws but the accused persons did not send Chandrawati.

25. Shankarlal (PW.5), who is a cousin of deceased Chandrawati, in paragraph 1 of his examination-in-chief, has stated that the compensation, which was awarded due to the death of the father of Chandrawati has been deposited in the name of Chandrawati and her brother. Chandrawati had told him that her husband Suraj always asked to withdraw the money of compensation deposited in her name in the bank but she did not agree to give it to him.

26. Amardas (PW.6), who is also a brother of deceased Chandrawati

corroborated the statement of Shankarlal (PW.5) and stated that after the death of his father, his mother had received an amount of Rs.35,000/-. His mother had deposited Rs.10,000/- in his favour as well as Rs.10,000/- in favour of Chandrawati in a fixed deposit in the bank. In paragraph 2 of the examination-in-chief, he stated that his sister used to tell him that her husband was insisting her to deposit money in his favour. He further stated that when accused Suraj had come to know about the money deposited in her favour, he became greedy and started demanding money.

27. The above-said statements of witnesses show that appellant No.1 Suraj Chandrawanshi wanted to withdraw the money of compensation deposited by the deceased but deceased did not want to give it to him. This was the motive of the incident proved by the prosecution.

28. It is true that motive is important in case of circumstantial evidence but it does not mean that in all cases of circumstantial evidence if the prosecution has been unable to satisfactorily prove the motive, its case must fail. It all depends on the facts and circumstances of the case. As is said correctly the men may lie but circumstances do not.

29. The medical evidence disclosed that on the body of deceased, antemortem abrasion was present over supra orbital region 1 cm X ½ cm and another antemortem abrasion was present over infra orbital left side region 1 cm X 1 cm with clotted blood. The cause of death was asphyxia resulting from compression of chest and blockage of air passage. It was homicidal in nature. Period between death and postmortem examination was 24–48 hours.

30. The appellants in their statements under Section 313 Cr.P.C did not offer any plausible explanation as to how deceased received injury, which was found on her body. In the absence of any explanation by the appellants about the circumstances in which wife of appellant No. 1 Suraj Chandrawanshi died coupled with the fact that appellants were living with the deceased, the circumstances enumerated above are inconsistent with their innocence and unerringly point to the guilt of the appellants.

31. For the above-said reasons, the contention advanced on behalf of the appellants cannot be accepted.

32. Learned counsel for the appellants has also relied upon decisions of the Supreme Court in the cases of *Kapildeo Mandal and others Vs. State of Bihar* {AIR 2008 SC 533}, *Ramachami Vs. State Rep. By State*

Prosecutor {AIR 2009 SC 712}, *State of Rajasthan Vs. Chhote Lal and others* {2012 CRI.L.J 1214}, *State of Haryana Vs. Shakuntla and others* {AIR 2012 SC 2123} and *Bishnupada Sarkar and another Vs. State of West Bengal* {AIR 2012 SC 2248}. The facts and circumstances of both these precedents are clearly distinguishable from those of this case in hand, therefore, both these authorities do not help the appellants.

33. As discussed above, the judgment of the trial Court is based on correct appreciation of the evidence placed on record. The chain of circumstances is clearly proved by the prosecution, therefore, this appeal fails and conviction and sentence awarded to the appellants by the Court below are hereby confirmed.

34. This appeal is dismissed being without merit. The order of suspension of sentence of appellant No. 2 Kedarnath by granting ad-interim bail on 22.3.2005 during pendency of this criminal appeal stands vacated. Appellant No. 2 Kedarnath is directed to surrender before the trial Court for undergoing remaining part of the jail sentence.

Appeal is dismissed.

Appeal dismissed.

I.L.R. [2013] M.P., 1162
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Smt. Justice Vimla Jain
Cr.A. No. 1781/2002 (Jabalpur) decided on 19 March, 2013

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

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. (Paras 19 & 20)**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – परिस्थितिजन्य साक्ष्य – अंतिम बार एक साथ देखा जाना – साक्षियों के कथन में तात्विक लोप एवं विरोधाभाष – 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।

Cases referred :

(1996) 10 SCC 193, AIR 1991 SC 1388.

Durgesh Gupta, for the appellant.
Umesh Pandey, G.A. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **VIMLA JAIN, J. :-** Appellant Karan preferred this appeal under Section 374(2) of the Code of Criminal Procedure being aggrieved by the judgment dated 8.6.2002 passed by 2nd Additional Sessions Judge, Betul in Sessions Trial No.31/02, whereby he had been convicted and sentenced with the direction to run all the sentences concurrently as under:-

Provision	Sentence
Under Section 302 IPC	Imprisonment for life with fine of Rs.500/- and in default of payment of fine, rigorous imprisonment for three months.
Under Section 201 IPC	Rigorous imprisonment for two years with fine of Rs.100/- and in default of payment of fine, rigorous imprisonment for one month.
Under Section 404 IPC	Rigorous imprisonment for one year with fine of Rs.100/- and in default of payment of fine, rigorous imprisonment for one month.

2. Allegation against appellant/accused Karan is that on 27.11.2001 at about 6 pm, he intentionally committed murder of Kalabai, wife of Ashok

Dubey in the field of Ganesh Chawla, caused disappearance of evidence by hanging her dead body on a tree and dishonestly misappropriated her property i.e. can of kerosene oil and Rs.500/-, which were in her possession at the time of her death.

3. Brief facts of the case are that complainant Kunjbihari Nandulkar submitted a marg intimation on 28.11.2001 at Police Chowki Ghodadongri that yesterday (27.11.2001) in the evening, his sister Kalabai was returning from market alongwith his son Durgesh. On the way, she saw a man carrying her can and she started going towards him. When she did not turn up in the night, a search was made and her dead body was found hanging on a tree with her own SARI, tied around her neck.

4. On the basis of the report, Sub-Inspector S.N.Pandey (PW.8) registered the Marg Intimation (Ex.P/1). The police party reached the spot and started the investigation. After due notice, witnesses were called and Inquest Panchnama (Ex.P/3) and Spot Map (Ex.P/4) were prepared in their presence. Bloodstained earth, plain earth, pieces of bangles, earring, ladies Kajiya, happal, purse were recovered from the spot and their Seizure Memo (Ex.P/14) was prepared. The dead body of Kalabai was sent for postmortem wherein it was opined that she died as a result of asphyxia due to strangulation. Statements of witnesses were recorded. Crime No. 442/2001 for the offences under Sections 302, 201 & 404 of IPC was registered against accused Karan. He was arrested on 1.12.2001. On the basis of memorandum of accused, pair of chappal, Rs.400/-, GAMCHHA, blue can with 17/18 litres of kerosene were recovered and seizure memo was prepared. Seized articles were sent to Forensic Science Laboratory, Gwalior.

5. After investigation, charge sheet was filed under Sections 302, 201 and 404 of IPC against accused Karan before the Court of Chief Judicial Magistrate, Betul, who committed the case to the Court of Sessions and ultimately it was transferred to the Court of 2nd Additional Sessions Judge, Betul for trial. On being charged with the offences under the said sections, the accused/appellant pleaded not guilty, complete innocence and claimed to be tried with the prayer that he had been falsely implicated in the case.

6. In order to bring home the charges against the appellant, the prosecution examined twelve witnesses and proved twenty five documents (Ex.P/1 to P/25). The appellant did not examine any witness in support of his defence.

7. The learned Court below after scanning the evidence found the charges proved against appellant Karan. Therefore, it convicted and sentenced him as stated hereinabove.

8. This appeal has been filed by the appellant assailing the said judgment of conviction and order of sentence.

9. Learned counsel for the appellant submitted that the Court below has committed an error of law in holding the appellant/accused guilty for the offences under Sections 302, 201 and 404 of IPC. He also submitted that the parameters laid down by the Apex Court in deciding such a case based on circumstantial evidence had not been applied. He has prayed that the appeal deserves to be allowed by setting aside the finding of conviction and order of sentence.

10. On the other hand, learned counsel for the State has supported the finding of the trial Court.

11. We have considered the arguments advanced by learned counsel for the parties and perused the record.

12. The prosecution version essentially rested on circumstances. The trial Court found that the circumstances were sufficient to hold the accused/appellant guilty.

13. The Apex Court in *C.Chenga Reddy and others Vs. State of A.P* (1996) 10 SCC 193, observed thus :-

> "In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.....".

14. PW.12 Dr.Mohit Tawar conducted the postmortem (Ex.P/23) of deceased Kalabai and found following injuries on her dead body:-

> "(1) Abrasion over right breast, interrupted semicircular 6 cm X 1 cm, individual marks 1X1 cm.

(2) 3 cm below (1) is similar semicircular area of redness 4X2 cm..

(3) Single abrasion over left parietal region 1X1 cm.

(4) Abrasions over right shoulder anteriorly 1X0.5 cm and 1X1 cm, 2 cm apart.

(5) Abrasion over left shoulder 1X1 cm.

(6) Multiple abrasions over right elbow.

(7) Multiple abrasions over left elbow.

(8) Multiple linear abrasions of varying sizes over back, both scapular region, B/L paraspinal region, lumbar region in midline.

(9) Abrasions over limbosacral region 8X6 cm in midline with paraspinal region.

(10) Abrasions over medial aspect of right knee 1X1 cm.

(11) Abrasion over right foot dorsally 1X1 cm.

(12) Superficial lacerated wound 1X0.25 cm at the base of left fist metacarpal laterally.

Ligature marks:- Two marks parallel to each other observed: (I) In upper part of neck extending from right mastoid process obliquely downwards and passing above the thyroid cartilage in midline then running obliquely upwards towards the left mastoid process as a deep groove 2.5 cm wide with multiple abrasions at side of right neck and multiple vesicular eruptions on left side of neck below the ligature mark. (II) About 2.5 cm below (I) mark, encircling whole neck darker on sides and falling over thyroid region 3.5 cm wide anteriorly running obliquely upwards posteriorly, narrowing to 2 cm width.

Opinion:- Mode of death is asphyxia due to strangulation. Final opinion about rape can be made only after the examination of slide. No signs of rape on postmortem examination. Time passed since death is within 24 hours at the commencement of postmortem examination.

15. According to Dr.Mohit Tawar (PW.12), the cause of her death was asphyxia due to strangulation. Therefore, it is apparent that injuries caused on her person were fatal in nature and sufficient to cause her death in due course. Looking to the nature of injuries, death of Kalabai appears to be homicidal.

16. In the matter of *Jaharlal Das Vs State of Orissa* (AIR 1991 SC 1388), the Hon'ble Supreme Court observed as under:-

> "In cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the Courts below in coming to the conclusion that the accused alone has committed the offence."
>
> In view of the aforesaid principle, we are examining the case at hand.

17. Durgesh (PW.3), a minor of 12 years of age and son of deceased Kalabai, stated that on 27.11.2001, he had gone to Ghodadongri Bazar alongwith his mother and two sisters. He was returning home alongwith his mother and elder sister Kalpana after bazar. On the way, his mother started talking with his maternal uncle Ashok. His elder sister Kalpana proceeded towards the home and he remained with his mother. On the way, accused Karan met them. Accused had a can of kerosene oil. His mother questioned the accused that where was he carrying the can? The accused answered that such can did not belong to her and he had brought this can from the house of Pinky. Accused also told her to come to his home, he would show more such cans in his house. This witness also stated that thereafter his mother went to the house of accused to find out the can. He further stated that he had gone to his home to search the can of kerosene oil. After search, his sister Kalpana replied that can was not at home. However, this witness Durgesh (PW.3) did not tell her sister Kalpana (PW.2) that his mother went to the house of accused Karan to see the can.

18. Kalpana (PW.2), daughter of deceased Kalabai, stated that on 27.11.2001 at about 2 pm, she had gone to Ghodadongri Bazar alongwith her mother and brother. Thereafter, they had also gone to the house of her maternal uncle Kunjbihari. When they were returning to their home, they met Ashok (maternal uncle) and he started conversation with her mother Kalabai and she (Kalpana) had returned to her home. After sometime, her brother Durgesh came to home and enquired her about the can of kerosene oil. She made a search but could not find the can. Durgesh returned to join her mother. Durgesh returned back to home and told that he could not find his mother. Her mother did not return to the home. This witness stated that her mother had sent her brother Durgesh to home to find out that whether can of kerosene oil was at home or not.

19. Kunjbihari Nandulkar (PW.1), younger brother of deceased Kalabai, stated in Paragraph 2 of his deposition that on 27.11.2001, Kalabai had gone to Ghodadongri Bazar alongwith her son Durgesh and daughter Kalpana. In the evening at 6 pm, when they were returning from market, his sister Kalabai and nephew Durgesh stopped on the way for talking to somebody and his niece Kalpana reached her home alongwith some other lady of her village. Niece Sunaina had come and told him that somebody had stolen kerosene can of deceased and she followed him to get back her can. He also went to see the deceased but he could not find her. On return, he met his nephew. He (Kunjbihari) returned to his home thinking that deceased would return after sometime. In paragraph 3 of his deposition, this witness stated that in the morning of the next day, when he was walking near Behadidhana, he saw dead body of Kalabai hanging on a Mango Tree and her belongings–bag, pieces of bangles, Chappal–were lying on the spot. He immediately rushed towards his home and narrated the incident to his cousin Murli and Ashok. He also narrated the incident to Police Chowki Ghodadongri. In paragraph 7 of his deposition, this witness stated that he knew accused Karan before the incident. His nephew Durgesh told him that accused Karan had carried can of kerosene oil and deceased had followed him. But he did not report in the Marg Intimation (Ex.P/1) that accused/appellant Karan had carried can of kerosene oil and deceased had followed him. He only reported that "मेरी बहन कलाबाई कल शाम को बाजार करके अपने लड़के दुर्गेश के साथ लौट रही थी कि रास्ते में एक आदमी केन लेकर जाते मिला उसके पास केन देखकर वह बोली कि केन हमारा है कहाँ ले जा रहे हो और उसके पीछे पीछे चल दिया।". Therefore, his statement could not be corroborated from Marg Intimation (Ex.P/1).

20. After a close and careful analysis of the evidence of above-said witness, the circumstance that was relied on by prosecution namely that accused and deceased were last seen together was not proved beyond doubt. No doubt the offence is a shocking one but the gravity of the offence needs legal proof. Invariably in such cases, a person last seen with the victim, unless otherwise there are circumstances prima facie exonerating him, would be the prime suspect but in the ultimate judicial adjudication suspicion, however strong, can not be allowed to take the place of proof.

21. Keeping in view the said discussion, there is no satisfactory proof of the guilt. Therefore, we are of the opinion that it would not be safe to uphold the judgment of conviction and sentence passed against the appellant. We have no other option but to give the benefit of doubt to the appellant and we are constrained to do so in this case. Accordingly, the appeal is allowed. The conviction and sentence of appellant/accused are set aside and he shall be set at liberty forthwith if not required in any other case.

Appeal is allowed.

Appeal allowed.

I.L.R. [2013] M.P., 1169
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice D.K. Paliwal
Cr. A. No. 1604/2003 (Jabalpur) decided on 15 April, 2013

ROOP SINGH ...Appellant
Vs.
STATE OF M.P. ...Respondent

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.** **(Para 22)**

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 रूप से मृत्यु कारित हो सकती थी – अपीलार्थी धारा 304 भाग–I के अंतर्गत दोषसिद्ध और 10 वर्ष के सश्रम कारावास से दंडित।

Saumen Mukherjee, for the appellant.
Amit Pandey, P.L. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by:
RAKESH SAKSENA, J. :- Appellant has filed this appeal against the judgment dated 9th April, 2002, passed by Sessions Judge, Bhopal in Sessions Trial No.359/2002, convicting him under Section 302 of the Indian Penal Code and sentencing him to imprisonment for life with fine of Rs.5000/-. In default of payment of fine, further rigorous imprisonment for one year.

2. In short, the prosecution case is that in the night of 2.8.2002 at about 8.00 O'clock, appellant came drunk in his hut. His wife Lalwati (deceased) remonstrated him and asked him to take food, but he abused her and asked her to leave his house. A quarrel ensued between them, in the course of which, appellant picked up a kerosene Kuppi from the house, poured kerosene on deceased and ignited her with a matchstick. When deceased caught fire and cried, he tried to extinguish her fire whereby he also suffered burn injuries on his hands. Hearing cries of deceased, neighbours viz. Sarojbai, Radhabai and Laxmibai reached there and extinguished her fire by pouring water on her. She informed them that appellant ignited her. Ladies of the neighbourhood carried her to Hamidiya Hospital in an auto rickshaw where Dr. Subhash Singh Tomar (PW-5) examined her injuries and referred her to burn ward for further examination and treatment. On receiving information from Hamidiya Hospital, ASI Uday Beer Singh Tomar (PW-6) of Police Station, Jahangirabad, Bhopal

requested Executive Magistrate, R.K. Singh Tomar (PW-11) to record dying declaration of deceased. Mr. Tomar (PW-11) went to Hamidiya Hospital and recorded dying declaration (Ex.P/6) of deceased after obtaining opinion of duty doctor Praveen Sharma (PW-12) about her fitness to make statement.

3. Investigating Officer, ASI Uday Beer Singh Tomar (PW-6), also enquired about the incident from the deceased and on her information recorded *Dehati Nalishi* (Ex.P/6). On the basis of *Dehati Nalishi,* a case under Section 307 of the Indian Penal Code was registered against the appellant. Assistant Sub Inspector Dinesh Onker (PW-8) also went to hospital and recorded case diary statement (Ex.P/10) of the deceased. In all the aforesaid statements, deceased stated that appellant set fire to her.

4. During treatment in Hamidiya Hospital, on 6.8.2002, deceased succumbed to her burn injuries. On receiving such information, police converted the offence against the appellant under Section 302 of the Indian Penal Code. Investigating officer went at the spot, seized kerosene can, match box etc. from the spot and arrested the appellant on 4.8.2002. After completion of the investigation, he filed charge sheet in the court of Judicial Magistrate First Class, Bhopal, who, in his turn, committed the case for trial.

5. On charge being framed, appellant abjured his guilt and pleaded false implication. Though no specific defence was taken by him in his statement under Section 313 Cr.P.C., but he led evidence by examining Jyoti Dixit (DW-1), Shivram (DW-2) and Sunil (DW-3) to prove that out of anger deceased made attempt to commit suicide and when he tried to save her, he also got burnt.

6. Upon trial and after appreciation of evidence learned Sessions Judge held the appellant guilty, convicted and sentenced him under Section 302 of the Indian Penal Code.

7. Aggrieved by the impugned judgment of conviction, appellant has preferred this appeal.

8. Shri Saumen Mukherjee, learned counsel for the appellant, submitted that learned Sessions Judge committed error of fact and law in

holding the appellant guilty on the basis of sole evidence of dying declaration. In the facts and circumstances of the case, the evidence of dying declaration was unnatural, improbable and unreliable. According to him, from the evidence of defence witnesses it was proved that deceased committed suicide. On the other hand, Shri Amit Pandey, learned Panel Lawyer for the State, submitted that the evidence of dying declaration recorded by the Executive Magistrate is reliable. It stood corroborated from the evidence of police officers who recorded *Dehati Nalishi* and the case diary statement of deceased. According to him, no interference was called for in the impugned judgment of conviction passed by the learned Sessions Judge.

9. We have heard the learned counsel for the parties and perused the impugned judgment and the evidence on record carefully.

10. It has not been disputed by the learned counsel for the appellant that deceased died of burn injuries. Radha Bai (PW-1), Saroj (PW-2), Laxmi (PW-3) and Jagdish Singh (PW-4) unequivocally stated that on hearing noise at the house of deceased, when they reached there, they saw deceased burning. They extinguished her fire and carried her to hospital. During treatment, she died. This fact was not even challenged by the appellant or by the defence witnesses viz. Jyoti Dixit (DW-1), Shivram (DW-2) and Sunil (DW-3). Head Constable Narendra Pratap Singh (PW-7) stated that he conducted inquest proceedings and drew inquest memorandum (Ex.P/4) of the dead body of deceased.

11. Apart from above, Dr. Geetarani Gupta (PW-10), who conducted postmortem examination of the body of deceased, deposed that on 6.8.2002 she found following injuries on the body of deceased:-

> "1. Marginal scalp hair, eyebrows , eyelashes, axillary hair, pubic hair singed.
>
> 2. Superficial infected burn present on face all over including neck.
>
> 3. Superficial infected burn present on chest and abdomen up to waist, while it is in patchy form at pubic region and upper antero lateral part of right thigh.

4. Superficial infected burn present on left upper limb extending from upper part of arm up to wrist and partial deglobing of hand present while on right upper limb it is in patchy form extending from upper part of arm up to wrist. Palm is healthy.

5. Superficial infected burn present on both lower limbs extending from upper part of thigh up to ankle region both aspects. On left lower limb dorsum of foot also burnt.

6. Superficial infected burn present on back laterally both sides while rest of the area is healthy. Both gluteal region is health.

OPINION:- Death of deceased was due to cardio respiratory failure as a result of burn and its complications. Duration of death is within 24 hours since postmortem examination.

(Hospitalized case).

Postmortem examination report (Ex.P/14) was written by Dr. V.K. Dhruv and signed by her and also by Dr. Dhruv."

From the above evidence, in our opinion, it has been amply established that the deceased died of burn injuries.

12. Next we have to see whether it was appellant who caused burn injuries to deceased, which resulted into her death.

13. The case mainly rested on the evidence of dying declaration (Ex.P/16) recorded by Executive Magistrate R.K. Singh Tomar (PW-11). Learned counsel for the appellant submitted that this dying declaration was not reliable since deceased could not have been in a position to speak. Naib Tahsildar R.K. Singh Tomar (PW-11) deposed that on the requisition made by Police Jahangirabad, he went to Hamidiya Hospital for recording dying declaration of Lalwati, wife of Roop Singh, who was admitted in burn ward. Before recording her dying declaration, he obtained opinion from RSO of the burn ward whether she was fit to make statement. When doctor gave certificate, he recorded the dying declaration (Ex. P/16). In the dying declaration, Lalwati told that "her husband came after

consuming liquor and quarreled with her. He also asked her to leave the house. He then poured kerosene on her from a Kuppi and set fire to her with a matchstick. She suffered burns at his hands". After recording the said statement, he again obtained opinion from the doctor who certified that Lalwati was fully conscious during the time her statement was recorded. It was deposed by PW-11 that during the time when he recorded the dying declaration, no person including any police person was present near the deceased. She was able to speak and put her thumb impression on the dying declaration.

14. The aforesaid dying declaration finds corroboration from the evidence of Dr. Praveen Sharma (PW-12), who was posted as RSO in Burn Ward of Hamidiya Hospital. According to Dr. Sharma, when Executive Magistrate sought his opinion, he examined Lalwati (deceased) and found that she was fit to give her statement. He endorsed the certificate on the dying declaration (Ex P/16). According to him, after the dying declaration was recorded, he again examined Lalwati and found that she was fully conscious while making statement.

15. On a critical examination of the evidence of Naib Tehsildar R.K. Singh Tomar (PW-11) and Dr. Praveen Sharma (PW-12), we find nothing to indicate that they recorded dying declaration (Ex.P/16) incorrectly or falsely or that the deceased was not in a position to make dying declaration. It is also important to note that the incident had occurred in the night of 2.8.2002 whereas the said dying declaration was recorded in the morning of 3.8.2002 and that the deceased died on 6.8.2002. These witnesses were public servants and were totally strangers to the appellant and the deceased. Therefore, there appeared no reason to doubt that they would have manoeuvred the dying declaration to make it incriminating against the appellant. In these circumstances, we are of the opinion that learned Sessions Judge committed no error in holding the dying declaration (Ex.P/16) reliable and trustworthy.

16. The dying declaration (Ex.P/16) stood further corroborated from *Dehati Nalishi* (Ex.P/6) recorded by the Investigating Officer Uday Beer Singh Tomar (PW-6). According to him, on 2.8.2002 while he was posted at Police Station, Jahangirabad, Bhopal, on receiving information from J.P. Hospital, he went to Burn Ward of Hamidiya Hospital, where deceased was admitted. On the information given by deceased, he

recorded Dehati Nalishi (Ex.P/6). Deceased informed him that her husband Roop Singh used to quarrel with her after consuming liquor. At about 8.00 O'clock in the night, he doused her with kerosene and set fire to her with a matchstick. She also told that hearing her cries women of the neighbourhood viz. Saroj, Radha Bai and Laxmi reached there and extinguished her fire and also brought her to hospital. She put her thumb impression on Ex.P/6.

17. Similarly, during investigation, ASI Dinesh Onker (PW-8) recorded police statement (Ex.P/10) of deceased. According to him, he went to Hamidiya Hospital and in the burn ward and recorded statement of deceased wherein she stated that her husband Roop Singh poured kerosene and set fire to her. He recorded the statement as narrated by the deceased. Dinesh Onker (PW-8) categorically stated that when he recorded the statement of deceased, she was fully conscious and no boy or girl or anybody else was present near her. We have no reason to doubt the veracity of the evidence of this witness.

18. *Dehati Nalishi* (Ex.P/6) as well as the case diary statement of deceased (Ex.P/10) being the statements of deceased in respect to the circumstances and the transactions in which she died, are certainly relevant and admissible in evidence by way of dying declarations under the provisions of Section 32 of the Indian Evidence Act.

19. In addition to the aforesaid evidence of written dying declarations, there is also evidence of oral dying declaration made by the deceased to Radha Bai (PW-1), Jagdish (PW-4) and Dr. Subhash Singh Tomar (PW-5). Radha Bai (PW-1) and Jagdish Singh (PW-4) stated that when they reached the house of deceased after hearing her cries, she told to them that her husband Roop Singh ignited her. When deceased was taken to J.P. Hospital, Bhopal, she was examined by Dr.Subash Singh Tomar (PW-5). Dr. Tomar deposed that in giving history of the occurrence deceased told to him that her husband Roop Singh quarreled with her after consuming liquor and set fire to her.

20. Dr. Subhash Singh Tomar (PW-5) stated that the deceased had suffered second degree burn injuries. After primary treatment, he referred her to the Burn Unit of Hamidiya Hospital. Though upper part of her upper lip was burnt, but her mouth was not burnt. He stated that since the condition

of patient was serious, she was referred for further treatment immediately without detailed examination, but it was wrong to say that deceased was not able to speak.

21. After carefully scanning and scrutinizing the aforesaid evidence of dying declarations, we find that it has been established that it was appellant who caused burn injuries to deceased. As far as the evidence of defence witness Shivram (DW-2) is concerned, he stated that on his asking deceased told to him that after a quarrel with appellant, with a view to frighten him, she sprinkled a little bit of kerosene and ignited herself without anticipating the proportion it assumed. This kind of defence was not pleaded by the appellant in his statement under Section 313 Cr.P.C. Such suggestions were also not put to prosecution witnesses. Jyoti Dixit (DW-1) and Sunil (DW-3) merely stated that deceased did not say anything to them as she was not in a position to speak. In these circumstances, we find the evidence of Shivram (DW-2) an attempt to create an afterthought defence for appellant.

22. Now we have to see whether conviction of appellant under Section 302 of the Indian Penal Code is just and proper. It has been deposed by Radha Bai (PW-1) and also by ASI Dinesh Onker (PW-8) that the fingers of both the hands of appellant were burnt. According to Jagdish (PW-4), when he went inside the house of appellant, he saw appellant extinguishing the fire of deceased. In the dying declaration (Ex.P/16), *Dehati Nalishi* (Ex.P/6) and the police statement (Ex.P/10) it has been disclosed by the deceased that at the time of occurrence appellant was under the spell of liquor and because of that the quarrel occurred between them, in the course of which, he asked her to go out of the house and set fire to her after pouring kerosene on her from a *kuppi*. In this fact situation, in our opinion, it could be inferred that the incident occurred under a sudden impulse/quarrel without any premeditation on the part of the appellant. It seemed to be a spur of the moment affair with no intention of appellant to commit murder of deceased. In these circumstances, *Exception-4* to Section 300 IPC was clearly attracted. 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 to deceased as was likely to cause her death, the case of appellant clearly fell under Section 304-I of the Indian Penal Code.

23. For the reasons aforesaid, the conviction and sentence of appellant under Section 302 of the Indian Penal Code is set aside, instead he is convicted under Section 304-I of the Indian Penal Code and sentenced to rigorous imprisonment for a period of 10 years.

24. Appellant is reported to be in jail since 4.8.2002. If he has served out his sentence, he be released forthwith, if not required in any other case.

25. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2013] M.P.,1177
APPELLATE CRIMINAL
Before Mr. Justice Rakesh Saksena & Mr. Justice Subhash Kakade
Cr. A. No. 1541/2003 (Jabalpur) decided on 16 April, 2013

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

A. 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. (Para 11)**

क. 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।

B. 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. (Para 11)**

ख. 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 दोषसिद्ध साबित करने में किसी प्रकार से हितबद्ध था – यह धारणा नहीं की जा सकती कि कथन शंकास्पद या संदेहास्पद था।

C. 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.** **(Paras 14 & 15)**

ग. 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।

Ramesh Tamrakar, for the appellants.
Amit Pandey, P.L. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by:
RAKESH SAKSENA, J. :- Appellants have filed this appeal against the judgment dated 8.9.2003, passed by First Additional Sessions Judge,

Chhindwara in Sessions Trial No.12/2002, convicting them under Section 302/34 and 324/34 of the Indian Penal Code and sentencing them to imprisonment for life with fine of Rs.1000/- and rigorous imprisonment for one year with fine of Rs.500/-, on each count respectively.

2. In short, the prosecution case is that in the town of Chhindwara, in front of a liquor shop, there was a Mangoda shop of complainant Ashok (PW-5). Laxman (deceased) and his son Baba used to work in that shop. On 17.11.2001, at about 6.30 O'clock in the evening, when deceased and his son were selling Mangodas, appellants Suresh, Ashok and Naresh passed from the front of the shop of Ashok after taking a liquor bottle from the liquor shop. Suddenly, liquor bottle slipped from the hands of Suresh and broke down in front of the shop. When deceased asked appellant Suresh to remove pieces of glass scattered in front of the shop, he got annoyed and saying that he would kill him, pierced the spear in his abdomen, which he already had in his hand. When Ashok (PW-5) tried to save deceased, all the three appellants grappled with him and Suresh inflicted a blow of spear on his abdomen also. Baba (PW-6) was also beaten by them. Ashok immediately went to Police Station, Chhindwara and lodged first information report (Ex.P/22) at 7.00 pm. Deceased and injured Ashok were sent to District Hospital, Chhindwara where deceased expired in the night. After his death the case was converted into an offence under Section 302 of the Indian Penal Code.

3. Investigating Officer J.S. Bisen (PW-15), after recording first information report, went to hospital and recorded statement of deceased under Section 161 Cr.P.C. He went to the place of occurrence, prepared spot map and seized broken pieces of glass from the spot. After the death of deceased, he conducted inquest proceedings, recorded memorandum (Ex.P/2) and referred the body of deceased for postmortem examination. Dr. R.K. Gohiya (PW-13), who had examined the injuries of deceased while he was alive, conducted the postmortem examination and found injuries on the body of deceased caused by sharp cutting weapon. Investigating officer arrested appellants and seized their clothes stained with blood. He also seized a spear on the information furnished by appellant Suresh. All the articles were sent to Forensic Science Laboratory for examination. After completion of the investigation, charge sheet was filed and the case was committed for trial.

4. On charges being framed, appellants abjured their guilt and pleaded false implication. They also examined Ashok Yadav (DW-1) and Vinod Kumar (DW-2) in their defence to show that nobody knew how the deceased suffered injuries.

5. Prosecution examined Ashok Parteti (PW-5), Baba (PW-6) and Ashok Kumar (PW-11) as eyewitnesses of the case, but these witnesses did not support the prosecution story. Learned trial judge, however, placing reliance on circumstantial evidence and the evidence of dying declaration (Ex.P/24) recorded by investigating officer, held the appellants guilty, convicted and sentenced them as mentioned above. Aggrieved by the impugned judgment of conviction and sentence, appellants have filed this appeal.

6. Learned counsel for the appellants submitted that the trial court committed error in holding the appellants guilty under Section 302 of the Indian Penal Code. According to him, the conviction of appellants Ashok and Naresh was illegal since they did not cause injury to deceased. Learned counsel submitted that the incident occurred suddenly on the spur of the moment and without premeditation. Therefore, the conviction of even appellant Suresh under Section 302 of the Indian Penal Code was not justified. Appellant Suresh has already remained in jail for a period of about 11 years. On the other hand, learned counsel for the State supported the impugned judgment of conviction of appellant and submitted that the statement of deceased recorded by investigating officer amounted to be a dying declaration. The evidence of said dying declaration, in the circumstances of the case, was reliable and sufficient to hold the appellants guilty, even if the eyewitnesses of incident did not support the prosecution case.

7. It has not been disputed that deceased died a homicidal death. Baba @ Lakhan, the son of deceased, aged about 13 years, admitted that his father Laxman had died. He however stated that he did not see the occurrence and the injuries of his father. Investigating officer Inspector J.S. Bisen (PW-15) stated that he recorded first information report (Ex.P/12) on being lodged by Ashok Kumar. On the same day, he recorded the statement of deceased Laxman in which he disclosed that appellant Suresh inflicted a blow of spear in his abdomen as a result of which he suffered injury. Injuries of deceased were examined by Dr. R.K. Gohiya (PW-

13), Assistant Surgeon in District Hospital, Chhindwara. Dr. Gohiya deposed that on 17.11.2001 when deceased was brought by police constable Ramesh in injured condition, he examined his injuries. There was one incised wound admeasuring 4 x 1 cm x ? deep on the left side of abdomen of deceased. His intestine was coming out from the wound. The injury was caused by some sharp object. His general condition was very weak. Therefore, he admitted deceased in male surgical ward for check up and further treatment. The injury report of deceased (Ex.P/20-A) was recorded and signed by him. On 18.11.2001, when dead body of deceased was brought to him; he conducted autopsy and found one incised injury on the left side of abdomen just below the rib of the deceased. The size of would was 3 x 5 x 1.5 cm. On internal examination, omentum and left lobe of liver were found cut. The size of cut of liver was 3 x 05 x 1 cm. About 1½ litre of blood was found present in the abdominal cavity. He also found an abrasion 2 x 1 cm on left elbow and a superficial abrasion 6 x 4 cm on his left gluteal region. In the opinion of Dr. Gohiya, the injury No.1 to deceased was caused by sharp edged cutting weapon. Second and third injuries were caused by some hard and blunt object. The death of deceased resulted due to shock produced by the excessive haemorrhage from the injury of liver. Postmortem examination report (21-A) was written and signed by him.

8. From the aforesaid evidence, it stood amply established that deceased met with a homicidal death.

9. Dr. R.K. Gohiya (PW-13), on examination of Ashok, found two incised injures on his body, one on the left side of abdomen and another on left hand's little finger. Both the injuries were ultimately found to be simple in nature.

10. Now the question is whether the trial court was justified in holding that it were appellants who caused injuries to deceased and to injured Ashok (PW-5). As already pointed out, eyewitnesses viz. Ashok Parteti (PW-5), Baba (PW-6) and Ashok Kumar (PW-11) did not support the prosecution case at trial. They were declared hostile. The trial court, however, relied on the evidence of investigating officer J.S. Bisen (PW-15), who recorded the statement of deceased under Section 161 Cr.P.C. According to PW-15, on 17.11.2001 he went to hospital and recorded the statement (Ex.P/24) of deceased wherein he disclosed that he and

his son used to sell Mangoda in front of liquor shop. At about 6.30 pm when he and Ashok were selling Mangoda, appellants came at liquor Bhatti to fetch liquor. After fetching liquor, when they were passing from the front of Mangoda shop, the bottle of liquor slipped from the hands of appellant Suresh and broke down. The pieces of glass scattered in front of the Magoda shop. When he asked Suresh to clean the pieces of glass, he got excited and dealt a spear blow, which he already had in his hand, in his abdomen. When Ashok tried to save him, all the three appellants scuffled and assaulted Ashok. Suresh dealt a spear blow to him also. Alongwith Ashok he went to police station where Ashok lodged report and carried him to hospital for treatment.

11. Since Ex.P/24 happened to be a statement made by deceased as to the cause of his death and also about the circumstances of the transaction which resulted in his death, it amounted to be a dying declaration of deceased, relevant and admissible under Section 32(1) of the Indian Evidence Act. In view of the fact that it has not been challenged that the investigating officer, who recorded the statement of deceased, was in any manner interested in bringing about the conviction of appellants by concocting the said statement, it could not be held that the aforesaid statement was doubtful or suspicious. Since the injury of deceased was serious in nature and there appeared no time to call a magistrate for recording regular dying declaration, the recording of the statement under Section 161 Cr.P.C. by the investigating officer was proper and natural. The statement (Ex.P/24) seems natural, consistent, cogent, coherent and reliable.

12. After arrest of the accused persons, their clothes were seized by investigating officer and on the information given by appellant Suresh, a spear was also recovered and seized. As per chemical examination report (Ex.P/25) by Forensic Science Laboratory, blood was found on the spear and the clothes of appellant Suresh. Human blood was detected on the clothes of other two appellants. Vide FSL report Ex.P/26 cut marks found on the clothes of deceased and Ashok tallied with the blade of the spear recovered from appellant Suresh.

13. From the above circumstances, in our opinion, it was established that all the appellants were present at the spot when appellant Suresh inflicted spear blow in the abdomen of deceased and caused hurt to Ashok

(PW-5). The evidence of defence witnesses viz. Ashok Yadav (DW-1) and Vinod Kumar (DW-2) being inconsistent, contradictory and vague did not appear trustworthy and acceptable.

14. The question, however, would be whether appellants Ashok and Naresh were also vicariously liable for causing injuries to deceased and Ashok (PW-5) by appellant Suresh. As far as Ashok (PW-5) and Baba (PW-6) are concerned, none of them stated that any injury was caused to them by appellants. From the statement (Ex.P/24) made by the deceased, it appears that appellants Ashok and Naresh grappled with Ashok Parteti (PW-5) and manhandled Baba (PW-6), but the fact remains that the injury by spear to Ashok (PW-5) was caused by appellant Suresh only.

15. On minutely examining the circumstances in which the incident occurred, it seems that there was no premeditation or intention on the part of Suresh to assault the deceased. It was just by chance that the bottle of liquor slipped from his hand and broke down in front of the shop of deceased. It was also by chance that deceased asked Suresh to remove pieces of glass from the front of his shop and on getting excited appellant Suresh dealt single blow of spear into his abdomen and caused an injury to Ashok Parteti (PW-5) also. Even if appellants Ashok and Naresh grappled with Ashok Parteti (PW-5), it does not appear that they shared the common intention of appellant Suresh of causing spear injury to deceased or to injured Ashok. Since the incident occurred suddenly wherein appellant Suresh assaulted deceased with spear, which he already had in his hand, Ashok and Naresh, in our opinion, cannot be held liable for the act of appellant Suresh vicariously with the aid of Section 34 of the Indian Penal Code.

16. Since the genesis of the incident, as brought out by the prosecution, is traceable to a patty quarrel which sparked off merely on deceased's asking appellant Suresh to clean pieces of glass from the front of his shop, it is not possible to hold that appellant Suresh intended to commit murder of deceased, but, since he inflicted the blow of spear on the abdomen of deceased, it can be held with certainty that he acted either with the intention of causing death or of causing such bodily injury to deceased as was likely to cause his death. His case, therefore, in our opinion, clearly fell within the ambit of Section 304-I of the Indian Penal Code.

17. For the reasons aforesaid, we are of the view that it was appellant Suresh only who could be convicted for causing death of deceased and for causing simple hurt to Ashok Parteti (PW-1) by a deadly weapon like spear.

18. Accordingly the conviction of appellant No.1 Suresh under Section 302/34 of the Indian Penal Code is set aside, instead he is convicted under Section 304-I of the Indian Penal Code and sentenced to rigorous imprisonment for ten years. His conviction and sentence under Section 324/34 of the Indian Penal Code is affirmed. The conviction of appellants No.2 Ashok and No.3 Naresh as awarded by the trial court under Section 302/34 and 324/34 of the Indian Penal Code is set aside. They are acquitted of the said charges. Their bail bonds and surety bonds stand discharged.

19. It is reported that appellant Suresh has been in jail for over 11 years; if that be so, he be released forthwith, if not required in any other case.

20. Appeal partly allowed.

Appeal partly allowed.

I.L.R. [2013] M.P., 1184
APPELLATE CRIMINAL
Before Mr. Justice U.C. Maheshwari
Cr. A. No. 1212/1996 (Jabalpur) decided on 19 June, 2012

RAM RATAN KEWAT & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. 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 - Conviction of appellant No.2 altered to 376(1) of I.P.C. (Para 3)**

क. 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।

***B. 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. (Para 6)**

ख. 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।

G.S. Baghel, for the appellants.
Swapnil Ganguli, P.L. for the respondent.

J U D G M E N T

U.C. Maheshwari, J. :- The appellants/accused have directed this appeal under Section 374 (2) of Cr. P. C. being aggrieved by the judgment dated 8.7.1996 passed by Sessions Judge, Sidhi in S. T. No.63/95, convicting and sentencing to each of them under Section 450 and 376 (2) (g) of IPC for RI three years and for RI ten years with fine of Rs. 1,000/-, respectively under such sections.

2. The facts giving rise to this appeal in short are that on 23.11.1994 at about 4.00 p. m. the prosecutrix Anarkali was pestling the paddy in her home, her father was gone to Kardhua and her mother was gone to pluck leafy vegetables, at the same time the appellants by committing the criminal trespass entered in her house and out of them appellant No.2 Ramcharan caught hold the pestle of the prosecutrix from her hand and after laying her on the flour, contrary to her will and wish committed the

rape on her. At the time of such incident the appellant No.1 Ramratan was standing on the door of such house. The aforesaid incident was reported to the police Chitrangi on 29.11.1994, on which FIR (Ex.P.7) was registered against the appellants for the offence of Section 376/34 of IPC. The cause of lodging the FIR at the belated stage was mentioned that the father of the prosecutrix was not available at home on the date of the incident. After registration of the offence, the appellants were arrested, interrogatory statements of the witnesses were recorded and the prosecutrix as well as the appellant No.2 were medically examined. On completion of the investigation they were charge sheeted for their prosecution under the above mentioned offence. On evaluation of the papers of the charge sheet on framing the charge of section 450 and 376/34 of IPC by the trial Court against the appellants, each of them abjured the guilt, on which the trial was held. After recording the evidence on appreciation of the same after holding guilty to the appellants under the aforesaid sections, each of them were convicted and sentenced with the above mentioned punishment. Being dissatisfied with such conviction and sentence the appellants have come to this Court.

3. Appellant's counsel Shri G. S. Baghel, after taking me through the record of the trial Court along with the impugned judgment argued that on proper appreciation of evidence the appellants ought to have been acquitted by the trial Court, as such the appellants were convicted under the wrong premises on false pretext. Lodging the FIR at very belated stage itself made the case and the story of the prosecution suspicious and in such premises, the expert /FSL report of the vagina fluid and the cloths could not be considered against the appellants as the same is based on the basis of slide vagina fluid prepared near about after 6 days from the date of incident. As such fluid could not be said to be consequence of the intercourse committed by the appellant No.2 Ramcharan. In any case, after six-seven days such fluid could not be found in the vagina. The story put forth by the prosecution regarding seized clothes of the prosecutrix as she did not wash such clothes in this period, could not be believed. FSL report in this regard could not be foundation to hold the conviction against the appellants. He further argued that in any case keeping in view the fact that the appellant and prosecutrix family since long had good relations and in that premises, the prosecutrix and appellant Ramcharan were very close and in such premises only the inference could be drawn

that such alleged intercourse was committed by the appellant no.2 Ramcharan with the consent of prosecutrix and pursuant to it, the appellant No.2 Ramcharan, deserves to extend the benefit of acquittal, as on ossification test carried out by the radiologist, the prosecutrix was found to be major of more than 18 years of the age. He also said that in the lack of any support from the testimony of independent witnesses to the testimony of the prosecutrix mere on her deposition the appellants could not be convicted. He further argued that in case on re-appreciation of evidence if the Court comes to the conclusion that appellant No.2 has committed the rape against her will and hold him guilty for the same, even then in view of the specific averments in the deposition of prosecutrix that appellant No.1 Ramratan although came with the appellant No.2 Ramcharan to her resident but he remained outside of the house and did not enter in her house. So it could not be deemed that Ramratan came with the appellant No.2 Ramcharan with intention to commit rape on the prosecutrix or he has committed any act in furtherance of their common intention to commit rape on the prosecutrix. In such premises, the appellant no.1 Ramratan mere on account of standing outside the house of the prosecutrix at the time of committing the alleged rape by the appellant no.2 Ramcharan with the prosecutrix could not be convicted for the alleged offence of gang rape. He also said that as per deposition of the prosecutrix herself appellant Ramratan did not enter in the house of the prosecutrix, therefore, his conviction under Section 450 of IPC is also not sustainable. With these arguments he prayed to extend the benefit of acquittal to the appellants or in any case to extend the benefit of acquittal to appellant No.1 Ramratan and modify the conviction and sentence of the appellant No.2 Ramcharan from Section 376 (2) (g) and 450 of IPC to Section 376 (1) and 450 of IPC., by allowing this appeal.

4. On the other hand learned P. L. Shri Swapnil Ganguli by justifying the impugned conviction and sentence of the appellants under the aforesaid section said that the findings and the approach of the trial Court holding guilty to the appellants under the aforesaid section being based on proper appreciation of evidence and in conformity with law, did not require any interference at this stage. According to him, appellant-Ramcharan committed the alleged rape on the prosecutrix in presence and with the assistance of the Ramratan in furtherance of their common intention as Ramratan, also wish to commit rape with the prosecutrix, so he is equally

responsible for the alleged offence. However, he fairly conceded that in the FIR and in the interrogatory statement, the prosecutrix has categorically stated that Ramratan was also entered in her house and thereafter while committing the rape on her by Ramcharan appellant No.2, the appellant was stood on the door, but on recording her deposition she has not stated any thing regarding entrance of Ramratan inside of the house at any point of time either before or after committing the rape on her by Ramcharan. So in such circumstances, if any benefit of acquittal is extended to Ramratan even then the conviction and awarded sentence of the appellant No. 2 Ramcharan could not be interfered and deserves to be maintained and prayed for dismissal of this appeal.

5. Having heard the parties keeping in view their arguments, after perusing the record of the trial Court along with the impugned judgment, I am of the considered view that trial court has committed error in convicting both the appellants under Section 376 (2)(g) and Section 450 of IPC while in the available circumstances the trial Court ought to have acquitted the appellant No.1 Ramratan from both the aforesaid charges and appellant No.2 Ramcharan ought to have convicted and sentenced under Section 376 (1) and 450 of IPC.

6. True, it is that incident had taken place on 23.11.1994 and FIR was lodged by the prosecutrix Anarkali (P.W.3) on 29.11.1994 near about after 6 days, but on perusing the FIR (Ex. P.7) as well as the deposition of prosecutrix Anarkali (P.W.3) and investigation officer Damodar Prasad (P.W.7), it is apparent that explanation regarding lodging the report at belated stage has been put forth and proved by the prosecution and such explanation has not been challenged by the defence in the cross-examination of any witnesses of the prosecution. Even otherwise the explanation put forth by the prosecutrix that his father was suffering from the disease of epilepsy and his uncle Bhola was not available at home and she also became ill, in the available scenario, appears to be reasonable, proper and reliable so on that count, it could not be deemed that FIR was lodged by the prosecutrix on false pretext against the appellants at belated stage. So, the arguments advanced by the appellants' counsel in this regard are hereby failed.

7. As per FIR (Ex.P.7) and interrogatory statement of the prosecutrix (Ex.D.1), initially both the appellants entered in her house, but

subsequently while committing the rape on her by appellant no.2 Ramcharan, the appellant No.1 Ramratan was standing on the door. I am of the considered view that such averments of FIR unless proved by ocular evidence neither could be treated to be sustentative evidence nor sufficient to convict the accused like appellant no.1. The interrogatory statement of the prosecutrix or other witnesses could not be read as evidence against the accused unless such facts are proved by ocular evidence in deposition of such witnesses. Such interrogatory statements in view of provision of Section 161 and 162 of the Cr.P.C., could only be used by the defence for contradiction and omission and not for any other purpose, hence the same could not be treated to be the substantive evidence unless the same is proved by concerning witnesses.

8. In the case at hand, the deposition of the prosecutrix being ocular evidence could only be foundation to draw any inference against the appellant or appellants in the matter.

9. On perusing the deposition of prosecutrix Anarkali (P.W.3) I have not found any where in her chief in which she stated that appellant No.1 Ramratan entered in her house accompanied with the appellant no.2 Ramcharan and was remained inside either at the time of committing the rape by Ramcharan or subsequent to his such act. In her further deposition she has not stated anything against the appellant No.1 showing that he also came with the appellant no.2 Ramcharan in furtherance of their common intention to commit rape on her. In view of such testimony of prosecutrix mere averments of FIR and her case diary statement, no inference could be drawn against the appellant No.1 that he also came to her residence with their common intention to commit rape on her as defined and enumerated in explanation 1 of Section 376 (2) of IPC. The same is read as under:

> "Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

In the aforesaid premises, the impugned conviction of appellant no.1 could not be sustained.

10. As per prosecution case except the prosecutrix, no other eye

witness of the alleged incident of rape has been examined, however, two witnesses namely Vishnu and Deolal were cited as witnesses, who saw the appellants while they were running away from the side of the house of the prosecutrix. Out of them, one Vishnu has neither been examined nor any explanation regarding his non-examination has been put forth by the prosecution on record. Deolal, on recording his deposition had categorically stated that he only saw the appellants when they were running away from the house of the prosecutrix but mere on such evidence it could not be assumed or deemed that Ramratan, had also committed any offence either of criminal trace pass by entering in the house of the prosecutrix or by committing any act along with the appellant no.2 in furtherance of their common intention to commit rape on the prosecutrix.

11. It is settled law that in the lack of any positive, admissible and convening evidence on the record showing the involvement of the accused with the alleged offence mere on the basis of averments of the FIR and case diary statement of witnesses or any papers of the charge sheet, the accused like appellant No. 1 could not have been convicted by the trial Court. So in view of the aforesaid discussions, it is held that the prosecution has failed to prove the aforesaid alleged offence of Section 376 (2) (g) or Section 450 of IPC. Against the appellant no.1 Ramratan. Consequently the findings and approach of the trial Court holding him guilty for such offence deserves to be and is hereby set aside.

12. Coming to consider the sustainability of impugned conviction and sentence of appellant No.2 Ramcharan is concerned, it is apparent that on lodging the FIR (Ex.P.7) the prosecutrix categorically stated that appellant No.2 Ramcharan accompanied with the Ramratan by committing the criminal trace pass entered in her house, where appellant No.2 committed forcefully rape on her. On recording her deposition as P.W.3 (Anarkali) she supported the incident of alleged rape till the extent of appellant No.2 Rarncharan. She deposed each and every act with description of such appellant no.2 regarding rape committed by him on her. In para 2 of her deposition, she categorically stated that she was laid by Ramcharan on the flour and thereafter, he committed the rape against her will and wish and on her crying by leaving her he ran away. Such story is further supported by her uncle Bhola Singh (P.W.4) and mother Golari (P.W.5), and Deolal (P.W.6), to whom she stated the scenario of

the incident after happening the same. On going through the cross-examination of all these witnesses, I have not found any material substance discarding or destroying the version stated by them in their chief alleging that appellant no.2 committed rape on the prosecutrix. So in the light of such evidence I have not found any error in the approach of the trial Court holding guilty to the appellant No.2 Ramcharan for committing the alleged rape on the prosecutrix, thus till this extent, the findings of the trial Court with respect of appellant No.2 Rarncharan is hereby affirmed.

13. The argument advanced by the appellant's counsel with respect of FSL report regarding vagina fluid of the prosecutrix could not be connected with the appellant No.2, as such slide was prepared after six days is concerned, true it is that such slides were prepared after six days, therefore, such report could not be deemed to be relevant or admissible to the case at hand but, in view of other available evidence mere on such ground the appellant No.2 Ramcharan could not be acquitted.

14. It is settled proposition of law that whenever and wherever if there is a conflict between the medical/expert evidence and ocular evidence, then in such circumstance,. the available ocular evidence if reliable shall prevail over the medical/ expert evidence. Therefore, arguments of the appellants counsel relating to the FSL report regarding vagina fluid or the clothes of the prosecutrix are not helping to the appellant No.2 Ramcharan for extending him the acquittal.

15. The law is also well settled on the question that in the matter of rape the independent corroboration to the testimony of prosecutrix is not necessary if in the available circumstances her testimony appears to be reliable then mere on her testimony conviction could be held against the accused like appellant, No.2. As per aforesaid discussion the deposition of prosecutrix Anarkali (P.W.3) does not appear to be suspicious in any manner.

16. Law is also well settled that in the matter of rape it is not necessary that sign of the struggle or any injury must be found on the person of the prosecutrix. So the absence of any injury on the person of the prosecutrix does not give any circumstance to extend the benefit of acquittal to the appellant No.2 Ramcharan.

17. In view of the aforesaid discussion, it is held that trial Court has

not committed any error in holding guilty to the appellant No.2 for committing the alleged rape on the prosecutrix. So till this extent the findings of the impugned judgment are hereby affirmed.

18. After acquitting the appellant No.1 Ramratan from both the charges as stated above the appellant No.2 Ramcharan even after holding guilty could not be convicted under Section 376 (2) (g) of IPC relating to the gang rape and it requires modification from such section to Section 376 (1) of IPC. So till this extent the impugned judgment requires modification while his conviction and sentence under Section 450 of IPC do not require any interference at this stage, hence the same deserves to be affirmed.

19. In view of the aforesaid by allowing this appeal in part the appellant No.1 Ramratan is acquitted from the alleged charge of Section 376 (2) (g) and Section 450 of IPC. Consequently his awarded jail sentence and imposed fine is set aside. While by affirming the conviction and sentence of appellant No.2 Ramcharan under Section 450 of IPC his conviction under Section 376 (2) (g) of IPC is modified from such section to Section 376 (1) of IPC and pursuant to it his sentence awarded by the trial Court under Section 376 (2) (g) of IPC is set aside and instead to it, he is convicted and sentenced under Section 376 (1) of IPC for seven years RI with fine of Rs. 1,000/-, in default of depositing the fine amount he has to suffer further six months RI. The amount depositing by the appellant No.2 shall be adjusted in the aforesaid imposed fine. In view of the aforesaid the bail bonds of the appellant No.1 is hereby discharged while the bail bonds of the appellant No.2 is hereby cancelled and he is directed to surrender himself before the trial Court on or before 15th of July, 2012 for facing the remaining part of the aforesaid awarded jail sentence. The amount of fine, if deposited by the appellant No.1 Ramratan be refunded to him after proper verification. Till this extent the findings of the impugned judgment are hereby modified while the other findings are hereby affirmed.

20. The appeal is allowed in part, as indicted above.

Appeal partly allowed.

I.L.R. [2013] M.P., 1193
CIVIL REVISION
Before Mr. Justice U.C. Maheshwari
C.R. No. 113/2006 (Gwalior) decided on 13 February, 2013

BHAGWATI DEVI (SMT.) ...Applicant
Vs.
JAMEELA BEGAM ...Non-applicant

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.**
(Para 8)

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 समुद्घृत 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।

Cases referred :

2011(2) MPLJ 101, 2000(2) MPLJ 104, AIR 2005 SC 439, AIR 1970 MP 225.

N.K. Gupta, for the applicant.
Sunil Jain, for the non-applicant.

O R D E R

U.C. Maheshwari, J.: The applicant/ plaintiff has filed this revision under Section 115 of CPC being aggrieved by the judgment and decree dated 23.1.2006 passed by 8th Additional District Judge, Gwalior in Civil Appeal No.1-B/2006 affirming the judgment and decree dated 18.7.2005 passed by 8th Civil Judge, Class-I, Gwalior whereby his suit

filed against predecessor in title of the respondent namely Munna Khan for recovery of Rs.10,000/- was dismissed.

2. The facts giving rise to this revision in short are that the applicant herein filed the impugned suit against the predecessor of the respondent namely Munna Khan the proprietor of M/s Kishan Rehat Industries for recovery of Rs.10,000/-. As per further averments such sum was arrears against Munna Khan, on 17.3.1991 by accepting the liability to pay such sum Munna Khan had executed promissory note of Rs.10,000/- in favour of the appellant with assurance to pay such sum along with interest @ 1.75 % per month within 120 days i.e. four months and later sum of Rs.1050/- as interest was paid by the deceased Munna Khan to the applicant on 17.7.1991 and when remaining sum was not paid by Munna to the appellant then the impugned suit for recovery of the same was filed 16.1.1994.

3. In the written statement by the predecessor in title of the respondents Munna Khan by denying the material facts of the alleged transaction it is stated that there was no arrears of alleged sum against principal defendant Munna. It is also stated that neither the alleged promissory note was executed nor any terms and conditions were settled between the parties. The amount of interest as stated in the plaint has also not been paid to the appellant by the deceased principal defendant. The suit is also opposed on the ground of lacking proper cause of action and as per plaintiff herself it was an old transaction and accordingly the suit was not filed within the prescribed limitation, so the suit being time barred is not maintainable. The objection with respect of the validity of the promissory note in the lack of proper stamp duty was also taken. With these averments the prayer for dismissal of the suit was made.

4. In view of the pleadings of the parties after framing the issues, parties were directed to adduce their respective evidence, after recording the same, on appreciation, the trial Court has dismissed the suit holding that in the lack of the embossed stamp of proper denomination the alleged promissory note is not admissible and in such premises the alleged transaction was not found to be proved. The suit was also dismissed on account of non-examination of the plaintiff herself, taking into consideration that in this regard no explanation has been put forth by the applicant on

record. However, the suit was held within limitation by the trial court. Subsequent to dismissal of the suit the applicant had preferred the appeal under Section 96 of CPC before the District Court. In such appeal a cross-objection to hold the suit barred by time, from the date of original transaction which had taken place in the year 1988, was also filed on behalf of the respondents herein under Order 41 Rule 22 of CPC. On consideration, by affirming the judgment and decree of the trial Court dismissal of the suit the cross-objection of the respondents was also allowed and taking into consideration the circumstance that the suit is filed after six years from the date of the original transaction which had taken place in the year 1988 the suit was also dismissed as barred by time. Thereafter, the applicant/ plaintiff has come to this Court with this revision.

5. The applicant's counsel after taking me through the record along with the judgment of the Courts below by referring the decision of the Full Bench of this Court in the matter of *Gurunanak Medical and Surgical Agency Vs. Sitaram Shivhare* reported in 2011 (2) MPLJ 101 argued that the decision of the single Bench of this Court in the matter of *Ismail Khan Vs. Ram Prakash Verma* reported in 2000 (2) MPLJ 104, on which the Courts below relied upon has been over ruled and it has been held that the purpose of the fiscal law is only to recover the revenue, either through embossed stamp or the revenue tickets, in any case, revenue should be paid. In such premises, he said that the findings of the Courts below holding that in the lack of embossed stamp the promissory note is inadmissible, is not sustainable and prayed to hold the promissory note executed on revenue tickets, is admissible and in such premises also prayed to hold the suit of the applicant is within limitation. He further argued that case has been successfully proved by the appellant through her power of attorney holder by recording his deposition and in the available circumstances there was no necessity to enter the appellant into the witness box to prove the case. Thus even in the lack of deposition of the applicant/ plaintiff, her suit could not be dismissed by any of the Courts below. In this regard he also said that the decision of the Apex Court on which her suit has been dismissed, is distinguishable on facts with the present case but such aspect was not considered by the courts below. With these submission he prayed to set aside the judgment and decree of the Courts below and decreed her suit by allowing this appeal.

6. On the other hand responding the aforesaid arguments by justifying the impugned judgment and decree the respondents counsel said that same being based on proper appreciation of the available evidence is in conformity with law, does not require any interference at this stage under the revisional jurisdiction. In continuation he said that in view of aforesaid Full Bench decision if the impugned promissory note is held to be admissible even then the impugned suit could not be decreed against the respondents. By referring the decision of the Apex Court in the matter of *Janki Vasudeo Vs. Indusand Bank* reported in AIR 2005 SC 439, he argued that it is settled proposition that in the absence of the examination of plaintiff in support of his/ her pleading to prove the alleged transaction the suit could not be decreed mere on the basis of the pleadings. He also argued that it is apparent fact from the pleadings of the plaintiff that the impugned transaction was personal transaction between the applicant and the predecessor in title of the respondents and in such premises if the material facts of the transaction was in the knowledge of the applicant/ plaintiff herself then it could not be assumed that such thing was in the knowledge of the Power of Attorney specially when nothing has been stated in this regard in the plaint. Therefore on account of non-entrance of the appellant in the witness box is sufficient circumstance to draw the inference that the appellant-plaintiff had failed to prove the alleged transaction and execution of promissory note and prayed for dismissal of this revision.

7. Having heard the counsel, keeping in view their arguments after perusing the record of the Courts below along with the impugned judgment, I am of the considered view that some findings of the impugned judgment requires some modification while the approach of the courts below dismissing the suit does not require any interference under Section 115 of CPC.

8. It is undisputed fact on record that the impugned suit was filed by the applicant herself to recover sum of promissory note as alleged executed on 17.3.1991 by Munna Khan the predecessor in title of the respondents. It is also undisputed fact that such pronote was executed by Munna Khan by accepting the liability of earlier arrears of sum. It is settled proposition of law whenever the negotiable instrument takes place between the parties then old transaction becomes the new transaction for all the purposes,

including the purpose for assessing the period of limitation to initiate the proceedings. Although, in the case at hand in the light of the decision of the single Bench of this Court in the case of *Ismail Khan* (Supra) the impugned promissory note was held to be inadmissible on the count that the same was not executed on proper embossed stamp but subsequent to the decisions of both the Courts below in the pendency of this revision on arising the occasion in some other matter such question was answered by the Full Bench of this Court in the case of *Gurunanak Medical and Surgical Agency* (Supra), according to which in any shape either in the shape of the embossed stamp or in the shape of revenue ticket/ stamp if the requisite duty is paid on the document like promissory note then such document could not be held to be inadmissible, as such same should be treated to be admissible document. So, in such premises this Court has no any other option except to hold the aforesaid promissory note is admissible document and in such premises, the findings of the courts below holding the promissory note inadmissible being perverse is set aside and alleged promissory note is held to be admissible.

9. After holding the aforesaid promissory note as an admissible document, I proceed to examine the question of limitation to file the impugned suit. As the promissory note was executed on 17.1.1991 and the impugned suit being filed on 16.1.1994 within three years from the date of execution of promissory note within limitation. In such premises, the appellate Court has wrongly held the same to be barred by time. So such finding of the appellate Court deserves to be and is hereby set aside.

10. On holding the aforesaid promissory note as an admissible document and the suit of the applicant within limitation, I proceed to consider the question whether in view of available evidence the impugned suit ought to have decreed by any of the Courts below or the ultimate approach of such Courts regarding dismissal of the suit is correct.

11. It is apparent from the pleadings of the impugned suit that the impugned transaction was between the applicant and the predecessor in title of the respondents namely Munna Khan and such transaction was not carried out by the applicant through some power of attorney holder namely Tarachand. If the transaction had been carried out through power of attorney holder then certainly the pleading in this regard should have

been made in the plaint. So, in the lack of such pleading it shall be deemed that the impugned transaction was personal transaction of the applicant with Munna Khan and the material facts of such transaction was within the knowledge of the applicant, and not in the knowledge of the power of attorney holder. It is also undisputed fact on record that in order to prove the pleading of earlier transaction regarding arrears of sum and execution of the promissory note the applicant herself has not entered into the witness box. Accordingly it could be assumed that the plaintiff herself has neither entered in the witness box nor proved her case. In the lack of her deposition mere on the basis of deposition of her power of attorney holder Tarachand the suit could not have been decreed by the Courts below in the light of the principle laid down by the Apex Court in the matter of *Janki Vasudev* (Supra), in which it was held as under :

> "Order II, Rules 1 and 2, empowers the holder of power of attorney to "Act" on behalf of the principal. In our view the word "acts" employed in Order III Rules 1 and 2, CPC, confines only in respect of the "acts" done by the power of attorney holder in exercise of power granted by the instrument. The terms "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of the such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

12. Long before on arising the occasion the aforesaid question was also answered by this Court in the matter of *Gulla Kharagjit Vs. Narsingh Nandkisore* reported in AIR 1970 MP 225, in which it was held as under:

> "When a material fact is within the knowledge of a party and he does not go in to the witness box without any plausible reason, an adverse inference musts be drawn

against him. A presumption must be drawn against a party who having knowledge of the fact in dispute does not go into the witness box particularly when a prima facie case has been made out against him.

13. In view of the aforesaid settled proposition, there was no option with the Courts below except to dismiss the suit of the applicant on account of non-examination of the plaintiff herself. So, in such premises the findings of the subordinate Court dismissing the suit and appeal deserves to be and are hereby affirmed.

14. In view of the aforesaid even after modifying the findings of the appellate Court and holding the impugned promissory note admissible and the suit of the applicant was within limitation on account of non-examination of applicant in the matter, I have not found any illegality, irregularity or anything against the propriety of law in the approach of the Courts below regarding dismissal of the suit, consequently, this revision being devoid of any merits is hereby dismissed with costs.

15. The applicant shall bear its own cost as well as the cost of the respondents, if the same is certified.

16. Revision is dismissed as indicated above.

Revision dismissed.

I.L.R. [2013] M.P., 1199
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 1291/2012 (Jabalpur) decided on 11 March, 2013

SUNNY GAUR ...Applicant
Vs.

STATE OF M.P. ...Non-applicant

A. ***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. (Paras 3 & 6)

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – एक साथ विचारण – जांच एजेंसी ने अन्वेषण के दौरान पाया कि सुरक्षा गार्डों 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 गार्डों 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 गार्डों 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।

***B. 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.(Paras 8 to 10)**

ख. 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।

Cases referred :

(1985) 1 SCC 422, (1999) 7 SCC 467, (2000) 1 SCC 285, AIR 2009 SC 2792, (2010) 1 SCC 250, (2009) 3 SCC 329, (2009) 4 SCC 423, 2010 (2) MPLJ 611, 2010 (2) MPLJ 617, 2005(3) MPLJ 398, (2007) 6 SC 460.

Surendra Singh with Prakash Upadhyay, for the applicant.
Mohd. Nasir, for the non-applicant No.1.
S.K. Kashyap, P.P. for the State/Non-applicant No.2.

ORDER

N.K. GUPTA, J.: These two revisions are connected with the common order dated 3.7.2012 passed by the learned Sessions Judge, Rewa in S.T.No.135/2008 and therefore, decided by a common order.

2. The applicant Sunny Gaur (hereinafter he will be referred to as ***'Applicant/accused'***) of criminal revision No.1291/2012 has challenged the impugned order dated 3.7.2012 passed by the learned Sessions Judge, Rewa in S.T.No.135/2008, whereby he was included in the list of accused persons under section 319 of the Cr.P.C., whereas the criminal revision No.2457/2012 has been preferred by the applicant Vinod Kumar Mishra (hereinafter he will be referred to as '***Applicant/applicant'***), in which he has challenged the impugned order to add the remaining persons to be accused in the case, by an application under section 319 of the Cr.P.C. filed before the trial Court.

3. The facts of the case, in short, relating to the present revisions, are that, on 2.9.2008, at about 7 a.m. in the morning, some unemployed villagers of their association gathered before Vindhya Gate of JP cement factory, Naubasta, District Rewa. They demonstrated to get their demands fulfilled. They demanded that the applicant/accused Sunny Gaur should come to the gate to receive their memorandum but, the applicant/accused did not accept their demand. Thereafter, to maintain the law and order, the authorities decided that the demonstrators be arrested and sent to the jail in various buses. One bus was also parked near the Vindhya Gate. Thereafter, the demonstrators started using their sticks and pelted stones upon the officers of the administration of the factory as well as the district administration and police including the guards of the factory. They damaged the buses, some motorcycles and they tried to destroy the Vindhya Gate. Some firing was done and one Raghvendra Singh Behra succumbed to the injuries due to firing, whereas 42 other persons were alleged to be injured in that firing. An FIR was lodged by Rajbahadur Singh, brother of the deceased, by way of a Dehati Nalshi and case was registered but, in investigation no one supported the case of the complainant that the firing was done by the applicant/accused Sunny Gaur

and therefore, the case was registered against two security guards namely Sanjay Kumar Singh and Raghunandan Singh. In investigation, the police found that those two security guards were responsible for firing and therefore, a charge-sheet was filed against two security guards. The trial Court has examined as many as 27 witnesses, prior to the filing of the application under section 319 of the Cr.P.C., whereas the complainant Rajbahadur Singh (P.W.4) did not support his own FIR, Ex.P/4. Some witnesses like Rajbahadur Singh (P.W.20), Rajababu (P.W.21) and Chandrashekhar Singh (P.W.24) have stated that the firing was done by the applicant/accused Sunny Gaur initially and thereafter, the fire was done by Rajnesh Gaur, K.P.Sharma, Ajay Singh Rana, Shivshankar Choubey, Ramesh Gupta and others and so many persons of the crowd sustained injuries. On the basis of the evidence given by said witnesses, the applicant/applicant has filed an application under section 319 of the Cr.P.C. to add the applicant/accused and other persons like Shivshankar Choubey, Rajnesh Gaur, K.P.Sharma etc. to be accused in the case. The learned Sessions Judge vide the impugned order, partly allowed that application and name of the applicant/accused Sunny Gaur was added and remaining application filed by the applicant/applicant was dismissed.

4. I have heard the learned counsel for the parties at length. They have raised so many points in the matter and therefore, their contentions will be considered pointwise at present.

5. The learned Senior Advocate for the applicant has submitted that provisions under section 319 of the Cr.P.C. can be applied to those, who can be tried simultaneously. At present, the case of the present accused persons is totally different from the case of the applicant/accused and therefore, they cannot be tried in the same case. Consequently, the application under section 319 of the Cr.P.C. could not be accepted. In his support, he has placed his reliance on various judgments and orders passed by Hon'ble the Apex Court in cases of *"Harjinder Singh Vs. State of Punjab and others"*, [(1985) 1 SCC 422], *"Shiv Kumar Vs. Hukam Chand and another"*, [(1999) 7 SCC 467], *Balbir Vs. State of Haryana and another"*, [(2000) 1 SCC 285].

6. It is true that the application was filed under section 319 of the Cr.P.C. but, acceptance of that application would result in a joint trial of the present accused persons alongwith the proposed accused persons,

whereas, their cases are diagonally opposite. Initially, it was mentioned in the FIR that the security guards were armed with guns but, it was alleged that the applicant/accused Sunny Gaur took a gun from the guard and fired from that gun, causing death of Raghvendra Singh. Thereafter, remaining office bearers of the factory, took the guns from various security guards and fired from those guns, by which 42 persons were injured. However, in investigation, the present accused security guards were found to have fired. If the applicant/accused and other office bearers of the factory are joined as accused persons in the present case then, that case is entirely different from the case of the present accused persons. Rather it can be said that the case of the security guards (the present accused) is diagonally opposite to the case of the applicant/accused. If it is presumed that firing was done by the applicant/accused Sunny Gaur and his associates then, case of the prosecution against the present accused persons shall go away and trial would not proceed against them because two contradictory cases cannot be tried simultaneously and if trial is proceeded against the present accused persons then, opposite factual story cannot be established in the same case. Hon'ble the Apex Court in case of *Balbir* (supra) has directed that :-

> *"Thus, where there is commonality of purpose or design, where there is continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction,"But if in one case the accused is alleged to have killed a person without any junction with the accused in the other case, then it cannot be treated as the same offence or even different offences "committed in the course of the same transaction". If such two diametrically opposite versions are put to joint trial the confusion which it can cause in the trial would be incalculable. It would then be a mess and then there would be no scope for a fair trial."*

Therefore, in the light of law laid by Hon'ble the Apex Court in case of *Balbir* (supra), the present accused persons cannot be tried simultaneously with the proposed accused persons in the present case in a common trial. If provisions of section 319 (1) of the Cr.P.C. are perused, which are as under:-

"(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which Such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed."

Then, it would be clear that the persons can be added with the help of those provisions. They could be tried together with the present accused. In the present case, if it was stated by the witnesses that the guards were firing upon the crowd and thereafter, the applicant/accused Sunny Gaur and his companions also took the guns of guards and they also fired then, they could be tried in a common case but, at present, the prosecution's case is that only the security guards had fired from guns, causing the entire incident, whereas the applicant/applicant has contended in this application under section 319 of the Cr.P.C., on the basis of the statements of various witnesses that the security guards did not fire but, fire was done by the applicant/accused Sunny Gaur and his companions and therefore, in the light of judgment passed by Hon'ble the Apex Court in case of *Balbir* (supra), the present accused persons cannot be tried simultaneously with the proposed accused persons and therefore, the proposed accused persons cannot be added as accused under section 319 of the Cr.P.C.

7. The learned counsel for the applicant/accused has stated that looking to the entire story of the case, no proposed accused can be added in absence of the evidence produced before the Court, which should be convincing for the purpose of the exercise of the extraordinary jurisdiction of the Court under section 319 of the Cr.P.C. In support of the submissions, law laid by Hon'ble the Apex Court in case of "*Sabarjeet Singh and another Vs. State of Punjab and another*" [AIR 2009 SC 2792] is referred. On the other hand, the learned counsel for the State and the learned counsel for the applicant/applicant have referred the various judgments passed by Hon'ble the Apex Court in cases of *"Suman Vs. State of Rajasthan and another"*, [(2010) 1 SCC 250], "*Brindaban Das and others Vs. State of West Bengal*", [(2009) 3 SCC 329] and *"Rampal Singh and others Vs. State of Uttar Pradesh and another"*, [(2009) 4 SCC 423] and some orders of single Bench of this Court in cases of *"Ramlakhan Dhakad Vs. State of Madhya Pradesh"*, [(2010)

(2) M.P.L.J. 611], *"Sumitra W/o Mukesh Vs. State of Madhya Pradesh"*, [(2010) (2) M.P.L.J. 617] and *"Jagjeevan Tiwari Vs. State of Madhya Pradesh and others"*, [(2005) (3) M.P.L.J. 398] are referred. In all the aforesaid judgments, it is directed that what would be the consideration of the evidence at the time of considering the application under section 319 of the Cr.P.C. Out of such cases, in law laid by Hon'ble the Apex Court in case of *Sabarjeet Singh* (supra) a clear direction is given by Hon'ble the Apex Court, a judgment of Hon'ble the Apex Court in case of *"Y.Saraba Reddy Vs. Puthur Rami Reddy and another"*, [2007 (6) SC 460]. is referred :-

> *"...Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court..."*

Also, by quoting that para, Hon'ble the Apex Court in case of *Sabarjeet Singh* (supra) in para 17, it is directed as under:-

> *"An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction.*
>
> *For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned."*

8. In the light of aforesaid judgments passed by Hon'ble the Apex Court, if evidence of the present case is considered then, the FIR, which was lodged by the witness Rajbahadur Singh (P.W.4) was discarded by himself and therefore, FIR, which was lodged after so many hours of the incident, is highly

doubtful. The application of the applicant/applicant was dependent upon the evidence given by Rajbhan Singh (P.W.20), Rajababu (P.W.21) and Chandrashekhar Singh (P.W.24), whereas, all other independent eye witnesses have turned hostile. Shri U.C.Tiwari, SHO (P.W.22) and Tahsildar Shivani Pandey (P.W.26) did not state that fire was done either by the applicant/ accused Sunny Gaur or his companions. There is a lot of contradictions in the statements of witnesses Rajbhan Singh, Rajababu and Chandrashekhar Singh. The witness Rajbhan Singh has accepted that he did not state to the police that it was the applicant/accused Sunny Gaur, who fired from the gun and killed the deceased Raghvendra. His contradiction with his case diary statement, Ex.D/2 was recorded and therefore, his testimony cannot be believed. It is an after thought statement given by the witness Rajababu Singh. Chandrashekhar Singh has stated that initially the applicant/accused Sunny Gaur fired from the gun and thereafter, his companions also started firing from the gun, whereas Rajababu did not say that the companions of the applicant/accused fired from the guns, which indicates that Chandrashekhar Singh is telling a falsehood about the companions of the applicant/accused Sunny Gaur and hence, the learned Sessions Judge did not believe the witness Chandrashekhar Singh in respect of the companions of the applicant/accused Sunny Gaur while considering the application under section 319 of the Cr.P.C.

9. The witness Rajababu did not state to the police that the proposed accused Rajnish Gaur was present at the time of the incident. He has stated that he was not at all examined by the police and he was not amongst the demonstrators but, he was going through the passage, where the crowd was gathered. If a crowd is gathered on the Vindhya Gate and a pedestrian is while passing through the passage cannot see that who fired from the gun because in between the proposed accused and this witness, a crowd of many persons was present and therefore, he cannot pinpointone person from the crowd. Therefore, the statement of the witness Rajababu appears to be not believable. Chandrashekhar Singh has accepted that the applicant/accused Sunny Gaur took a gun from a security guard and killed the victim Raghvendra, who fell on Earth but, such description is not written in his case diary statement, Ex.D/4. Similarly, he has stated that the companions of the applicant/accused Sunny Gaur had also fired from various guns but, no such statement was given by him to the police and a contradiction was recorded with his case diary statement, Ex.D/4. The learned Sessions Judge has rightly disbelieved this witness relating to the companions of the applicant/accused Sunny Gaur.

Looking to his contradiction with the case diary statement, his testimony cannot be accepted against the applicant/accused Sunny Gaur.

10. Under such circumstances, if the statements of SHO, U.C.Tiwari (P.W.22) and Tahsildar Shivani Pandey (P.W.26) are considered then, no doubt is created against the applicant/accused Sunny Gaur that he assaulted the deceased Raghvendra by firing from a gun. If the applicant/ accused Sunny Gaur would have come on the gate then, a memorandum could be given to him by the crowd and there was no possibility of any incident. Under such circumstances, where the FIR of the case is discarded because the complainant himself did not support the FIR and only 2-3 witnesses are telling against the applicant/accused Sunny Gaur and his companions, also the learned Sessions Judge did not rely upon these witnesses for the companions of the applicant/ accused Sunny Gaur, therefore, in absence of their such previous statements or due to evidence of majority witnesses, the evidence given by these three witnesses would not be accepted finally and therefore, with help of the evidence given by these three witnesses, neither the applicant/accused Sunny Gaur, nor his companions can be convicted for the offence punishable under section 302 or 307 of IPC. Hence, it is apparent that there is no cognate evidence against the applicant/accused Sunny Gaur, so that this extraordinary power be used to implicate him in the case as an accused. On the contrary, if he is added then, the prosecution's case against the present accused persons shall be damaged. The learned Sessions Judge did not rely upon the witnesses for the companions of the applicant/accused Sunny Gaur then, such witnesses should not be relied against the applicant/accused Sunny Gaur also. Hence, in the absence of any cognate evidence, neither the applicant/accused Sunny Gaur, nor his companions could be made accused in the present case.

11. Also, as discussed above, a common trial cannot be done against the present accused persons and the applicant/accused Sunny Gaur and his companions and therefore, they cannot be joined as an accused in the present case. The learned Sessions Judge has committed an error of law in passing the order against the applicant/accused Sunny Gaur to join him as an accused in the case.

12. So far as the joining of remaining proposed accused is concerned, as discussed above, there is no cognate evidence against them that they participated in the crime and therefore, the learned Sessions Judge has rightly rejected the application under section 319 of the Cr.P.C. against those

proposed accused persons and therefore, the revision filed by the applicant/ applicant Vinod Kumar Mishra cannot be accepted. Also, it is pertinent to note that the applicant/applicant Vinod Kumar Mishra sought a relief against the proposed accused persons, by way of a revision but, he did not include those persons to be party in the present revision and therefore, in absence of those proposed accused persons, no relief can be granted to the applicant against the persons, who were not made party in the present revision.

13. On the basis of the aforesaid discussion, the revision filed by the applicant Vinod Kumar Mishra cannot be accepted. Hence, it is hereby dismissed. On the other hand, the revision filed by the applicant/ accused Sunny Gaur is acceptable and therefore, it is hereby accepted. The impugned order passed by the learned Sessions Judge, Rewa relating to implication of the applicant/accused Sunny Gaur to be accused in the present case under section 319 of the Cr.P.C. is hereby set aside.

14. A copy of the order be sent to the trial Court, so that he may continue with the trial against the present accused persons. However, by perusal of the impugned order, it appears that the learned Sessions Judge has disclosed his mind in detail prematurely and therefore, a prejudice would be caused to the State if trial will proceed before the Sessions Judge, Rewa, therefore, the learned Sessions Judge, Rewa is advised that the trial may be transferred to any other Additional Sessions Judge, Rewa.

Order accordingly.

I.L.R. [2013] M.P., 1208
CRIMINAL REVISION
Before Mr. Justice N.K. Gupta
Cr. Rev. No. 2109/2011 (Jabalpur) decided on 7 May, 2013

PAPPU @ CHANDRA PRAVESH TIWARI ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

A. 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. **(Para 7)**

क. 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।

B. 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.** **(Paras 8 to 9)**

ख. 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।

Cases referred :

AIR (36) 1949 Federal Court 6, 1992 Cr.L.J. 436, 2000(1) JLJ 321, 2007(1) MPLJ 84, 1989 JLJ 217, AIR 2006 SC 1769.

S.K. Dwivedi, for the applicant.
Ajay Tamrakar, P.L. for the non-applicant/State.

O R D E R

N.K. Gupta, J.: The applicant has preferred the present revision

against the order dated 23.11.2011 passed by the learned 4th Additional Sessions Judge, Katni in S.T. No.152/04, whereby the application filed by the applicant under Section 233(3) of Cr.P.C. was dismissed.

2. The facts of the case, in short are that, the applicant is an accused in a murder trial pending before the trial Court. In that trial, the witnesses namely Arun Tiwari (PW-9) and V.P. Singh were examined and cross-examinationed. Thereafter, an application under Section 311 of Cr.P.C. was moved to recall these witnesses but the same was dismissed by the trial Court. Thereafter, an application under Section 233(3) of Cr.P.C. was moved, which was dismissed by the trial Court by passing the impugned order.

3. I have heard the learned counsel for the parties.

4. The learned counsel for the applicant has submitted that the name of the applicant was not mentioned in the FIR and therefore, re-examination of the witnesses namely Arun Tiwari and V.P. Singh is necessary. The right given to the accused under Section 233(3) of Cr.P.C. is absolute and the Court cannot deprive him from his rights. In support of his contention, the judgment of the Federal Court in the case of *"Sudhir Kumar Datt and others Vs. the King"* [AIR (36) 1949 Federal Court 6] is referred. Also the orders passed by the Single Bench of this High Court and various High Courts are referred. One judgment of Kerala High Court passed in the case of *"T.N. Janardhanan Pillai Vs. State"* [1992 Cri.L.J. 436] is also referred, whereas the order passed by the Single Bench of this Court in the case of *"Nyaju @ Niyaj Mohd. Vs. State of M.P.* [2000 (1) J.L.J. 321] is also cited. Similarly, the order passed by the Single Bench of this Court in the case of *"Nand Lal S/o Dayaram Dewani and others Vs. State of Maharashtra"* [2007 (1) M.P.L.J. 84] is also referred. The learned counsel for the applicant has further submitted that the witness, who is examined as a prosecution witnesses may be recalled as a defence witness again and in support of this contention, the order passed by the Single Bench of this Court in the case of *"Harbhajan and others Vs. State of M.P."* [1989 J.L.J. 217] is referred.

5. On the other hand, the learned Panel Lawyer has submitted that the scope of Provision under Sections 311 and 233(3) of Cr.P.C. are

different and the applicant cannot get that relief under the garb of Provision under Section 233(3) of Cr.P.C., which was refused under Section 311 of Cr.P.C. and therefore, the learned Additional Sessions Judge has rightly dismissed the application filed by the applicant.

6. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, it is apparent that the application under Section 311 of Cr.P.C. was moved to recall the aforesaid witnesses, which was rejected. Thereafter, an application under Section 233(3) of Cr.P.C. was moved. It is true that the scope of both the sections is slightly different. If the provision of Section 311 of Cr.P.C. is perused, which is as under:-

> **"Power to summon material witness, or examine person present-** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case".

Whereas, the provision of Section 233(3) of Cr.P.C. is perused which is as under:-

> "If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

On comparison of these two provisions, it would be clear that the Provision under Section 311 of Cr.P.C. is more wide. The Court can recall any prosecution witnesses, if it is required to meet the ends of the justice. It may also call any witness, though not cited by any of the party

for the just decision of the case. In general, if a witness is examined by the prosecution then, he can be recalled according to the Provision of Section 311 of Cr.P.C. and that witness cannot be recalled under Section 233(3) of Cr.P.C. For the purpose of Section 233(3) of Cr.P.C. witness is required to prove the defence evidence or to produce any document or a thing. Various orders cited by the learned counsel for the applicant about the Section 233(3) of Cr.P.C. were about the calling of the witnesses in defence and not about the recalling of the prosecution witnesses therefore, except the order passed in the case of *Harbhajan* (Supra), and other orders cited by the learned counsel for the applicant they are not at all applicable in the present case because it is a case of recalling of the witnesses.

7. The Hon'ble Apex Court in the case of *"State of M.P. Vs. Badri Yadav and another"* [AIR 2006 SC 1769] has held that if a prosecution witness, who had been examined, cross-examined and discharged to be juxtaposed as defence witness, then he remains as a prosecution witness. In the light of the judgment passed by the Hon'ble Apex Court, the fact as to whether the prosecution witness can be called as a defence witness needs to be examined. For example, if a doctor is examined by the prosecution, who has proved the various injury reports of the victims and was released after his cross-examination, it was found that he was required to prove the injuries caused to any of the accused persons and the injury reports are filed after his cross-examination by the defence then, such a doctor can be a defence witness for the injury reports of the accused persons. Therefore, if the prosecution witness who has already been fully examined is required to be recalled as a defence witness then, it is for the accused to show as to how he may be counted as a defence witness. In the order passed by the Single Bench of this Court in the case of *Harbhajan* (Supra), it was observed that, though the prosecution's witness was recalled as a defence witness but he shall remain a prosecution witness and a further cross-examination if necessary can be done upon that witness. In that order, the Single Bench of this Court has found an error that one witness, who was examined as a prosecution witness also examined a defence witness and his evidence was recorded for two times in a different manner. In the light of the order passed by the Single Bench of this Court in the case of *Harbhajan* (Supra), it would be apparent that 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.

8. Under such circumstances, it was for the accused to establish that both the witnesses who were examined as a prosecution witnesses were the defence witness and therefore, examination was necessary. If the application filed by the applicant before the trial Court under Section 233(3) of Cr.P.C. is perused then, it would be apparent that no reason has been mentioned by the applicant as to why he wanted to examine those two witnesses as a defence witness. What was the kind of defence that he wanted to prove by those witnesses. The applicant did not mention any reason in that application and therefore, it is apparent that when the application under Section 311 of Cr.P.C. was dismissed and that order attained finality, thereafter to defeat that order, an application under Section 233(3) of Cr.P.C. was moved and therefore, it would be apparent that the applicant's application was not submitted on bonafide grounds. No defence was to be proved by the applicant from those witnesses but he wanted to recross-examine them with the help of the application and therefore, the application moved by the applicant under Section 233(3) of Cr.P.C. for the purpose of vexation and therefore, it could not be allowed under Section 233(3) of Cr.P.C. The trial Court has rightly rejected the application filed by the applicant under Section 233(3) of Cr.P.C. because it was moved only to defeat the previous order of the trial Court under Section 311 of Cr.P.C., which attained the finality.

9. On the basis of aforesaid discussion, no illegality or perversity is visible in the impugned order passed by the learned Additional Sessions Judge and therefore, there is no basis by which the revision filed by the applicant can be accepted. Consequently, the revision filed by the applicant is hereby dismissed.

10. Copy of this order be sent to the trial Court for information and to proceed with the case with the direction that the interim stay granted to the applicant is hereby vacated.

Revision dismissed.

I.L.R. [2013] M.P., 1214
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Sujoy Paul
M.Cr.C. No. 8898/2012 (Gwalior) decided on 22 January, 2013

UMMED SINGH & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

A. 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. (Para 8)**

क. 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।

B. 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. (Paras 14 &15)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 व अनुसूचित जाति और अनुसूचित जनजाति (अत्याचार निवारण) अधिनियम (1989 का 33), धारा 18 – अग्रिम जमानत की पोषणीयता – यदि इस जांच की संतुष्टि की जाती है अर्थात प्रथम दृष्ट्या अपराध नहीं बनता, अग्रिम जमानत प्रदान की जा सकती है – अग्रिम जमानत की पोषणीयता से संबंधित आक्षेप, अधिनियम की धारा 18 के बावजूद उलट दिये गये।

C. 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. (Para16)**

ग. 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।

Cases referred :

(2012) 8 SCC 795, (1995) 3 SCC 221, (2008) 8 SCC 435, 1997 CR.L.J. 2036 (Ker), (2011) 11 SCC 259, 1991 JLJ 468, 1999(1) JLJ 84, 2004(4) MPHT 78(CG), 2006(1) MPLJ 400, 2006(1) MPLJ 439, 2009(1) MPLJ 604, 2009(2) MPHT 13(CG).

Ankur Maheshwari, for the applicants.
B.K. Sharma & Sangita Pachauri, P.P. for the non-applicant/State.

ORDER

SUJOY PAUL, J.: In this case a preliminary objection was raised by the State regarding maintainability of this application under section 438, Cr.P.C., in view of specific bar under section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, the "SC/ST Act'") for grant of anticipatory bail. In other words, it is the stand of the State Government that application for grant of anticipatory bail for offences under the SC/ST Act is not maintainable.

2. With the consent of parties, matter is finally heard on the question of maintainability as well as on merits.

On maintainability:

3. In this case the offences are registered vide crime No. 476/2012 under sections 447, 294 of Indian Penal Code and section 3(1)(x) of SC/ST Act by Police Station Chachoda as well as by Police Station AJK, Guna.

4. Learned counsel for the State heavily relied on section 18 of SC/ST Act to submit that anticipatory bail is completely barred. It is profitable to quote section 18, which reads as under:-

> *"18. Section 438 of the Code not to apply to persons committing an offence under the Act.*-- Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

5. Learned counsel for the State heavily relied on a recent judgment Supreme Court delivered in the case of *Vilas Pandurang Pawar v. State of Maharashtra* (2012) 8 SCC 795, to submit that anticipatory bail cannot be entertained in view of prohibition under section 18 of the SC/ ST Act. Shri B.K.Sharma, learned Public Prosecutor for the State,submits that in *Vilas Pandurang Pawar* (supra) the Apex Court has dismissed the anticipatory bail, which shows that the anticipatory bail application cannot be entertained.

6. Shri Ankur Maheshwari, learned counsel for the applicants, on the other hand, relied on various judgments of this Court and other High Courts to submit that when prima facie on reading of the complaint/FIR the ingredients of section 3(1)(x) of the SC/ST Act are not satisfied/ attracted, bar of section 18 has no role to play for entertaining the application under section 3(1)(x) of the SC/ST Act.

7. In view of rival contentions of learned counsel for the parties, I deem it proper to trace the legal history on the subject. Section 438 of Code of Criminal Procedure was introduced pursuant to 41st report of Law Commission. The recommendation for introduction of anticipatory bail reads as under:-

> *"We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised."*

In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Thus, it is essentially a statutory right conferred long after coming into force of the Constitution of India. The Apex Court considered this aspect in (1995) 3 SCC 221 (*State of MP v. Ram Krishna Balothia*), wherein the constitutional validity of section 18 of SC/ST Act was called in question and opined that section 18 neither violates Article 14 nor 21 of the

Constitution. Thus, the question is whether section 18 aforesaid provides a blanket prohibition for anticipatory bail under section 438 ? In other words, whether anticipatory bail is totally barred if offences under section 3(1)(x) are alleged against the accused.

8. In (2008) 8 SCC 435 (*Swaran Singh vs. State*) the Apex Court opined as under:-

> *"24. In our opinion, calling a member of the Scheduled Caste "chamar" with intent to insult or humiliate him in a place within public view is certainly an offence under Section 3(1)(x) of the Act. Whether there was intent to insult or humiliate by using the word "chamar" will of course depend on the context in which it was used.*
>
> *25. A perusal of the FIR clearly shows that, prima facie, an offence is made out against Appellants 2 and 3. As already stated above, at this stage we have not to see whether the allegations in the FIR are correct or not. We only have to see whether treating the FIR allegations as correct an offence is made out or not."*

A bare perusal of the underlined portion shows that the court may examine the FIR or complaint on its face value at this stage.

9. The court has also examined the language employed in section 3(1)(x) of the SC/ST Act, wherein the legislature has chosen to use the words *"in any place within public view"*. The makers of law have not chosen to insert the word *"public place"* and deliberately chosen the words *"in any place within pubic view"*. The Apex Court in para 27 of *Swaran Singh* (supra) opined as under:-

> *"27. Learned counsel then contended that the alleged act was not committed in a public place and hence does not come within the purview of Section 3(1) (x) of the Act. In this connection it may be noted that the aforesaid provision does not use the expression "public place", but instead the expression used is "in any place within public view". In our opinion there is a clear*

distinction between the two expressions."

10. *Kerala High Court in E. Krishnan Nayanar v. Dr. M.A. Kuttappan* (1997 Cri.L.J. 2036 (KER), opined that the words used in section 3(1) (x) are not *"in public place"* but *"within public view"* which means the public must view the person being insulted for which he must be present and no offence on the allegations under the said section gets attracted. Kerala High Court opined on the basis of complaint that no offence is made out against the petitioner. This judgment of Kerala High Court was considered by Supreme Court in the case reported in (2011) 11 SCC 259 (*Asmathunnisa v. State of Andhra Pradesh*) and Apex Court opined as under:-

> *"9. The aforesaid paragraphs clearly mean that the words used are "in any place but within public view", which means that the public must view the person being insulted for which he must be present and no offence on the allegations under the said section gets attracted if the person is not present."*

In para 11 of the same judgment the Apex Court opined as under:-

> "11. The learned counsel for the appellant has also drawn our attention to a judgment of this Court in *Gorige Pentaiah v. State of A.P.2* The relevant paragraph of this judgment is as under:
>
> > *"6. ... According to the basic ingredients of Section 3(1)(x) of the Act, the complainant ought to have alleged that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he (Respondent 3) was intentionally insulted or intimidated by the accused with intent to humiliate in a place within public view. In the entire complaint, nowhere is it mentioned that the appellant-accused was not a member of the Scheduled Caste or a Scheduled Tribe and he intentionally insulted or intimidated with intent to humiliate*

Respondent 3 in a place within public view. When the basic ingredients of the offence are missing in the complaint, then permitting such a complaint to continue and to compel the appellant to face the rigmarole of the criminal trial would be totally unjustified leading to abuse of process of law."

11. Pausing here for a moment, it is profitable to quote the judgments of this Court and other High Courts on the subject:-

1991 JLJ 468 (Ramdayal and others v. State of MP)

"8. On the allegation that a particular person has committed an offence or is an accused under the Act or if he has been so described by the Police as an accused, the Court would not without examining the merits of the accusation, dismiss his application. Where there is no material to reasonably raise a suspicion of the commission of an offence, it cannot be said that there is an accusation within the meaning of section 18 of the Act and the maintainability of application under section 438 CrPC, cannot be challenged."

1999(1) JLJ 84 (Suresh Kumar Vs. State of M.P.)

"4. On considering the submissions of the learned counsel and perusing the orders of this Court in cases of Kalyan Singh v. State of M.P. and Bablu v. State of M.P. (supra), it is not disputed that the bar created to grant anticipatory bail for under the S.C. & S.T. Act U/s. 18 of the said Act shall not apply when no Prima-facie material is available on the case diary to raise suspicion of commission of any offence under the Act is found out against the accused-applicant. In Ramdayal and others v. State of M.P. (1999 JLJ 498), this Court has also held that, "a particular person has committed an offence or is an accused under the Act or if he has been so described by the police as an accused, the

Court would not without examining the merits of the accusation dismiss his application filed U/s. 438 Cr.P.C. Where there is no material to reasonably raise a suspicion of commission of the offence it cannot be said that there is an accusation within the meaning of Sec. 18 of the Act and the maintainability of application U/s. 438 Cr.P.C. cannot be challenged.

5. In view of the above, on considering the allegations made against the applicant and the evidence available on the case diary, without commenting on the merits of the case at this stage, I do not find material for prima-facie suspecting the applicant of having committed an offence under the Act. As such, the ban imposed by Sec. 18 of the Act does not come into play and the applicant, under the facts and the circumstances of the case deserves the benefit of anticipatory bail U/s. 438 Cr.P.C."

2004(4) MPHT 78 (CG) (Dilip Chhabariya Vs. State of Chhattisgarh)-

"7. In order to attract the provisions of Section 3 (1) (x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, it is necessary that the accused intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to five years and with fine.

8. Perusal of the First Information Report shows that, at the time of the incident the accused abused the complainant in the name of the caste and mother. There is no mention in the First Information Report that the accused abused the complainant with intention to intimidate or insult or humiliate him being a member of the Scheduled Caste.

9. Therefore, looking to the above facts, I am of the opinion that it is a case to grant anticipatory bail to the applicant. Accordingly, the bail application is allowed."

2006(1) MPLJ 400 (Shayam Singh @ Dhannu vs. State of MP)

"5. Besides this, taking the name of caste of any citizen of this country itself is not the offence till it is not taken with the intention to humiliate that person because of his community. Thus bar created by section 18 of the SC and ST Act does not attract in the case at hand.

6. So far breach of contract is concerned, it gives to Civil Right to the parties. Thus in view of the aforesaid dictum of this Court and the Apex Court and considering the other circumstances of the case, without expressing any opinion on the merits of the matter I deem fit to allow this application. Thus, the application is allowed."

2006(1) MPLJ 439 (Rajendra Singh vs. State of MP)

"7. Having heard the learned counsel for the parties, after perusing the case diary, it is apparent that according to FIR incident did not take place because of that the victim was belonging to caste which is covered by the said Act. Beside this no ingredients are found in the FIR about the offences of the said Act and considering other facts and circumstances it appears that no act has been attributed to humiliate the victim on the basis of his caste, but alleged incident was happened because of earlier political enmity or sudden altercation in the function of marriage. Thus, in such circumstances the bar of section 18 of the said Act is not applicable while other alleged offences are bailable."

2009 (1) MPLJ 604 (Kavindra Nath Thakur vs. State

of MP) -

"15. To attract section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act the intentional insults or intimidation must be at the place in the public view. According to Bharatlal Raut this incident took place in the house of appellant. No evidence is adduced as to how the place of occurrence was within the public view, therefore, this essential element to prove the offence under section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is missing in tis case.

16. In the case of J. Sumana vs. Endluri Aseerwadamma, 2003 (1) ALD (Cri) 252 (AP) it has been held that where the petitioner was alleged to have abused in his chamber, the complainant on the ground of caste. But there was no pubic in the chamber and it was not within the public view. As such, no offence could be said to be committed under section 3(1)(x).

17. In the case of K. Padma Reddy vs. Station House Officer, Bellampalli, 2004 Cri.L.J. 503 (AP) it has been held that where FIR was registered on a complaint for abusing a person in the name of caste by the petitioner. Held that every utterance which came within the purview of provision of At by itself was not offence, unless it was made in a place within the public view. In the instant case scene of offence was Chamber of Municipal Commissioner. As there was no allegation to effect that said utterance was made 'within the public view', therefore, offence could not be said to have been committed by the petitioner.

18. To attract this section the alleged insult or intimidation is to be done within intent to humiliate a member belonging to that particular community. Merely call b caste is not sufficient to constitute the offence."

2009(2) MPHT 13 (CG) (Leedhar Yadav Vs. State of

Chhattisgarh)-

"6. Provision of Section 438 of the Code is a general rule for granting anticipatory bail but bar of anticipatory bail under Section 18 of the Act is an exception to the general rule. In case of any exception the prosecution is required to show prima facie the facts which attract the bar in the general rule. Without there being any material to this effect it cannot be said that the person concerned would not be entitled for anticipatory bail as he has been merely described as accused by the Police for committing an offence punishable under the provisions of the Act. There must be material available on record to show that the person is involved in the offence punishable under the provision of the said Act. While dealing with the application under Section 438 of the Code, the Court is required to examine the material collected by the prosecution or the complainant and if the Court finds prima facie sufficient material for the commission of the offence under the Act, then the bar created under Section 18 of the Act comes into play and it is not competent to grant bail under Section 438 of the Code. But if it does not find any such material against the applicant under the provisions of the Act, then it is competent to consider the application filed under Section 438 of the Code. Merely by mentioning section of the Act does not create a bar for considering the application under Section 438 of the Code.

11. Taking into consideration the aforesaid facts, the previous dispute and apprehension of the applicant prior to the lodging of the written complaint, I am of the view that at this stage, the prosecution has not collected any material against the applicant to prima facie show that the applicant has committed the offence punishable under Section 3(1)(x) of the Act.

12. Consideration for bail is different from that of framing

the charge or making out the case against the applicant for trial even if strong suspicion is there. Therefore, in the light of the above discussion and the law laid down by the Apex Court in respect of entertaining the application under Section 438 of the Cr.PC in the matter of offences relating to the Act, 1989, I am of the opinion that it is a fit case in which the benefit of Section 438 of the Cr.PC should be extended to the accused/applicant. Accordingly, the application is allowed. It is, therefore, directed that in the event of arrest of the accused/applicant namely Leeladhar Yadav, if he furnishes a personal bond of Rs.10,000/- with a surety in the like sum to the satisfaction of the arresting Officer, he be released on bail."

12. Learned counsel for the State submits that although the judgments passed by this Court and various other High Courts on earlier occasions cannot be doubted but in view of recent judgment of Supreme Court in *Vilas Pandurang Pawar* (supra), no anticipatory bail is permissible. At the cost of repetition, Shri B.K.Sharma, learned Public Prosecutor for the State, by relying on paragraph 13 of the judgment of *Vilas Pandurang Pawar* (supra) submits that anticipatory bail is ultimately rejected by the Supreme Court, which goes to show that anticipatory bail itself is not tenable in view of bar under section 18 of SC/ST Act.

13. In the light of this contention, it is apt to quote the relevant paragraphs of the judgment in *Vilas Pandurang Pawar* (supra), which read as under:-

"9. Section 18 of the SC/ST Act creates a bar for invoking Section 438 of the Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the SC/ST Act has been prima facie made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name, the accused persons are not entitled to anticipatory bail.

10. The scope of Section 18 of the SC/ST Act read with

Section 438 of the Code is such that it creates a specific bar in the grant of anticipatory bail. When an offence is registered against a person under the provisions of the SC/ST Act, no court shall entertain an application for anticipatory bail, unless it prima facie finds that such an offence is not made out. Moreover, while considering the application for bail, scope for appreciation of evidence and other material on record is limited. The court is not expected to indulge in critical analysis of the evidence on record. When a provision has been enacted in the Special Act to protect the persons who belong to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the Code, the provision in the Special Act cannot be easily brushed aside by elaborate discussion on the evidence.

12. In view of the specific statutory bar provided under Section 18 of the SC/ST Act, the above decisions relied on by the petitioners cannot be taken as a precedent and as discussed above, it depends upon the nature of the averments made in the complaint.

13. In view of the above discussion and in the light of the specific averments in the complaint made by the complainant Respondent 3 herein, we are of the view that Section 18 of the SC/ST Act is applicable to the case on hand and in view of the same, the petitioners are not entitled to anticipatory bail under Section 438 of the Code. Accordingly, the special leave petition is dismissed. However, it is made clear that the present conclusion is confined only to the disposal of this petition and the trial court is free to decide the case on merits."

(Emphasis Supplied)

14. The highlighted portion by this Court shows that the argument of learned Public Prosecutor is devoid of merits and substance. The Apex Court held that when offence under section 3(1)(x) of the SC/ST Act is

prima facie not made out and if there is no specific averment in the complaint regarding insult or intimidation with intent to humiliate by calling with caste name, anticipatory bail is not barred. It is further held that although there is no scope of critical examination of evidence at the stage of considering anticipatory bail, consideration of the complaint, FIR or evidence on its face value is permissible for considering whether case under section 3(1)(x) of SC/ST Act is *prima facie* made out. A bare perusal of the judgment of *Vilas Pandurang Pawar* (supra) shows that if the litmus test laid down by Supreme Court is satisfied, anticipatory bail can be granted under section 438 of the Code of Criminal Procedure. It is also clear that the court must satisfy itself that *prima facie* case under section 3(1)(x) is not made out and, therefore, anticipatory bail can be entertained.

15. Thus, the contention of the learned Public Prosecutor for the State cannot be accepted. In the opinion of this Court, the objection regarding maintainability of anticipatory bail in the teeth of section 18 of the SC/ST Act deserves to be and is accordingly overruled. The Supreme Court in para 13 in *Vilas Pandurang Pawar* (supra) dealt with the facts of the case on hand and it is of no assistance to the State.

On merits:

16. In the present case, in the FIR it is stated that the applicants were not permitting the complainant to work on the agricultural field and was using abusive and filthy language. However, a bare perusal of the FIR shows that there is no allegation that the present applicants do not belong to SC/ST community. It is also not *prima facie* clear that the incident took place in public view and, therefore, *prima facie* the ingredients of section 3(1)(x) of the SC/ST Act are not satisfied. However, it is made clear that this discussion is only for the purpose of granting anticipatory bail and it will not affect the trial of the case in any manner.

17. In the light of aforesaid and applying the test laid down in various judgments of this Court and in recent judgment in *Vilas Pandurang Pawar* (supra), I deem it proper to enlarge the applicants on anticipatory bail.

18. Accordingly, this application is allowed. It is directed that in the event of arrest, applicants be released on bail on their executing a personal bond in the sum of **Rs.50,000/- (Rupees Fifty Thousand only)** each

and furnishing two solvent sureties, each of Rs.25000/-, by each applicant to the satisfaction of the arresting officer subject to following conditions:-

1. The applicants will comply with all the terms and conditions of the bonds executed by them;

2. The applicants will cooperate in the investigation/ trial, as the case may be;

3. The applicants will not indulge themselves in extending inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to the Police Officer, as the case may be;

4. The applicants shall not commit an offence similar to the offence of which they are accused.

5. The applicants will not seek unnecessary adjournments during the trial; and

6. The applicants will not leave India without previous permission of the trial Court/Investigating Officer, as the case may be.

Certified copy as per rules.

Application allowed.

I.L.R. [2013] M.P., 1227
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Anil Kumar Sharma
M.Cr.C. No. 2356/2013 (Jabalpur) decided on 1 March, 2013

AVDHESH RAGHUVANSHI ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***A. 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. (Para 10)

क. 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।

***B. 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 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 (Paras 11 &12)**

ख. सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धाराएं 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 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।

Cases referred :

(2000) 4 SCC 168, (2006) 6 SCC 736, AIR 1965 SC 1, 1992 AIR SCW 237.

P.N. Dubey, for the applicant.

Alok Tapikar, P.L. for the non-applicant/State.

ORDER

ANIL KUMAR SHARMA, J.: Petitioner has filed this petition under Section 482 of Cr.P.C. seeking quashment of S.T. No. 235/11 pending before the XIII Additional District and Sessions Judge Bhopal for the offence punishable under Sections 420, 467, 468, 471 read with Section 120-B of IPC.

2. The brief facts of the case are that complainant Mukesh Lala forwarded a complaint to the Deputy Commissioner, Cooperative making allegation that Shri Ganesh Grih Nirman Sahkari Sanstha Maryadit, Bhopal (herein after shall be referred as "Society") has illegally allotted plot No. 127 to some other person ; however, the said plot was allotted to complainant on 29/10/1998 by Lottery System.

3. An enquiry was conducted by Shri Pramod Rai, Investigation Officer, Cooperative Bhopal and it was found in enquiry report dated 26/09/2009 that after allotment of the said plot No. 127 to the complainant in the year 1998, the complainant has not deposited the maintenance charges, Bhoo Bhatak and further did not complete the registration process, which was necessary for the complete allotment of the said plot to the complainant. On the basis of said deficiencies mentioned above, the right of the complainant to receive the plot was taken away in year 2000 after giving him due notice and even after publication of public notice in the newspaper and after giving the complainant several notices for cancellation of allotment of plot in accordance with the byelaws of the society. The report of the investigating officer, Cooperative Bhopal has been filed as Annexure A/1 with the petition. Thereafter, the Deputy Commissioner, Cooperative, forwarded a letter in accordance with the report on 13/10/2009 to the Superintendent of Police, Bhopal by letter dated 13/10/2009 on the basis of said letter, an FIR has been registered against the Prakash Chand Jain and Board of Directors of the society, under Sections 420, 467, 468, 471 read with Section 120-B of IPC and thereafter on the basis of the FIR investigation was conducted and final report dated 23/11/2000 was filed before the competent Court. Copy of the challan and order-sheet of the Court have been filed as Annexures A/3 and A/4 with the petition respectively.

4. The petitioner has challenged the FIR and final report and the

proceedings before the learned trial' Court on the ground that he is a Public Servant, therefore, no action under the provisions of Cr.P.C. can be initiated against him without prior sanction against him as enumerated under Section 197 of Cr.P.C..

5. Learned counsel for the petitioner has submitted that FIR has been lodged ignoring the provisions of M. P. Cooperative Societies Act, 1960 (for short "Act of 1960"). The provisions of Cr.P.C. are not attracted in the case as for alleged offence there is provisions under the Cooperative Societies Act for imposition of punishment. It is further submitted that the matter involves dispute between member of society and governing body of the society and for resolving the same the only competent authority is Deputy Registrar or Joint Registrar of the Cooperative Society. Learned counsel for the petitioner has drawn attention of this Court towards the provisions of Section 64 of the M.P. Cooperative Societies Act, 1960 which is reproduced below:

> "64. Disputes.-(1) Notwithstanding anything contained in any other law for the time being in force (any disputes touching the constitution, management or business, terms and conditions of employement of a society or the liquidation of a society shall be referred to the Registrar) by any of the parties to the dispute if the parties thereto are among the following (a) a society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or a nominee, heirs or legal representatives of any deceased agent or deceased servant of the society, or the liquidator of the society; (b) a member, past member or a person claiming through a member, past member or deceased member of a society or of a society which is a member of the society; (c) a person other than a member of the society who has been granted a loan by the society or with whom the society has or had business transactions and any person claiming through such a person; (d) a surety of a member, past member or deceased members or a person other than a member who has been granted a loan by the society, whether such a surety is or is not a member of the society; (e) any other society or the liquidator of such a society;

and (f) a creditor of a society. (2) For the purposes of sub-section (1), a dispute shall include- (I) a claim by a society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not; (ii) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand be admitted or not; (iii) a claim by a society for any loss caused to it by a member, past member or deceased member, any officer, past officer or deceased officer, any agent, past agent or deceased agent, or any servant, past servant or deceased servant, or its committee, past or present, whether such loss be admitted or not; (iv) a question regarding rights, etc, including tenancy rights between a housing society and its tenants or members; and (v) any dispute arising in connection with the election of any officer of the society or representatives of the society or of composite society; provided that the Registrar shall not entertain any dispute under this clause during the period commencing from the announcement of the election programme till the declaration of the results. (3) If any question arising whether a dispute referred to the Registrar is a dispute, the decision thereon of the Registrar shall be final and shall not be called in question in any court."

On perusal of the above provisions, it is clear that as per above mentioned section 64 of Act, 1960 the Registrar, Cooperative Societies has jurisdiction to resolve the dispute between the member of society and the society. Learned counsel for the petitioner has further submitted that even if any criminal aspect is found out in dispute of society then the Registrar is competent to lodge a criminal case and as such the cases can be registered after obtaining due permission from the registrar as per the provisions of the Act, 1960. He has further drawn attention of this Court towards provisions of Section 72-D of Act, 1960 which shall amount to and be construed as offence punishable under Section 74 of the Act. The

provisions of Section 72-D are reproduced below:-

> "72D. Offences- Any of the following acts shall amount to and be construed as an offence under Section 74, namely.- (i) transfer of a registered plot, dwelling house or flat to another person, in violation of the provisions of this Act, Rules, Byelaws of the society or any condition of allotment; (ii) tempering with the membership list; (iii) admitting members in excess of the number prescribed in the byelaws; (iv) not developing the land in accordance with the development plans of the society; (v) allotment or the sale of the land, in violation of the approved lay out plans of the society; (vi) non development of the land which is reserved for general use of the society such as for community hall, school or hospital, or for any other purpose specified in the bye laws; (vii) not maintaining or providing services paid for by the members without just and sufficient cause; (viii) allotment of plots to members are not made according to the oriority list of members; (ix)selling or leasing out the land held by society or transferred the land without permission of the Registrar; (x) not complying with the provisions of clause (f) of sub-section (1) of Section 72 B."

6. According to Section 76 of the Act, 1960 for instituting the prosecution, previous sanction in writing of the Registrar is necessary and the competent Court having jurisdiction to try such offence shall be not to inferior to that of a Magistrate of the first class shall try any offence under this Act. Provisions of Section 76 of the Act, 1960 are reproduced below:-

> "76. Cognizance of offence-(1) No court inferior to that of a Magistrate of the first class shall try any offence under this Act. (2) no prosecution shall be instituted under this Act without the previous sanction in writing of the Registrar and such sanction shall not be given without giving to the person concerned an opportunity to represent his case."

7. According to provisions of Section 72 (D) (i) of the Act, 1960, the transfer of a registered plot to any person in violation of provisions of Act, 1960, rules, byelaws or any condition of allotment ,shall amount to and be construed as an offence under Section 74 of the Act of 1960. Considering the allegation made in the complaint, the only grievance of the complainant is that his plot has been allotted to other person. Learned counsel for the petitioner has submitted that the plot of the complainant has been allotted to other person after not only publishing public notice in newspaper Dainik Bhaskar dated 5/10/2008 and 6/10/2008 but also after sending him several notices. Copy of the notices published in Dainik Bhaskar are at page No. 142 and 143 of the petition. Annexure A/5 and Annexure A/6 are making a reference of earlier notices dated 16/6/1999, 10/01/1998 and 25/11/1999. Learned counsel for the petitioner has also drawn attention of this Court towards the resolution passed by the society dated 29/10/2000 which has been filed as Annexure A/7 by which allotment of plots to the members who have not got registered their plots and have not given any reply to the notices sent to them after giving several notices, have been cancelled and resolution has been passed to allot these plots to the members who are in waiting list. List of those persons to whom allotment of plot has been cancelled finds name of complainant at serial No. 26. The copy of the resolution has also been sent to Deputy Registrar, Cooperative Societies thereafter letter Annexure A/9 has been sent by Registered AD post to complainant under Section 19 (c) of the Act of 1960 by which the resolution of general meeting dated 25/3/2007 regarding cancellation of membership and allotment of plot to the complainant, has been intimated to him. Copy of the acknowledge of registered letter has also been filed by the petitioner.

8. Therefore, the allotment of plot to the complainant has been cancelled alongwith his membership with the society by passing resolution of which due intimation was also given to the complainant. Since, the act of the society has been done in accordance with the byelaws of the society and allotment of plot to the complainant has been cancelled in accordance with the byelaws of the society, therefore, looking to the provisions of Section 72 read with Section 74 of the Act of 1960, no offence punishable under Sections 420, 467, 468, 471 read with Section 120-B of IPC is made out against the petitioner.

9. Learned counsel for the petitioner has cited the judgment of Hon. Apex Court in the matter of *Hridaya Ranjan Prasad Verma and others Vs. State of Bihar and another.* (2000) 4 SCC 168 in which it has been held that where the complaint and criminal proceedings are abuse of process of Court and the transaction of sale of land by appellants to respondent 2 society and cheques issued by respondent 2 in favour of appellant dishonoured by bank because of insufficiency of amount in the account of drawer, the allegations in the complaint read as a whole not indicating, expressly or impliedly, any intentional deception on the part of the appellants right from the beginning of the transaction, prima facie the allegations made by respondent 2 not constituting offence punishable under Section 420 of IPC or allied offences mentioned in the complaint, it has been held continuing the criminal proceedings against the appellants would amount to an abuse of process of Court, therefore, High Court erred in refusing to quash the complaint and the proceedings.

10. Counsel for the petitioner has also cited the judgment of Hon. Apex Court in the matter of *Indian Oil Corporation Vs. NEPC India Ltd. And others,* (2006) 6 SCC 736, in which it has been held that in case of default in making payment of oil in accordance with the contract (i) the complaint related to purely contractual disputes of a civil nature in respect of which IOC had already south injunctive reliefs and money decrees (ii) even if all the allegations in the complaints were taken as true, they did not constitute any criminal offence as defined under Sections 378, 403, 405, 415 or 425 of IPC. It has been further held that 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. A commercial transaction may also involve a criminal offence. if it is found that a frivolous criminal complaint had been filed knowing well that remedy lay only in civil law, person who filed such complaint should himself be made accountable in accordance with law at the end of such proceedings. The Court should exercise power under Section 250 of Cr.P.C. frequently where there is malice or frivolousness or ulterior motives on the part of the complainant.

11. In the present case, the membership and allotment of plot to the complainant have been cancelled for non-following the due procedure in

accordance with the byelaws of the society and complainant has not filed any objection or taken recourse of any legal action by filing a suit against the petitioner, further no complaint has been lodged by him before the Deputy Registrar, Cooperative Societies, who is competent authority to enquire into and lodged complaint, if any offence is committed by society with regard to allotment of plot and in absence of such proceedings, under Section 76 of the Act of 1960, the FIR registered against the petitioner is liable to be quashed.

12. Learned counsel for the petitioner has further drawn attention of this Court towards the provisions of Section 5 of Cr.P.C. which is reproduced below:-

> 5. Saving.-Nothing contained in this Code shall, in the absence of a specific provisions to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

On perusal of above provision, it is clear that dispute regarding allotment of plot or cancellation of plot allotted to a member by society is punishable under Section 72 read with Section 74 of Act of 1960 and cognizance of such offence can be taken only on a sanction given by Registrar, Cooperative Societies under Section 76 of the Act of 1960 and the provisions of Cr.P.C. are not applicable to such offence which are part of a special act i.e. M.P. Cooperative Societies Act.

13. Learned counsel for the petitioner has cited the judgment of Hon. Apex Court in the matter of *Nilratan Sircar Vs. Lakshmi Narayan Ram Niwas*, AIR 1965 SC 1, in which it has been held that under Section 5 of Cr.P.C. proceedings an offence shall be investigated, inquired into,tried and otherwise dealt with according to the provisions contained in the Cr. P.C., but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The Foreign Exchange Regulation Act is a Special Act and it provides under Section 19-A for the necessary investigation into the alleged suspected commission of an offence under the Act, by the Director of Enforcement. The provisions of Cr.P.C. therefore will not apply to such investigation by him.

14. By applying principle of analogy, this citation is also applicable to M.P. Cooperative Societies Act, 1960 which makes the provisions for investigation and filing of complaint after due sanction and cognizance of offence on a complaint filed by the Registrar, Cooperative Societies. Therefore, provisions of Cr.P.C. are also not applicable to the facts and circumstances of the present case.

15. Therefore, considering the fact that first, no offnece punsiahble under Section 420, 467, 468, 471 read with Section 120-B of IPC is made out against the petitioner as the plot allotted to the complainant has been cancelled alongwith his membership with the society after following due procedure of law under the Act of 1960 and in accordance with the byelaws of the society. Secondly, after the allotment has been cancelled after due intimation to the complainant in the year 1999 and after cancellation of membership and allotment of plot to the complainant, complainant has been given due intimation of the resolution passed by society in its general meeting, therefore, also the complaint submitted by the complainant is just a counter blast to the cancellation of plot allotted to him and there is no ingredient of cheating involved in the case as the plot has been allotted to other person after due intimation of the same to the complainant in accordance with the byelaws of the society and rules made thereunder.

16. Learned counsel for the petitioner has drawn attention of this Court towards the letter (Annexure A/11) according to which complainant has been allotted a house by Danish Grih Nirman Sahkari Sanstha Maryadit, Bhopal and he is not a homeless person, therefore, after allotment of house to the complainant, complainant is not entitled to get the plot in the society of the petitioner.

17. Looking to the provisions of Section 72-D, 74, 76 and 64 of the Act of 1960, neither the police has any power to investigate the dispute between member of society and society relating to business of society which include allotment and cancellation of plot, therefore, looking to the provisions of Act of 1960 and bye laws of the society for allotment of a plot and cancellation of allotment, no cognizance for the offence punishable under Section 420,467, 468, 471 read with Section 120-B of IPC can be taken or FIR can be lodged as the offence falls within the ambit of Section 72-D of the Act of 1960 and provicions of punishable have been made in the said Act and cognizance of such offence can only be taken

under Section 76 (2) of the Act of 1960 on a sanction given by Registrar of the Cooperative Society, therefore, the proceedings pending against the petitioner in S.T. No. 235/11 pending before the XIII Additional District and Sessions Judge Bhopal for the offence punishable under Sections 420, 467, 468, 471 read with Section 120-B of IPC and FIR lodged against him at crime No. 616/2009 at police station Shahjahanabad, Bhopal are liable to be quashed considering the circumstances No. 1, 2, and 4 as laid down by Hon'ble Apex Court in the matter of *State of Haryana Vs. Bhajanlal*, 1992, AIR SCW 237, which is reproduced as under:

> 1) Where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> 2) Where the allegations in the FIR and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.
>
> 4) Where, the allegation in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.

18. Resultantly, petition is allowed and the proceedings pending against the petitioner in S.T. No. 235/11 pending before the XIII Additional District and Sessions Judge Bhopal for the offence punishable under Section 420, 467, 468, 471 read with Section 120-B of IPC and FIR lodged against him at crime No 616/2009 at police station Shahjahanabad. Bhopal are hereby quashed and petitioner is acquitted from all the charges.

A copy of this order be sent to concerned Court for necessary action and compliance.

Petition allowed.

I.L.R. [2013] M.P., 1238
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Brij Kishore Dube
M.Cr.C. No. 4819/2011 (Gwalior) decided on 21 March, 2013

RAMCHARAN & ors. ...Applicants
Vs.
YOGENDRA SINGH (MINOR) ...Non-applicant

***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. (Para 13)**

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 परिस्थितियों 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।

Cases referred :

(2007) 1 SCC (Cri) 376, 1997 SCC (Cri) 679, (2009) 6 SCC 698, (2006) 1 SCC (Cri) 320, 2005(3) MPLJ 432.

Rajmani Bansal, for the applicants.
S.K. Shrivastava, for the non-applicant.

O R D E R

Brij Kishore Dube, J.: By invoking the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (In short, the Code), the petitioners have called in question the legality, validity and propriety of the impugned order dated 02/07/11 passed by I Additional Sessions Judge,

Vidisha in Criminal Revision No.61/11 affirming the order dated 25/04/11 passed by the SubDivisional Magistrate, Kurwai, District Vidisha in Criminal Case No.12/2008/ Section 145 of the Code whereby an order directing delivery of the possession to the respondent herein has been passed.

2. The facts necessary for adjudication of this matter are that the respondent herein filed an application on 23/10/08 under Section 145 of the Code before the SubDivisional Magistrate, Kurwai, District Vidisha. The SDM passed an order under Section 145(1) of the Code and issued notices to both the parties. On the same day, an order under Section 146(1) of the Code directing the Officer-in-Charge of the Police Station, Kurwai to deliver the disputed land in supardgi to Anwar Khan s/o Dildhar Khan was passed. On 18/11/08, the petitioners herein have filed an application for change of receiver and by allowing the application on 29/01/09, Laxman Singh was appointed as receiver. Thereafter, after affording opportunity of being heard to both the parties, the SDM by an order dated 25/04/11 held that the respondent herein is the owner and in possession of the land in dispute and directed to the supardgidar, Laxman Singh to handover the possession to the respondent herein. The order dated 25/04/11 was tested before the Additional Sessions Judge, Vidisha in Criminal Revision No.61/11 by the present petitioners. The Revisional Court by the impugned order dated 02/07/11 dismissed the revision and maintained the order passed by the SDM, Kurwai. Being aggrieved by both the orders, this petition has been preferred by the petitioners herein.

3. Shri Rajmani Bansal, learned counsel for the petitioners submits that there was no material before both the Courts below which shows that the respondent herein was in possession and on the contrary, the material shows that the petitioners are in possession. Section 145 of the Code is applicable only when the person is in possession of the disputed property but in the present case, the petitioners herein are in possession of the disputed property and on the basis of this factual matrix, the Apex Court granted stay in favour of the petitioners herein. The suit property was attached from the possession of the petitioners. Therefore, an order passed directing the delivery of possession to the respondent herein is illegal and arbitrary. It is further submitted that the Magistrate while deciding the proceedings under Section 145 of the Code has to decide which of the party had been in possession on the date of preliminary order and within two months next before it. The SDM has not conducted any enquiry as required under proviso to Section 145(4) Code. In

absence of any material to show that land was in possession of the respondent herein on the date of complaint or soon before it, Section 145 of the Code could not have been invoked and the remedy is only to file a civil suit for restoration of the possession. He has placed reliance on the following decisions:

(i) *Kunjbihari Vs. Balram and another,* (2007) 1 SCC (Cri) 376;

(ii) *R.C.Patuck Vs. Fatima A. Kindasa and others,* 1997 SCC (Cri) 679

(iii) *Bharat Prasad and others Vs. State of Bihar and others,* (2009) 6 SCC 698; and

(iv) *Mahar Jahan and others Vs. State of Delhi and others,* (2006) 1 SCC (Cri) 320

4. On the contrary, Shri S.K.Shrivastava, learned counsel for the respondent submits that initially Kunwarlal, the father of the petitioner No.1 filed a civil suit for declaration, permanent injunction and for restoration of the possession by virtue of 'will' against predecessors of the respondent herein. He lost from this Court and even the SLP filed before the Apex Court was withdrawn by him. Meaning thereby, the possession is still with the respondent herein. It is further stated that after withdrawal of the SLP, the petitioners herein started creating nuisance and hindrance over the suit property, therefore, the respondent herein filed an application under Section 145 of the Code which was allowed by the SDM after considering the material placed on record. The SDM opined that the respondent herein was in possession at the time of filing the application under Section 145 of the Code and, therefore, passed the order in favour of the respondent herein. The conduct of the petitioners of placing the false affidavits before the SDM shows that they wants to grab the property of the respondent herein by hook or crook. The finding of fact arrived at by the SDM cannot be interfered with by the High Court while exercising the jurisdiction under Section 482 of the Code. In this regard, he has cited *Sarwar Beg and others Vs. Satyanarain and others*, 2005(3) MPLJ 432 wherein this Courtheld as under:

"7. When a finding of fact was arrived by the SDM on appreciation of the material before him, the same cannot

interfered with by the High Court while exercising jurisdiction under section 482, Criminal Procedure Code. In a petition under Section 482, Criminal Procedure Code it is is not the practice of the High Court to go into the disputed question of fact. It is not open to a party to assail a concurrent finding of fact given by two courts below. It is not a case where a glaring thing is brought to the notice of this Court which proved beyond any shadow of doubt that the facts mentioned in the order are not true.

8. When there was a clear finding in the order of the SDM that the apprehension of breach of peace exists, existence of emergency was implicit in the order, therefore, it will not be appropriate to interfere with the orders of the courts below. The petition is, therefore, sans merit and the same is dismissed."

5. I have heard learned counsel for the parties at length and bestowed my anxious consideration on rival contentions.

6. In *Kunjbihari* (supra), it has been held by the Apex Court that if any party claims to be in possession of the property and seeks its protection, it is for that party to approach the civil Court and get an appropriate order. The proceedings under Section 145 of Cr.P.C., cannot be allowed to continue. In *R.C.Patuck* (supra), the Apex Court observed as under:

"9. It will be seen from the facts stated above that the order under Section 145(1) was passed by the learned Magistrate on 16-3-1993. The question is whether the Magistrate could have passed any order in favour of the petitioner under sub-section (4) of Section 145. Going by the main sub-clause (4) of Section 145 it is clear that the Magistrate could initially decide who was in possession as on the date when the order under Section 145(1) was passed on 16-3-1993. In cases where the proviso to the said sub-clause (4) applied, that is, if it appeared to the Magistrate that any party had been forcibly and wrongfully dispossessed, within two months next before the date on which the report of a police officer or other

> information was received by the Magistrate, or after that date and before the date of his order under subsection (1), the Magistrate might treat the party so dispossessed as if the said party had been in possession on the date of his order under subsection (1). In other words, if the conditions mentioned in the proviso to sub-section (4) were satisfied, the Magistrate could deem a person to be in possession as on the date of the order under Section 145(1) notwithstanding the fact that he was not in fact in possession on that date, but lost possession earlier, within two months before the order....."

7. In *Bharat Prasad and others* (supra), there was clear finding of fact in bataidari proceeding that the appellants are *bataidars*. In such circumstances, it has been held by the Apex Court that if the respondents are aggrieved by the findings reached in the *bataidari* proceeding they have the statutory right of the appeal to be exercised according to law. Without doing that the effect of *bataidari* proceeding cannot be scuttled with the subterfuge and juggle of Sections 144/145 of the Code.

8. In *Mahar Jahan and others* (supra), it has been held by the Apex Court as under:

> "4. It is not disputed by the learned counsel for the parties that this very property which is the subject-matter of these criminal proceedings is also the subject-matter of the civil suit pending in the civil court. The question as to possession over the property or entitlement proceedings have remained pending for about a decade. We do not find any propriety behind allowing these proceedings to continue in view of the parties having already approached the civil court. Whichever way proceedings under Section 145 Cr. P.C., may terminate, the order of the criminal court would always be subject to decision by the civil court. Inasmuch as the parties are already before the civil court, we deem it proper to left the civil suit be decided and therein appropriate interim order be passed taking care of the grievances of the parties by making such arrangement as may remain in operation during the hearing of the civil suit.

9. Admittedly, the petitioner No.1, Ramcharan is the son of Kunwarlal

who had died. Phoola Bai was the widow, Deva Bai and Kasturi Bai were the daughters of the deceased, Dhiraj Singh and the respondent herein is claiming the property in dispute through them.

10. From a bare perusal of the record, it is evident that Phoola Bai and others filed a civil suit for declaration and injunction against Kunwarlal and others which was numbered as Civil Suit No.39-A/78 wherein it was alleged that the disputed land situated at village Karmodia was owned by Dhiraj Singh (since deceased), husband of Phoola Bai. The defendants have no right, title and interest over the suit property and they are interfering with the possession of the plaintiffs on the basis of forged 'will' alleged to be executed by the deceased, Dhiraj Singh in their favour, hence they filed a civil suit claiming declaration of title, injunction and to restrain the defendants from interfering in their possession over the suit land. The defendant, Kunwarlal had also filed Civil Suit No.42-A/78 for declaration of title, possession and injunction in respect of the same land alleging that the land was owned by Dhiraj Singh who had died on 02/10/1977. He (Kunwarlal) was residing with the deceased, Dhiraj Singh and was serving him. The deceased, Dhiraj Singh executed a 'will' dated 04/06/75 in his favour in respect of the suit land and, therefore, he has acquired the title to the suit land, therefore, he be declared as owner of the suit land. It was also prayed that the defendants be restrained from interfering in his possession and alternative, it was prayed that if the Court finds that the defendant, Phoola Bai to be in possession of the suit land then, a decree for restoration of possession be granted in his favour.

11. The suit filed by Phoola Bai was partly decreed by the Trial Court to the extent that the defendants shall not dispossess her without following the due process of law and the suit filed by Kunwarlal was decreed, hence, two civil appeals were filed by Phoola Bai and both the appeals were dismissed by the First Appellate Court and, therefore, two second appeals bearing S.A.No.29/90 and S.A.No.40/90 were filed by Phoola Bai and others. During the pendency of the proceedings, Phoola Bai had died and, therefore, her legal representatives were brought on record. Both the second appeals were allowed by a common judgment dated 18/03/05 passed by this Court holding that Phoola Bai being widow of Dhiraj Singh entitled to succeed his property and granted declaration of title as well as injunction whereby restrained the defendants from dispossessing her. The suit filed by Kunwarlal for declaration of title, possession and injunction was dismissed. Being aggrieved by the

aforesaid common judgment passed in the second appeals by this Court, Kunwarlal filed SLP wherein on 03/10/05, the Apex Court passed the following order:

> "Without going into this dispute as to who is in possession, we direct that status quo as of today shall be maintained."

This SLP was dismissed by the Apex Court as withdrawn vide order dated 19/08/2008. Thus, the rights of the parties settled by the judgment and decree passed by this Court, none of the parties is justified in reagitating the same issue again. The parties must respect the judgments and decrees of the Courts.

12. On 23/10/08, the respondent herein filed an application before the SDM, Kurwai under Section 145 of the Code alleging that the petitioners herein knowing well that they do not have any right, title, possession and interest over the suit land even then, they are illegally trying to interfere with the possession of the respondent herein and hence, there is likelihood of breach of the peace between the parties. The SDM, Kurwai passed the orders under Sections 145(1) and 146(1) of the Code and after considering the material available on record passed the impugned order dated 25/04/11 and the same was upheld by the Revisional Court vide the impugned order dated 02/07/11.

13. Proviso to sub-section (4) of Section 145 of the Code 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.

14. For the forgoing reasons and the peculiar facts and circumstances of the case, this Court in exercise of the powers under Section 482 of the Code does not find any ground to interfere in the impugned orders. This petition is devoid of merit and is, therefore, dismissed.

Petition dismissed.