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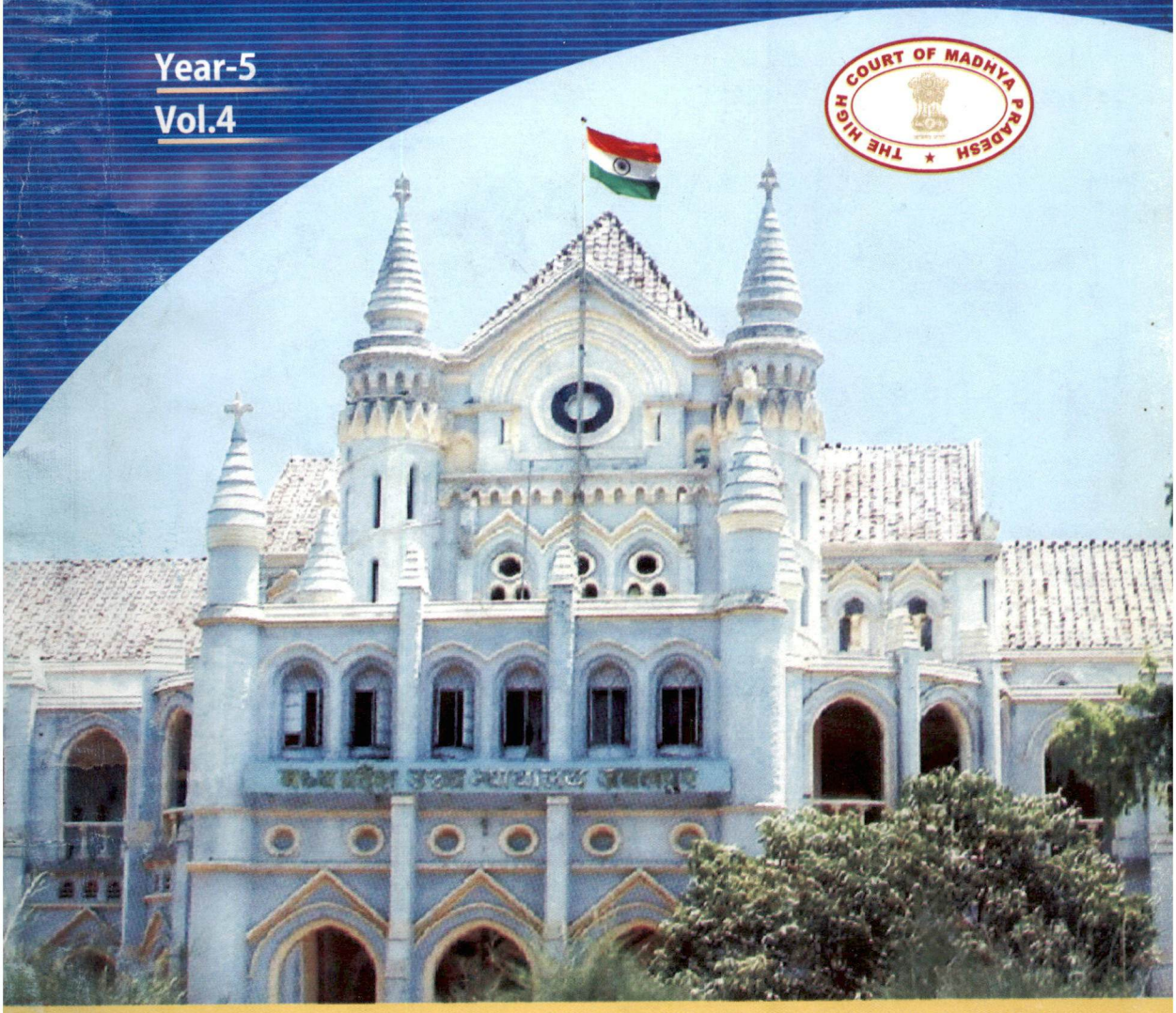

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दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – पत्नी जीवन स्तर को बनाये रखने की हकदार, जो कि न तो वैभवपूर्ण हो और न ही अभावग्रस्त और साथ ही शिष्ट जीवन जी सके, उसके पति की गरिमा के समकक्ष। (अनिल कुमार जैन वि. श्रीमति शिल्पा जैन) ...2734

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शिक्षा और विश्वविद्यालय – स्नातकोत्तर पाठ्यक्रम में प्रवेश – अंतिम तिथि को बढ़ाया जाना – परामर्श हेतु अंतिम तिथि 31.10.2012 थी – याची महाविद्यालय ने स्नातकोत्तर पाठ्यक्रम चलाने के लिए अनुमति हेतु आवेदन किया और 26.10.2012 को भारतीय औषधि की केन्द्रीय परिषद द्वारा अनुमति प्रदान की गई – याची महाविद्यालय को अनुमति पत्र की प्रति 26.10.2012 को प्राप्त हुई और स्वीकृत रुप से 27, 28 व 29 को अवकाश था – परामर्श में याची संस्थान को समाविष्ट करने के लिये 30.10.2012 को निदेशक, चिकित्सीय शिक्षा को अनुमति पत्र दिया गया – याची संस्थान ने अंतिम तिथि बढ़ाने के लिये आवेदन प्रस्तुत किया, जिसे प्रत्यर्थीगण द्वारा नामंजूर किया गया – अभिनिर्धारित – केन्द्र सरकार और सीसीआईएम ने कुछ अन्य मामलों में अंतिम तिथियां बढ़ायी थीं – याची/संस्थान की कोई गलती नहीं थी – विद्यार्थी जिन्होंने पात्र अभ्यर्थियों की सूची में स्थान प्राप्त किया था, उनकी भी कोई गलती नहीं क्योंकि 30.10.2012 को याची/संस्थान को परामर्श के महाविद्यालयों की सूची में समाविष्ट नहीं किया गया था – अंतिम तिथि नहीं बढ़ाये जाने की केन्द्र सरकार और सीसीआईएम की कार्यवाही विभेदकारी – केन्द्र सरकार को, सीसीआईएम से अनुमति चाहने के पश्चात 10 दिनों के भीतर अंतिम तिथि बढ़ाये जाने के संबंध में आदेश पारित करने के लिये और 15 सीटों के लिये 2 सप्ताह के भीतर पूर्ण रुप से गुणदोषों के आधार पर पात्र अभ्यर्थियों की सूची से परामर्श कराने के लिए निदेशित किया गया – याचिका मंजूर। (शुभ दीप आयुर्वेद मेडिकल कॉलेज वि. यूनियन ऑफ इंडिया) **(DB)...2552**

Employees Provident Funds Act, (19 of 1952), Section 2(f) - Employee **- Employee means any person who is employed for wages in any kind of work - Petitioner had pointed out to Inspector that out of 20 persons, 4 persons are voluntarily providing their service as per their will and convenience and are not being paid any salary or emoluments - Such contention was found to be true however, Authority held that Act is applicable as 20 persons are working in the institute - In view of Section 2(f) of the Act, as four persons were not being paid salary and there was no rebuttal to petitioner's case that they were not attending the establishment on regular basis and were coming at their own will voluntarily, the findings recorded by Authority and Tribunal are perverse and bad - Petition allowed. [Jan Shiksha Prasar**

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Samiti Barwari Vs. Assistant Provident Fund Commissioner]
(DB)...2544

कर्मचारी भविष्य निधि अधिनियम, (1952 का 19), धारा 2(एफ) – कर्मचारी – कर्मचारी का अर्थ है कोई व्यक्ति जो किसी भी प्रकार के कार्य के लिये वेतन पर नियोजित किया गया है – याची ने निरीक्षक को यह दर्शाया है कि 20 व्यक्तियों में से 4 व्यक्ति अपनी मर्जी से और सुविधानुसार स्वेच्छापूर्ण रुप से अपनी सेवाऐं दे रहे हैं और उन्हें किसी वेतन या परिलब्धियों का भुगतान नहीं किया जा रहा है – उक्त तर्क सत्य पाया गया, किन्तु प्राधिकारी ने अभिनिर्धारित किया कि अधिनियम लागू होगा क्योंकि 20 व्यक्ति संस्थान में कार्यरत हैं – अधिनियम की धारा 2(एफ) को दृष्टिगत रखते हुए, चूंकि चार व्यक्तियों को वेतन का भुगतान नहीं किया जा रहा था और याची के प्रकरण का खंडन नहीं किया गया था कि वे नियमित आधार पर स्थापना में उपस्थित नहीं हो रहे थे और वे स्वेच्छापूर्ण अपनी रजामंदी से आ रहे थे, प्राधिकारी और अधिकरण द्वारा अभिलिखित निष्कर्ष अनुचित और दोषपूर्ण – याचिका मंजूर। (जन शिक्षा प्रसार समिति बरवारी वि. असिस्टेन्ट प्रॉविडेन्ट फण्ड कमिश्नर) **(DB)...2544**

Entry Tax Act, M.P. (52 of 1976) - Charging Section - "Mediker" and "Starch" **- Mediker and Starch have not been classified under Entry Tax Act nor are covered under Schedules I & II - Charging Section has to be taken into consideration - "Mediker" is basically a medicinal product but is used as shampoo - However, its period of treatment is four weeks and shampoo is not used generally for washing hair and therefore, principle of ejusdem generis is not applicable - It is out of the purview of Schedule III and cannot be taxed since both 'Mediker' and 'Starch' are used in production of further products and not meant for sale - As article is not taxable goods under the statute then the provisions of Entry Tax Act cannot be attracted - Petition allowed [Marico Industries Ltd. Vs. State of M.P.] (DB)...2625**

प्रवेश कर अधिनियम, म.प्र. (1976 का 52) – अधिरोपण करने वाली धारा – "मेडीकर" और "स्टार्च" – मेडीकर और स्टार्च को प्रवेश कर अधिनियम के अंतर्गत वर्गीकृत नहीं किया गया है और न ही अनुसूची I व II के अंतर्गत आते हैं – अधिरोपित करने वाली धारा को विचार में लिया जाना चाहिए – "मेडीकर" मूलतः औषधि उत्पाद है परन्तु शैम्पू के रुप में उपयोग किया जाता है – अपितु, उपचार की उसकी अवधि चार सप्ताह है और शैम्पू का उपयोग सामान्यतः बाल धोने के लिये नहीं किया जाता और इसलिए सजाति का सिद्धांत लागू नहीं होता – वह अनुसूची III की परिधि से बाहर है और उस पर कर नहीं लगाया जा सकता, चूंकि "मेडीकर" और "स्टार्च" का उपयोग अन्य उत्पाद के उत्पादन में किया जाता है

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था, को आईटीएटी द्वारा निर्णित किया जाना अपेक्षित था – आईटीएटी का आदेश अपास्त – अपीलार्थी के तर्क का विनिश्चय करने हेतु मामला प्रतिप्रेषित – अपील मंजूर। (प्रेम स्वरूप खण्डेलवाल (श्री) वि. द कमिश्नर ऑफ इनकम टैक्स)

(DB)...2731

Industrial Disputes Act (14 of 1947), Section 3 - Works Committee **- Requirement of constitution of works committee depends on general or special order by appropriate Govt. - As an order has been issued by the Govt. therefore, it is obligatory on the part of the petitioner to constitute the Works Committee. [South Eastern Coal Field Ltd. Vs. Union of India]** **...2631**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 3 – कार्मिक समिति – कार्मिक समिति के गठन की आवश्यकता, समुचित सरकार के सामान्य या विशेष आदेश पर निर्भर होती है – चूंकि सरकार द्वारा आदेश जारी किये गये हैं इसलिए, कार्मिक समिति गठित करना याची के लिये बाध्यकारी है। (साउथ ईस्टर्न कोल फील्ड लि. वि. यूनियन ऑफ इंडिया) ...2631

Industrial Disputes Act (14 of 1947), Section 36-B - Power to Exempt **- Exemption from constitution of works committee can be granted by applying the test that whether there exists adequate provision for investigation and settlement of industrial disputes in respect of workmen - Application for exemption was required to be decided considering that whether the committee mentioned by petitioner is well equipped and suitable which can investigate and settle the industrial disputes of workmen - As the application for grant of exemption has been rejected only on the ground that constitution of works committee is a statutory requirement therefore, matter is remanded back to decide the application of exemption afresh in the light of Section 36-B of the Act. [South Eastern Coal Field Ltd. Vs. Union of India]** **...2631**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 36बी – छूट देने की शक्ति – कार्मिक समिति के गठन से छूट, इस परीक्षण को लागू करके प्रदान की जा सकती है कि क्या कर्मकारों के संबंध में औद्योगिक विवादों की जांच एवं निपटारे के लिये पर्याप्त उपबंध अस्तीत्वमान है – छूट के आवेदन का निर्धारण यह विचार में लेकर किया जाना अपेक्षित था कि क्या याची द्वारा उल्लेखित समिति परिपूर्ण एवं उपयुक्त है जो कर्मकारों के औद्योगिक विवादों की जांच एवं निपटारा कर सकती है – चूंकि छूट प्रदान किये जाने हेतु आवेदन को केवल इस आधार पर अस्वीकार किया गया कि कार्मिक समिति का गठन, कानूनी अपेक्षा है और इसलिए

किया, परन्तु वह पंजीकृत कम्पनी नहीं थी – अभियुक्त के रुप में कम्पनी को पक्षकार बनाये बिना आवेदकगण का अभियोजन अनुज्ञेय है – अन्यथा भी, यदि कम्पनी को अभियुक्त के रुप में जोड़ा नहीं गया तब भी आरोप पत्र को अस्वीकार नहीं किया जा सकता – कम्पनी को एक अभियुक्त के रुप में जोड़ा जा सकता है, यदि यह साबित किया जाता है कि आवेदकगण किसी विशिष्ट कम्पनी के लिये कार्य कर रहे थे जो कि एक विधिक व्यक्ति है। (शैलाभ जैन वि. म.प्र. राज्य) ...2747

Insurance Act (4 of 1938), Section 45 - Repudiation of claim by insurer **- Assured concealed the reality that she was suffering from renal disease at the time of obtaining policy - It is gathered from bed head ticket that she was a patient of chronic renal failure for the last four years - Policy can be repudiated. [Rajendra Prasad Pathak Vs. Union of India] ...2622**

बीमा अधिनियम (1938 का 4), धारा 45 – बीमाकर्ता द्वारा दावे का निराकरण – बीमित ने वास्तविकता प्रकट की कि पॉलिसी अभिप्राप्त करते समय वह गुर्दे की बीमारी से ग्रसित थी – बेड हेड टिकट से पता चलता है कि वह पिछले चार वर्षों से दीर्घकालिक गुर्दे नाकाम होने की मरीज थी – पॉलिसी का निराकरण किया जा सकता है। (राजेन्द्र प्रसाद पाठक वि. यूनियन ऑफ इंडिया) ...2622

Interpretation of Statute - Golden Rule - Composite perception is to be seen **- A narrow interpretation which kills the intention of the legislature or makes the provision redundant cannot be accepted - Text and Context are the bases of Interpretation - If text is texture, context gives colour - Neither can be ignored. [Shammi Sharma Vs. Municipal Corporation] ...2569**

कानून का निर्वचन – उत्तम सिद्धांत – संयुक्त बोध देखा जाना चाहिए – संकुचित निर्वचन जो विधायिका के आशय को समाप्त करता है या उपबंध को बेकार बनाता है, स्वीकार नहीं किया जा सकता – विषय और संदर्भ, निर्वचन के आधार हैं – यदि विषय तत्व है, संदर्भ रंग भरता है – दोनों को अनदेखा नहीं किया जा सकता। (शम्मी शर्मा वि. म्युनिसिपल कारपोरेशन) ...2569

Interpretation of Statute - Meaning **- Words of statute are clear, plain or unambiguous - The Courts are bound to give effect to that meaning irrespective of consequences - The use of word "shall" by the legislature cast the duty mandatory in nature - Hence, Authorities are bound to perform it. [Shammi Sharma Vs. Municipal Corporation] ...2569**

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दिन से परे विलम्बित करने की निगम को अनुज्ञा है – अभिनिर्धारित – प्राधिकरण मीटिंग बुलाने के लिये बाध्य है – आगे अभिनिर्धारित, धारा 30 में कुछ नहीं जो मीटिंग की संख्या या विषय पर अवरोध लगाता है। (शम्मी शर्मा वि. म्युनिसिपल कारपोरेशन) ...2569

Nagar Palika (Registration of Colonizers, Terms & Conditions) Rules, M.P. 1998, Rule 12(A),13 - Permission of Construction - **Builder/ Society not completing development work in 6-7 days - Rules of 1998 vest the Corporation with ample remedial powers - Municipal Corporation is directed to carry out the necessary inspection of development work carried out by the respondent/Society within a period of four weeks and, if work is not complete it shall take action as directed and mandated under Rules and to issue necessary permission to the appellant/petitioner. [Ramkatori Goyal (Smt.) Vs. Municipal Corporation]** **(DB)...2513**

नगरपालिका (कॉलोनाईजर का रजिस्ट्रीकरण, निर्बन्धन तथा शर्तें) नियम, म.प्र. 1998, नियम 12(ए), 13 – निर्माण की अनुमति – निर्माणकर्ता/सोसायटी ने 6–7 दिनों में विकास कार्य पूरा नहीं किया – 1998 के नियम, निगम में पर्याप्त उपचार की शक्तियां निहित करते हैं – नगरपालिका निगम को प्रत्यर्थी/सोसायटी द्वारा किये गये विकास कार्य का आवश्यक निरीक्षण चार हतों की अवधि के भीतर करने के लिये निदेशित किया गया और यदि कार्य पूरा नहीं है तब नियम के अंतर्गत निदेशानुसार एवं आदेशाधीन वह कार्यवाही करेगा तथा अपीलार्थी/याची को आवश्यक अनुज्ञा जारी करेगा। (रामकटोरी गोयल (श्रीमति) वि. म्युनिसिपल कारपोरेशन) **(DB)...2513**

Nagar Palika (Registration of Colonizers, Terms & Conditions) Rules, M.P. 1998, Rule 12(A), 13 - Permission of Construction - **Issuance of completion certificates of development work is not a pre-requisite for grant of permission to commence building construction in any colony - However, it is obligatory upon the competent authority under Rule 12(A) of Rules 1998 to ensure development process is completed by the colonizer before permission for construction of building is granted. [Ramkatori Goyal (Smt.) Vs. Municipal Corporation]** **(DB)...2513**

नगरपालिका (कॉलोनाईजर का रजिस्ट्रीकरण, निर्बन्धन तथा शर्तें) नियम, म.प्र. 1998, नियम 12(ए), 13 – निर्माण की अनुमति – किसी कॉलोनी में भवन निर्माण कार्य आरंभ करने की अनुमति प्रदान किये जाने हेतु, विकास कार्य पूर्ण होने का प्रमाण पत्र जारी करना पूर्व शर्त नहीं है – परन्तु, नियम 1998 के नियम 12(ए)

के अंतर्गत सक्षम प्राधिकारी पर बाध्यकारी है कि वह यह सुनिश्चित करे कि भवन निर्माण की अनुमति प्रदान किये जाने से पहले कॉलोनी निर्माणकर्ता द्वारा विकास प्रक्रिया को पूरा किया गया है। (रामकटोरी गोयल (श्रीमति) वि. म्युनिसिपल कारपोरेशन) (DB)...2513

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 3 - Presentation of Election Petition - Authorization **- Authorization to file an election petition has to be specific and not by mere endorsement in Vakalatnama - It is not an authorization as is required under Rule 3(1) - No evidence to show that election petitioner was present at the time of presentation of election petition as he did not put his signature on the order sheet - Specified Officer committed grave error in entertaining election petition. [Uma Shankar Chobey Vs. Madan]** ...2603

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र.1995, नियम 3 – चुनाव याचिका का प्रस्तुतीकरण – प्राधिकार देना – निर्वाचन याचिका प्रस्तुत करने का प्राधिकार देना विनिर्दिष्ट होना चाहिए और न कि मात्र वकालतनामे में पृष्ठांकन द्वारा – यह प्राधिकार देना नहीं है जैसा कि नियम 3(1) के अंतर्गत अपेक्षित है – यह दर्शाने के लिए साक्ष्य नहीं कि निर्वाचन याचिका प्रस्तुत करते समय निर्वाचन याची उपस्थित था, क्योंकि आदेश पत्रिका पर उसने हस्ताक्षर नहीं किये हैं – निर्वाचन याचिका ग्रहण करने में विनिर्दिष्ट अधिकारी ने घोर त्रुटि कारित की। (उमाशंकर चौबे वि. मदन) ...2603

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 6 - Relief(s) **- Election Petitioner did not seek the setting aside of election and declaring it to be null and void instead sought the relief of declaring the alleged votes casted in favour of returned candidate as invalid and declare fresh result in favour of Election Petitioner - As no relief was sought for declaring the election as null and void, the Specified Officer exceeded the relief sought for by Election Petitioner by declaring the result as null and void. [Uma Shankar Chobey Vs. Madan]** ...2603

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता),

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नियम, म.प्र. 1995, नियम 6 – अनुतोष – निर्वाचन याची ने निर्वाचन अपास्त करना और उसे अकृत एवं शून्य घोषित किया जाना नहीं चाहा है, बल्कि निर्वाचित प्रत्याशी के पक्ष में डाले गये अभिकथित मतों को अवैध घोषित किया जाना चाहा है और निर्वाचन याची के पक्ष में नया परिणाम की घोषणा चाही है – चूंकि निर्वाचन को अकृत एवं शून्य घोषित किये जाने का कोई अनुतोष नहीं चाहा गया, विनिर्दिष्ट अधिकारी ने परिणाम को अकृत एवं शून्य घोषित करके, निर्वाचन याची द्वारा चाहे गये अनुतोष से अधिक किया। (उमाशंकर चौबे वि. मदन) ...2603

Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 21 - Corrupt Practice **- To establish allegation of corrupt practice, it is incumbent upon election petitioner to lead cogent evidence - Election Petitioner did not examine those persons who were said to have participated in casting votes at two places, but examine some persons who were not named in election petition of having casted votes in favour of Returned candidate - Some evidence does not lead to a conclusion that returned candidate had taken recourse to unfair means and corrupt practice. [Uma Shankar Chobey Vs. Madan]** ...2603

पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता), नियम, म.प्र. 1995, नियम 21 – भ्रष्ट आचरण – भ्रष्ट आचरण का अभिकथन स्थापित करने के लिए, निर्वाचन याची को प्रबल साक्ष्य पेश करना जरुरी है – निर्वाचन याची ने उन व्यक्तियों का परीक्षण नहीं किया, जिनके लिये कहा गया है कि उन्होंने दो स्थानों पर मतदान करने में हिस्सा लिया था, परन्तु कुछ ऐसे व्यक्तियों का परीक्षण किया, जिनके नाम निर्वाचन याचिका में, निर्वाचित प्रत्याशी के पक्ष में मतदान करने वाले दर्शाते हुए नहीं दिये गये थे – कुछ साक्ष्य इस निष्कर्ष पर नहीं पहुंचाता कि निर्वाचित प्रत्याशी ने अनुचित साधन एवं भ्रष्ट आचारण का सहारा लिया। (उमाशंकर चौबे वि. मदन) ...2603

Panchayat Nirvachan Niyam, M.P. 1995 - Corrupt Practices **-Rules are in pari materia to the provisions of Representation of People Act - Allegation if established have a serious consequence - Hence, required to be proved to the hilt like criminal cases i.e. proof beyond reasonable doubt - Mere bald statements cannot be treated as a conclusive proof of committing corrupt practices.**

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for his 1st Kramonnati w.e.f. 19.04.1999 as he had already completed 12 years of service in the year 1993 - However, for calculating the period of 24 years for grant of 2nd Kramonnati, the date of his initial appointment is to be considered - Petitioner was appointed in the year 1981, he will be entitled for 1st Kramonnati in the year 1999 and 2nd Kramonnati in the year 2005. [Krishnakant Choudhari Vs. State of M.P.] **...2518**

सेवा विधि – क्रमोन्नति – योजना का निर्वचन – योजना, 19.04.1999 से प्रभावी रुप से अस्तित्व में आयी थी – याची को वर्ष 1981 में नियुक्त किया गया था – चूंकि योजना स्वयं 19.04.1999 से प्रभावी रुप से अस्तित्व में आयी थी, इसलिए याची अपनी प्रथम क्रमोन्नति के लिए 19.04.1999 से प्रभावी रुप से हकदार होगा, क्योंकि उसने पहले ही वर्ष 1993 में 12 वर्षों की सेवा पूर्ण की – किन्तु, द्वितीय क्रमोन्नति हेतु 24 वर्षों की अवधि की संगणना के लिये, उसकी आरंभिक नियुक्ति की तिथि को विचार में लिया जाना चाहिए – याची को वर्ष 1981 में नियुक्त किया गया था, वह वर्ष 1999 में प्रथम क्रमोन्नति एवं वर्ष 2005 में द्वितीय क्रमोन्नति का हकदार होगा। (कृष्णकांत चौधरी वि. म.प्र. राज्य) **...2518**

Transfer of Property Act (4 of 1882), Section 53-A - Part Performance - Possession **- An agreement to sell was executed in favor of respondent and was placed in possession - A person is entitled to protect his possession only when if he is ready and willing to perform his part of contract - Respondent never took any steps for execution of sale deed or paid the balance sale consideration nor filed any suit for specific performance of Contract - As respondent was not ready and willing to perform his part of contract therefore, not entitled to benefit of Section 53-A of Act, 1882 - Appeal allowed. [Bhavuti (Deceased Through LR's) Vs. Alam (Deceased Through LR's)]** **...2670**

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 53ए – आंशिक पालन – कब्जा – विक्रय का करार, प्रत्यर्थी के पक्ष में निष्पादित किया गया था और उसे कब्जा दिया गया – कोई व्यक्ति अपने कब्जे को सुरक्षित रखने के लिए केवल तब हकदार है यदि वह संविदा के अपने भाग का पालन करने के लिये तैयार व रजामंद है – प्रत्यर्थी ने विक्रय विलेख के निष्पादन हेतु कोई कदम नहीं उठाये या बकाया

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मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 70 – मुँह से फुलाकर बनायी गई कांच की हस्तशिल्पी वस्तु – गलाने से लेकर अंतिम रुप दिये जाने तक की संपूर्ण प्रक्रिया, हस्तचालित प्रक्रिया द्वारा की जाती है और मात्र कांच को काटने एवं पॉलिश करने के लिए हाथ से चलायी जाने वाली कुछ मशीनों का यदि उपयोग किया जाता है, यह नहीं कहा जा सकता कि उत्पाद को प्रधान रुप से हाथों द्वारा निर्मित नहीं किया गया था या उसे मशीनों द्वारा निर्मित किया गया है। (डायमंड क्रिस्टल प्रा.लि. (मे.) वि. म.प्र. राज्य) **(DB)...2589**

Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, M.P. (36 of 1982), Sections 24, 25, 26 - Local Area **- In order to make out an offence under Sections 25, 26 of Adhiniyam, the construction should be made on the land or plot situated in local area - Before granting sanction, the Prescribed Authority ought to have got satisfied that the offence was being committed on the land/plots in local area. [Sewakram Banjare Vs. State of M.P.] ...2697**

विनिर्दिष्ट भ्रष्ट आचरण निवारण अधिनियम, म.प्र. (1982 का 36), धाराऐं 24, 25 व 26 – स्थानीय क्षेत्र – अधिनियम की धारा 25, 26 के अंतर्गत अपराध बनने के लिए, स्थानीय क्षेत्र में स्थित प्लॉट या भूमि पर निर्माण किया गया होना चाहिए – मंजूरी प्रदान करने से पहले, विहित प्राधिकारी को संतोष कर लेना चाहिए था कि स्थानीय क्षेत्र में भूमि/प्लॉट पर अपराध कारित किया जा रहा था। (सेवकराम बंजारे वि. म.प्र. राज्य) **...2697**

Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, M.P. (36 of 1982), Section 39 - Cognizance of Offence **- A police officer is required to make a report to the Authority for the purposes of investigation - Police Officer did not submit a report to such authority - In absence of such report, Prescribed Authority is not competent to take cognizance of matter and direct investigation - Collector had sought sanction for investigation - Collector clearly acted beyond his jurisdiction - Collector ought to have informed the police officer to make an application before Prescribed Authority putting all facts and then to seek permission for investigation - Cognizance taken by law was void ab-initio. [Sewakram Banjare Vs. State of M.P.] ...2697**

विनिर्दिष्ट भ्रष्ट आचरण निवारण अधिनियम, म.प्र. (1982 का 36), धारा 39

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कार्य संविदा – सुरक्षा निधि को मुक्त किया जाना – कार्य संविदा की शर्तोंनुसार, याची को पांच वर्ष तक सड़कों का रखरखाव करना अपेक्षित था – 50 प्रतिशत सुरक्षा निधि, तीन वर्ष पूर्ण होने के पश्चात मुक्त की जानी थी – शेष 50 प्रतिशत सुरक्षा निधि, पांच वर्ष पूर्ण हो जाने के पश्चात मुक्त की जानी थी – याची ने कार्य पूर्ण किया – 50 प्रतिशत सुरक्षा निधि, तीन वर्ष पूर्ण होने पर मुक्त की गई – किन्तु, रखरखाव करने एवं 5 वर्ष की अवधि बीत जाने के पश्चात भी शेष 50 प्रतिशत सुरक्षा निधि मुक्त नहीं की गई, क्योंकि अन्य संविदा के अंतर्गत कुछ देयकों को मुक्त किया जाना है – अभिनिर्धारित – प्रश्नगत संविदा की सुरक्षा निधि से किसी अन्य संविदा के अंतर्गत देय रकम वसूल करने के लिये प्रत्यर्थीगण को सशक्त करने वाला कोई खंड, संविदा में नहीं – किसी अन्य संविदा के बारे में विवाद म.प्र. माध्यस्थम अधिकरण के समक्ष लंबित – प्रत्यर्थीगण को सुरक्षा निधि यथाशीघ्र मुक्त किये जाने के लिये निदेशित किया गया – रिट याचिका मंजूर। (ब्यावरा इन्फ्रास्ट्रक्चर प्रा.लि. (मे.) वि. एम.पी. ग्रामीण सड़क विकास प्राधिकार)

(DB)...2526

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APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Hon'ble Mr. Justice Ajay Manikrao Khanwilkar on his appointment as Chief Justice of the High Court of Madhya Pradesh. Hon'ble Mr. Justice Ajay Manikrao Khanwilkar, took oath as Chief Justice of the High Court of M.P. on 24/11/2013 at Bhopal.

HON'BLE MR. JUSTICE
AJAY MANIKRAO KHANWILKAR, CHIEF JUSTICE

Born on July 30, 1957 at Pune in Maharashtra. Having completed Degree in Commerce from Mulund College of Commerce, Mumbai University and Degree in Law from K.C. Law College, Mumbai University, was enrolled as Advocate in the year 1982 and handled Civil, Criminal and Constitutional matters before the Subordinate Courts, Tribunals and High Court of Judicature at Bombay on the Appellate side as well as the Original side. Started practise exclusively in Supreme Court of India from the year 1984. Was appointed as Standing Counsel for the State of Maharashtra, for Supreme Court matters in October 1985 and also worked as Additional Government Advocate for the State of Maharashtra till December 1989. Was appointed Panel Counsel for Union of India in January 1990 and represented Union of India in several matters of national importance. In August 1994, was appointed Amicus Curiae by the Hon'ble Supreme Court of India to assist on environmental issues in the case of M.C. Mehta- Pollution Control in respect of West Bengal Industries and Tanneries. Was also appointed Standing Counsel for the Election Commission of India for Supreme Court matters in March 1995. Was also appointed Member of the Task force constituted by the Ministry of Health and Family Welfare, Government of India in November, 1995 for examining and reporting on the amendments needed in the Prevention of Food Adulteration Act. Has also remained Executive Member of the Supreme Court Bar Association and Joint Secretary and Executive Member of the Supreme Court Advocates on Record Association. Was appointed Additional Judge of the Bombay High Court in March 2000 and confirmed as Permanent Judge in April 2002. Before taking over as Chief Justice of Madhya Pradesh, was Chief Justice of Himachal Pradesh.

Sworn-in as the 22nd Chief Justice of the Madhya Pradesh High Court on November 24, 2013 and took charge of the high office on November 26, 2013.

We wish Hon'ble Mr. Justice Ajay Manikrao Khanwilkar, Chief Justice, a successful tenure on the Bench.

OVATION TO HON'BLE MR. JUSTICE A.M. KHANWILKAR CHIEF JUSTICE GIVEN ON 26-11-2013 IN THE CONFERENCE HALL OF HIGH COURT OF M.P. AT JABALPUR

Hon'ble Mr. Justice Krishn Kumar Lahoti, Administrative Judge, while felicitating the new Chief Justice, said :-

It is my proud privilege to extend a warm and cordial welcome to Your Lordship on being appointed as 22nd Chief Justice of Madhya Pradesh High Court. I on behalf of my brother and sister Judges and on my own behalf welcome and congratulate your Lordship on assumption of office of the Chief Justice of High Court of Madhya Pradesh.

Born on 30th July, 1957 at Pune, Maharashtra, your Lordship obtained bachelor's degree in Commerce from Mulund College of Commerce, Mumbai and thereafter degree of bachelor of Law from K.C. Law College, Mumbai. After getting enrolled as an Advocate on 10th February, 1982, your Lordship had started practising as Lawyer in Civil, Criminal and Constitutional Branches of Law before the Subordinate Courts, Tribunal and High Court of Judicature at Bombay.

After practising for about two and half years at Bombay, your Lordship shifted to New Delhi in July, 1984 and started practising in the Supreme Court. In October, 1985 Your Lordship was appointed as Standing Counsel for the State of Maharashtra for Supreme Court. Your Lordship functioned as an Additional Government Advocate for the State of Maharashtra till December, 1989 and thereafter was appointed as Panel Lawyer for Union of India in January, 1990. Your Lordship was also appointed as Amicus Curiae in 1994 by the Supreme Court of India to assist the Court on environmental issues in the case of M.C. Mehta pertaining to Pollution Control in respect of Industries and Tanneries of West Bengal. You were also appointed as Standing Counsel for the Election Commission of India for Supreme Court in the year 1995.

Your Lordship was a member of the Task Force constituted by the Ministry of Health and Family Welfare, Government of India in November, 1995 for examining and suggesting amendments needed in the Prevention of Food Adulteration Act. You were also the Executive Member of the Supreme Court Bar Association, Joint Secretary and Executive Member of the Supreme Court Advocates on Record Association.

Recognizing your legal acumen and juristic talent, you were appointed as an Additional Judge of Bombay High Court on 29th March, 2000 and as Permanent Judge on 8th April, 2002.

While functioning as a Judge of Bombay High Court, Your Lordship magnificently contributed on administrative side of the High Court as Member of the Administrative Committee and was part of various important Committees of Judges, namely Case Management Committee, Computer and E-Courts Committee, Committee to oversee the proper implementation of ADR mechanisms in the High Court and Sub-ordinate Courts, Mediation Committee, Committee for framing of Rules relating to Advocates, General Rules Committee, Committee for advising the High Court on all legal matters where High Court has been impleaded as a party, Judges Library Committee, Disaster Management Committee, Building Committee, Committee for hearing Administrative Appeals and Representations from Lower Courts and from High Court staff.

Due to your Lordship's initiative and leadership, mediation movement had spread across the State of Maharashtra in a big way from Taluka Courts to High Court level in less than three years period.

Besides being associated with the aforementioned Committees of the High Court, your Lordship was appointed to the one member Committee constituted for development of software of Case Information Management System for the Bombay High Court. Your Lordship was also the Chairman of the Advisory Board under COFEPOSA, National Security Act, 1980 and other enactments.

Your Lordship had also the privilege to work on a very promising and prestigious project of "Centralized Filing-cum-Digitization of Court Record and E-Filing Centre" of the Bombay High Court.

Your Lordship was appointed as Member of National Court Management Systems Committee constituted by the Chief Justice of India in May, 2012 and contributed a well-researched paper on Case Management. Your Lordship was also nominated as Member of the Advisory Committee of the National Court Management Systems by the Chief Justice of India on 8th August, 2013.

Looking to the tremendous Administrative capability, deep legal acumen and vast experience of the Judicial System, Your Lordship was appointed as Chief Justice of the Himachal Pradesh High Court and took oath of the office of Chief Justice on 4th April, 2013.

While functioning as Judge of the Bombay High Court and later on as Chief Justice of Himachal Pradesh High Court, Your Lordship has immensely contributed to the development of law by delivering several land mark judgments which adorn various law Journals.

At this juncture, I would like to draw your attention that High Court of

Madhya Pradesh is having its glorious history.

This High Court is having its two Benches at Indore and Gwalior. Initially these were temporary Benches, but later by order dt. 28.11.1968 the President of India had established these Benches as permanent Benches of Madhya Pradesh High Court.

The High Court of Madhya Pradesh has also adopted modern information technology and at present it is fully equipped to the extent of 90% by the technology. We are having technical staff who have improved technology and at present we are using the technology for dispensation of justice. We are having our website, case information system, case data on website. Recently, we have provided software to copying section and also have installed Kiosk for information to the public at large. Now under your able guidance, as you are having vast experience of this technology, we will be proceeding ahead and will make ourselves at par with any other State of the country. Jabalpur, Indore and Gwalior Bar are having glorious history, their performance is par excellence. Our judges are working hard for dispensing the justice, but because of short of judges and long pendency, the arrears of cases are accumulating.

Hon'ble Justice Khanwilkar, who enjoys a dynamic personality has already proved his immense capability as Chief Justice of Himachal Pradesh. We are confident that His Lordship will be able to further strengthen this High Court which has a glorious past. In this regard, I assure you the fullest co-operation of myself, my brother and sister Judges, Bar, Judiciary and the Registry of the High Court.

I am sure that under the dynamic leadership of Your Lordship, this High Court will attain new heights in providing justice to the common man.

I once again welcome your Lordship and Smt. Sanjaya Khanwilkar to this High Court.

Shri Purushaindra Kaurav, Addl. Advocate General M.P., while felicitating the new Chief Justice, said :-

I extend a hearty welcome to Hon'ble Mr. Justice Ajay Manikrao Khanwilkar on his assuming the office of the Chief Justice of M.P. High Court. It is an interesting coincidence, that My Lord was the 21st Chief Justice of the Himachal Pradesh High Court and is the 22nd Chief Justice of this High Court. It is my immense pleasure, on behalf of the State of Madhya Pradesh to offer respectful felicitation to My Lord Chief Justice.

Born in Pune (Maharashtra) on 30th of July 1957, My Lord obtained degree in Commerce from Mulund College of Commerce, Mumbai University and obtained the degree in Law from K.C. Law College, Mumbai University. My Lord enrolled as an Advocate on 10th February 1982 and dealt with Civil, Criminal and Constitutional matters before the subordinate Courts, Tribunals and High Court of Judicature at Mumbai, on appellate side as well as on original side. From 1984, My Lord started practising exclusively in the Supreme Court of India.

My Lord was appointed as the Standing Counsel for the State of Maharashtra in the Supreme Court in October 1985 and also worked as Additional Government Advocate for the State of Maharashtra upto December 1989. My Lord was appointed as Panel Counsel for the Union of India in January 1990 and represented the Union Government in several matters of National importance. Even in private practise, My Lord had the opportunity to deal with matters of great significance before the Supreme Court while representing the persons in high public offices as well as various Statutory Authorities, Corporations and Institutions. In August 1994, considering My Lord's legal acumen, My Lord was appointed as Amicus-curiae by the Hon'ble Supreme Court of India to assist in environmental issues especially in the landmark case of M.C. Mehta Calcutta Tanneries Matter v. Union of India 1997 (SCC) (2) 411. My Lord was Standing Counsel for the Election Commission of India in the Supreme Court since March 1995 till elevation and was also appointed as Member of the Task Force constituted by the Ministry of Health and Family Welfare in November 1995 for suggesting amendments in Prevention of Food Adulteration Act. My Lord had a wide range of experience in Criminal, Civil, Constitutional, Election & Co-operative matters. My Lord was the Executive Member of Supreme Court Bar Association, Joint Secretary & Executive member of S.C. Advocates on Record Association. Considering My Lord's dedication and devotion, My Lord was appointed as Additional Judge of Bombay High Court on 29th March 2000 & was confirmed as a permanent Judge on 8th April 2002. My Lord was appointed as the Chief Justice of the Himachal Pradesh High Court on 4th April 2013.

During the period from 2000 to 2013, My Lord has delivered several land mark judgments on various subjects which reflect upon My Lords way of work so as to balance the competing interest of different groups. To name a few:

(i) In the case of Anand Bhimrao Salvi vs State of Maharastra. AIRBOMR 2010 (4) 586. wherein the Petitioner had prayed that the Respondents who were organizers of the Aurangabad Premier League be directed to stop using high volume sound systems during matches as the area where the petitioner was residing was a residential

area near the stadium. My Lord held that "Indeed, it is a fundamental right to organize such sports events, but that does not mean that the Organizers have absolute right in that behalf. The right is subject to grant of permission by the local authority including by the Police Department. It is open to the authorities to regulate such events in larger public interest and refusal to grant permission for such an event can be justified on that basis. My Lord also impressed upon the State Government, to take suitable measures as recommended by the Apex Court (in the case of In re: Noise Pollution) in addressing the problems in controlling noise pollution and solutions thereto and more particularly in spreading civic awareness amongst the youth in schools and colleges as well as in the, police and civil administration.

(ii) In the case of Asha Sewa Bhavi Sanstha vs State of Maharastra, BCR 2010 (3) 429, the issue was whether the private society which intend to start primary or higher secondary school without seeking any aid from the State has fundamental right to do so under Article 19(1)(g) of the Constitution. My Lord held that "Right to establish an educational institution of its choice on permanent no grant basis is a fundamental right to all citizens within Article 1 9(1)(g). That fundamental right, however, cannot be confused with the right to seek recognition for the school. The proposals for recognition of the school to be established by private management will have to fulfill the conditions, specified in the statute.

(iii) In the case of Indian Harm Reduction Network vs Union of India, BCR (Cri) 2012 (1) wherein the constitutional validity of section 31-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 was challenged on the ground that the mandatory death sentence prescribed therein is violative of Article 14 and 21 of the Constitution of India. In this case it has been considered that the offence referred to in Section 31A of the NDPS Act cannot be classified as Crimes Mala In Se, but as an offence as Crimes Mala Prohibita. Under the English Common Law crimes in mala in se are distinguished from Crimes Mala Prohibita. Crimes Mala In Se embrace acts immoral or wrong in themselves, whereas, crimes mala prohibita embrace things prohibited by statute or infringing other rights. My Lord held that Section 31-A of the NDPS Act is violative of Article 21 of the Constitution as it provides for mandatory death penalty. However, My Lord rejected that the provision was violative of Article 14 of the Constitution of India. Further,

instead of declaring Section 31-A as unconstitutional, and void ab initio, the alternative argument of the respondent was accepted that the said provision be construed as directory by reading down the expression "shall be punishable with death" as "may be punishable with death" in relation to the offences covered u/s 31A. Thus the courts can award death penalty for the offences covered by Section 31 -A, upon recording reasons therefore.

(iv) My Lord, in the short tenure as Chief Justice of the Himachal Pradesh High Court has delivered several important judgments pertaining to Luxury Tax, Entry Tax, Educational matters and Service Matters and has dealt with them in a deft and skillful manner.

On a perusal of my Lord's judgments, it is clearly evident that My Lord has delivered judgments involving intricate issues in a precise & meticulous manner and the judgments have not only been delivered in a plain and simple language but are also clear and cogent reflecting the hardwork and indepth research.

Apart from My Lord being a legal luminary, My Lord is also adept in the art of administration and a pioneer of innovation and modernization. My Lord besides being a member of the Administrative Committee of the Bombay High Court was also appointed as Chairman of several important committees of Judges for technological advancement of the Bombay High Court which were crucial for development in this age of rapid changing technology such as

(i) the Computer and E-Courts Committee of the Bombay High Court

(ii) Case Management Committee of the Bombay High Court

My Lord was also appointed a Member of the National Court of Management Systems Committee constituted by the Chief Justice of India.

Much praise has been bestowed by Hon'ble Judges and Lawyers in Mumbai and Himachal Pradesh on your Lordship's style of working. My Lord's vast expertize in the legal field as well as administrative approach will definitely enhance the richness of this Hon'ble High Court and My Lord' greater reliance on technology will help develop a smooth legal system which will assure smooth running of the Justice delivery system.

We offer, with utmost conviction, our full co-operation on behalf of the Advocate General to fulfill the great expectations of the litigants.

I, on behalf of State Government, the Hon'ble Advocate General, Law

Officers and on My own behalf congratulate Hon'ble Justice A. M. Khanwilkar on his assuming office of the Chief Justice of M.P. High Court and wish him a successful tenure as Chief Justice of this Court.

Shri Adarsh Muni Trivedi, President, M.P. High Court Bar Association, while felicitating the new Chief Justice, said :-

Today, we have assembled here to welcome Your Lordship Shri Justice Khanwilkar as our Chief Justice. Arrival of Your Lordship from the land of the great Himalayas is a mascot for us. The great Sanskrit poet Kalidas says in 'Kumar Sambhav' while praising the Himalaya :-

"अस्त्युत्तरस्यां दिशि देवतात्मा,
हिमालयो नार्म नगाधिराजः।
पूर्वापरौ तोयनिधो वगाहय,
स्थितिःपृथिव्या इव मानदंडः।।

[Kumar Sambhav 1/l]

Your arrival has brought a fresh heavenly Himalayan breeze to the portals of this High Court. This land of deep forests and mountains like Vindhyachal and Satpura is nourished by the great river Narmada like a mother which flows here at Jabalpur through shiny white marvelous marble rocks. Narmada is life-line of Madhya Pradesh. The holy waves of Narmada greet you at this occasion of adorning by Your Lordship the highest seat of Justice in this State of Madhya Pradesh.

Your Lordship hail from the historical city of Pune in Maharashtra. Your Lordship were born on 30th July 1957, and did your degree in Commerce from Mulund College of Commerce, Mumbai University and degree in Law from K.C. Law College, Mumbai University. You were enrolled as an Advocate in year 1982 and practised in Civil, Criminal and Constitutional law before the Subordinate Courts, Tribunals and High Court of Bombay on the Appellate side as well as the Original side attaining vast sphere of knowledge. From year 1984 Your Lordship started practise exclusively in the Supreme Court of India and came off with flying colours developing a great vision. You were appointed as Standing Counsel for the State of Maharashtra for Supreme Court in October 1985 and also worked as Additional Advocate for the State Government of Maharashtra till December 1989. You were further appointed as Panel Counsel for Union of India in January 1990 and represented the Union of India in several matters of national importance.

Even in your private practice, Your Lordship appeared before the Supreme Court the matters of great significance representing persons in high public offices, as also various statutory authorities, corporations and institutions. In August 1994, the Supreme Court of India appointed you 'Amicus Curiae' to assist on environmental issues in the case of "M.C. Mehta- Pollution control in respect of West Bengal industries and tanneries. Your Lordship were also appointed as Standing Counsel for the Election Commission of India in Supreme Court in March 1995. You were also appointed member of the Task Force constituted by the Ministry of Health and Family Welfare, Government of India in November 1995 for examining and reporting on the amendments required in the Prevention of Food Adulteration Act.

Apart Your Lordship have rendered great service to the Bar. You remained an Executive Member of Supreme Court Bar Association as well as Joint Secretary of Supreme Court Advocates' on Record Association. You were appointed Additional Judge of Bombay High Court in March 2000 and confirmed as Permanent Judge in April 2002. Thereafter, Your Lordship took over as 21st Chief Justice of Himachal Pradesh High Court and in next move as 22nd Chief Justice of this High Court of great traditions and history.

Jesus Christ in Sermon of the Mount preached :-
"Blessed are they
That are always cheerful –
And always hopeful
For they have already
The kingdom of heaven."

A Judge is like the busy bee, who improves each shining hour and gathers honey of thoughts all the day, from every opening flower's arguments. There is as much dignity in delivering a Judgment as in writing a poem. This is an overpraised month of November, when mother earth praised God with her thousand voices. Your oath to this high office of Chief Justice in month of November is really significant. It is suggested in Psalm -82 that -

> "a Judge sits in God's place - he is a Judge among the Gods and a Judgment when it is just is God's Judgment, not yours. When you come to sit upon your quishon let these things be remembered, and that will be a principal motive to be careful and watchful in all your Judgments and proceedings."

To see Your Lordship adorning the Bench as Chief Priest of the Temple

of Justice will be an affectionate experience and intellectual pleasure. At this juncture I welcome Your Lordship on behalf of all members of M.P. High Court Bar Association and my own behalf. We all have great expectations from Your Lordship. It is dawn of a charming season. The poet Shelly says:-

"If winter comes, can spring be far behind."

The constellations of high ideals and values Your Lordship have cherished, practiced will pave our way to meet with great challenges of the future before the Bench as well as the Bar. Your Lordship have been an eminent scholar, a jurist par excellence and a Judge of high repute and kind heart, will write the golden history of this High Court on sand of time through incessant efforts with vast experience and complete dedication. Your Lordship will secure and serve the larger cause of humanity and keep your resolutions with due diligence and we hope that anyone who knocks your door, gets substantial Justice with your known commitment to human values.

Rabindra Nath Tagore in his poem ' Kadi and Komal says :-

"Into the months of these
Dumb, pale and meek
We have to infuse the language of the soul.
Into the hearts of these
Weary and worn, dry and forlorn
We have to minstel the language
of humanity."

I wish Your Lordship a great forensic tenure as Chief Justice of this High Court.

Shri D.K. Dixit, President, M.P. High Court Advocates' Bar Association, while felicitating the new Chief Justice, said :-

Today we have assembled here to felicitate Hon'ble Justice Ajay Manikrao Khanwilkar on his appointment as the Chief Justice of this great institution situated in the city of Jabalpur which is almost the centre point of the country, on the banks of Holy River Narmada. This moment is giving lot of pleasure to all of us because we have got a great jurist as our Chief Justice. We welcome and offer our heartfelt congratulations to my lord at this occasion.

My Lord was born on 30th July, 1957 at Pune, Maharashtra.

My Lord have obtained the degree of Bachelor of Commerce from Mulund College of Commerce, and Bachelor of Laws from K.C. Law College,

Mumbai University. Thereafter enrolled as Advocate on 10th February, 1982.

My Lord have handled Civil, Criminal and Constitutional matters before the Subordinate Courts, Tribunals and High Court of Judicature at Bombay on the Appellate side and Original side.

My Lord have practised exclusively in the Supreme Court of India from July, 1984. Appointed as Standing Counsel for the State of Maharashtra for Supreme Court matters in October, 1985, worked as Additional Government Advocate for the State of Maharashtra till December, 1989. Appointed as Panel Counsel for Union of India in January, 1990. Had opportunity to represent Union of India in several matters of national importance. Even in private practice, had occasion to handle matters of great significance to represent persons in high public offices as also various statutory Authorities, Corporations and institutions. In August, 1994 My lord were appointed as Amicus Curiae by the Hon'ble Supreme Court of India to assist on environmental issues in the case of M.C. Mehta -Pollution Control in respect of West Bengal Industries, and Tanneries. My Lord were Standing Counsel for the Election Commission of India for Supreme Court matters since March, 1995 till elevated.

My Lord were appointed as Member of the Task Force (headed by the former Chief Justice of India Mr. Justice E.S. Venkataramaiah) constituted by the Ministry of Health and Family Welfare, Government of India in November, 1995 for examining and reporting on the amendments needed in the Prevention of Food Adulteration Act.

My Lord were Executive Member of the Supreme Court Bar Association and Joint Secretary and Executive Member of the Supreme Court Advocates on Record Association.

My Lord were appointed as Additional Judge of the Bombay High Court on 29th March, 2000 and confirmed as permanent Judge on 8th April, 2002. Remained as such till 3rd April, 2013.

My Lord were appoint as Member of National Court Management Systems Committee constituted by the Chief Justice of India vide order dated 7th May, 2012. Contributed a well researched paper on Case management nominated by the Chief Justice of India as Member of the Advisory Committee of the National Court Management Systems (NCMS), pursuant to office order dated 8th August, 2013.

Besides being Member of the Administrative Committee of the High Court of Bombay, was also nominated by the Chief Justice of Bombay High Court as Chairman of several important Committees of Judges constituted for distribution

of administrative work from time to time.

My Lord were appointed as a one man Committee by the Full House of the Bombay High Court for development of software of Case Information Management System (for short, CIMS), for the Bombay High Court. Before being elevated as Chief Justice of Himachal Pradesh High Court, My Lord had conceived a very promising and prestigious Project of" Centralized Filing-cum-Digitization of Court record and E-Filing Centre" of the Bombay High Court.

My Lord took oath as Chief Justice of the High Court of Himachal Pradesh on 4th April, 2013 and now transferred to this court took oath on 24-11-2013.

My Lord this court is the successor court of High Court of Nagpur and has witnessed the series of legal luminaries like Hon'ble Justice M. Hidaytullah, Hon'ble Justice J.S. Verma, Hon'ble Justice R.C. Lahoti who also adorned the Office of Chief Justice of India and also Justice Vivian Bose, Hon'ble Justice A.P. Sen, Hon'ble Justice G.L.Oza, Hon'ble Justice Faizanuddin, Hon'ble Justice D.M. Dharmadhikari, Hon'ble Justice P.P. Naolekar & Hon'ble Justice Deepak Verma, who were also elevated to the Office of Judge of Supreme Court. Hon'ble Justice Late Shri G.P. Singh former Chief Justice of this Hon'ble Court is known nation wide and abroad for his knowledge and accumen as said on his ovation by the then Hon'ble Chief Justice Shri S.A. Bobde, Judge Supreme Court of India. We are sure that My Lord will also carry the same traditions and take this High Court to the further heights & glory. We also assure that the Bar shall be fully cooperative.

I on behalf of the members of M.P. High Court Advocates Bar Association and on my own behalf once again welcome My Lord as the Chief Justice of this Court and also pray for the successfull and memorable tenure in the history of this Court.

Shri Shivendra Upadhyay, Chairman, M.P. State Bar Council, while felicitating the new Chief Justice, said :-

आपके के.जी. लॉ कालेज मुंबई से विधि की परीक्षा पास करने के बाद 1982 से विधिक जगत में विभिन्न आयामों में काम करने का जो अनुभव है उसका लाभ मध्य प्रदेश के न्यायिक जगत को प्राप्त होगा। आप जैसे व्यक्तित्व को मध्यप्रदेश के मुखिया के रूप में प्राप्त किया। जिसकी मध्य प्रदेश के अभिभाषकों को अत्याधिक प्रसन्नता है। आपने वर्ष 2000 से न्यायाधिपति के रूप में विभिन्न उच्च न्यायालयों में जो न्यायदान दिया है उसके देखते हुए मध्यप्रदेश के अधिवक्तागण आशांवित हैं कि मध्यप्रदश की न्यायपालिका को बुलंदियों पर आप ले जाएंगे ऐसी आशा है।

सफेद शेरों की जन्म स्थली एवं मां नर्मदा एवं सोन की उद्गम स्थली, तानसेन की जन्म स्थली मध्यप्रदेश में, मैं मध्यप्रदेश राज्य अधिवक्ता परिषद की ओर, प्रदेश के अधिवक्ताओं एवं स्वयं

अपनी ओर से आपका स्वागत, वंदन, अभिनंदन करता हूं।

मध्यप्रदेश का न्यायिक जगत आपसे काफी आशा रखता है। न्यायाधिपतियों व वरिष्ठ अभिभाषकों की नियुक्तियों में पारदर्शिता न होने से संशय का वातावरण बना हुआ है। मध्यप्रदेश के उच्च न्यायिक सेवा के करीब 70 पद जो अभिभाषकों से नियुक्त होने हैं वे रिक्त हैं। मध्यप्रदेश उच्च न्यायालय के न्यायाधिपतियों के पद रिक्त हैं व नये पद सृजित होने हैं। हमें आशा हैं कि आप ऐसा प्रयास करेंगे कि ये पद तुरंत भरे जायें। एवं पूरे हिन्दुस्तान में मध्यप्रदेश एक ऐसा उदाहरण देगा कि किसी भी विधिक संस्था को हमारे न्यायाधिपतियों के द्वारा की गई नियुक्तियों एवं दिये गये निर्णयों में संशय अथवा प्रश्न चिन्ह करने का अवसर नहीं मिलेगा। माननीय उच्च न्यायालय में प्रकरणों का अम्बार लगा हुआ है। दायरे के अनुपात में निराकरण काफी कम हो रहा है जिससे देरी से मिलने वाले न्याय में पक्षकारों व न्यायिक जगत में निराशा व्याप्त हो रहा है। अधीनस्थ न्यायालयों के द्वारा किये जा रहे न्याय–निर्णयों में विवेकाधिकार की शक्तियों एवं निडर होकर प्रकरण निराकृत करने की क्षमता अत्याधिक गिरी है जिसकी वजह से छोटी–छोटी सहायता के लिए पक्षकारों को उच्च न्यायालय में आना प्रकरण के लंबन का एक महत्वपूर्ण कारण है। मध्यप्रदेश राज्य अधिवक्ता परिषद व प्रदेश के अभिभाषकों को यह आशा कि आपकी चमत्कारिक कार्यशैली मध्यप्रदेश के न्यायिक जगत को एक नई दिशा देगी।

मध्यप्रदेश उच्च न्यायालय के न्यायाधिपतियों व वरिष्ठ अभिभाषकों के चयन में राज्य अधिवक्ता परिषद व संघों की राय अपेक्षित है। राज्य अधिवक्ता परिषद व अधिवक्ता संघों के द्वारा कमियों को उजागर करने पर संवैधानिक पद में बैठे व्यक्तियों में मर्यादाओं का उल्लंघन की प्रवृत्ति न बढ़े ऐसा प्रयास करेंगे हमें आशा है।

आपके उज्जवल भविष्य एवं नये पद पदस्थ होने पर मैं राज्य अधिवक्ता परिषद की ओर से एवं अपनी ओर से स्वागत, वंदन, अभिनंदन करता हूं।

जय हिन्द, जय भारत

Shri Rashid Suhal Siddiqui, Asstt. Solicitor General, Madhya Pradesh, while felicitating the new Chief Justice, said :-

Today we have assembled here to welcome our new Hon'ble Chief Justice Shri Ajay Manikrao Khanwilkar who took oath of office on 24.11.2013 at Bhopal, it is my proud privilege to welcome your Lordship as the 22nd Chief Justice of Madhya Pradesh.

Hon'ble Shri Justice A.M.Khanwilkar was born on 30 July 1957 at Pune, Maharashtra. Hon'ble Justice Khanwilkar Graduated in Bachelor of Commerce from Mulund College of Commerce, Mumbai University. Thereafter, joined K.C. Law College, Mumbai University and completed law study and enrolled as Advocate on 10th February 1982. Justice Khanwilkar handled Civil, Criminal and Constitutional matters before the Subordinate Courts, Tribunals and High Court of Judicature at Bombay on the Appellate side as well as the Original side. Your Lordship also practised exclusively in the Supreme Court of India and was

appointed as Standing Counsel for the State of Maharashtra for Supreme Court. Justice A.M. Khanwilkar worked as Additional Government Advocate for the State of Maharashtra till December 1989. My Lord has served as Panel Counsel for Union of India and had opportunity to represent Union of India in several matters of national importance. On several occasion the Hon'ble Supreme Court had appointed your Lordship as Amicus Curiae to assist on environmental issues. Your Lordship was also a Standing Counsel for the Election Commission of India for Supreme Court. Your Lordship has a wide range of exposure in Criminal, Civil, Constitutional, Election and Co-operative matters and was Executive Member of the Supreme Court Bar Association and Joint Secretary and Executive Member of the Supreme Court Advocates on Record Association.

On 29th March 2000 your Lordship was Appointed as Additional Judge of the Bombay High Court and was confirmed as permanent Judge on 8th April 2002. Your Lordship took oath as Chief Justice of the High Court of Himachal Pradesh on April 4, 2013.

It may be mentioned that our High Court is one of the oldest High Court in India, my Lord many of the Hon'ble Judges of this High Court were elevated as judges of the Supreme Court and Chief Justices of other High Courts which is a great honour to this institution, many of the Hon'ble Judges of this court have also elevated as the Chief Justice of India namely Hon'ble Shri Justice B.P.Sinha, Hon'ble Shri Jutice Hidayatullah, Hon'ble Shri Justice J.S.Verma and Hon'ble Shri Justice R.C.Lahoti and this speech would be incomplete without my going back and recalling of one of the greatest legal luminaries of his time Hon'ble Justice Late Justice G.P.Singh who is a shining beacon for many, till date whose passion and dedication are a source of inspiration for all of us. I feel confident that under the dynamic leadership of your Lordship this court will have a glorious future.

On this occasion, while greeting you for taking over the reins of the administration of justice of this court, I extend warm welcome and wish a successful tenure while adorning the office of Chief Justice. I on behalf of Union of India and my own behalf and all the Central Government Standing Counsels who are appearing on behalf of India welcome you.

Shri M.L. Jaiswal, President, Senior Advocates' Council, while felicitating the new Chief Justice, said :-

At the outset I congratulate and welcome your Lordship on your appointment as the Chief Justice of High Court of Madhya Pradesh.

Your Lordship has been a practicing lawyer in the Supreme Court as well as in the High Court and very well acquainted with problems and difficulties of Bar. Your Lordship has been a judge of presidency High Court of Bombay, which is one of the leading High Courts in the country. It has produced great judges, eminent authors of law books and reputed lawyers. Your Lordship has all round experience first as a judge and thereafter as Chief Justice of Himachal Pradesh High Court and is well conversant with the responsibilities and duties of this August office. We are fortunate enough in having your Lordship as our Chief Justice and we shall have the benefit of My Lords administrative experience and wide learning in the field of law. My Lord, we have also contributed in maintaining high standard, dignity, traditions and culture of this High Court. We have also produced eminent lawyers and learned judges and authors too. I need not name them, your Lordship is welt aware of them.

A disconcerting feature that has been observed in the recent past is the judicial intervention in decision making process. Though it is a welcome step, but the impression that has been created is that every decision taken by the executive is tainted with malice and bias. Add to that the recent report of the comptroller and Auditor General, which have led to further depression in the higher echelons of the Government. If every decision taken by the executive is to be criticized and scrutinized, definitely inertia is bound to set, in the decision making process which has an adverse effect on the development perse. It is settled law that decision making process is within the sole domain of executive and Court is required to interfere when malafides and unfairness are writ large on the face of record. Approaching the court at the drop of the hat has now become a norm. Public interest litigation has become a fashion. God may forbid, if stay in granted, the feasibility of projects take a severe hit and due to delay in decision, the cost rises by manifold and in most of the cases project becomes unviable. At the same time corruption in the system has become rampart and eating away all our progress and resources. Legislature and executive are in the process of failure except judiciary there does not appear any other agency to check this flow, lest it may also suffer the same fate. Dealing with the State of affairs Hon'ble Justice Jeewan Reddy of the Supreme Court observed in a decision reported in1996 (4) SCC 622 and I quote "But how many matters can we handle? How many more of such matters still there? The real question is how to swing the polity, a polity which has become indolent and soft in its vitals? Can the Courts alone do it? Even so to what extent in prevailing State of affairs? Not that we wish to launch upon a diatribe against anyone in particular but Judges of the Court are also permitted, we presume to ask in anguish What have we made of our country in less than 50

years, where is the respect and regard for law has gone? And who is responsible for it?" This is the dilemma with which we are confronted. Who is to be blamed, politicians, bureaucrats, technocrats, judges, lawyers or litigants? We all have to ponder and find a solution for the present state of affairs. Judiciary has always played an important role in this and we hope it will continue to guide all concerned.

Your Lordship shall have full co-operation. We have today present with us the respected father of our Chief Justice, I welcome you sir.

I, on behalf of Senior Advocate's Council and on my own behalf extend your Lordship a hearty welcome and wish you well.

Reply to the ovation, by Hon'ble Mr. Justice Ajay Manikrao Khanwilkar, Chief Justice :-

I thank all the speakers for having expressed many kind words and for the compliments showered on me. I feel humbled to be here amongst you on this occasion.

This Court has a glorious past. I am fortunate to have inherited the rich legacy of the office of the Chief Justice of Madhya Pradesh High Court. This office has been graced by legal luminaries of a very high order - from Hon'ble Justice M. Hidayatullah, the first Chief Justice of this Court, including many others, who went on to attain the distinction of becoming Judges of the Supreme Court of India. I have had the privilege to appear before Hon'ble Mr.Justice A.P. Sen, Justice G.L. Oza, Justice J.S. Verma and Justice N.D. Oza in the Supreme Court.

Since the establishment of this High Court on 1st November, 1956, at least two Chief Justices of this High Court - Justice M.Hidayatullah and Justice J.S. Verma -achieved the distinction of becoming the Chief Justices of India. The members of the legal fraternity, of my generation, have had the good fortune of witnessing the sagacity of Justice J.S. Verma and the manner in which he conducted court proceedings. He was an able administrator besides being a jurist of great fortitude and learning.

Madhya Pradesh is known to be home of a large tribal population, who have been largely cut off from the main stream development. Nevertheless, it is endowed with rich traditions, customs, art, music and culture that bind all the tribal groups residing in the State. They abide by fantastic moral values and impart the same to their younger generation. One of the concerns of our State is

that it is the least developed State in India with a Human Development Index (HDI) value of 0.375. Even the State's per capita Gross State Domestic Product (nominal GDP) is the fourth lowest in the country. It is also the lowest ranked State on the India State Hunger Index. These figures are as on 2011. These are the challenges to overcome, for which the Judiciary, as one of the important pillars of democracy, is obliged to discharge its constitutional obligation and achieve the aspirations of the citizenry.

The successive Chief Justices of this Court have unreservedly appreciated the maturity of this Bar, not only for their legal acumen, but also for their humility, forthrightness, cooperation with the Bench and more importantly, their concern and commitment for the common man. The members of this Bar, in the past have untiringly endeavored to accomplish the ideals of the Constitution of India, "rule of law" and good governance, which, we the people of India, have given to ourselves.

I need not underscore that the high traditions and conventions of this Institution will have to be honoured by one and all. With the senior colleagues on the Bench and the mature Bar of this Court, I am confident that I will be guided by all of you to fulfill these goals.

It is common knowledge that the Courts in India are grappling with the issue of "docket explosion". That is not unique to the courts of Madhya Pradesh. The Bar and the Bench will have to continually work together to address the issues which have significance in the development of an improved justice delivery system. The Bar and the Bench may also have to give serious thought about the issue of "docket exclusion". The only way forward is an efficient court management policy to be adopted by the Courts in Madhya Pradesh, which can be accomplished only with the assistance and cooperation of the Bar. I have no manner of doubt that the Bar of our State will extend full cooperation in that regard. I have read and also have been told that the Bar has already taken initiative to assuage the cause of the common man including by resorting to ADR mechanism in a big way.

Let us work together to take the judicial system in the State of Madhya Pradesh to new heights so that it becomes a role model for the entire country and fulfill the aspirations of the common man by providing them easy access to justice.

Thank you,

Jai Hind.

NOTES OF CASES SECTION

Short Note

****(41)***

Before Mr. Justice K.K. Trivedi

W.P. No. 610/2012 (Jabalpur) decided on 3 July, 2013

ADITYA TIWARI ....Petitioner

Vs.

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

Constitution - Articles 15, 16 - Reservation **- Vertical reservation is only a reservation under Article 16(4) of the Constitution of India and horizontal (Special) reservation is under Article 16(1) or Article 15(3) of the Constitution of India - While reservations made on social basis are not to be changed, the horizontal reservation are compartmentwise and in such circumstances, if the Rules permit, the vacancies available in horizontal reservation are to be filled in by similar category candidates.**

संविधान – अनुच्छेद 15,16 – आरक्षण – भारत के संविधान के अनुच्छेद 16(4) के अंतर्गत उर्ध्व आरक्षण केवल एक आरक्षण है एवं भारत के संविधान के अनुच्छेद 16(1) या अनुच्छेद 15(3) के अंतर्गत क्षैतिज (विशेष) आरक्षण – सामाजिक आधार पर दिये गये आरक्षण को बदला नहीं जा सकता जबकि क्षैतिज आरक्षण खण्ड अनुसार है और ऐसी परिस्थिति में यदि नियम अनुज्ञा देते हैं, क्षैतिज आरक्षण में उपलब्ध रिक्तियों को उन्हें समरुप श्रेणी के अभ्यर्थियों द्वारा भरा जावे।

Case referred :

(2007) 8 SCC 785.

D.K. Dixit with *Ramsufal Chaturvedi,* for the petitioner.

Piyush Dharmadhikari, G.A. for the respondents No. 1 to 3.

None for other respondents though served and earlier represented.

Short Note

****(42)***

Before Mr. Justice Sujoy Paul

Comp. Petition No. 7/2012 (Gwalior) decided on 15 May, 2013

SANIL P. SAHU & ors. ...Petitioners

Vs.

M/S VISHWA ORGANICS PVT. LTD. & ors. ...Respondents

A. High Court Rules, 2008 - Rule 14 - Company Petition - Ordinarily **- Word 'Ordinarily' means that provision is a general one**

and must be read subject to the special provisions contained in the parent enactment.

क. उच्च न्यायालय नियम, 2008 – नियम 14 – कम्पनी याचिका – सामान्यतः – शब्द 'सामान्यतः' का अर्थ है कि उपबंध सामान्य है और मूल अधिनियमिती में अंतर्विष्ट विशेष उपबंधों के अधीन पढ़ा जाना चाहिए।

***B. Companies Act (1 of 1956), Sections 284 & 398 - Company petition for declaration of resolutions as illegal* - Company Petition is filed seeking declaration that impugned Board Meeting and resolutions passed at meeting are non-existent, fictitious, illegal, void - Held - Company Law Board alone has jurisdiction to entertain the application u/s 398 - Jurisdiction of High Court is ousted - Company Petition not maintainable.**

ख. कम्पनी अधिनियम (1956 का 1), धाराऐं 284 व 398 – संकल्पों को अवैध घोषित किये जाने हेतु कम्पनी याचिका – कम्पनी याचिका यह घोषणा चाहते हुए प्रस्तुत की गई कि आक्षेपित बोर्ड मीटिंग और मीटिंग में पारित संकल्प अविद्यमान, मनगढंत, अवैध और शून्य है – अभिनिर्धारित – केवल कम्पनी लॉ बोर्ड को धारा 398 के अंतर्गत आवेदन ग्रहण करने की अधिकारिता है – उच्च न्यायालय की अधिकारिता से बाहर है – कम्पनी याचिका पोषणीय नहीं।

Cases referred :

(2002) 35 SCL 347 (AP), (1990) 68 Comp. Case 608 (Bom), (1985) 58 Comp. Case 805 (Raj.), 2002 (2) MPJR 587, (1994) 79 Comp Case 830 (Guj.), (1998) 1 CTC 682, 1993 (3) ALT 160, (1995) 84 Comp Case 782, (2006) 68 SCL 233, (2007) 140 Comp Case 823, AIR 1997 SC 2364, (2001) 4 SCC 350, (2005) 11 SCC 314, (2006) 7 SCC 613, (2000) Comp. Case (100) 66.

Nandita Dubey, for the petitioners.
Pravin N. Surange, for the respondents No. 1 & 2.

I.L.R. [2013] M.P., 2503
SUPREME COURT OF INDIA
Before Mr. Justice R.M. Lodha & Mr. Justice Sharad Arvind Bobde
Civil Appeal No. 4166/2013 decided on 1 May, 2013

GURU GRANTH SAHEB STHAN
MEERGHAT VANARAS ...Appellant
Vs.
VED PRAKASH & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Section 10 r/w Section 151 - Stay of Proceedings - Civil and Criminal Parallel Proceedings* - Even if there is a possibility of conflicting decisions in civil and criminal courts, such an eventuality cannot be taken as a relevant consideration - As the respondents have already filed their written statement in civil suit and issues have been framed, therefore, there is no likelihood of any embarrassment - Civil Proceedings cannot be stayed merely because of pendency of criminal case. (Paras 20 & 21)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 10 सहपठित धारा 151 – कार्यवाहियों पर रोक – सिविल और आपराधिक समानांतर कार्यवाहियां – यदि सिविल और दाण्डिक न्यायालयों के विरोधाभाषी निर्णयों की संभावना हो, उक्त परिणाम को सुसंगत तथ्य के रुप में नहीं लिया जा सकता – जैसा कि प्रत्यर्थीगण ने पहले ही सिविल वाद में अपना लिखित कथन प्रस्तुत किया है और विवाद्यक विरचित किये जा चुके हैं, इसलिए किसी उलझन की कोई संभावना नहीं – सिविल कार्यवाही को मात्र इसलिए रोका नहीं जा सकता कि आपराधिक प्रकरण लंबित है।

Cases referred :

AIR 1954 SC 397, 1970(3) SCC 694, (2002) 8 SCC 87, (1995) 5 SCC 767, (1996) 3 SCC 87.

JUDGMENT

The Judgment of the Court was delivered by : **R.M.Lodha, J. :-** Leave granted.

2. The short question for consideration in this appeal by special leave is whether High Court was justified in staying the proceedings in civil suit till the decision in criminal case.

3. It is not necessary to narrate the facts in detail. Suffice it to say that

the appellant filed an FIR (P.S. Case No. 8 of 2003) at Dharampura Police Station against respondent nos. 1 to 4 for commission of the offences under Sections 420, 467, 468 and 120B, IPC alleging that they had executed a false, forged and fabricated will on 02.07.1997 in the name of late Devkinandan Sahay with the intention to grab his property. It was further alleged that based on the fabricated will, these respondents had obtained a mutation order dated 24.11.1999 from the Tehsildar, Ajaygarh. On completion of investigation in the above F.I.R., the challan has been filed against the above respondents and trial against them is going on in the Court of Judicial Magistrate, First Class, Ajaygarh, Panna (M.P.).

4. On 09.02.2004, the appellant brought legal action in representative capacity against the respondents nos. 1 to 4 by way of a civil suit in the Court of District Judge, Panna (M.P.) praying for a decree for declaration of title, perpetual injunction and possession in respect of disputed lands and for annulling the sale deed dated 14.08.2003 and the mutation order dated 24.11.1999. In the suit, reference of will forged by the respondent nos. 1 to 4 has been made. The said suit has been transferred to the Court of Additional District Judge, Panna and bears Civil Suit No. 10A of 2006. The respondent nos. 1 to 4, who are defendants in the suit, have filed their written statement on 19.06.2006. The trial court has framed issues on the basis of the pleadings of the parties on 21.09.2007. On 21.04.2008, the defendants (respondent nos. 1 to 4 herein) filed an application under Section 10 read with Section 151, CPC for staying the proceedings in the civil suit during the pendency of abovereferred criminal case.

5. The Additional District Judge, Panna, by his order dated 21.04.2008 dismissed the application for staying the proceedings in the suit.

6. The respondent nos. 1 to 4 herein challenged the order of the Additional District Judge in the High Court in a writ petition under Article 227 of the Constitution of India. The Division Bench of the Madhya Pradesh High Court by the impugned order has set aside the order of the Additional District Judge and, as noted above, has stayed the proceedings in Civil Suit till the decision of criminal case. It is from this order that the present civil appeal, by special leave, has arisen.

7. We have heard Mr. Nagendra Rai, learned senior counsel for the appellant, and Mr. K.G. Bhagat, learned counsel for respondent nos. 1 to 4.

8. A Constitution Bench of this Court in *M.S. Sheriff & Anr. v. State of Madras & Ors.* A.I.R. 1954 SC 397 has considered the question of simultaneous prosecution of the criminal proceedings with the civil suit. In paragraphs 14,15 and 16 (Pg. 399) of the Report, this Court stated as follows:

> "14. . . . . It was said that the simultaneous prosecution of these matters will embarrass the accused.
>
> . . . . but we can see that the simultaneous prosecution of the present criminal proceedings out of which this appeal arises and the civil suits will embarrass the accused. We have therefore to determine which should be stayed.
>
> 15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.
>
> 16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S. 476. But in

> this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

9. The ratio of the decision in *M.S. Sheriff*[1] is that no hard and fast rule can be laid down as to which of the proceedings – civil or criminal – must be stayed. It was held that possibility of conflicting decisions in the civil and criminal courts cannot be considered as a relevant consideration for stay of the proceedings as law envisaged such an eventuality. Embarrassment was considered to be a relevant aspect and having regard to certain factors, this Court found expedient in *M.S. Sheriff*[1] to stay the civil proceedings. The Court made it very clear that this, however, was not hard and fast rule; special considerations obtaining in any particular case might make some other course more expedient and just. *M.S. Sheriff*[1] does not lay down an invariable rule that simultaneous prosecution of criminal proceedings and civil suit will embarrass the accused or that invariably the proceedings in the civil suit should be stayed until disposal of criminal case.

10. In *M/s. Karam Chand Ganga Prasad and Another etc. v. Union of India and Others*[2], this Court in paragraph 4 of the Report (Pg. 695) made the following general observations, "it is a well established principle of law that the decisions of the civil courts are binding on the criminal courts. The converse is not true." This statement has been held to be confined to the facts of that case in a later decision in *K.G. Premshanker v. Inspector of Police and Another*[3], to which we shall refer to a little later.

11. In *V.M. Shah v. State of Maharashtra and Another*[4], while dealing with the question whether the conviction under Section 630 of the Companies Act was sustainable, this Court, while noticing the decision in *M.S. Sheriff*[1] in para 11 (pg. 770) of the Report, held as under:

> "11. As seen that the civil court after full-dressed trial recorded the finding that the appellant had not come into possession through the Company but had independent tenancy rights from the principal landlord and, therefore, the decree for eviction was negatived. Until that finding is duly considered

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[1] AIR 1954 SC 397
[2] 1970 (3) SCC 694
[3] (2002) 8 SCC 87
[4] (1995) 5 SCC 767

by the appellate court after weighing the evidence afresh and if it so warranted reversed, the findings bind the parties. The findings, recorded by the criminal court, stand superseded by the findings recorded by the civil court. Thereby, the findings of the civil court get precedence over the findings recorded by the trial court, in particular, in summary trial for offences like Section 630. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial court and neither the finding of the civil court gets nor the decree becomes inoperative."

12. The statement of law in *V.M. Shah*[4], as quoted above, has been expressly held to be not a good law in *K.G. Premshanker*[3].

13. In *State of Rajasthan v. Kalyan Sundaram Cement Industries Ltd. and Others*[5], this Court made the following statement in paragraph 3 (pgs. 87-88):

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

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[5] (1996) 3 SCC 87

14. We may now refer to a three-Judge Bench decision of this Court in *K.G. Premshanker*[3]. The three-Judge Bench took into consideration Sections 40, 41, 42 and 43 of the Evidence Act, 1872 and also the decision of this Court in *M.S. Sheriff* 1 and observed in paragraph 32 of the Report that the decision rendered by the Constitution Bench in *M.S. Sheriff* case 1 would be binding wherein it has been specifically held that no hard and fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration.

15. Section 40 of the Evidence Act makes it plain that the existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

16. Section 41 provides for relevancy of judgments passed in the exercise of probate, matrimonial admiralty or insolvency jurisdiction by the Competent Court. It reads as follows :

> "S. 41. Relevancy of certain judgments in probate, etc., jurisdiction.—A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof—
>
> that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;
>
> that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
>
> that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
>
> and that anything to which it declares any person to be

> so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."

17. Section 42 deals with relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41. It reads as under:

> "S.42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.— Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state."

18. Section 43 provides that the judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provisions of the Evidence Act.

19. In *K.G. Premshanker*[3], the effect of the above provisions (Sections 40 to 43 of the Evidence Act) has been broadly noted thus: if the criminal case and civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein. Moreover, the judgment, order or decree passed in previous civil proceedings, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case the Court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. In each and every case the first question which would require consideration is, whether judgment, order or decree is relevant; if relevant, its effect. This would depend upon the facts of each case.

20 In light of the above legal position, it may be immediately observed that the High Court was not at all justified in staying the proceedings in the civil suit till the decision of criminal case. Firstly, because even if there is possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration. Secondly, in the facts of the present case there is no likelihood of any embarrassment to the defendants (respondent nos. 1 to 4 herein) as they had already filed the written

statement in the civil suit and based on the pleadings of the parties the issues have been framed. In this view of the matter, the outcome and/or findings that may be arrived at by the civil court will not at all prejudice the defence(s) of the respondent nos. 1 to 4 in the criminal proceedings.

21. For the above reasons, appeal is allowed. The impugned order dated 24.11.2008 passed by the Division Bench of the Madhya Pradesh High Court is set aside. The proceedings in the civil suit shall now proceed further in accordance with law. The parties shall bear their own costs.

Appeal allowed.

I.L.R. [2013] M.P., 2510
WRIT APPEAL

Before Mr. S.A. Bobde, Chief Justice & Mr. Justice K.K. Trivedi

W.A. No. 1439/2012 (Jabalpur) decided on 13 February, 2013

PADMESH GOUTAM ...Appellant
Vs.
STATE OF M.P. & ors. ...Respondents

***Motoryan Karadhan Adhiniyam, M.P. (25 of 1991), Section 16(3) & Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 457* - Appellant's Bus seized by the Officer-in-charge, Traffic, for offence u/s 16(3) of the Adhiniyam as well as for offences under Motor Vehicles Act and the Rules - Said Officer was not notified by the State Government under its notification dated 09.01.1992 to seize vehicles for any violation of the Adhiniyam and as such was not competent to seize the vehicle for offence u/s 16(3) of the Adhiniyam but was competent to seize it for offences under Motor Vehicles Act - Seizure of the Bus u/s 16(3) of the Adhiniyam was bad in law and is quashed - Bus will be treated as seized only under the Motor Vehicles Act - Appellant can make an application for its custody before the appropriate Court. (Paras 2 to 5)**

मोटरयान कराधान अधिनियम, म.प्र. (1991 का 25), धारा 16(3) व दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 451 व 457 – मोटर यान अधिनियम एवं नियमों के अंतर्गत अपराधों के लिये तथा अधिनियम की धारा 16(3) के अंतर्गत अपराध के लिये ऑफीसर इंचार्ज, यातायात के द्वारा अपीलार्थी की बस जप्त की गई – उक्त अधिकारी राज्य सरकार की अधिसूचना दिनांक 09.01.1992 के अंतर्गत अधिनियम का कोई उल्लंघन करने पर वाहन जप्त करने हेतु अधिसूचित नहीं था

और इस कारण वह अधिनियम की धारा 16(3) के अंतर्गत अपराध के लिये वाहन जप्त करने हेतु सक्षम नहीं था, किन्तु मोटर यान अधिनियम के अंतर्गत अपराधों में इसे जप्त करने में सक्षम था – अधिनियम की धारा 16(3) के अंतर्गत बस की जप्ती विधि की दृष्टि में दोषपूर्ण और अभिखंडित – बस को केवल मोटर यान अधिनियम के अंतर्गत जप्त माना जावे – सुपर्दगी हेतु अपीलार्थी समुचित न्यायालय के समक्ष आवेदन प्रस्तुत कर सकता है।

Cases referred :

W.P. No. 5057/2007, decided on 03.08.2007, 1998 (2) JLJ 6.

Subodh Pandey, for the appellant.
Sanjay Dwivedi, G.A. for the respondents/State.

ORDER

The Order of the court was delivered by :

K.K. TRIVEDI, J.:- This intra court appeal under Section 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005, has been filed challenging the correctness of the order dated 29.11.2012 passed in W.P. No.15895/2012 contenting inter alia that the issue that the vehicle of the appellant was seized under the provisions of Madhya Pradesh Motoryan Karadhan Adhiniyam, 1991 (herein after referred to as 'Adhiniyam) and no application under Section 451 or 457 of the Code of Criminal Procedure was maintainable for grant of *Supurdginama* of said vehicle before the Court of Judicial Magistrate as per the law laid-down by the Full Bench of this Court, but instead of considering such pleas in appropriate manner, the learned Single Judge has disposed of the writ petition of the appellant/petitioner with a liberty to the appellant to approach the aforesaid Court of Judicial Magistrate. It is contended that if the vehicle was seized under the Adhiniyam by an unauthorized officer, said seizure was illegal as was held in many cases by this Court. However, without appreciating these aspects, the learned Single Judge has disposed of the writ petition of the appellant, therefore, this intra court appeal is required to be filed.

2. Brief facts are that the appellant, a transporter, is the owner of the bus MP17 P/0291. The aforesaid stage carriage vehicle is registered in the office of Regional Transport Authority, Rewa. On 09.09.2012, the Officer-in-Charge, Traffic, District Shahdol, seized the vehicle of the appellant and registered certain offences under the provisions of Motor Vehicles Act, 1988 as also under Section 16(3) of the Adhiniyam. The State Government has

issued the notification authorizing officers to seize a vehicle under the Adhiniyam, if any violation of the aforesaid Adhiniyam is found and as is clearly indicated in the notification dated 09.01.1992, only the officers not below the rank of Assistant Transport Sub Inspector of the Transport Department are authorized to make seizure of the vehicle, if the same is found to have contravened the provisions of the Adhiniyam and any offence is registered under the aforesaid Adhiniyam. It is contended that in the case of *M/s Hardeo Motor Transport Company vs. State of Madhya Pradesh & others,* W.P. No.5057/2007, decided on 03.08.2007, this has categorically been held by this Court that if a seizure of a vehicle is made by an officer not competent to do so, for any offence committed under the Adhiniyam, such a seizure is bad in law. The fact was brought to the notice of learned Single Judge that the offence is registered against the appellant under the Adhiniyam as is indicated in the seizure memo by an officer not duly notified in this respect and a seizure of vehicle is made, as such the seizure of the vehicle in respect of the said offence was bad in law. It is further contended that in view of the law laid-down by the Full Bench of this Court in the case of *State of M.P. vs. Rakesh Kumar Gupta,* 1998 (2) JLJ 6, there was no right available to the appellant to approach the Court of Judicial Magistrate for seeking the custody of the vehicle in terms of the provisions of Sections 451 and 457 of the Code of Criminal Procedure. Thus, such an observation and finding recorded by the learned Single Judge are bad in law.

3. Learned Govt. Advocate appearing for the respondents was directed to produce before us the copy of the seizure memo so as to indicate whether any offence under the Adhiniyam was registered against the appellant while seizure of the vehicle was made or not. Such documents have been produced.

4. After careful examination of the seizure memo produced by learned Govt. Advocate, it is clear that offence under Section 16(3) of the Adhiniyam was registered against the appellant and for the said purpose, seizure was cumulatively made by the respondent No.3 on 09.09.2012. Of course the seizure is made with respect to the offence committed under Sections 66/192, 56/192(1)(c), 146/196, 115(7)/190(2), 130(1)(2)(3)/177, 9/177, 36/177 of the Motor Vehicles Act and Rule 77/177 of the Motor Vehicles Rules. For the offences under the Motor Vehicles Act, the respondent No.3 was competent to seize the vehicle as notification in that respect was not required but for the seizure of the vehicle under the provisions of Section 16(3) of the Adhiniyam, the respondent No.3 was not notified and as such he could not have seized

the vehicle of the appellant for the aforesaid offence. This particular aspect has already been considered by this Court in the case of *M/s Hardeo Motor Transport Company* (supra) and as such the seizure of the vehicle of the appellant to this extent by respondent No.3 was not to be upheld. Learned Single Judge has failed to see these aspects in appropriate manner and he has disposed of the writ petition of the appellant to make appropriate application before the Judicial Magistrate. As has been held by the Full Bench of this Court in the case of *State of M.P. vs. Rakesh Kumar Gupta* (supra), no such application under Section 451 or 457 of the Code of Criminal Procedure was maintainable before the Judicial Magistrate for the purpose of grant of custody of vehicle seized under the Adhiniyam. To that extent the order passed by learned Single Judge is not to be approved.

5. Consequently, this writ appeal is allowed in part. We modify the order of learned Single Judge holding that the seizure of the vehicle of the appellant by the respondent No.3 under the Motoryan Karadhan Adhiniyam, 1991 for offence under Section 16(3) of the said Adhiniyam is bad in law. The seizure of the vehicle of the appellant in respect of such offence of the Adhiniyam is hereby quashed. However, the vehicle will be treated to be seized only under the Motor Vehicles Act for which the appellant will have to make application for grant of custody before the appropriate Court of competent jurisdiction.

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

Appeal partly allowed.

I.L.R. [2013] M.P., 2513
WRIT APPEAL
Before Mr. Justice Sheel Nagu & Mr. Justice Sujoy Paul
W.A. No. 340/2013 (Gwalior) decided on 30 August, 2013

RAMKATORI GOYAL (SMT.) ...Appellant
Vs.
MUNICIPAL CORPORATION & anr. ...Respondents

***A. Nagar Palika (Registration of Colonizers, Terms & Conditions) Rules, M.P. 1998, Rule 12(A), 13 - Permission of Construction* - Issuance of completion certificates of development work is not a pre-requisite for grant of permission to commence building construction in any colony - However, it is obligatory upon the competent**

authority under Rule 12(A) of Rules 1998 to ensure development process is completed by the colonizer before permission for construction of building is granted. **(Para 4)**

क. नगरपालिका (कॉलोनाईजर का रजिस्ट्रीकरण, निर्बन्धन तथा शर्तें) नियम, म.प्र. 1998, नियम 12(ए), 13 – निर्माण की अनुमति – किसी कॉलोनी में भवन निर्माण कार्य आरंभ करने की अनुमति प्रदान किये जाने हेतु, विकास कार्य पूर्ण होने का प्रमाण पत्र जारी करना पूर्व शर्त नहीं है – परन्तु, नियम 1998 के नियम 12(ए) के अंतर्गत सक्षम प्राधिकारी पर बाध्यकारी है कि वह यह सुनिश्चित करे कि भवन निर्माण की अनुमति प्रदान किये जाने से पहले कॉलोनी निर्माणकर्ता द्वारा विकास प्रक्रिया को पूरा किया गया है।

B. Nagar Palika (Registration of Colonizers, Terms & Conditions) Rules, M.P. 1998, Rule 12(A),13 - Permission of Construction **- Builder/Society not completing development work in 6-7 days - Rules of 1998 vest the Corporation with ample remedial powers - Municipal Corporation is directed to carry out the necessary inspection of development work carried out by the respondent/Society within a period of four weeks and, if work is not complete it shall take action as directed and mandated under Rules and to issue necessary permission to the appellant/petitioner.** **(Paras 12 & 13)**

ख. नगरपालिका (कॉलोनाईजर का रजिस्ट्रीकरण, निर्बन्धन तथा शर्तें) नियम, म.प्र. 1998, नियम 12(ए), 13 – निर्माण की अनुमति – निर्माणकर्ता/सोसायटी ने 6–7 दिनों में विकास कार्य पूरा नहीं किया – 1998 के नियम, निगम में पर्याप्त उपचार की शक्तियां निहित करते हैं – नगरपालिका निगम को प्रत्यर्थी/सोसायटी द्वारा किये गये विकास कार्य का आवश्यक निरीक्षण चार हफ्तों की अवधि के भीतर करने के लिये निदेशित किया गया और यदि कार्य पूरा नहीं है तब नियम के अंतर्गत निदेशानुसार एवं आदेशाधीन वह कार्यवाही करेगा तथा अपीलार्थी/याची को आवश्यक अनुज्ञा जारी करेगा।

C. Constitution - Article 226 - Writ Petition - Cost of litigation **- Petitioner applying for permission of construction, which was refused on account of non-issuance of certificate of completion of development work - Municipal Corporation, though having ample remedial power chooses to remain inactive doing nothing except blaming the colonizer society - Held - The respondent Corporation has thus exposed itself to the liability of bearing the cost of this avoidable litigation - Rs. 15,000/- quantified as cost.** **(Para 12)**

ग. संविधान – अनुच्छेद 226 – रिट याचिका – मुकदमे का खर्च – याची ने निर्माण की अनुमति हेतु आवेदन किया, जिसे विकास कार्य की पूर्ति का प्रमाण पत्र नहीं जारी होने के आधार पर अस्वीकार किया गया – यद्यपि नगरपालिका निगम के पास पर्याप्त उपचार की शक्ति थी, वह निष्क्रिय बना रहा और निर्माणकर्ता सोसायटी को दोष देने के अलावा कुछ नहीं किया – अभिनिर्धारित – अतः प्रत्यर्थी निगम ने इस परिहार्य मुकदमे का खर्च वहन करने के लिये स्वयं को उत्तरदायी बनाया है – खर्चे के रुप में रु. 15,000/– परिमाणित किया गया।

N.K. Gupta, for the appellant.
Ami Prabal, for the respondent No.1.
H.K. Shukla, for the respondent No.2.

ORDER

The Order of the court was delivered by :

SHEEL NAGU, J.:- This writ appeal filed under Section 2 (1) of the Madhya Pradesh Uchcha Nyayalaya (Khandpeeth Ko Appeal) Adhiniyam, 2005 assails the final order of the learned Single Judge passed in Writ Petition No.5406/2010 on 10.07.2013, whereby the petition has been disposed of with a direction to the Municipal Corporation, Gwalior to grant permission for construction in accordance with law after satisfying itself that the development work carried out by the respondent no.2/Society is complete.

2. Learned counsel for the rival parties are heard on the question of admission and is being finally decided with the consent of rival parties.

3. Learned counsel for the appellant/petitioner primarily contends thus :

(i) that there is no statutory provision requiring issuance of completion certificate as a pre-requisite for the appellant/petitioner to start construction on her individual plot; and

(ii) that despite the respondent no.2/Society having completed process of development of the plot, the Municipal Corporation, Gwalior is neither granting permission for construction to the appellant/petitioner nor it is taking any action under Rule 13 of the M. P. Nagar Palika Registration of Colonizers (Terms & Conditions) Rules, 1998 (for brevity the "Rules of 1998").

4. As regards the first contention, it is seen from perusal of the statutory provision contained in Rule 12(A) of the Rules of 1998 that issuance of certificate of completion of development work is not a pre-requisite for grant of permission to commence building construction in any colony, but none the less it is obligatory upon the competent authority under Rule 12 (A) of the Rules of 1998 to ensure completion of development process is completed by the colonizer (respondent/Society herein) before permission for construction of building is granted.

5. Learned counsel for the Municipal Corporation, Gwalior contends that the respondent/Society has failed to complete the process of development in terms of the letter dated 25.03.2006 (vide Annexure P/5), by which the respondent/Society was granted permission by the respondent/Corporation to commence process of development.

6. Per contra, the learned counsel for respondent/Society refuting the stand of the Municipal Corporation contends that the process of development is complete and the fault lies with the Municipal Corporation in failing to grant permission to the appellant/petitioner to commence construction of building on her plot.

7. The writ Court has issued necessary directions to the Corporation to verify completion of development work and thereafter to grant permission for construction to the appellant/ petitioner.

8. Pertinently Rule 13 of the Rules of 1998 bestows ample power upon the respondent/Municipal Corporation to take necessary remedial action in case of failure of the colonizer to complete with the process of development.

9. Thus, the Municipal Corporation is not remediless as projected by the learned counsel for respondent/Corporation. It is admitted by the learned counsel for respondent/Corporation that no action has been taken against the respondent/Society under the provisions of Rule 13 of the Rules of 1998.

10. It appears that due to the contentions and counter-contentions of the respondent/Society, who is the colonizer on one hand and the respondent/ Corporation, which is the competent authority on the other, the ultimate sufferer is the appellant/petitioner, who is unable to commence construction over her plot for no fault of her's.

11. It is an undisputed fact that on 09.06.2004 (vide Annexure P/4), the

Department of Town & Country Planning granted development permission to the Society, which was valid for three years extendable by two further years. Further, the Municipal Corporation on 25.03.2006 (vide Annexure P/5) granted development permission to the Society on the same terms and conditions as imposed by the Department of Town & Country Planning (vide Annexure P/4) and also imposed the condition that all the plots shall remain pledged with the Corporation till compliance of all the conditions imposed by the Department of Town & Country Planning is made. It is further undisputed that the appellant/petitioner has not yet been able to commence construction over her plot on account of the prevailing dispute about completion or non-completion of the process of development between the Municipal Corporation on one hand and the respondent/Colonizer on the other.

12. The case at hand discloses a disturbing trend where a law abiding citizen to fulfill her dream to have a house of her own is made to wait for years together (6-7 years in the instant case) despite complying with all the legal requisites within the prescribed time. The Municipal Corporation despite being a creature of a statute and boasting itself to be an instrumentality of a welfare state, chooses to degenerate itself to a mute spectator by failing to step in and perform its statutory duty of completing the development work of the colony which is left incomplete by the colonizer society. The Rules of 1998 vest the Corporation with ample remedial powers. Yet the Corporation chooses to remain inactive doing nothing except blaming the colonizer society in the instant case. The respondent Corporation has thus exposed itself to the liability of bearing the cost of this avoidable litigation.

13. In view of the above, to do complete justice in the matter, this Court modifies the impugned order of the learned Single Judge to the following extent :-

(i) Respondent/Municipal Corporation is directed to carry out the necessary inspection of the development work carried out by the respondent/Society within a period of four weeks from the date of communication of this order;

(ii) In case the Municipal Corporation finds that the development work carried out by the respondent/Society is in terms of the letter dated 25.03.2006 (vide Annexure P/5), the necessary permission for construction shall be issued in favour of the appellant/petitioner within a period of two weeks

thereafter;

(iii) In case the Municipal Corporation, Gwalior finds that the development process carried out by the respondent/Society is incomplete, then action in terms of Clause (4) of the letter dated 25.03.2006 (vide Annexure P/5) read with the statutory provisions of Rule 13 of the Rules of 1998 shall be taken by the respondent/Corporation and concluded within a period of eight weeks from the date of knowledge of the development process being incomplete;

(iv) After complying with the directions as contained in clause (iii) above, the respondent/Corporation shall issue necessary permission to the appellant/petitioner for carrying out construction on her plot within a further period of two (2) weeks.

(v) The respondent Corporation is liable to pay cost which is quantified as Rs.15,000/- to be paid to the appellant/petitioner to the extent of Rs.10,000/- whereas the remaining R.s.5,000/- to be paid in favour of M/s. Institute of Advocate Continuing Legal Education, Gwalior for consuming precious time of the Court for adjudicating an avoidable piece of litigation.

14. With the abovesaid directions, this writ appeal stands disposed of.

Appeal disposed of.

I.L.R. [2013] M.P., 2518
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 269/2007 (S) (Jabalpur) decided on 13 December, 2012

KRISHNA KANT CHOUDHARI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

A. ***Service Law - Kramonnati - Interpretation of Scheme*** **- Scheme came into existence w.e.f. 19.04.1999 - Petitioner was appointed in the year 1981 - As the Scheme itself came into existence w.e.f. 19.04.1999 therefore, the petitioner will be entitled for his 1st Kramonnati w.e.f. 19.04.1999 as he had already completed 12 years of**

service in the year 1993 - However, for calculating the period of 24 years for grant of 2nd Kramonnati, the date of his initial appointment is to be considered - Petitioner was appointed in the year 1981, he will be entitled for 1st Kramonnati in the year 1999 and 2nd Kramonnati in the year 2005. (Para 9)

क. सेवा विधि – क्रमोन्नति – योजना का निर्वचन – योजना, 19.04.1999 से प्रभावी रुप से अस्तित्व में आयी थी – याची को वर्ष 1981 में नियुक्त किया गया था – चूंकि योजना स्वयं 19.04.1999 से प्रभावी रुप से अस्तित्व में आयी थी, इसलिए याची अपनी प्रथम क्रमोन्नति के लिए 19.04.1999 से प्रभावी रुप से हकदार होगा, क्योंकि उसने पहले ही वर्ष .1993 में 12 वर्षों की सेवा पूर्ण की – किन्तु, द्वितीय क्रमोन्नति हेतु 24 वर्षों की अवधि की संगणना के लिये, उसकी आरंभिक नियुक्ति की तिथि को विचार में लिया जाना चाहिए – याची को वर्ष 1981 में नियुक्त किया गया था, वह वर्ष 1999 में प्रथम क्रमोन्नति एवं वर्ष 2005 में द्वितीय क्रमोन्नति का हकदार होगा।

***B. Service Law - Kramonnati - Grant of* - Screening of service record is to be done and then the assessment is to be done whether an incumbent is fit for grant of Kramonnati or not - If an incumbent is found fit in accordance to the norms prescribed for grant of such Kramonnati pay scales, the benefit is required to be granted from the date it has become applicable. (Para 10)**

ख. सेवा विधि – क्रमोन्नति – प्रदान की जाना – सेवा अभिलेख की छानबीन की जानी चाहिए और फिर यह निर्धारण किया जाना चाहिए कि क्या पदधारी क्रमोन्नति प्रदान किये जाने हेतु योग्य है अथवा नहीं – यदि उक्त क्रमोन्नति वेतनमान प्रदान किये जाने हेतु मापदंड के अनुसरण में पदधारी को योग्य पाया जाता है, लाभ उस तिथि से प्रदान किया जाना चाहिए जब वह लागू किये जाने योग्य हुआ था।

R.K. Thakur, for the petitioner.
S.K. Shrivastava, P.L. for the respondents/State.

ORDER

K.K. Trivedi, J.:- The grievance of the petitioner appears to be that despite the grant of Kramonnati, the petitioner is not extended the benefit of the same inasmuch as his salary has not been revised in the Kramonnati pay scale and that the second Kramonnati, as was available to him, has not been extended. Despite making representations since the same were not considered, this petition under Article 226 of the Constitution of India is required to be filed.

2. It is contended by the petitioner that initially he was appointed on the post of Coup Guard in the Forest Department of Govt. of Madhya Pradesh on 13.10.1976. Later on he was regularized w.e.f. 01.01.1977 on the post of Forest Guard. The order in this respect was issued and later on the petitioner was given the forest training and was regularized w.e.f. 01.04.1981 as trained Forest Guard. The State Government has formulated a policy commonly known as Kramonnati Yojna and circulated the same vide circular dated 17.03.1999/ 19.04.1999. However, despite rendering the services for a period of 12 years on the very same post in the very same pay scale, the benefit of Kramonnati was not extended to the petitioner. There was discrepancy in maintaining the seniority of the petitioner and he was lowered down in the seniority list against which the representation was made by the petitioner. It is contended that instead of considering the representation of the petitioner in appropriate manner, it was communicated that the petitioner has been treated as Forest Guard w.e.f. 01.04.1986 and this is how the petitioner's seniority was changed. Further there was no cogent reason shown as to how the seniority of the petitioner was changed because of change of his date of regularization. This being so, the petitioner has claimed the relief to the effect that the respondents be commanded to correct the seniority of the petitioner in appropriate manner and to grant him first Kramonnati w.e.f. 01.01.1989 and second Kramonnati w.e.f. 01.01.2001 and to pay him all the consequential benefits after revision of his pay with interest.

3. Upon notices of the writ petition, the respondents have filed the return and they have contended that the case of the petitioner was considered for regularization. On availability of the post of Forest Guard, the petitioner was treated to be regularized w.e.f. 01.04.1986. The period spent by the petitioner in service as Coup Guard was not to be counted for the purposes of seniority and accordingly, from the date of regularization, the seniority of the petitioner was properly maintained and he has been shown in the appropriate place in the gradation seniority list. It is contended that the benefit of Kramonnati was granted to the petitioner vide order dated 11.03.2008 and the said benefit is extended w.e.f. 19.04.1999 in terms of the scheme made by the State Government. The petitioner would be paid the benefit of grant of first Kramonnati. Nothing more can be granted to the petitioner and as such the petition is misconceived and deserve dismissal.

4. By filing a rejoinder, the petitioner has contended that in terms of the decision taken by the State Government way back, the posts of Coup Guards

were converted into the posts of Forest Guards. Those who were working as Coup Guards were directed to be treated as Forest Guards. Those who were untrained, were required to be sent for forest training. At any rate, benefit of seniority was not to be denied to the petitioner. It is contended that the similar issue was looked into by this Court in W.P. No.9271/2008 decided on 18.07.2012 and in view of this, a direction was given to decide the claim of seniority of such persons. If that is done, it would be clear that petitioner is much above in the gradation list and would be entitled to the promotion on the next post. No additional return has been filed to controvert such a stand taken by the petitioner in the rejoinder.

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

6. As has been put forth by the petitioner by placing on record the documents to show that the State Government itself has taken a decision to declare certain temporary posts as permanent posts w.e.f. 01.03.1977 by its order dated 03.05.1977/13.05.1977 and in fact the posts of Coup Guards, one thousand in number, were made permanent. It is also clear from the other documents that instead of Coup Guards, the said posts were to be designated as Forest Guards and for that purposes the specific orders were issued on 17.12.1979. The post was not only equated in the designation but the pay scale was also prescribed. The only difference was those who were untrained, were required to be sent for training and after obtaining the training, they were to be regularized as trained Forest Guard. From the gradation list annexed with the petition, it is clear that the same was the gradation list of trained Forest Guards. It is not disputed that the petitioner was imparted training as Forest Guard and an order was issued in his respect on 08.04.1981, posting him as trained Forest Guard w.e.f. 03.04.1981. Thus, it is clear that initially the petitioner was treated as Coup Guard, he was treated to be appointed on the post of Forest Guard after the conversion of the said post in terms of the order dated 03.05.1977/13.05.1977 read with order dated 17.12.1979 and after the training, was regularized as trained Forest Guard w.e.f. 03.04.1981. Even if permanent post was not available for the petitioner, such services rendered by him as trained Forest Guard were to be counted for the purposes of fixation of his seniority. At any rate, the period spent by the petitioner as a trained Forest Guard in between 03.04.1981 to 01.04.1986 could not be excluded for the purpose of giving benefit of seniority to the petitioner. This being so, the stand taken by the respondents that on account

of non-availability of the post petitioner was not treated to be regular trained Forest Guard and for that purpose the seniority was fixed w.e.f. 01.04.1986 cannot be accepted. The seniority of the petitioner as a trained Forest Guard would be counted only and only from 03.04.1981.

7. It is not clear that any junior to the petitioner was granted promotion or not. He has attained the age of superannuation in the year 2012 and has retired w.e.f. 29.02.2012. But, it would be necessary for the respondents to assign proper seniority to the petitioner from the date on which he was regularized as trained Forest Guard, i.e. 03.04.1981 and to see whether any junior to the petitioner was promoted on the next higher post or not. In case any junior to the petitioner is promoted, a review D.P.C. be held for consideration of the claim of the petitioner for promotion and in case he is found fit for such promotion, he be granted the benefit of promotion with all consequential benefits with retrospective effect.

8. Now the claim made by the petitioner with respect to grant of Kramonnati is to be considered. As is admitted by the respondents, since no promotion was granted to the petitioner, the order was issued on 11.03.2008 granting the Kramonnati to the petitioner w.e.f. 19.04.1999. This was done in terms of the policy made by the State Government on 17.03.1999/19.04.1999. The said policy makes it clear that the decision was taken by the State Government to implement the scheme of Kramonnati for those, who have not been granted any promotion after their regular appointment on a post. If they have remained continued on the said post for a period of 12 years, the first Kramonnati pay scale was to be granted to such employees. For the persons, who have not even granted the promotion even after completion of 24 years of service, they were to be granted the benefit of second Kramonnati. The scheme was made applicable from the date the amendments in terms of the policy made by the State Government were to be made in the recruitment rules of each department. It appears that no amendment was made in any of the service Rules and, therefore, by an order dated 03.05.2000/17.05.2000 the respondent-State decided that the Kramonnati scheme itself would come into force w.e.f. 19.04.1999.

9. Now the interpretation of the scheme is required to be done. Even if a person is appointed in the service in the year 1981, as in the case in hand, according to the scheme, he would become entitled to grant of first Kramonnati in the year 1993 and would become entitled to grant of second Kramonnati in the year 2005. However, since the scheme itself is made applicable w.e.f.

19.04.1999, how the pay fixation is to be done after grant of Kramonnati before the date of coming into force of the scheme, has not been specifically provided. The pay scales, which are to be granted on account of grant of Kramonnati have been mentioned in the circular of the State Government and in paragraph-4 of the scheme, it is said that after grant of the pay scale as indicated in the list of pay scales, the pay would be fixed in the Kramonnati pay scale or whatever the pre-revised pay scale of the said Kramonnati pay scale prevalent at the relevant time and the salary would be fixed accordingly. It is the well settled law that an order can be issued with retrospective effect but it is also settled law that in case a particular cutoff date is prescribed, the scheme or action would become operative only from the cutoff date. Here in the case in hand, the cutoff date prescribed by the State Government is 19.04.1999 and, therefore, even if the petitioner had completed the 12 years of service before this cutoff date, he would not be entitled to grant of first Kramonnati before this date. Of course if he had completed the period of 24 years of service, after the regular recruitment made, without any promotion, he would be entitled to consideration of his claim for grant of second Kramonnati even if the first Kramonnati is granted w.e.f.19.04.1999. It cannot be said that first Kramonnati is treated to be granted w.e.f. 19.04.1999 and, therefore, further 12 years of service would be necessary for grant of second Kramonnati from the date of grant of first Kramonnati. In fact the scheme of the Kramonnati itself prescribes the period of service from the initial date of appointment and not from the date of grant of first Kramonnati as the starting point from which the period of 12 years is to be counted for the purposes of grant of second Kramonnati. Thus, it is the intention of the State Government to grant at least two upgradation in the pay scales on completion of 24 years of service from the initial date of appointment and, therefore, it has to be treated that the petitioner would be entitled to grant of second Kramonnati on completionof 24 years of service. Since the petitioner is said to be appointed on regular basis as trained Forest Guard w.e.f. 03.04.1981, he would be entitled to grant of first Kramonnati w.e.f. 19.04.1999 as has rightly been done in his case and his case would be considered for grant of second Kramonnati on completion of 24 years of service from the aforesaid date of initial appointment, in the year 2005. Apparently, this has not been done and, therefore, an error has been committed by the respondents in not implementing the Kramonnati scheme in appropriate manner in respect of the petitioner.

10. It is also the settled position of law that Kramonnati in the pay scale is

not to be granted automatically on completion of requisite years of service. The scheme has been made by the State Government to consider the claims for grant of such Kramonnati. The scheme contemplates that the screening of the service record is to be done and then the assessment is to be done whether an incumbent is fit for grant of Kramonnati or not. The Apex Court and this Court has also considered the aspect of grant of Kramonnati in catena of decisions and it has been categorically held that grant of Kramonnati is not automatic, on the other hand, it depends on due consideration by the Committee and only if an incumbent is found fit in accordance to the norms prescribed for grant of such Kramonnati pay scales, the benefit is required to be granted from the date it has become applicable. Thus, again it would be only a right available to the petitioner to be considered for grant of second Kramonnati and it would be necessary for the respondents to consider the claim of the petitioner for grant of such Kramonnati pay scales within time.

11. For the aforesaid discussions, this writ petition is allowed. The respondents would first fix the seniority of the petitioner in appropriate manner as has been directed herein above and will examine whether any junior to the petitioner is promoted on the next higher post or not. In case it is found that despite fixation of seniority in appropriate manner petitioner would not be entitled to any promotion, on account of non-availability of the vacancies up to his seniority number or on account of the fact that no junior to him has been promoted on the next higher post, the respondents would consider the claim of the petitioner for grant of Kramonnati on the aforesaid two stages. So far as the first Kramonnati is concerned, it is indicated by filing return that the petitioner has already been considered and found fit for grant of such Kramonnati and orders in that respect have been issued by them on 10.03.2008. The petitioner would be entitled to grant of Kramonnati pay scale of Rs.3500-5200 in terms of the order dated 10.03.2008, w.e.f. 19.04.1999. However, the respondents would consider the claim of the petitioner for grant of second Kramonnati in terms of the policy dated 17.03.1999/19.04.1999 with effect from the year he completed 24 years of service, taking into consideration the initial date of appointment of petitioner as trained Forest Guard w.e.f. 03.04.1981 and in case it is found that the petitioner is fit for grant of second Kramonnati, the benefit of grant of second Kramonnati would be extended to the petitioner from the appropriate date on which he has completed 24 years of service. The petitioner would be entitled to the salary in the Kramonnati pay scale as is granted and is directed to be

considered herein above in the event he is found fit for grant of second Kramonnati and all the arrears of salary be calculated and paid to him. Since now the petitioner has. attained the age of superannuation, in all the aforesaid circumstances, the pensionary claim of the petitioner be revised fixing appropriate pension of the petitioner and all the retiral dues be calculated and paid to him. The aforesaid exercise be completed within a period of four months from the date of the order and actual payments be made to the petitioner within the aforesaid period.

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

Petition allowed.

I.L.R. [2013] M.P., 2525

WRIT PETITION

Before Mr. Justice U.C. Maheshwari

W.P. No. 20744/2012 (Jabalpur) decided on 14 December, 2012

RAMANUJ KUSHWAHA & anr. ...Petitioners

Vs.

BRIJBHAN KUSHWAHA & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 26 Rule 9* - Commission can not be issued to ascertain actual possession over disputed property - Evidence cannot be collected by issuance of commission - Issue has to be decided by the Court itself on the basis of evidence. (Para 3)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – विवादित सम्पत्ति पर वास्तविक कब्जे का पता लगाने के लिये कमीशन नहीं जारी किया जा सकता – कमीशन जारी करके साक्ष्य एकत्रित नहीं किया जा सकता – विवाद्यक का निर्णय न्यायालय को ही साक्ष्य के आधार पर करना होगा।

Case referred :

2002(1) M.P.W.N. 105.

P.K. Pandey, for the petitioners.

ORDER

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

1. The petitioners- plaintiffs have filed this petition under Article 227 of the Constitution of India for quashment of the order dated 16.10.2012, (Ann.

P-1) passed by the IInd Civil Judge, Class-II, Sidhi in C.O.S. No. 82-A/10 whereby their application filed under Order 26 Rule 9 of the CPC for appointment of the Commissioner to call the Commissioner's report of the disputed place has been dismissed.

2. Having heard the counsel, keeping in view the arguments advanced, I have perused the impugned order alongwith the papers placed on record, so also the case law in the matter of *Chhunnilal Vs. Ramchandra* reported in 2002 (1) M.P. Weekly Notes 105 stated in the impugned order. In the available scenario, I have not found any error, infirmity, perversity or anything against the propriety of law in the order impugned, so it does not require any interference at this stage, specially when the impugned suit is at the initial stage and the evidence of the plaintiff is yet to be started.

3. It is settled proposition of law that neither of the party has a right to use the process of the court as an agency for collecting evidence for him of them. In such premises, the impugned order does not require any interference, hence this petition is hereby dismissed but by extending a liberty to the petitioners to file appropriate application in this regard after recording the evidence of both the parties if there is any ambiguity in the evidence then to clarify the same such application may be filed by the petitioners and at that stage on filing such application, the trial court shall be at liberty to consider such application afresh on its own merits without influencing from any finding and observation made by the trial court in the order impugned or in this order.

C c as per rules.

Petition dismissed.

I.L.R. [2013] M.P., 2526
WRIT PETITION

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

W.P. No.1379/2012 (Indore) decided on 11 January, 2013

BIAORA INFRASTRUCTURE PVT. LTD.(M/S) ...Petitioner
Vs.
M.P. GRAMIN SADAK VIKAS PRADHIKAR & anr. ...Respondents

Works Contract - Release of security amount **- In terms of Works Contract, petitioner was required to maintain roads for five years - 50% of security amount was to be released after completion of three**

years - Rest of 50% of security amount was to be released after completion of five years - Petitioner completed the work - 50% of security amount was released on completion of three years - But, even after maintenance and expiry of the period of five years remaining 50% of security amount was not released because some dues are to be realised under another contract - Held - No clause in the contract empowering respondents to recover amount due under any other contract from security of the contract in question - Dispute about some other contract is pending before the M.P. Arbitration Tribunal - Respondents were directed to release the security amount expeditiously - Writ Petition allowed. (Paras 2, 3, 8 to 10)

कार्य संविदा – सुरक्षा निधि को मुक्त किया जाना – कार्य संविदा की शर्तों नुसार, याची को पांच वर्ष तक सड़कों का रखरखाव करना अपेक्षित था – 50 प्रतिशत सुरक्षा निधि, तीन वर्ष पूर्ण होने के पश्चात मुक्त की जानी थी – शेष 50 प्रतिशत सुरक्षा निधि, पांच वर्ष पूर्ण हो जाने के पश्चात मुक्त की जानी थी – याची ने कार्य पूर्ण किया – 50 प्रतिशत सुरक्षा निधि, तीन वर्ष पूर्ण होने पर मुक्त की गई – किन्तु, रखरखाव करने एवं 5 वर्ष की अवधि बीत जाने के पश्चात भी शेष 50 प्रतिशत सुरक्षा निधि मुक्त नहीं की गई, क्योंकि अन्य संविदा के अंतर्गत कुछ देयकों को मुक्त किया जाना है – अभिनिर्धारित – प्रश्नगत संविदा की सुरक्षा निधि से किसी अन्य संविदा के अंतर्गत देय रकम वसूल करने के लिये प्रत्यर्थीगण को सशक्त करने वाला कोई खंड, संविदा में नहीं – किसी अन्य संविदा के बारे में विवाद म.प्र. माध्यस्थम अधिकरण के समक्ष लंबित – प्रत्यर्थीगण को सुरक्षा निधि यथाशीघ्र मुक्त कियें जाने के लिये निदेशित किया गया – रिट याचिका मंजूर।

Case referred :

2007 (4) MPLJ 610.

S.V. Dandwate, for the petitioner.
Manoj Munshi, for the respondents.

ORDER

The Order of the court was delivered by : SHANTANU KEMKAR, J.:- By filing this writ petition, the petitioner is seeking direction to the respondents to release the security amount deposited by it with the respondents.

2. According to the petitioner, in terms of the works contract entered into by it with the respondents for construction / up-gradation of rural roads

under Pradhan Mantri Sadak Yojana for an amount of Rs.505.01 lakhs under the Package No.3008, the petitioner submitted with the respondents the performance security of 10% of the contract amount, bank guarantee of 5% amount and one fixed deposit receipt for an amount of 25.25 lakhs. As per the terms of the contract, the petitioner was required to maintain the roads for a period of five years. 50% of the security amount was to be released after completion of three years and rest 50% of the security amount was to be released after completion of five years.

3. The petitioner had completed the work on 25.06.2006 and performed regular maintenance during the prescribed period, and as such, satisfied with the same, 50% of the performance security was released by the second respondent on completion of three years successful maintenance. However, even after maintenance and expiry of the period of five years on 24.06.2011, remaining 50% security amount, which was deposited by the petitioner in the form of fixed deposit receipt for an amount of Rs.25.25 lakhs, was not released by the respondents. In the circumstances, the petitioner vide letter dated 03.08.2011 asked the respondents to refund the said amount, but in spite of repeated requests, it was not returned. However, on 29.08.2011, the petitioner was informed that under some other contract (PIU, Jhabua) an amount of dues of Rs.61.44 lakhs against the petitioner, the amount payable under this contract cannot be released. Feeling aggrieved, the petitioner has filed this petition.

4. According to the petitioner, as per the terms and conditions of the contract, after successful completion of maintenance and the period of five years, the amount was required to be released to the petitioner and in the garb of dues under other contract, the respondents cannot withheld the amount undisputedly payable to the petitioner.

5. The respondents have filed reply. It has been stated that although there is no complaint or dispute about the petitioner's work under the contract in question and also no dispute about the petitioner's entitlement to get the amount under this contract, but the aforesaid 50% security deposit amount, cannot be refunded to the petitioner, as there are dues to be realized from the petitioner under another contract. Reliance has been placed on Clause 53 of the contract document.

6. A rejoinder has been filed by the petitioner stating that having regard

to the fact that there is no dispute so far as the payment of the amount in regard to the contract in question is concerned, the respondents cannot withheld the amount against the alleged dues of some other contract.

7. Admittedly, the dispute of other contract is pending decision before the MP Arbitration Tribunal, Bhopal as Reference Case No.27/2010. In the circumstances, in the garb of dues against the petitioner under another contract, the amount payable under contract in question cannot be withheld. In Full Bench judgment in the case of *B.B. Verma and another v. State of MP and another* 2007 (4) MPLJ 610, it has been held by this Court that claim against contractor for payment of sum or money under the contract cannot be recovered by the Government from the contractor until the dispute is adjudicated.

8. So far as the reliance of the respondents on Clause 53 of the agreement is concerned, the same is wholly misconceived. Clauses 53 and 53.1 relate to how the payment is to be made upon termination of contract. Clause 53 (1) does not authorize the respondents to recover the amount due in regard to other contracts of the same contractor. In the present case, the petitioner successfully completed the work and then the period of successful maintenance of the road for five years has also been elapsed. On going through the contract in question, we find that there is no clause in it empowering the respondents to recover the amount due under any other contract from the security of the contract in question.

9. Having regard to the aforesaid legal position and the fact that the amount, which the petitioner is claiming under this agreement is undisputedly payable to the petitioner, in our view, the same cannot be allowed to withheld on account of the alleged dues against the petitioner for some other contract about which the dispute is pending consideration before the MP Arbitration Tribunal.

10. In the circumstances, the writ petition is allowed. The respondents are directed to release the balance amount under the contract in question to the petitioner, as expeditiously as possible, but not later than two months from the date of receipt of copy of this order.

C. c. within three days.

Petition allowed.

I.L.R. [2013] M.P., 2530
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
W.P. No. 1639/2011 (Indore) decided on 11 January, 2013

ELIXIR IMPEX PRIVATE LIMITED ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Contract - Tender - Single bid **- Second respondent floated tender for two options i.e. for operation, maintenance and management of ware-housing and for setting up the manufacturing facilities - In the NIT itself, it was provided that if eligible and sufficient bids are not received for the first option, then the NIT would be considered for the second option - In the alternative, entire tenders be quashed and second respondent was obliged to invite fresh tender for the first option - Only one bid was received for the first option - Second respondent awarded the tender for the first option - Held - Award of tender to single bidder cannot be upheld - Respondent to consider floating fresh tender if at all they are interested to go ahead with award of tender for first option - In the alternative, they are free to consider the tender for the second option in terms of the NIT. (Paras 1,5 & 39)**

संविदा – निविदा – एकल बोली – द्वितीय प्रत्यर्थी ने दो विकल्पों के साथ निविदा निकाली अर्थात् वेयरहाऊसिंग के संचालन, अनुरक्षण एवं प्रबंध के लिये और विनिर्माण सुविधायें उपलब्ध कराने के लिए – एनआईटी में स्पष्ट है कि यदि पात्र और पर्याप्त बोली प्रथम विकल्प के लिये प्राप्त नहीं होती है, तब द्वितीय विकल्प के लिए एनआईटी को विचार में लिया जायेगा – वैकल्पिक रुप से सभी निविदायें अभिखंडित एवं द्वितीय प्रत्यर्थी से प्रथम विकल्प के लिये नयी निविदा आमंत्रित कर उपकृत किया गया था – प्रथम विकल्प के लिये केवल एक बोली प्राप्त हुई – द्वितीय प्रत्यर्थी ने प्रथम विकल्प के लिये निविदा अवार्ड की – अभिनिर्धारित – एकल बोलीकर्ता को निविदा दिये जाने का समर्थन नहीं किया जा सकता – प्रत्यर्थी नयी निविदा निकालने पर विचार करे यदि वे प्रथम विकल्प के लिये निविदा अवार्ड करने के लिये अग्रसर होने में रुचि रखते हैं – विकल्प में, वे एनआईटी की शर्तों में द्वितीय विकल्प के लिये निविदा का विचार करने हेतु स्वतंत्र है।

Cases referred :

AIR 1979 SC 1628, AIR 1987 SC 1109, 2006 (13) SCC 382.

G.M. Chaphekar with *Vandana Kasrekar,* for the petitioner.

Mini Ravindran, Dy. G.A. for the respondent No. 1.
Manoj Munshi, for the respondent No.2.
A.S. Garg with *Maqbool Ahmed Mansoori,* for the respondent No.3.

JUDGMENT

The Judgment of the Court was delivered by : **M.C.GARG, J. :-** Both the petitioners who participated in the tender floated by the second respondent for two options ***(i) for operation, maintenance, and management of warehousing (ii) for setting up the manufacturing facilities*** are aggrieved of the second respondent having awarded the tender to third respondent only for the first option even though they were the single bidder and sufficient bids had not been received in accordance with the tender notice.

2 Both these writ petitions raise common question of law i.e. " whether second respondent was justified in awarding contract for the first option of the tender notice to the third respondent alone despite there being only single bid in this regard ? "

3 The second respondent issued NIT bearing no. 12366 dated 19th of October, 2010. The said tender was issued for the purpose of operation and maintenance, and management of warehousing or for setting up the manufacturing facilities for a period of thirty years at SEZ Pithampur, District – Dhar. The said tender was published in English (Free Press Journal) as well Hindi daily (Nai Dunia). As per NIT, last date for submission of tender form was 29th of October, 2010 and the tender was to be opened on 30th of October, 2010 at 4 pm.

4 It would be appropriate to take not of publication inviting tender. Notice as given in Hindi reads as under :

म.प्र. औद्योगिक केन्द्र विकास निगम (इं) लि

प्रथम तल फ्रीप्रेस हाउस, 3/54, प्रेस काम्पलेक्स, ए.बी.रोड,
इन्दौर

क्र. औकेविनि/इ/एसईजेड/2010/12366
दि. 19.10.10

द्वितीय निविदा आमंत्रण

वेयरहाउस के संचालन, संधारण प्रबंधन एवं उपयोग हेतु निविदा आमंत्रण

म.प्र. औद्योगिक केन्द्र विकास निगम (इं) लि., इन्दौर द्वारा विशेष आर्थिक प्रक्षेत्र फेस–1, पीथमपुर, जिला धार में 2 हेक्टर भूमि पर निर्मित वेअरहाउस (3932 वर्गमीटर) के नियमानुसार संचालन, संधारण, प्रबंधन एवं उपयोग हेतु उपलब्ध है।

विकल्प (1) वेअरहाउसिंग हेतु 3 वर्ष अवधि के पट्टे पर एवं विकल्प

(2) मेन्युफेक्चरिंग के लिए 30 वर्ष की अवधि के पट्टे पर उपलब्ध है।

विकल्प (1) में पात्र एव पर्याप्त निविदायें नहीं आने की स्थिति में विकल्प (2) पर विचार किया जावेगा।

निविदा की शर्त निविदा प्रपत्र में दर्शाये अनुसार रहेगी। निविदा प्रपत्र दिनांक 19.10.2010 के पश्चात् किसी भी कार्यालयीन दिवस एवं समय में राशि रू. 15,000/– जमा कर कार्यालय से प्राप्त किये जा सकेंगे। निविदा प्रपत्र का विकय दिनांक 29.10.10 सायं 4.00 बजे तक किया जाएगा। भरी हुई सीलबंद निविदायें दिनांक 30.10.10 अपरान्ह 4.00 बजे तक मय धरोहर राशि के जमा की जा सकती है। धरोहर राशि वेअर हाउसिंग के लिए आवेदन करने पर रू. 50,000/– के या मेन्यूफेक्चरिंग के लिए 30 वर्ष की अवधि के पट्टे के लिए आवेदन करने पर 2,00,000/– की राशि के राष्ट्रीयकृत बैंक के डीड़ी/एफडीआर के रूप में मान्य की जावेगी। वेअर हाउसिंग के लिए आवेदन करने पर बैंक सालवेंसी रू. 5 लाख जो शेडयूल्ड/राष्ट्रीयकृत बैंक से जारी की गई हो एवं 12 माह से पुरानी न हो, भी प्रस्तुत करना होगी।

निविदा प्रपत्र के लिफाफा 1 एवं 3 दि. 30.10.10 को सायं 4.30 बजे खोले जावेंगे। यह संक्षिप्त निविदा है। निविदा की अन्य शर्त निविदा प्रपत्र में उपलब्ध हैं। यह निविदा निगम की बेवसाईट www.mpakvindore.com पर भी उपलब्ध है। वेबसाईट से डाउनलोड कर निविदा प्रस्तुत करने की स्थिति में इसका मूल्य रू. 15000/– का बैंक ड्राफ्ट प्रस्तुत करने पर ही निविदा मान्य की जावेगी।

TIME TABLE AND MILESTONES

Milestones	Time	Dates
Date for issue of Tender Documents	During office hours	19.10.10
Last date for receipt of Tender by MPAKVN	16.30 Hrs.	29.10.10
Opening of the Cover 1-General Information and Cover 3-Earnest money	16.30 Hrs.	30.10.10

Opening of the Cover 2-Commercial Offer	16.30 Hrs.	Date will be intimated after scrutiny of technical offer

5 Conditions of NIT enables the second respondent to have two options. First option was for operation, maintenance and management of warehousing. The second option was for setting up manufacturing facilities. In the NIT itself, it was provided that if eligible and sufficient bids are not received for the first option, then the NIT would be considered for the second option i.e. for setting up manufacturing facilities.

6 The petitioners submitted their tenders for the second option only. The second respondent despite having not received sufficient number for the first option instead of re-tendering, or proceeding with considering the tender for the second option, decided to award tender for the first option to the third respondent even though he was the only bidder for that option i.e. to say, only single bid was received for the first option by the second respondent. Neither second respondent thought it appropriate to re-tender for the first option nor the second respondent proceeded with consideration of the bid for the second option, even though for the said option, there were three bidders including the petitioner. It is submitted that in this case, as only one bid was opened for the first option, second respondent as per tender condition was bound to go for the second option i.e. to consider tender for setting up manufacturing facilities.

7 The petitioner submits that the second respondent being an instrumentality of the State is an authority under Article 12 of the Constitution of India and as such cannot act in arbitrary manner, but is required to follow transparent procedure for the purpose of awarding contract. Therefore, they were obliged to follow the conditions of NIT i.e. to say if sufficient tenders were not received for the first option then to go for the second option or to re-tender for the first option. Anything contrary to this would tantamount to discriminate or violate principles of equality as enshrined under Article 14 of the Constitution of India and as such the said action on the part of the second respondent would be illegal and would liable to be quashed.

8 It is the contention of the petitioner that instead of proceedings as per the assurance, second respondent suddenly and abruptly opened financial bid on 03rd of February, 2011 for the first option i.e. for operation, maintenance and management of warehousing which option exercised by second respondent

was illegal and without jurisdiction. It is submitted that if there was only one bid for the first option, second respondent could not have considered the bid for the first option and second respondent was having no option, but to opt for the second option and should have accepted the tender for the second option.

9 It is submitted that if the second respondent wanted to consider the tender for the first option only and there were insufficient bids, the second respondent ought to have cancelled the entire tender process and could have initiated for re-tendering process, which was not done.

10 In both the Writ Petitions, common prayer has been prayed by the petitioner to the following effect :

> i) Quash the impugned action of respondent no. 2 in considering the tender for first option i.e. for operation, maintenance and management and direct the respondent no. 2 to consider the tender for second option for SEZ Phase-I, Phithampur, District – Dhar.
>
> ii) In the alternative, entire tender No. 12366 dated 19/10/2010 be quashed and the respondent no. 2 be directed to initiate new tender for SEZ, Phase-I, Phithampur, District- Dhar for the purpose of warehousing, and or setting up manufacturing facilities.
>
> iii) Any other order or direction may be issued which this Hon'ble Court deems fit in the premises aforesaid.
>
> iv) Allow this petition with costs.

11 Basically the Writ Petitions are based upon the submissions that in absence of receiving sufficient tender for the first option, second respondent was not entitled to award tender for the first option to the third respondent who was the only bidder (single bidder) and rather it was incumbent upon second respondent to have opted for second option

12 It has been submitted that in the facts and circumstances of this case, the impugned action of respondent no. 2 in considering the tender for the first option i.e. for operation, maintenance and management of warehousing at SEZ, Phase-I, Pithampur, District – Dhar on the basis of single bid is illegal and discriminatory, thus violative of Article 14 of the Constitution of India,

therefore, the second respondent is required to be restrained by means of writ of mandamus not to award the tender of work in terms of the first option to the third respondent being the only bidder and , to invite fresh tender for the said option, in case the second respondent so want or in the alternative, to proceed and consider bids received for the second option.

13 Vide order passed on 14th of February, 2011, interim orders were passed in W.P. no. 1641/2011 restraining the respondents no. 1 & 2 from issuing letter of intent in favour of the third respondent, if the same has not already been issued and if the same has already been issued, the agreement be not executed, if not already executed.

14 Vide order dated 27th of April, 2012, Writ Petition no. 1641/2011 was also directed to be listed along with Writ Petition no.1639/2011 which contains the similar prayer and similar pleadings. Respondent no. 1 has adopted the reply filed by second respondent in terms of order passed on 25th of June, 2012.

15 Before we discuss the reply filed by the respondents, we may also take note of the tender documents which were issued by second respondent pursuant to NIT.

16 Some of the terms of tender documents require to be taken note of to understand the real intention of the second respondent in issuing the tender notice which reads as under :

"Object of present document :

MPAKVN is looking for an experienced entrepreneur to operate, maintain and manage the warehouse facility through the Operation, Maintenance and Management Contract (in short O 7 M Contract) as per the scope provided in Annexure – B and alternatively in case feasible bids for warehousing is not received to the satisfaction of the tender committee for leasing of the facility as per allotment of land rules to the bidder whose offer is highest for the Civil constructions on the demised land."

17 A reading of aforesaid makes it very clear that if suitable and sufficient tenders were not received by the second respondent for the first option, then they were obliged to go for the second option or to invite fresh tender for the

first option.

18 Now, coming to the reply filed on behalf of the respondents, we find that in so far as second respondent is concerned, in the preliminary submissions, it has been submitted that :

> *In pursuance of the above objectives to set up warehouse at SEZ Indore, a tender was invited by publishing notice inviting tender (NIT) in Dainik Bhashkar on 12/07/2008 and the work order for design, fabricates, supplying, erection of pre-engineering steel warehouse at SEZ Indore was awarded to the successful contractor M/s Assardas Construction Pvt. Ltd, Indore. Thus, since inception, the property was constructed as warehouse for the purpose of providing common facility of warehousing to the industries in SEZ. A copy of the Tender Notice and work Order to show that the suit property was constructed for the purpose of warehousing are Annexure as Annexure- R/1*
>
> *That the suit property was constructed specifically for the purpose of warehousing, therefore for the purpose of operation, maintenance and management of the same tenders were invited in past, however no bidder took part in the tender process, therefore the warehouse was laying idle. Since, no bidder came forward for operation and management of the warehouse, a second bid was invited and notice inviting tenders were published in Nai Dunia and Free Press Indore on 20/10/2010 mainly for warehousing and alternatively, in case no sufficient bid is received for warehousing then for the use of manufacturing activities. It was made clear in the tender document itself that the second option shall be considered only if the sufficient offer for warehousing is not received. Copy of NIT is placed with the petition.*

19 A bare reading of the aforesaid fortify the stand of the petitioner that the tender was invited initially to consider the tender for the first option and if eligible and sufficient tenders were not received for the first option, then to consider the tenders for the second option.

20 It is thus clear that the second respondent was obliged to go for the second option, if they had not received sufficient tender for the first option and were not entitled to award tender for the first option, as single bid cannot be said to be sufficient bid in terms of notice inviting tenders.

21 It may be observed here that even though there is mention that tender was issued after failing to receive sufficient bids pursuant to first tender, there is nothing in the tender notice to suggest that if sufficient bids are not received, then even single bid would be considered for the first option.

22 No separate reply has been filed by the first respondent to have simply adopted the reply of the second respondent, but the third respondent has filed its separate reply. In the said reply, there is no specific reply to the basic submission of the petitioner that the notice inviting tender required second respondent to proceed with the second option if eligible and sufficient bids were not received by them for the first option. Admittedly, in this case only one bid was received for the first option and therefore, the said bid could not have considered as sufficient in terms of the notice inviting tender.

23 Learned counsel appearing for the petitioner submitted that in this case the very fact that the tender notice inviting tender is very specific that the tenders had been invited for two options i.e. *(i) for operation, maintenance, and management of warehousing (ii) for setting up the manufacturing facilities.* It has been submitted that the NIT was very clear that if sufficient bid is not received from eligible persons for the first option, second respondent would proceed to go for the second option.

24 As such, it has been submitted that once only one bid was received by the second respondent for the first option, they were obliged to consider second option and were not entitled to accept single bid of the third respondent for the first option as the bid of third respondent cannot be considered as sufficient.

25 It has been submitted that the second respondent is State and / or instrumental of the State within the meaning of Article 12 and are not entitled to discriminate or act in arbitrary fashion as has been done by the them in this case. It is submitted that the arbitrary action on the part of the second respondent strikes at the root of the equality and therefore their action in awarding work to third respondent is violative of Article 14 of the Constitution of India and as such, such action on their part is liable to be set aside.

26 The petitioner also submitted that even otherwise accepting single tender is violative of Article 14 of the Constitution of India, in as much as it does not provide fair opportunity to all concerned who could have participated in the tender.

27 On the other hand, learned counsel for the second and third respondents have submitted that in this case, tenders were invited even earlier and since those tenders did not produce fruitful result, second tender was floated in this case. As such, it was open for the second respondent to consider even single bidder for the reason that the basic objectives of the second respondent was to operate, maintain, and manage the warehouse or set up the manufacturing facilities. As such, it is submitted that there is no illegality done on the part of the respondents in this case.

28 We have given our thoughtful consideration to the rival submissions.

29 In the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India reported in* AIR 1979 SC 1628, the Hon'ble Supreme Court was confronted with the situation when the tenders were invited for running restaurant and snacks bar where award of contract was given to a person who was not having requisite qualification. In that judgment, it was held that the Court can interfere in the matter where the tenders had been invited for running restaurant and snacks bar at the Airport and clearly stated the principle that the Government cannot accept the tender of person who did not fulfill the requisite qualification. The Court held that :

> *The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set forth by Herry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in Democracy, Equality and Freedom "substantial agreement*

in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.

The learned Chief Justice said that when the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions.... The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any

particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

30 In the case of *Vijay Kumar Gupta Vs. State of Maharashtra decided* on 13 th March, 2008 by the High Court of Bombay, it has been held that the Government could not act like private individual in exercise of its power even with respect to contractual matters. It was held that Article 14 would be attracted where ever such action smacks of arbitrariness and violates the basic principles.

31 In the same judgment referring to earlier precedent including *Ramana Deyaram Shetty* (supra), the Apex Court also held that the terms and conditions of the tender should be construed from the stand point of a prudent businessman and the decision of the State authorities should also stand the test of fairness.

32 It will be appropriate to take note of the judgment delivered O. Chinnappa Reddy, J. in the case of *Sachidanand Pandey v. State of West Bengal,* AIR 1987 SC 1109 at 1133, where after considering almost all the decisions of the Court on the subject summarized the legal propositions in the following terms:

"On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established: State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of a property is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done

which gives an appearance of bias, jobbery or nepotism." "The public property owned by the State or by an instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be above board. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favoritism or nepotism. Ordinarily, these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the Court repeatedly stated and reiterated that the State owned properties are required to be disposed of publicly. But that is not the only rule. As O.Chinnappa Reddy, J. observed, "that though that is the ordinary rule, it is not an invariable rule". There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience".

The law is, thus, clear that ordinarily all contracts by the Government or by an instrumentality of the State should be granted only by public auction or by inviting tenders, after advertising the same in well known newspapers having wide circulation, so that all eligible persons will have opportunity to bid in the bid, and there is total transparency. In our opinion this is an essential requirement in a democracy, where the people are supreme, and all official acts must be actuated by the public interest, and should inspire public confidence.

33 In the present case, the tender called for offers in two parts i.e. *(i) for operation, maintenance, and management of warehousing (ii) for setting up the manufacturing facilities*. The tender notice inviting tender as quoted above was clear and in unequivocal words reflected intention of second

respondent that if eligible and sufficient number of tenders were not received for the first option, then the second respondent would proceed with the consideration of the second option. However, in this case, second respondent had not adhere to the aforesaid tender condition and rather only on the basis of one tender decided to grant tender to third respondent which precisely has been questioned by the petitioner.

34 In the case of *Nagar Nigam, Meerut Vs. Al Fatheem Meat Exports Pvt Ltd reported in [2006 (13) SCC 382]* wherein the Apex Court has been pleased to observe that :

> *The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'*

35 In that case, there was sufficient condition mentioned in the tenders

that since in the first tender invited sufficient offers could have been received, the authority inviting tenders kept to its right to consider even single tender if received on the second occasion for the work to be done, which is not the case with us.

36 Thus on receipt of single bid for the first option, second respondent was not entitled to grant contract to the said bidder for the first option since such exercise on the part of the second respondent was violative of the principles of equality and awarding contract to the third respondent amounted to discrimination viz-viz other bidders who had opted for the second option.

37 Submissions made on behalf of the respondent that it was not a case of first tender, but a second tender is of no consequence because NIT does not say that if sufficient tenders are not received for the first option then the second respondent may consider even single bid, which course of action was approved in the case of *Pandrol Rahee Technologies Vs. Delhi Metro Rail Corporation Ltd passed by Competition Commission of India in case no. 03/2010 on 07 th of October, 2011*

38 In view of the aforesaid circumstances, we have satisfied that awarding the contract under the first option in favour of the third respondent who was only single bidder by the second respondent is not legal and such action on their part amounts to arbitrary exercise of power and which action on the part of their strike at the root of equality in terms of the words of the Hon'ble Supreme Court in the case of *Ramana Dayaram Shetty* (supra) and would therefore violative under Article – 14 of the Constitution of India and will have to set aside.

39 Accordingly, we hold that the award of tender or the decision to award the tender to third respondent based upon single tender given by the third respondent for the first option cannot be upheld. Consequently, we set aside the award of the contract with respect to first option to third respondent and direct the second respondent to consider floating fresh tender if at all they are interested to go ahead with award of a tender for the first option with specific terms and conditions and in the alternative, they are certainly free to consider the tender received by them for the second option in terms of the NIT.

40 With the aforesaid observations, both the writ petitions are disposed of.

A copy of this order be kept in W.P. no.1641/2011.

Petition disposed of.

I.L.R. [2013] M.P., 2544
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
W.P. No.10127/2011 (Indore) decided on 23 January, 2013

JAN SHIKSHA PRASAR SAMITI BARWARI ...Petitioner
Vs.
ASSISTANT PROVIDENT FUND COMMISSIONER ...Respondent

Employees Provident Funds Act (19 of 1952), Section 2(f) - Employee **- Employee means any person who is employed for wages in any kind of work - Petitioner had pointed out to Inspector that out of 20 persons, 4 persons are voluntarily providing their service as per their will and convenience and are not being paid any salary or emoluments - Such contention was found to be true however, Authority held that Act is applicable as 20 persons are working in the institute - In view of Section 2(f) of the Act, as four persons were not being paid salary and there was no rebuttal to petitioner's case that they were not attending the establishment on regular basis and were coming at their own will voluntarily, the findings recorded by Authority and Tribunal are perverse and bad - Petition allowed. (Paras 11 & 12)**

कर्मचारी भविष्य निधि अधिनियम, (1952 का 19), धारा 2(एफ) – कर्मचारी – कर्मचारी का अर्थ है कोई व्यक्ति जो किसी भी प्रकार के कार्य के लिये वेतन पर नियोजित किया गया है – याची ने निरीक्षक को यह दर्शाया है कि 20 व्यक्तियों में से 4 व्यक्ति अपनी मर्जी से और सुविधानुसार स्वेच्छापूर्ण रुप से अपनी सेवाऐं दे रहे हैं और उन्हें किसी वेतन या परिलब्धियों का भुगतान नहीं किया जा रहा है – उक्त तर्क सत्य पाया गया, किन्तु प्राधिकारी ने अभिनिर्धारित किया कि अधिनियम लागू होगा क्योंकि 20 व्यक्ति संस्थान में कार्यरत हैं – अधिनियम की धारा 2(एफ) को दृष्टिगत रखते हुए, चूंकि चार व्यक्तियों को वेतन का भुगतान नहीं किया जा रहा था और याची के प्रकरण का खंडन नहीं किया गया था कि वे नियमित आधार पर स्थापना में उपस्थित नहीं हो रहे थे और वे स्वेच्छापूर्ण अपनी रजामंदी से आ रहे थे, प्राधिकारी और अधिकरण द्वारा अभिलिखित निष्कर्ष अनुचित और दोषपूर्ण – याचिका मंजूर।

T.N. Singh with *Hemtala Gupta,* for the petitioner.
Anand Pathak, for the respondent.

ORDER

The Order of the court was delivered by : SHANTANU KEMKAR, J.:- This petition under Article 226/227 of the Constitution of India has been filed challenging the order dated 20.05.2004 (Annexure P/1) passed by the Assistant Provident Fund Commissioner, Employees Provident Fund Organization, Madhya Pradesh, Indore (for short, 7-A Authority) as also the orders dated 30.11.2010 (Annexure P/4) and 15.04.2011 (Annexure P/6) passed by the Employees Provident Fund Appellate Tribunal (for short, the Tribunal), New Delhi in ATA No.491 (8) 2004 and in review petition respectively.

2. Briefly stated, on 21.09.1999, the Inspector of the Provident Fund Department visited the petitioner's establishment in order to examine the applicability of the Employees Provident Fund Act (for short, the Act) on it. After getting the necessary information, the report dated 24.09.1999 was submitted by him before the 7-A Authority, recommending for application of the Act on the petitioner's establishment.

3. The petitioner – establishment disputed the applicability of the Act on it, by raising a plea that it never employed 20 or more persons. It was stated by the petitioner that though in the letter dated 22.09.1999, list of 20 persons were given but it was clearly mentioned in it, that the names appearing at Serial No.1, 2, 3 and 4 are not its employees, as they are not being paid any salary / emoluments by the petitioner. It was also stated that those persons are providing their services on their own will as per their convenience to the petitioner's establishment, without any fixed working hours or days.

4. On raising such plea, the Inspector appointed under Section 13 of the Act again visited the establishment and examined the records produced by the petitioner viz. salary register, attendance register, cash book and balance sheet. On verification, he submitted a report to the 7-A Authority that the petitioner never employed 20 employees or more. He also reported that salary / wages register corroborates the entries in the cash book. As per his report, the employees' strength of the petitioner never reached more than 16, excluding the said four persons. He also confirmed that the names of the said four persons are also not appearing in the petitioner's records including salary and attendance register. He, therefore, observed that it is evidently clear unless four employees in dispute are treated as employees, the establishment cannot be covered under the provisions of Section 1 (3) of the Act.

5. After receiving said report, 7-A Authority vide order dated 20.05.2004 held that the aforesaid four persons are not actually employed in the establishment and are not taking salary and wages; hence are not employees. However, it held that this does not mean that the petitioner – establishment is not coverable under the Act as these persons are working for imparting education which is the main work of the establishment. Having observed so, the 7-A Authority held that the said four persons are to be treated as employees of the establishment for the purpose of applicability of the Act.

6. Feeling aggrieved by the said order dated 20.05.2004 (Annexure P/1) passed by the 7-A Authority, the petitioner filed the appeal before the Tribunal. The Tribunal vide interim order dated 02.02.2005 (Annexure P/3) while admitting the appeal for hearing observed thus: -

> "Perusal of impugned order shows that as per report of Enforcement Officer, only 16 employees were working and 4 persons, who were rendering voluntary service without any remuneration, were included as employees the appellant. In these facts, the operation of the impugned order shall remain stayed till the disposal of appeal and APFC shall not determine the dues under Section 7-A (1) (b) of the EPF & MP Act, 1952."

7. Thereafter, vide final order dated 30.11.2010 (Annexure P/4), the Tribunal dismissed the appeal by holding that since the appellant has not produced any document to show its staff strength, and the report of the Inspector reveals that the appellant engaged 20 employees, the same has rightly been ordered to be covered under the Act. The Tribunal further observed that though it is asserted that no salary was paid to those four employees given in the list, no document was filed to that effect. The Tribunal held that since the four persons were also working in connection with the work of the establishment, the order of the 7-A Authority is justified. Feeling aggrieved by the said order, the petitioner submitted a review petition (Annexure P/5) before the Tribunal, but the said review petition also suffered dismissal vide order dated 15.04.2011 (Annexure P/6) passed by the Tribunal. Feeling aggrieved, the petitioner has filed this petition.

8. Heard Shri T.N. Singh, learned Senior Counsel for the petitioner and Shri Anand Pathak, learned counsel for the respondent and perused the record.

9. We find that throughout the petitioner's case was that it never employed 20 or more persons. In the names appearing in the list dated 22.09.1999, out of 20 persons shown; the persons whose names are appearing at No.1 to 4 are not being paid any salary or emoluments by the petitioner. These four persons are providing their service at their own will as per their convenience and that their working hours or days are also not fixed. Thus, it is the case of the petitioner that four persons are not being employed and are not being its employees and as such, the Act is not applicable on its establishment.

10. The aforesaid plea of the petitioner found support by the report of the Inspector based upon the verification of salary register, attendance register, cash book and balance sheet. The said report was considered by the 7-A Authority and it was accepted also as would be clear from the order of the 7-A Authority. The only reason, which the 7-A Authority assigned for the recording the finding that the Act is applicable on the petitioner was that since those four persons were working for the petitioner, may be on voluntary basis, they are to be treated as its employees. In the appeal against the said order of the 7-A Authority, the Tribunal by misreading the findings available on record and ignoring the report submitted by the Inspector, which was also affirmed by the 7-A Authority observed that to substantiate the plea that no salary was paid to those four persons; no document was filed by the petitioner.

11. In our considered view, in view of Section 1 (3) (b) of the Act, which has been applied by the Provident Fund Department for holding the applicability of the Act on the petitioner, the Act applies to any establishment **employing 20 or more persons** or class of such establishments, which the Central Government may by notification in the official gazette specify in this behalf. Section 2 (f) of the Act defines the term 'employee', which means 'employee' means any person who is **employed for wages** in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets, his wages directly or indirectly from the employer, and includes any person — (i) employed by or through a contractor in or in connection with the work of the establishment; (ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment.

12. Considering the aforesaid, we are of the view that when there was a clear report in favour of the petitioner that those four persons are not being

paid salary and there was no rebuttal to the petitioner's case that they were not attending the petitioner establishment on regular basis on fixed day and timings, and were coming at their own will voluntarily and when this fact was also established from various documents including attendance register, we fail to understand what more evidence was expected by the Tribunal for the petitioner to have led.

13. Having regard to the aforesaid, in our considered view, the impugned orders passed by the 7-A Authority and the Tribunal are unreasonable, perverse, based on misreading of evidence and also having been passed overlooking the material evidence available on record, the same are liable to be and are hereby quashed.

14. As a result, the petition is allowed with no orders as to costs.

Petition allowed.

I.L.R. [2013] M.P., 2548
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 2227/2005 (Jabalpur) decided on 12 February, 2013

NIZAMUDDIN ANSARI ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Ayurvedic Unani Tatha Prakritic Chikitsa Vyavasi Adhiniyam, M.P., 1970 (5 of 1971) - Degree of Ayurved Ratna or Vaidya Visharad - Registration - **These degrees were recongnized when the degree was obtained by petitioner and it was de-recognized later on - However, on the date when the application for registration was made, these degrees were already de-recognized and further in view of judgment passed by Apex Court that Degree and Diploma of Vaidya Visharad or Ayurved Ratna from Hindi Sahitya Sammelan Prayag, Allahabad was never recognized by the Parliamentary Act or by Central Council, therefore, they cannot be treated as eligible qualification to register any person as medical practitioner in Ayurved, the petitioner cannot be registered as medical practitioner in Ayurved. (Paras 5 & 6)**

आयुर्वेदिक यूनानी तथा प्राकृतिक चिकित्सा व्यवसायी अधिनियम, म.प्र., 1970 (5 का 1971) – आयुर्वेद रत्न या वैद्य विशारद की उपाधि – पंजीकरण – यह

उपाधियां मान्यता प्राप्त थीं जब याची द्वारा उपाधि अभिप्राप्त की गई और उसकी मान्यता बाद में वापस ली गई. – अपितु, जिस तिथि को पंजीकरण हेतु आवेदन किया गया था, इन उपाधियों की मान्यता पहले ही वापस ली गई थी और इसके अतिरिक्त सर्वोच्च न्यायालय द्वारा पारित किये गये निर्णय को दृष्टिगत रखते हुए कि हिन्दी साहित्य सम्मेलन प्रयाग, इलाहाबाद से वैद्य विशारद या आयुर्वेद रत्न की उपाधि या डिप्लोमा को संसद अधिनियम के द्वारा या केन्द्रीय परिषद द्वारा कभी मान्यता नहीं दी गई थी, इसलिए आयुर्वेद में चिकित्सक के रुप में किसी व्यक्ति का पंजीयन करने के लिए उसे योग्य अर्हता नहीं माना जा सकता, याची का आयुर्वेद में चिकित्सक के रुप में पंजीयन नहीं किया जा सकता।

Cases referred :

W.P. No. 1348/2000 decided on 09.08.2000, W.P. No. 1182/2003 decided on 05.03.2003, AIR 2010 SC 2221.

A.P. Singh, for the petitioner.
Ved Prakash Tiwari, P.L. for the respondents No. 1 & 2.
R.K. Verma, for the respondent No. 3.

ORDER

K.K. TRIVEDI, J.:- This is a second round of litigation before this Court and the petitioner is aggrieved by the order by which the claim made by the petitioner for his registration as an Ayurved Medical Practitioner, has been rejected. The petitioner approached this Court by way of filing Writ Petition No.909/2004. The said writ petition was disposed of vide order dated 3.3.2004 with the following directions :-

> "(a) The petitioner may file fresh application for registration under the M.P. Ayurvedic, Unani Tatha Prakritic Chikitsa Vyavasai Adhiniyam, 1970.
>
> (b) If such an application is filed by the petitioner before respondent No.3 for registration under the said provisions, respondent No.3 shall consider and decide it in accordance with law within a period of three months from the date of receipt of the application."

2. Now since the order is passed on 23.8.2004 rejecting the claim of the petitioner, this writ petition has been filed. It is contended by the petitioner that he has obtained a degree of Ayurved Ratna from Hindi Sahitya Sammelan Prayag, on 14.6.1989. The said degree was recognized as a degree for the

purposes of registration of Ayurved doctors in the respondent No.3 Council, as was mentioned in the M.P. Ayurvedic, Unani Tatha Prakritic Chikitsa Vyavasai Adhiniyam, 1970 (hereinafter referred to as the Act for brevity). An amendment was made in the said Act in the year 1989, which came to be published in the Gazette on 4.11.1989, deleting the degree of Ayurved Ratna or Vaidya Visharad granted by Hindi Sahitya Sammelan Prayag. It is contended that since the petitioner has obtained degree before its deletion from the aforesaid Act, the same was to be treated as recognized by the State Government and, thus, the petitioner was entitled to be registered by the respondent No.3 as an Ayurved Medical Practitioner. It is contended that such an application was made on 16.08.1989, but the said application was rejected. In view of the law laid down by this Court in the case of *Prafulla Shrivastava Vs., State of M.P. and others* (WP.No.1348/2000, decided on 9.8.2000), the petitioner made approach before this Court and this Court disposed of the writ petition with a direction to consider the application of the petitioner afresh. It is contended that if the consideration is done keeping in view the fact that the petitioner has obtained the degree when it was duly recognized by the State Government, the petitioner was entitled to be registered as a Medical Practitioner in Ayurved. However, since this has not been done, the writ petition is required to be filed.

3. The respondents No. 1 and 2 have filed a return adopting the return filed by the respondent No.3. The respondent No.3 has filed a detailed return categorically contending that the Indian Medicines Central Council Act, 1970 was promulgated by the Parliament and according to the said Act of 1970, the provisions were made for recognition of the degrees in Ayurved form of Medicines. Only those who were holding the degrees duly recognized were to be registered as Ayurved Medical Practitioner. The petitioner has obtained the degree when it was already recognized, but the same was subsequently de-recognized by the State Government by making an amendment. Even if, the petitioner was holder of such a degree, on the date of application made for registration, the degree was not recognized qualification for such registration and, therefore, rightly the application of the petitioner was rejected. This issue was dealt with by this Court in the case of *Kripesh Kumar Shrivas Vs. State of M.P. and others* (W.PNo1182/2003, decided on 5.3.2003) wherein after examining the Central Law, various laws laid down by the Apex Court, this Court reached to the conclusion that on the date of making of the application, a candidate must be possessing a degree in particular field for his registration,

duly recognized by the Council. It is contended that as per the law laid down by this Court, a person is to be recognized as a medical practitioner if he has to his credit a degree duly recognized by the Council. In case such a person is not having the degree duly recognized by the Council, on the date of application, he would not be registered as a medical practitioner. It is further contended that the law is well settled in respect of such a situation and even the degree granted by certain Universities were not to be treated to be valid degree for the purposes of registration of the medical practitioner. This being so, it is contended that the petitioner is not entitled to any relief and the petition is liable to be dismissed.

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

5: This is not in dispute that the petitioner when made the application on 16.8.1989, the degree obtained by him was duly recognized by the State Government as no amendment in the Act was done by that time. However, this particular aspect is considered by the Apex Court in the case of *Rajasthan Pradesh V.S. Sardarshahar & another Vs. Union of India and others* (AIR 2010 SC 2221). The Apex Court considering the law made by the Parliament has categorically dealt with the degree and diploma of Vaidya Visharad or Ayurved Ratna from Hindi Sahitya Sammelan Prayag, Allahabad, and has reached to the conclusion that the same were never recognized by the Parliamentary Act or by the Central Council and, therefore, were not to be treated as eligible qualification to register any person as medical practitioner in Ayurved. The Apex Court has not only directed to remove the name of such persons, but has also directed that such person should not be allowed to indulge in any kind of medical practice. In paragraph 45 of the report, the Apex Court has categorically directed thus:-

> "45. In view of the above, Civil Appeal arising out of SLP (C) No.21043 of 2008 is allowed and it is held that a person who acquired the certificate, degree or diploma from Hindi Sahitya Sammelan Prayag after 1967 is not eligible to indulge in any kind of medical practice. All other Civil Appeals are dismissed. No costs."

6: Even if order was passed by this Court in the case of *Prafulla Shrivastava* (supra), the said order is not helpful to the petitioner now in view of the law laid down by the Apex Court and, therefore, no benefit could be granted to the petitioner. Of course, amendment was made after making of

the application by the petitioner for his registration as a medical practitioner in Ayurved, in the State Act, but once it is held by the Apex Court that any degree or diploma granted by Hindi Sahityá Sammelan Prayag, Allahabad, after 1967, is not requisite qualification to indulge any person in any kind of medical practice, no such direction can be given to the respondents to register the petitioner as a medical practitioner in Ayurved. Secondly, the order was passed on the earlier writ petition of the petitioner as has been indicated herein above by which the petitioner was directed to make a fresh application for registration. The fresh application made by the petitioner would only after the order of this Court and, therefore, would be after 4.1.1989. If the application is to be considered, again the petitioner is not to be allowed to practice as a medical practitioner in Ayurved because the degree obtained by him is no longer recognized by the State Government for the said purposes.

7. In view of the aforesaid, the writ petition fails and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 2552
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Maheshwari

W.P. No. 11917/2012 (Indore) decided on 18 March, 2013

SHUBH DEEP AYURVED MEDICAL COLLEGE ...Petitioner

Vs.

UNION OF INDIA & ors. ...Respondents

***Education and Universities - Admission in Post Graduate Courses* - Extension of Cut off date - Cut off date for counselling was 31.10.2012 - Petitioner college applied for permission to run PG courses and permission was granted by Central Council of Indian Medicines on 26.10.2012 - Petitioner College received the copy of permission on 26.10.2012 and admittedly 27th,28th and 29th were holiday - Letter of permission was given to Director Medical Education on 30.10.2012 for inclusion of petitioner institute in counselling - Petitioner institute filed an application for extension of cut off date which was rejected by respondents - Held - Central Govt. and CCIM had extended cut off dates in some other cases - Petitioner/institute was not at fault - Students who found place in**

the list of eligible candidates are also not at fault as petitioner/ institute was not included in the list of colleges of counselling on 30.10.2012 - Action of Central Govt. as well as CCIM in not extending cut off date is discriminatory - Central Govt. directed to pass an order regarding extension of cut off date within 10 days after seeking permission from CCIM and counselling be held within 2 weeks for 15 seats, from the list of eligible candidates strictly on merit basis - Petition allowed. (Paras 26 to 28)

शिक्षा और विश्वविद्यालय – स्नातकोत्तर पाठ्यक्रम में प्रवेश – अंतिम तिथि को बढ़ाया जाना – परामर्श हेतु अंतिम तिथि 31.10.2012 थी – याची महाविद्यालय ने स्नातकोत्तर पाठ्यक्रम चलाने के लिए अनुमति हेतु आवेदन किया और 26.10.2012 को भारतीय औषधि की केन्द्रीय परिषद द्वारा अनुमति प्रदान की गई – याची महाविद्यालय को अनुमति पत्र की प्रति 26.10.2012 को प्राप्त हुई और स्वीकृत रुप से 27, 28 व 29 को अवकाश था – परामर्श में याची संस्थान को समाविष्ट करने के लिये 30.10.2012 को निदेशक, चिकित्सीय शिक्षा को अनुमति पत्र दिया गया – याची संस्थान ने अंतिम तिथि बढ़ाने के लिये आवेदन प्रस्तुत किया, जिसे प्रत्यर्थीगण द्वारा नामंजूर किया गया – अभिनिर्धारित – केन्द्र सरकार और सीसीआईएम ने कुछ अन्य मामलों में अंतिम तिथियां बढ़ायी थीं – याची/संस्थान की कोई गलती नहीं थी – विद्यार्थी जिन्होंने पात्र अभ्यर्थियों की सूची में स्थान प्राप्त किया था, उनकी भी कोई गलती नहीं क्योंकि 30.10.2012 को याची/संस्थान को परामर्श के महाविद्यालयों की सूची में समाविष्ट नहीं किया गया था – अंतिम तिथि नहीं बढ़ाये जाने की केन्द्र सरकार और सीसीआईएम की कार्यवाही विभेदकारी – केन्द्र सरकार को, सीसीआईएम से अनुमति चाहने के पश्चात 10 दिनों के भीतर अंतिम तिथि बढ़ाये जाने के संबंध में आदेश पारित करने के लिये और 15 सीटों के लिये 2 सप्ताह के भीतर पूर्ण रुप से गुणदोषों के आधार पर पात्र अभ्यर्थियों की सूची से परामर्श कराने के लिए निदेशित किया गया – याचिका मंजूर।

Cases referred :

(2012) 7 SCC 389, (2002) 7 SCC 258, (1981) 2 SCC 484, (1994) 2 SCC 370, AIR 2003 MP 81.

Piyush Mathur with *Anand Pathak,* for the petitioner.
Anand Soni, Assistant Solicitor General for the respondent No.1.
A.K. Sethi with *Harish Joshi,* for the respondent No. 2.
Mini Ravindran, Dy. G.A. for the respondents No. 3 & 4.
Vivek Sharan, for the University/Devi Ahilya Vishwavidyalaya.

ORDER

The Order of the court was delivered by :

J.K. MAHESHWARI, J.:- Both these petitions have been filed under Article 226/227 of the Constitution of India seeking quashment of the order dated 11.12.2012 and directions to the extend the cut off date of counselling for admission to the PG courses to the Session 2012-2013, in view of the recent judgment of the Apex Court in the case of *Asha Vs. Pt. B.D.Sharma University of Health Sciences and others* reported in (2012) 7 SCC 389. It is further prayed by the petitioner students that they may be allowed to be admitted in the PG course in Shubh Deep Ayurved Medical College, Indore and to prosecute their studies.

2. The Shubh Deep Ayurved Medical College and Hospital, Indore is being run by Shubh Deep Shikshan Sansthan, a society registered under the Societies Registrikaran Adhiniyam, 1973 for the under graduate course of BAMS. The institution has applied for running the PG courses whereupon on 27.01.2012, the respondent no.1 has issued a letter of intent vide Annexure P-3. Thereafter the Central Council of Indian Medicines (in short CCIM) has inspected the college on 18th and 19th May, 2012 and submitted its report. As per the requirement of the letter of intent, a bank guarantee of 1.5 crores was also submitted seeking request to grant permission to continue the PG courses on 30.08.2012. After due consideration as per Annexure P-5 dated 26.10.2012, Central Government granted permission to the college for opening of new PG courses in three subjects namely (i) Ayurved Samhita/Siddhant, (ii)Kayachikitsa and (iii) Rasashastra/Bhaishajya Kalpana with in take capacity of five seats in each course for the Session 2012-2013.

3. It is relevant to note here that the said sanction was granted in furtherance to the provision contained under Section 13-A of the Indian Medicine Central Council Act, 1970 (in short IMCC Act) subject to the conditions of the compliance of the IMCC (Postgraduate Ayurveda Graduation) Regulations, 2005 for the purpose of staff and infrastructure. Copy of the said letter was also sent to the Secretary, Department of Medical Education, Government of Madhya Pradesh, Vallabh Bhawan, Bhopal and the Registrar, Devi Ahilya Vishwavidyalaya, Indore, because the affiliation was granted by the University vide letter dated 13.08.2008.

4. The admission in PG Ayurved Colleges ought to be made as per Rules framed by the M.P. Professions Examination Board, Bhopal which are known

as M.P.Ayurveda Chikitsa Snatkottar Patyakram Pravesh Pariksha Niyam, 2012 (in short Rules, 2012) published in the Gazette of the State of Madhya Pradesh on 22.06.2012. As per those rules, the counselling shall be closed on 31.10.2012 and the last date of the admission in the college is also prescribed as 31.10.2012, or the date if any fixed by CCIM. The Educational session shall start from 01.11.2012. The CCIM has issued their own Regulations which are known as Indian Medicines Central Council (Post-Graduate Ayurveda Education) Regulations, 2012 (in short Regulations, 2012). The professional Examination Board in furtherance to the Rule has conducted the entrance examination on 29.10.2012 and the result has been declared on the same date. The counselling as per the advertisement dated 26.10.2012 was on 30.10.2012. The petitioner Institution has received the copy of the permission letter of the Central Government dated 26.10.2012, on the same date, but on 27th, 28th and 29th October, 2012 were Government holidays and the offices of the State Government were closed. However, he has submitted the letter of sanction on 30.10.2012 to the Director Medical Education for inclusion of the petitioner Institution in the counselling.

5. Immediately, on the next date a writ petition being W.P.No.10430/2012 was filed seeking direction to allow the petitioner Institution to participate in the counselling.. The said writ petition was dismissed on the same day on the instructions of the government advocate, indicating that the counselling has already been closed on 30.10.2012 and within a short span of time, it is not feasibly possible to call the students for a fresh counselling and as per the judgment of the Apex Court, the last date of counselling is 31.10.2012. However, the Court found that there is no justification to interfere in the matter at this stage. Thereafter an application was submitted on 3.11.2012 for extension of the cutoff date to the Central Government and the Review petition was filed being number 559/2012. In the light of the judgment of the Apex Court in the case of *Asha* (Supra), this Court has disposed of the review petition on 21.11.2012 with an observation that the petitioner has already approached before the Competent Authority for extension of the cutoff date for admission and counselling. However, it would be open for the Authority to consider the same and decide the said application as expeditiously as possible, in accordance with law uninfluenced by the observations made by this Court. In view of the observations made by this Court and after rejection of the representation vide order Annexure P-1, dated 11.12.2012, refusing the extension of cutoff date to admission in PG courses, the petitioner Institution

has preferred one petition.

6. It is contended that the action of the respondents no.1 and 2 is arbitrary and discriminatory while the action of the respondent no.4 in depriving the petitioner Institution for counselling is arbitrary and malafide. To substantiate the aforesaid contentions, it is stated that in a case of Kadam Kuan Ayurvedic College, Patna, the cutoff date for admission to under Graduate as well as PG courses has been extended as per order Annexure P-12 dated 2.11.2012 upto 15.11.2012. The said order was passed in furtherance to the interim order passed by the Patna High Court in C.W.J.C.No.16355/2012 on 8.10.2012 to grant provisional sanction subject to the final decision of the writ petition. The said action of respondents no.1 and 2 is discriminatory because the extension granted to Kadam Kaun Ayurvedic College has again been extended upto 31.12.2012 vide order Annexure P-20 on 01.01.2013, and thereafter, as per order dated 26.02.2013, Annexure P-21 for a further period of one month i.e. upto 25.03.2013, but in case of petitioner despite observation of this Court at par, benefit has been denied arbitrarily.

7. It is contended that in respect of Rajiv Gandhi University of Health Sciences, Karnataka, cutoff date has also been extended after 31.10.2012, similarly, to Dr.Sarvapalli Radhakrishnan Rajasthan Ayurved Vishwavidyalaya, Jodhpur, but in case of petitioner despite directions, the respondents no.1 and 2 has acted arbitrarily and in a discriminatory manner, depriving the petitioner Institution to fill up the seats even after permission of the Central Government and affiliation by the University. It is also contended in the rejoinder that in furtherance to the order dated 15.02.2013 passed by this Court, the CCIM also rejected the representation distinguishing the judgment in *Asha*(supra) without considering the issue of discrimination as stated hereinabove. However, the order passed during the pendency of this petition by the CCIM dated 20.02.2013 may also be quashed.

8. So far as the State authorities are concerned, it is submitted that on granting recognition by the Central Government as per order dated 26.10.2012, Annexure P-5, the copy thereof was sent to the Secretary Department of Medical Education, but the action of the State authorities remained arbitrary because having been aware of the provisional sanction as the copy of the said letter was also sent to them. However, it was in their knowledge that the petitioner Institution is in the queue of permission on completion of the formalities. It is submitted that the Rules of 2012 has been published in the

Gazette notification on June 22, 2012 and the permission to Pt. Shivshaktilal Sharma Ayurved Mahavidyalaya, Ratlam was granted on 6.7.2012, after the publication of the rules but the said institution has been enlisted in available Institution for counselling. But in the case of the petitioner Institution despite having knowledge of provisional permission from January, 2012, and final permission dated 26.10.2012, not included for counselling and the students have also not been allowed to participate and permitted to admit in PG courses newly started in the petitioner Institution.

9. In addition to the aforesaid it is submitted that on receiving the permission on 26.10.2012 from the Central Government, 27th 28th and 29th October, 2012 were Government holidays. However, on 30.10.2012, the order has been submitted before the Director Government of M.P who continued the counselling upto to mid night, but showing the receiving of said letter at 5`O' Clock, counselling to the petitioner Institution has been denied though they have no right to deny the counselling after granting permission by the Central Government. In such circumstances, the action of the State authorities has remained arbitrary, malafide and discriminatory only to deprive the petitioner Institution from the eligible claim.

10. In W.P.No.2084/2013, students who have passed out the PG entrance examination have filed this petition seeking direction to hold counselling by extending the cutoff date and to permit them to prosecute their P.G. studies in the academic session 2012-2013 in Shubh Deep Ayurvedic College, Indore. The petitioner have all together made similar submission as made in other petition filed by the College indicating the arbitrariness and discriminatory action of the Central Government, the State Authorities and CCIM on account of such action the career of the students have been jeopardised. However, it is prayed that the direction to admit the petitioner in the academic session 2012-2013 after holding the counselling may be issued, extending cutoff date.

11. Shri Piyush Mathur, learned senior counsel assisted by Shri Anand Pathak has strenuously urged that the action of the State authorities remained arbitrary ignoring the order of the central Government and acted in a discriminatory manner thereby the students have been deprived to prosecute their studies, and the permission of Central Government to run P.G. Course in 2012-2013 resulted in futility. Learned senior counsel has heavily placed reliance on the judgment of the Hon'ble Apex Court in the case of *Asha*(supra) and submitted that after considering the judgment in the case of *Medical*

Council of India Vs. Madhu Singh and others reported in (2002) 7 SCC 258 and various other judgments it has observed that the authorities cannot grant admission beyond the cutoff date which is specifically postulated. But where no fault is attributable to a candidate and the admission is denied arbitrarily, it would result in ruining the professional career of the candidate, then the Court in rarest of the rare cases of unequivocal discrimination or arbitrariness or in pressing emergency may grant admission but such power preferably may be exercised by the Courts. It has also been observed that in rarest of rare case where the ends of justice would be subverted or the process of law remain frustrated, then the Court would exercise the extra ordinary jurisdiction of admitting the students to the Courses after the deadline of admission in the academic year. It is submitted by him that in the present case, provisional permission was granted in January, 2012 and final permission i.e. on 26.10.2012 prior to the the cut of date with a copy to the State authorities. In such circumstances, they are duty bound to include the petitioner Institution for counselling to grant admission to the students. Deviation would amount to frustrate the legal proceedings and rights accrued to the various students by prosecuting studies to build their career and also to nation. The authorities have acted in discriminatory manner with the petitioner Institution, despite the observations made by this Court though in cases of other institutions of Patna and Bangalore, directions for extension of cutoff date was not issued. However, there is no reason to take a different view in the case of the petitioner Institution. In such circumstances, the order passed by the Central Government refusing to extend the cutoff date and to hold counselling and also the order passed by the CCIM dated 20.02.2013, during the pendency of this petition may be quashed and the extension of cutoff date at par to the Kadam Kaun Ayurvedic College, Patna may be granted to petitioner with the direction to hold counselling 15 PG seats out from the eligible candidates who passed out the P.G. entrance examination of 2012.

12. Per contra, Shri A.K.Sethi, learned counsel representing the respondent no.2 CCIM by filing a counter affidavit referring various provisions of IMCC Act contended that the CCIM having much concern to maintain the educational standard for the professional courses and in view of the various judgments of the Apex Court the extension of cutoff date is not permissible therefore it has rightly been refused. The order dated 20.02.2013 has been passed in furtherance to the directions of this Court but it has not been challenged by the petitioner. However, referring the various paragraphs of the judgment of

Asha(Supra) it is contented that in the said case the Hon'ble Apex Court has allowed the admission in mid session looking to the fact that more meritorious candidates were deprived from admission, therefore, the judgment of *Asha* (Supra) is distinguishable on facts. Shri Sethi has further contended that the issue regarding holding counselling has been decided by this Court as per order dated 31.10.2012 passed in W.P.No.10430/2012. However, the petitioner Institution cannot raise the said issue again in the light of the order passed in the R.P.No.559/2012 on 21.11.2012. It is submitted that the CCIM did not find it feasible to extend the date of counselling for granting admission in mid academic session. In such circumstances, interference in the writ petition is not warranted.

13. Respondent no.1 by filing return has not disputed the issuance of letter of intent as well as the letter of permission, Annexure P-3 and P-5 respectively. It is submitted that the Central Government in the case of Kadam Kaun Ayurved College, Patna and RVS Siddha College Coimbatore, has extended the cutoff date in the light of the orders passed by the High Courts. LPA against the interim order of Patna High Court has been preferred which is still pending and the said order cannot be cited to be precedent. Placing reliance on the judgment of *Madhu Singh* (Supra) it is submitted that the extension of the cutoff date for professional courses has been deprecated by Hon'ble the Apex Court referring various other cases therefore extension of cut of date has rightly been refused by passing the order Annexure P-1.

14 Respondents no.3 and 4 by filing their return has contended that the answering respondents have limited role of conducting the counselling. They are having no power or authority in the matter of extension of cutoff date for admission in PG Courses and bound to follow the instructions issued by the Central Government in this regard. It is further stated that in the case of Kadam Kaun Ayurved College Patna, the permission was granted by the Central Government and CCIM in the light of order of the Patna High Court. In the order of extension dated 1.1.2013, it is mentioned that this is one time settlement and cannot be cited as precedent for any other college. As the recognition of the petitioner was received first time on 30.10.2012 to him, by that time the counselling was closed thus petitioners were rightly not permitted to participate in counselling, and the said contentions has been accepted by this Court in the order dated 31.10.2012 passed in W.P.No.9492/2012. In such circumstances, the action of the State Government cannot be said to be arbitrary or malafide, therefore the petition filed by the petitioner may be dismissed.

15. After having heard learned counsel for the parties at length and on perusal of the record, it is not in dispute that the letter of intent in favour of Shubh Deep Ayurved College, Indore was issued by the Central Government, for recognition of the PG Courses to the academic session 2012-2013 vide Annexure P-3 dated 27.01.2012 subject to the compliance of conditions as specified therein.. It is not in dispute that the second inspection of the college was conducted on 18th and 19th May, 2012 and thereafter, on submitting the bank guarantee of 1.5 crores on 30.08.2012, the letter of permission dt. 26/10/2012was issued by the Central Government to run the PG courses in three subjects namely (i) Ayurved Samhita/Siddhant, (ii)Kayachikitsa and (iii) Rasashastra/Bhaishajya Kalpana. It is also not in dispute that the copy of the said letter was received by the petitioner on the same date i.e. 26.10.2012, and it was also endorsed to the State Government. It is also not disputed that on 26.10.2012, the State Government has issued a public notice of counselling indicating only two colleges leaving the petitioner Institution. The pre PG Entrance examination was held on 29.10.2012 and the result has also been declared on the same date. Thereafter, as per the public notice made in the news paper, the counselling was conducted on 30.10.2012, although the period to finish the counselling as per the Rules of 2012 was upto 31.10.2012. It is also not in dispute that on 27th, 28th and 29th October, 2012 were Government holidays and the offices of the State Government were closed. However, as per the general Clauses Act, on opening, the first date of office available to the petitioner Institution was 30.10.2012, i.e. the date of counselling. The State Government has said that the letter of recognition send by the Central Government has not been received prior to counselling and it was received only at 5 P.M on 30.10.2012. Such disputed fact is not required to be gone into. However, the said factual aspect is not required to be dealt with.

16. Thus, now the issue for determination confines to the extent that the denial of extension is just, proper or not and in the facts of the present case, the action of the Central Government and CCIM is arbitrary and discriminatory. In the said context, first of all the law laid down by Hon'ble Apex Court in the case of *Madhu Singh*(Supra) in para 22 is required to be taken note of, which is reproduced as under:-

> "22. It is to be noted that if any student is admitted after commencement of the course it would be against the intended objects of fixing a time schedule. In fact, as the factual positions

go to show, the inevitable result is increase in the number of seats for the next session to accommodate the students who are admitted after commencement of the course for the relevant session. Though, it was pleaded by learned counsel for respondent No.1 that with the object of preventing loss of national exchequer such admissions should be permitted, we are of the view that same cannot be a ground to permit midstream admissions which would be against the spirit of governing statutes. His suggestion that extra classes can be taken is also not acceptable. The time schedule is fixed by taking into consideration the capacity of the student to study and the appropriate spacing of classes. The students also need rest and the continuous taking of classes with the object of fulfilling requisite number of days would be harmful to be students' physical and metal capacity to study."

17. Thereafter, relying upon a judgment of Dr. Dinesh Kumar following the guidelines have been narrated in conclusion which are as under:-

"23. There is, however, a necessity for specifically providing the time schedule for the course and fixing the period during which admissions can take place, making it clear that no admission can be granted after the scheduled date, which essentially should be the date for commencement of the course.

In conclusion:

(i) there is no scope for admitting students midtream as that would be against very spirit of statutes governing the medical education;

(ii) even if, seats are unfilled that cannot be a ground for making mid session admissions;

(iii) there cannot be telescoping of unfilled seats of one year with permitted seats of the subsequent year;

(iv) the MCI shall ensure that the examining bodies fix a time schedule specifying the duration of this course, the date of commencement of the course and the last date for admission;

(v) different modalities for admission can be worked out

and necessary steps like holding of examination if prescribed, counseling and the like have to be completed within the specified time;

(vi) no variation of the schedule so far as admissions are concerned shall be allowed;

(vii) in case of any deviation by the concerned institution, action as prescribed shall be taken by the MCI."

18. The aforesaid judgment of *Madhu Singh* (Supra) has been considered by Hon'ble Apex Court in the subsequent judgment of *Asha* (Supra), wherein the Apex Court in para 29, 30, 31, and 32 has observed as under:-

"29. However, the question that immediately follows is whether any mid-term admission can be granted after 30th September of the concerned academic year, that being the last date for admissions. The respondents before us have argued with some vehemence that it will amount to a mid-term admission which is impermissible, will result in indiscipline and will cause prejudice to other candidates. Reliance has been placed upon the judgments of this Court in *Medical Council of India v. Madhu Singh and Others* [(2002) 7 SCC 258], *Ms. Neelu Arora and Another v. Union of India and Others* [(2003) 3 SCC366], *Aman Deep Jaswal v. State of Punjab and Others* [(2006) 9 SCC 597], *Medical Council of India v. Naina Verma and Others* [(2005) 12 SCC 626], *Mridul Dhar and Another v Union of India and Others* [(2005) 2 SCC 65], *Medical Council of India v Madhu Singh and Others* [(2002) 7 SCC 258].

30. There is no doubt that 30th September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the professional career of a meritorious candidate, is the question we have to answer.

31. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible, we are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to a meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission.

32. Though there can be rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30th September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. [Refer *Arti Sapru and Others v. State of J & K and Others* [(1981) 2 SCC 484]; *Chavi Mehrotra v.Director General Health Services* [(1994) 2 SCC 370]; and *Aravind Kumar Kankane v.State of UP and Others* [(2001) 8 SCC 355]".

Thereafter, in reference to the question B which relates to the last date of admission of the student and extension of cutoff date, in para 38.2, the Court has concluded as thus:-

"38.2 Question (b): 30th September is undoubtedly the last date by which the admitted students should report to their respective colleges without fail. In the normal course, the

admissions must close by holding of second counseling by 15th September of the relevant academic year [in terms of the decision of this Court in *Priya Gupta* (supra)]. Thereafter, only in very rare and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible but such power may preferably be exercised by the courts. Further, it will be in the rarest of rare cases and where the ends of justice would be subverted or the process of law would stand frustrated that the courts would exercise their extra-ordinary jurisdiction of admitting candidates to the courses after the deadline of 30th September of the current academic year. This, however, can only be done if the conditions stated by this Court in the case of *Priya Gupta* (supra) and this judgment are found to be unexceptionally satisfied and the reasons therefor are recorded by the court of competent jurisdiction."

19. In view of the foregoing, it is apparent that in case of *Asha* (Supra) all the judgment including the case of *Madhu Singh*(Supra) and the judgment of *Arti Sapru and others Vs. State of Jammu and Kashmir and others* (1981) 2 SCC 484; *Chavi Mehrotra Vs. Director General Health Services* (1994) 2 SCC 370 has been considered and thereafter the Apex Court has laid down a law that in very rarest and exceptional cases of unequivocal discrimination or arbitrariness or pressing emergency, admission may be permissible, but such power preferably be exercised by the Courts. It has further been observed that in the rarest of rare cases, where the ends of justice would be subverted or the process of law would stand frustrated, then only the Court shall exercise extra ordinary jurisdiction admitting the candidates to the courses after the deadline of admission of the current academic year. Thus, the judgment of two Judges Bench of the Apex Court in the matter of *Madhusingh* (supra) has been considered and explained in the judgment of *Asha* (supra). However, the latest judgment of the Bench of equal strength is binding. In this regard, the guidance may be taken by the Full Bench Judgment of five judges Bench of this Court in the case of *Jabalpur Bus Operators Association and others Vs. M.P. and another* reported in AIR 2003 M.P. 81.

20. In the said context and in the facts of the present case, it is to be examined that the petitioner Institution and students fall within the parameters and guidelines issued by Hon'ble Apex Court in the case of *Asha* (supra) or

not, and refusal of cutoff date for counselling and admission is justifiable in the facts of this case.

21. On careful examination of the facts of the present case, it is apparent that the letter of intent was issued on 27.1.2012 by the Central Government thereby petitioner Institution ought to have start the new PG courses in three subjects namely (i) Ayurved Samhita/Siddhant, (ii)Kayachikitsa and (iii) Rasashastra/Bhaishajya Kalpana with intake capacity of five seats in each course. By sending the copy of the said letter, it was communicated to the State Government also. The aforesaid permission was subject to four conditions. Thereafter, the CCIM conducted the inspection and submitted its report and after furnishing the bank guarantee of 1.5 Crores on 30.08.2012 as per letter dated 26.10.2012, final permission to start the PG courses was granted for academic year 2012-2013, to which the counselling is required to be conducted upto 31.12.2012, as per Rules of 2012.

23. On receiving the letter of permission by petitioner Institution, rushing to Bhopal on 30.10.2012, copy was supplied to the Director, Medical Education on the same date. On 27th 28th and 29th October,2012, the offices of the State Government were closed due to holidays. However, the date available to communicate the permission was only 30th October, 2012. As per stand taken by the State Government, the said letter was received by them at 5 P.M., while as per the petitioner, it was submitted in due time on opening of the office. From the record, it appears that PG Entrance Examination was conducted on 29th October, 2012 and the result was also declared on the same date. It is also not in dispute that the students who have preferred W.P.No.2084/2013 have passed out the said Entrance Examination, and found place the list of eligible candidates. On the next date, i.e. 30.10.2012 the counselling was done as notified on 26th June, 2012. Thus, it is a case wherein Entrance Examination for Pre PG as well as the counselling has been conducted within two days. In such sequel of facts, if the letter of permission was communicated to the State Authorities on 30th October itself, then on the next date, steps would have been taken by them and the counselling may be conducted for 15 seats as directed by the Central Government. As per the facts which are available on record, the Examination Rules, 2012 were published in the Gazette notification of M.P. dated 22nd June, 2012. The name of Pt. Shivshaktilal Sharma Ayurveda Mahavidyalaya, Ratlam was specified in the list of colleges available in Rules for counselling, but the permission to the said College was granted on 06.07.2012, later on. It is also

relevant to note here that the provisional permission granted by the Central Government in favour of the petitioner Institution on 27.01.2012 was well within the knowledge of State of Madhya Pradesh. However, it was the duty of the officers of the State prior to holding the counselling, to ascertain that how many college in Madhya Pradesh has been granted permission to run the PG Courses and how many seats are available for admission in those colleges. It is to be observed here that if the officers of the State Government were desirous to hold counselling prior to closing it, out from the list of eligible candidates on 31.10.2012, then it may continue the counselling from those students, but it has not been done. It is to be noted further that when the petitioner Institution was not permitted on 30.10.2012 to participate in the counseling, then after coming from Bhopal to Indore and after preparation a writ petition was filed on 31.10.2012, and on the same date, it was listed for hearing. But at the last moment as per the instructions of the Government Advocate, counselling was not found possible on the same date, therefore, this Court has declined to interfere in the matter. From the facts as discussed above, the action of the officers of the State Authorities do not appear to be very fair. On filing review, this Court has directed to file an application for extension of cutoff date for counseling and admission, and the Central Government and the CCIM were directed to decide it as expeditiously as possible, in accordance with law, uninfluenced with the observations made by this Court in the writ petition. After issuance of such directions, the order of rejection was passed on 11.12.2012 (Annexure P-12) by the Central Government and during the pendency of the writ petition by the CCIM on 20.02.2013.

24. In the said context, it is to be noted here that the Central Government vide its order dated 2.11.2012 granted extension of cutoff date and permitted Under Graduate and the PG Course admission in the Kadam Kaun Ayurved College, Patna. In the said case, the Institution was not having the sanction to run the college. However, the writ petition C.W.J.C. No. 16355/2012 was filed wherein the Patna High Court has directed for grant of provisional sanction to the Institution vide order dt. 8.10.2012. In furtherance to the said order on 2.11.2012 after the approval of the competent authority i.e. CCIM extension was granted upto 15.11.2012 for admission in academic session 2012-2013. It is relevant to point out here that in the said letter it was mentioned that this is one time extension of cutoff date and be not cited as precedent to any other college. However, the Central Government should not have granted further

extension. But surprising even after filing the Letter Patent Appeal before the Patna High Court by Union of India without asking for stay, further extension was granted considering the request of the Secretary of Health Government of Bihar, upto 31.12.2012. The said order was passed after expiry of the extended period on 01.01.2013. It is relevant to note that If the extension earlier granted on 2.11.2012 was for one time, then there was no occasion to Central Govt. to further extend the cutoff date, but writing the same language further extension upto 31.12.2012 was granted, for the reason which has not been explained in the return. It is further surprising that again the Central Government has granted extension to the same college on 26.02.2013 for a period of one month with similar condition, which is still continuing, and no plausible explanation is available on record in this regard, except making a bald statement in reference to the judgment of *Madhu Singh* (Supra) and other judgments of the Hon'ble Apex Court to deny extension of cutoff date to petitioners.

25. Similarly, when this Court directed on 15.02.2013 to file reply by CCIM, order dated 20.02.2013 was passed rejecting the prayer of extension of cutoff date distinguishing the case of *Asha* (Supra) because in the said case, less meritorious candidates were admitted ignoring the candidates of higher merit. It is said that in the present case, no discrimination has done however the extension has denied. The CCIM has not considered the fact that in the case of the Kadam Kaun Ayurved College, Patna, three extensions of the cutoff date have been allowed by their consent without any reason or rhym, though in the order impugned it was mentioned that the uniform policy has been observed for the colleges in India. In the return filed by the Central Government as well as CCIM, the grant of extension to the college of Karnataka has also not been denied except that the action was taken in furtherance to the order of Karnataka High Court. But looking to the orders of both the High Courts in the said cases, it is apparent that the Court has not directed for extension of cutoff date for counselling and admission to the students. While in the review petition, direction was issued by this Court to consider the prayer for extension of cutoff date as well as for granting admission to the PG Courses. In such circumstances, the refusal of the extension of cutoff date as per Annexure P/1 passed by Central Govt dated 11/12/2012 and the order dated 20.02.2013 passed by the CCIM appears to be discriminatory. Thus, in the opinion of this Court without having any explanation in the return and in peculiar facts of the case, extension granted to Kadam

Kaun Ayurved College Patna, refusing similar relief, to petitioner is discriminatory.

26. In view of the foregoing discussion, it is to be held that the petitioner Institution is not at fault. It is to be further held that the student found place in the list of eligible candidates are also not at fault because the Shubh Deep Ayurved Medical College, Indore has not been included in the list of colleges of counselling on 30.10.2012. It is to be further held that the action of the Central Government as well as the CCIM is discriminatory in the matter of extension of cut off date and to grant admission to the students. In the facts of this case, It is also held that the action of the State Authorities is only to frustrate the process of law, which is not permissible under the law.

27. It is also relevant to note that in the counselling, two colleges were included namely Pt. Shivshaktilal Sharma Ayurveda Mahavidyalaya, Ratlam which falls in Vikram University, Ujjain and Rani Dhullaiya Ayurved College and Hospital, Bhopal which falls in Barkatullah University, Bhopal. However, the curriculum of both the Universities to conduct the examination for the college affiliated shall be on different dates. while petitioner Institution falls in Devi Ahilya Vishwavidyalaya, Indore, the curriculum and date of the examination shall be different. As per the Regulations, 2012, the period of study for PG Courses is of three years after the admission. It is apparent that as per clause 7 of the said Regulations, the students were required to attend atleast seventy five percent of total lectures, practicals and clinical classes on starting a new PG Courses. If admission had been granted in this academic year to protect the career of the students on the seats available as per the permission of the Central Government it would not cause any serious prejudice either to other students or it will not cause any burden to the State. In such circumstances, it is one of the rarest of the rare case in which looking to the arbitrary and discriminatory act of the respondent, this Court can exercise extra ordinary jurisdiction conferred under Article 226 of the Constitution of India and to secure the ends of justice, for upliftment of the careers of the eligible candidates, direction for counselling of PG Course, to academic session 2012-2013 for admission may be issued.

28. In view of the foregoing discussion, and in the light of the law laid down by the Apex Court in the case of *Asha*(Supra), in conclusion the orders Annexure P-1 dated 11.12.2012 passed by the Central Government and also the order passed by CCIM dated 20.02.2013 during the pendency of this

petition is hereby quashed. It is further directed that the Central Government shall pass an order regarding extension of the cutoff date within ten days after seeking permission from the CCIM and thereafter within two weeks, the counselling shall be held by the State Government for 15 seats of the Shubh Deep Ayurvedic College, Indore from the list of eligible candidates strictly on merit. Accordingly, both the petitions filed by the petitioners are allowed and the parties are directed to bear their own costs.

C.C.as per rules.

Petition allowed.

I.L.R. [2013] M.P., 2569

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 1351/2013 (Gwalior) decided on 17 April, 2013

SHAMMI SHARMA & anr. ...Petitioners

Vs.

MUNICIPAL CORPORATION & ors. ...Respondents

A. Municipal Corporation Act, M.P. (23 of 1956), Section 29/30 - **Whether conjoint reading of both the Sections permits the corporation to delay the meeting beyond 15 days on the ground of preparation of agenda - Held - The Authorities are bound to call the meeting - Further held, there is nothing in Section 30 which puts a cap on number or the subject of requisition meeting. (Paras 7 & 14)**

क. नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धारा 29/30 – क्या दोनों धाराऐं एक साथ पढ़ने पर, एजेंडा की तैयारी के आधार पर मीटिंग को 15 दिन से परे विलम्बित करने की निगम को अनुज्ञा है – अभिनिर्धारित – प्राधिकरण मीटिंग बुलाने के लिये बाध्य है – आगे अभिनिर्धारित, धारा 30 में कुछ नहीं जो मीटिंग की संख्या या विषय पर अवरोध लगाता है।

B. Interpretation of Statute - Golden Rule - Composite perception is to be seen - **A narrow interpretation which kills the intention of the legislature or makes the provision redundant cannot be accepted - Text and Context are the bases of Interpretation - If text is texture, context gives colour - Neither can be ignored. (Para 11)**

ख. कानून का निर्वचन – उत्तम सिद्धांत – संयुक्त बोध देखा जाना चाहिए – संकुचित निर्वचन जो विधायिका के आशय को समाप्त करता है या उपबंध को बेकार बनाता है, स्वीकार नहीं किया जा सकता – विषय और संदर्भ, निर्वचन

के आधार हैं – यदि विषय तत्व है, संदर्भ रंग भरता है – दोनों को अनदेखा नहीं किया जा सकता।

C. ***Interpretation of Statute - Meaning*** **- Words of statute are clear, plain or unambiguous - The Courts are bound to give effect to that meaning irrespective of consequences - The use of word "shall" by the legislature cast the duty mandatory in nature - Hence, Authorities are bound to perform it.** **(Para 13)**

ग. *कानून का निर्वचन – अर्थ* – कानून के शब्द, स्पष्ट, सरल एवं असंदिग्धार्थ हैं–न्यायालय, परिणामों की परवाह किये बिना उस अर्थ को प्रभावी रुप देने के लिए बाध्य है – विधायिका द्वारा शब्द **"shall"** का उपयोग, आज्ञापक स्वरुप का कर्तव्य लादता है – अतः, प्राधिकारीगण उसका पालन करने के लिए बाध्य है।

Cases referred :

(1977) 2 SCC 256, (1987) 1 SCC 424, (1992) 4 SCC 711.

Arvind Dudawat, for the petitioners.
Deepak Khot, for the respondent/Municipal Corporation.

ORDER

SUJOY PAUL, J.:- In this petition filed under Article 226 of the Constitution, the petitioners, Corporators of Municipal Corporation, Gwalior, prayed for a direction to the respondents for calling/convening the meeting of the Corporation as per their written requisition, Annexure P-2.

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

2. The petitioners are elected councilors of Municipal Corporation, Gwalior. Petitioner No.1 is also leader of opposition whereas the petitioner No.2 is former leader of opposition. On 27.12.2012 petitioners and 22 other elected councilors submitted a written requisition for calling the meeting of the Corporation to discuss eight points mentioned in their requisition letter. It is stated that the said points are of great public importance which require urgent consideration by the Corporation. It is further stated that total number of elected councilors is 60 and written requisition is signed by 24 elected councilors.

3. It is the case of petitioners that as per section 30 of Municipal Corporation Act, 1956 (for brevity, the 'Act') the Speaker or in the event of his incapacity, the Mayor must call a special meeting within two weeks of receipt of written requisition signed by not less than one third of the total

number of elected councilors. It is further argued that in the event Mayor or Speaker do not act on the said requisition, the proviso makes it obligatory for the Commissioner to convene such meeting and in the present case the Commissioner has also failed to act in accordance with the statutory mandate of section 30 aforesaid.

4. Shri Arvind Dudawat, learned counsel for the petitioners submits that after the said requisition letter the petitioners also served a legal notice upon the respondents but the said respondents have not called the special meeting. It is further argued that earlier also the petitioners were required to file Writ Petition No. 875/2012, which was disposed of by this Court on 14.2.2012, Annexure P-1. In view of the stand of the parties in the said matter, this Court directed the Corporation to act in accordance with section 30 and other provisions of the Act and call a meeting within 15 days. Shri Dudawat further submits that the Corporation obtained a legal opinion against the said order passed by this Court and the Senior Advocate by letter dated 22.2.2012, Annexure P-5, opined that as per section 30, it is obligatory on the part of Corporation to call a special meeting within 15 days. In nutshell, it is stated that the respondents have failed to comply with the statutory mandate of section 30 and, therefore, a mandamus be issued to fulfill said statutory requirement.

5. Shri Deepak Khot, learned counsel for the respondents by placing reliance on certain paragraphs of the return, submits that section 30 of the Act does require and casts an obligation on the Mayor and Speaker to call a special meeting on the requisition of one third of total number of elected councilors. It is further stated by learned counsel for the Corporation that it is also provided that if such meeting is not convened within the stipulated time by the Speaker or Mayor, as the case may be, such meeting shall be called by Municipal Commissioner under intimation to the State Government. However, it is argued that the method of calling meeting is prescribed in section 29 of the Act. The agenda is to be prepared by the Commissioner and needs to be submitted before the Mayor for approval. The Mayor is required to approve the agenda and send it to the Speaker. In turn, it is the Speaker who shall send the notices to the councilors for convening the meeting. The Speaker can neither exclude nor include any item in the agenda provided by the Mayor. Shri Deepak Khot submits that the provision of section 29 of the Act makes it clear that section 29 (5) is application on section 30 for preparation of agenda. The Commissioner who has to prepare the agenda is required to deal with the agenda proposed by the petitioners and for this purpose, he has

already sent a letter to Secretary of Council to call the petitioners through a notice to discuss and submit the reply for preparation of agenda as items mentioned in the requisition have already been discussed by the Council many times earlier and same would be wastage of time of Council. It is further argued that as and when reply is submitted by the petitioners and they appear for discussion on the agenda, the final agenda would be submitted to the Mayor for further action. It is stated that the petition is premature. The document dated 30.3.2013, Annexure R/1, is filed which shows that the Commissioner has written a letter to the Secretary of the Corporation. This letter contains the point of the agenda for which meeting is sought to be requisitioned by the petitioners and in juxtaposition to that the real situation as per the Commissioner's opinion is disclosed. The same is the stand in the second letter dated 30.3.2013 annexed with the return. These letters were sent to the Secretary of the Corporation and copies are sent to the Mayor, Speaker and leader of the opposition. It is stated in the letter that if the applicants want to produce any new fact, a letter may be issued to them so that they can submit their written representation. Along with the return, certain resolutions are filed to show that the agenda item were already discussed earlier. Lastly, Shri Khot submits that the requisition meeting cannot be called on mere asking. If it is permitted, there may be endless meetings. Thus, the requisition meetings may include an agenda which has not already been discussed.

6. I have bestowed my anxious consideration to the rival contentions of the parties and perused the record.

7. In view of the aforesaid stand of the parties, it is not in dispute that the requisition dated 27.12.2012 is submitted by requisite number of councilors. It is also not in dispute that as per section 30 of the Act, it is obligatory on the part of the Mayor and Speaker to call a meeting within a stipulated time and if they fail to do the same, it is obligatory for the Commissioner to call the said meeting. Learned counsel for the Corporation posed the questions as to (i) Whether the conjoint reading of sections 29 and 30 of the Act permits the Corporation to delay the meeting beyond 15 days on the ground of preparation of the agenda etc. ? (ii) Whether there is a cap/impediment in calling a requisition meeting more than once/repeatedly ? (iii) Whether an issue already discussed or remotely discussed can become subject matter of a requisition meeting ?

8. In the opinion of this Court, it is apt to quote sections 29 and 30 of the Act for its proper adjudication. The said provision reads as under:-

*"29. **Convening of meetings.**- (1) A meeting of the Corporation shall be either ordinary or special.*

(2) The date of every meeting except the meeting referred to in Section 18 and 23-A, shall be fixed by the Speaker with the consent of the Mayor or in the event of his being incapable of acting by the Mayor:

Provided that if the date of the meeting is not fixed by the Speaker or by Mayor, as the case may be, the Municipal Commissioner shall fix the date of the meeting under intimation to the State Government.

(3) Subject to the provisions of Section 18 or 23-A or 24, notice of every meeting specifying the time and place thereof and the business to be transacted thereat shall be dispatched to every councillor and exhibited at the Municipal Office seven clear days before an ordinary meeting and three clear days before a special meeting:

Provided that if the notice other than a notice of meeting under Section 18 or 23-A or 24 has been exhibited at the Municipal Office, failure to serve it on a councillor shall not affected the validity of a meeting.

(4) No business other than that specified in the notice relating thereto shall be transacted at a meeting except with the consent of two-thirds of the members present.

(5) The Commissioner shall prepare the list of the business (agenda) to be transacted in the meeting as mentioned in sub-section (3) and submit it to the Mayor for approval. The Mayor shall approve the agenda and send it to the Speaker. The Speaker shall arrange to send the same along with the notice of meeting to the Councillors. The Speaker shall neither exclude nor include any item in the agenda as approved by the Mayor.

***30. Power of Speaker and Mayor to call Special Meeting-** The Speaker or in the event of his being incapable of acting by the Mayor, may, whenever he thinks fit, call a*

special meeting and shall be bound to do so within two weeks of the receipt of written requisition signed by the not less than one third of the total number of elected Councillors:

Provided that if on receipt of requisition the special meeting is not convened within the stipulated time by the Speaker or the Mayor, as the case may be, the Municipal Commissioner shall convene such meeting under intimation to the State Government."

9. Section 30 was introduced by way of amendment by M.P. Act No. 18 of 1997. The basic purpose of insertion of this provision was to ensure that requisition meeting is called within stipulated time. Section 30 makes it clear that in the event of presentation of written requisition signed by not less than one third of total number of elected councilors, the Mayor and Speaker are bound to call the meeting within two weeks of the said written requisition. In section 30 the relevant words are "..... *and shall be bound to do so within two weeks of the receipt of written requisition signed by not less than requisite members.*" In my opinion, the intention of the Legislature is clear while employing the words "*shall be bound to do so*". These words are clearly mandatory in nature and firstly it is the duty of the Mayor and Speaker to call the said meeting within the time stipulated in the provision. However, the proviso makes it clear that in the event the Speaker or Mayor do not convene the said meeting, "*the Municipal Commissioner shall convene such meeting.*" The first portion of section 30 read with proviso makes it clear that a duty is cast on the Commissioner to convene "*such meeting*". The words "*such meeting*" means the meeting which was required to be called by Speaker and Mayor and they did not convene/call the said meeting. Thus, the time limit prescribed for calling that meeting by the Mayor and Speaker would be the same for the Commissioner because of the use of words "*such meeting*". In other words, in my opinion, the use of word "*such meeting*" has a definite purpose and the same are inserted with a view to make it mandatory on the part of the Commissioner to call the meeting which should have been called by the Speaker and Mayor at the first instance. Here also the mandatory word "*shall*" is used to ensure that the Speaker positively calls that meeting within 15 days. The entire section read together shows that at the first instance it is for the Mayor and Speaker to call a requisition meeting within two weeks of the receipt of written requisition. If it is not done within 15 days, the duty is shifted on the Municipal Commissioner to convene such meeting. A harmonious reading of

the entire provision will show that if a meeting was required to be called by the Mayor and Speaker and they do not call the said meeting within 15 days, the Commissioner is bound to call/convene such meeting within 15 days threrefrom. The proviso further employs the words "shall convene such meeting under intimation to the State Government" (emphasis supplied).

10. There is no doubt in my mind that section 29 deals with ordinary and special meetings both. The meeting required to be called in the present case is admittedly a "special meeting". Under section 29(2) the date of that meeting is required to be fixed by the Mayor and Speaker or in the event of their being incapable of acting, by the Municipal Commissioner under intimation to the State Government. Sub-Section (3) of section 29 prescribes that the notice of meeting including special meeting must specify the time and place. In the event of special meeting, three days clear notice before the meeting is required to be given. The proviso makes it clear that if the notice is exhibited at the Municipal Office, failure to serve it on councilors shall not affect the validity of the meeting. Sub-section (5) of section 29 makes it obligatory for the Commissioner to prepare the list of business (agenda) which needs to be transacted in the meeting as per sub-section (3) and submit it to the Mayor for approval. The Mayor shall approve the agenda and shall send it to the Speaker. In turn, Speaker shall issue notice of meeting to the councilors.

11. There is no dispute between the parties that section 30 mandates the Mayor and Speaker at the first instance and then the Commissioner to call a requisition meeting as mandated in section 30. The stand of the Corporation is that section 29 is also applicable because the meeting in question is a special meeting. For calling this special meeting also the provision of section 29 has to be applied. Before dealing with this aspect, it is apt to examine the action of the respondent No.4 in the present matter. Admittedly, the respondents No.2 and 3 (Mayor and Speaker, respectively) did not act on the requisition and, therefore, it became obligatory for the respondent No.4 to act on the said resolution. At the cost of repetition, it is clear that the Speaker and Mayor as per first portion of section 30 were required to call a special meeting within 15 days. If they failed to do so, it is mandatory on the part of the Commissioner to call "such meeting". Thus, if Mayor and Speaker failed to call the meeting within 15 days, the Commissioner was required to call that meeting within 15 days therefrom. In the present case, the requisition was submitted on 27.12.2012. The Commissioner for the first time issued letter, Annexure R-1, dated 30.3.2013. The Mayor and Speaker were required to act on this

requisition within 15 days from the date of submission of requisition dated 27.12.2012. If they failed to do so for whatever reason, the Commissioner was required to do so within 15 days therefrom. However, in the present case it appears that the Commissioner initiated action only after receiving notices from this Court in the present writ petition. This is clear from the foot remark of the letter dated 30.3.2013. Thus, in my opinion, the Commissioner has utterly failed to take desired action and convene the meeting as mandated in section 30. He was required to promptly act within 15 days as mandated in section 30 of the Act. Section 29(5) of the Act makes it clear that Commissioner must prepare an agenda to be transacted in the meeting and is required to submit it to the Mayor. In the entire sub-section, the Legislature has chosen to employ the word "*shall*". It casts mandatory duty on the part of the Commissioner, Mayor and Speaker to act in the manner prescribed in this sub-section. Thus, it was mandatory on the part of the Commissioner to prepare the agenda and submit it before the Mayor and Speaker. Annexure R-1 is not the agenda prepared in consonance with section 29(5). Even assuming that the Commissioner wanted to discuss with the petitioners whether any meeting is required to be called, this should have been done by the Commissioner within the time aforesaid, i.e., 15 days from the date Mayor and Speaker had failed to call the meeting. If the contention of the Corporation is accepted that conjoint reading of sections 29 and 30 means an unlimited period of time in the hands of the Corporation to discuss and prepare the agenda, then in my opinion, the very purpose of insertion of section 30 and its proviso would be frustrated and defeated. This is the golden rule of interpretation that the composite perception is to be seen. The judicial key to construction is the composite perception of the *deha* and the *dehi* of the provision. A narrow interpretation which kills the intention of the Legislature or makes the provision redundant cannot be accepted. The interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. The interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. The aforesaid view was taken by Supreme Court in the cases reported in (1977) 2 SCC 256 (*The Chairman, Board of Mining Examination and Chief Inspector of Mines and another,* and in (1987) 1 SCC 424 (*Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*).

12. In the light of aforesaid principle of interpretation, in my opinion, the intention of the Legislature is to ensure that the special requisition meetings are called within 15 days and, therefore, it is made clear that if such meeting is not called within the stipulated time by Speaker and Mayor, the Commissioner shall call that meeting under intimation to the State Government. In the opinion of this Court, it was obligatory on the part of the Commissioner to act in quite promptitude after 15 days from the date Mayor and Speaker failed to call the said meeting and if he wanted to discuss or deliberate on the issue of agenda, he was required to do and complete it within 15 days. Merely because in section 29(5) no time limit is given for preparation of agenda, it cannot be left to the Commissioner for unlimited period when the meeting is a special requisition meeting to be called under section 30 of the Act. A harmonious reading of sections 29 and 30 makes it clear that special meeting needs to be called as per sections 29 and 30 both but the time limit and mandate in this regard has to be followed even while applying section 29 of the Act. Thus, in my opinion, the respondents have miserably failed to call the said meeting within the stipulated time. Annexure R-1, by no stretch of imagination, can be said to be an agenda and, therefore, the Commissioner has failed to prepare the agenda as mandated in section 29(5) of the Act.

13. Apart from this, since the word "*shall*" is repeatedly employed in sub-section (5) of section 29, it shows the intention of the Legislature to ensure that agenda is prepared, approved and translated in the shape of notice by the Commissioner, Mayor and Speaker, respectively. This entire exercise of calling special meeting needs to be undertaken by the said authorities within the stipulated time. Thus, on the pretext of preparation of agenda, the authorities cannot sit tight over the agenda and they are required to complete the exercise within 15 days. Any other interpretation will defeat the purpose of insertion of section 30 and will ultimately have an effect of nullifying the mandate of calling the meeting within the stipulated time. Apart from this, this is also settled principle of interpretation that when the words of Statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. This view is taken by Supreme Court in catena of judgments including (1992) 4 SCC 711 (*Nelson Motis v. Union of India*). Thus, the proper consideration of text and context of sections 29 and 30 read together shows that section 29 prescribes the procedure of calling a meeting whereas section 30 mandates

that the meeting needs to be called within 15 days. Thus, section 30 mandates the authorities to call the meeting within stipulated time and section 29 prescribes the method to call the meeting. Combined reading of the said provisions will lead to an inevitable conclusion that in the event of calling of a requisition meeting in accordance with law, the authorities are bound to call it within 15 days, as discussed above.

14. The contention of Corporation is that section 30 cannot be invoked again and again and the topics which have been discussed, cannot become subject matter again. Shri Dudawat to this submits that a microscopic reading of the agenda with earlier resolution shows that the topics are not exactly the same and the Commissioner has utterly failed in relying on the earlier agenda which do not deal, cover and match with agenda/ points mentioned in the requisition letter. In my opinion, there is nothing in section 30 which puts a cap on number of requisition meetings. In other words, section 30 does not prescribe any impediment for calling a special meeting on more than one occasion nor it contains any provision about the nature of the issues to be raised in the said meeting. It appears that visualising that difficulty in the State of Chhattisgarh, an amendment was made in section 30 of the Act. Said provision reads as under:-

> *"Amendment of Section 30.-- In Section 30 of the Principal Act, after the word "special meeting" the words "to discuss any emergent and burning issues of the town" shall be inserted.*
>
> *After proviso following shall be inserted :--*
>
> *"Provided further that such meeting shall not be more than three in a year.""*

In absence of any such prohibition in Madhya Pradesh, I am unable to hold that either number of the requisition meetings or the subject can be a reason for not convening such meeting.

15. On the basis of aforesaid analysis, this petition deserves to be allowed. The respondents have failed to act in accordance with the statutory mandate of section 30 of the Act. Resultantly, petition is allowed. The respondents are directed to call the said meeting within 15 days in accordance with law. No costs.

Petition allowed.

I.L.R. [2013] M.P., 2579
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 169/2011 (Gwalior) decided on 25 April, 2013

GEETA BAI (SMT.) ...Petitioner
Vs.
THE SUB DIVISIONAL OFFICER & ors. ...Respondents

A. ***Constitution - Election Petition*** **- Mandate of the Public should not be disturbed in a routine manner - Interference will hamper democratic process - Election can only be disturbed only when allegations are proved to the hilt. (Para 18)**

क. *संविधान – निर्वाचन याचिका* – जनादेश को साधारण तौर पर बाधित नहीं किया जाना चाहिए – हस्तक्षेप से लोकतांत्रिक प्रक्रिया बाधित होगी – निर्वाचन को केवल तब बाधित किया जा सकता है जब अभिकथन पूर्णतः साबित किये गये हैं।

B. ***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 36 - Disqualification of Office bearer of Panchayat*** **- Act of encroachment of land or building of the Panchayat and Government must be committed by the candidate himself - Factum of encroachment must be construed strictly - In absence of any evidence, candidate cannot be held to be disqualified.(Paras 11 to 13)**

ख. *पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 36 – पंचायत के पदधारी की अपात्रता* – पंचायत और सरकारी भूमि पर या भवन पर अतिक्रमण का कृत्य, स्वयं प्रत्याशी द्वारा कारित किया गया होना चाहिए – अतिक्रमण के तथ्य का कड़ाई से अर्थ लगाया जाना चाहिए – किसी साक्ष्य की अनुपस्थिति में, प्रत्याशी को अपात्र नहीं माना जा सकता।

C. ***Panchayat Nirvachan Niyam, M.P. 1995 - Corrupt Practices*** **-Rules are in pari materia to the provisions of Representation of People Act - Allegation if established have a serious consequence - Hence, required to be proved to the hilt like criminal cases i.e. proof beyond reasonable doubt - Mere bald statements cannot be treated as a conclusive proof of committing corrupt practices. (Paras 14 to 17)**

ग. *पंचायत निर्वाचन नियम, म.प्र. 1995 – भ्रष्ट आचरण* – नियम, लोक प्रतिनिधित्व अधिनियम के उपबंधों के समविषय **(pari materia)** में है – अभिकथन

यदि स्थापित होता है, तब परिणाम गंभीर होगा – अतः पूर्णतः साबित किया जाना अपेक्षित है जैसा कि आपराधिक प्रकरणों में अर्थात युक्तियुक्त संदेह से परे – मात्र कोरे कथनों को, भ्रष्ट आचरण कारित किये जाने का अंतिम प्रमाण के रुप में नहीं समझा जा सकता।

Cases referred :

2011(4) MPHT 90, (2009) 16 SCC 300, 2001 AIR SC 490, AIR 1992 SC 1981, 2011(2) MPLJ 488 (SC), (2011) 11 SCC 786, 1986 (Supp.) SCC 315.

N.S. Kirar, for the petitioner.
R.P. Rathi, G.A. for the respondents No. 1 & 2/State.
Anil Mishra, for the respondent No.3.
None for other respondents, despite notice.

ORDER

Sujoy Paul, J.:- This petition filed under Article 226 of the Constitution of India is directed against the order dated 23.12.2010 whereby the Sub Divisional Officer (Revenue) allowed the election petition filed under Section 122 of the Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 (Adhiniyam) and declared the petitioner's election as void and in lieu thereof declared the respondent No.3 as elected Sarpanch.

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

1. The election for the post of Sarpanch in Gram Panchayat, Barodakalan was declared on 22.12.2009. The private parties herein submitted their candidature for the post of Sarpanch. The petitioner was elected as Sarpanch. This election was called in question by filing the petition under Section 122 of the Act (Annexure P-2). The petitioner filed his reply and thereafter the Sub Divisional Officer (hereinafter called as Election Tribunal) framed the issues, recorded the evidence of the parties and then decided the matter by the impugned order.

2. Shri Kirar, learned counsel for the petitioner, assailed this order on following grounds:-

By placing reliance on Rule 3(2) of M.P. Panchayat (Election Petitions Corrupt Practices and Disqualification for Membership) Rules, 1995 (for brevity called as "E.P. Rules, 1995), he submits that the election petition needs

to be accompanied by as many as copies thereof as there are respondents and every such copy shall be attested by the petitioner's own signature. Shri Kirar submits that in the present case the election petition and its copies were although signed by the election petitioner, it was not mentioned that it is 'attested' by the election petitioner. Thus, by placing reliance on 2011(4) M.P.H.T. 90 (*Sanjay Vs. Shri Lal and others*), it is argued that the Election Tribunal has committed an error in entertaining the election petition, despite the aforesaid serious infirmity in the election petition. He submits that the election petition was liable to be dismissed on this score alone.

The next attack on the order of the Election Tribunal is on the ground that the proper issues were not framed by the Tribunal. It is stated that although certain issues are framed but those issues are not specific. In absence of framing of specific issues, grave prejudice is caused to the petitioner and, therefore, the order is liable to be entertained. In support of this contention, reliance is placed on (2009) 16 SCC 300 (*Shivakumar D.K. Vs. Basavaraju and others*) and 2001 AIR SC 490 (*Makhan Lal Bangal Vs. Manas Bhunia and others*). The aforesaid two contentions are with regard to procedural part of the election proceedings, whereas on merits also Shri Kirar assailed the order of the Election Tribunal.

3. It is stated that as per Section 36(1)(cc) of the Act, the disqualification is attached to a candidate only when it is shown and established that he himself has encroached the Government or Panchayat land. He submits that there was no material to show the same therefore, the disqualification clause under Section 36 (1)(cc) is not attracted. By placing reliance on the declarations filed by the petitioner while submitting the candidature, it is argued that the petitioner has not suppressed any material facts. The declaration is in consonance with the requisite statutory format. No declaration on merit falls within the ambit of suppression of material facts or mentioning incorrect facts. He submits that the language of Section 36 (1)(cc) is plain, clear, precise and unambiguous. By placing reliance on AIR 1992 SC 1981 (*Nelson Motis Vs. Union of India and another*), Shri Kirar submits that this is settled principle of interpretation of a statute that when language is clear and not susceptible to more than one interpretation, such plain meaning has to be given effect to irrespective of its consequences.

4. By taking this Court to the finding part of the impugned order and the evidence relied upon by the Election Tribunal, it is argued that for deciding

the election matter and more so when it deals with the "corrupt practice", the principle and degree of "proof which is beyond reasonable doubt" has to be applied and the principle which is applicable in civil cases i.e. "preponderance of probability" has no application. He submits that oral evidence of interested candidate was not enough to hold the petitioner as guilty. In support of this contention, he relied on 2011 (2) M.P.L.J. 488 (SC) (*Joseph M. Puthussery Vs. T.S.John and others*). No other point is pressed by Shri Kirar.

5. Shri Anil Mishra, learned counsel for respondent No.3, submits that the petitioner has not taken any objection while filing the written statement before the Election Tribunal with regard to non observance of Rule 3 of the said rules. He submits that in absence of any such objection, there was no occasion for the Election Tribunal to enter into the said facet. He submits that the petitioner participated in the proceedings before the Tribunal without any objection on this aspect and raised this point for the first time before this Court. He submits that the signature of election petitioner is very much there in the body of the election petition and on the copies supplied to the other parties of the said election petition and, therefore, this case is distinguishable from the case cited by Shri Kirar. It is submitted that mere non mention of "true copy" will not vitiate or deprive the election petitioner to have a full trial when admittedly her signatures are there in the body of the election petition and copies supplied to the other contesting parties.

6. By placing reliance on Rule 3 of M.P. Panchayat Nirvachan Niyam, 1995, it is stated that statutory forms are prescribed under the aforesaid rules and petitioner has not disclosed the correct facts in the said disclosure/ declaration and, therefore, she is guilty of suppression of material facts and on this count itself her election was liable to be declared as void and illegal. Shri Mishra relied on the statement of Geeta Bai, Nannu Lal and Bhuri Bai to submit that the petitioner was guilty of corrupt practices. By taking this Court on various statements of the witnesses aforesaid, it is stated that the petitioner was rightly held to be an encroacher and, therefore, the Tribunal has rightly declared her election as illegal by invoking Section 36(1)(cc) of the Act. In addition, Shri Mishra supported the finding of the Tribunal regarding corrupt practice by the petitioner and submits that in the event of clear evidence on record, the Tribunal has committed no error of law in holding that the petitioner was guilty of corrupt practices. Lastly, by placing reliance on (2011) 11 SCC 786 (*Kalyan Singh Chouhan Vs. C.P. Joshi*), it is stated that the parties were clear about the issues involved in the matter, whether or not issues are

actually framed or rightly framed, it will not cause any prejudice to the parties and on this score the proceedings and order impugned cannot be set aside.

7. Shri Kirar in his rejoinder submission submits that even if the objection with regard to non fulfillment of requirement of Rule 3(2) is not taken in the written statement, it was the mandatory duty of the election petitioner to examine whether the election petition fulfills the aforesaid statutory requirement or not? In absence thereof, the proceedings were bad and, therefore, merely because objection is not raised, will not provide any legality to the order impugned herein. No other point is pressed by the parties, nor any other authority is relied by them.

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

9. The first attack of the petitioner is on the ground that Rule 3 of 1995 Rules are not complied with in as much as in the copy supplied to the parties to the election petition, the word 'attested' or 'true copy' was not mentioned. In my opinion, the judgment of *Sanjay Vs. Shri Lal and others* (supra) is distinguishable and has no application in the facts and circumstances of the present case. In the said case, the respondent No.1/election petitioner did not sign on the copies and, therefore, by invoking Rule 3, this Court opined that this a serious deficiency and amounts to non compliance of mandatory provision. In the present case, admittedly, the signature of the election petitioner is there on every copy supplied to the parties to the election petition. In my opinion, the basic purpose of bringing Rule 3 in the statute book is to ensure that the correct copies are supplied to the party concerned. The purpose is also to fix the responsibility. Once it is admitted that the signature of the election petitioner was there on all the copies, merely because the word 'attested' or 'true copy' was not there, it will not have any adverse impact on the election petition. Thus, this point is decided against the petitioner.

10. The petitioner further submits that the Tribunal had committed an error in not framing specific issues or framed improper issues. In my opinion, the pleadings of the parties before the Tribunal and in the manner matter was contested, it is clear that the present petitioner was fully aware about the issues involved in the election petition. He contested the matter accurately and it cannot be said that mere defect in framing any issue resulted into any prejudice or injustice to the petitioner. The judgments in the case of *Shivakumar D.K and Makhan Lal* (supra) are not applicable in the facts and circumstances of the present case.

11. Before dealing with the contention regarding disqualification under Section 36 (1)(cc), it is profitable to quote the said provisions:-

> **"36. Disqualification for being office bearer of Panchayat.**-(1) No person shall be eligible to be an office-bearer of Panchayat who-
>
> (cc) has encroached upon any land or buildings of the Panchayat and Government; or"

12. A bare perusal of this provision makes it crystal clear that the said provision can be applied, provided the petitioner herself had encroached any land or building of the Panchayat or Government. This is settled principle of interpretation of statute that a penal provision or a provision which may have adverse impact on the person has to be construed strictly. Thus, this provision may apply only when it is established that the petitioner herself had encroached upon the land. The declaration which was required to be given by the petitioner in the prescribed form was whether she herself had encroached the Government or Panchaytat land. The petitioner filled up the form and gave declaration as desired under the prescribed format. The declaration is that she has not encroached any Panchayat or Government land.

13. By taking this Court to the evidence, Shri Anil Mishra made herculean efforts to establish that there was an encroachment on the land in question. However, the evidence shows that there is no material that the petitioner herself had encroached on the land. On the contrary, the evidence shows that the alleged encroachment is there for many decades. Admittedly, it is not the case of the election petitioner that the petitioner herself had encroached the land in question. In absence of any such evidence, it cannot be said that the petitioner is either disqualified under Section 36(1)(cc) or gave any incorrect declaration or suppressed the material facts. To this extent, the finding of the Tribunal is erroneous wherein it was held that the petitioner was an encroacher and, therefore, under the aforesaid provision she should be treated as disqualified. The impugned order is bad in law with regard to this aspect (issue No.1).

14. The next aspect is with regard to allegations of 'corrupt practices' by the petitioner. Under the Act, the Rules are framed which are known as The Madhya Pradesh Panchayats (Election petitions, Corrupt Practices And Disqualification for Membership) Rules, 1995 (Corrupt Practices Rules). A bare perusal of these rules in juxtaposition to the relevant provision and

Representation of People Act (R.P. Act) shows that the provision with regard to 'corrupt practices' in these rules are almost *parimateria* to the provisions of the R.P. Act. In R.P. Act also in the event allegations of corrupt practices are proved, disqualification attached on the candidate and deprived him to contest election within a stipulated period. Same is the provision here in the said rules. Rule 29 makes it clear that the said disqualification should be attached in the event of adopting 'corrupt practice'. The evidence which came against the petitioner with regard to 'corrupt practice' is that she was distributing liquor in certain villages. The allegations of 'corrupt practice', if established, have a serious consequence. Accordingly, in catena of judgments it has been held that such allegations are required to be proved to the hilt. The principle applicable for this purpose is the same which is applicable in criminal cases, i.e., proof which must be beyond reasonable doubt.

15. The Apex Court in *Joseph M. Puthussery* (supra) held as under:-

> "So far as standard of proof is concerned, there is no manner of doubt that the High Court misdirected itself on the point of standard of proof required under section 123 of the Representation of People Act, 1951. The learned Judge without explaining invented a new standard of proof to be made applicable to election disputes and has held that standard of proof higher than the one applicable to the civil cases but certainly lesser than one applicable to the criminal cases, should be adopted while determining the question whether an elected candidate is guilty of corrupt practice/s within the meaning of the Act. Normally, standard of proof made applicable to civil cases is preponderance of reasonable doubt. Even with the ablest assistance of the learned counsel for the parties, this Court could not comprehend as to which is that standard of proof which is higher than the one applicable to civil cases and lesser than the one applicable criminal cases. The standard of proof, spoken of by the learned Judge, neither gets recognition/stamp of authority either from the provisions of the Indian Evidence Act or from any other statute or from judicial precedents. There is no manner of doubt that the standard of proof, which should be adopted according to the High Court while determining an election dispute, is contrary to settled principles of law. The settled law is that an election

trail where corrupt practice is alleged is to be conducted as a criminal trial. Unfortunately, the High Court has not referred to any decision of this Court on the point though the learned counsel for the appellant claimed that several decisions were cited by the learned counsel for the parties to guide the High Court as to which standard of proof should be adopted while deciding an election dispute. In *Jagdev Singh Sidhani vs. Pratap Saingh Daulta,* (1964) 6 SCR 750, the Five Judge Constitution bench of this Court has laid down, in paragraph 12 of the reported decision as under:-

"12. it may be remembered that in the trial of an election petition, the burden of proving that the election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case, and unless it is established in both its branches i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his consent for its practice not by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail."

It may be observed that the principle that in an election petition based on corrupt practice the Court has to adopt standard of proof beyond reasonable doubt, is enunciated in at least not less than six other reported decisions of this Court. However, this Court does not wish to burden the judgment unnecessarily by referring to those reported decisions in detail because the learned counsel for the respondent has fairly conceded before this Court that a wrong standard of proof was adapted by the High Court while trying the election petition filed by the respondent No.1 challenging the election of the appellant.

The consequence of the conclusion, that the learned single Judge adopted a wrong standard of proof while determining the election dispute raised by the respondent No.1, would be that the other findings recorded by the learned Judge will have to be viewed in the light of this fundamental error committed by him."

16. Apart from this, the Apex Court opined that in the cases of election disputes, it is very easy to produce oral statements but it is very unsafe to accept and rely on such oral statements. The responsibility is to be fixed so that there is no scope of misstatement or wrong evidence. The Apex Court in *Azhar Hussain Vs. Rajiv Gandhi* (1986 (Supp) SCC 315) opined as under:-

> "There is no averment to show that the publication was made with the knowledge or consent of the returned candidate when the book was published in June, 1983. In fact, in 1983 there was no question of having acted in anticipation of the future elections of 1985 and in anticipation of the respondent contesting the same. In the election petition even the offending paragraphs have not been quoted. The petitioner has set out in paragraph (a) to (h) the inferences drawn by him or the purport according to him. This apart, the main deficiency arises in the following manner. The essence of the charge is that this book containing alleged objectionable material was distributed with the consent of the respondent. Even so strangely enough even a bare or bald averment is not made as to :
>
> (i) whom the returned candidate gave consent;
>
> (ii) in what manner and how; and
>
> (iii) when and in whose presence the consent was given,
>
> to distribute these books in the constituency. Nor does it contain any material particulars as to in which locality it was distributed or to whom it was distributed, or on what date it was distributed. Nor are any facts mentioned which taken at their fact value would show that there was consent on the part of the returned candidate. Under the circumstances it is difficult to comprehend how exception can be taken to the view taken by the High Court."

17. In the present case, there is a bald statement by certain witnesses that liquor was distributed by the petitioner. However, the name of the village, the time when it was allegedly distributed is not mentioned. The name of the persons who have allegedly taken the said distributed liquor is also not mentioned. No independent person other than the interested contesting parties entered the witness box in support of the said submission. Witness Ratan Singh stated

that liquor was distributed to certain "saharia" persons. However, names of those persons, time and other relevant aspects were not disclosed. No person who allegedly received liquor was examined on behalf of election petitioner. Similarly, witness Mahendra Singh stated that the liquor and money was distributed in Barodakalan and Kailash Nagar. It is important to note that the persons who allegedly received it have not been called to depose their statement. Other necessary particulars regarding quantum of amount, time of distribution, in whose presence it was distributed, with whose consent it was distributed is not mentioned. Applying the test laid down in *Rajiv Gandhi* (supra), such evidence cannot be treated to be a clinching evidence of corrupt practice against the petitioner. Same is the case in the statement of Bhuri Bai, who made a bald statement that petitioner distributed liquor in various villages. Names of the villages, time, date etc. are not mentioned. Bhuri Bai herself is an interested person being a candidate and, therefore, in absence of other statements of independent persons which meets the requirement of establishing the case beyond reasonable doubt, the petitioner's election cannot be set aside in a routine manner. Thus, in my opinion, such bald statement cannot be treated as a conclusive proof of committing corrupt practices by the petitioner. Accordingly, in my opinion, the Court below has erred in relying on the sweeping statement of the witnesses in this regard and erred in holding that the petitioner was guilty of committing corrupt practices. On this ground also the impugned order is liable to be interfered with.

18. At the cost of repetition, in my opinion, the statements of Geeta Bai, Nannu Lal and Bhuri Bai are not sufficient to hold that the petitioner had committed any 'corrupt practice'. This is also settled in law that the mandate of Public election should not be disturbed in a routine manner, otherwise, it will hamper democratic process. Accordingly, the election can be disturbed only when allegations are proved to the hilt. The election petitioner has failed to do the same and, therefore, the order cannot be permitted to stand in this regard.

19. A bare perusal of the impugned order shows that the Tribunal has interfered with the election on the ground that the petitioner was an encroacher and the petitioner had adopted corrupt practices. As analyzed above, both the points were erroneously decided by the said authority. Hence, the result is inevitable. The impugned order Annexure P-1 is set aside. The petition is allowed. No cost.

Petition allowed.

I.L.R. [2013] M.P., 2589
WRIT PETITION
Before Mr. Krishn Kumar Lahoti, Acting Chief Justice &
Mr. Justice Shantanu Kemkar
W.P. No. 2510/2009 (Indore) decided on 3 May, 2013

DIAMOND CRYSTAL PRIVATE LTD. (M/S) ...Petitioner
Vs.
STATE OF M.P. & anr. ...Respondents

A. Value Added Tax Act, M.P. (20 of 2002), Section 70 - Handicrafts - **Some goods may be produced partly by machine and partly by hand - In such cases product should be regarded as hand made or handicrafts if the essential character of the product in its finished form is derived from Handcraft aspect of its production. (Para 10)**

क. मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 70 – हस्तशिल्प – कुछ वस्तुएं आंशिक रुप से मशीन द्वारा और आंशिक रुप से हाथों द्वारा निर्मित की जा सकती है – उक्त मामलों में, उत्पाद को हस्तनिर्मित या हस्तशिल्प के रुप में माना जाना चाहिए यदि उस उत्पाद के अंतिम रुप का अनिवार्य स्वरुप, उसके उत्पादन के हस्तशिल्प के पहलू से प्राप्त हुआ हो।

B. Value Added Tax Act, M.P. (20 of 2002), Section 70 - **Mouth Blown hand crafted Glass Article - Entire process from melting to finishing is done by manual process and merely for cutting and polishing on glass, if some hand operated machines are used, it cannot be said that product was not predominantly made by hands or it is made by machines. (Para 11)**

ख. मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 70 – मुँह से फुलाकर बनायी गई कांच की हस्तशिल्पी वस्तु – गलाने से लेकर अंतिम रुप दिये जाने तक की संपूर्ण प्रक्रिया, हस्तचालित प्रक्रिया द्वारा की जाती है और मात्र कांच को काटने एवं पॉलिश करने के लिए हाथ से चलायी जाने वाली कुछ मशीनों का यदि उपयोग किया जाता है, यह नहीं कहा जा सकता कि उत्पाद को प्रधान रुप से हाथों द्वारा निर्मित नहीं किया गया था या उसे मशीनों द्वारा निर्मित किया गया है।

Cases referred :

1996 (83) E.L.T. 13 (SC), 1989 (43) E.L.T. 195(SC).

L.N. Soni with *Jerry Lopez,* for the petitioner.
Mini Ravindran, Dy. G.A. for the respondents.

ORDER

The Order of the court was delivered by : **K.K. Lahoti, Ag.CJ.:-** The petitioner has challenged the order dated 6. 10.2008 Annexure P-1, passed by the Commissioner, Commercial Tax, Madhya Pradesh, respondent no.2, in exercise of his powers under section 70 of the Madhya Pradesh VAT Act, 2002, by which the claim of petitioner to treat mouth blown, hand crafted glass articles as "Handicrafts' under Entry No.45 of Schedule 1 of the Madhya Pradesh VAT Act, 2002 (hereinafter referred to as 'Act' for short) was turned down.

2. The facts of case are as under :-

(a) That the petitioner is a Company registered under the provisions of the Companies Act, 1956, having its registered office at Indore. The petitioner Company is engaged in the business of manufacturing and trading of mouth blown, handcrafted, 3% lead crystal glassware. As per the petitioner, the petitioner is the only unit which is engaged in the business of manufacturing of such handcrafted glassware in the entire country.

(b) The petitioner company is registered with Export Promotion Council for promotion of handicrafts, New Delhi sponsored by the Ministry of Textile, Government of India for manufacturing of "Handicrafts". A copy of such certificate is enclosed as Annexure P-4 alongwith the petition. The petitioner is also registered with M.P.Handicraft Development Corporation Limited, Bhopal. As per Annexure P-3 certificate, the petitioner company is the only company in India manufacturing 30% lead crystal glassware by the process of mouth blown hand cutting and hand polishing.

(c) The entire manufacturing process is based on minute specifications of mixture of raw material by hand and melting thereof at a specified degree of heat in oven. On melting at a specified degree, the melted glass is extracted manually by long pipe and is placed in a dye and blown by the mouth to get the desired structure. The structure in dye is kept for sufficient time to come down to a particular level of temperature. The ingot so prepared by the mouth blown process is then marked by ink by hand for design on pieces where cutting is required. After marking, the article is given desired shape by hand cutting through hand operated grinder. The entire process of hand cutting through grinder manual and requires skilled labour.

(d) The process of cutting leads to ornamentation of the article to improve

the visual appearance by artistic improvement. By the process of hand cutting the value of article gets enhanced manifold. After marking of design by hand is over, cutting by hand starts and on completion of cutting, hand colishing is made. Then the article becomes a marketable product. Without cutting the ingot has no marketable value, except a mouth blown article. Cutting and polishing are important part of crystal, without which it is a simple article.

(e) The petitioner had moved an application on 7.3.2008 to the respondent no.2 to consider the product of petitioner as "handicraft" and exempt the product for levy of Entry Tax Sales Tax/ VAT Tax. A copy of the application is filed as Annexure P-5.

(f) Schedule 1 of Act provides list of tax free goods and Entry No.45, which is relevant in the case reads as under:-

> "45. Handicraft and incense sticks commonly known as agarbatti, dhupkathi or dhupbatti, hawan samagri including lobhan and gugal"

(g) The Deputy Commissioner, Commercial Tax, Madhya Pradesh, vide letter dated 25th March, 2008 had intimated to the petitioner that the product of petitioner cannot be treated as 'Handicraft" without assessment and this fact can be decided by the assessing officer only at the time of assessment. If the petitioner requires clarification in the matter, it can move an appllication under section 70 of the Act to respondent no.2 Commissioner, Commercial Tax. A copy of the letter dated 25.3.2008 by the Deputy Commissioner, Commercial Tax is filed as Annexure P-7.

(h) Then the petitioner vide application dated 26.6.2008 had moved to the respondent no.2 the Commissioner under section 70 of the Act for clarification of the issue as to whether the product manufactured by the Company falls within the purview of handicraft under the Entry No.45 of Schedule 1. In this regard a detailed representation was filed on 26.6.2008 Annexure P-8.

(i) The respondent no.2 vide order dated 6th October, 2008 rejected the application of petitioner company on the ground that the petitioner company was using machinery for manufacture of glassware, the benefit of exemption under Entry No.45 cannot be extended to it by treating the mouth blown hand crafted glass articles as 'Handicrafts". This order is under challenge in this petition.

3. The contentions of the petitioner are that the entire process of manufacturing crystals as stated hereinabove is not in dispute. For hand cutting and polishing the hand machines are being used. That by itself cannot be a ground to say that the product was not a handicraft.

4. The petitioner has placed reliance to the Apex Court judgment in the case of *Collector of Central Excise, New Delhi Vs. Louis Shoppe* [1996 (83) F.L.T. 13 (SC)] in which the Apex Court has laid down two tests to decide whether any article qualifies to be handicraft or not. The Apex Court in *Louis Shoppe* (supra) held that an article is a handicraft, if it satisfies following conditions :-

(i) That it must be predominantly made by hand. It does not matter if some machinery is also used in the process.

(ii) That it must be graced with visual appeal in the nature of ornamentation or in-lay work or some similar work lending it an element of artistic improvement. Such ornamentation must be of a substantial nature and not a mere pretense.

On the basis of aforesaid discussion, it was submitted by the petitioner that the products of the petitioner are handicraft and are exempted from payment of VAT/Entry Tax.

5. The respondent/State has filed reply opposing the petition. In para 2 of the reply the process in so far as manufacturing of crystal has not been disputed, but it is submitted that in the process electric machines for cutting and giving artistic shapes are used. The article is also polished by acid, which results in the final product. Thus in the process of manufacturing of product, it is processed through various machines, therefore it cannot be said that the final product is predominantly made by the hand and was not a handicraft.

6. Shri L.N.Soni, earned Senior Advocate supported his contention by the judgment of Apex Court in *Louis Shoppe* (Supra) and has also placed reliance to another judgment of the Apex Court in *Padmini Products Vs. Collector of Central Excise* [1989(43) E.L.T. :95 (SC)].

7. To appreciate the rival contention of the parties, it is not in dispute that process of manufacturing of crystals is entirely manual. The respondent no.2 in the order Annexure P-1 under section 70 of the Act has referred the entire process of manufacturing of crystal items. The entire process before designing

and cutting is not in dispute, but the Commissioner has recorded that for designing and polishing hand machines are used. Though for polishing acid is used, but because of this use of machines, the product cannot be said to be a handicraft. On this ground the Commissioner has dismissed the application of the petitioner.

8. To consider the entire process of manufacturing of crystals, it would be appropriate if the process as placed on record by the petitioner is referred, which is reproduced as under : -

(a) **Mixing:**

First of all the required chemicals are weigned in the required quantity for hand mixing. Mixing of chemicals such as Quartz (Sand), Lead, Potassium Carbonate. Borax and broken glass pieces etc is done in a big SS tray with hands for 2 Hours. After the mixing of chemical by hand, the mixed batch is poured manually into the furnace by hand with the help of SS Scopes.

(b) **Mouth Blowing Process**

(i) Melted glass is taken out of the furnace at around 1200 degree celsius, manually with the help of SS Pipes, by gathering the required quantity of glass on the SS pipe. Utmost skilled is required to gather the glass from the furnace at such a high temperature. The glass gathering process form the furnance requires immense skill and deep expertise that the atmospheric air inside the furnace should not be trapped while rolling the glass on the pipes. The trapping of air along with the glass forms air bubbles in the glass. Any article made of such glass with bubble is being rejected and is not acceptable in the market.

(ii) The quantity of glass required to mouth blow an article varies and is dependent on the size and shape of the article. For bigger articles the quantity of glass to be drawn from the furnace will be more and different as compared to the quantity required to blow a smaller piece. To ascertain the quantity of glass to be withdrawn from the furnace, according to the requirement of the article, is a highly skilled work and can only be done by the skilled, experienced and experts craftsmen.

(iii) For taking out the required quantity of glass by hand on the pipes, first of all a very small quantity of glass is taken out of the furnace. A very calculated quantity of air is given by the mouth from the other end of the pipe to make a small ball of glass on the other end of the pipe. The air given by mouth should be given with such a care that the wall thickness of the entire ball should be identical. This pipe is rolled for proper balancing of glass ball with hands for some time to allow it to cool down. After, the required cooling, the same pipe is again dipped into the furnace to gather some more glass (required to finally blow the article) on the cooled ball. Here again, the gathering should be done in such a way that the atmospheric air is not trapped along with the glass to avoid the formation of air bubble in the glass.

(iv) The glass, thus taken out by hand on the pipe is balanced and handled by the craftsmen in such a way that around 70% - 80% of the shape of the article is given outside only by hand by hitting the glass on paper scrap/bowl or even balancing it by hands, before dropping it into the mould.

(v) While balancing and giving the shape, the glass on the pipe is handled, and is blown by mouth in such a way that the distribution of glass within the entire article should be uniform. This is a highly skilled process and any mistake or mishandling at this level, results in un-uniform distribution of glass within the article which gives bad visual appearance in the final product and the product thus made or irregular wall thickness is not salable in the market. So, a proper handling at this level is the utmost requirement for a perfectly distributed article.

(vi) After giving this shape by hand, outside the furnace, the glass is dropped into the mould and a very calculated quantity of air is given by mouth from the other end of the pipe. Any un-calculated blowing of air by mouth gives an un-uniform wall thickness of the article.

(vii) The air given through mouth and balancing and handling glass outside the mould by hand also plays the most important role in the entire manufacturing process product. The visual

appearance and market acceptability of the final product completely depends on the proper distribution and bubble free glass making which is possible only by the skilled and experienced craftsmen. Any mistake / mishandling at these levels results in manufacture of a inferior/ defective product which gives a bad visual appearance and is not acceptable in the market.

The pipe, attaching the mouth blown article at one end, is rolled by hands on a balancing table till the article is comfortably balanced and cooled to a required temperature.

(viii) After the balancing and cooling of article, the pipe alongwith the attached mouth blown article is taken to crack-off table to detach the blown article from the pipe.

(ix) At crack-off table, small quantity of water is dropped exactly at the end where the article is attached with the pipe, then one or two strokes of a small wooden rod with hand on pipe detach the article off the pipe. The introduction of even excess water at the joint of article with pipe can crack the hot glass immediately.

(x) The article such detached from the pipe is put into the annealing even for gradual cooling by hand. This process also requires high skills and experience. The approximation of temperature at which the article should be put into the oven and method of placement of article in the annealing oven plays a very important role in the final appearance of the product. Any mis handling/ mis-approximation at this stage can cause the de-shaping /breakage of the article due to the temperature difference of the article and the temperature inside the oven.

Annealing in Ovens is done to avoid the breakage of blown product to cool down the blown products directly from 1200^0 to room temperature.

(c). **Surface Finishing and Hand Grinding:**

The mouth blown articles coming out of the oven have different types of shrinkages/marks on it. These are mainly due to the immediate drop of temperature form 1250 deg. cel. to around

450 deg. within a span of 1-2 minutes. These marks are being removed by hand grinding each article on wheels. This again a very tricky process which requires immense skill and expertise. Any mishandling at this stage causes unbalancing /difference in sizes or uniformity of the article. If an article is properly grinded and balanced, its visual appearance will definitely come out well and will be acceptable in the market.

(d) Designing, Marking and Cutting :-

(i) After grinding, the article is forwarded to marking section for marking of designs on the products by hand. Marking is done manually and plays the most important role in the design cutting on the articles.

(ii) Marking is a process where the design is drawn on the articles manually by hand with permanent markers to facilitate the cutters to cut on the articles, for required designs. The design made by hand should be accurate in all types of parameters as any misconduct in designing will finally lead to a wrong design being cut on the article, which badly affects the ornamental finish into the final appearance of the article.

(iii) A proper design drawn by hand gives the cutter a perfect guideline to cut the required design on the article and a perfect cutting finally results into a complete ornamental finish and excellent visual appearance of the article. Immense skill and experience is required for a perfect marking and training is being imparted to the workers at factory for this purpose. Once the design in drawn on the article, the same is taken to the cutting department.

(iv) Cutting is the most important section which plays the utmost role in the final visual appearance of the article. A proper cutting with a measured angle of the wheel creates a complete 'V' groove in the article which is the only responsible factor for the shining of the article.

The angle of the wheel is given by cutting the extra portion of wheel by holding diamond sticks in hands and rotating the stick in such a manner that the required angle of

the edge of the wheel is achieved.

(v) Cutting is done by hands with the help of wheels, by holding the article in hands in such a manner that the required amount of pressure can be introduced on the wheel to cut the article on the marked design. The pressure applied should be so calculative that if it exceeds the required limits, the article can be broken out and if it is less than the required measure then the required depth of the cut will not be achieved which ultimately gives a dull visual appearance after polishing.

(vi) A deep concentration and high skills are required while cutting the article as a slight carelessness can allow the article to be cut on the unmarked area which ultimately causes the disproportion of design.

(vii) A perfectly cut piece is a result of an accurate angle of the wheel and the accurate required pressure which finally gives the required depth of cutting of the article. Such articles when acid polished, gives a brilliant reflection of the lights falling on them which is visible as shining of the article. For the best visual appearance and utmost ornamental finish, an article needs to be perfectly designed, marked cut and polished.

(e) **Acid Polishing:**

(i) After the article is cut, the same is forwarded for acid polishing. It is a process where the article is being hold is hands and dipped into a mixture of two acids. The timing for dipping of the articles in the mixture of acid for them being polished is different for different articles. This dipping again requires skill and experience as for what time the article must be dipped, the concentration and temperature of the mix acid has to be maintained. This is again a calculative process where skill aid expertise is required to access the time required for polishing an article.

(ii) In this process first of all, the two acids i.e. Hydro fluoric acid 60% and sulphuric acid 99% are mixed in a fixed ratio and the mixture is heated to a required operating temperature.

(iii) This is a process which finally shines the article. Any misconduct at this stage can cause a complete rejection of all the efforts and cost incurred on the article in earlier processes. One single extra dip can cause the burn marks on the article which badly affects the visual appearance of the article and also lesser dips then required, can result into an dull type of finish on the article.

(iv) The article is hold in hands and needed to be rotated in such a manner that every part of the article is exposed to the acid for the polishing. A good and perfect polish gives a brilliant shining and ornamental visual appearance to the article. This process change the whole visual appearance of the products and grace the products a brilliant and everlasting shine and glitter. All the ornamentation done in cutting of the product is clearly exposed after polishing.

The aforesaid process, as placed on record by the petitioner, is not in dispute. Except cutting and polishing, machines are not used by the petitioner.

9. Now in the light of the aforesaid facts, whether the product of the petitioner can be treated as handicraft or not is to be seen. In *Concise Oxford Dictionary*, the handicraft has been given a meaning **"Manual skill; manual art or trade or occupation; man skilled in a handicraft."** In *Chamber's Dictionary* **"Handicraft"** has been given meaning **"A manual craft or trade."** In *Webster* **"Handicraft"** has been defined as **"a craft"**, the product of hand work.

10. The Apex Court in *Padmini Products* (supra) in paras 5, 6 & 7 of the order has considered various parameters for declaring the product as handicraft. The Apex Court has found that if some goods may be produced partly by machine and partly by hand, in such cases a product should be regarded as hand made or handicrafts if the essential character of the product in its finished form is derived from the 'hand-made aspect of its production. The Apex Court further referred the paragraph from Policy Book in respect of 'Handicrafts', which reads thus :-

'Articles which are classifiable elsewhere in this policy will be deemed to be 'Handicrafts' falling in this group only if such articles, besides being made by hand, have some artistic

> or decorative value; they may or may not possess functional utility value an addition. Artistic or decorative value of the article exported need not necessarily come out of any art. work, engraving or decoration done on the article but the very form, shape or design of the article could also be artistic and suggestive of the fact that the article is primarily meant for decorative and not for utility purposes."

The Apex Court referring the *Encyclopaedia Britannica*, has reproduced meaning of **'handicraft'**, which reads thus :-

> "Occupation of making by hand usable products graced with visual appeal. Handicrafts encompass activities that require a broad range of skills and equipment, including needle work, lace-making, weaving printed textile, decoration, basketry, pottery, ornamental metal working, jewelling, leather working, wood working, glassblowing, and the making of stained glass."

11. In the present case, it is not in dispute that for manufacturing of 30°/o lead crystal glassware the raw material is mixed by hands and it is being melted by a manual process upto a specified degree of heat in oven. After melting the material at a specified degree of heat, the melted glass is extracted manually by a long pipe and is being placed in a dye and blown by mouth to get desired structure. Thereafter the structure, ingot, prepared by mouth blown process, is then marked by ink by hand for design purposes and thereafter the article is given desired shape by hand cutting through hand operated grinder. Meaning thereby that for designing and shaping though some machines are used, but all the aforesaid machines are hand operated and requires skilled labour to cut and given proper design on the glass. The article is also being handled in the entire process in hands and the designing, cutting and polishing is also being done manually. If the entire process from melting to finishing is being done by manual process and merely for cutting and polishing on glass some hand operated machines are used. it cannot be said that the product was not predominantly made by hands or it is made by machines. The entire process shows that in the complete process such as handling, blowing, giving shape, marking and thereafter cutting and polishing by lifting article in hand is nothing, but an article made by hand and is Handicraft. Merely for cutting and polishing on a glass, hand operated machines are used then it cannot be said

that the article is not a handicraft.

12. In view of aforesaid facts, no conclusion can be arrived except that the product of petitioner is a hand made product and falls within the purview of handicraft. The order of respondent no.2 Annexure P-1 is not sustainable under the law and is accordingly set aside and it is declared that the crystal items manufactured by the petitioner company are handicraft and the petitioner is entitled for exemption under Entry No.45 of Scheduled I of the Act.

Accordingly, this petition is allowed. The petitioner shall be entitled for all the exemptions as are available to the petitioner under the Act. Considering the fact, petitioner shall be entitled for the cost of this petition. Counsel fee Rs.2,000/- (Rupees two thousand only).

Petition allowed.

I.L.R. [2013] M.P., 2600
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 10224/2013 (Jabalpur) decided on 18 June, 2013

LAKHAN LAL ...Petitioner
Vs.
DURGA PRASAD & ors. ...Respondents

Constitution - Article 227 - Interference by High Court - **Trial Court closed the right of petitioner to adduce evidence by speaking order - Held - Order passed by Sub-ordinate Court is under its vested jurisdiction and no jurisdictional error is committed by such Court then the same could not be interfered under the revisional jurisdiction of this Court. (Para 4 & 5)**

संविधान – अनुच्छेद 227 – उच्च न्यायालय द्वारा हस्तक्षेप – विचारण न्यायालय ने वादी के साक्ष्य देने का अधिकार सकारण आदेश द्वारा समाप्त किया – अभिनिर्धारित – अधीनस्थ न्यायालय द्वारा पारित आदेश इसकी निहित अधिकारिता के अंतर्गत और उक्त न्यायालय ने अधिकारिता की त्रुटि नहीं की तब पुनरीक्षण अधिकारिता के अंतर्गत इस न्यायालय द्वारा हस्तक्षेप नहीं किया जा सकता।

Case referred :

AIR 1973 SC 76.

Monesh Sahu, for the petitioner.

ORDER

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

1. The petitioner has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 09/05/2013 passed by IV Civil Judge, Class-I, Chhindwara in Civil Suit No. 41-A/2012 whereby the right of the petitioner/plaintiff to adduce evidence has been closed.

2. The petitioner's counsel after taking me through the papers placed on record along with averments of the petition argued that the right to adduce evidence of the petitioner has been closed by the trial court under the wrong premises. In continuation he said that the petitioner/ plaintiff along with witnesses were present before such court on the date 09/05/2013 to adduce the evidence instead their deposition were not recorded and the impugned order was passed and right of the petitioner/plaintiff to adduce evidence wrongly closed. He also argued that in case this court comes to a conclusion that there were any default on the part of the petitioner in non-producing the evidence on the aforesaid date then by adopting some lenient view he be extended opportunity to adduce the evidence in the matter by imposition of cost under the discretion of this court and prayed for admission and allowing this petition accordingly.

3. Keeping in view the aforesaid arguments advanced by the petitioner's counsel I have carefully gone through the averments of the petition as well as papers available on record so also the impugned order Annexure P/1. It appears from the impugned order that initially the date for recording of the evidence of petitioner was fixed on 17/07/2012 and thereafter till 18/09/2012 for one reason or the another at the instance of the petitioner case was adjourned and when, again the adjournment was prayed on 18/09/2012 the last opportunity was given to the petitioner to adduce his evidence even then on subsequent dates till 09/05/2013, the date of passing of the impugned order no evidence was adduced by the petitioner. It is apparent from the impugned order dated 09/05/2013 that on such date when the matter was taken in the first round, the plaintiff was not present then the case was directed to place before the court after coming the plaintiff, on which it has placed about 1:05 pm., at that time the petitioner was represented through Ramswaroop Tiwari, Advocate, on the request of the parties, the arguments on I.A., filed under order 7 Rule 14(3) of CPC was heard and such application was decided and subject to payment of cost of Rs. 200/- such application

was allowed and documents were taken on record. At 1.55 pm., when the petitioner was asked to adduce the evidence then he made request that case be taken up after lunch hours, subsequent to lunch hours when the matter was taken but no one was present on behalf of the petitioner/ plaintiff to adduce the evidence then the proceedings were adjourned with direction to place the matter after sometime and again the matter was placed before the court and the plaintiff was called through peon of the court according to the procedure, no one was appeared on behalf of the petitioner/ plaintiff to adduce the evidence and in such circumstances by the later part of impugned order the trial court has closed the right of the petitioner to adduce the evidence in the matter and such order is under challenge in this petition.

4. After perusing the aforesaid order of the trial court I have found that the same has been passed in a speaking manner by taking all existing circumstances in the matter and in the available circumstances, there was no option with the trial court except to close the right of the petitioner to adduce the evidence in support of the plaint and in such premises I have not found any perversity, illegality and irregularity or nothing against the propriety in the order impugned which requires any interference at this stage under the superintending jurisdiction of this court enumerated under Article 227 of the Constitution of India.

5. Even otherwise in view of the law laid down by the Apex Court in the case of *The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another (In both the appeals) Vs. Ajit Prasad-Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another* (In both the appeals) reported in AIR 1973 SC 76 holding that the order passed by subordinate court under it's vested jurisdiction and no jurisdictional error is committed by such court then the same could not be interfered under the revisional jurisdiction of this court, so, in such premises also the impugned order could not be interfered by this court under the superintending jurisdiction of this court.

6. In view of the aforesaid discussion I have not found any such material circumstances in the impugned order which requires any interference at this stage, consequently this petition being devoid of any merits is hereby dismissed at the stage of motion hearing.

Petition dismissed.

I.L.R. [2013] M.P., 2603
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 5497/2012 (Jabalpur) decided on 2 July, 2013

UMA SHANKAR CHOBEY ...Petitioner
Vs.
MADAN & ors. ...Respondents

A. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 21 - Corrupt Practice - **To establish allegation of corrupt practice, it is incumbent upon election petitioner to lead cogent evidence - Election Petitioner did not examine those persons who were said to have participated in casting votes at two places, but examine some persons who were not named in election petition of having casted votes in favour of Returned candidate - Some evidence does not lead to a conclusion that returned candidate had taken recourse to unfair means and corrupt practice.**
(Paras 15 to 21)

क. पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता), नियम, म.प्र. 1995, नियम 21 – भ्रष्ट आचरण – भ्रष्ट आचरण का अभिकथन स्थापित करने के लिए, निर्वाचन याची को प्रबल साक्ष्य पेश करना जरुरी है – निर्वाचन याची ने उन व्यक्तियों का परीक्षण नहीं किया, जिनके लिये कहा गया है कि उन्होंने दो स्थानों पर मतदान करने में हिस्सा लिया था, परन्तु कुछ ऐसे व्यक्तियों का परीक्षण किया, जिनके नाम निर्वाचन याचिका में, निर्वाचित प्रत्याशी के पक्ष में मतदान करने वाले दर्शाते हुए नहीं दिये गये थे – कुछ साक्ष्य इस निष्कर्ष पर नहीं पहुंचाता कि निर्वाचित प्रत्याशी ने अनुचित साधन एवं भ्रष्ट आचारण का सहारा लिया।

B. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 6 - Relief(s) - **Election Petitioner did not seek the setting aside of election and declaring it to be null and void instead sought the relief of declaring the alleged votes casted in favour of returned candidate as invalid and declare fresh result in favour of Election Petitioner - As no relief was sought for declaring the election as null and void, the Specified Officer exceeded the relief sought for by Election Petitioner by declaring the result as null and void.** **(Paras 23 to 26)**

ख. *पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता), नियम, म.प्र. 1995, नियम 6 – अनुतोष* – निर्वाचन याची ने निर्वाचन अपास्त करना और उसे अकृत एवं शून्य घोषित किया जाना नहीं चाहा है, बल्कि निर्वाचित प्रत्याशी के पक्ष में डाले गये अभिकथित मतों को अवैध घोषित किया जाना चाहा है और निर्वाचन याची के पक्ष में नया परिणाम की घोषणा चाही है – चूंकि निर्वाचन को अकृत एवं शून्य घोषित किये जाने का कोई अनुतोष नहीं चाहा गया, विनिर्दिष्ट अधिकारी ने परिणाम को अकृत एवं शून्य घोषित करके, निर्वाचन याची द्वारा चाहे गये अनुतोष से अधिक किया।

C. ***Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, M.P. 1995, Rule 3 - Presentation of Election Petition - Authorization*** **- Authorization to file an election petition has to be specific and not by mere endorsement in Vakalatnama - It is not an authorization as is required under Rule 3(1) - No evidence to show that election petitioner was present at the time of presentation of election petition as he did not put his signature on the order sheet - Specified Officer committed grave error in entertaining election petition.**

(Paras 37 & 38)

ग. *पंचायत (निर्वाचन अर्जियाँ, भ्रष्टाचार और सदस्यता के लिए निरर्हता) नियम, म.प्र.1995, नियम 3 – चुनाव याचिका का प्रस्तुतीकरण – प्राधिकार देना* – निर्वाचन याचिका प्रस्तुत करने का प्राधिकार देना विनिर्दिष्ट होना चाहिए और न कि मात्र वकालतनामे में पृष्ठांकन द्वारा – यह प्राधिकार देना नहीं है जैसा कि नियम 3(1) के अंतर्गत अपेक्षित है – यह दर्शाने के लिए साक्ष्य नहीं कि निर्वाचन याचिका प्रस्तुत करते समय निर्वाचन याची उपस्थित था, क्योंकि आदेश पत्रिका पर उसने हस्ताक्षर नहीं किये हैं – निर्वाचन याचिका ग्रहण करने में विनिर्दिष्ट अधिकारी ने घोर त्रुटि कारित की।

Cases referred :

AIR 1985 SC 89, AIR 1995 SC 2284, AIR 2009 SC 1045, AIR 1986 SC 3, (1991) 1 SCC 441, AIR 2010 SC 475, AIR 2010 SC 2210, 1998 RN 202, 1978 MPLJ 399, 1999(1) MPLJ 88, 2002(2) MPHT 554, 2008(4) MPHT 410, 2010(4) MPLJ 405.

Jitendra Tiwari, for the petitioner.
A.M. Trivedi with *M. Pateriya,* for the respondent No.1.
Vandana Shrivastava, for the respondents No. 2 to 6.

ORDER

SANJAY YADAV, J.:- Order dated 27.03.2012 passed by the Specified Officer, Additional Collector, Damoh is being assailed vide this petition. By impugned order, the Specified Officer, while allowing the election petition by respondent no.1, has set aside the election of the petitioner as Member, Janpad Panchayat Sammana, District Damoh.

2- Election was held on 18.01.2010 wherein 3265 votes were casted of which 199 votes were declared invalid and of remaining 3066 valid votes, 1065 votes were polled in favour of petitioner and 990 votes in favour or respondent No.1. The petitioner was declared elected on 03.02.2010. Aggrieved, respondent No.1 filed an election petition on 15.03.2010 on the ground that, the petitioner adopted unfair means of getting the votes casted in his favour by voters of different wards who casted votes at two places. Another ground raised by the respondent No.1 was that the returning officer did not resort to fair counting of votes and was politically influenced.

3- The petitioner though countered the allegations, however, did not lead evidence.

4- The Specified Office on the basis of claim and the counter framed following issues:

1– क्या उत्तरवादी क0 2 ने निर्वाचन नियमों के विरूद्ध कृत्य किया है।

2– क्या याचिकाकर्ता द्वारा उत्तरवादी क0 2 के विरूद्ध शिकायत प्रस्तुत की है ।

3– क्या दो स्थानों की मतदाता सूची में दर्ज 22 मतदाताओं के द्वारा मतदान में भाग लिया गया है ।

4– क्या केन्द्र कं0 183 की मतगणना में मतगणना अधिकारियों द्वारा याचिकाकर्ता के 20 वैध मत अवैध एवं उत्तरवादी कं0 2 के 30 अवैध मतों को वैध घोषित किया गया है ।

5– क्या केन्द्र कं0 25 में याचिकाकर्ता के 5, केन्द्र कं0 26 में 5, केन्द्र कं0 27 में 20, केन्द्र कं0 161 में 10 एवं 183 में 20 वैध मत अवैध घोषित कियें गये हैं।

6– क्या केन्द्र कं0 25 में उत्तरवादी कं02 के 5 कं0 26 में 10, कं027 में 30, कं0 161 में 5 अवैध मत घोषित किये गये ।

7– क्या मतगणना अधिकारी के द्वारा मतगणना में अनियमितितायें श्री अरूण टण्डन के दबाव में की गई ।

8– क्या याचिकाकर्ता पुनः मतगणना करा पाने व उत्तरवादी कं0 2 का निर्वाचन शून्य करापाने का अधिकारी है ।

5- All the issues were answered in favour of respondent No.1 and against the petitioner.

6- The petitioner assails the order on the grounds that the conclusion arrived at by the Specified Officer that the petitioner adopted unfair means by getting the votes casted by the voters of different wards was without examining the alleged voters who were named in the election petition. It is urged that no summons were issued to those alleged voters nor were they produced by the respondent No.1 to prove that they casted votes at two places. It is urged that it is only on hear and say evidence that the conclusion has been arrived at by the Specified Officer. Contending further that the pleadings unless proved with cogent evidence cannot be treated to be proved on mere surmises, it is urged that the Specified Officer taking advantage of the petitioner being proceeded ex-parte has on mere guess work arrived at a conclusion of unfair means of getting the voters from other places. It is also contended that the election petition was not maintainable as the same was not presented as per Rules and that the Specified Officer exceeded in granting relief then sought.

7- The respondent No.1 on his turn contradicts the version of the petitioner. It is urged that there were ample evidence on record to bring home the fact that the voters were brought from outside who casted these votes at two places and in favour of petitioner. It is accordingly contended that the Specified Officer did not falter in construing that the election of the petitioner as member Janpad Panchayat, Sammana got vitiated because of use of unfair means.

8- Considered the rival submissions and perused the record furnished by the Specified Officer, Additional Collector, Damoh.

9- That, Rules 5 and 6 of the Madhya Pradesh Panchayat's (Election Petition corrupt Practices and Disqualification for Membership) Rules 1995, lays down as to what election petition shall contain and what relief the election petitioner can claim. Whereas Rule 5 requires that the election petition shall contain a concise statement of all material facts on which the petitioner relies, set forth with sufficient particulars, the grounds on which the election is called

in question and that the same be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908. Rule 6 stipulates that a partitioner may claim (a) a declaration that the election of all on any of the returned candidates is void and (ii) in addition thereto, a further declaration that he himself on any other candidate has been duly elected.

10- Furthermore, Rule 21 of 1995 Rules provide for grounds for declaring election to be void. It stipulates:

> "21- Grounds for declaring Election to be void: (1) Subject to the provisions of sub-Rule (2) is a specified officer is of opinion
>
> (a) That on the date of his election the return candidate who was not qualified or was disqualified to be chosen to fill the seat under the Act; or
>
> (b) That any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent; or
>
> (c) That any nomination paper has been improperly rejected or
>
> (d) That the result of the election in so far as it concerns returned candidate has been materially affected-
>
> (i) by the improper acceptance of any nomination; or
>
> (ii) by a corrupt practice having been committed in the interest of the returned candidate by a person acting with the consent of the candidate or his agent or
>
> (iii) by the improper acceptance, refusal or rejection of any vote or the reception of any vote which is void; or
>
> (iv) by any non-compliance with the provisions of the Act or of any rules or orders made thereunder-
>
> the specified officer shall declare the election of the declared candidate to be void.
>
> (2)- If in the opinion of the present authority a return candidate has been guilty by an agent of any corrupt practice, but the Specified authority is satisfied-

(a) that no such corrupt practice was commended at the Election by the candidate and every such corrupt practice was committed contrary to the instruction and without the consent of the candidate;

(b) that the candidate took all reasonable means for preventing the commission of corrupt practice at the election: and

(c) that in all other respect the election was free from any corrupt practice on the part of the candidate or any of his agent;

then the Specified authority may decide that the election of the returned candidate is not void."

11- The instances of corrupt practices find mention in Rule 22 of 1995 Rules.

12- That Sub-Rule (1) of Rule 23 of 1995 Rules stipulates that at the conclusion of the enquiry of the Specified Officer shall make an order (a) dismissing the election [petition (b) declaring the election of all or any of the returned candidates to be void, or (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidates to have been duly elected. The sub-Rule (2) of Rule 23 further stipulates that, if any person who has filed an election petition has in addition calling in question the election of the returned candidate claimed declaration that he himself or any other candidate has been duly elected and the specified officer is of the opinion: (a) that in fact the petitioner of such other candidate received a majority of valid votes or (b) that but for the votes obtained by the returned candidate the petitioner on such other candidate would have obtained a majority of valid votes; the specified officer shall after declaring the election of the returned candidate to be void, declare the petitioner on such other candidate as the case may be to have been duly elected.

13- That, sub-Rule (3) of Rule 23 further empowers the Specified Officer to take action against all such persons found guilty of corrupt practice. It stipulates-

"3. At the time of making order under this rule, the specified officer shall also make an order-

a. Where any charge is made in the petition of any corrupt practice having been committed at the election, recording-

(i) a finding wherther any corrupt practice has or has not been proved to have been committed at the election and the nature of that corrupt practice, and

(ii) the name of all persons, if any, who have been proved to have been guilty of any corrupt practice and the nature of that practice; and

b. fixing the total amount of costs payable and specifying the persons by whom the costs shall be paid:

Provided that a person who is not party to the petition shall not be named in the order under sub-clause (ii) of clause (a) unless-

(a) he has been given notice to appear before him and show cause why he should not be so named; and

(b) if he appears in pursuance of the notice, he has been given an opportunity of cross examining any witness who has already been examined by the specified officer and had given evidence against, of calling evidence in his defence and of being heard."

14- The Specified Officer, being empowered to impose penalty on such persons found guilty of corrupt practice has to strictly adhere to the stipulation mentioned in sub-Rule (3) of Rule 23.

15- In the case at hand apparent it is from the pleading as contained in paragraph 2 and 3 of the Election Petition that respondent No.1 has specifically given the names of voters who have casted the votes at two places. It was therefore, incumbent upon respondent no.1 to have examined these very voters to substantiate the contentions put forth in the election petition instead of that petitioner as apparent from the finding recorded by the Specified Officer only examined himself and other such persons who were not named in the election petition of having casted the votes in favour of the petitioner. The Specified Officer instead of summoning the person who were named in the election petition having casted votes at two places went on record his conclusion as to the unfair means and the corrupt practice allegedly adopted by the petitioner in the election.

16- Trite it is that to establish the allegation of corrupt practice incumbent

it is upon the election petitioner (respondent no.1 herein) to have led cogent evidence.

17- In *Surinder Singh v. Hardial Singh and others:* AIR 1985 SC 89 it has been held -

> "23- It is thus clear beyond any doubt that for over 20 years the position has been uniformly accepted that charges of corrupt practice are to be equated with criminal charges and proof thereof would be not preponderance of probabilities as in civil action but proof beyond reasonable doubt as in criminal trials. We are bound by the decision of the larger Bench in *Mohan Singh's case* (supra) as also by decisions of coordinate benches and do not feel inclined to take a different view. ....."

18- In *Gajanan Krishnaji Bapat and another v. Dattaji Raghobaji Meghe and others:* AIR 1995 SC 2284 it has been observed:

> "16. The election law insists that to unseat a returned candidate, the corrupt practice must be specifically alleged and strictly proved to have been committed by the returned candidate himself or by his election agent or by any other person with the consent of the returned candidate or by his election agent. Suspicion, howsoever, strong cannot take the place of proof, whether the allegations are sought to be established by direct evidence or by circumstantial evidence. Since, pleadings play an important role in an election petition, the legislature has provided that the allegations of corrupt practice must be properly alleged and both the material facts and particulars provided in the petition itself so as to disclose a complete cause of action." (please also see *Quamarul Islam v. S. K. Kanta* 1994 AIR SCW, 1598).

19- In *Baldev Singh Mann v. Surjit Singh Dhiman:* AIR 2009 SC 1045 it is held:

> "24. ..... The law is now well-settled that charge of a corrupt practice in an election petition should be proved almost like the criminal charge. The standard of proof is high and the burden of proof is on the election petitioner. Mere

preponderance of probabilities are not enough, as may be the case in a civil dispute. Allegations of corrupt practices should be clear and precise and the charge should be proved to the hilt as in a criminal trial by clear, cogent and credible evidence."

20- In *Ram Singh and others v. Col. Ram Singh:* AIR 1986 SC 3:

"117- ..... Even if the respondent made some admissions in his unguarded moments that would not strengthen the case of the appellants in view of the standard of proof required in an election matter where the allegations of corrupt practice have to be proved beyond reasonable doubt almost just like a criminal case."

21- In the case at hand the findings recorded by the Specified Officer on the basis of 'some' evidence which has been led by respondent no.1 since does not meet out the parameters as is being set out by various decision of the Supreme Court nor does it take into consideration the cogent evidence of the persons who were said to have participated in casting votes at two places, does not lead to a conclusion that the returned candidate, the petitioner herein has taken recourse to unfair means and corrupt practice as alleged.

22- In view whereof, the findings arrived at by the Specified Officer being perverse cannot be given the stamp of approval and are hereby set aside.

23- There is another aspect of the matter besides the factum of proving corrupt practice . It is apparent from Rule 6 of 1995 Rules that a specific relief as is being delineated therein has to be set for in an election petition.

24- In the case at hand, the respondent no.1 as apparent from the election petition has not sought the relief of setting aside the election and declaring it to be null and void. Instead the respondent no.1 sought the relief of declaring the alleged votes casted in favour of the petitioner as invalid and declare fresh result in favour of respondent no.1 as elected.

25- The relief sought by respondent no.1 election petitioner in the election petition were as under-

"16. अतएव माननीय न्यायालय से विनम्र प्रार्थना है कि याचिकाकर्ता द्वारा प्रस्तुत याचिका स्वीकार कर निम्नानुसार अनुतोष प्रदान करने की कृपा करें:–

1. यह कि जनपद पंचायत दमोह के क्षेत्र कमांक 05 समन्ना के मतदान

केन्द्र कमांक 25,26 समन्ना, 27 आंवरी, 161 लुर्हरा, 183 नोनपानी के मतों की पुर्नमतगणना कराये जाने हेतु आदेश पारित किया जावे ।

2. यह कि याचिकाकर्ता के मतदान केन्द्र कमांक 25 में 5, 26 में 5, 27 में 20, 161 में 10 एवं 183 में 20 वैध मतों को उत्तरवादी कमांक 1 के अधीनस्थ मतगणना अधिकारियों द्वारा अवैध घोषित करने को नियम विरूद्ध घोषित कर उक्त 60 मतों को वैध घोषित किया जावे एवं उत्तरवादी कमांक 2 के उक्त मतदान केन्द्रों के 5, 10, 30, 5, 30 कुल 80 अवैध मतों को उक्त अधिकारियों के वैध घोषित किये जाने के कृत्य को शून्य घोषित कर उक्त 80 मतों को निरस्त किया जावे ।

3. यह कि उत्तरवादी कमांक 2 के पक्ष में दो स्थानों के 22 मतदाताओं द्वारा डाले मतों को एवं कंडिका 2 वर्णित 80 मतों को निरस्त कर जनपद पंचायत दमोह के क्षेत्र कमांक 05 समन्ना के जनपद सदस्य के निर्वाचन का परिणाम घोषित किया जावे ।

4. यह कि याचिकाकर्ता को उत्तरवादी कमांक 1 व 2 से संपूर्ण याचिका खर्च दिलाया जावे ।"

26- Apparent it is from Rule 6 of Rule 1995 that two fold declaration can be sought for by the election petitioner, viz, (a)a declaration that the election of all or any of the returned candidates is void; and (b) in addition thereto, a further declaration that he himself or any other candidate has been duly elected. As apparent it is from the relief sought for by the respondent no.1 that no relief was sought by him for declaring the election as null and void, despite thereof the Specified officer proceeded to declare the entire election void by allowing the election petition. Thus , the Specified officer exceeded the relief sought for by respondent no.1.

27- In *Om Prakash and others v. Ram Kumar and others:* (1991) 1 SCC 441 it is held " A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute." (Please also see *Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi:* AIR 2010 SC 475 and *Manoharlal (D) by LRs v. Ugrasen (D) by LRs and others:* AIR 2010 SC 2210).

28- In view of these pronouncement of law in respect of relief sought and can be granted by the Court, the decision in *Maharishi Ved Vigyan Vishwavidya Peetham v. State of M. P. and others* 1998 RN 202 relied by the respondent No.1 is of no assistance to the respondents.

29- In view whereof, this Court is of considered opinion that the Specified Officer exceeded in granting the relief by declaring the election of member of Janpad Panchayat Sammana as void which was not sought for by respondent no.1. For this reason also the order deserves to be set aside.

30- The next contention put forth by learned counsel for the petitioner is that the election petition which is to be filed under Section 122 of the Adhiniyam 1993 has to be in consonance with rule 3 of the Rules of 1995. It is urged that sub-rule (1) of Rule 3 clearly stipulates that an election petition shall be presented to the specified officer during the office hours by the person making the petition or by a person authorized in writing in this behalf by the person making the petition.

31- It is urged that in the case at hand the respondent no.1 had engaged the counsel and it is the counsel who had presented the petition before the Specified officer. To substantiate the submissions petitioner has relied on the order sheet dated 15.3.2010, the date on which the election petition was presented before the Specified officer. The order sheet dated 15.3.2010 is extracted as :

"15-03-2010

1- आवेदक/याचिकाकर्ता मदन वल्द उमाशंकर निवासी समन्ना ने जनपद पंचायत दमोह के क्षेत्र कमांक 05 से दिनांक 3.2.2010 को जनपद पंचायत सदस्य पद पर हुए निर्वाचन से असंतुष्ट होकर म0प्र0 पंचायत एवं ग्राम स्वराज अधिनियम 1993 की धारा 122 के तहत निर्वाचन याचिका अधिवक्ता श्री संतोष नामदेव के माध्यम से प्रस्तुत की है । याचिका के साथ निर्धारित शुल्क 500 रूपये के चालान की प्रति एवं शपथ–पत्र एवं सूची अनुसार दस्तावेज संलग्न किये हैं ।

2. प्रकरण ग्राह्यता के बिन्दु पर विचारार्थ ।"

32- Decision in *Raman Lal Surajbhan Premy v. Shiv Pratap Singh and another:* 1978 MPLJ 399, *Suman Santosh Kumar Patel v. Bhanwanti Mahesh Pratap Patel and another:* 1999(1) MPLJ 88, *Tara v. Dabla alias Lalita and others:* 2002 (2) M.P.H.T. 554 and *Urmila Devi v. Returning Officer (Panchayat) and others:* (2008) 4 MPHT 410 has been placed reliance on by the petitioner in support of his contention.

33- In *Ramanlal Surajbhan* (Supra), an election petition under representation of People's Act 1951 while holding the presentation of petition by election petitioner as mandatory it has been observed -

> "17. The Court is enjoined by section 86(1) of the Representation of the People Act to dismiss the petition if the presentation did not comply with the provisions of section 81. The manner of presentation, by the very nature of penalty imposed for non-compliance, makes it obligatory, and the compliance ought to be strictly within the letters of the law. The Court has no power to act in any other manner. Where the Legislature has in its wisdom made the observance of certain formalities and provisions mandatory, the failure in that respect must be visited with a dismissal of the petition.
>
> 18. The learned counsel for the petitioner relied on the authority of the Supreme Court reported in *Sheodan Singh v. Mohan Lal:* AIR 1969 SC 1034; wherein the presentation of an election petition by an Advocate's clerk in the immediate presence of the petitioner was held to be proper presentation. The Court said that it was in substance though not in form, presentation by the petitioner himself, and, therefore, the requirement of law was fully satisfied. The learned counsel says that the presentation, in the instant case, was made by the counsel, in the immediate presence of the candidate; whether the candidate was present in the room itself or outside, should hardly matter when he was available to the counsel if the Deputy Registrar had any questions to ask, which should be within the personal knowledge of the candidte, or if he had any doubts as to the identity of the person presenting the petition. The candidate did appear before the Deputy Registrar on the previous day for swearing an affidavit. The petition was kept

duly signed on that day. The authenticity of the person was not in doubt. Should it not, therefore, be sufficient compliance if the formality of presentation was done by the counsel and the candidate waited outside the room? If required, he could be called in.

19. In my view, the formality of presentation by the candidate himself, however, insignificant it may appear under the circumstances, was yet a mandatory formality, the non-observance of which invalidate the presentation. If the candidate waited outside the room or was somewhere away, the presentation could not be construed as one in his immediate presence, to imply presentation by him personally. It was all the same presentation by a counsel."

34- A similar view has been expressed in *Suman Santosh Kumar Patel* (supra) wherein it was observed-

"8- ..... there is distinction between the 'present' and 'presentation'. Even if the Election Petition was present before the sub-Divisional Officer on 26.7.1997 even then it cannot be said that the election petition as required under sub-Rule (1) of Rule 3 of 1991 Rules was presented by the Election Petitioner before the Sub-Divisional Officer on 26.7.1994 as it is established from the record that it was in fact presented to the Office Superintendent of the Collectorate Rewa on 23.7.1994 and by evidence no link has been established regarding the fact that it was taken back from the superintended on 23.7.1994 and was presented on 26.7.1994 to the Sub-Divisional Officer. It thus, cannot be held that the Election Petition was presented to the Specified Authority on 23.7.1994 by the Election Petitioner himself. Apart from this it is a settled position of law that if a thing is required to be done in a particular manner then either it should not be done in the manner provided for or it should not be done at all. The presentation of Election Petition was not done in the manner provided therefore."

35- Though it is contended on behalf of respondent no.1, that he was very much present when the election petition was filed by his counsel

and that he has authorised his counsel to file his petition by endorsing the words 'election petition' in the Vakalatnama, in the considered opinion of this Court is of no assistance to the petitioner.

36- The Vakalatnama said to have been executed in favour of the counsel was the following terms:

> "मैं/हम मदन वल्द उमाशंकर पाण्डेय समन्ना व्यवहार न्यायालय/फौजदारी न्यायालय/राजस्व न्यायालय या किसी समक्ष पदाधिकारी या किसी शासकीय/गैर शासकीय विभाग में मूलवाद चुनाव याचिका कार्यवाही या उसकी/अपील/रिवीजन/रिव्यू में अपनी ओर से उसे प्रस्तुत करने या बचाव करने या पैरवी करने के लियेः श्री संतोष नामदेव एड0 सिंह राजपूत एड0 को अपना अधिवक्ता नियुक्त कर इकरार करता हूँ कि तत्संबंध में जो भी कार्यवाही या पैरवी आवश्यक हो मेरी/हमारी ओर से करें । आवश्यकतानुसार अपनी ओर/मेरी/हमारी ओर से दूसरा अधिवक्ता नियुक्त करे, नालिश दावा, अपील रिवीजन, रिव्यु जो भी कार्यवाही हो उठा सकते हैं या सम्बन्धित प्रकरण में दस्तावेज, कागजात, आवेदन, जवाब वगैरह प्रस्तुत करें या वापिस लेवें या रूपया जमा करें या उठावें/डिकी या निष्पादन करके रूपया सामान आदि वसूल करें या खजाने से प्राप्तकर रसीद पेश करें अर्थात् प्रकरण में जो भी कार्यवाही आवश्यक हो उसे मेरी/हमारी ओर से करने के लिये अधिकृत हैं । तदनुसार मेरे अधिवक्ता के रूप में उपरोक्तानुसार की गई समस्त कार्यवाही मुझे/हमें मान्य व स्वीकार होगी । हर पेशी पर मैं/हम या हमारा मुख्तयार या अधिकृत व्यक्ति उपस्थित रहकर अधिवक्ता महोदय को पुकार की सूचना देवेंगे अन्यथा अनुपस्थितिथि की दशा में प्रकरण निरस्त होने या एकपक्षीय होने का उत्तरदायित्व मेरा/हमारा होगा । अधिवक्ता महोदय को यह भी अधिकार होगा कि फीस न देने या बाकी होने की दशा में प्रकरण में उपस्थित हों या न हों । मूल प्रकरण तथा उसकी अपील रिवीजन या रिव्यू तथा रूपया जमा करने या उठाने की फीस अतिरिक्त होगी अतएव इकरार के साक्ष्य यह वकालतनामा निष्पादित कर दिया जिसके वर्णन के विपरीत कोई आपत्ति मान्य नहीं होगी ।"

37- The authorization to file an election petition has to be specific and not by mere endorsement as has been put in the Vakalatnama. It is not an authorization as is required under sub-Rule (1) of Rule 3 of 1995 Rules which clearly stipulates that there should an authorisation of writing in favour of the petitioner for presenting the election petition.

38- The decision relied upon by the petitioner in *Renu Shah v. Kant Shirh Dev Singh:* 2010 (4) MPLJ 405, is of no assistance to respondent no.1 as the same turn on its own fact wherein the order sheet dated 21.7.2010

specifically recorded that the presentation of the petition was by election petitioner who appeared along with the counsel "आवेदक सहित श्री सी० एम० गुप्ता अधिवक्ता उपस्थित ।"

39- Whereas the same is not the case in hand. Even the respondent no.1 did not put his signature on the order sheet dated 21.7.2010 as would lay any credence to the submission put forth on behalf of respondent no.1 that he was present and that the election petition was presented by him along with his counsel.

40- In view whereof, and taking into consideration the stipulation contained in Rule 8 of Rules 1995 which mandates that if provision of Rule 3 or rule 4 or rule 7 has not been complied with the petitioner shall be dismissed by the specified officers. This Court is of the considered opinion that the Specified officer committed grave error in entertaining the election petition not presented by the election petitioner (respondent no.1).

41- Having thus, considered it is held that the impugned order passed by the Specified Officer setting aside the election of the petitioner as Member, Janpad Panchayat, Sammana, is not sustainable in the eyes of law, accordingly the same is quashed.

42- In the result petition is allowed. However, no costs.

Petition allowed.

I.L.R. [2013] M.P., 2617
WRIT PETITION

Before Mr. Justice U.C. Maheshwari & Mr. Justice B.D. Rathi

W.P. No. 4020/2013 (Gwalior) decided on 3 July, 2013

COLLEGE OF SCIENCE & TECHNOLOGY ...Petitioner

Vs.

BOARD OF SECONDARY EDUCATION & anr. ...Respondents

Constitution - Article 226 - Natural Justice **- Applications for eligibility of Ist year students were rejected on the ground of delayed receipt of the same - No allegation that students were given admission after cut-off date - Why delay could not be condoned, reasons should have been mentioned - Speaking order is the part of natural justice - Matter remitted. (Para 10)**

संविधान – अनुच्छेद 226 – नैसर्गिक न्याय – प्रथम वर्ष के विद्यार्थियों की अर्हता हेतु आवेदन विलम्ब से प्राप्त होने के आधार पर अस्वीकार किया गया – कोई अभिकथन नहीं कि विद्यार्थियों को अंतिम तिथि के पश्चात प्रवेश दिया गया था – विलम्ब को माफ क्यों नहीं किया जा सकता, इसके कारण उल्लिखित किये जाने चाहिए थे – सकारण आदेश, नैसर्गिक न्याय का भाग है – मामला प्रतिप्रेषित।

Case referred :

(2012) 2 SCC 425.

Alok Sharma, for the petitioner.
J.P. Mishra, for the respondents.

ORDER

The Order of the court was delivered by :
B.D. Rathi, J.:- This writ petition No.4020/2013 has been filed under Article 226 of the Constitution of India being aggrieved by the action of respondents, whereby applications for eligibility of its First Year students of D.Ed. Course for 2012-13 have been rejected and returned to petitioner on the ground of late receipt of eligibility application, record and fees. Copy of the impugned order of respondent No.-2 dated 05.06.2013 is Annexure. P-1.

2. As per the petitioner's case, petitioner is running the course of Diploma in Education and is recognized by the National Council for Teachers Education and is affiliated to respondent No.1 Board of Secondary Education, Madhya Pradesh, Bhopal. Copy of recognition order dated 24.12.2008 is Annexure P-3. Name of petitioner is also reflected in the list of recognized institutions on the website of N.C.T.E. Copy of relevant part of list is Annexure P-4 in which at S.No.170 name of petitioner has been reflected. It has also been mentioned in the petition that name of petitioner also appears in the list (Annexure P-5) of affiliated institutions by respondent No.1 for the year 2012-13. The students for First Year Course of D.Ed. were admitted. Admission list was submitted by the petitioner to respondents on 25.05.2013 by Annexure P-6. Thereafter, the enrolment and eligibility fees for the students was deposited by the petitioner through Bank Challan on 29.05.2013 and copies of the application for. enrollment and eligibility of students were forwarded by petitioner to the respondents on 29.05.2013 by Annexure P-7. Last date of submission for admission list of First Year D.Ed. students was fixed by respondents.as 07.06.2013 by Annexure P-8. Thereafter, the examination forms of students of first year and second year both have been submitted by

the petitioner after uploading through online on 11.06.2013 received by respondents on 13.06.2013 (Annexure P-9) and because last date for submission of admission list was fixed by the Board as 07.06.2013, therefore, in view of this date it is crystal clear that the enrolment and eligibility fees for the students which was deposited by the petitioner on 29.05.2013 through Bank Challan was well within time. But, in spite of that, arbitratory order Annexure P-1 was passed by respondent No.2 on 05.06.2013.

3. The petitioner prayed for the following reliefs by this writ petition :-

"(I) That, this Hon'ble Court may kindly be pleased to allow this petition and impugned order/action contained in Annexure P-1 may kindly be declared as illegal and the same may kindly be quashed.

(II) That, respondents may kindly be directed to accept the enrolment and eligibility application forms of students of petitioner and further be directed to allow the students to appear in the examination of D.Ed. 1st year going to be held in July, 2013.

(III) Any other relief, which this Hon'ble Court may deem fit and proper may also be given to the petitioner along with Costs."

4. As per the return filed by respondents on 28.06.2013, the only objection which has been raised by the respondents is that eligibility fees was deposited on 29.05.2013 by the petitioner whereas the last date for this purpose was 15.05.2013 which was further extended upto 24.05.2013. Therefore, the eligibility forms of 46 students were rejected by the respondents. It was also mentioned that last date 07.06.2013 was fixed for submitting admission list by online. Admission list which could be filed by online upto 07.06.2013 means admission list only of those students to whom eligibility was already granted. In absence of eligibility, students or any institution cannot be permitted to submit examination form for first and second year examination of D.Ed. course and ultimately prayer for dismissal of writ petition has been made.

5. Arguments heard.

6. It is submitted by learned Advocate Shri Sharma on behalf of the petitioner that in fact any particular date for submission of enrolment and

eligibility applications and fees have never been communicated or published or informed by the respondents. It is also submitted that when last date was fixed as 07.06.2013 for submitting admission list by online process then impugned order Annexure P-1 dated 05.06.2013 has been passed arbitratorily and against the principle of natural justice by the respondents.

7. On the contrary, it is argued by learned counsel Shri J.P. Mishra on behalf of the respondents that last date for filing enrolment and eligibility forms and fees was fixed as 15.05.2013 and thereafter time was extended upto 24.05.2013 by issuing letter No.823/प.स./2013 dated 06.05.2013 and letter No.829/प.स./2013 dated 17.05.2013 respectively by the respondents and this fact was very well within the knowledge of petitioner, therefore, enrolment forms and eligibility fees filed after passing the date fixed for, could not be accepted by the respondents, hence, the order Annexure P-1 dated 05.06.2013 was rightly passed. It was also argued by learned counsel Shri Mishra that last date 07.06.2013 was not fixed for submitting enrolment and eligibility fees but that date was fixed to file list of admission of students to whom enrolment and eligibility has already been granted by the Board. It is also argued that petition be dismissed because such type of relief cannot be granted in view of principles laid down in *Adarsh Shiksha Mahavidyalaya & Ors. Vs. Subhash Rahangdale & Ors.* [(2012) 2 SCC 425] especially in para 87(xvi) at page 487.

8. In view of contentions advanced by both the parties, record has been perused.

9. Although in impugned order Annexure P-1 dated 05.06.2013 it was mentioned that last date 15.05.2013 was fixed for filing enrolment and eligibility form and fee by letter No. 823/प.स../2013, dated 06.05.2013 and thereafter this period was extended upto 24.05.2013 by letter No. 829/प.स./2013, dated 17.05.2013. But, neither the copy of these letters were filed nor the receipt of receiving these letters by petitioner, was filed by the respondents, in spite of the fact that on 29.05.2013 (Annexure P-7) letter addressed to Secretary, Madhyamik Shiksha Mandal, Madhya Pradesh, Bhopal was issued by Principal of. the petitioner's college in which it was clearly mentioned that till today college has not received any letter in regard to date for filing/depositing the eligibility fees. Petitioner has deposited Rs.13110/- on 29.05.2013 in State Bank of India, Branch Jayendraganj by Challan No.037388990 for 46 students @ Rs. 285/- per student. The fact of receiving letter dated 29.05.2013

(Annexure P-7) through respondents is clearly evident from order Annexure P-1 passed on 05.06.2013 by respondents itself.

10. Apart from this, for the sake of arguments if we are agreed that last date was 24.05.2013 for submitting the list of students along with requisite eligibility fee, even then reasons, why delay could not be condoned, should have been mentioned in order Annexure P-1 for refusal to accept the eligibility fee of 46 candidates, speaking order should have been passed by respondents, keeping in mind the principle of natural justice and future of 46 students.

11. It is not the allegation of respondents that all these abovementioned 46 students were provided admissions in college after the date fixed for and against the norms. Not only this the facts mentioned in para 5.2 of the petition "that the students for first course of D. Ed. were admitted in the petitioner's institution as per the prescribed procedure of respondents and principle Govt. Higher Secondary School Sakhani District Gwalior was appointed as departmental representative to supervise the admission process. The admission list was submitted by the petitioner vide covering letter dated 25.5.2013 before the respondents. The Copy of which is annexed and marked as Ann. P.6." were also not denied by the respondents in their return.

12. So far as the principles laid down by Apex Court in *Adarsh Shiksha Mahavidyalaya* case are not applicable in this particular case. In para 87(xvi) at page 487 it is mentioned that:-

> "The student admitted by the recognized institutions otherwise than through the entrance/eligibility test conducted in accordance with the admission procedure contained in para 3.3 of appendix 1 to the regulations are also not entitled to appear in the examination conducted by the examining body or any other authorized agency."

13. But, this is not the dispute of any party in this case. Therefore, respondents cannot be benefited.

14. In view of the discussions mentioned above we are of the considered view that this petition should be disposed of with a short direction.

15. Looking to the facts and circumstances of the case, petition is disposed of with a short direction that if petitioner prefer a representation to the respondents in regard to the dispute raised in this petition within a period of

two days since today i. e. 3.7.2013 then representation be decided before the date of commencement of examination and if it is found that all the 46 students can be allowed to appear in examination by condoning the delay may be by imposing late fees on them or otherwise, then appropriate directions be issued to petitioner in a way so that petitioner could be able to deposit the same.

16. No order as to costs. C.C. today.

Petition disposed of.

I.L.R. [2013] M.P., 2622
WRIT PETITION
Before Mr. Justice A.K. Shrivastava
W.P. No. 3768/1999 (Jabalpur) decided on 3 July, 2012

RAJENDRA PRASAD PATHAK ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

Insurance Act (4 of 1938), Section 45 - Repudiation of claim by insurer **- Assured concealed the reality that she was suffering from renal disease at the time of obtaining policy - It is gathered from bed head ticket that she was a patient of chronic renal failure for the last four years - Policy can be repudiated. (Para 9)**

बीमा अधिनियम (1938 का 4), धारा 45 – बीमाकर्ता द्वारा दावे का निराकरण – बीमित ने वास्तविकता प्रकट की कि पॉलिसी अभिप्राप्त करते समय वह गुर्दे की बीमारी से ग्रसित थी – बेड हेड टिकट से पता चलता है कि वह पिछले चार वर्षों से दीर्घकालिक गुर्दे नाकाम होने की मरीज थी – पॉलिसी का निराकरण किया जा सकता है।

Cases referred :

AIR 1985 SC 1265, W.P. No. 7269/2002 decided on 23.11.2006, AIR 1986 Kerala 201, AIR 2001 SC 549.

B.K. Pandit, for the petitioner.
D.K. Dixit, for the respondents No. 2 & 3.

ORDER

A.K. Shrivastava, J.:- By this petition under Article 226 and 227 of the Constitution of India the petitioner has challenged the action of the respondents 2 and 3 by which the claim of the petitioner to benefit him from

the death insurance policy of his mother has been denied.

2. In brief, the case of the petitioner is that his mother, namely, Pavitra Devi Pathak (hereinafter referred to as "the assured") took the death claim policy No.370725612 (for short "the policy") and signed the proposal and personal statement for insurance on 27.2.1995. However, unfortunately she died within two months on 21 .4.1995 in the M.P. Electricity Board Hospital, Jabalpur. Thereafter, on being approached by the petitioner to respondent No.2, Senior Divisional Manager to provide benefit of the policy, the said respondent vide letter dated 31.3.1999 (Annexure P-1) declined to provide such benefit on the ground that there was material concealment of fact at the time when the proposal to obtain policy was submitted by the assured and on the basis of wrong and false information in regard to her health the policy was obtained. The petitioner against the order of the respondent No.2, Senior Divisional Manager, filed a departmental appeal before the Regional Manager, LIC, Bhopal (respondent No.3) vide appeal memo dated 10.5.1999 (Annexure P-3). The appellate authority (respondent No.3) on 10.5.1999 intimated the petitioner that his appeal shall be decided immediately but till the date of filing of the petition (i.e. 17.8.1999) the appeal was not decided and hence, the present petition has been filed and it has been prayed by the petitioner that because the assured was holding a valid policy and on account of her death, the petitioner is entitled for the claim under the policy.

3. All the respondents have filed a joint return and raised the plea of dismissal of the petition because alternative remedy to file the civil suit is available. On merits it has been contended that deliberately incorrect information in regard to health was supplied by the assured stating that she did not remain ill for last five years with a disease which was persisting for more than a week; she was never admitted in any hospital for surgery; she is not suffering from any ailment of lever; abdomen, heart, lungs, kidney and brain etc. and she is also not suffering from diabetes, tuberculosis, high or low blood pressure etc. According to the stand taken in the return, the assured/deceased was a chronic patient of renal disease. It is further stated in the return that the appeal filed by the petitioner had already been dismissed on 4.9.1999 and it has also been intimated vide order contained in Annexure R-/2(4) to the return. Hence, it has been prayed in the return that the petition be dismissed.

4. The contention of Shri Pandit, learned counsel for the petitioner is that the policy was obtained on 27.2.1995, however, after two months all of a sudden the

assured sustained heart attack on 18.4.1995, as a result of which she was admitted in M.P. Electricity Board Hospital, Jabalpur where she breathed her last after three days on 21.4.1995 on account of cardio respiratory arrest. According to learned counsel, the assured was not aware that she was suffering from any chronic renal disease and therefore, in the proposal form she answered the question in negative and therefore, since the assured was fully covered under the policy the petitioner is entitled for the claim under the policy.

5. On the other hand, Shri Dixit, learned counsel for the respondents submitted that deliberately the assured concealed that she is a chronic patient of renal disease and by submitting false information the insurance policy was obtained and therefore, the claim of petitioner under the policy cannot be accepted. It has also been put forth by him that since there is factual dispute, the petitioner should have filed the civil suit. In this regard he has placed reliance on the decision of Supreme Court, *Life Insurance Corporation of India and others vs. Smt. Kiran Sinha,* AIR 1985 SC 1265. By placing reliance on single Bench decision of this Court *Shyam Sunder Tripathi vs. Life Insurance Corporation of India and another,* W.P. No.7269/2002 decided on 23.11.2006 by Hon'ble Mr. Justice Dipak Misra (as His Lordship then was) it has been submitted that if the assured at the time of obtaining the policy has concealed the ailment etc. then after the death of the assured heirs are not entitled for the claim under the policy. On these premised submissions it has been prayed that this petition be dismissed.

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

7. Although normally the claimant should have filed a civil suit because there is factual dispute but in the present case the stand of the respondents appears to be correct that at the time of obtaining the policy the assured concealed the reality that she was suffering from renal disease. On bare perusal of the bed-ticket (Annexure R-2/(3)) of the M.P. Electricity Board Hospital, Jabalpur where the assured was admitted on 18.4.1995 it is gathered that she was a patient of CRF (Chronic Renal Failure) for last four years. Learned counsel for the petitioner submits that assured was not aware that she is suffering from such ailment. To me, if she was a chronic patient of renal failure for last four years certainly she must not be healthy and must be having some complaint in that regard and therefore, according to me, since she deliberately did not disclose in the proposal form that she is suffering from renal disease, I am of the view that her heirs are not entitled

for the claim under the policy after her death.

8. Admittedly, the death policy was obtained on 27.2.1995 and after within two months therefrom the assured had died in the hospital on 21.4.1995. In the decision of *Shyam Sunder Tripathi* (supra) reliance was also placed on the Division Bench decision of *Kerala High Court, P. Sarojam vs. L.I.C. of India,* AIR 1986 Kerala 201 in which it was held that even before obtaining death policy Medical Officer of the Corporation had certified the life assured as good would not be of any consequence. The false answers to the question in the proposal form given by the assured relating to the state of her health vitiate the contract of insurance and according to me the insurer is entitled to repudiate the policy and to decline the payment. To me, it was the duty of the assured to disclose material facts because it continues right upto the conclusion of the contract.

9. If there is any misrepresentation or suppression of material fact the insurer certainly has a right to repudiate the claim made under the policy which was obtained under the suppression of true facts. In this regard, I may profitably place reliance on the decision of Supreme Court *Life Insurance Corporation of India vs. Smt. Asha Goel*, AIR 2001 SC 549.Since the assured was suffering from renal disease for last four years before she was admitted in the hospital, according to me, material facts have been suppressed and therefore, the petitioner is not entitled for any relief.

10. For the reasons stated herein-above, this petition fails and is hereby dismissed with no order as to costs.

Petition dismissed.

I.L.R. [2013] M.P., 2625

WRIT PETITION

Before Mr. Justice P.K. Jaiswal & Mrs. Justice S.R. Waghmare

W.P. No. 1198/2004 (Indore) decided on 19 August, 2013

MARICO INDUSTRIES LTD. ...Petitioner

Vs.

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

***Entry Tax Act, M.P. (52 of 1976) - Charging Section - "Mediker" and "Starch"* - Mediker and Starch have not been classified under Entry Tax Act nor are covered under Schedules I & II - Charging**

Section has to be taken into consideration - "Mediker" is basically a medicinal product but is used as shampoo - However, its period of treatment is four weeks and shampoo is not used generally for washing hair and therefore, principle of *ejusdem generis* is not applicable - It is out of the purview of Schedule III and cannot be taxed since both 'Mediker' and 'Starch' are used in production of further products and not meant for sale - As article is not taxable goods under the statute then the provisions of Entry Tax Act cannot be attracted - Petition allowed. **(Paras 8 & 9)**

प्रवेश कर अधिनियम, म.प्र. (1976 का 52) – अधिरोपण करने वाली धारा – "मेडीकर" और "स्टार्च" – मेडीकर और स्टार्च को प्रवेश कर अधिनियम के अंतर्गत वर्गीकृत नहीं किया गया है और न ही अनुसूची I व II के अंतर्गत आते हैं – अधिरोपित करने वाली धारा को विचार में लिया जाना चाहिए – "मेडीकर" मूलतः औषधि उत्पाद है परन्तु शैम्पू के रुप में उपयोग किया जाता है – अपितु, उपचार की उसकी अवधि चार सप्ताह है और शैम्पू का उपयोग सामान्यतः बाल धोने के लिये नहीं किया जाता और इसलिए सजाति का सिद्धांत लागू नहीं होता – वह अनुसूची III की परिधि से बाहर है और उस पर कर नहीं लगाया जा सकता, चूंकि "मेडीकर" और "स्टार्च" का उपयोग अन्य उत्पाद के उत्पादन में किया जाता है और विक्रय के लिए नहीं है – चूंकि वस्तु, कानून के अंतर्गत कर योग्य माल नहीं, तब प्रवेश कर अधिनियम के उपबंध लागू नहीं किये जा सकते – याचिका मंजूर।

Cases referred :

1990-(027-ECR-0406-CEGAT, (1975) 36 STC 191(SC), (1981) 21 CTR (SC) 138, 142 Income Tax Reports (Vol.XL), 596 Sales Tax Cases (Vol.137), (2013) 8 STD 1, 1989(39) ELT 468.

H.Y. Mehta, for the petitioner.
Mini Ravindran, Dy. G.A. for the respondents/State.

ORDER

The Order of the court was delivered by:
MRS. S.R.WAGHMARE, J.:- By this writ petition under Articles 226 and 227 of Constitution of India, the petitioner Marico Industries Ltd. has challenged the order dated 05.01.2004 passed by Additional Commissioner Commercial Tax in revision case No.80/03/Ind/Entry Tax.

02. Brief facts giving rise to the petition are that the petitioner is a manufacturer of hair oil, edible oil, Mediker, Starch and other products for

sale in M.P. and is the registered dealer under M.P. Commercial Tax Act 1994 (Originally M.P.G. Sales Tax Act), and being a dealer is liable to be assessed under the M.P. Entry Tax Act 1976 (hereinafter called E.T. Act) for brevity. The assessment years for E.T. Act for the products 'Mediker' and 'Starch' in the petition pertains to period 01.04.1999 to 31.03.2000 and for the same relevant period under the Commercial Tax Act 1994 (hereinafter called C.T. Act) for brevity, 'Mediker' was an item chargeable (including surcharge)@6.9% upto December 1999 and @9.2% from January 2000 onwards, under the item 'drugs and medicine' under Schedule II part VII. However, if the product is treated as Shampoo i.e. toilet or cosmetics then it is chargeable @13.08% and Counsel urged that such a classification is not all attracted in the present case, since 'Mediker' is an anti-lice treatment product.

Secondly, 'Starch' although chargeable under the C.T. Act is not a 'Chemical' as per the Counsel for the petitioner, chemical is a separate entry under the E.T. Act and starch is not included in schedule I or schedule II under the Act.

03. Counsel for the petitioner contented that the petitioner has regularly filed return from time to time under both the Acts and paid the taxes as required and it is also not in dispute petitioner is a 'Dealer' liable to pay tax under Section 3(1)(a) of E.T. Act only if the goods so brought in are items shown in schedule I or II of the Act, however under the schedules I and II of the E.T. Act 'medicine and drugs' and 'starch' are not mentioned and these products are brought from outside Madhya Pradesh but they are not for sale and also since they do not find mention in the schedules they do not attract the provisions of the E.T. Act. Hence, the petitioner filed an application for exemption. It was vehemently contended by the Counsel for the petitioner also that 'Mediker' is the medicine and drug in Commercial Tax Act and 'Starch' as such is 'Starch' and not a chemical. In the assessment proceedings by respondent No.3 Assistant Commercial Tax Officer agreed with the contention of the Counsel for the petitioner. However, the contention was not acceptable under the Entry Tax Act and vide Annexure P/2 respondent No.3 has wrongly disallowed the claim for exemption under the E.T. Act. Being aggrieved by the order the petitioner had also filed revision before respondent No.2 Additional Commissioner, Commercial Tax and the respondent No.2 upheld the order of respondent No.3 vide Annexure P/1. The respondent No.2, however, treated as Mediker as item of 'drugs and medicine' chargeable at @6.9% upto December 1999 and @9.2% for 'Starch' as 'Starch' and not

as chemical under Commercial Tax Act vide Annexure P/5 and being aggrieved the petitioner has filed the present petition.

04. The main contention of the Counsel for the petitioner is that it is still the question whether the 'Mediker' is to be classified under an item 'drugs and medicine' under the M.P. Commercial Tax Act also and 'Starch' is not to be treated as the Chemical under the E.T. Act. Counsel stated that once it was accepted in the main case of the Commercial Act that Mediker was under the entry lice medicine although used as shampoo for washing hair it could not be purely treated as shampoo. Moreover under Commercial Act, it would have been assessed @13.8% instead if @6.9% or @9.2% as held by the Commercial Tax Officer. Counsel prayed that the impugned order Annexure P/1 and Annexure P/2 including the demand notice be quashed or set aside. To bolster his submissions Counsel relied in the matter of *Collector of C.Ex. V. Pharmasia (P) Ltd.* 1990-(027-ECR-0406-CEGAT to state that in the said matter, the Collector appeals, held that we further observe that the medicinal use of the product is not its subsidiary function but is the only function. Therefore, the classification of the product under 33.05 is ruled out. Since we have already held that the product is classifiable as medicament under 30.03 by virtue of note 1 (c) to Chapter 38 the product cannot be classified under Chapter 38. [paras 16, 17, 20 and 21]. Counsel relied in the matter of *The State of Tamil Nadu V. M.K. Kandaswami and others* [1975] 36 STC 191 (SC) to state that whether under the charging section the goods purchased are 'goods for sale or purchase of which is liable to tax under this Act has to be decided first i.e., **the touch stone is the charging section;** and by exclusion or implication; goods, the sale and purchase of which it may be totally exempted from has to be considered in this light.

05. More or less the same principle is enunciated in the matter of *Commissioner or Income Tax Vs. B.C. Srinivasa Setty* (1981) 21 CTR (SC) 138. Further Counsel relied on *Commissioneror Income Tax, Bombay City V. Elphinstone Spinning and Weaving Mills Co. Ltd* 142 Income Tax Reports (Vol. XL) to state that if the words of a taxing statute fail, then so must the tax. The Courts cannot, except rarely and in clear cases, help the draftsmen by a favourable construction. Counsel submitted that an item Mediker was not mentioned any of the schedules and if we look to the charging section in the tax i.e. it fails and if the taxing statute fails, then so must the tax. Counsel also relied in the matter of

Commissioner of Central Excise Pondicherry V. ACER India Ltd. 596 Sales Tax Cases (Vol 137) Counsel submitted that Apex Court has held in the charging section, language according to its natural meaning has to fairly and squarely hit the classification, and is to be considered. They cannot tax by implication; the liability must fall within ambit by clear words. Counsel relied on *Grasim Industries Ltd. v. Collector of Customs, Bombay (S.C.)* 349 to state that when classification included specified 'and the other items' but they do not refer to items of the same genus then the principle of *ejusdem generis* is not applicable i.e. words must be enumerated in the statute or words must follow the genus term and the legislature intent has also to be considered.

06. In the present case Counsel submitted that Mediker contains an active ingredient permethrin which is used to paralyse the insect lice, thereby killing it and although it is used in the form of shampoo; it is not purchased for washing hair generally. Besides Mediker is one of the ingredient used in a shampoo and Counsel submitted that the genus has to be considered and expressions 'other' and 'and the like' 'other' could not be equated to the words 'similarly' as laid down in *Grasim Industries* (supra). Counsel submitted that the Apex Court held in the matter of *Tata Sky Ltd. V. State of M.P. and others* (2013) 8 STD 1 that it is well settled that if the collection machinery provided under the Act is such that it cannot be applied to an event, it follows that the event is beyond the charge created by the taxing statute and submitted that E.T. Act could not apply beyond verge of the charging section.

Counsel for the petitioner submitted that Starch as well as Mediker has already been considered as being exempted for E.T. Act by Assistant Commercial Tax in the case of the petitioner himself in the subsequent years 2000-01, 2001-02, 2002-03 and 2003-04 and in this light also the two articles are not under the purview of the schedule II and do not attract E.T. Act liability as held by the Courts below.

07. **Per Contra,** Counsel for the respondents/State has fully supported the orders and the judgments of the lower Courts and stated that there are based proper classification of the articles stating that the 'Mediker' was properly used as shampoo, which is classified E.T. Act schedule II as **'cosmetic'** and was liable to tax. And stating that 'Starch' has been duly classified by the authority under the head of **chemical** along with the articles

colour fix. Besides the petitioner failed to produce any evidence in the Courts below regarding the said articles being otherwise and hence no fault can be found by the classification as accepted by lower Courts. Counsel submitted that in the impugned order Annexure P/3 in the case of *Sunny Industries v. Collector of Central Excise* [1989 (39) ELT 468] stated that the evidence laid before the Collector included that publication 'Manufacture of Beauty Products' (pages 110 to 112, SBP) and argued that antibacterial and anti dandruff shampoos were considered as shampoos only. Counsel prayed that the petition was without merit and the same be dismissed as such.

08. Having bestowed of our anxious consideration to the above submissions and to the record and the impugned orders, we find that 'Mediker' and 'Starch' admittedly having not been classified under the Entry Tax Act nor is it covered under schedules I & II of the said Act. Then undoubtedly the charging section is to be taken into consideration and requires to be interpreted. The Apex Court held already directed that the goods may be charged under the charging section by exclusion or implication and in the present case it has to be considered on the touch stone of the charging section by implication. 'Mediker' is basically a medicinal product but is used as shampoo, however, its period of treatment is four weeks and the shampoo is not used generally for washing hair and, therefore, the principle of ejusdem generis is not applicable [(*Grasim Industries Ltd.* (supra) relied on] and in this sense, it is not the cosmetic and, therefore, both the respondents No.2 & 3 Additional Commissioner Commercial Taxes & Assistant Commercial Tax Officer have erred in charging Mediker and Starch under the Entry Tax Act. Moreover it is also out of the purview schedule III cannot be taxed since both 'Mediker' as well as 'Starch' are used in the production of further products and not meant for sale as is being projected.

09. In this view of the matter, we find that the interpretation of the charging section by implication also must be followed in the strict sense, if the article is not taxable goods under the statute then the provisions of Entry Tax Act cannot be attracted. The Writ petition No.1198/2004 is, therefore, **allowed** and orders of both the Courts below impugned Annexure P/1 and Annexure P/2 along with the demand notice are hereby quashed.

Counsels fees, if certified.

Petition allowed.

I.L.R. [2013] M.P., 2631
WRIT PETITION
Before Mr. Justice Sujoy Paul
W.P. No. 8368/2013 (Jabalpur) decided on 20 September, 2013

SOUTH EASTERN COAL FIELD LTD. ...Petitioner
Vs.
UNION OF INDIA ...Respondent

A. Industrial Disputes Act (14 of 1947), Section 3 - Works Committee - **Requirement of constitution of works committee depends on general or special order by appropriate Govt. - As an order has been issued by the Govt. therefore, it is obligatory on the part of the petitioner to constitute the Works Committee. (Para 10)**

क. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 3 – कार्मिक समिति – कार्मिक समिति के गठन की आवश्यकता, समुचित सरकार के सामान्य या विशेष आदेश पर निर्भर होती है – चूंकि सरकार द्वारा आदेश जारी किये गये हैं इसलिए, कार्मिक समिति गठित करना याची के लिये बाध्यकारी है।

B. Industrial Disputes Act (14 of 1947), Section 36-B - Power to Exempt - **Exemption from constitution of works committee can be granted by applying the test that whether there exists adequate provision for investigation and settlement of industrial disputes in respect of workmen - Application for exemption was required to be decided considering that whether the committee mentioned by petitioner is well equipped and suitable which can investigate and settle the industrial disputes of workmen - As the application for grant of exemption has been rejected only on the ground that constitution of works committee is a statutory requirement therefore, matter is remanded back to decide the application of exemption afresh in the light of Section 36-B of the Act. (Paras 11 to 14)**

ख. औद्योगिक विवाद अधिनियम (1947 का 14), धारा 36बी – छूट देने की शक्ति – कार्मिक समिति के गठन से छूट, इस परीक्षण को लागू करके प्रदान की जा सकती है कि क्या कर्मकारों के संबंध में औद्योगिक विवादों की जांच एवं निपटारे के लिये पर्याप्त उपबंध अस्तीत्वमान है – छूट के आवेदन का निर्धारण यह विचार में लेकर किया जाना अपेक्षित था कि क्या याची द्वारा उल्लेखित समिति परिपूर्ण एवं उपयुक्त है जो कर्मकारों के औद्योगिक विवादों की जांच एवं निपटारा कर सकती है – चूंकि छूट प्रदान किये जाने हेतु आवेदन को केवल इस आधार पर

अस्वीकार किया गया कि कार्मिक समिति का गठन, कानूनी अपेक्षा है और इसलिए अधिनियम की धारा 36बी के आलोक में नये सिरे से निर्णित करने के लिए मामला प्रतिप्रेषित।

C. Interpretation of statute - Reasons - **Reasons assigned in impugned order are to be seen - Any other reason by way of reply or counter affidavit cannot provide strength to impugned order. (Para 14)**

ग. कानून का निर्वचन – कारण – आक्षेपित आदेश में दिये गये कारण देखे जाना चाहिए – प्रतिउत्तर या प्रतिशपथ पत्र द्वारा कोई अन्य कारण, आक्षेपित आदेश को बल प्रदान नहीं कर सकता।

Cases referred :

(1994) 3 SCC 1 , (1978) 1 SCC 405, 2002 (2) MPLJ 366, (2003) 6 SCC 545.

Indira Nair with *Rajas Pohankar* for the petitioner.
O.P. Namdeo with *Praveen Namdeo,* for the respondent.

ORDER

Sujoy Paul, J.:- These batch of petitions are analogously heard on the joint request of parties. Since similar question of facts and law are involved, the matters are decided by this common order.

The facts are taken from WP No. 8368/2013-

2. By filing these petitions under Article 226 of the Constitution the petitioner has called in question the legality, validity and correctness of the order dated 20th March, 2013 (Annexure P/1). By this order, the request of Coal India Limited for exemption from requirement of formation of works committee was rejected by the Ministry of Labour and Employment.

3. The case of the petitioner is that Coal India Ltd. has multilevel redressal mechanism. In this mechanism, prevailing since time immemorial, workmen can get their grievances redressed. Learned senior counsel Mrs. Nair contended that a Joint Bipartite Committee for Coal Industry (JBCCI) was constituted way back on 11.12.1974. Five Central trade unions viz. INTUC, BMS, HMS, AITUC and CITU are the members of JBCCI. The grievances of the workmen are redressed in the meeting of JBCCI. Attention of this Court is drawn on another committee, namely, Joint Consultative Committee (JCC). It is contended that JCC exists at unit level, area level and headquarter level. Issues

which remains unaddressed at unit level are brought to area level and then to the Headquarter. JCC consists of trade unions, leaders of all recognized trade unions as well as representatives from management. After due deliberation in session, the disputes are resolved in in-house mechanism. It is further contended that their exists a Welfare Board having representation of members of central trade unions and Coal Company comprising of CMD, Functional Directors and HOD of concerned department. This forum decides the budget, allocation of fund, fixing priority of expenditure with reference to needs of the employees, sets target for medical, housing, constructions and repairing etc.

4. In addition to aforesaid, it is contended that industrial relation meetings are held in regular intervals between the management and central trade unions at the area and unit level. The meetings are regularly convened to redress the grievances of workmen. Mrs. Nair, learned senior counsel submits that there exists a unique feature of of alternative effective institutional mechanism for redressal of grievances in Coal India which is not available in various other industries including BSNL and railways. It is contended that a bare perusal of the Code of Conduct Annexure P/3 makes it crystal clear that decision was taken to strengthen and develop participation system and continue it at all levels. It is contended that a minute reading of code of conduct makes it clear that all possible industrial disputes can be taken care of and resolved in the aforesaid mechanism.

5. The respondent issued the order dated 23.12.1994 (Annexure R/1A. The respondents directed to constitute the works committee under section 3 of Industrial Disputes Act, 1947 (ID Act). The Coal India Ltd. preferred a representation seeking exemption under section 36 (B) of the ID Act from constituting works committee. The said representation was rejected on 24.02.2000 (Annexure R/4). Thereafter WP No. 18574/2010 was filed by Jan Shakti Koyla Mazdoor Sangh. This Court disposed of the said petition on 12.01.2011 and directed the respondent No.6 to decide the representation seeking formation of works committee. The Coal India Ltd. filed review petition No. 323/2011 seeking review of that order . This Court rejected the said review petition on 15.07.2011 by holding that this Court has not expressed any opinion on the merits and merely directed to decide the representation. There is no error apparent on the face of the record which needs review.

6. The grievance of the petitioner is that after that the statutory officers of respondent department started action under section 34 of the ID Act. Criminal proceedings were lodged against the statutory officers of the petitioner company. Thereafter Coal India preferred another representation seeking exemption from

constituting works committee in CIL and its subsidiary companies. This Court in WP No. 3564/2013 passed an order dated 13.03.2013 (Annexure P/19). By the said order, the petition was disposed of with the direction to the respondent No.1, Ministry of Labour, to decide the representation preferred on behalf of the CIL seeking exemption from the applicability of section 3 of the ID Act within stipulated period. Till such decision is taken, show cause notices were directed to be kept in abeyance. By the impugned order, application seeking exemption under Section 36B is rejected by the respondent. This order is called in question in four writ petitions which are WP No. 8368/2013, WP No. 12379/2012, WP No. 14791/2013 and WP No. 15657/2013.

7. Criticizing the impugned order, Mrs. Nair submits that in the order it is mentioned that works committee is a statutory requirement and such requirement cannot be substituted by bipartite committee or welfare committee. She submitted that reasons assigned are not in consonance with the relevant considerations mentioned in section 36 (B) of the ID Act. By taking this Court to various documents i.e. memo of agreement Annexure P/2 dated 11th December, 1974, code of conduct dated 03.08.1994 and joint resolution of office bearers of all Central Trade Union Annexure P/7 it is contended that there exists effective institutional alternative redressal mechanism in CIL and therefore respondents should have granted exemption to the petitioner.

8. Per Contra Shri O.P. Namdeo, learned counsel for the respondent submits that section 3 of ID Act is a mandatory provision. The petitioner is under a statutory obligation to constitute a works committee and there is no infirmity in the impugned order inasmuch as other bodies like bipartite or welfare committee cannot substitute the statutory functionary of works committee. He further submits that exemption was earlier rejected on 24.02.2000 (Annexure R/4) There is no illegality in proceeding against the officer of the petitioner company because they have not followed mandatory provision of ID Act. Criminal proceedings can be initiated because of said violation. He placed reliance on section 34 of ID Act in this regard. He further submits that in WP No. 18547/2010 direction was issued to decide the representation and according to that the officers of respondents proceeded against the statutory officers of the petitioner for not following the mandate of section (3) of the Act. At the cost of repetition, Shri Namdeo placed heavy reliance on section 3 of the ID Act. He submits that it is mandatory in nature and petitioner cannot escape from the constitution of said statutory committee. By drawing attention of this Court on para 17 of the return, it is contended that these are the reasons

on which the representation of the petitioner was rejected by Annexure P/1.

No other point is raised by learned counsel for the parties.

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

10. The basic question is whether the Annexure P/1 passed by respondent is in consonance with the requirement of ID Act, 1947. Before dealing with the rival contentions of the parties at bar, I deem it proper to reproduce the relevant provision, which reads as under:

> **S.3. Works Committee.-** (1) In the case of any individual establishment in which one hundred or more workmen are employed or have been employed on any day in the preceding twelve months, the appropirate Government may by general or special order require the employer to constitute in the prescribed manner a Works Committee consisting of representatives of employers and workmen engaged in the establishment so however that the number of representatives of workmen on the Committee shall not be less than the number of representatives of the employer. The representatives of the workmen shall be chosen in the prescribed manner from among the workmen engaged in the establishment and in consultation with their trade union, if any, registered under the Indian Trade Unions Act, 1926 (16 of 1926)
>
> (2) It shall be the duty of Works Committee to promote measures for securing and preserving amity and good relations between the employer and workmen and, to that end, to comment upon matters of their common interest or concern and endeavour to compose any material difference of opinion in respect of such matters.
>
> **36 B. Power to exempt-**Where the appropriate Government is satisfied in relation to any industrial establishment or undertaking or any class of industrial establishments or undertaking carried on by a department of that Government that adequate provisions exist for the investigation and settlement of industrial disputes in respect of workmen employed in such establishment or undertaking or class of establishments or undertakings, it may, by notification in the

> Official Gazette, exempt, conditionally or unconditionally such establishment or undertaking or class of establishments or undertaking from all or any of the provisions of this Act.
>
> (Emphasize supplied)

A bare perusal of section 3 of ID Act makes it crystal clear that the law makers have employed the word "may" in section (3). In the considered opinion of this Court, it is an enabling provision. The appropriate Government may by general or special order require the employer to constitute a works committee. It goes without saying that in given facts and circumstances the Central Government may not require or direct the employer to constitute a works committee. If requirement of constitution of works committee would have been a mandatory requirement, the law makers would not have used the word " appropriate Government may....". The constitution of works committee becomes a requirement only when a general or special order is issued by Central Government. It is not in dispute in the present case that the order in this regard was issued on 23rd December, 1994 (Annexure R1A). Pursuant to this order, it became obligatory on the part of the petitioner to constitute a works committee. Section 36(B) gives power to appropriate Government to grant exemption from all or any of the provisions of the ID Act. The key words of this provision are - *"appropriate Government is satisfied that adequate provision exists for the investigation and settlement of industrial disputes in respect of workmen...."* The appropriate Government was required to apply its mind about availability of adequate provision with the employer for the purpose of investigation and settlement of industrial disputes in respect of workmen. Appropriate Govt. can be satisfied only when it applies its mind on the basis of relevant consideration in the context of relevant statute. The Apex Court in (1994) 3 SCC (*S.R. Bommai and others Vs. Union of India and others*) opined as under-

> "Hence it is not the personal whim, wish, view or opinion or the *ipse dixit* of the President dehors the material but a legitimate inference drawn from the material placed before him *which is relevant for the purpose."*

In the context of section 36B, the respondent was required to examine whether the alternative institutional mechanism relied upon by CIL fulfills the requirement of exemption

11. On reading section 3 and section 36(B) of the ID Act conjointly, it is crystal clear that requirement of constitution of works committee depends on

general or special order by the appropriate Government. Even if such general or special order for constitution of works committee is issued by the appropriate government, the said requirement can be exempted by exercising the power under section 36(B) of the Industrial Disputes Act. Test for deciding the question of exemption is whether there exists adequate provision for investigation and settlement of industrial disputes in respect of workmen. Thus the litmus test on which the application of the petitioner was required to be decided was whether the provision and committee mentioned by petitioner are well equipped and suitable which can investigate and settle the industrial disputes of workmen. It is apt to quote the impugned order which reads as under-

Dated, New Delhi, the 20.03.2013.

Office Memorandum

Subject: Exemption from the provisions of Section 3 of the industrial Disputes Act, 1947 regarding constitution of 'Works Committees' in the Coal India Ltd. and its subsidiary companies.

The undersigned is directed to refer to the correspondence resting with Ministry of Coal O.M. No. 49012 /1 /2011-PRIW-1, dated 25.02.2013 on the above mentioned subject and to say that the proposal of Ministry of Coal for granting exemption from the provisions of Section 3 of the Industrial Disputes Act, 1947 has been examined in this Ministry.

2. In this connection it is clarified that constitution of the 'Works Committee' is a Statutory requirement enshrined in the Industrial Disputes Act, 1947 and this cannot be substituted by other bipartite Welfare Committees.

3. After due consideration of all the facts, the proposal of the Ministry of Coal to grant exemption under Section 36 B of Industrial Disputes Act, 1947 from the constitution of 'Works Committee' under Section 3 to Coal India Ltd. and its subsidiaries cannot be acceded to.

4. This issue with the approval of the Secretary (L& E)

(Babu Cherian)
Deputy Secretary
Ph. No. 23753079
(Emphasize supplied)

12. In the considered opinion of this Court, the respondent was required to examine the application of the petitioner on the anvil of aforesaid test. If impugned order is minutely examined it will show that singular reason for rejection of the application was that the works committee is a statutory requirement as per the ID Act and it cannot be substituted by other bipartite or welfare committee. In the considered opinion of this Court the impugned order clearly shows that the respondent has not applied its mind whether the alternative mechanism shown by the petitioner were adequate for investigation and settlement of industrial disputes in respect of workmen. The application was rejected at threshold solely on the ground that the statutory committee cannot be substituted on by any other committee. Constitution of the committees relied by the petitioner, its nature of activity, grievance redressal mechanism, scope of interference in industrial disputes etc. were not gone into by the respondent. Thus, in my opinion, Annexure P/1 is not in consonance with the requirement of section 36(B) of the ID Act.

13. Shri O.P. Namdeo, learned counsel contended that para 17 of the return makes it clear that reasons of rejection are justifiable. I am afraid that those reasons cannot be gone into in this petition. The order Annexure P/1 is passed by the statutory authority under the ID Act. This is settled in law that validity of an order of statutory authority is to be examined and seen on the grounds mentioned therein. Same cannot be substituted by filing counter affidavit before this Court. This view was taken way back by Constitution Bench in 1978 (1) SCC 405 (*Mohinder Singh Gill Vs. The Chief Election Commissioner, New Delhi and others*). Para 8 reads as under:-

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J in Gordhandas Bhanji
>
> Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public

authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older."

14. This view is followed by this Court in 2002 (2) MPLJ 366 (*Kamla Bai Vs. Nagar Panchayat, Jatara and another*). In 2003 (6)SCC 545 (*Chandra Singh and others Vs. State of Rajasthan and another*) the apex Court followed the said *ratio decidendi*. Thus, the reasons assigned in Annexure P/1 alone are to be seen. Any other reason by way of reply or counter affidavit cannot provide strength to Annexure P/1.

15. On the basis of aforesaid analysis, in my opinion, the respondents utterly failed to examine the application of the petitioner seeking exemption as per relevant considerations and test laid down in section 36(B) of the ID Act. Thus, the impugned order Annexure P/1 cannot be permitted to stand. Accordingly, Annexure P/1 is set aside. Respondent shall decide the application of exemption of CIL afresh in the light of section 36(B) of the ID Act. Till such decision is taken, no coercive action be taken against the petitioner.

It be noted that this Court has not expressed any opinion on the merits of the case. Petitions are allowed to the extent indicated above. No cost..

Petition allowed.

I.L.R. [2013] M.P., 2639
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 154/2010 (Indore) decided on 8 January, 2013

JAM SINGH ...Appellant
Vs.
BHARAT & ors. ...Respondents

***A. Motor Vehicles Act (59 of 1988), Section 173 - Enhancement of award* - Appellant's right hand has been amputated from the shoulder - As per Schedule I, Part-II of Workmen's Compensation Act, the loss of earning capacity is 80% and not as 42%**

as assessed by learned Tribunal - Award amount enhanced from 2,29,880/- to the tune of Rs. 5,80,880/-. (Para 6)

क. मोटर यान अधिनियम (1988 का 59), धारा 173 – अवार्ड की वृद्धि – अपीलार्थी का दाहिना हांथ कंधे से काट दिया गया था – कर्मकार प्रतिकर अधिनियम की अनुसूची I भाग II के अनुसार, उपार्जन सामर्थ्य की हानि 80 प्रतिशत और न कि 42 प्रतिशत जैसा कि विद्वान अधिकरण द्वारा निर्धारित किया गया – अवार्ड की गई रकम, 2,29,880/– से बढ़ाकर 5,80,880/– की गई।

***B. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Driving Licence* - Cause of accident was sudden failure of brake - Driver/Claimant was not at fault - He was having the licence of same category except the endorsement and the vehicle was empty - No evidence has been adduced by Insurance Company to prove negligence of driver - Insurance Company liable. (Para 8)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का दायित्व – चालन अनुज्ञप्ति – दुर्घटना का कारण अचानक ब्रेक फेल होना था – चालक/दावाकर्ता का दोष नहीं – उसके पास समान श्रेणी की अनुज्ञप्ति थी, पृष्ठाकंन छोड़कर तथा वाहन खाली था – चालक की उपेक्षा सिद्ध करने के लिए बीमा कंपनी द्वारा साक्ष्य प्रस्तुत नहीं – बीमा कंपनी उत्तरदायी।

Cases referred :

2003(III) ACJ 1441, 2001 ACJ 428, 2004 ACJ 1, 2009 ACJ 1411, 2008 ACJ 627.

Manish Jain, for the appellant.
Mayank Upadhyay, for the respondent No.3.

ORDER

N.K.Mody, J.:- This order shall also govern the disposal of M.A.No.3865/09 as in both the appeals, the award under challenge is dated 30/9/2009 passed by MACT, Sardarpur in claim case No.83/08 whereby the claim petition filed by the appellant was allowed and compensation of Rs.2,29,880/- was awarded on account of injuries sustained by the appellant.

2. In M.A.No.154/2010 which is the appeal filed by the claimant/ appellant, prayer is for enhancement of the amount while in M.A.No.3865/09 which is the appeal filed by the respondent No.3/Insurance company, prayer

is for setting aside of the award as respondent No.3 has wrongly been held liable for payment of compensation.

3. Short facts of the case are that appellant filed a claim petition under section 163-A of the Motor Vehicles Act alleging that on 3/2/2008, when the appellant was driving the tempo bearing registration NO.MP11 K 0116, the break failed, with the result appellant sustained injuries in right hand and leg. It was alleged that offending vehicle was owned by respondent Nos. 1 and 2 and insured with respondent No.3. It was alleged that claim petition be allowed and compensation be awarded. The claim petition was contested by the respondent NO.3 on various grounds including on the ground that since the appellant was not possessing the valid driving licence, therefore Insurance company is not liable. It was prayed that claim petition be dismissed. After framing of issues and recording of evidence learned tribunal allowed the claim petition and awarded a sum of Rs.2,29,880/-, break-up of which is as under:-

towards permanent disability	Rs.1,61,280/-
towards medical expenses	Rs.68,600/-

4. Learned counsel submits that learned tribunal assessed the income @ Rs.3,000/- per month and after deducting 1/3rd towards personal expenses, assessed the permanent disability as 42% and after applying the multiplier of 16, calculated the amount of permanent disability. Learned counsel submits that right hand of the appellant is amputated from the shoulder and as per medical evidence adduced, permanent disability was 85% in the hand and 32% in leg which was wrongly assessed by the learned tribunal as 42%. It is submitted that appellant was hospitalised from the date of accident till 11/3/2008. It is submitted that no amount has been awarded in other conventional heads. Similarly, learned tribunal also committed error in assessing the income @ Rs.3,000/- per month. So far as liability is concerned, learned counsel submits that appellant was possessing the valid driving licence which is Ex.P/141. In alternate, it is submitted that even if it is assumed that offending vehicle was the transport vehicle and appellant was possessing the licence of LMV, then too appellant is entitled. For this contention, reliance is placed on a decision in the matter of *Jitendra Kumar Vs. Oriental Insurance company Ltd.*, 2003(111)ACJ 1441 wherein van caught fire due to mechanical reasons and was damaged, Insurance company repudiated the claim on the ground that driver was not holding a valid driving licence, the Hon. Apex Court held that incident occurred due to no fault of the driver, therefore Insurance company

cannot repudiate the claim for damages on the ground the driver of the vehicle had no valid licence. Further reliance is placed on a decision in the matter of *Kaushnuma Begum Vs. New India Assurance Co.Ltd.*, 2001 ACJ 428 wherein front tyre of jeep burst while in motion, vehicle became unbalanced and turned turtle, crushing to death a person walking on the road, the tribunal held that there was neither rashness nor negligence in driving the vehicle, the Hon. Apex Court held that owner of the vehicle is liable for damages to a person who suffered on account of accident even if there is no negligence on the part of the driver or owner. Lastly reliance is placed on a decision in the matter of *National Insurance Company Vs. Swarn Singh,* 2004 ACJ 1. It is submitted that appeal be allowed and amount be enhanced.

5. Learned counsel for respondent No.3 submits that since the appellant was possessing the driving licence of LMV and was driving the goods vehicle having no endorsement to drive the transport vehicle, therefore as per sections 3 and 10 of the Motor Vehicles Act, learned tribunal committed error in holding the respondent No.3 liable for compensation. It is submitted that case laws submitted by the appellant is not applicable in the present case as cause of accident was incompentency on the part of appellant himself. Learned counsel placed reliance on a decision in the matter of *Oriental Insurance Co.Ltd. Vs. Angad Kol,* 2009 ACJ 1411, wherein the driver had licence to driver 'LMV' whereas he was driving a goods transport vehicle, the Hon. Court had occasion to distinguish between LMV and transport vehicle, it was observed that "definition of LMV brings within its umbrage both 'transport vehicle' or 'omnibus' but a distinction between an effective licence granted for transport vehicle and passenger motor vehicle exists, the distinction between a 'LMV' and a 'transport vehicle' is evident and it was held that insurance company shall pay the compensation to claimants with a right to recover the amount from owner and driver of the vehicle." Learned counsel further placed reliance on a decision in the matter of *New India Assurance Company Vs. Prabhulal*, 2008 ACJ 627 wherein truck damaged in accident and insurance company repudiated the claim on the ground that person who was driving the vehicle had no valid licence, Hon'ble Apex Court held that District Consumer Forum was justified in holding that driver who had licence to drive light motor vehicle without any endorsement entitling him to drive transport vehicle was not authorized to drive the truck which is a good vehicle and insurance company is not liable. Learned counsel further submits that since the claim petition is filed u/s 163-A of the Motor Vehicles Act and the appellant himself was

negligent, therefore appellant cannot be rewarded by compensation on account of his own negligence. Learned counsel further submits that there is no mechanical report on record to demonstrate that accident occurred because of sudden failure of break which was beyond control of the appellant. So far as amount is concerned, learned counsel submits that amount awarded is just and proper which requires no interference. It is submitted that appeal filed by the appellant/claimant be dismissed and appeal filed by respondent No.3 be allowed and findings whereby respondent No.3 has been held liable be quashed.

6. From perusal of record it appears that appellant has admitted that his income was Rs.3,000/- per month, therefore learned tribunal committed no error in taking the same as Rs.3,000/- per month. So far as permanent disability is concerned, appellant is present in court to demonstrate the permanent disability. His right hand has been amputated from the shoulder. As per schedule-1, part-II of Workmen's Compensation Act, in case of amputation through shoulder joint, the percentage of loss of earning capacity is 90%while amputation below shoulder with stump less than (20.32 cms.) from tip of acromion, the loss of earning capacity is 80%. Keeping in view the aforesaid position, there was no justification on the part of learned tribunal in assessing the permanent disability as 42% and the same is assessed as 80%. So far as deduction of 1/3rd towards personal expenses is concerned, there was no justification on that part as it is not a death case. Accordingly, appellant is entitled for the following amount :-

towards permanent disability	Rs.4,75,000/-
towards medical expenses	Rs. 70,880/-
towards transport exp. & spl.diet	Rs.10,000/-
towards exp.incurred on attenders	Rs.5,000/-
towards loss of income -	Rs.10,000/-
towards pain & sufferings	Rs.10,000/-
total	Rs.5,80,880/-

7. In the appeal filed by respondent No.3, vide order dated 28/6/2010, the operation of the award was stayed subject to depositing 50% of the awarded amount which has been deposited by the respondent NO.3 and has been withdrawn by the appellant.

8. So far as liability of respondent No.3 is concerned, the accident took

place on 3/2/2008. Appellant was brought to Manav Sewa -Trust. Intimation was given to police by the trust and on that basis case was registered in Rojanmacha at Aam Choki, Rajgarh, for which document is Ex.P/142, spot map was also prepared of which document is Ex.P/143. Accident inspection report of the vehicle is Ex.P/44 and the statement of appellant recorded by the police u/s 161 Cr.P.C. on 14/2/2008 is Ex.P/145 in which appellant has stated that all of a sudden cow and bullock came in front of the offending vehicle and when the appellant applied to the brake it was failed. Same story is repeated by the appellant in his affidavit submitted under Order XVIII Rule 4 CPC. The cross examination on behalf of insurance company is that appellant did not try to stop when the animals came in front of the offending vehicle. Vehicle inspection report, Ex.P/144 is proved by ASI, AW-3. In cross-examination it has come that Ex.P/144 does not bear the crime number and also the date of inspection. Suggestion is given that forged report has been obtained, but inspite of his statement to the effect that report was prepared by Arif Sheikh, no effort was made by the insurance company either to examine Arif Sheikh or get it investigated by the investigatior that in what circumstances report of ExP/144 was prepared. It is true that claimant cannot be rewarded in a claim petition filed u/s 163-A of the Motor Vehicles Act on account of his own fault. It is also true that negligence of the appellant can be proved by the insurance company by adducing evidence by cross-examination on the evidence adduced by the appellant. In the presence case no evidence has been adduced by the respondent NO.2. In cross examination there is nothing on the basis of which it can be said that accident occurred because of negligence of appellant. Undisputedly the offending vehicle was light motor vehicle and was carrying no luggage/goods at the relevant time, the only fault on the part of appellant was that the licence which the appellant was holding was having no endorsement to drive transport vehicle. Matter of *Prabhulal* (supra) is not applicable in the present case as in that case the driver was possessing licence of Light motor vehicle and was driving a truck. Law laid down in the matter of *Jitendra Vs. OIC,* 2003 ACJ 1441 was taken into consideration in the matter of *Prabhulal* (supra) but was not disapproved. Since to avoid its liability towards insured, the insurer has to prove that insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of policy regarding use of vehicle by duly licenced driver. The license of the appellant is on record as Ex.P/141 which is for a period of 20 years. The distinction between light motor vehicle and transport vehicle is evident from section 10 of the Act. The transport vehicle may be a light motor

vehicle but for the purpose of driving the same a distinct licence is required to be obtained. Distinction between transport vehicle and passenger vehicle can also be noticed from section 14 of the Act. Sub-section (2) of Section 14 provides for duration of a period of 3 years in case of an effective licence to drive a transport vehicle whereas in case of any other licence, it may remain effective for a period of 20 years. In the present case since license was for 20 years therefore it can safely be said that appellant was having the license of light motor vehicle and not the license to drive the transport vehicle. However since the cause of accident was sudden failure of brake and the appellant was having the license of same category except the endorsement and the vehicle was empty at the relevant time. In view of this, M.A.No.154/10 which is the appeal filed by the appellant/claimant is allowed and the amount is enhanced as indicated above and M.A.No.3865/09 which is the appeal filed by the respondent NO.3 is dismissed. The amount which has already been withdrawn shall not be recovered by the respondent No. 3 from the appellant. Respondent No.3 shall be entitled to withdraw the amount if any which is still lying with the learned tribunal. If any recovery proceedings are initiated by the respondent No.3 against respondent Nos.1and 2, then respondent Nos.1 and 2 shall be at liberty to demonstrate before the learned tribunal that respondent No.1 was possessing the valid licence to drive transport vehicle.

9. With the aforesaid observations, both the appeals stand disposed of. Copy of this order be kept in the record of connected Appeal.

Appeal disposed of.

I.L.R. [2013] M.P., 2645
APPELLATE CIVIL
Before Mr. Justice N.K. Mody
M.A. No. 3801/2007 (Indore) decided on 17 January, 2013

ANJLI BHATIYA (Smt.) & ors. ...Appellants
Vs.
RAJKUMAR & ors. ...Respondents

***A. Civil Procedure Code (5 of 1908), Order 41 Rule 22 - Cross-objection* - Two vehicles collided with each other resulting in death of owner, driver and occupant of Car - Insurance Company of car was exonerated - Cross-objection by Insurance Company of another vehicle against exoneration of Insurance Company of another vehicle**

maintainable, as it is impossible to implead owner of car as he had also died. (Paras 11 & 12)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 22 – प्रत्याक्षेप – दो वाहन एक दूसरे से टकराए, फलस्वरुप मालिक, चालक एवं कार के अधिभोगी की मृत्यु – कार की बीमा कम्पनी को उत्तरदायित्व से मुक्त किया गया – एक वाहन की बीमा कम्पनी को मुक्त किये जाने के विरुद्ध दूसरे वाहन की बीमा कम्पनी द्वारा प्रत्याक्षेप, पोषणीय है, चूंकि कार के स्वामी को पक्षकार बनाना असंभव है क्योंकि उसकी भी मृत्यु हो गई है।

***B. Motor Vehicles Act (59 of 1988), Section 173 - Compensation - Enhancement of* - Tribunal ought to have ordered some amount on account of future prospect - Award enhanced. (Paras 13 & 14)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 – प्रतिकर – बढ़ाया जाना – अधिकरण को भविष्य की संभाव्यता के कारण कुछ रकम आदेशित करनी चाहिए थी – अवार्ड बढ़ाया गया।

Case referred :

2005 ACJ 2131,

S.S. Nahar with *Anand Chouhan*, for the appellants.
S.V. Dandwate, for the respondent No. 3.
S.S. Chawla, for the respondent No. 4.

ORDER

N.K.Mody, J.:- This order shall also govern the disposal of MA.No.3080/07, as both the appeals are arising out of award dated 07/09/07 passed by II MACT, Dewas whereby two claim petitions were allowed and compensation was awarded holding respondent Nos. 1 to 3 liable for payment of compensation. In MA.No.3801/07 award under challenge is passed in Claim Case No.77/06, while in MA.No.3080/07 award is passed in Claim Case No.76/06.

2. Short facts of the case are that claimants in both the appeals filed claim petitions before the learned Tribunal alleging that on 27/01/06 at about 8.30 A.M. deceased Avdhesh Raghuvanshi and Bharat Bhatia were travelling in a Indica Car bearing registration No.MP/04-HT/8317, which was being owned and driven by one Anil Yadav. It was alleged that when the said Indica Car reached to Chinotha Jod, at that time met with an accident with a truck

bearing registration No.MP/09-KD/2756 which was coming from opposite direction and was being driven rashly and negligently by respondent No.1, owned by respondent No.2 and insured with respondent No.3. It was alleged that because of accident driver and owner of Indica Car Anil Yadav and also Avdhesh Raghuvanshi and Bharat Bhatia died on spot. It was prayed that the claim petitions be allowed and compensation be awarded. The claim petitions were contested by respondent Nos. 3 & 4 on various grounds. After framing of issues and recording of evidence learned Tribunal allowed both the claim petitions and awarded a sum of Rs.12,39,000/- in MA.No.3801/07 and a sum of Rs.7,35,000/- in MA.No.3080/07 and respondent NO.4 was exonerated, against which both the appeals have been filed.

3. In MA.No.3080/07 wherein Mr. Anand Chouhan is the counsel for appellants submits that the learned Tribunal assessed the income of the deceased @ Rs.5,000/- per month and after deducting 1/3rd towards personal expenses applied the multiplier of 18 and awarded a sum of Rs.7,35,000/-, breakup of which is as under:-

Rs.7,20,000/-	Towards loss of dependence.
Rs.10,000/-	Towards loss of consortium.
Rs.5,000/-	Towards funeral expenses.

4. It is submitted that the income of the deceased assessed by the learned Tribunal is grossly inadequate, as the deceased was income tax payee of whom income tax returns are on record, which are marked as Ex.P/34 to Ex.P/38. It is submitted that apart from salary which was Rs.60,000/- per year, deceased was also commission agent for supplying the labourers and was getting income of Rs.50,000/- approximately from other sources. It is submitted that the learned Tribunal committed error in not taking into consideration the income of the deceased from other sources, which are well proved and well supported by the documentary evidence. It is submitted that on other heads also amount awarded is on lower side. It is submitted that the appeal filed by appellants be allowed and amount of compensation be enhanced.

5. In MA.No.3801/07 Mr. SS. Nahar counsel for appellants submits that the learned Tribunal assessed the income of the deceased @ Rs.9,000/- per month and after deducting 1/3rd towards personal expenses applied the multiplier of 17 and awarded a sum of Rs.12,39,000/-, breakup of which is as under:-

Rs.12,24,000/-	Towards loss of dependence.
Rs.10,000/-	Towards loss of consortium.
Rs.5,000/-	Towards funeral expenses.

6. It is submitted that the deceased was well qualified and was in a secured job. It is submitted that the deceased was appointed with Tata Teleservices Ltd. as is evident from the appointment letter Ex.P/32. It is submitted that the salary of the deceased was Rs.18,152/- per month, but the learned Tribunal has taken into consideration only basic pay of Rs.9,000/- per month, which is grossly inadequate. It is submitted that future prospects has also not been taken into consideration by the learned Tribunal. It is submitted that the appeal filed by the appellants be allowed and amount of compensation be enhanced.

7. Mr. SV. Dandwate, learned counsel for respondent No.3 submits that the amount awarded by the learned Tribunal in both the cases is on higher side. It is submitted that in the matter of Avdhesh Raghuvanshi deduction of 1/3rd is on lower side, which out to have been one half. It is submitted that since the deceased were not in secured job as Avdhesh Raghuvanshi was in a private job, while Bharat Bhatiya was on probation and recently joined, therefore, no question of future prospects arises. It is submitted that since both of them were occupant of the Indica Car, therefore, it was a case of joint tort feasors for the appellants in both the appeals. It is submitted that in the facts and circumstances of the case learned Tribunal was not justified in exonerating respondent No.4. It is submitted that both the appeals filed by appellants be dismissed and cross-objection filed by respondent No.3 be allowed and that part of the award whereby respondent No.4 has been exonerated be modified by holding the responsibility of respondent Nos. 3 & 4 jointly and severely.

8. Mr. SS. Chawla, learned counsel appearing on behalf of respondent No.4 submits that after due appreciation of evidence learned Tribunal found that the accident occurred because of negligence of respondent No.1, who was driver of the truck. It is submitted that since the owner and driver of the offending car is not impleaded as party, therefore, learned Tribunal has rightly exonerated respondent No.4 as respondent No.4 indemnify the liability of owner. It is submitted that in the present case no doubt owner died, but his legal representatives ought to have been impleaded as party. It is submitted that criminal case was also registered against respondent No.1. Learned counsel further submits that cross-objection filed by respondent No.3 is not

maintainable against respondent No.4. For this contention reliance is placed on a decision of Divisional Bench in the matter of *National Insurance Co. Ltd. Vs. Javitri Devi*, 2005 ACJ 2131 wherein this Court has held that cross -objections filed by the claimant are not maintainable against owner and driver in an appeal filed by the Company. It is submitted that in the facts and circumstances of the case both the appeals filed by appellants and also cross-objection filed by respondent No.3 have no merits and the same be dismissed.

9. Evidence was recorded in Claim Case No.76/06. Documentary evidence is on record as Ex.P/1 to Ex.P/61. Apart from this appellants have examined AW/1 Anjali Bhatiya, AW/2 Ashok Upadhyaya, AW/3 Rakesh Vyas and AW/4 Harshali Mahajan. While respondent No.3 has examined Dilip Kale (Surveyor) and also respondent No.1 driver of the truck as NAW/2. Survey report is on record alongwith photographs, which shows that in what circumstances accident occurred. In the report it is mentioned that the accident occurred because of rash and negligent driving of driver of Indica Car. Criminal case was registered against respondent No.1, but respondent No.1 himself has appeared before the learned Tribunal to explain that in what circumstances accident occurred. AW/2 Ashok Upadhyaya is also eye witness, who has stated that in what circumstances the accident occurred. Statement recorded in criminal case under Section 161 Cr.P.C. are not on record. Outcome of criminal case is also not on record. Since the accident occurred on a State Highway and both the vehicles were going in opposite direction at the relevant time, therefore, it was a case of composite negligency so far as appellants are concerned as the deceased were occupant. In the facts and circumstances of the case learned Tribunal was not justified in exonerating respondent No.4. On the contrary respondent Nos. 1 to 4 ought to have been held liable jointly and severely.

10. Apart from this Section 155 of Motor Vehicles Act deals with effect of death, which reads as under:-

> **155. Effect of death on certain causes of action.** - Notwithstanding anything contained in section 306 of the Indian Succession Act, 1925, the death of a person in whose favour a certificate of insurance had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this Chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his

estate or against the insurer.

11. So far as contention of respondent No.4 that cross-objections are not maintainable against a co-respondent is concerned, law laid down in the matter of *Javitri* (Supra) is not applicable in this case. In the present case no cross-objection has been filed by respondent No.3 against respondent No.4. In this case appeal is filed by claimants and not by Insurance Company. Respondent No.3 is challenging the findings of learned Tribunal whereby learned Tribunal held respondent No.1 liable for the accident, while as per respondent No.3 as per the evidence on record, driver of both the vehicles were equally liable for the accident. In the circumstances arguments raised by respondent No.4 regarding maintainability of the cross-objections cannot be upheld.

12. It is true that owner and driver of the offending Indica Car are not on record, but since Anil Yadav who was the owner and was also driving the vehicle at the relevant time died, therefore, it was practically not possible to implead him as party.

13. So far as amount of compensation is concerned, in MA.No.3080/07 wherein deceased is Avdhesh Raghuvanshi, no doubt income tax returns are on record, but all the returns are for the year 2004-05 and 2005-06 and were submitted on 09/03/06, while Avdhesh Raghuvanshi died on 27/01/06. There is no explanation that why returns were not filed by Avdhesh Raghuvanshi himself in his life time in the relevant financial year. In the circumstances income of Avdhesh Raghuvanshi assessed by the learned Tribunal @ Rs.5,000/- per month appears to be just and proper. Since the dependent on the deceased is only appellant No.1 i.e. Master Arpit aged three years, therefore, also it appears that the income assessed is just and proper. However, since the deceased was in a secured job, though was in a private job, therefore, some amount ought to have been awarded on account of future prospects. Hence, a case of enhancement is made out. In my opinion it will be proper to enhance the compensation by Rs.2,50,000/-. Thus appellants in MA.No.3080/07 shall be entitled for a total sum of Rs.9,85,000/- instead of Rs.7,35,000/-. The enhanced amount shall carry interest @ 8% P.A. from the date of application. The amount awarded shall be deposited by the Insurance Company with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant No.1 under guardianship of appellant No.2 in the nearest Nationalized Bank, in the area where the appellant No.1 is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on

monthly basis in S.B. Account of appellant No.1, which shall be opened by the appellant No.1 from where appellant No.1 can withdraw the amount as per his needs. However, on an application by the appellant No.1 this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant No.1.

14. So far as MA.No.3801/07 wherein deceased is Bharat Bhatiya is concerned, undoubtedly Ex.P/32 is appointment letter dated 14/01/06 wherein salary for which he was offered was Rs.18,152/- per month. According to the appellants deceased joined the services on 24/01/06. As per appointment letter deceased was to join at Raipur. Accident took place on 27/01/06 when deceased Bharat Bhatiya was going in the Indica Car from Indore to Bhopal. If all the facts are taken to be true, then it appears that immediately after joining, deceased left from Raipur to Indore and again started for Bhopal when he met with the accident. Sufficient evidence is on record that the deceased was having good academic background and also was in job right from 1997. Earlier he was in the job and was getting salary of Rs.6,000/- per month in the year 1998-2000 and thereafter his salary was enhanced to Rs.10,000/- in the year 2000-2004 and thereafter the deceased was kept by Tata Commercial at the salary of Rs.9,000/- per month excluding other perk of which gross salary comes to Rs.19,000/- per month. In the circumstances it can safely be said that the salary for which deceased was employed was Rs.18,000/- per month. But at the same time this fact cannot be ignored that no income tax return has been filed by the deceased. Right from 2001-02 to 2005-06 the tax was payable on the income above Rs.50,000/- and in the year 2006-07 to 2007-08 the tax was payable on the income above Rs.1,35,000/-. There is nothing on record that any amount of tax was paid at any point of time by the deceased. As per service conditions also deceased was recently appointed and was on probation for a period of six months. The employer Harshali Mahajan has appeared as witness on behalf of employer and has also stated that a sum of Rs.1,40,000/- was paid to the widow of deceased as Ex-gratia under employees deposit scheme. But this fact cannot be ignored that the deceased was already in employment of Tata Motors. There is no evidence to the effect that in fact the deceased joined the service on 24/01/06 at Raipur except oral statement of Harshali Mahajan (Administrative Officer). However, a case of enhancement is made out. In my opinion it will be proper to enhance the compensation by Rs.5,00,000/-. Thus, appellants in MA.No.3801/07 shall be entitled for total sum of

Rs.17,39,000/-. The enhanced amount of Rs.5,00,000/- shall carry interest @ 8% P.A. from the date of application. The amount awarded shall be deposited by the Insurance Company with the learned tribunal and the learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant No.1 in the nearest Nationalized Bank, in the area where the appellant No.1 is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant No.1, which shall be opened by the appellant No.1 from where appellant No.1 can withdraw the amount as per her needs. However, on an application by the appellant No.1 this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant No.1.

15. With the aforesaid observations, appeal stands disposed of. Copy of the order be placed in the record ofM.A.No. 3080/07.

Appeal disposed of.

I.L.R. [2013] M.P., 2652
APPELLATE CIVIL
Before Mr. Justice J.K. Maheshwari
M.A. No. 880/2010 (Indore) decided on 19 February, 2013

KANTA BAI (SMT.) ...Appellant
Vs.
BALU SINGH & ors. ...Respondents

A. Motor Vehicles Act (59 of 1988), Sections 166 & 173 - **Claimant lady aged 35 years and earning Rs. 5,000/- per month by doing household labour work, received injury by Bus while walking on the road - Her left leg was amputated below knee and she became permanently disabled - Compensation of Rs. 4,11,600/- awarded for future loss of earning by the Tribunal is just but for pain and suffering in case of amputation and other heads the amount awarded is inadequate - Claimant is awarded Rs. 50,000/- for pain and suffering in addition to the compensation awarded by the Tribunal and Rs. 50,000/- awarded for artificial limb. (Para 12)**

क. मोटर यान अधिनियम (1988 का 59), धाराऐं 166 व 173 – दावाकर्ता महिला जो 35 वर्ष आयु की है और घरेलू श्रमिक कार्य करके प्रति माह रु. 5,000/– अर्जित कर रही है, को सड़क पर चलते समय बस से चोट लगी –

उसका बांया पैर, घुटने के नीचे से विच्छेदित किया गया और वह स्थायी रुप से निःशक्त हो गई – अधिकरण द्वारा रु. 4,11,600/– का प्रतिकर, भविष्य के अर्जन की हानि हेतु न्यायोचित है, परन्तु विच्छेदन तथा अन्य शीर्षक के मामले में पीड़ा और यातना हेतु अवार्ड की गई रकम पर्याप्त नहीं है – दावाकर्ता को अधिकरण द्वारा अवार्ड किये गये प्रतिकर के अतिरिक्त, पीड़ा और यातना के लिये रु. 50,000/– अवार्ड किये गये तथा कृत्रिम अंग हेतु रु. 50,000/– अवार्ड किये गये।

***B. Motor Vehicles Act (59 of 1988), Section 81 - Permit - Grant or renewal of - Period of validity* - Grant of permit shall be valid for 5 years and renewal thereof would also be valid for 5 years - In case of renewal, it would be operative from the date of expiry of the initial grant. (Para 10)**

ख. मोटर यान अधिनियम (1988 का 59), धारा 81 – अनुज्ञापत्र – प्रदान किया जाना अथवा उसका नवीनीकरण – विधि मान्यता की अवधि – अनुज्ञापत्र का प्रदान, 5 वर्ष के लिये विधिमान्य होगा और उसका नवीनीकरण भी 5 वर्ष के लिए विधिमान्य होगा – नवीनीकरण के प्रकरण में, वह आरंभिक प्रदान की समय समाप्ति की तिथि से लागू होगा।

Case referred :

1992 MPLJ 931.

Lokesh Mehta, for the appellant/claimant.
Vishal Baheti, for the respondents/owner & driver.
S.V. Dandwate, for the respondent/Insurance Co.

ORDER

J.K. MAHESHWARI, J.:- Both these appeals are arising out of the award dated 18.11.2009 passed by the 3rd Additional Member, Motor Accident Claims Tribunal, Indore in Claim Case No.06/2009 whereby in a case of amputation below the knee accepting the disability to the extent of 60% compensation to the tune of Rs.4,11,600/- has been awarded.

2. M.A. No.880/2010 has been filed by the claimant assailing the inadequacy of the compensation and also raising the issue of liability fastened against the owner and driver. M.A. No.238/2010 has been filed by the owner and driver challenging the issue of liability and exoneration of the insurance company by the tribunal, however, both these appeals are being decided by the common order.

3. Facts of the case in brief are that on 25.9.2008 when the claimant was coming after performing her duties as a pedestrian and reached in front of Rajani Bhawan near High Court, M.G. Road, Indore driver driving bus bearing No. MKI 1810 rashly and negligently dashed her whereby she received crush injury in her left leg. After having treatment her left leg below the knee was amputated. The claimant was 35 years aged lady performing the house-hold labour work with different persons and earning Rs.5,000/- per month. On account of receiving injury she has become permanent disabled, therefore, compensation to the tune of Rs.15,00,000/- by filing an application under Section 166 of the Motor Vehicles Act, 1988 (for brevity, hereinafter referred to as **"the Act"**) was claimed.

4. Insurance company as well as owner and driver have resisted the claim on various grounds. Insurance company in its return raised objection that the vehicle was being driven in violation of the terms and conditions of the policy and the driver was not possessing valid driving licence, therefore, insurance company is not liable to pay the amount of compensation.

5. Learned Claims Tribunal found that the accident has taken place on 25.09.2008 wherein the injured received crush injuries in her left leg below the knee due to which it was amputated. However, accepting the earning @ Rs.3,000/-per month commensurate to the disability of 60%, applying the multiplier of 16 awarded a sum of Rs.3,45,600/- in future loss of earning, Rs.29,000/- in medical expenses, Rs.25,000/-in pain and suffering, Rs.2,000/- for attendant and Rs.10,000/- for special diet, making total compensation of Rs.4,11,600/-. The tribunal further recorded a finding that application for renewal of the permit was submitted by a delay, therefore, the benefit of Section 81 (5) of the Act is not available to the owner however exonerating the insurance company directed that the owner and driver are liable for payment of the aforementioned amount along with interest.

6. Shri Lokesh Mehta, learned counsel representing the claimant has strenuously urged that the compensation so awarded by the tribunal in future loss of earning is inadequate looking to the nature of the work which the claimant was performing prior to the accident. It is also submitted that the earning @ Rs.3,000/- per month so accepted by the tribunal is inappropriate which may be reasonably enhanced and applying the proper multiplier compensation may be enhanced. It is also contended that in other heads the compensation so awarded by the tribunal is also inadequate. In addition thereto

because the amputation is below the knee, however, for artificial leg some amount ought to be awarded. It is also contended that exoneration of the insurance company is contrary to the provisions of Section 81 (5) of the Act, therefore, the finding of exoneration of the insurance company may be set aside and the amount of compensation may be directed to be paid jointly and severally by respondents. In view of the foregoing it is urged that the appeal filed by the claimant may be allowed.

7. Shri Vishal Baheti, learned counsel representing the owner and driver contends that on filing an application for renewal of the permit and after its acceptance by the Regional Transport Authority and thereafter granting renewal of the permit it would be with effect from the date of such expiry. It is contended by him that there was delay in submission of the application for renewal of the permit, but after renewal such delay is having no consequence and by operation of law as clarified under sub-section (5) of Section 81 of the Act said permit would be valid for 5 years from the date of its expiry. It is submitted by him that grant of permit and its renewal are two different situations, once a matter relates to renewal then on allowing application, renewal of permit would relate back to the date of expiry of permit. In support of the said contention reliance has been placed on a Division Bench judgment of this Court in the case of *M.P. State Road Transport Corporation v. State Transport* Appellate Tribunal reported in 1992 MPLJ 931. In view of the foregoing it is urged that liability fastened by the tribunal may be modified making it joint and several along with insurance company and finding of exoneration of insurance company may be set aside.

8. Shri S.V. Dandwate, learned counsel representing the insurance company in counter to the arguments of Shri Baheti contended that the application for renewal should be filed prior to 15 days of its expiry and if it is not filed as is the situation prevalent in the present case benefit of Section 81 (5) is not available to the owner and driver. Referring provisions of Section 81 it is contended by him that the benefit as specified therein shall be available only after compliance of the other provisions. Explaining the position of fact as was prevalent in the case of *M.P. State Road Transport Corporation* (supra) it is contended that in the said case application for renewal was submitted prior to the period of expiry, therefore, the Court proceeded to interpret provisions of Section 81 (5) while in the present case application for renewal was filed after expiry of period of one year, therefore, the said benefit as prayed for is not available to them. In such circumstances the finding

recorded by the tribunal may be upheld on the said issue dismissing the appeal filed by the owner and driver.

9. After hearing learned counsel appearing on behalf of the parties and on perusal of the facts of the present case it is apparent that Emerald Heights School Samiti has obtained a permit as per Section 76 of the Act for a period from 19.09.2003 to 18.09.2008. The application for its renewal was submitted on 10.08.2009 by them which was granted as per order dated 11.08.2009 and the renewal was ordered up-to 18.09.2013.For the purpose of renewal under Motor Vehicles Act Section 81 specifies Duration and renewal of permits. Section 81 of the Act is relevant for the purpose of the present case, however, it is reproduced as under :-

> "81. Duration and renewal of permits.-
>
> (1) A permit other than a temporary permit issued under section 87 or a special permit issued under sub-section (8) of section 88 shall be effective from the date of issuance or renewal thereof for a period of five years;
>
> Provided that where the permit is countersigned under sub-section (1) of section 88 such counter-signature shall remain effective without renewal for such period so as to synchronise with the validity of the primary permit.
>
> (2) A permit may be renewed on an application made not less than fifteen days before the date of its expiry.
>
> (3) Notwithstanding anything contained in sub-section (2), the Regional Transport Authority or the State Transport Authority as the case may be, entertain an application for the renewal of a permit after the last date specified in that sub-section if it is satisfied that the applicant was prevented by good and sufficient cause from making an application within the time specified.
>
> (4) The Regional Transport Authority or the State Transport Authority, as the case may be, may reject an application for the renewal of a permit on one or more of the following grounds, namely:-
>
> a) the financial condition of the applicant as evidenced

by insolvency, or decrees for payment of debts remaining unsatisfied for a period of thirty days, prior to the date of consideration of the application;

(b) the applicant had been punished twice or more for any of the following offences within twelve months reckoned from fifteen days prior to the date of consideration of the application committed as a result of the operation of a stage carriage service by the applicant, namely:-

(i) plying any vehicle-

(1) without payment of tax due on such vehicle;

(2) without payment of tax during the grace period allowed for payment of such tax and then stop the plying of such vehicle;

(3) on any unauthorised route;

(ii) making unauthorised trips:

Provided that in computing then number of punishments for the purpose of clause (0), any punishment stayed by the order of an appellate authority shall not be taken into account:

Provided further that no application under this sub-section shall be rejected unless an opportunity of being heard is given to the applicant.

(5) Where a permit has been renewed under this section after the expiry of the period thereof, such renewal shall have effect from the date of such expiry irrespective of whether or not a temporary permit has been granted under clause (d) of section 87,and where a temporary permit has been granted, the fee paid in respect of such temporary permit shall be refunded.

Bare reading of the aforesaid it is apparent that on submission of an application for fresh grant or renewal of a permit other than temporary permit or a special permit shall be effective for a period of five year from date of grant or its renewal. As per sub-section (2) an application for renewal is required to be submitted prior to fifteen days from the date of its expiry. As per sub-section

(3) the Regional Transport Authority or the State Transport Authority has conferred with the discretion to entertain an application for renewal after the last date specified in sub-section (2) if he is satisfied that a person applying for renewal was prevented by good and sufficient cause, within the time specified. As per sub-section (5) on renewal of the permit under section 81 after expiry of the period of earlier grant its renewal shall have effect from the date of such expiry.

10. Thus it is clear that a permit renewed shall be effective from the date of such expiry as per sub-section (5). In the said context if document Ex.D-5 filed in the present case is visualized then it is clear that renewal was ordered on an application submitted on 10.08.2009, as per order dated 11.8.2009 upto 18.09.2013. In the said context, if the language of section 81(1) is perused, then from the date of application or from the order, the period of 5 year has not yet elapsed upto 18/9/2013 i.e. the date of renewal. But simultaneously if we see the document of renewal Ex.D-5C, then the initial grant was from 19/9/03 to 18/9/2008 i.e. for the period of 5 year. In front of such column, the authority has rounded up the period of initial grant and by putting the cross, date was clarified as 11/8/2009. The meaning of the said date is not understandable to this court. By plain reading of sub-section 1 of section 81, either the grant or the renewal would be valid for the period of 5 year. But if the date of renewal is accepted as 11/8/2009, then looking the date of expiry of that renewal i.e.. 18/9/2013, the period of 5 year shall not elapse by that date. Simultaneously, if sub-section 5 of section 81 is perused, then it is apparent that on renewal of the permit under section 81, such renewal shall be effective from the date of such expiry irrespective of whether or not the temporary permit has been granted under clause (d) of section 87 and where a temporary permit has been granted, the fee paid in respect of such temporary permit shall be refundable. On conjoint reading of section 81(1) and 81(5), it is clear that a permit shall be effective from the date of issuance or renewal thereof for a period of five year, however either initial grant or renewal shall only be valid for 5 year. After its renewal under section 81, the said renewal shall be effective from the date of expiry of the earlier grant. Thus, either grant or renewal it shall be for the period of 5 years. But as per Ex.D-5C, it the period of renewal is accepted as 11/8/2009 and the date of expiry of the renewal of permit i.e. 18/9/2013 then period of 5 year is not completed, therefore, the contention advanced by Shri Dandwate does not appear to be justifiable. In the context of sub-section 5 of section 81, in any case looking to

the ambiguity in the document Ex.D-5C. the issuing authority i.e. R.T.O. may explain it before Trial Court. In such circumstances, to have the clarity of the document Ex.D-5C the claims tribunal may record the statement of transport authority by giving explanation of the dates in the context of the provision of sub-section (1) and (5) of section 81 of the Motor Vehicles Act. But this Court is having no hesitation to say that by the conjoint reading of these sub-sections, the grant of permit shall be valid for 5 years and renewal thereof would also be valid for 5 years, and in the case of renewal, it would be operative from the date of expiry of the initial grant.

11. In view of the foregoing observations, for a limited purpose of recording the statement of RTO on Ex.D-5C and for clarification of the dates, the matter is remitted back. The claims tribunal shall record the statement of RTO and thereafter in the light of observation made hereinabove, shall decide the issue of liability afresh.

12. Now coming to the point of enhancement, in the facts of the present case compensation awarded by the Claims Tribunal for future loss of earning appears to be just because it has been awarded applying the multiplier method and the earning so accepted on the date of accident is also proper. But for pain and suffering in a case of amputation and in other heads the amount so awarded is inadequate. Simultaneously some amount further deserves to be awarded for artificial limb looking to the fact that the amputation is below the knee. Thus for the pain and suffering and in other heads Rs.50,000/- deserves to be added while for artificial limb Rs.50,000/- further deserves to be awarded in addition to the compensation awarded by the tribunal. However, the appeal filed by the claimant for the purpose of enhancement is allowed by directing enhancement of Rs.1,00,000/-.

13. It is seen from the record that compensation to the tune of Rs.4,11,600/- has been awarded, but on depositing Rs.75,000/- in the appeal filed by the owner and driver assailing the issue of liability and exoneration of the insurance company the claimant could not get any amount. The issue of liability is in between the owner, driver and the insurance company, which is required to be adjudicated in view of the observations made hereinabove by Claims Tribunal. In such circumstances, in the facts of this case it is directed that the amount of compensation Rs.5,11,600/- in total be paid by the insurance company within two months along with interest. It is made clear here that on Rs.4,11,600/- awarded by the tribunal, interest be paid as per award and on

enhanced amount, interest shall be paid @ 7.5%. per annum. It is further made clear here that after decision afresh on the issue of liability as per remand directed by this court, the claims tribunal shall decide the issue of liability within a period of three months. It is further made clear that by the decision on the issue of liability by the tribunal, if finding of exoneration is recorded, then the insurance company would be at liberty to recover the entire amount from the owner and driver. It is also made clear here that if the issue of liability is decided in favour of the owner and driver by the claims tribunal, then insurance company would not be entitled to recover the amount so paid and owner and driver may take recourse to take refund of the amount deposited by them. It is also made clear that if either the owner, driver or the insurance company feels aggrieved by the finding of the claims tribunal recorded afresh, they would be at liberty to assail it in accordance with law. Parties present in the court shall appear before the concerned tribunal on 15th April, 2013 and the Registry of this court shall posthaste transmit the record to the tribunal with a view to reach there on or before the said date.

In the facts of this case, parties to bear their own costs.

Order accordingly.

I.L.R. [2013] M.P., 2660
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 23/2000 (Indore) decided on 2 April, 2013

YASHRAJ DATTA (DEAD) THROUGH LR. ...Appellant
Vs.
BHERULAL & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Order 39, Rule 1 & 2 - Suit for declaration of Bhumiswami right & injunction - **Pure finding of fact by courts below that plaintiff is not in possession of the suit property - Finding based upon correct appreciation of the pleadings and evidence, both oral and documentary - Plaintiff being not in possession of the suit property, not entitled for a decree of injunction. (Paras 8 & 9)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – भूमिस्वामी अधिकार की घोषणा व व्यादेश हेतु वाद – निचले न्यायालयों द्वारा तथ्य

का शुद्ध निष्कर्ष कि वाद सम्पत्ति, वादी के कब्जे में नहीं – अभिवचन एवं साक्ष्य, मौखिक तथा दस्तावेजी, दोनों के सही मूल्यांकन पर निष्कर्ष आधारित – वाद सम्पत्ति, वादी के कब्जे में न होने के कारण, व्यादेश की डिक्री का हकदार नहीं।

***B. Evidence Act (1 of 1872), Section 114(e), Land Revenue Code, M.P. (20 of 1959), Sections 110 & 117 - Revenue record* - Entry made by Patwari in the remark column or any other column of a khasra or field book - No presumption of correctness can be attached - Therefore, even if any entry in column No. 12 has been made by Patwari in the khasra, it would not mean that plaintiff is in possession of the suit property. (Para 8)**

ख. साक्ष्य अधिनियम (1872 का 1), धारा 114(ई), भू राजस्व संहिता, म.प्र. (1959 का 20), धाराएं 110 व 117 – राजस्व अभिलेख – पटवारी द्वारा खसरे के या क्षेत्र पंजी के टिप्पणी स्तंभ में या किसी अन्य स्तंभ में प्रविष्टि की गई – सत्यता की उपधारणा नहीं की जा सकती – अतः, यदि पटवारी द्वारा खसरे में स्तंभ क्र. 12 में कोई प्रविष्टि की गई हो तब भी इसका अर्थ यह नहीं होगा कि वाद सम्पत्ति, वादी के कब्जे में है।

Cases referred :

1991 RN 61, 2000(2) JLJ 143, AIR 1989 SC 2097.

H.Y. Mehta, for the appellant.
Himanshu Joshi, for the respondents No.1 & 2.
Sanjay Guha, P.L. for the respondent No.3/State.

JUDGMENT

A.K. SHRIVASTAVA, J. :- The unsuccessful plaintiff has taken redressal of this Court under Section 100 CPC by challenging the judgment and decree passed by two Courts below dismissing his suit for declaration of Bhumi-swami right and injunction.

2. No exhaustive statements of fact are required to be narrated for the purpose of disposal of this second appeal looking to the sole substantial question of law which has been framed and which is in respect of decree for injunction in respect of plaintiff. Suffice it to say that plaintiff has specifically pleaded that he is the Bhumi-swami and is having possession over the suit property and, therefore, the suit be decreed. The defendants no.1 and 2 by filing the written-statement denied the plaint averments and specifically pleaded that they are the Bhumi-swami of the land in question and are also possessing

the same.

3. The learned Trial Court framed necessary issues and after recording the evidence of the parties dismissed the suit. The first appeal which was filed by the plaintiff has also been dismissed by the impugned judgment and decree.

4. In this manner, this second appeal has been filed by the plaintiff which was admitted on 24.1.2001 on the following substantial question of law:

> "Whether the lower appellate Court erred in law in not granting a decree for permanent injunction on the basis of long possession of the appellant?"

4. The contention of learned counsel for the appellant is that learned First Appellate Court in para 14 has recorded a finding that the name of plaintiff has been entered in column no.12 of the khasra which is a column of possession and, therefore, the plaintiff is in possession of the suit property and if that would be the position, learned two Courts below have erred in substantial error of law in dismissing the suit atleast for injunction. Learned counsel has also invited my attention to para 5 of the additional plea of the written-statement filed by the defendants and argued that defendants themselves have pleaded that plaintiff is in possession of the suit property. By putting a deep dent on the case of defendants, learned counsel has also placed reliance upon the statement of defendant Bherulal (DW-1) and has submitted that he himself has admitted the possession of plaintiff and, therefore, the plaintiff is entitled for a decree of injunction.

5. On the other hand, Shri Himanshu Joshi, learned counsel appearing for the respondents argued in support of the impugned judgment and submitted that cogent reasons have been assigned by learned two Courts below holding that plaintiff is not in possession of the suit property and, therefore, this appeal be dismissed.

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

Regarding Substantial Question of Law framed:

7. There is specific averments of plaintiff that the suit property is in his Bhumi-swami right and he is possessing it. However, these averments have been emphatically denied by first and second defendants by filing written-

statement and they have specifically pleaded that plaintiff is not in possession of the suit property. I do not find merit in the contention of learned counsel for the appellant that defendants themselves have admitted in the written-statement that plaintiff is in possession of the suit property. The argument so advanced by learned counsel for the appellant at the first blush appears to be quite attractive but on the deeper scrutiny it is found to be devoid of any substance. True, in additional pleas para 5, at one place it has been pleaded by defendants that plaintiff is in possession of the suit property and he is the Bhumi-swami but this position has been clarified in later lines of the same para wherein it has been specifically pleaded that defendants are possessing the land as owner of the suit property. In the first line of para 5 there appears to be a clear typographical error which has been clarified by defendants in later lines of the same para. That apart, the sole plaintiff is Yashraj and the word 'plaintiffs' is plural and this word is written in the first line of additional plea para 5 of the written-statement and, therefore, it can be inferred that the word *'vadigan'* (plaintiff) indeed is *'prativadigan'* (defendant). Further, I do not find any merit in the contention of learned counsel for the appellant that in para 5, the defendant Bherulal (DW-1) has admitted the plaintiffs possession. By paying heed to para 5 of his deposition sheets, only this much is gathered that he has stated that name of plaintiff has been entered in possession column and the same has been wrongly written by Patwari. Nowhere it is admitted by him in his cross-examination that indeed plaintiff is in possession of the suit property. If the Patwari has written the name of plaintiff in column no.12, it would not confer any right upon the plaintiff.

8. The Division Bench of this Court *Churamani and another Vs. Shri Ramadhar and others* 1991 RN 61 has categorically held that the entry made by Patwari in the remark column or any other column of a khasra or field book, no presumption of correctness can be attached. The Division Bench further held that Patwari is not required to make any kind of entry in a khasra or field book under Chapter IX of M.P. Land Revenue Code, 1959. In this view of the matter, even if any entry in column no.12 has been made by Patwari in the khasra, it would not mean that plaintiff is in possession of the suit property. Learned counsel has placed heavy reliance upon the Single Bench decision of this Court *State of M.P. and another Vs. Uttam Chand and others* 2000 (2) JLJ 143 and submitted that if a person is in settled possession of property, even on the assumption that he had no right to retain on the property, he cannot be dispossessed by the owner of the property except by

due course of law. In this regard, learned counsel has also placed reliance on the decision of Supreme Court *Krishna Ram Mahale (dead) by his LRs Vs. Mrs. Shobha Venkat Rao* AIR 1989 SC 2097. There is no dispute in this proposition but the question still rest upon the pivot as to whether plaintiff is in possession of the suit property. There is a pure finding of fact in this regard by learned two Courts below holding that plaintiff is not in possession of the suit property and this is a pure finding of fact based upon correct appreciation of the pleadings and evidence, both oral and documentary.

9. The substantial question of law is thus answered against the appellant and it is hereby held that because plaintiff is not in possession of the suit property, therefore, he is not entitled for a decree of injunction.

10. Resultantly, this appeal fails and is hereby dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2013] M.P., 2664
APPELLATE CIVIL
Before Mr. Justice A.K. Shrivastava
S.A. No. 35/2000 (Indore) decided on 5 April, 2013

STATE OF M.P. & ors. ...Appellants
Vs.
SMT. KESHAR BAI ...Respondent

A. Land Revenue Code, M.P. (20 of 1959), Section 131 - Rights of way - **Private easement is customary easement and is having wider connotation with that of rights of easement as envisaged in Easements Act, 1882. (Para 10)**

क. भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 131 – मार्गाधिकार – निजी सुखाचार, रुढ़िक सुखाचार है और सुखाचार के अधिकारों के संबंध में इसका व्यापक अर्थ है जैसा कि सुखाचार अधिनियम 1882 में अनुध्यात है।

B. Easement Act, (5 of 1882), Section 4 - Customary easement - **Plaintiff herself admitted that suit land is being used as path throughout from the time of her ancestors - Path is already existing for considerable long period and is ancient, reasonable, certain, regular, is not opposed to Public Policy, and is not forbidden by law - If path is being constructed by constructing a Pakka road for the convenience of**

public at large, it cannot be obstructed by plaintiff. (Para 11)

ख. सुखाचार अधिनियम, (1882 का 5), धारा 4 – रुढ़िक सुखाचार – वादी ने स्वयं स्वीकार किया कि वाद भूमि का उपयोग उसके पूर्वजों के समय से रास्ते के रुप में किया जाता आ रहा है – रास्ता पहले से ही काफी लंबी अवधि से अस्तित्व में है और प्राचीन, युक्तियुक्त, निश्चित, नियमित है, लोक नीति के विरुद्ध नहीं है और विधि द्वारा निषिद्ध नहीं है – यदि जन सामान्य की सुविधा हेतु पक्की सड़क का निर्माण करके रास्ता बनाया जा रहा है, उसमें वादी द्वारा बाधा नहीं डाली जा सकती।

C. Custom - Valid custom - **To constitute a valid custom, the essential ingredients are (i) it should be ancient (ii) certain (iii) reasonable (iv) should not be opposed to morality or Public Policy (v) not forbidden by law and (vi) regular. (Para 11)**

ग. रुढ़ि – वैध रुढ़ि – वैध रुढ़ि के गठन हेतु, आवश्यक घटक हैं (1) वह प्राचीन होना चाहिए (2) निश्चित होना चाहिए (3) युक्तियुक्त होना चाहिए (4) नैतिकता के या लोक नीति के विरुद्ध नहीं होना चाहिए (5) विधि द्वारा निषिद्ध नहीं होना चाहिए और (6) नियमित होना चाहिए।

D. Civil Procedure Code (5 of 1908), Section 100 - Substantial question of law - **Finding of fact recorded by two courts below that the suit land is being used as public way by the inhabitants of village - Finding of fact is arrived at by correct appreciation of evidence - Cannot be interfered in Second Appeal. (Para 9)**

घ. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – विधि का सारवान प्रश्न – निचले दो न्यायालयों द्वारा अभिलिखित किया गया निष्कर्ष कि वाद भूमि को गांव वालों द्वारा सार्वजनिक मार्ग के रुप में उपयोग किया जा रहा है – साक्ष्य का सही मूल्यांकन करके तथ्य का निष्कर्ष निकाला गया – द्वितीय अपील में हस्तक्षेप नहीं किया जा सकता।

Case referred :

2011 RN 361.

Swati Mehta, P.L. for the appellants.
J.B. Dave, for the respondent.

JUDGMENT

A.K.SHRIVASTAVA, J. :- The defendants who are the State of M.P. and it is functionaries have assailed the judgment and decree dated 21.09.1999 passed by learned First Additional District Judge, Dhar in

Civil Appeal No.123-A/1997 decreeing the suit of the plaintiff-respondent and thereby reversing the judgment and decree dated 21.07.1997 passed by learned First Civil Judge, Class-II Dhar in Civil Suit No.165-A/1996 dismissing the suit of plaintiff.

2. The suit of the plaintiff is that the disputed property is owned by her in her Bhumiswami right and she is also possessing it. On this land, defendants do not have any right, title, interest. The first and second defendants are keen enough to construct a road upon the suit land from Lohari to Baggad and when the plaintiff respondent restrained the employees of first and second defendants, they told that they have been directed to construct road by these defendants. Hence, the plaintiff filed the instant suit for injunction and prayed relief that defendants be restrained by passing a decree of permanent injunction from constructing the road from Lohari to Baggad upon the suit land. The first defendant-Gram Panchayat Lohari filed a written-statement and pleaded that the disputed property is being used as public path having width 25 feet from the ancient time and from this path the bullock-carts and tractors of the inhabitants of village pass-by and they use it for access. The road has already been constructed and only asphalt is to be made. Further it has been pleaded that on this 25 feet wide path the plaintiff never remained in possession. According to first defendant, the Gram Panchayat is not constructing the road and it has been made party unnecessarily and therefore the suit be dismissed against it by awarding special damages.

3. The second and third defendants namely Jila Gramin Vikas Abhikaran (D.R.D.A.) and State of M.P. filed their joint written-statement and pleaded that there is a customary easement right of way for last 500 years on the public path having width 25 to 30 feet. From this path, several bullock-carts, cattle, tractors and inhabitants of village access. No objection was ever raised by the plaintiff earlier and therefore she is estopped from raising any dispute. The plaintiff never remained in possession of suit property. The suit is also barred by time.

4. Learned Trial Court framed necessary issues and after recording the evidence of the parties, dismissed the suit. However, the first appeal which was filed has been allowed by the impugned judgment and decree.

5. In this manner this second appeal has been filed by the State of M.P. and its functionaries which was admitted for hearing on 22.06.2000 on the

following substantial questions of law :-

(1) Whether the 1st appellate court has committed the error of law in not dismissing the suit when it held that the road in question is a public road?

(2) Whether the 1st appellate court has committed error in holding that the State of M.P. is entitled to construct PAKKA road on road in question properly so as to make it usable by villagers of village Baggad the.& Dist.Dhar and villagers of other villages for plying their vehicles including bullockcards (sic.), tractors alongwith using for trafficking?

(3) Whether, impugned judgment and decree is perverse and illegal?

6. The contention of Smt. Mehta, learned Panel Lawyer appearing for appellants is that having arrived at a conclusion by learned First Appellate Court that the village path is already in existence upon the suit land for last several years and is being used as a public road, learned First Appellate Court has erred in substantial error of law in decreeing the suit of the plaintiff by passing a decree of injunction. It has also been put-forth by her that there is clear admission of plaintiff that suit land is being used as village path from ancient time by the inhabitants of the village and therefore when there is an admission of plaintiff in that regard, learned First Appellate Court ought not to have decreed the suit of plaintiff by passing the decree of injunction against the defendants restraining them from constructing pakka road.

7. On the other hand, Shri J.B. Dave, learned counsel appearing for plaintiff-respondent argued in support of the impugned judgment and submitted that cogent reasons have been assigned by learned First Appellate Court decreeing the suit and no interference is warranted in this appeal and therefore appeal deserves to be dismissed.

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

Regarding substantial question of law No. (1) and (2)

9. There is no dispute to the proposition that the suit land is owned by plaintiff under her Bhumiswami right. Indeed, defendants are also not disputing

this factual aspect. However, the factum of possession of plaintiff upon the suit land is highly disputed. According to the plaintiff she is possessing the suit land and on the other hand defendants in their separately filed written-statements have pleaded that said land is being used as customary easement by the inhabitants of the village for their access and they also use this way for carrying their tractors, bullock-carts, cattle etc. The specific pleadings of all the defendants that road has already been constructed only asphalt is to be made so that conveniently the inhabitants of village may carry their tractors, bullock-carts and they may use it in convenient manner. The plaintiff Kesharbai who was examined as PW1 herself in cross-examination has admitted that she allowed the villagers to carry their bullock-carts and further permitted the inhabitants of the village to use 10 feet wide road for access. In very specific words she has admitted that this way is ancient and was being permitted by her ancestor to use it as a way. She has further admitted that on the same width which was earlier being used by villagers as village path the pakka road is being constructed. Her witness Tulsiram (PW2) has also admitted this fact. Indeed learned two Courts below have also recorded a pure finding of fact that the suit land is being used as public way by the inhabitants of village. Learned First Appellate Court in paras 11, 12 and 13 of its judgment has affirmed the finding of learned Trial Court holding that the suit land is being used from ancient time by the villagers as path to access. No cross-objections have been filed by the plaintiff assailing the aforesaid finding of learned First Appellate Court holding and affirming the finding of learned Trial Court that the suit land is being used as public path from ancient time. This is a pure finding of fact and based upon correct appreciation of evidence and therefore it cannot be interfered with in this second appeal.

10. Section 131 of M.P. Land Revenue Code, 1959 (in short "Code") speaks about the rights of way and other private easement. According to sub-section (1) of this section if in the event of a dispute arising as to the route by which a cultivator shall have access to his fields or to the waste or pasture lands of village, otherwise than by the recognised roads, paths or common land, including those road and paths recorded in the village *Wajib-ul-arz* prepared under Section 342 or as to the source from or course by which he may avail himself of water, a Tahsildar may, after local enquiry decide the matter with reference to the previous custom in each case and with due regard to the conveniences of all the parties concerned. According to me, this private easement is customary easement and is having wider connotation with that of

rights of easement as envisaged in the Indian Easements Act, 1882 (in short "Easements Act'). Sub-section (1) of Section 131 of the Code is not akin to that of Section 4 of Easements Act. The scope of Section 131(1) of the Code is if a particular route is being used by a cultivator to access to his fields etc. and if any dispute has arisen, the Tahsildar may with reference to previous custom may decide the said dispute by considering the conveniences of parties concerned. Recently, by interpreting section 131 of the Code the Supreme Court in *Ramkanya Bai (Smt.) and another v. Jagdish and others*, 2011 RN 361 has held that when a person who does have an easementary right, tries to assert or exercise any easementary right over another's land, the owner of such can resist such assertion or obstruct the exercise of the easementary right and also approach the civil Court to declare that the defendant has no easementary right of the nature claimed over his land and/or that the defendant should be prevented from inserting such right of interfering with his possession and enjoyment and such a suit is not barred. Thus, the civil Court is required to see whether the said route was being used as private easement with reference to the previous custom. Since the defendant herself has admitted that the suit land is being used as path by the villagers to carry their cattle, bullock-carts and even tractors from the period of her ancestors, certainly the ancient custom has been proved and therefore when there is specific finding of two Courts below that suit land is being used as path from the time of ancestors of the plaintiff and the villagers were using the path as their customary easement, in these facts and circumstances, I am of the view that plaintiff is not entitled to for any decree of injunction.

11. To constitute a valid custom, the essential ingredients are as under :-

(i) It should be ancient;

(ii) certain;

(iii) reasonable,

(iv) should not be opposed to morality or public policy;

(v) not forbidden by law; and

(vi) regular.

The aforesaid ingredients do tally in the present factual scenario since the plaintiff herself has admitted that the suit land is being used as path throughout from the time of her ancestors. Hence, I am of the view that the plaintiff has

no case. The path is already there for considerable long period and is ancient; reasonable; certain; regular; is not opposed to public policy; and is not forbidden by law and therefore for the convenience of public at-large of the village if path is being constructed by constructing a pakka road it cannot be obstructed by plaintiff. The substantial questions of law no.(1) and (2) are thus answered against the plaintiff-respondent and in favour of appellants.

Regarding substantial question of law No.(3)

12. Since learned First Appellate Court by affirming the finding of learned Trial Court holding that suit land is being used as path for several years as customary easement by the villagers and in these facts and circumstances if the finding recorded by it that defendants are not having any right to construct the pakka road, according to me, it is perverse. Learned First Appellate Court has incorrectly applied Section 4 of the Easements Act. I have already held hereinabove that the scope of Section 131(1) of the Code is not akin to that of Section 4 of Easements Act and is having a wider connotation. Substantial question of law no.(3) is thus answered against the plaintiff-respondent and it is hereby held that finding of learned First Appellate Court is perverse and illegal.

13. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by learned First Appellate Court so far as holding that defendants are not entitled to construct pakka road is hereby set aside and the judgment and decree of learned Trial Court is restored in toto. No costs.

Appeal allowed.

I.L.R. [2013] M.P., 2670
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 257/1998 (Jabalpur) decided on 1 August, 2013

BHAVUTI (DECEASED THROUGH LR'S) ...Appellant
Vs.
ALAM (DECEASED THROUGH LR'S) & anr. ... Respondents

Transfer of Property Act (4 of 1882), Section 53-A - Part Performance - Possession **- An agreement to sell was executed in favor of respondent and was placed in possession - A person is entitled to protect his possession only when if he is ready and willing to perform his part of contract - Respondent never took any steps for execution of**

sale deed or paid the balance sale consideration nor filed any suit for specific performance of Contract - As respondent was not ready and willing to perform his part of contract therefore, not entitled to benefit of Section 53-A of Act, 1882 - Appeal allowed. (Paras 7 & 8)

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 53ए – आंशिक पालन – कब्जा – विक्रय का करार, प्रत्यर्थी के पक्ष में निष्पादित किया गया था और उसे कब्जा दिया गया – कोई व्यक्ति अपने कब्जे को सुरक्षित रखने के लिए केवल तब हकदार है यदि वह संविदा के अपने भाग का पालन करने के लिये तैयार व रजामंद है – प्रत्यर्थी ने विक्रय विलेख के निष्पादन हेतु कोई कदम नहीं उठाये या बकाया विक्रय प्रतिफल अदा किया और न ही संविदा के विनिर्दिष्ट पालन हेतु कोई वाद प्रस्तुत किया – चूंकि प्रत्यर्थी, संविदा के अपने भाग का पालन करने के लिए तैयार व रजामंद नहीं था, इसलिए अधिनियम, 1882 की धारा 53ए के लाभ का हकदार नहीं – अपील मंजूर।

Cases referred :

AIR 1996 SC 910, 2000(3) MPHT 18, 2004(2) MPLJ 557, AIR 1999 SC 3248, AIR 2000 SC 1485, AIR 2002 SC 812, AIR 2007 SC 1753.

Saket Agarwal, for the appellant.
Smita Arora, for the respondents No. 1 & 2.
Pratibha Mishra, P.L. for the respondent No. 3.

JUDGMENT

ALOK ARADHE, J. :- This appeal is filed by the plaintiff who has died during the pendency of the appeal and his legal representatives have been substituted. A bench of this Court had admitted the appeal on the following substantial question of law:-

> *"Whether the Courts below are right in holding that the defendants can retain their possession in view of Section 53-A of Transfer of Property Act, 1882?"*

2. The facts giving rise to filing of the appeal, briefly stated, are that the original plaintiff filed a suit *inter alia* on the ground that the defendant nos. 1 and 2 are money lenders. The original plaintiff was in need of money, and therefore, from time to time he took loan from defendant nos. 1 and 2. As a security for loan documents dated 12-07-1979, 29-06-1982 and 20-01-1983 (Exhibit D/1 to D/3) were executed in respect of the land admeasuring 4.5 acres and the possession of the land in question was handed over to the

defendants. The original plaintiff from time to time made payment to the defendants on account of the loan taken by him. It is the case of the plaintiff that though he had repaid the entire amount of loan, yet the possession of the suit land was not handed over to him. Accordingly, the plaintiff filed a suit seeking relief of possession.

3. The defendant nos. 1 and 2 filed a written statement in which *inter alia* it was pleaded that they are not money lenders. The defendants had entered into an agreement for sale with the plaintiff and on receipt of part of the sale consideration, possession of the land in question was handed over to the defendants. It was further pleaded that defendants are ready and willing to perform their part of contract and therefore, entitled to benefit of Section 53-A of Transfer of Property Act, 1882(hereinafter referred to as 'the Act').

4. The trial Court vide judgment and decree dated 31-07-1991 *inter alia* held that the documents Exhibit D/1 to D/3 were not executed by way of security for loan and the plaintiff is not entitled to seek possession of the land in question, as the defendants in pursuance of the agreement Exhibit D/1 to Exhibit D/3 are in possession of the suit lands. Accordingly, the suit filed by the plaintiff is dismissed. The aforesaid decree has been affirmed in appeal by the lower appellate Court.

5. Learned counsel for the appellants submitted that the Courts below committed error of law in holding that the defendants are entitled to protect their possession under Section 53-A of the Act but it ought to have appreciated that protection under Section 53-A of the act can be availed only by a party who is ready and willing to perform his part of contract. In support of his submissions, learned counsel for the appellants has placed reliance on the decision of the Supreme Court in the cases of *Mohanlal (deceased) through his LR's Kachru and others Vs. Mira Abdul Gaffar and another* AIR 1996 SC 910, *Roop Singh Vs. Ram Singh* 2000(3) MPHT 18 and *Subhash Chandra and others Vs. Manjla and another* 2004(2) MPLJ 557. On the other hand, learned counsel for the respondents submitted that the defendants out of the total sale consideration of Rs. 10,000/- had already paid a sum of Rs. 6900/- and are ready and willing to pay the remaining sale consideration. It is also urged that both the Courts below have recorded a concurrent findings of fact against the appellants which do not call for any interference by this court in exercise of powers under Section 100 of Code of Civil Procedure.

6. I have considered the submissions made by learned counsel for the

parties and have perused the record. The sole question which arises for consideration in the instant appeal is whether the defendants are entitled to retain their possession under Section 53-A of the Act. The relevant extract of Section 53-A of the Act reads as under :-

> ***"53A. Part performance :-****Where any person contracts or transfer for consideration any immoveable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,*
>
> *and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, of the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,*
>
> *and the transferee has performed or is willing to perform his part of the contract."*

From a perusal of Section 53-A of the Act, it is evident that in order to avail the benefit of Section 53-A of the Act, the transferee has to show that he has done some act in furtherance of the contract and has performed or is ready and willing to perform his part of contract.

7. The provisions of Section 53-A of the Act were considered by the Supreme Court in the case of *Mohanlal (deceased) through his LR's Kachru and others Vs. Mira Abdul Gaffar and another* AIR 1996 SC 910, wherein it was held that a person in possession in pursuance of the agreement for sale is entitled to protection under Section 53-A of the Act only, if he is ready and willing to perform his part of the contract. It is further held that mere statement of a person in possession of the property in pursuance of an agreement for sale, that he is ready and willing to perform his part of contract is not enough. Similar view has been taken in the case of Supreme Court in the case of *Ram Kumar Agarwal and another Vs. Thawar Das (Dead) through LR's* AIR 1999 SC 3248, *Roop Singh (Dead) through LRs Vs. Ram Singh (Dead) through LR's* AIR 2000 SC 1485, *Mool Chand Bakhru and another Vs. Rohan and Others* AIR 2002 SC 812 and *P.T. Munichikkanna Reddy and Ors. Vs. Revamma and Others* AIR 2007 SC 1753.

8. In the instant case, documents Exhibit D/1 to D/3 were executed on

12-09-1979, 29-06-1982 and 20-1-83 respectively. It is pertinent to mention here that in documents Exhibit D/1 and D/3 date of execution of the sale deed has been specified. Under the said documents, the original plaintiff had placed the defendants in possession in respect of 4.5 acres of land for a consideration of Rs. 6900/-. The plaintiff filed the suit on 22-06-1987 on the ground that he has repaid the entire amount of loan. However, there is no material on record to infer that either the defendants took any steps for execution of the sale deed or paid the balance amount of sale price. The defendants have also not filed any suit for specific performance of the contract despite expiry of the period of limitation. The aforesaid facts lead to irresistible conclusion that the defendants are not ready and willing to perform their part of contract. Consequently, they are not entitled to benefit of Section 53-A of the Act.

9. In view of the preceding analysis, substantial question of law is answered in the negative and in favour of the appellants. Accordingly, the judgment and decree passed by the trial Court and the lower appellate Court are set aside and the suit filed by the plaintiff is decreed with costs.

10. In the result, the appeal is allowed.

Appeal allowed.

I.L.R. [2013] M.P., 2674
APPELLATE CIVIL
Before Mr. Justice G.D. Saxena
M.A. No. 450/2003 (Gwalior) decided on 6 August, 2013

KIRAN YADAV & ors. ...Appellants
Vs.
SHRIKRISHNA & ors. ...Respondents

Motor Vehicles Act (59 of 1988), Section 163 - Negligence **- Two Vehicles were involved in accident - Composite and Contributory negligence are not the same - Where there is absolutely no concert or common design, the liability depends purely on the aspect of negligence on the part of the driver - Vicarious liability is on the part of the owner, and the liability of the insurance company is to indemnify on the basis of the contract of Insurance - Insurance Companies of both the vehicles are liable - Fixation of 50% liability against both the drivers proper.**
(Paras 9 & 10)

मोटर यान अधिनियम (1988 का 59), धारा 163 – उपेक्षा – दो वाहन दुर्घटना में शामिल – संयुक्त एवं योगदायी उपेक्षा समान नहीं है – जहां अनन्य रुप से कोई सहमति या सामान्य परिकल्पना नहीं, दायित्व शुद्ध रुप से वाहन चालक की ओर से उपेक्षा के पहलू पर निर्भर होता है – प्रतिनिधिक दायित्व, स्वामी की ओर से है और बीमा के अनुबंध के आधार पर क्षतिपूर्ति के लिये बीमा कम्पनी का दायित्व है – दोनों वाहनों की बीमा कम्पनियों का दायित्व है – दोनों वाहन चालकों के विरुद्ध 50 प्रतिशत दायित्व का निर्धारण उचित।

Case referred :

2008 ACJ 1165.

K.N. Gupta with *Sweta Bothra* for the appellants.
S. Gajendragadkar, for the respondent No. 3 United Insurance Co.

ORDER

G.D. SAXENA, J.:- This order shall govern the disposal of aforesaid two appeals **(Misc. Appeal No.450/2003 and Misc. Appeal No.458/2003)**

(2) Misc. Appeal No.450/2003 is filed by the claimants of the deceased whereas Misc. Appeal No.458/2003 is preferred by the injured being aggrieved by a common Award dated 26th April 2008 passed in respective Claim Cases No. 84/02 and 72/02 by the Fifth Additional Member of the Motor Accident Claims Tribunal, Bhind (M.P.).

(3) The facts of the case, which are necessary for the decision are that on 21st April 2003 at around 10 o' clock in night, Bhagwan Singh with his family members was travelling in a Maruti Car bearing registration No.DNC 5667. Said Maruti Car was driven by Komal Kumar which collided with a tractor No. CIG 6537 coming in a high speed from front side. As a result, Bhagwan Singh who was travelling in car died on the spot while his son Raju @ Rajesh Singh was seriously injured. The F.I.R. of the incident was lodged by Komal Singh, driver of the car against the driver of tractor involved in accident in Police Station Bhind. The crime was registered and after investigation, the charge-sheet was filed before the criminal court. In Claim Case No. 72/2002, injured Raju @ Rajesh Singh claimed compensation in the sum of Rs.12,02,745/-. In another Claim Case No. 84/2003, the claimants of the deceased claimed compensation in the sum of Rs. 9,11,070/-. The Tribunal after recording the findings that the accident was caused due to the composite negligence of drivers of both the vehicles fixed the percentage of negligence

as 50% each, hence, a sum of Rs. 31,405/- in favour of the injured Rajesh in Claim Case No.72/02 was awarded. In another Claim Case No.84/02, the claimants of the deceased have been compensated by a sum of Rs. 3,32,910/-. Being aggrieved, the appellants have come to this court.

(4) The submission of the learned counsel appearing in Misc. Appeal No. 450/03 on behalf of the claimants is that the learned tribunal erred in applying the principles of composite negligence on the part of the driver of the car in which the deceased alongwith other family members was travelling. It is further submitted that there is an error committed by the learned MACT in calculating the dependency on the income of the deceased to the tune of Rs. 1873/- as well as applying lesser multiplier. The rate of interest is also on lower side. It is further urged that the income of the deceased ought to have been assessed on the basis of principles of last salary drawn. On this basis, it is prayed that the impugned findings contained in the Award are liable to be set aside and the appeal deserves to be allowed.

(5) Similar is the submission put forth on the point of composite negligence in another Misc. Appeal No.458/03. It is further submitted that the learned tribunal committed an error in observing the nature of permanent disability suffered by the injured Raju. Moreover, the certificate issued by the District Medical Board after examining the injured on settled norms of disability examination is ignored. The medical expenses incurred were not properly awarded. The multiplier apply is on lower side. In view of the above, it is prayed that by allowing the appeal the award may be modified up to the amount as sought for.

(6) On the contrary, the learned counsel appearing on behalf of the Insurance Company in both the appeals submitted that the appellants in both the cases have not joined the owner, driver and Insurance company of another vehicle involved in accident. It is submitted that the tribunal rightly concluded that the accident was result of the joint tort-feasers and the drivers of both the vehicles were negligent and equally responsible for payment of compensation to the claimants and injured. In this manner, the learned tribunal has rightly passed the award in favour of injured and claimants of the deceased which is sought to be maintained by the learned counsel with dismissal of the appeals.

(7) In the light of the submissions put forth, this court has examined the legal principles laid down by Hon. Apex Court in the decision *T.O.Anthony Vs. Kavaran and others* (2008 ACJ 1165). That was a case of head on

collision. K.S.R.T.C. bus and a private bus were involved in the accident. The driver of the K.S.R.T.C. bus filed claim petition claiming compensation. The Apex court noticed the fact that in many cases, including the one at hand, the Tribunal fell in to a common error in proceeding on the assumption that composite negligence and contributory negligence are one and the same. The Apex court held that where a 3rd party, other than the driver or owner of the vehicles involved, claims damages for loss or injuries in an accident involved in a motor vehicle, compensation is payable in respect of the composite negligence of the drivers of those vehicles. But in respect of such an accident, if the claim is by one of the drivers himself for personal injuries, or by the legal heirs of one of the drivers for loss on account of his death, or by the owner of one of the vehicles in respect of damages to his vehicle, it was held that the issue that arises is not about the composite negligence of all the drivers, but about the contributory negligence of the driver concerned.

(8) The Apex court held that composite negligence refers to the negligence on the part of the two or more persons and that where a person is injured as a result of negligence on the part of two or more wrong doers, it is stated that the person was injured on account of composite negligence of those wrong doers. In such a case, each wrong doer, is jointly and severally liable to the injured to pay the entire damages and the injured person has the choice of proceeding against all or any of them. The Apex court further held that in such a case, the injured need not establish the extent of responsibility of each wrong doers separately, nor is it necessary for the court to determine the extent of liability of each wrong doer separately. The Apex court also examined the differences between the composite negligence and contributory negligence. The Apex court held that where a person suffers injury, partly due to negligence on the part of another person or persons, and partly, as a result of his own negligence, then the negligence on the part of the injured, which contributed to the accident, is referred to as his contributory negligence. In the said case, the Apex court found that contributory negligence on the part of the appellant/ claimant is only 25% and not 50%. The court modified the award to the extent of contributory negligence on the part of the claimant which is only 25%.

(9) Following the decision of the Apex court in the case of *T.O.Anthony* (supra) and after analysing the factual situation similar to the present case, this court has held that where there is absolutely no concert or common design, the liability depends purely on the aspect of negligence on the part of the

driver, vicarious liability on the part of the owner, and liability of the insurance company to indemnify on the basis of the contract of insurance. In such case, the liability of parties of each vehicle cannot be shared each other. The owner of a vehicle can be held vicariously liable only to the extent of the negligence caused by his employee, who is the driver of his vehicle. The insurer of a vehicle can be fastened with liability only on the basis of the contract of insurance and that too only to indemnify the insured of that vehicle.

(10) In the present case, two vehicles are involved in the accident. This is a case where 3rd party claim damages for loss or injuries and compensation is payable in respect of composite negligence of the drivers of both vehicles. In this case, the Tribunal examined the extent of negligence on the part of the drivers of both vehicles, the Tribunal on evidence found that 50% negligence each can be attributed against both the drivers. Said approach cannot be said to be wrong.

(11) The question now remains to be answered in these appeals is the quantum of award amount payable to the injured and the claimants.

(12) It is established from the evidence on record that the deceased aged 53 years was posted as Head Constable in the Office of Superintendent of Police Gwalior and was getting Rs. 7,282/- as monthly salary alongwith other facilities attached to the post. The dependency of the claimants on the earnings of the deceased will thus be calculated on his last drawn monthly salary i.e., Rs. 7,282/-. Since the deceased was aged 53 years at the time of accident, his monthly income for the purpose of assessment of compensation is determined as Rs. 8374/- by adding 15% of his salary to actual salary income. Deducting 1/3rd of the monthly income towards personal and living expenses of the deceased, contribution to family (dependents) is determined as Rs.5,583/-. Having regard to the age of the deceased, applying the multiplier of 11, the loss of dependency is worked out as Rs. 61,413/-,annually Rs.7,36,956/-. In addition thereto, claimants are also entitled to Rs. Rs. 20,000/- under the head of loss of consortium, Rs. 20,000/- as love and affection, Rs. 5,000/- towards funeral expenses, Rs. 5,000/- as cost of transportation of the dead-body and Rs. 10,000/- for loss of estate. Thus, the claimants are entitled to receive total compensation as **Rs. 7,96,956/- (Rs. Seven lac ninety six thousand nine hundred fifty six only)** alongwith interest @ 8% per annum on the enhanced amount from the date on which the claim petition was filed before the tribunal till final payment of compensation

amount is made to them.

(13) Now, considering the case of injured Raju @ Rajesh Singh, it appears that he in the accident got several injuries on his body including fractures in shaft of ulna right and shaft of femur left. He was engaged in Hotel and loading business on Highway and looking to the nature of his business, the disability sustained by him carries some meaning. The nature of the injuries suffered by the claimant was such that he never fully got over the same and continued to be under medical treatment till the end of his life. So, compensation awarded by the tribunal appears to be on lower side. For expenses of medicine by way of compensation Rs. 30,000/-, Rs. 20,000/- for future treatment for bony injuries, Rs.10,000/- for nourishing and healthy food, Rs. 20,000/- for transportation and nursing and Rs. 30,000/- for future loss in business in which he was engaged was awarded. Hence, in this manner, the claimant/injured is entitled to receive total compensation amounting to Rs. 1,10,000/- alongwith 8% monthly simple interest from the date of filing of claim petition before the tribunal till date of final realisation. In the light of the principles of law discussed above, the Insurance Company/respondent No.3 is directed to satisfy 50% of the award, i.e. **Rs. 3,98,478/- (Rs. Three lac ninety eight thousand four hundred seventy eight only)** in Misc. Appeal No.458/03 and **Rs. 55,000/- (Rs. Fifty Five Thousand Only)** in Misc. Appeal No.450/03 **alongwith interest @ 8% per annum on the enhanced amount** from the date on which the claim petitions were filed before the tribunal till actual payment is made.

(14) As regards balance 50% of the award amount with interest from the driver, owner and Insurance Company insuring the offending car, on perusal of the evidence adduced before the learned tribunal, it is gathered from the statements of Raju @ Rajesh injured, Rakesh and Mahendra Singh that Komal Singh was driving the car on the fateful day which was owned by his friend. Name of the owner and Insurance Company despite being known to them were not disclosed before the tribunal. It is proved that the accident was direct result of head on collision of car with tractor. So, contributory negligence on the part of the driver of the car could not be denied in causing the accident. Therefore, a more appropriate view in the case of composite negligence is to apportion the percentage of negligence and to fix up the liability on each vehicle to the extent of negligence. In such cases, it is not correct to say that the sufferer of the wrong, who is the victim of the accident, has got any choice to sue any one of the owner or insurer for the total damages for which they are

liable beyond the extent of negligence caused by the driver of such vehicle, when the drivers of both the vehicles are not 'joint tortfeasors' but only 'separate tortfeasors'. Since the owner of the car is not joined, who had entered into any contract of insurance with the Insurance Company which is liable to indemnify a person insured, by virtue of contract of insurance, it is directed that the claimants as well as injured shall disclose their names alongwith all necessary particulars of the driver, owner and Insurance company where offending Maruti car was insured, at the relevant point of time, as from the facts on record it is clear that at the time of accident the said vehicle was being driven by Komal Singh, who is nephew of the deceased and cousin of injured Raju @ Rajesh. Subject to furnishing aforesaid requisite informations and depositing Rs. 5,00,000/- before the learned MACT by the owner of such vehicle against solvent surety to the satisfaction of the tribunal, the Insurance company shall first pay the balance 50% of the award amount with necessary interest within a period of three months from the date of this order to the claimants and would be at liberty to recover the same from the driver and the owner of the offending car in execution proceedings. It is further directed that the learned MACT after affording opportunity of hearing to both the parties shall proceed for recovery of the contributory amount recoverable from the opponents within a year from the date such amount is deposited before it.

(15) The appeals are accordingly disposed of as indicated above.

Appeal disposed of.

I.L.R. [2013] M.P., 2680
APPELLATE CIVIL
Before Mr. Justice G.D. Saxena
M.A. No. 260/2012 (Gwalior) decided on 6 August, 2013

PUSHPA DEVI ...Appellant
Vs.
HARVILAS & ors. ...Respondents

A. Civil Procedure Code (5 of 1908), Order 22 Rule 10 - **If the interest is assigned of the subject matter of the suit, the assignee may apply to be impleaded as a party even at an appellate stage. (Para 12)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 22 नियम 10 – यदि वाद की विषय वस्तु का हित समनुदेशित किया गया है, समनुदेशिती पक्षकार के रुप में अभियोजित किये जाने हेतु अपीलीय प्रक्रम पर भी आवेदन कर सकता है।

B. Civil Procedure Code (5 of 1908) Order 41 Rule 23A - Remand in other cases - **The appellate court may remand the suit to the trial court even though such suit has been disposed of on merits and the decree is reversed in appeal and the appellate court considers that retrial is necessary - Held - If the finding of the appellate court in remanding the case for fresh trial is not in consonance with the provisions of law, liable to be set aside. (Para 17)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 23ए – अन्य प्रकरणों में प्रतिप्रेषण – अपीली न्यायालय, वाद को विचारण न्यायालय प्रतिप्रेषित कर सकता है, यद्यपि उक्त वाद गुणदोषों पर निपटाया गया और अपील में डिक्री को उलट दिया गया और अपीली न्यायालय के विचार में पुनः विचारण आवश्यक है – अभिनिर्धारित – यदि प्रकरण प्रतिप्रेषित करने में अपीली न्यायालय का नये विचारण का निष्कर्ष, विधि के उपबंधों के अनुरुप नहीं, अपास्त किये जाने योग्य।

Cases referred :

(2002) 5 SCC 686, (2009) 8 SCC 231, 2009 (I) MPLJ 620, (2004) 4 SCC 26, 1977 JLJ SN 83, AIR 1958 SC 394, AIR 1994 M.P. 181, (2012) 5 SCC 543.

N.K. Gupta, for the appellant.
Jitendra Sharma, for the respondents No. 1 to 3.
Suresh Agrawal, for the respondent No. 5.

ORDER

G.D.SAXENA, J.:- This order shall govern the disposal of aforesaid two appeals (**Misc. Appeal No.260/2012 and Misc. Appeal No.261/2012**).

(2) These appeals under Section 104 read with Order 43 Rule 1(u) of C.P.C. through inter-pleader have been submitted against a common order dated 24th January 2012 in Civil Appeal No. 26/2009 and 27/2009 of the Additional District Judge, Gohad, district Bhind, allowing thereby an application preferred by the appellant under Order XXII Rule 10 C.P.C. and allowing her to be impleaded as a defendant while making remand of the entire case to the learned trial court for afresh decision, after setting aside the impugned judgment and decree dated 31st August 2009. Being aggrieved, the appellant has come to this court with certain reliefs.

(3) Bare facts necessary for determination of this controversy can now be stated. The plaintiffs/respondents No. 1 to 3 instituted a suit against

defendants/respondents No. 4, 5 and 6 (in Misc. Appeal No.260/12) for declaration of title and permanent injunction over the agricultural land comprised in Survey Nos. 33, 51, 62, 430, 432, 434, 1004, 1007, 1008 and 1210, total area 3.36 hector, situated in village Achaya Tehsil Gohad, district Bhind which was subject matter of the suit. The said disputed land earlier was owned by Gangaram, father of the plaintiffs and Tej Singh. After death of Gangaram, plaintiffs and Tej Singh became the owners of the land with equal share of 1/4th in the suit property. The suit land was partitioned in the year 1994 and pursuant thereto the mutation proceedings took place. It was alleged that by the defendant No.1 that she was not given share as per the agreement made between her father and the plaintiff Harvilas. On the contrary, plaintiff Harvilas pleads that the father of defendant No.1 being Karta of the family made partition of the property which was not proper and he played fraud with his rights. In such circumstances, both the parties filed separate suits against each other. However, the learned trial Judge by the impugned judgment dated 31st August, 2009 did not find the partition proved between the parties contesting the suit, hence, left the parties to proceed for getting their partition before the competent court. Being aggrieved, both the parties filed two separate appeals and challenged the above impugned findings. During hearing, the appellant-intervener filed the application under Order XXII Rule 10 of C.P.C. with a prayer that she be joined with seller Savitridevi in pending appeals. Said prayer was allowed but in a different manner. The appellant was allowed to be impleaded as defendant in the appeals but instead of deciding the appeals on merits, the lower appellate court remanded the case back to the trial court for taking afresh decision after affording opportunity to the appellant to file written statement and produce evidence.

(4) Learned counsel for the appellant invites attention to impugned order dated 24/1/12 to demonstrate that it is in fact a remand order and as such provision of order XLIII Rule 1(u) C.P.C. will apply and appeal against such an order is the only remedy. It is further submitted that the first appellate court instead of deciding the case on merits, passed the impugned order. Accordingly, it is prayed that by allowing the appeals the order of remand may be set aside and the appellate court may be directed to implead the appellant in the appeals filed by the parties with seller Savitridevi and thereafter same may be heard on merits. In support of the submissions he has relied upon the judgments reported AIR 1953 SC 837 in this respect in the cases of *P. Purushottam Reddy & another Vs. Pratap Steels Ltd.* (2002) 5 SCC 686, *H.P. Vedavyas*

Sachar Vs. Shivashabkar & another (2009) 8 SCC 231 as well as of this court in the case of *Dr. Arvind Vs Mannalal 2009* (1) MPLJ 620.

(5) In the case of *P. Purushottam Reddy* (supra), the Hon. Apex court while dealing with the matter has observed as follows :-

> "Prior to the insertion of Rule 23-A in Order 41 of the Code of Civil Procedure by the CPC Amendment Act, 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand inasmuch as the subordinate court can try only such issues as are referred to it for trial and having done so, the evidence recorded, together with findings and reasons therefor of the trial court, are required to be returned to the appellate court.
>
> In 1976, Rule 23-A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23-A as it is under Rule 23. After the amendment, all the cases of wholesale remand are covered by Rules 23 and 23-A. In view of the express provisions of these Rules, the High Court cannot have recourse to its inherent powers to make a remand because, as held in *Mahendra Manilal Nanavati v. Sushila Mahendra Nanavati* (AIR at p. 399), it is well settled that inherent powers can be availed of *ex debito justitiae* only in the absence of express provisions in the Code. It is only in exceptional cases

where the court may now exercise the power of remand dehors Rules 23 and 23-A. To wit, the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 41 Rule 31 CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for rewriting the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23-A or Rule 25 CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore, must be avoided."

(6) As against this, learned counsel for the respondent has invited attention to provisions of Order 41 Rule 23 of C.P.C. to point out when remand is possible. He states that by the impugned order here, the learned Additional District Judge has not in appeal before him interfered with the "decree" passed by lower Court and as such, provisions of Order 43 Rule l(u) are not attracted. Apart from it, he submits that in both the appeals the appellant did not frame the substantial question of law as per requirement of Section 100 of C.P.C., so this miscellaneous appeals are not tenable. In support, learned counsel placed reliance on the decision in the case of *Narayanan Vs. Kumaran* (2004) 4 SCC 26.

(7) In case of *Narayaman* (supra) it has been held as follows:-

"It is obvious from the above rule that an appeal will lie from an order of remand only in those cases in which an appeal would lie against the decree if the appellate court instead of making an order of remand had passed a decree on the strength of the adjudication on which the order of remand was passed. The test is whether in the circumstances an appeal would lie if the order of remand were to be treated as a decree and not a mere order. In these circumstances, it is quite safe to adopt that appeal under Order 43 Rule 1 clause (u) should be heard only on the ground enumerated in Section 100. We, therefore, accept the contention of Mr. T.L.V. Iyer and hold that the appellant under an appeal under Order 43 Rule 1 clause (u) is not entitled to agitate questions of facts. We, therefore,

hold that in an appeal against an order of remand under this clause, the High Court can and should confine itself to such facts, conclusions and decisions which have a bearing on the order of remand and cannot canvass all the findings of facts arrived at by the lower appellate court. "

(8) Before proceeding further, it will be necessary to reproduce relevant provisions of Order XLI, Rule 23 and 23 A of Civil Procedure Code. Said provisions read :

(9) Rule 23. Remand of case by Appellate Court.- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of Civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand. Rule 23 A. Remand in other cases - Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.

(10) A perusal of Rule 23 or Rule 23A reveals that the appeal before Appellate Court has to be from a decree passed by lower Court.

(11) On coming back to the case, it is noted that before the date of judgment of the suit on 24/8/09, half of the share of the disputed land was soled by Smt. Savitribai in favour of the appellant-Smt. Pushpa Devi vide sale-deed and the possession was also handed over to her. So after sale of the property, appellant has acquired the right and title over it. Both parties of the suits being aggrieved by the judgment passed in civil suits filed separate appeals before the appellate court. During pendency of appeals, appellant-Smt. Pushpa Devi filed an application under Order XXII Rule 10 of C.P.C. for impleading her in the appeals alongwith aforesaid seller Smt. Savitribai.

(12) In the case of *Radheshyam Vs. Bhagwanlal* 1977 JLJ SN 83, this Court, following the decision in the case of *Saila Bala Vs. Birmala Sundari*

(AIR 1958 SC 394), observed that Rule 10 of Order XXII, is enacted with the object that in case of assignment, creation or devolution of interest, the suit may be continued by or against a person whom or upon whom such interest has come or devolved. It is true that the Court has been invested with discretion, but like any other discretion, it must be exercised judicially. This provision enable a party to apply to the Court for being made a party so that he may safeguard his own interest by prosecuting the suit as he himself desires. It was further observed that Order XXII, Rule 10 does not cast any obligation on the transferee to become a party to the suit because he may think that his interests are protected by the original defendant. In other words, the transferee is not obliged to apply for being made a party. The fact remains that a decree to be passed in that suit against the original defendant will operate against the transferee as well. Thus, essentially it is the choice of the transferee whether to apply for leave of the Court or not. A Division Bench of this Court, in the case of *Devisahai v. Govindrao* 1966 JLJ 32 : (AIR 1965 MP 275), while considering the case of addition of party of transferee pendente lite at appellate stage, has observed that so far as allowing a party to be impleaded under Order I, Rule 10(2) or Order XXII, Rule 10, or Order XLI, Rule 20 is concerned the discretion has to be exercised by the Court judicially. It was further observed that there is no bar of the transferee pendente lite being impleaded as a party under Order XXII, Rule 10 at the appellate stage. However, the question will be one of the due diligence. But, if he is guilty of unreasonable delay and waits and watches the proceedings without making an attempt to be impleaded and later on files an application at a very late stage, unless he explains the delay or shows some justifiable reason for having remained silent, his prayer to be impleaded at a late stage can evidently not be allowed.

(13) In *Kamta Prasad Vs. Vidhyawati* (AIR 1994 M.P. 181) this court answered the relevant question covering the present case in the following terms:-

> "In the opinion of this Court, a reading of the two provisions of Order XXII, Rule 10 and Order I, Rule 10, CPC, it is amply clear that under Order XXII, Rule 10, if the interest is assigned of the subject-matter of the suit, the assignee may apply to be impleaded as a party even at an appellate stage and if a person is vitally interested in the litigation and ultimate decree which may be passed in the said litigation vitally affecting his rights, he may apply to be added as a party under Order I, Rule 10(2), CPC. However, the Court, while considering the

application under Order I, Rule 10(2) or under Order XXII, Rule 10, has to exercise the discretion judicially.'

(14) Recently, the Hon. Apex Court has observed in *Jagannathan Vs Raju Sigamani* (2012) 5 SCC 543 as follows :-

"6. Order 41 Rule 23 is invocable by the appellate court where the appeal has arisen from the decree passed on a preliminary point. In other words, where the entire suit has been disposed of by the trial court on a preliminary point and such decree is reversed in appeal and the appellate court thinks proper to remand the case for fresh disposal. While doing so, the appellate court may issue further direction for trial of certain issues.

7. Order 41 Rule 23-A has been inserted in the Code by Act 104 of 1976 w.e.f. 1-2-1977. According to Order 41 Rule 23-A of the Code, the appellate court may remand the suit to the trial court even though such suit has been disposed of on merits. It provides that where the trial court has disposed of the suit on merits and the decree is reversed in appeal and the appellate court considers that retrial is necessary, the appellate court may remand the suit to the trial court.

8. Insofar as Order 41 Rule 25 of the Code is concerned, the appellate court continues to be in seisin of the matter; it calls upon the trial court to record the finding on some issue or issues and send that finding to the appellate court. The power under Order 41 Rule 25 is invoked by the appellate court where it holds that the trial court that passed the decree omitted to frame or try any issue or determine any question of fact essential to decide the matter finally. The appellate court while remitting some issue or issues, may direct the trial court to take additional evidence on such issue(s).

9. Insofar as the present case is concerned, the trial court had disposed of the suit on merits and not on a preliminary issue. The first appellate court set aside the judgment and decree of the trial court and directed the trial court to decide the suit afresh after giving parties an opportunity to lead evidence-

oral as well as documentary. The nature of the order passed by the appellate court leaves no manner of doubt that such order has been passed by the appellate court in exercise of its power under Order 41 Rule 23-A of the Code.

10. Order 43 of the Code provides for appeals from orders. Clause (u) of Rule 1 Order 43 was amended consequent upon insertion of Rule 23-A in Order 41 w.e.f. 1-2-1977. It reads as under:

"1. **Appeals from orders.-** An appeal shall lie from the following orders under the provisions of Section 104, namely

xxxx xxxx xxxx

(u) an order under Rule 23 or Rule 23-A of Order 41 remanding a case, where an appeal would lie from the decree of the appellate court; "

It is clear from the above provision that an order of remand passed under Order 41 Rule 23-A is amenable to appeal under Order 43 Rule 1(u) of the Code.

11. The High Court relied upon a decision of this Court in *Narayanan v. Kumaran* ... holding that civil miscellaneous appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in Narayanan is that an appeal under Order 43 Rule 1(u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u) can only be heard on the grounds a second appeal is heard under Section 100.

12. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of Narayanan in holding that miscellaneous appeal preferred by the appellant was not maintainable."

(17) Keeping in view the law and in the light of the definition aforesaid, it is clear that the Additional District Judge who decided appeals and delivered

impugned order is covered there under. It is to be noted that such judgment of District Court has been artificially treated as decree with further provision of appeal against it. To attract provisions of Order 41 Rule 23 or Rule 23A, present appellant has to demonstrate that the Additional District Judge was considering validity or otherwise of "decree" and, in that event only, present appeal against order can be held that to be maintainable. Moreover, perusal of impugned order reveals that it is not only an order of remand but thereby set aside the impugned judgment and decree without consideration on merits. Thus, a retrial as required by Order 41, Rule 23A is not warranted in the facts and circumstances of the case. Therefore, this court finds that remedy of filing appeal against order is available to the appellant. Hence after analysing the principles underlying the object, the findings of the appellate court by setting aside the judgment and decree of the trial court, while remanding back the case for fresh trial are not in consonance with the provisions of law mentioned above. The appellate court ought to have addressed itself to these vital points and was expected to proceed with the case on merits. Consequently, the appeals are hereby allowed and the findings of the appellate court in remanding the case back for fresh trial are set aside. It is directed that appellate court shall restore the appeals to their original numbers and after affording opportunity of hearing to the parties and the inter-pleader decide the appeals on their own merits, in accordance with law.

(18) The parties shall bear their own cost. Counsel fee Rs. 2000/-, if certified.

Appeal allowed.

I.L.R. [2013] M.P., 2689
APPELLATE CIVIL
Before Mr. Justice Alok Aradhe
S.A. No. 862/1998 (Jabalpur) decided on 20 August, 2013

RAM NIWAS ...Appellant
Vs.
JAGAT BAHADUR SINGH & ors. ...Respondents

***A. Transfer of Property Act (4 of 1882), Section 54 - Sale - Minor Transferee* - There is no provision in the Act, 1882 which prohibits a minor from being transferee - Minor is not disqualified to be transferee. (Para 8)**

क. सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 54 – विक्रय –

अवयस्क अंतरिती – अधिनियम, 1882 में ऐसा कोई उपबंध नहीं जो अवयस्क को अंतरिती बनने से प्रतिषिद्ध करता हो–अंतरिती बनने के लिए अवयस्क अयोग्य नहीं।

B. Land Revenue Code, M.P. (20 of 1959), Sections 165 & 170-B **- Land was sold in favour of plaintiff in the year 1957 - Vindhya Pradesh Land Revenue and Tenancy Act, 1853 was in force which did not contain any provision restraining alienation by a tribal in favour of non-tribal - Provisions of M.P. Land Revenue Code, 1959 do not apply. (Para 9)**

ख. भू राजस्व संहिता, म.प्र. (1959 का 20), धाराऐं 165 व 170बी – वर्ष 1957 में वादी के पक्ष में भूमि का विक्रय किया गया था – विंध्यप्रदेश भू राजस्व और अभिधृति अधिनियम, 1883 प्रभावी था, जिसमें जनजाति व्यक्ति द्वारा किसी गैर जनजाति व्यक्ति के पक्ष में अन्य संक्रामण अवरुद्ध करने वाला कोई उपबंध समाविष्ट नहीं – म.प्र. भू राजस्व संहिता 1959 के उपबंध लागू नहीं होते।

Cases referred :

AIR 1922 Nagpur 239, AIR 1930 Madras 425, (2001) 5 SCC 705, (2002) 2 SCC 440, (2002) 6 SCC 404, (2004) 9 SCC 468, (2009) 17 SCC 467, AIR 1965 SC 1179, (1911) ILR 33 All 657, (1914) ILR 37 Mad. 390, (1916) ILR 39 All 62.

Pranay Verma, for the appellant.
None present for the respondents.

JUDGMENT

ALOK ARADHE, J. :- This is an appeal by the plaintiff, which was admitted by a Bench of this Court on following substantial questions of law:-

> "i) Whether the findings arrived by the Courts below that there cannot be a valid alienation of immovable property to a minor, is perverse and unsustainable in law ?"
>
> ii) Whether the findings arrived at by the Courts below that in view of the provisions of Section 165(6) and 170-B of the M.P. Land Revenue Code, the plaintiff/appellant did not prescribe title on the disputed land by adverse possession, is also perverse and unsustainable in law ?"

2. Facts giving rise to filing of the appeal briefly stated are that one Suryadeen, the erstwhile tenant of land admeasuring 12.51 acres, sold the

same orally on 15.6.1957 to the plaintiff for a consideration of Rs.90/- and placed him in possession. Thereafter, the name of the plaintiff was recorded in the *Khatoni* of the year 1958-59 (Ex.P/1) and *Khasra Panchshäla* of the years 1957-58 up to 1986-87 i.e. Ex.P/2 to P/6. The plaintiff became the owner of the suit land on the basis of an oral sale followed by delivery of possession for a consideration of Rs.90/- and is in possession of the suit land as owner thereof. However, one Baldev threatened the plaintiff with dispossession some time in the year 1987. Thereupon, the plaintiff filed the suit seeking the relief of declaration of title and permanent injunction restraining the defendants from interfering with the plaintiff's possession.

3. The defendants No.1, 3, 4 and 6 i.e. legal representatives of vendor of the plaintiff namely Suryadeen in the joint written statement admitted the claim of the plaintiff. Similarly, defendants No.2 and 5 also admitted the claim of the plaintiff. The defendant No.7 on service of summons neither entered appearance nor filed the written statement. Consequently, he was proceeded ex-parte. The plaintiff adduced evidence and examined himself as well as one witness namely Sukhdev Singh Gond. The witnesses of the plaintiff were not cross-examined by the defendants.

4. The trial Court vide judgment and decree dated 19.3.1989 *inter-alia* held that the purchase dated 15.6.1957 in favour of the plaintiff has not been proved and the plaintiff has not prescribed title by adverse possession. It was further held that in view of Section 170-B of the M.P. Land Revenue Code, 1959 [hereinafter referred to as 'the Code'], the sale in favour of the plaintiff is invalid, as he is a non-tribal. The lower appellate Court vide impugned judgment and decree dated 4.7.1998 inter-alia held that at the time of purchase of the suit land, the plaintiff was minor and, therefore, the purchase is void. It was further held that in view of Section 165(6) of the Code and in the absence of permission from the Collector, no alienable interest was transferred to the plaintiff and consequently, he could not be held to have perfected his title by adverse possession.

5. The learned counsel for the appellant submitted that the Courts grossly erred in holding that the alienation in favour of the plaintiff was void, as at the time of alienation, he was minor. In support of his aforesaid submissions, reference has been made in the cases of *Balkrishna Vs. Lakhu and others*, AIR 1922 Nagpur 239 and *Subba Reddy Vs. Gurva Reddy,* AIR 1930 Madras 425. It is further submitted that the sale took place in the year 1957 i.e. prior

to commencement of the Code and, therefore, the Courts below grossly erred in applying the provisions of Section 165(6) and 170-B of the Code to the facts of the case.

6. I have considered the submissions made by learned counsel for the appellant and have perused the records. It is well settled in law that if the finding of fact is perverse or the same has been reached in ignorance of the material available on record or by misreading of the evidence on record, it is open to interference in exercise of power under Section 100 of the Code of Civil Procedure. [See : *Deenanath Vs. Pooranlal,* (2001) 5 SCC 705, *Neelaknatan and Others Vs. Mallika Begum,* (2002) 2 SCC 440, *Yadarao Dajiba Shrawane Vs. Nanilal Harakchand Shah and Others,* (2002) 6 SCC 404, *Krishna Mohan Kul alias Nani Charan Kul and Another Vs. Pratina Maity and Others,* (2004) 9 SCC 468, *Arumaraj Devadhas Vs. K. Sundaram Nadar,* (2009) 17 SCC 467]. It is well settled in law that where the other side pleads no evidence, very slight evidence is required to discharge the initial burden which lies on the plaintiff.

7. In the instant case, the plaintiff has examined himself as well as the witness Sukhdev Singh Gond, who have stated in their evidence that the suit land was purchased by the plaintiff and he is in possession of the same as owner thereof. In the revenue records namely Ex.P/1 to P/6 for the period from 1957-58 up to 1986-87, the possession of the plaintiff over the suit land is recorded. Therefore their testimony shall be deemed to be admitted [See : *Punjabrao Vs. Dr. D.P. Meshram and Others,* AIR 1965 SC 1179].

8. A sale is transfer of ownership for a price. Section 54 of the Transfer of Property Act, 1882 (hereinafter in short referred to as "the Act") provides that in case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by registered instrument or by delivery of property. Section 6 (h) of the Act provides that no transfer can be made in so far as it is opposed to the nature of interest affected thereby or for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872 or to a person legally disqualified to be transferee. It is essential for valid sale that transferor should be competent to transfer as per Section 7 of the Act and the transferee should not be subject to legal disqualification as prescribed under Section 6 (h) of the Act. Thus, any living person can be transferee provided he is not disqualified under Section 136 of the Act or under Order 21 Rule 73 of the Code of Civil Procedure, 1973.

Thus, from perusal of relevant provisions of the Act, it is evident that there is no provision in the Act which prohibits a minor from being transferee. Thus, a minor is not disqualified to be transferee. [See : *Ulfat Rai Vs. Gauri Shankar* (1911) ILR 33 All 657, *Munia Vs. Perumal* (1914) 37 Mad. 390, *Munni Kunwar Vs. Madan Gopal,* (1916) ILR 39 All 62, *Balkrishna Vs. Lakhu and others,* AIR 1922 Nagpur 239 and *Subba Reddy Vs. Gurva Reddy,* AIR 1930 Madras 425.]

9. At the time when the sale took place in favour of the plaintiff, the provisions of the Vindhya Pradesh Land Revenue and Tenancy Act, 1953, were in force, which did not contain any provision restraining alienation by a tribal in favour of the non-tribal. The provisions of the M.P. Land Revenue Code, 1959 do not apply to the facts of the case. For the aforementioned reasons, the substantial questions of law framed by this Court are answered in the affirmative and in favour of the appellant.

10. Accordingly, the judgment and decree passed by the trial Court as well as the lower appellate Court are hereby set aside. The claim of the plaintiff is decreed with cost.

In the result, the appeal is allowed.

Appeal allowed.

I.L.R. [2013] M.P., 2693
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice B.D. Rathi
Cr. A. No. 2171/2003 (Jabalpur) decided on 16 July, 2013

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

A. ***Penal Code (45 of 1860), Section 302 - Murder*** **- Injuries found on the deceased were caused by Gupti (sharp edged weapon) - Evidence of eye witnesses is corroborated by the medical evidence - No reason to discredit the prosecution case - Appeal dismissed.**
(Paras 8 & 9)

क. *दण्ड संहिता (1860 का 45), धारा 302 – हत्या* – मृतक पर पाई गई क्षतियां गुप्ती (धारदार हथियार) से कारित की गई – चक्षुदर्शी साक्षी के साक्ष्य की पुष्टि चिकित्सकीय साक्ष्य से होती है – अभियोजन प्रकरण पर अविश्वास का

कोई कारण नहीं – अपील खारिज।

B. ***Arms Act (54 of 1959), Sections 25 & 4*** **- Mandatory requirement of Section 4 read with Section 25(1-B) of the Act not proved - Appellant/Accused is acquitted of the offence u/s 25 of the Arms Act. (Para 12)**

ख. *आयुध अधिनियम (1959 का 54), धाराऐं 25 व 4* – अधिनियम की धारा 4 सहपठित धारा 25(1बी) की आज्ञापक उपेक्षा प्रमाणित नहीं – अपीलार्थी/अभियुक्त आयुध अधिनियम की धारा 25 के अंतर्गत अपराध से दोषमुक्त।

Archana Tiwari, for the appellant.

Vijay Pandey, Dy. A.G. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by : **B.D. RATHI, J. :-** The above named appellant has been convicted for an offence under section 302 of the Indian Penal Code for committing the murder of Chhakkilal on 18/9/2002 at 8 p.m. at Khirhani Phatak, Katni, and sentenced to undergo imprisonment for life. He has also been convicted under Section 25 of the Arms Act 1959 with a sentence of one year rigorous imprisonment.

2. According to the prosecution case, on the fateful night of 18/9/2002 at about 8'O Clock, complainant Horilal (PW5), father of the deceased, was sitting in the house of his father-in-law Ramapati Nishad. At that time appellant Santosh and deceased Chhakkilal were quarrelling with each other in front of the house of Chunnilal Nishad. On hearing the cries of Chhakilal, complainant Horilal immediately rushed towards the spot and saw that Chhakilal was being stabbed repeatedly by the appellant with a *Gupti* (sharp edged weapon) on left side of his chest, left side of the forehead as well as on the occipital region. Resultantly, the deceased fell down and the appellant fled from the spot. The incident was witnessed by Pallu Nishad, Jagannath Nishad and others. Dehati Nalishi (Ex.P/1) was written on the spot at about 8.30 p.m. by Town Inspector Akahand Pratap Singh. Crime No.673/02 (Ex.P/2) at Police Station Katni, was registered on the basis of the Dehati Nalishi by Assistant Sub-Inspector Shri U.S.Parihar.

3. During the course of investigation, autopsy was conducted by Dr. Naresh Saraogi (PW4). Weapon of offence i.e. *Gupti* was seized from the spot vide seizure memo (Ex.P/10). Forensic Science Laboratory Report (Ex.P/

12) was obtained in regard to seized articles.

4. During the trial, the appellant pleaded not guilty to the charges and contended that he had been falsely implicated.

5. The trial court, after appreciating the evidence and materials brought on record including the statements of eye-witnesses Horilal (PW5) and Buddhabai (PW3), held the appellant guilty of committing the murder of Chhakkilal with a *Gupti*.

6. Learned counsel on behalf of the appellant argued that the statements of eye-witnesses are not reliable. Name of Buddhabai (PW3) was not mentioned in the first information report. That apart, Buddhabai also stated in paragraph 1 of her evidence contrary to the first information report and the statement of Horilal, that deceased was beaten by a shaft (*Danda*). Statement of Horilal (PW5) is also not reliable because being father of deceased, he is an interested witness. Apart from that, Horilal himself stated in paragraph 3 of his evidence that place of incident could not be seen from the house because of a turning in between. Similarly, it is also submitted that independent witnesses, named in the first information report, were not produced in the Court and, therefore, conviction cannot be sustained in such circumstances.

7. On the contrary, learned Deputy Advocate General, while making reference to the incriminating pieces of evidence on record, submitted that the conviction is well merited. He also argued that it is not the rule of law to discard the evidence of relatives so also it is for prosecution how to prove its case.

8. Having regard to the arguments advanced by the parties, we have perused the evidence and material on record. Horilal (PW5), who is an eyewitness, has categorically testified that his son Chhakkilal was murdered by the appellant with a *Gupti*. He has deposed that injuries were inflicted on the left side of the chest and near the left eyebrow. His evidence is fully corroborated by the autopsy report (Ex.P/4-A). Dr. Naresh Saraogi (PW4) had conducted the autopsy who opined that the cause of death was shock on account of injuries on heart and lung.

9. Buddhabai (PW3) also narrated in paragraph 1 of her evidence that she saw Chhakkilal was being assaulted by the appellant with a *Danda* and after throwing it on spot he ran away. She is an illiterate witness and hence unable to differentiate *Gupti* from a *Danda*. Gupti is a sharp edged long knife that is kept in its wooden sheath that looks like a stick. Due to this

reason, she stated that she saw Chhakkilal was assaulted by *Danda.*

10. Horilal (PW5) has testified that he had lodged the report (Ex.P/1) on the spot when police came there. Thereafter, corpus of Chhakkilal was sent for post-mortem by police. Gupti was also seized from the spot vide seizure memo (Ex.P/10). In support of his statement Police Constable Umesh Singh (PW6) and Assistant Sub-Inspector U.S.Parihar (PW1) stated that Dehati Nalishi (Ex.P/1) was recorded on the spot by Town Inspector Akahand Pratap Singh, on the basis of which the first information report was registered. *Gupti* (Article-C) was sent for Forensic Science Laboratory examination and as per Forensic Science Laboratory report (Ex.P/12), human blood-stains were found present on the *Gupti.*

11. We agree with the contention of learned Deputy Advocate General that it is the choice of prosecution how it wants to prove its case. It is not necessary that all the eye-witnesses should be examined. Besides this, in para 14 of the judgment, it is mentioned that independent witnesses Jagannath and Kallu were summoned by all the means but summons and warrants were returned un-served, therefore, they could not be examined.

12. For the above reasons, we are of the view that the conviction of the appellant under Section 302 of the Indian Penal Code is just and proper. Although conviction under Section 25 of the Arms Act 1959 has been challenged in appeal memo yet no arguments were advanced in this regard. We have gone through the evidence. In this regard, no notification issued under Section 4 of the Arms Act 1959 has been produced to prove that carrying of seized *Gupti* in the area where offence was committed was prohibited.

13. In view of the aforesaid, we are of the view that conviction under Section 25 of the Arms Act 1959 cannot be sustained.

14. In the result, the appeal is allowed in part. Appellant is acquitted of the offence under Section 25 of the Arms Act 1959. His conviction and sentence for the same are, accordingly, set aside. However, his conviction and sentence under Section 302 of the Indian Penal Code are maintained.

15. Copy of the judgment be sent to the trial Court for compliance and necessary action.

Appeal partly allowed.

I.L.R. [2013] M.P., 2697
APPELLATE CRIMINAL
Before Mr. Justice B.D. Rathi
Cr. A. No. 235/1998 (Jabalpur) decided on 19 July, 2013

SEWAKRAM BANJARE & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, M.P. (36 of 1982), Section 39 - Cognizance of Offence - **A police officer is required to make a report to the Authority for the purposes of investigation - Police Officer did not submit a report to such authority - In absence of such report, Prescribed Authority is not competent to take cognizance of matter and direct investigation - Collector had sought sanction for investigation - Collector clearly acted beyond his jurisdiction - Collector ought to have informed the police officer to make an application before Prescribed Authority putting all facts and then to seek permission for investigation - Cognizance taken by law was void ab-initio. (Paras 9 to 10)**

क. विनिर्दिष्ट भ्रष्ट आचरण निवारण अधिनियम, म.प्र. (1982 का 36), धारा 39 – अपराध का संज्ञान – पुलिस अधिकारी से अपेक्षित है कि वह अन्वेषण के प्रयोजन हेतु प्राधिकारी को प्रतिवेदन दे – पुलिस अधिकारी ने उक्त प्राधिकारी को प्रतिवेदन प्रस्तुत नहीं किया – उक्त प्रतिवेदन की अनुपस्थिति में, विहित प्राधिकारी मामले का संज्ञान लेने के लिये और अन्वेषण का निदेश देने के लिए सक्षम नहीं – कलेक्टर ने अन्वेषण हेतु मंजूरी चाही – कलेक्टर ने स्पष्ट रुप से अपनी अधिकारिता से परे कार्यवाही की – कलेक्टर को चाहिए था कि वह पुलिस अधिकारी को सूचित करता कि विहित प्राधिकारी के समक्ष संपूर्ण तथ्यों को रखते हुए आवेदन करे और तब अन्वेषण के लिये अनुमति चाहे – न्यायालय द्वारा लिया गया संज्ञान आरंभ से शून्य था।

B. Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, M.P. (36 of 1982), Sections 24, 25, 26 - Local Area - **In order to make out an offence under Sections 25, 26 of Adhiniyam, the construction should be made on the land or plot situated in local area - Before granting sanction, the Prescribed Authority ought to have got satisfied that the offence was being committed on the land/plots in local area. (Paras 11 to 12)**

ख. विनिर्दिष्ट भ्रष्ट आचरण निवारण अधिनियम, म.प्र. (1982 का 36), धाराएँ 24, 25 व 26 – स्थानीय क्षेत्र – अधिनियम की धारा 25, 26 के अंतर्गत अपराध बनने के लिए, स्थानीय क्षेत्र में स्थित प्लॉट या भूमि पर निर्माण किया गया होना चाहिए – मंजूरी प्रदान करने से पहले, विहित प्राधिकारी को संतोष कर लेना चाहिए था कि स्थानीय क्षेत्र में भूमि/प्लॉट पर अपराध कारित किया जा रहा था।

Manisha Shrivastava, for the appellants.
B.D. Singh, G.A. for the respondent.

JUDGMENT

B.D. Rathi, J. :-The appellants have been convicted for an offence under section 27 of the M.P. Vinirdishta Bhrashta Acharan Nivaran Adhiniyam, 1982 (for short "the Adhiniyam") and sentenced to pay a fine of Rs.1000/- each, in default to suffer S.I. for three months. The impugned judgment dated 9/12/1997 was passed by I Additional Sessions Judge, Bhopal in Sessions Trial No.115/93. At the relevant point of time, appellants were respectively working as President and Secretary of Sarvodaya Grah Nirman Sahkari Samiti, Bairagarh (hereinafter referred to as "the Samiti"), which was a registered Society.

2. According to the prosecution case, without obtaining necessary approval and Colonizer's Licence from the competent officer and without valid transfer and mutation, appellants carved out plots on Land bearing Survey Numbers 109, 116/2, 117/2, 110/2, 113/2 and 116/1 at Village Laukhedi, admeasuring 7.02 acres, and entered into agreements to sell the same to the members of the *Samiti,* as a result of which, houses were constructed thereon in violation of Sections 24, 25 and 26, punishable under Section 27 of the Adhiniyam. On the facts mentioned above, a memo was sent to the Commissioner by Collector, Bhopal vide memo no.20/R-1/94 dated 18/1/1994, on the basis of which, direction for registration of crime and further investigation was issued by the prescribed authority viz. Commissioner, Bhopal under Section 39 of the Adhiniyam. After completion of investigation, charge-sheet was filed before the Court of Session and after completion of trial, impugned judgment was passed.

3. It is not disputed that for the purpose of providing plots to the members of *the Samiti,* agreements were entered into between *the Samiti* and joint Bhumiswamis viz. Sunderlal, Kasturibai, Kedar and Raghunath for purchasing their lands for considerations of Rs.50,000/- per acre excluding the sale price

of Well viz. Rs.12,000/- and the possession was obtained after making a payment of Rs.84,000/- to each Bhumiswami. For the aforesaid land, the *Samiti* had neither taken No Objection Certificate from Nazul Department nor any permission for its diversion and development. It is also admitted that on deposition of Land Fees of Rs.5,105/- and Development Charges of Rs.20,000/- by the members of *the Samti*, agreements on stamp papers were executed for allotment of plots to them and they had also constructed about 60 to 70 houses on the respective plots. It is also admitted that No Objection Certification from Nazul Department, Licence for developing Colony, Diversion Order and Sanctioned Maps for construction of houses, were not obtained by the *Samiti*.

4. During the trial, the appellants pleaded not guilty to the charge and contended that they had been falsely implicated.

5. Learned counsel for the appellants has submitted that the Samiti neither carved out plots on the land, nor granted permission to the members of *the Samiti* for carrying out any construction. According to her, it was agreed to between *the Samiti* and its members that only after getting the land diverted and obtaining necessary approval from the competent authorities, the plots will be allotted to them and only then they would get right to construct their houses on the corresponding plots, but members of *the Samiti*, after taking unauthorized possession of the land, have constructed their houses. For this, learned counsel has invited attention of the Court to the order dated 8/1/93 passed by IV Civil Judge Class II, Bhopal in Civil Suit No.121A/89, whereby injunction was granted to restrain the defendants from construction on the suit land in favour of the appellants herein. It was also argued by learned counsel that sanction was not properly granted by the prescribed authority as no report was submitted by the Investigating Officer before the authority. Such sanction could not have been granted on the basis of memo sent by Collector. Therefore, cognizance in this case was void *ab initio*.

6. In response, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the conviction was well merited. It was also submitted that the sanction granted by prescribed authority was proper.

7. Having regard to the arguments advanced by the parties and after perusal of the record, in the opinion of the Court, direction issued by the

prescribed authority i.e. Commissioner for registration of crime and investigation was not in accordance with law.

8. Radheshyam Tiwari (PW5) has deposed that permission (Ex.P/16) was granted by the Commissioner. It is apparent from perusal of Ex.P/16 that the direction issued on the basis of memo sent by Collector, Bhopal as indicated above, was not in accordance with law. It would be useful to quote the language of Section 39 of the Adhiniyam as under:

> *"39. Cognizance of offences* – All offences under this Act shall be cognizable
>
> Provided that the Police Officer shall not investigate an offence under this Act except on a direction of the prescribed authority not below the rank of the Commissioner of Division on a report submitted by him to such authority"

9. For the purpose of investigation, a police officer is required to make a report to the authority which shall not be below the rank of Commissioner of the Division. In the instant case, it is not in dispute that the police officer who investigated into the matter, before entering into the investigation, did not submit a report to such authority. In the absence of the report of this nature, even the Commissioner is not competent to take cognizance of the matter and direct investigation. The jurisdiction of the Commissioner to direct investigation comes in force only if the Police Officer competent to investigate makes a report to him regarding these matters. It is clear from the facts of the case that the Collector, Bhopal wrote the letter dated 18/1/94 to the Commissioner and asked him to grant sanction for investigation. The Collector clearly acted beyond his jurisdiction. If the Collector was of the opinion that offences of this nature are growing up then too he cannot make a complaint directly to the Commissioner. He should have firstly informed the Police Officer to make an application before the Commissioner putting all the facts and then to seek permission for investigation. But, in this case by issuing order (Ex.P/16), registration of crime was also directed by the Commissioner. As per the provisions contained in Section 39, such direction could not have been issued by the Commissioner, and the direction could have been issued only for initiating investigation, meaning thereby that by the time of issuing order (Ex.P/ 16), offence was not registered in Police Station.

10. In view of the aforesaid, the cognizance taken by Court was void *ab initio* and bad in law and the order of conviction can be quashed on this ground alone.

11. Even otherwise, the order dated 8/6/1994 (Ex.P/16) passed by Commissioner *prima facie* does not show application of mind. A perusal of the order shows that the material which was required for coming to a positive conclusion was never placed before the Commissioner. The Khasra entries and the registered documents/agreements, in the light of injunction order which was passed in favour of appellants, showing involvement of the present appellants in an offence under the Adhiniyam, were never placed before the Commissioner. It is important to note that the offences relating to illegal colonization, fall under Chapter VIII of the Adhiniyam. Section 24 (b) defines the term "local area". If any offence is committed, as defined under Section 24 read with Sections 25 and 26 of the Adhiniyam, it is necessary that construction should be made on the land or plot which was situated in the local area as defined in Section 24(b).

12. So, before granting the permission, Commissioner ought to have looked into the matter and got satisfied that the offence was being committed on the land/plots in "local area" and for that purpose it was also necessary that sufficient material in that regard was placed before the authority by the Investigating Officer. In this case, the disputed land/ plots were situated in Village Laukhedi. A perusal of Ex.P/16 reveals that this aspect was not considered as the Commissioner has nowhere mentioned therein that the lands/plots fell within the "local area".

13. Moreover, this fact could not be ignored that there was an injunction in favour of appellants, restraining the defendants/plot holders from raising further construction on the respective plots and for violation of that, appellants could not be held liable. Accordingly, conviction of the appellants is bad in law and cannot be sustained.

14. In the result, the appeal stands allowed. Conviction of the appellant under Section 27 of the Adhiniyam and the consequent sentence are hereby set aside. Fine amount, if deposited, be refunded.

Appeal allowed.

I.L.R. [2013] M.P., 2702
APPELLATE CRIMINAL
Before Mr. Justice Subhash Kakade
Cr. A. No. 653/2007 (Jabalpur) decided on 10 September, 2013

VISHWAJEET & anr. ...Appellants
Vs.
STATE OF M.P. ...Respondent

A. Penal Code (45 of 1860), Section 304B - Dowry Death - **Soon before death - There must be proximate link between the acts of cruelty along with the demand of dowry and death of victim.(Para 13)**

क. दण्ड संहिता (1860 का 45),धारा 304बी – दहेज मृत्यु – मृत्यु से तुरंत पहले – दहेज की मांग के साथ क्रूरतापूर्ण व्यवहार और पीड़िता की मृत्यु के बीच निकटतम संबंध होना चाहिए।

B. Penal Code (45 of 1860) Section 304-B - Dowry Death - **Law discussed. (Para 15)**

ख. दण्ड संहिता (1860 का 45), धारा 304बी – दहेज मृत्यु – विधि विवेचित।

C. Penal Code (45 of 1860) Section 304-B - Valid Marriage - **Deceased was already married and appellant brought her after giving her promise to marry - When marriage was accepted by relatives, friends and others, then it cannot be said as invalid - Concept of marriage to constitute the relationship of husband and wife may require strict interpretation where claims for civil rights, right to property etc. may follow or flow - When the question of curbing a social evil is concerned a liberal approach and different perception cannot be an anatheme - Invalid marriage cannot be a ground to exclude from purview of Section 304-B or 498-A of Act. (Paras 33 to 35)**

ग. दण्ड संहिता (1860 का 45), धारा 304बी – विधिमान्य विवाह – मृतिका पहले से विवाहिता थी और अपीलार्थी ने उसे विवाह का वचन देने के बाद ले आया – जब विवाह को रिश्तेदारों, दोस्तों और अन्य द्वारा स्वीकार किया, तब उसे अविधिमान्य विवाह नहीं कहा जा सकता – पति–पत्नी का नाता स्थापित करने के लिए विवाह की संकल्पना का कड़ाई से निर्वचन किया जाना अपेक्षित हो सकता है, जहां सिविल अधिकार, सम्पत्ति के अधिकार इत्यादि अनुसरित या प्रवाहित होंगे – जहां सामाजिक दुष्टता/बुराई पर रोक लगाने के प्रश्न का संबंध हो, उदार

दृष्टिकोण एवं भिन्न बोध अभिशप्त नहीं हो सकता – अधिनियम की धारा 304बी या 498ए की परिधि से अपवर्जित करने के लिए अविधिमान्य विवाह आधार नहीं हो सकता।

D. Penal Code (45 of 1860), Sections 304B, 498-A - Dowry Death - **Deceased died within 7 months of marriage - Evidence with regard to dowry demand, torture and harassment believable - Appellants guilty of offence under Section 304-B and 498-A of I.P.C. (Para 37)**

घ. दण्ड संहिता (1860 का 45), धाराऐं 304बी, 498–ए – दहेज मृत्यु – मृतिका की मृत्यु विवाह के 7 माह के भीतर हुई – दहेज की मांग, यातना एवं प्रपीड़न के संबंध में साक्ष्य विश्वसनीय – अपीलार्थीगण भा.दं.सं. की धारा 304बी एवं 498ए के अंतर्गत अपराध के दोषी।

E. Penal Code (45 of 1860), Sections 304B, 498-A - Sentence - **Appellants already in jail for more than 8 and half years - Sentence reduced to period already undergone. (Paras 38 to 40)**

ङ. दण्ड संहिता (1860 का 45),धाराऐं 304बी, 498–ए – दण्डादेश – अपीलार्थीगण पूर्व से कारागृह में साढ़े 8 वर्षों से अधिक समय से है – दण्डादेश पहले की भुगताई जा चुकी अवधि तक घटाया गया।

Cases referred :

AIR 2008 SC 332 : 2007 AIR SCW 6871, (2006) 1 SCC 463 : AIR 2006 SC 680 : 2005 AIR SCW 6470, (2006) 10 SCC 115 : AIR 2006 SC 2855 : 2006 AIR SCW 4068, AIR 2009 SC 1454 : 2009 AIR SCW 928, AIR 2005 SC 1411: 2004 AIR SCW 7299, AIR 2004 SC 1418.

I.K. Dwivedi, for the appellants.
Akshay Namdeo, P.L. for the respondent/State.

JUDGMENT

SUBHASH KAKADE, J. :- In this appeal preferred under Section 374(2) of the Criminal Procedure Code, 1973, from jail, the appellants had called in question the defensibility of the judgment of conviction and order of sentence passed on 24.04.2006 by the learned First Additional Sessions Judge, Betul in Sessions Trial No.186/2005 (State of M.P. Through P.S. Chopan, District Betul vs. Vishwajeet and others), whereby the learned Trial Judge after finding them guilty under Section 304-B of the I.P.C. and sentenced to undergo R.I.

for 10 years each.

02. The facts, briefly stated are as under:-

(A) The three accused persons namely Vishwajeet, Taruni and Gautam were prosecuted under Section 304-B of the I.P.C., in alternative under Section 302 of the I.P.C. Deceased Vishakha was married to accused Vishwajeet 5-6 months prior to her death. Accused Taruni was her mother-in- law and accused Gautam was her Nandeu, brother- in- law. After marriage, every thing was in order, but, after one month accused Taruni forced her to get Rs.50,000/- and golden chain, ring, etc. as dowry from her parents. Vishakha refused it saying that her widow mother is not capable to fulfill this demand. Further case of the prosecution is that for non- payment of dowry, the accused persons harassed the deceased and subjected her to cruelty. Many times, even they did not give her food, so villagers arranged it. In these circumstances, Vishakha reported the matter to the President, Mahila Utpiran Nivaran Samiti, Shahpur which ends in form of compromise between both the parties. But, she was being repeatedly tortured. These facts were informed by deceased to her relatives and neighbour also. She was unable to bear the cruelty to which she was subjected, by the accused persons. After one month from compromise, on 30th April, 2005, at about 1:00 p.m. Vishakha committed suicide by hanging herself in matrimonial house of accused Vishwajeet. Neighbour Niranjan informed the incident with the Police Station, Chopana which came to the registered as Marg Intimation No.10/2005 by H.C. Narendra Verma. Thereafter, investigation was conducted by Sub Divisional Police Officer, Sarani Shri Rajesh Kumar Singh. He inspected the site, prepared map from where he recovered and seized piece of mufflur (Duppatta) and green colored Nylon rope that had been used for hanging from sealing beam. This was done in the presence of Niranjan and Jamuni Bhushan. Thereupon, he prepared Panchayata nama in presence of witnesses Manju, etc. and arranged to sent the body for post mortem examination through Constable Shailendra. Team of Dr. M.K. Patil and Dr. K. Aathaner conducted autopsy over the body of the deceased lady and prepared post mortem report giving the cause of death as asphyxia, as a result of strangulation.

(B) Shri Singh received 7 marriage photographs on being presented by Manju, sister of the deceased. He also received and seized application filed by Vishakha and compromise deed vide seizure memo on being presented by H.C. Narendra Kumar Verma. During further investigation Shri Singh

recorded statements of witnesses Niranjan, Manju, Neelu, Laxmibai, Urmilabai, Manojeet Haldar, Gurudasi, Jaminibhushan, Sunita and others on various dates. On being enquired Dr. Patil given opinion that probably the case was of homicidal in nature due to strangulation. Senior Scientific Officer of F.S.L. Unit Betul, Shri S.B. Batham also inspected incident site and vide his report, he had given some directions to comply. Shri Makode took photographs filed with negatives. Thereafter, Shri Singh arrested all the three accused persons and on completion of other required formalities investigating agency filed challan under Section 304(B), 498 (A) of the I.P.C. adding Section 302/34 of the I.P.C. in the competent Court which in his turn committed the matter to the Court of Sessions Betul and eventually the matter was tried by learned trial Judge.

03. The accused persons abjured their guilt, pleaded false implication as they are innocent, therefore, put to trial.

04. The prosecution in furtherance its case examined neighbor Niranjan (PW/1), who lodged the Marg Intimation (Ex.P-1), the elder sister of deceased Manju (PW/2), other neighbours Neelu (PW/3), Laxmibai (PW/4) and Urmilabai (PW/6). Dr. Patil (PW/5) is Autopsy Surgeon. Shri Batham (PW/7) is the Senior Scientific Officer and Shri Makode (PW/8) is photographer of F.S.L. Unit Betul. Manojeet Haldar (PW/10) is attesting witness of important documents compromise deed (Ex.P.38) and application (Ex.P.37). A.S.I. Shri Vikram Singh Chouhan (PW/9), Constable Mamraj Singh (PW/8) and H.C. Narendra Verma (PW/11) are police officers in their presence documents, etc. seized by Shri Singh (PW/9), who conducted entire investigation.

05. The accused persons in their statements recorded under Section 313 of Criminal Procedure Code, denied all evidence put forth against them and claims to be falsely implicated. On behalf of the defence no witness is examined.

06. The trial Court after consideration of the evidence placed before it, found the appellants Vishwajeet and Taruni guilty of the offence punishable under Section 304-B of the IPC and imposed the sentence of ten years rigorous imprisonment on each of them. However, acquitted accused Gautam from the charges punishable under Section 304(B) and 302/34 of the I.P.C. The accused Vishwajeet and his mother accused Taruni also acquitted from the charges punishable under Section 302/34 of the I.P.C. The respondent State does not preferred appeal against these acquittals.

07. Heard learned counsel for the appellant and learned counsel for the respondent- State, also perused the impugned judgment and the material records placed before me.

08. As we are concerned with Sections 304B of IPC, the said provision along with Section 113B of the Evidence Act are relevant, the same are extracted hereinunder:

> **"304B. Dowry death:-** (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> **Explanation** - For the purpose of this sub- section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.
>
> **Section 113B. Presumption as to dowry death -** When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.
>
> **Explanation.** For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)."

09. In this respect, it will be worthwhile to deal with some of the earlier decisions of the Supreme Court where the legal principles in this regard have been dealt with and the law laid down therein with regard to offence falling under Section 304-B of the IPC, while convicting the accused persons for the

said offence.

10. The Supreme Court in case of *Devilal* (AIR 2008 SC 332 : 2007 AIR SCW 6871) have been set out the ingredients of the provisions of Section 304-B of the IPC as laid down by the Apex Court in earlier cases of *Harjit Singh v. State of Punjab* – (2006) 1 SCC 463 : AIR 2006 SC 680 : 2005 AIR SCW 6470 and *Ram Badan Sharma v. State of Bihar* – (2006) 10 SCC 115 : AIR 2006 SC 2855 : 2006 AIR SCW 4068 that:-

> "The question, as to what are the ingredients of the provisions of Section 304-B of the Penal Code is no longer res integra. They are:
>
> (1) that the death of the woman was caused by any burns or bodily injury or in some circumstances which were not normal;
>
> (2) such death occurs within 7 years from the date of her marriage;
>
> (3) that the victim was subjected to cruelty or harassment by her husband or any relative of her husband;
>
> (4) such cruelty or harassment should be for or in connection with the demand of dowry; and
>
> (5) it is established that such cruelty and harassment was made soon before her death."

11. As per above mentioned provisions of Section 304-B of the IPC, the most significant expression used in the section is "soon before her death". The expression "soon before her death" cannot be given a restricted or a narrower meaning. They must be understood in their plain language and with reference to their meaning in common parlance.

12. The concept of reasonable time is the best criteria to be applied for appreciation and examination of dowry death cases. The Supreme Court in case of *Tarsem Singh v. State of Punjab* (AIR 2009 SC 1454 : 2009 AIR SCW 928), held that "the legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasize the idea that her death should, in all probabilities, has been the aftermath of such cruelty or harassment. In other words, there should be a reasonable, if not direct, nexus

between her death and the dowry - related cruelty or harassment inflicted on her."

13. The determination of the period would depend on the facts and circumstances of a given case. However, the expression would normally imply that there has to be reasonable time gap between the cruelty inflicted and the death in question. If this is so, the legislature in its wisdom would have specified any period which would attract the provisions of this section. However, there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of the victim. For want of any specific period, the concept of reasonable period would be applicable. Thus, the cruelty, harassment and demand of dowry should not be so ancient, whereafter, the couple and the family members have lived happily and that it would result in abuse of the said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence was led to show to the contrary. These matters, of course, will have to be examined on the facts and circumstances of a given case. Similar view was expressed by the Apex Court in case of *Yashoda v. State of M.P.* (AIR 2005 SC 1411 : 2004 AIR SCW 7299).

14. The Apex Court in case of *Devilal* (supra) expressed the view that:- "the Court cannot ignore one of the cardinal principles of criminal jurisprudence that a suspect in the Indian law is entitled to the protection of Article 20 of the Constitution of India as well as has a presumption of innocence in his favour. In other words, the rule of law requires a person to be innocent till proved guilty. The concept of deeming fiction is hardly applicable to the criminal jurisprudence. In contradistinction to this aspect, the legislature has applied the concept of deeming fiction to the provisions of Section 304-B. Where other ingredients of Section 304-B are satisfied, in that event, the husband or all relatives shall be deemed to have caused her death. In other words, the offence shall be deemed to have been committed by fiction of law. Once the prosecution proves its case with regard to the basic ingredients of Section 304-B, the Court will presume by deemed fiction of law that the husband or the relatives complained of, has caused her death. Such a presumption can be drawn by the Court keeping in view the evidence produced by the prosecution in support of the substantive charge under Section 304-B of the Code."

15. Now, the following principles can be culled out to attract the provisions of Section 304-B, IPC the main ingredient of the offence to be established is

that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry:-

(a) The death of the deceased woman was caused by any burn or bodily injury or some other circumstance which was not normal.

(b) Such death occurs within seven years from the date of her marriage.

(c) That the victim was subjected to cruelty or harassment by her husband or any relative of her husband.

(d) Such cruelty or harassment should be for or in connection with demand of dowry.

(e) It should be established that such cruelty and harassment was made soon before her death.

(f) Section 304-B of the IPC is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304-B of the IPC.

(g) Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304-B of the IPC were not satisfied.

16. The first question that arise for determination is whether the death of Vishakha occurred otherwise than under normal circumstance?

17. Dr. M.K. Patil (PW/5) conducted autopsy on body of deceased with his colleague Dr. Athaner, prepared postmortem report (Ex.P-5). Doctor firstly opined cause of death as strangulation, but on being enquired vide his report (Ex.P.6) given second opinion that death was probabally homicidal in nature due to strangulation.

18. The death of Vishakha was not normal as evidenced by the version of

Dr. Patil (PW/5) post-mortem report (Ex.P.5), statements of FSL officers Shri Batham (PW/7) and his detailed report (Ex.P-7) which is supported by photographs (Ex.P-8 to 16) with negatives (Ex.P-17 to 24) clicked by photographer Shri Makode (PW/8). Statements of Niranjan (PW-1), Manju (PW-2), Neelu (PW/3) and Laxmibai (PW/4) and Urmilabai (PW/6) are also supportive.

19. From the evidence of Dr. Patil (PW/5) and other witnesses, it is quite clear that Vishakha died due to hanging herself, therefore, the trial court has rightly concluded that the death of Vishakha occurred otherwise than under normal circumstance.

20. The next question that arises for determination is whether the death of Vishakha occurred within 7 years of her marriage?

21. Manju (PW/2) has stated that the marriage of Vishakha was solemnized about 5 - 6 months before the incident. This evidence of Manju (PW/2) has been fully corroborated by Niranjan (PW/1), Neelu (PW/3), Laxmibai (PW/4) and Urmilabai (PW/6). Nothing has been elicited in their cross examinations to discredit them. Therefore, the evidence of these witnesses, it is established that the marriage between the Vishakha and applicant Vishwajeet was solemnized about 6 months ago i.e. within 7 years of her marriage.

22. This brings to determine the crucial question as to whether just before the death of Vishakha she was subjected to cruelty by the husband appellant Vishwajeet and relative of the husband, his mother Taruni for not meeting the dowry demand?

23. The gravamen of the accusation revolves on the question of harassment and cruel treatment to the wife for not bringing or meeting the dowry demands emerging from the husband on various occasions. Such an event can occur only within the precincts of the matrimonial abode and the plausibility of possibility of such occurrence, being known to persons other than the members of the family fold, is rather bleak, if not impossible and to expect for proof of such an event evidence from the independent quarters, is to look something, which, in the ordinary course of event, cannot at all be expected to happen. The possible evidence that could be procedure is the testimony of the relatives of the victim and her other kith and kin, who would normally be living away from her, provided the victim was able to contact or communicate with them, by plausible modes or in person, about the sufferings and harassment meted out to her, immediately after the occurrence.

24. In light of above legal position, on perusal of evidence of these witnesses it is pertinent to mention here that though at the time of marriage, no demand was made by the appellants, but after sometime appellants started demanding dowry, mainly by appellant Taruni and whenever deceased meet relatives and neighbours, she told to them about her agony, harassment and many more times beating at the hands of appellants.

25. The entire fabric of the prosecution case rested on the evidence of Manju (PW/2). The rule of careful scrutiny applies to the statements of Manju (PW/1), because she is sister of prosecutrix. It is to be remember that even in case of interested witness, the rule of careful scrutiny is merely a rule of caution rather then a rule of law. Adopting such precaution, the statement of this witnesses have no reason to disbelieve her testimony. Shorn of a few contradictions or discrepancies here and there, the evidence is clearly consistent. Manju (PW/2) has no axe to grind against the applicants.

26. Star witness Manju (PW/2), sister of Vishakha as well as neighbour also, categorically sated that so many times Vishakha communicated about her sufferings and harassment meted out by her husband Vishwajeet and mother- in- law Taruni and also demand of Rs.50,000/- , Golden ring and full dowry. Prior to date of incident on eve of Shivratri Festival, Vishakha badly beaten by both the appellants, were also stated by Manju (PW/2).

27. Other next door neighbours Niranjan Sheel (PW/1), Neelu (PW/3), Laxmibai (PW/4) and Urmilabai (PW/6) also fully supported the version of Manju (PW/2). All these witnesses stated that because of this harassment and cruelty for demand of dowry, Vishakha committed suicide by hanging herself from sealing beam in matrimonial house. These witnesses stated that Vishakha were subjected to harassment and cruelty for demand of dowry after lapse of only one or two months of marriage.

28. The evidence of PW/2 has been further corroborated by the evidence of neighbors PW/1, PW/3, PW/4 and PW/6 who have stated that whenever the diseased visited them or came to meet them after her marriage, she used to complain regarding harassment by appellants for or in connection with the demand for Rs.50,000, golden ring in the form of dowry. Nothing has been elicited in their cross examination to doubt their testimony.

29. Manju (PW/2) narrated that prior to incident so many times Vishakha was not served food by appellants so, she was compel to eat uncooked potato

etc. Urmilabai (PW/6) supported this fact in these words that Vishakha started bagging for food. This behaviour of appellants also proves cruelty against Vishakha.

30. Manju (PW/2) specifically stated that looking to unbearable torture by Vishwajeet and Taruni her sister Vishakha reported the matter to the President of Mahila Utpiran Nivaran Samiti, Shahpur. Manojeet Haldar (PW/10) is witness of the compromise (Ex.P.38) proceedings which took place between Vishakha and the appellants on the basis of application (Ex.P.37) filed by the Vishakha to the above Samiti. Manojeet (PW/10) specifically stated that compromise (Ex.P.38) bear his signature. This compromise (Ex.P.38) was seized by Investigating Officer, Shri Singh (PW/9) vide seizure memo (Ex.P.31) with application (Ex.P.37) of Vishakha and other two letters of Manju, though these letters were not filed. This compromise (Ex.P.38) proceeding is fully convincing evidence to prove this fact that there was dispute between the couple, though it was settled by compromise. Manju (PW/2) categorically stated that even after compromise the appellants again started cruelty against Vishakha till her death.

31. Though on behalf of the appellants and acquitted accused Gautam witnesses were not examined by way of defence, but, defence of invalid marriage was put up during cross examination of prosecution witnesses. Learned counsel for the appellants also submitted that to constitute a marriage in the eye of law it has first to be established that the same was a valid marriage.

32. Manju (W/2) admitted this fact that firstly Vishakha was married to one Sachin, after that with Vishnu and appellant Vishwajeet after giving her promise to marry brought her at Village Tavakati and Vishakha and Vishwajeet were living in relation of husband and wife. This fact of third marriage of Vishakha is also admitted by Niranjan Sheel (PW/1), Neelu (PW/3), Laxmibai (PW/4) and Urmilabai (PW/6).

33. When, marriage was accepted by relatives, friends and others therefore it cannot be said as invalid. Compromise deed (Ex.P.38) is also substantial proof of acceptance of marriage by the appellants. Marriage photographs are also on record which were seized by Shri Singh (PW/9) vide memo (Ex.P.4) during course of investigation being presented by Manju (PW/2).

34. The concept of marriage to constitute the relationship of 'husband' and 'wife' may require strict interpretation where claims for civil rights, right to property

etc. may follow or flow. But, when the question of curbing a social evil is concerned a liberal approach and different perception cannot be an anatheme.

35. Demand of dowry in respect of invalid marriage would not be legally recognisable, because purpose for which Ss. 498-A and 304-B and S. 113-B of Evidence Act were introduced cannot be ignored. Absence of definition of "husband" to specifically include such persons who contract marriages ostensibly and cohabitate with such woman in purported exercise of his role and status as "husband". Therefore, invalid marriage is no ground to exclude from purview of S. 304-B or 498-A of the I.P.C. Please see *Reema Aggarwal vs. Anupam and others*, AIR 2004 Supreme Court 1418.

36. When once there is a demand for dowry and harassment against the deceased, and death occurs within 7 years after the marriage, the other things automatically follow due to the statutory presumption contemplated under Section 113-A of the Evidence Act against such person. Therefore, presumption of abetment for suicide by her husband Vishwajeet and his mother Taruni could be invoked under Section 113-A of the Evidence Act when the prosecution has discharged the initial onus of proving that the appellant Vishwajeet and Taruni subjected to cruelty against Vishakha.

37. On the reading of the evidence of these five witnesses who have spoken about dowry demand, torture and harassment nothing substantially discrepant can be noticed. These witnesses, though cross examined at length, stated in clear terms about the dowry demand, the torture and the harassment. In that view of the matter the learned trial court was justified in holding the appellants guilty. Therefore, conviction of husband of Vishakha, appellant Vishwajeet and his mother- in- law Taruni under Section 304-B of Indian Penal Code is justified and deserves to be affirmed. The conviction as recorded by the learned trial Court needs no interference.

38. On the question of sentence, learned counsel for the appellants submitted that the incident had occurred in April, 2005. He further submitted that from the date of their arrest appellants are in jail that way about more than 8 and half years have been elapsed. In the above circumstances, learned counsel prayed for leniency in the matter of awarding jail sentence to the appellants Vishwajeet and Taruni.

39. What would be an appropriate sentence in a particular case cannot be based upon a straitjacket formula. It depends upon the facts and

circumstances of each cases. The principle of proportion between crime and punishment is governed by the "Doctrine of just desert". The doctrine is the foundation of a criminal sentence which is ultimately awarded for a punishment to the wrong doer. What one really deserves should be the punishment for having committed a crime is the underlying principle. The punishment must not be disproportionately great is a corollary of "just desert" which is governed by the same principle which says that there cannot be a punishment without guilt and the basic element behind the principle is the proportion between crime and punishment. The lesser is the gravity of the crime, the smaller would be the punishment and the greater is the gravity of the crime, the higher would be the punishment, subject to the ancillary factors for determining the proportion of the same, though all further subject to the statutory obligations specifically provided by law in force.

40. (i) **Period of detention**

S. No.	Appellant	Date of arrest	Bail, if granted
01.	Vishwajeet	02.05.2005	No. Under custody since date of arrest i.e. 02.05.2005.
02.	Smt. Taruni	08.07.2005	No. Under custody since date of arrest i.e. 08.07.2005.

(ii) It is pertinent to mentioned here that the present appeal is preferred by the appellants after getting the legal aid from the State Legal Aid Committee, which also goes to show their weaker financial condition.

(iii) It is observed by the Apex Court in case of *Heeralal vs. State (Govt. of NCT) Delhi*, A.I.R. 2003 SC 2865 = 2003 Cr.L.J. 3711 that the court has no jurisdiction of award the sentence of less than 7 years as prescribed minimum sentence under Section 304-B (2) of I.P.C. is 7 years.

41. Taking into consideration the over all circumstances, I found substance in the submission made by the learned counsel for the appellants, I deem it just and proper to reduce the sentence of imprisonment of appellants Vishwajeet and Taruni, now running in their forties and sixties, respectively.

42. On considering the background facts, the sentence of imprisonment of

appellants Vishwajeet and Smt. Taruni for 10 years by impugned judgment is modified to the period already undergone by the appellants. The appellants Vishwajeet and Smt. Taruni shall be released forthwith from custody unless required to be in custody in connection with any other case.

43. The appeal is partly allowed so far as it relates to quantum of sentence only.

44. Before parting, because matter involves question of common importance, Registry, subject to approval of Hon'ble the Chief Justice, may take suitable steps to inform learned Courts of the State while dealing with trial of criminal cases should specifically prepare complete chart of period of detention as required by Section 428 of the Code. Accused persons are entitled to set off period of each and every day of their detention for which they had been detained during investigation, enquiry or the trial of that particular case. Because, the trial Courts are in better position to furnish details of each and every day detention, specially detention period of investigation and enquiry, therefore, the trial Courts are requested to give specific details of the period of detention, if any, undergone by the accused during the investigation, enquiry or trial of the same case and before the date of conviction, in one appropriate para of the judgment.

Appeal partly allowed.

I.L.R. [2013] M.P., 2715

ARBITRATION CASE

Before Mr. Justice Prakash Shrivastava

Arb. Case No. 7/2009 (Indore) decided on 24 September, 2013

MAHENDRA SINGH DAHIYA ...Appellant

Vs.

DINESH NAGORI ...Respondent

Arbitration and Conciliation Act (26 of 1996), Section 11 - Appointment of Arbitrator - Arbitration Clause **- Partnership firm was constituted and agreement of admission to partnership was executed which contained arbitration clause - Subsequently petitioner agreed to retire from the firm and MOU in that regard was executed - As certain conditions of MOU were not complied with therefore, notice to appoint arbitrator was issued - Respondent in reply pleaded that there is no arbitration clause in MOU and MOU was got executed under duress,**

coercion - Held - Arbitration clause is a collateral term of contract independent of and distinct from its substantial terms and it is treated to be an agreement independent of other terms of contract - Whether rights of parties under agreement were superseded by subsequent settlement agreement can itself be an arbitrable issue which can be examined by Arbitrator - Objection against appointment of arbitrator rejected. (Paras 9 to 13)

माध्यस्थम् और सुलह अधिनियम (1996 का 26), धारा 11 – मध्यस्थ की नियुक्ति – माध्यस्थम खंड–भागीदारी फर्म गठित की गई और भागीदारी में प्रवेश का करार निष्पादित किया गया जिसमें माध्यस्थम खंड समाविष्ट था तत्पश्चात याची ने फर्म से निवृत्त होने के लिये सहमति दी और इस संबंध में एमओयू निष्पादित किया गया – चूंकि एमओयू की कतिपय शर्तों का पालन नहीं किया गया, इसलिए मध्यस्थ की नियुक्ति का नोटिस जारी किया गया – प्रत्यर्थी ने जबाव में अभिवाक् किया कि एमओयू में कोई माध्यस्थम खंड नहीं और एमओयू का निष्पादन विवाध्यता, प्रपीड़न के अधीन कराया गया था – अभिनिर्धारित – माध्यस्थम खंड, संविदा का समपार्श्वविक शब्द है जो उसकी सारभूत शर्तों से स्वतंत्र और भिन्न है तथा इसे संविदा की अन्य शर्तों से मुक्त एक करार माना जाना चाहिए – क्या पश्चातवर्ती समझौता करार द्वारा करार के अधीन पक्षकारों के अधिकारों को अध्यारोही किया जा सकता है, यह माध्यस्थम विवाद्यक है जिसे माध्यस्थ द्वारा परीक्षित किया जा सकता है – माध्यस्थ की नियुक्ति के विरुद्ध आक्षेप अस्वीकार किया गया।

Cases referred :

(2012) 2 SCC 93, (2009) 7 SCC 696, AIR 2007 SC 2327, 2010 AIR SCW 5621, (2013) 1 SCC 641, AIR 2008 Orissa 12.

Ronak Chouksey & Prakash Shrivastava, for the appellant.

R.T. Thanevala, for the respondent.

ORDER

PRAKASH SHRIVASTAVA, J.:- This is an application under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of the Arbitrator.

2/ The case of the petitioner is that petitioner and respondent were partners in partnership firm M/s Nagori & Dahiya as per the agreement of admission to partnership dated 1st January 2005, Annexure P-1. The petitioner had agreed to retire from the firm on certain terms and conditions. Accordingly, the MOU dated 2nd March 2007 was singed containing the terms of retirement of the petitioner from the firm. The respondent did not comply with the terms of

MOU, therefore, the petitioner had initially sent the legal notice to the respondent and thereafter asked the respondent to appoint Arbitrator in terms of Arbitration Clause of the agreement dated 1/4/2007 for amicable settlement of the dispute, but the respondent had not considered the said request hence, the petitioner has filed the present application for appointment of the Arbitrator.

3/ A reply has been filed by the respondent taking the stand that there is no arbitration clause in the MOU and the arbitration clause in the agreement dated 1/1/2005 cannot be read in the MOU dated 2/3/2007. A further plea was raised that the MOU dated 2/3/2007 was got executed from the respondent under the duress, coercion and is unconscionable contract and therefore, the respondent is not liable to pay in terms of the said MOU.

4/ Learned counsel appearing for the petitioner submits that original agreement dated 1st January 2005 contains the arbitration clause therefore, the dispute is required to be settled in terms of the said arbitration clause. He further submits that the MOU was executed in respect of dispute arising out of the agreement dated 1st January 2005 therefore, no arbitration clause was needed in MOU and even otherwise the arbitration clause can be read into the said MOU by reference and alternatively, the issue if the rights of the parties under the agreement are superseded by the MOU, itself is an arbitrable issue and can be examined by the Arbitrator.

5/ As against this, learned counsel for the respondent submits that the MOU does not contain the arbitration clause and the arbitration clause of the main agreement can not be read in the MOU. In this regard, he has placed reliance upon Section 7(5) of Arbitration and Conciliation Act. He further submits that the MOU is not properly stamped and that cannot be looked into by this Court.

6/ Having heard the learned counsel for the parties and on perusal of the record, it is found that the agreement dated 1/1/2005 undisputedly contains the following arbitration clause:

> **"14. Arbitration:-** That, all the disputes relating to this partnership business, the partners or their representatives, if cannot be settled mutually, the same shall be referred to arbitration and entire proceeding thereof shall be governed as per provisions of the Arbitration Act."

7/ The parties were partners of partnership firm M/s Nagori and Dahia

under the deed of partnership dated 1/1/2005. The MOU dated 2nd March 2007 has also been executed between the petitioner and respondent in their capacity as partners of the firm for the purpose of retirement of the petitioner from the firm w.e.f. 1st March 2007 and deletion of the title Dahiya from the firm's name. In terms of the said MOU certain amounts were payable to the petitioner which the petitioner allegedly has not received. The MOU has been executed to settle the dispute relating to partnership business by retiring the petitioner but since allegedly the MOU has not been honoured therefore, the dispute relating to partnership business and receipt of the due amount to the petitioner on his retirement from the partnership business has remained unsettled.

9/ It is settled position in law that the arbitration clause is an agreement within an agreement. It is a collateral term of the contract, independent of and distinct from its substantial terms and it is treated to be an agreement independent of other terms of the contract. Hence, the arbitration clause continues to be enforceable even if the contract is terminated. [See:- *Reva Electric Car Company Private Limited Vs. Green Mobil* (2012) 2 SCC 93; *M.R. Engineers and Contractors Private Limited Vs. Som Datt Builders Limited,* (2009) 7 SCC 696; *National Agricultural Co-op. Marketing Federation India Ltd. Vs. Gains Trading Ltd.,* AIR 2007 SC 2327]. Hence the arbitration clause contained in the partnership agreement dated 1st January 2005 will continue to survive and enforceable even after the dissolution of the partnership firm.

10/ The contention of the respondent is that since the MOU dated 2nd March 2007 was executed which did not contain any arbitration clause, therefore, the dispute cannot be referred to the arbitrator. Such an argument cannot be accepted for the simple reason that on the one hand the respondent in his reply before this Court has raised the plea that the MOU dated 2/3/2007 was executed under duress, coercion and is an unconscionable contract and on the other hand he is raising the plea that in view of the said MOU the arbitration clause of the main agreement cannot be invoked. The respondent cannot be permitted to blow hot and cold in the same breath. Even otherwise it is the settled position in law that whether rights of the parties under agreement were superseded by subsequent settlement agreement can itself be an arbitrable issue which can be examined by the Arbitrator. [See:-*Sirajuddin Kasim & Anr. Vs. M/s paramount Invesetment Ltd.,* 2010 AIR SCW 5621]

11/ It is also worth noting that the primary and mother agreement is the partnership agreement and the MOU dated 2nd March 2007 is not an independent agreement but it is an agreement for retirement of one of the partner of the firm on certain conditions. Considering the nature and contents of the MOU it would not be appropriate to read it independent of the partnership agreement dated 1st January 2005 since it is inextricably connected with the partnership agreement. The arbitration clause No. 14 in the partnership agreement itself provides for settlement of dispute by the arbitrator in case if the parties fail to settle the same mutually. Since the parties have failed to settle the dispute by MOU dated 2/3/2007, therefore, the arbitration clause No. 14 has come into play. Clause 14 is widely worded and all the disputes relating to partnership business have been covered under Clause 14. Therefore, the respondent's contention that on account of execution of the MOU dated 2/3/2007 the dispute is no longer arbitrable, cannot be accepted. [See *Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. And others*, (2013) 1 SCC 641; and *National Aluminium Company Ltd. Vs. The Doaba Industrial & Trading Co.(P) Ltd.*, AIR 208 Orissa 12].

12/ So far as the reliance of the counsel for the respondent on judgment of the Supreme court in the matter of *M.R. Engineers and Contractors Pvt. Ltd.* (supra) is concerned, the respondent is not entitled to the benefit of the said judgment in view of the fact that the respondent himself has alleged the MOU dated 2/3/2007 to be an unconscionable contract and that as per the respondent's own version by the said MOU the dispute between the parties has not been mutually settled and therefore, in terms of the clause 14 of the partnership agreement dated 1st January 2005, the matter is to be referred to the arbitration.

13/ In view of the aforesaid analysis respondent's objection against the appointment of arbitrator is rejected. It would be open to the parties to raise all legally permissible plea before the Arbitrator. Looking to the nature of dispute it is found necessary to appoint an independent and impartial Arbitrator under Section 11 of the Act. Accordingly Shri P.V. Namjoshi, Advocate is appointed as Arbitrator.

Parties are directed to appear before the Arbitrator on 22/10/2013.

Order accordingly.

I.L.R. [2013] M.P., 2720
CIVIL REVISION
Before Mr. Justice Alok Aradhe
C.R. No. 302/2012 (Jabalpur) decided on 11 July, 2013

ZAFAR ALI KHAN & anr. ...Applicants
Vs.
ARIF AQUIL & ors. ...Non-applicants

***Wakf Act (43 of 1995), Sections 84 & 83 - Wakf Tribunal - Question of jurisdiction* - Can be decided by it, whether it depends on the construction of the provision of Act or investigation of facts. (Para 7)**

वक्फ अधिनियम (1995 का 43), धाराऐं 84 व 83 – वक्फ अधिकरण – अधिकारिता का प्रश्न – उसके द्वारा निर्णित किया जा सकता है कि क्या वह अधिनियम के उपबंध के अर्थान्वयन पर निर्भर है अथवा तथ्यों के अन्वेषण पर।

Cases referred :

AIR 1941 Nagpur 364, 1989 JLJ 478, AIR 1982 Madras 202, AIR 2003 AP 528, 2010 (8) SCC 726, AIR 1978 Raj. 206, (2008) 7 SCC 310, AIR 1954 SC 340, 1970 MPLJ 16.

P.N. Dubey, for the applicants.
Imtiyaz Hussain, for the non-applicant No. 1.
S.K. Dwivedi, for the non-applicant No.2.

ORDER

ALOK ARADHE, J.:- With consent of the parties, the matter is heard finally.

1. In this revision preferred under Section 83(9) of the Wakf Act, 1995, the applicant has assailed the validity of the order dated 16.5.2012 passed by the M.P. State Wakf Tribunal by which the application for injunction filed by the non-applicant No.1 has been allowed.

2. Facts leading to filing of the revision briefly stated are that Mutallika Islamiya School, Korwai, District Vidisha is a Wakf registered under the provisions of the Wakf Act, 1995 (hereinafter referred to as 'the Act'). The Wakf is the owner of lands comprised in various Khasra Nos. admeasuring 16.235 hectares. The applicant No.1, who is the Mutwalli submitted an application on 10.10.2009 under Section 32 of the Act to M.P. Wakf Board, Bhopal for grant of permission to exchange 4.633 hectares of un-irrigated

agricultural lands with irrigated lands admeasuring 6.28 hectares situated near Betwa river. It was stated in the application that son-in-law of Mutwalli namely applicant No.2 has offered to pay Rs.15 Lacs for further construction and restoration of Darsgah as a result which, strength of the students would increase from 250 to 500. The applicant No.1 also offered to contribute a sum of Rs.1.05 lacs to Wakf Board by way of donation.

3. Thereupon, the valuation report in respect of lands in question from a private valuer was obtained and it was found that market value of the land of the Wakf is less than the market value of the lands sought to be received in exchange. It is the case of the applicants that the issue with regard to exchange of the land was considered in the meeting of the Board dated 26.2.2011 in which, out of 13 members, 10 members voted in favour of the resolution. Thereafter, non-applicant No.1 on 5.5.2011 issued a notice under Section 89 of the Act to the Board by which the Board was required to annul the proceeding with regard to exchange of the land. The Chief Executive Officer of the Board by communication dated 22.6.2011 informed the Mutwalli that permission has been granted by the Board and the Tahsildar was requested to make necessary entries in the revenue records. Before expiry of the notice period, the non-applicant No.1 filed a suit under Section 83 of the Act along with an application for injunction by which the applicants were sought to be restrained from alienating the property in question and to change the nature of the property. The applicants filed the written statement as well as the reply in which inter-alia it was pleaded that permission to exchange the land has been duly granted by the Board in accordance with law.

4. The Tribunal vide order dated 16.5.2011 inter-alia held that market value of the land sought to be received in exchange is less than the lands which belongs to the Wakf. It was further held that in case injunction is not granted, the purpose of filing the suit would be frustrated. Accordingly, the applicants were restrained either from alienating the property in question or from altering the nature of the same.

5. Learned counsel for the applicants submitted that the suit filed by the non-applicant No.1 before the Tribunal is not maintainable, as the same was filed before the expiry of the notice period prescribed under Section 89 of the Act and the non-applicant No.1 has no locus to file the suit. It was further submitted that in any case the non-applicant No.1 has alternative remedy under Section 51(5), Section 52 as well as Section 26 of the Act. It was also urged that the Tribunal grossly erred while passing the order dated 8.7.2011

and in granting liberty to file the suit to the non-applicant No.1 without there being any application in this regard by the non-applicant No.1. In support of his submissions, learned counsel for the applicants has placed reliance on *Cawashah Bomanji Parakh Vs. Prafulla Nath Rudra*, AIR 1941 Nagpur 364, *Gopal Prasad Chourasiya Vs. Prasanna Kumar Shrivastava and others*, 1989 JLJ 478, *Rahmath Bi and another Vs. State Wakf Board*, AIR 1982 Madras 202, *A.S. Abdul Khader Wakf for Deeni Talim Vs. Saber Miah* and etc., AIR 2003 AP 528, *Ramesh Gobindram* (dead) through *Lrs., Vs. Sugra Humayun Mirza Wakf*, 2010(8) SCC 726 and *Maharama and another Vs. Ram Bux*, AIR 1978 Rajasthan 206. Learned counsel for respondents No.2 and 3 have supported the submissions made by learned counsel for the applicants.

6. Learned counsel for non-applicant No.1 while inviting the attention of this Court to provisions of Section 32(j) as well as Section 51(2) of the Act, has submitted that there are twin mandatory requirements for transfer of immovable property of a Wakf namely that sanction has to be granted by the Board by two-third's majority and that there has to be publication in the official Gazette regarding the particulars of the transaction inviting objections and suggestions. In the instant case, neither the resolution has been passed by the two-third majority of the members of the Board nor any publication in the official Gazette has been made. It is also urged that there was no order by the Board for valuation of the property and there is no registered document evidencing the exchange of the property in question. Lastly, it is also submitted that the non-applicant No.1 has the locus to institute the suit and no alternative remedy is available to him for ventilation of his grievance and the suit filed by the non-applicant No.1 before the Tribunal is maintainable. In support of his submissions, learned counsel for non-applicant No.1 has placed reliance on a decision of Supreme Court in the case of *Mohammadia Cooperative Building Society Limited Vs. Lakshmi Srinivasa Cooperative Building Society Limited and Others*, (2008) 7 SCC 310.

7. I have considered the respective submissions made by learned counsel for the parties and have perused the record. Admittedly, the objections with regard to maintainability of the proceeding before the Tribunal have been raised by the applicants for the first time before this Court. In *Kiran Singh Vs. Chaman Paswan*, AIR 1954 SC 340, it has been held that defects of jurisdiction may be either pecuniary or territorial and it may also be in respect of subject matter of action. By jurisdiction is meant the authority on which a

Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. Halsbury, 4th Edin., Vol. 10, para 715 p.323. The jurisdiction of the Tribunal is circumscribed by the provisions of the Act. Whenever any question is raised before the Tribunal with regard to its jurisdiction, the Tribunal will have to decide such a question whether it depends on the construction of the provision of the Act or investigation of the facts. [See : *Rao Bhupendra Singh Vs. Smt. Gopal Kunwar Umath and another,* 1970 MPLJ 16. Thus, in view of aforesaid enunciation of law, it is apparent that the Wakf Tribunal has the authority to decide the question of jurisdiction.

8. In the instant case, the objections with regard to jurisdiction of the Tribunal on various grounds have been raised for the first time before this Court. In the facts of the case, without entering into the merits of the case, I deem it appropriate to dispose of the instant revision with a direction that in case the applicants move an application before the Tribunal raising an objection with regard to its jurisdiction to entertain the suit filed by the non-applicant No.1, the Tribunal on receipt of such an application shall decide such an objection within a period of three weeks from the date of receipt of such an application. Needless to state that in case suit filed by the non-applicant no. 1 is found to be not maintainable the tribunal would be at liberty to pass appropriate orders with regard to loss if any caused to applicants in view of injunction granted by it.

9. Let the record of the Tribunal be sent back forthwith. With the aforesaid directions, the revision is disposed of.

C.C. as per rules.

Revision disposed of.

I.L.R. [2013] M.P., 2723

CIVIL REVISION

Before Mr. Justice N.K. Gupta

C.R. No. 251/2007 (Jabalpur) decided on 1 November, 2013

MADHYA PRADESH HOUSING BOARD ...Applicant

Vs.

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

A. ***Evidence Act (1 of 1872), Section 115 - Estoppel - Jurisdiction*** **- In Execution proceedings, decree was challenged on the ground of nullity being without jurisdiction - Applicant had filed written**

statement and no objection with regard to the competency of the Civil Court was raised - Appeal filed by the applicant against the judgment and decree passed by Trial Court was also withdrawn - As the applicant had opportunity to raise the objection before the Trial Court and in absence of any such objection, the Trial Court could not consider such a point - Applicant is estopped from raising the objection of competency of Civil Court in execution proceedings. (Para 6)

क. साक्ष्य अधिनियम (1872 का 1), धारा 115 – विबंध – अधिकारिता – निष्पादन कार्यवाहियों में डिक्री को बिना अधिकारिता का होने के नाते, अकृत होने के आधार पर चुनौती दी गई – आवेदक ने लिखित कथन प्रस्तुत किया और सिविल न्यायालय की सक्षमता के संबंध में कोई आक्षेप नहीं उठाया गया – विचारण न्यायालय द्वारा पारित निर्णय एवं डिक्री के विरुद्ध आवेदक द्वारा प्रस्तुत अपील भी वापस ली गई थी – चूंकि आवेदक को विचारण न्यायालय के समक्ष आक्षेप उठाने का अवसर था और ऐसे किसी आक्षेप की अनुपस्थिति में, विचारण न्यायालय उक्त बिंदू पर विचार नहीं कर सकता – सिविल न्यायालय की सक्षमता का आक्षेप निष्पादन कार्यवाहियों में उठाने पर आवेदक को रोका जाता है।

***B. Civil Procedure Code (5 of 1908), Section 2(2) - Decree - Nullity* - If a decree is of such a nature which cannot be cured by consent or waiver of the party, then such a decree which was nullity ab-initio can be considered even in execution proceedings. (Para 7)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), धारा 2(2) – डिक्री – अकृतता – यदि डिक्री का स्वरुप ऐसा है कि जिसे पक्षकार की सहमति या अधित्यजन द्वारा सुधारा नहीं जा सकता, तब उक्त डिक्री जो आरंभ से अकृत थी, उसे निष्पादन कार्यवाहियों में भी विचार में लिया जा सकता है।

***C. Land Acquisition Act (1 of 1894), Sections 4 & 6, Civil Procedure Code, (5 of 1908), Section 9 - Jurisdiction of Civil Court - Validity of Acquisition Proceedings* - Acquisition proceedings were initiated in the year 1963 - Land was purchased by the plaintiff in the year 1954 and his name was also mutated in revenue records - However, notice was issued to original seller who had already died in the year 1959 - Notice was issued to original seller who was already dead and no notice was issued to plaintiff whose name was already mutated in revenue records - As principles of natural justice were violated therefore, Civil Court had jurisdiction to entertain the suit and to declare the title of plaintiff and to pass injunction order against applicants/defendants. (Paras 8 to 11)**

ग. भूमि अर्जन अधिनियम (1894 का 1), धाराऐं 4 व 6, सिविल प्रक्रिया संहिता (1908 का 5), धारा 9 – सिविल न्यायालय की अधिकारिता – अर्जन कार्यवाही की विधिमान्यता – अर्जन कार्यवाहियां, वर्ष 1963 में आरंभ की गई थीं – वादी द्वारा भूमि वर्ष 1954 में क्रय की गई और राजस्व अभिलेख में उसके नाम पर नामांतरित की गई – किन्तु, नोटिस मूल विक्रेता को जारी किया गया, जिसकी मृत्यु वर्ष 1959 में पहले ही हो चुकी थी – नोटिस मूल विक्रेता को जारी की गई, जिसकी मृत्यु पहले ही हो चुकी थी और वादी को कोई नोटिस जारी नहीं किया गया, जिसका नाम पहले ही राजस्व अभिलेख में नामांतरित किया गया था – चूंकि नैसर्गिक न्याय के सिद्धांतों का उल्लंघन किया गया इसलिए, सिविल न्यायालय को वाद ग्रहण करने की और वादी का हक घोषित करने की एवं आवेदकगण/प्रतिवादीगण के विरुद्ध व्यादेश पारित करने की अधिकारिता है।

Cases referred :

AIR 1996 SC 523. (1995) 4 SCC 229, (2006) 8 SCC 336, (2013) AIR SCW 2378, (1995) 4 SCC 301, (2005) 7 SCC 791, AIR 1963 SC 1547, (1971) 1 SCC 486, 1970 MPLJ 16, (2001) 1 MPHT 514, AIR 1996 SC 1819.

R.K. Samaiya, for the applicant.
Santosh Yadav, P.L. for the non-applicant No.1/State.
Shobha Menon, with *Rahul Choubey*, for the non-applicant No.2.

ORDER

N.K. Gupta, J.:- By way of the present civil revision, the applicant has challenged the order dated 30.6.2007 passed by the learned Civil Judge Class-II, Bhopal in Civil Execution No.44-A/82/90, whereby the application of the applicant was dismissed and the trial Court did not declare that the decree dated 8.2.1984 was nullity.

2. The brief facts of case are that the applicant obtained some land after acquisition of such land in the year 1963. The land bearing Survey No.40/34 area 18.86 acres situated at Mouja Govindpur Tahsil Huzur District Bhopal was also acquired. The respondent No.2 had instituted a Civil Suit No.44-A/82 to get a decree of injunction relating to the land of the respondent No.2 so that he should not be dispossessed. The learned 4th Civil Judge Class-II, Bhopal vide judgment and decree dated 8/2/1984 decreed the suit and declared the title of the respondent No.2 and further directed that the respondent No.2 should not be dispossessed by the applicant or its employees.

The appeal filed by the applicant was withdrawn and ultimately the execution proceeding was initiated. During the execution the applicant and its officers tried to obtain a settlement with the respondent No.2, but no concrete proposal was made by the officers of the applicant. Ultimately in compliance to the order dated 6.8.2004 passed in WP No.1520/2004, an objection was raised by the applicant in the execution matter to get the decree dated 8.2.1984 to be declared nullity but vide order dated 30/6/2007 the learned Civil Judge Class-II dismissed the said application.

3. I have heard the learned counsel for the parties.

4. The learned counsel for the applicant has submitted that according to the provisions of the Land Acquisition Act, jurisdiction of civil Court is barred, and therefore the decree given by the learned Civil Judge was null and void ab-initio. The learned counsel for the applicant has placed his reliance upon the various judgments and orders of Hon'ble the Apex Court in the cases of *"Laxmi Chand & others Vs. Gram Panchayat, Kararia"* (AIR 1996 SC 523), *"State of Bihar Vs. Dhirendra Kumar"*, [(1995) 4 SCC 229], *"Commissioner, Bangalore Development Authority Vs. K.S.Narayan"*, [(2006) 8 SCC 336] and *"Commissioner, Bangalore Development Authority Vs. Brijesh Reddy"*, (2013 AIR SCW 2378). It is further submitted that the doctrine of estoppal cannot be invoked against the applicant. In this context, the learned counsel for the applicant has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *"Shabi Construction Company Vs. City & Industrial Development Corporation & another"*, [(1995) 4 SCC 301]. It is submitted that the decree passed by the learned 4th Civil Judge Class-II was nullity ab-initio, and therefore it could be considered in the execution case also. In this regard the learned counsel for the applicant has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *"Harshad Chimanlal Modi Vs. DLF Universal Ltd.*, [(2005) 7 SCC 791]. Hence, it is submitted that the decree passed by the learned 4th Civil Judge Class-II, Bhopal was nullity from the very beginning and it could not be executed. Therefore, it is prayed that the decree may be declared nullity.

5. On the other hand, the learned counsel for the respondent No.2 has submitted that the decree was passed against the applicant after due opportunity given to the applicant to raise all such defence before the trial Court following which the applicant went in appeal but the appeal was withdrawn. Under such

circumstances, the decree attained finality, and therefore the Executing Court cannot go back into the merits of the decree. It is further submitted that no land of the respondent No.2 was acquired. No valid notice was given to the respondent No.2. The respondent No.2 had purchased the land from the previous owner Ballo Bai wife of Ramchand in the year 1954, whereas the land acquisition proceedings took place in the year 1963, and therefore no notice has been given to the respondent No.2. Hence the entire land acquisition proceedings were not binding to the respondent No.2, and therefore his case for declaration and injunction was tenable in a Civil Court. In this connection the learned counsel for the respondent No.2 has placed his reliance upon the judgment of Hon'ble the Apex Court in the cases of *"Firm Seth Radha Kishan (Deceased) Vs. Administrator Municipal Committee, Ludhiana"*, (AIR 1963 SC 1547) and *"Union of India Vs. Tarachand Gupta & others"*, [1971(1) SCC 486]. Similarly, the learned counsel for the respondent No.2 has placed his reliance upon the judgment of the Division Bench of this Court in the case of *"Rao Bhupendra Sinvgh Vs. Smt. Gopal Kunwar Umath"*, (1970 MPLJ 16) and the judgment passed by the Single Bench of this Court in the case of *"V.K.Munshi Vs. Raipur Cooprative Housing Society Ltd."* [2001(1) MPHT 514]. It is submitted that it is for the Civil Court itself to consider the question of jurisdiction and decide the same and when such a question is decided, then the aggrieved person has a right to challenge it before the higher courts. The applicant had an opportunity to challenge the judgment and the decree passed by the trial Court, but the appeal filed by the applicant was withdrawn, and therefore the applicant is estopped to raise the objection before the Executing Court again.

6. After considering the submissions made by the learned counsel for the parties and looking at the facts and circumstances of the case, only two questions are to be considered in the present case. Firstly, whether the applicant could raise such an objection before the Executing Court and secondly, whether the learned 4th Civil Judge Class-II, Bhopal had the jurisdiction to pass such a decree. For the first question, it would be apparent that the applicant was made party in the case and it had an opportunity to raise all such objections in the case and the trial Court had decided all the questions raised before it. If the judgment dated 8.2.1984 is perused, then it would be apparent that no such objection was raised by the applicant in the written statement and the trial Court could not consider such a point in the case. It was for the applicant to raise this objection before the trial Court along with the other objections

raised by it. According to the judgment of the Single Bench of this Court in the case of *V.K. Munshi* (supra) it is for the trial Court to consider as to whether the Civil Court had the jurisdiction to entertain the suit or not, and therefore it was for the applicant to raise such objections before the trial Court. When the opportunity is given to the defendant to raise all objections before the trial Court and if any objection is not taken before the trial Court, then the concerned defendant is not competent to take such an objection before the Executing Court. Hon'ble the Apex Court in the case of *Brijesh Reddy* (supra) has laid that such objection ought to have been raised at the earliest before the trial Court. The higher Court may refuse to entertain such plea in absence of proof of prejudice. In para 8 of the order Hon'ble the Apex Court has held as under:

> "Section 9 of the Code of Civil Procedure, 1908 provides jurisdiction to try all suits of civil nature excepting those that are expressly or impliedly barred which reads as under:
>
> "9. Courts to try all civil suits unless barred.- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."
>
> From the above provision, it is clear that Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The jurisdiction of Civil Court with regard to a particular matter can be said to be excluded if there is an express provision or by implication it can be inferred that the jurisdiction is taken away. An objection as to the exclusion of Civil Court's jurisdiction for availability of alternative forum should be taken before the trial Court and at the earliest failing which the higher court may refuse to entertain the plea in the absence of proof of prejudice."

No reason has been shown by the applicant as to why no such objection was raised before the trial Court at the time when the written statement was filed. Under such circumstances, where the applicant withdrew the appeal filed against the judgment and decree passed by the learned 4th Civil Judge Class-II, Bhopal, then certainly the applicant is estopped to raise such an objection before any other Court including the Executing Court, and therefore the contention of the learned counsel for the applicant cannot be accepted that

such objection could be raised before the Executing Court.

7. The learned counsel for the applicant has placed his reliance upon the judgment of Hon'ble the Apex Court in the case of *"Urban Improvement Trust, Jodhpur Vs. Gokul Narain"* (AIR 1996 SC 1819) in which it is laid that in some rare cases such objection may be raised in execution also. But in that judgment Hon'ble the Apex Court has observed that if a decree is of such a nature that it cannot be cured by consent or waiver of the party, then such a decree which was nullity ab-initio can be considered even in the execution. In the light of this decision, it is to be considered as to whether the decree was nullity ab initio.

8. The land acquisition proceedings were initiated in the year 1963 and if the award dated 30.11.1963 is perused, then it would be apparent that the Deputy Director In-Charge Land Acquisition, Bhopal had passed that award against one Mst Bao W/o Ramchand. In para 14, the non appearance of Mst Bao to file any statement of claim relating to Survey No.34/40 area 18.86 acres was observed. The respondent No.2 had established before the trial Court that he purchased the land from Ballo Bai in the year 1954 and mutation also took place soon after his purchase. The trial Court had decided the issue No.1 in an affirmative result that the land in question was owned by the respondent No.2. When the land in question was purchased by the respondent No.2 and mutation took place in the year 1954, then during the land acquisition proceedings which took place much after that mutation, a notice was to be given to the applicant. It is true that in the land acquisition proceeding, jurisdiction of the Civil Court is barred, but if the award passed by the concerned officer is perused, then it would be apparent that the respondent No.2 was not party in that award and no notice of the land acquisition proceedings was given to the respondent No.2. The applicant could not establish before the trial Court that a notice of the land acquisition was published in official gazette against the respondent No.2. Hence the land of the respondent No.2 was not acquired in the eye of law, since no notice was given to the respondent No.2. The land was initially registered in the name of Ballo, whereas a notice was given to Mst Bao wife of Ramchand, who had already expired in the year 1959, and therefore the notice issued to a dead person was nullity. Hence the acquisition proceedings against the respondent No.2 for the land in question was nullity from very beginning, and therefore the respondent No.2 had no option except to institute a civil suit for declaration and injunction relating to the property on which the applicant and its officers

tried to get possession by encroachment. This was the civil right of the respondent No.2. There is no provision in the Land Acquisition Act that if no notice of the land acquisition is given to the concerned party and the authority had tried to get the possession of the property forcefully without any acquisition of the land, then the matter shall be decided by any authority created under the Land Acquisition Act. Under such circumstances, looking at the nature of the case, there was no bar on the jurisdiction of the civil Court to entertain the suit of the respondent No.2 and to declare his title and to pass the injunction order against the applicant and its officers.

9. The learned counsel for the applicant has placed his reliance upon several judgments of Hon'ble the Apex Court in various cases, however due to factual difference, such judgments cannot be applied in the present case. It is true that the jurisdiction of the civil Court is barred for the land acquisition cases, but looking at the factual position of the present case, the respondent No.2 had no option except to knock the door of the Civil Court, because no notice of the land acquisition was given either to the respondent No.2 or Mst Ballo Bai. In this regard, the judgment of the Division Bench of this Court in the case of *Rao Bhupendra Singh* (supra) may be applied in which it is laid that the order made without jurisdiction is nullity, but it is for the civil Court itself to consider the question of jurisdiction and to decide the same. Similarly, in the case of *V.K.Munshi* (supra), it is held that the jurisdiction of the Civil Court is to be considered according to the facts of the case and if it appears that the Civil Court has jurisdiction in the case, then the Court may entertain the civil Suit accordingly.

10. The jurisdiction of the Civil Court is barred for the land acquisition proceeding, but in the present case no notice of the land acquisition was given either to the respondent No.2 or to his predecessor Ballo Bai, and therefore prima facie in absence of any notice the land of the respondent No.2 was not acquired in the eye of law, and therefore the respondent No.2 was entitled to proceed with the civil suit and since it was the matter of declaration of the right of the respondent No.2, then certainly the Civil Court has jurisdiction to decide the case and to pass a decree. Hence the decree directed by the learned 4th Civil Judge Class-II Bhopal is not nullity ab initio and is thus enforceable.

11. On the basis of the aforesaid discussion, it would be apparent that the Civil Court had jurisdiction to consider the suit and that the decree passed by the 4th Civil Judge Class-II, Bhopal was not nullity ab-initio.

The decree is executable and the objection raised by the applicant cannot be accepted. Also the applicant had an opportunity to raise such an objection before the trial Court and the appellate Court, but the applicant or its officers did not raise such an objection before the trial Court or the appellate Court and therefore, now the applicant is estopped to raise such objection before the Executing Court. Under such circumstances, the present revision filed by the applicant cannot be accepted. The learned Civil Judge Class-II, Bhopal has rightly dismissed the objection raised by the applicant vide order dated 30.6.2007. There is no illegality or perversity visible in the impugned order passed by the learned Civil Judge Class-II, Bhopal. Under such circumstances, the prevision revision filed by the applicant is hereby dismissed with costs.

12. It is made clear that the applicant shall bear its own cost as well as those incurred by the respondent No.2. Rs.5000/- is quantified towards the Advocate fee, if certified.

13. A copy of this order be sent to the Executing Court for information and to proceed with the execution case.

Revision dismissed.

I.L.R. [2013] M.P., 2731
INCOME TAX APPEAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
I.T.A. No. 89/2012 (Indore) decided on 22 January, 2013

PREM SWAROOP KHANDELWAL (SHRI) ...Appellant
Vs.
THE COMMISSIONER OF INCOME TAX ...Respondent

Income Tax Act (43 of 1961), Section 253 - Appeal to Appellate Tribunal **- Commissioner of Income Tax applied net profit rate of 2.5% on the turnover of Rs. 7 Crores - Revenue as well as appellant challenged the said order by filing appeal - ITAT dismissed the appeal of Revenue on the basis of some reference being made about the net profit rate being applied by CIT, also dismissed the appeal of appellant by observing that while deciding the appeal of revenue, the stand of CIT has been upheld - Held - ITAT committed error in dismissing the Appellant's appeal merely by observing that the stand of CIT has been upheld while dismissing the appeal of revenue - Contention of appellant**

that net profit at 2.5% could not have been applied was required to be decided by ITAT - Order of ITAT set aside - Matter remanded back for deciding appellant's contention - Appeal allowed. (Para 8)

आयकर अधिनियम (1961 का 43), धारा 253 – अपीली अधिकरण को अपील – आयकर आयुक्त ने रु. 7 करोड़ की कुल बिक्री पर 2.5 प्रतिशत शुद्ध लाभ दर लागू की – राजस्व तथा अपीलार्थी ने उक्त आदेश को अपील प्रस्तुत करके चुनौती दी – आईटीएटी ने सीआईटी द्वारा लागू की जाने वाली शुद्ध लाभ दर के बारे में कुछ संदर्भ दिये जाने के आधार पर राजस्व की अपील खारिज की, अपीलार्थी की अपील भी इस टिप्पणी के साथ खारिज की गई कि राजस्व की अपील का विनिश्चय करते समय, सीआईटी के पक्ष को अभिपुष्ट किया गया – अभिनिर्धारित – आईटीएटी ने अपीलार्थी की अपील मात्र इस टिप्पणी के साथ खारिज करने में भूल कारित की कि राजस्व की अपील खारिज करते समय सीआईटी के पक्ष की पुष्टि की गई–अपीलार्थी का तर्क कि 2.5 प्रतिशत का शुद्ध लाभ लागू नहीं किया जा सकता था, को आईटीएटी द्वारा निर्णित किया जाना अपेक्षित था – आईटीएटी का आदेश अपास्त–अपीलार्थी के तर्क का विनिश्चय करने हेतु मामला प्रतिप्रेषित–अपील मंजूर।

P.M. Choudhary, for the appellant.
R.L. Jain with *Veena Mandlik*, for the respondent.

ORDER

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

This appeal is admitted for hearing on the following substantial question of law :

> "Whether on the facts and circumstances of the case, ITAT is justified in dismissing the appellant's appeal in a summary manner?"

2. With the consent of the parties, the matter is finally disposed of.

3. The appellant claims to have been engaged in the business of trading of Soyabean, Maize and Wheat. He is regularly assessed to Income Tax. He submitted his return of income for the Assessment Year, 2002-03 declaring total income at Rs.1,49,420/. The Assessing Officer vide assessment order dated 31.03.2005 passed under Section 143 (3) of the Income Tax Act, (for short the Act) rejected the books of Accounts by applying provisions of Section 145 (3) of the Act and determined total income at Rs.32,66,603/- after making various additions including an addition of Rs.30,61,183/- in respect of the

alleged investment made in respect of bogus purchases.

4. Aggrieved by the order of the A.O. the appellant assessee preferred an appeal before the CIT (A). The CIT (A) partly allowed the appellant's appeal vide order dated 19.03.2010 passed in Appeal No.IT-30/ 2005-06/ 445. The CIT (A) upheld the findings of the A.O. in respect of bogus purchases but not against the addition made by A.O. of Rs.30,61,183/-. The CIT (A) directed the A.O. apply net profit rate of 2.5% on the turnover of Rs.7 Crores disclosed by the appellant.

5. The said order passed by CIT (A) was challenged by the appellant by filing further appeal before the Income Tax Appellate Tribunal, (for short the ITAT). In the appeal, the appellant challenged the application of net profit rate of 2.5% as determined by CIT (Appeal). The order of the CIT (Appeal) was also challenged by the respondent revenue by which the appellant's appeal was partly allowed by CIT (Appeal). Both the appeals were decided by the ITAT by a common order dated 10.04.2012. The ITAT mainly decided the appeal preferred by the revenue and dismissed the same. While dismissing the Revenue's appeal on the basis of some reference being made about the net profit rate being applied by CIT (Appeal), the ITAT also dismissed the appellant's appeal by observing that while deciding the appeal of revenue the stand of CIT (Appeal) to this effect has been upheld. Feeling aggrieved by such summary dismissal of the appellant's appeal by the ITAT in regard to applying net profit rate of 2.5% the appellant has filed this appeal under Section 260-A of the Act.

6. Shri P.M.Choudhary, learned counsel for the petitioner argued that the order passed by the ITAT dismissing the appellant's appeal in summary manner is wholly arbitrary and unjustified. According to him, even while deciding the revenue's appeal though it was recorded by the ITAT that net profit for the preceding 4 accounting years was 0.21%, 0.26%, 0.23% and 0.21% respectively still the ITAT failed to decide as to how CIT (Appeal) could have applied net profit of 2.5%. He submits that even Revenue's appeal and the appellant's appeal came to be dismissed without going to the question raised by the appellant about application of net profit at 2.5%.

7. Shri R.L.Jain, learned Senior counsel for the respondent supported the impugned order of the ITAT upholding the order of CIT (Appeal) for applying net profit rate of 2.5%.

8. Having considered the submissions made by the learned counsel for the parties, we are of the view that the ITAT has committed an error in dismissing the appellant's appeal merely by observing that while deciding the appeal of revenue the stand of the CIT (Appeal) has been upheld. We find that the appellant's contention that the net profit at 2.5% could not have been applied by CIT (Appeal) was required to be decided by the ITAT and the appellant's appeal could not have been dismissed summarily on the basis of the decision in revenue's appeal without dealing with the appellant's contention. It is evident from the order of ITAT that while deciding revenue's appeal also the said question of applying of net profit rate at 2.5% was not dealt with by it.

9. In the circumstances, we answer the question of law in favour of the assessee and against the revenue. The order of the ITAT to that extent is set aside. The matter is remanded back to the ITAT for deciding the appellant's contention that the CIT (Appeal) has wrongly applied the net profit at 2.5%.

10. Accordingly, the appeal stands allowed. No orders as to costs.

Appeal allowed.

I.L.R. [2013] M.P., 2734

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice Brij Kishore Dube

M.Cr.C. No. 7439/2012 (Gwalior) decided on 13 August, 2013

ANIL KUMAR JAIN ...Applicant

Vs.

SMT. SHILPA JAIN ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 125 - Maintenance - Wife is entitled to maintain a standard of living, which is neither luxurious nor penurious and also to lead a decent life yet, at par with the dignity of her husband. (Para 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 125 – भरण–पोषण – पत्नी जीवन स्तर को बनाये रखने की हकदार, जो कि न तो वैभवपूर्ण हो और न ही अभावग्रस्त और साथ ही शिष्ट जीवन जी सके, उसके पति की गरिमा के समकक्ष।

Cases referred :

2000 (2) Vidhi Bhasvar 76, 1983 MPWN 259, AIR 2003 SC 3174,

1998 (II) MPWN 95, 2004(2) MPHT 61(CG), 2008(4) MPHT 193, (1996) 6 SCC 326.

Rajesh Kumar Jain, for the applicant.
Pradeep Katare, for the non-applicant.

ORDER

BRIJ KISHORE DUBE, J.:- This petition under Section 482 of Code of Criminal Procedure, 1973 (for short 'the Code') is preferred by the petitioner for quashing the order dated 23.08.2012 passed in Criminal Revision No.168/2012 by the Additional Sessions Judge, Ambah, District Morena affirming the order dated 23.06.2012 passed in M.J.C. No.95/2009 by the Judicial Magistrate First Class and Gram Nayalaya, Ambah, District Morena whereby an application under Section 125 of the Code filed by the respondent herein/wife was allowed and the petitioner herein/husband was directed to pay the maintenance to the tune of Rs.10,000/- per month.

2. Background facts may be summarized as under:-

(a) The marriage of the parties was solemnized on 14.02.2006 as per Hindu rites and customs at Ambah, District Morena, thereafter, they resided together for a short span of about 12 months.

(b) On 07.02.2008, the proceedings for grant of an amount of Rs.17,000/- per month as maintenance were initiated by the respondent herein, Smt. Shilpa Jain (hereinafter referred to as 'wife') against the petitioner herein, Anil Kumar Jain (hereinafter referred to as the 'husband'). According to her, right from inception of the marital relationship, she had been subjected to cruelty and harassment by her husband and her husbands' family members in regard to demand of dowry. They also compelled her to take divorce and insisted to sign on the divorce papers. The elder brother of her husband who is unmarried and an advocate expected from her to fulfill his desire which she refused and due to which on his instigation, she was subjected to harassment. Any how, with the help of police on 18.02.2007, she was taken to her parental home by her father. Her husband did not maintain her. She has no independent source of income. She is unable to maintain herself, however, the husband is having hand-some income i.e., salary of Rs.18,000/- per month as he is working in the Bank of

India at Sihore, apart from that, he is getting Rs.6,000/- per month as rent from the flat and Rs.10,000/- per month from share market by doing business.

(c) In turn, the husband specifically denied the allegations in regard to cruelty and dowry harassment. Attention was also invited to the fact that no complaint regarding alleged ill-treatment on account of dowry demand was made at an earlier occasion. As per his version, the wife left matrimonial home voluntarily and residing separately at her parental house without any sufficient reason. He tried several times to take her back to her matrimonial house but she refused to come back. She is well educated and is having sufficient source of income while he is getting only salary of Rs.12,000/- per month after deductions. He has to look after his mother, unmarried brother and sisters, therefore, prayed that the application of the wife for maintenance may be rejected.

(d) The wife examined herself to prove her pleadings by entering into the witness-box and produced the relevant documents, however, neither the husband has been examined himself nor produced any witness to prove his pleadings.

(e) Upon the critical appraisal of the entire evidence on record, learned Magistrate found that the wife is unable to maintain herself whereas the husband has sufficient means to maintain his wife. The husband refused to pay the maintenance, therefore, proceeded to award maintenance, a monthly sum of Rs.10,000/- from the date of filing of the application.

(f) Being aggrieved thereof, the husband preferred revision before the Revisional Court. The Revisional Court vide the impugned order dated 23.08.2012 affirmed the order of maintenance granted by the Judicial Magistrate First Class, Ambah, District Morena, hence, this petition.

3. Shri Rajesh Kumar Jain, Advocate who is elder brother of the husband appearing on behalf of the petitioner herein strenuously contended that the wife is not only residing separately without any sufficient cause but she is also capable to maintain herself. Learned counsel further submits that the learned

Court below wrongly determined that the husband neglects or refused to pay the maintenance, as from the evidence it is clear that the wife left her matrimonial house voluntarily and went to her parental house. She is well-educated and able to earn and maintain herself but the Court below erroneously determined that she is unable to maintain herself. Regarding the earning of the husband, the learned Court below wrongly determined without legal proof that the husband is capable to maintain his wife. The evidence led by the wife is without any material on record. The learned Court below further wrongly held that the husband has not proved his pleadings. Learned counsel placed reliance upon the following decisions:-

(i) *Mamta Jaiswal (Smt.) v. Rajesh Jaiswal,* 2000 (2) Vidhi Bhasvar 76;

(ii) *Dulichand v. Prahlad Singh,* 1983 MPWN 259;

(iii) *Deb Narayan Halder v. Smt. Anushree Halder,* AIR 2003 SC 3174;

(iv) *R.P. Singh v. Narmada Prasad,* 1998 (II) MPWN 95;

(v) *Shiv Kumar Yadav v. Smt. Santoshi Yadav,* 2004 (2) MPHT 61 (CG);

(vi) *Anil Kachwaha v. Smt. Sunita Kachwaha and others,* 2008 (4) MPHT 193.

4. In response, Shri Pradeep Katare, learned counsel for the respondent argued in support of the impugned order and submitted that the petition is not maintainable as the respondent has not paid even a single pie in spite of the impugned orders passed by the Courts below and order dated 28.09.2012 passed by this Court.

5. I have considered the rival contentions of the learned counsel for the parties and perused the record.

6. The main point for consideration is whether the Courts below have committed any illegality in awarding maintenance at the rate of Rs.10,000/- per month to the respondent/wife?

7. As cautioned by the Hon'ble Apex Court in *Rajathi v. C. Ganesan,* (1996) 6 SCC 326, it is not necessary to examine the entire evidence

threadbare in exercising the jurisdiction under Section 482 of the Code in a case under Section 125 of the Code as only a prima-facie view of the matter is taken and it would not be desirable to enter into the minute details of the matrimonial disputes between the parties. The relevant paras of the judgment reads as under:-

> "11. In the present case, the High Court minutely examined the evidence and came to the conclusion that the wife was living separately without any reasonable cause and that she was able to maintain herself. All this the High Court did in exercise of its powers under Section 482 of the Code which powers are not a substitute for a second revision under sub-section (3) of Section 397 of the Code. The very fact that the inherent powers conferred on the High Court are vast would mean that these are circumscribed and could be invoked only on certain set principles.
>
> 12. It was not necessary for the High Court to examine the whole evidence threadbare to exercise jurisdiction under Section 482 of the Code. Rather in a case under Section 125 of the Code the trial court is to take a prima facie view of the matter and it is not necessary for the Court to go into the matrimonial disputes between the parties in detail. ....."

8. It is not in dispute that the marriage of the respondent was solemnized with the petitioner on 14.02.2006 at Ambah, District Morena. It is also not in dispute that the respondent/wife is living separately with her husband w.e.f. 18.02.2007 at her parental house at Ambah.

9. To prove the case, wife examined herself before the Court. According to her (A.W.1), she was married with Anil Kumar Jain on 14.02.2006 and thereafter, she went to her in-laws house and discharged the matrimonial obligations but she has been maltreated and humiliated by her husband and husbands' family members, not only for bringing insufficient dowry but also due to demand of more dowry. She categorically stated the instances of cruelty and harassment in her deposition. She further stated that in the month of December her father came to her in-laws house to take her, but she was not allowed to go with

him. She was compelled to take divorce. She was also pressurized to the effect that unless and until she put her signature on the divorce papers, she could not be allowed to go her parental house, thereafter, on 17.02.2007 her father again came to her in-laws house to take her. The earlier episode was again repeated by her in-laws family members but any how with the intervention of some relatives and with the help of police on 18.02.2007, she was taken by her father to her parental house and since then i.e., 18.02.2007 she is residing at her parental house, Ambah, District Morena. It is further stated by her that her husband is not maintaining her and no attempts have been made to take/bring her back to her matrimonial house by her husband. She is doing nothing and has no means of income. She is unable to maintain herself. On the contrary, her husband is working in Bank of India at Sehore and he was getting salary Rs.18,000/- per month at the time of her marriage. Nothing could be elicited in her cross-examination so as to suggest that she was interested in obtaining the maintenance on absolutely false grounds.

10. In *Rajathi* (supra), the Hon'ble Apex Court ruled that the statement of wife that she was unable to maintain herself would be enough and it would be for the husband to prove otherwise. It is further ruled that the words of "unable to maintain herself" would mean that means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after the desertion to survive somehow. Section 125 of the Code is enacted on the premise that it is the obligation of the husband to maintain his wife, children and parents. It will, therefore, be for him to show that he has no sufficient means to discharge his obligation and that he did not neglect or refuse to maintain them or any one of them.

11. The petitioner/husband neither examined himself nor examined any witness to prove his case and discharge the obligation.

12. The learned Magistrate vide order dated 23.06.2012 directed the husband to pay the maintenance to his wife but the same has not been paid. This Court vide order dated 28.09.2012 directed the petitioner/husband to pay Rs.7,000/- per month to the respondent/wife but the petitioner has not complied with the order till date. Failure on the part of the husband to pay maintenance in view of the order of this Court amounts to 'negligence' as contemplated under Section 125 of the Code.

13. The wife is living separately since 18.02.2007 and the husband neither made efforts to bring her back nor filed any proceedings for restitution of conjugal rights, therefore, the findings about husbands' negligence for refusal to maintain the wife are seems to be proper.

14. It is well settled that the wife is entitled to maintain a standard of living, which is neither luxurious nor penurious and also to lead a decent life yet, at par with the dignity of her husband.

15. In *Anil Kachwaha* (supra), the evidence showed that the wife left her matrimonial home without any justifiable ground and since then she was refusing to live with her husband without any sufficient reason. In such circumstances, this Court held that wife is not entitled to claim maintenance from her husband. In *Mamta Jaiswal* (Smt.) (supra), this Court while considering the scope of provisions of Section 24 of the Hindu Marriage Act observed that it has been enacted for needy persons, benefit cannot be asked by idle persons having capacity to earn. In *Dulichand* (supra), the suit of plaintiff was decreed which was affirmed by the First Appellate Court. In Second Appeal on questioning the judgment and decree on the ground that the defendants' evidence has not been taken into consideration by the Court below, this Court held that extraneous evidence can not be looked into in the absence of specific pleadings in that regard. In *Deb Narayan Halder* (supra), the Apex Court held that when wife left matrimonial home without any justifiable ground, then she would not be entitled to the grant of maintenance. In *R.P. Singh* (supra), this Court held that the burden lies on the prosecution to prove the ingredients of the offence. Non cross-examination of witness by accused on the fact that the sample had not been made homogeneous is immaterial. In *Shiv Kumar Yadav* (supra), the husband of Santoshi Bai has been able to discharge his primary burden, but wife is residing separately without any sufficient reason and wife has not been able to establish and prove her case, therefore, it has been held that the finding of III Additional Sessions Judge that there is sufficient reason for wife to live separately is perverse and contrary to the evidence, which cannot be sustained. The facts and nature of the present case are completely distinguishable and therefore, the ratio of the aforesaid judgments has no application to the facts of this case.

16. Taking into consideration, all the material aspects of the case, including the social background and standard of living of the parties and rise in cost of living, the maintenance awarded by the Court below is not unjustified.

17. In the result, no illegality, infirmity, impropriety or perversity is found in the impugned orders, hence, no interference in exercise of power under Section 482 of the Code is called for. This petition is devoid of merit and is, therefore, dismissed.

Petition dismissed.

I.L.R. [2013] M.P., 2741
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice D.K. Paliwal
M.Cr.C. No. 5600/2013 (Gwalior) decided on 11 October, 2013

PREETI (SMT.) & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Inherent Power* - Quashing of FIR and Order passed by Magistrate under section 156(3) of the code directing for the registration of FIR - Held - If no cogent reasons assigned by the Magistrate as to why he intends to proceed under chapter XII instead of chapter XV of the code - Such order discloses non application of mind by the Magistrate - Order liable to be quashed. (Paras 8/11)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अन्तर्निहित शक्ति – प्रथम सूचना प्रतिवेदन एवं संहिता की धारा 156(3) के अंतर्गत मजिस्ट्रेट द्वारा प्रथम सूचना प्रतिवेदन दर्ज किये जाने हेतु निदेश के साथ पारित आदेश अभिखंडित किया जाना – अभिनिर्धारित – यदि मजिस्ट्रेट द्वारा कोई प्रबल कारण नहीं दिया गया है कि क्यों वह संहिता के अध्याय 15 के स्थान पर अध्याय 12 के अंतर्गत कार्यवाही करने का आशय रखता था – ऐसा आदेश मजिस्ट्रेट द्वारा मस्तिष्क का प्रयोग नहीं किया जाना प्रकट करता है – आदेश अभिखंडित किये जाने योग्य।

Case referred :

1992 Suppl.(1) SCC 335.

Prashant Sharma, for the applicants.
Devendra Choubey, P.L. for the non-applicant No.1/State.
H.K. Shukla, for the non-applicant No.2.

ORDER

D.K. PALIWAL, J.:- This petition has been filed under Section 482 of Cr.P.C. for quashing the F.I.R. registered at Crime No. 11/13 for the offence punishable under Sections 452,366,387,388,389,506-B,294,323,190,427/34 of I.P.C. and also for quashing the order dated 20.11.2012, whereby in exercise of power under Section 156(3) of Cr.P.C. the F.I.R. has been directed to be registered.

2. The brief facts of the petition are that respondent no.-2/complainant has lodged a report on 28.04.2012 at Police Station Vishvavidyalaya but no action has been taken. Therefore, he lodged a written complaint to S.P.Gwalior on 01.08.2012 and to the City C.S.P. Murar on 4.08.2012 but no action has been taken. Then he filed a complaint before the J.M.F.C. Gwalior alongwith application under Section 156(3) of Cr.P.C. upon which J.M.F.C. Gwalior has directed to register the F.I.R. and submit the final report. It is alleged by the respondent/complainant in his complaint that marriage of the respondent/complainant took place on 23.01.2007 with the petitioner no.-1 Smt. Preeti and two children has been born out of their wedlock. The petitioner no.-2 is father-in-law, Petitioner No.3 is Cousin father-in-law, petitioner no.-4 is Brother-in-law, Petitioner no.-5 is Cousin father-in-law of the respondent/complainant. It is alleged that on 27.04.2012 the complainant and his father were in the District Court premises at about 12:00 P.M. mother of the complainant informed the father of the complainant on telephone that brother and uncle of complainant's wife are abusing her. Mother of the complainant told him that complainant and his father is not in the house and asked them to go back. Thereafter, complainant and his father reached the house along with Yudhishtar Tomar at about 1:00 P.M. Petitioner no.2 to 5 came there and kicked the gate and entered in the hall of the house of the complainant, when father of the complainant objected then they pushed the father of the complainant. Petitioners started entering in the bedroom of the complainant and complainant objected then petitioners have pushed him and after breaking glass of the Almirah took out cash and jewellery. Petitioners have also damaged gate and glass of Almirah costing about

Rupees Ten Thousand. When father of the complainant asked the petitioners whether they have any search warrant then they started abusing and threatened to involve in a false case. Report of the aforesaid incident was lodged by the complainant on 28.04.2012 at Police Station but no action has been taken. Thereafter, the complaint has been lodged before the J.M.F.C. Being aggrieved the aforesaid petitioners have knocked the door of this Court.

3. It is submitted by the learned Counsel for the petitioners the registration of F.I.R. against the petitioners is illegal, therefore deserve to be set aside. The learned Trial Court in a very cursory manner has exercised the power under Section 156(3) of Cr.P.C. The complaint is nothing but outcome of vengeance. The power under Section 156(3) of the Cr.P.C. cannot be exercised as and when wanted by the complainant party. There has to be a ground for the purpose of invoking of provisions of Section 156(3) of Cr.P.C. which are absolutely non existent in the present case. It is further submitted that the complaint has been filed for the purpose of pressuring petition no.-1 and her family. The continuance of the prosecution of the petitioners is abuse of process of law and hence it is prayed that the F.I.R. and order passed by the learned trial Court by which the direction has been issued to register the case be quashed.

4. The leaned Counsel for the respondent has submitted that *prima facie* the F.I.R. discloses the commission of offence, hence the F.I.R. cannot be quashed.

5. To appreciate the submissions of the learned Counsels, I have perused the record.

6. From the perusal of the complaint filed by the respondent no.-2/ complainant, it appears that it has been filed on 7.11.2012. In para 9 of the complaint it has been mentioned that the complainant has lodged the report of the incident in writing on 28.04.2012 at Police Station Vishvavidyalaya, but no action has been taken. Then another complaint in writing has been lodged with S.P. Gwalior on 1.08.2012 and to C.S.P. Murar on 4.08.2012, when no action has been taken then this private complaint has been filed. But from the copy of the report alleged to have been lodged by the complainant at Police Station, Vishvavidyalaya, it appears that it has been given on 3.05.2012 and not on 28.04.2012.

7. The learned Magistrate on receipt of complaint along with the application under Seciton 156(3) of Cr.P.C. passed the following order :

> प्रस्तुत परिवाद एवं दस्तावेजो का अवलोकन किया गया परिवादी ने दिनाक 27/04/12 को थाना वि0 वि0 क्षेत्र मे उसके घर पर घटना घटित होना कहा है एवं उक्त संबंध मे पुलिस को शिकायत किये जाने के उपरांत पुलिस के द्वारा अपराध पंजीबद्व किया जाना परिवादी ने व्यक्त किया है। परिवाद के तथ्यो को दृष्टिगत रखते हुये मामले मे पुलिस के द्वारा अन्वेषण कराया जाना समुचित है । अतः परिवाद एवं प्रस्तुत दस्तावेजो को कमाकित करते हुये प्रथक से ज्ञापन जारी कर निर्देशित किया जावे कि वह परिवाद के तथ्यो के आधार पर प्रथम सुचना रिर्पोट दर्ज कर अपराध साबित पाये जाने या ना साबित पाये जाने दोनो दशा मे अंतिम प्रतिवेदन न्यायालय के समक्ष प्रस्तुत करे ।
>
> प्रकरण दिनाक 22/ 12/12 को पेश हो ।

8. The aforesaid order reveals that the learned Magistrate before directing the registration of the case, has not examined what action has been taken by the S.H.O. Police Station Vishvavidyalaya or even by the S.P. when approached by the respondent no.-2/complainant. The learned Magistrate has also not recorded any opinion whether the facts mentioned in the complaint disclose the commission of cognizable offences by the accused persons arrayed in the complaint. The order also does not reveal that the learned Magistrate has satisfied himself about the need of investigation by the police in the matter. The learned Magistrate simply mentioned that looking to the facts of the complaint it is necessary to direct the matter be investigated by the police. The learned Magistrate before passing the order has also not called the status report by the police. No cogent reasons assigned by the learned Magistrate as to why he intends to proceed under Chapter XII instead of Chapter XV of the Code. Thus the order passed by the learned Magistrate discloses non application of mind.

9. It appears from the complaint filed by Rampratap petitioner no.-4,who is brother of petitioner no.-1, has lodged the complaint that he is taking away his sister Preeti because in-laws of Preeti are harassing his sister and threaten to kill him and his family members. A note has also been written by Bhumi Dubey alias Preeti stating that due to harassment and the fact that in laws used to beat her she is going to her parents house. This report itself has been lodged on 27.04.2012. From the perusal

of the copy of F.I.R. No.102/12 lodged by petitioner Smt. Preeti 2.05.2012, it appears that petitioner has lodged a report regarding demand of dowry and harassment by husband and her in-laws. A complaint has also been lodged by petitioner Smt. Preeti on 24.05.2012 under Section 12 of Protection of Women from Domestic Violence Act 2005. A report has also been lodged by the petitioner Smt. Preeti on 19.05.2012 alleging that respondent/ complainant threatened to finish her. It seems Smt. Preeti left her matrimonial home along with her minor daughter.

10. Taking into consideration that respondent/complainant has lodged the report of alleged incident of 27/04/2012 on 01/05/2012 and in there is no any explanation for delay it seems that the complainant/ respondent who is an Advocate, anticipating that his wife might take action against him with a view to defend himself has cooked up a false story.

10. Hon'ble Supreme Court in the case of State of *Harayana and Others Vs. Bhajan Lal and Others,* reported in 1992 Suppl. (1) SCC 335 laid down the principal of law enunciated in series of decisions relating to exercise of inherent powers under Section 482 of Cr.P.C and formulated the guidelines observing as under:-

> *"This Court in the backdrop of interpretation of various relevant provisions of the Cr.P.C under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482, Cr.P.C gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the Court or otherwise to secure the ends of justice. Thus, this Court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formula and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised:-*
>
> *(1) Where the allegations made in the First*

Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report 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.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specified provisions in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for

wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

11. In view of the aforesaid analysis the present case is covered under the guidelines no.-1 of *Bhajanlal's case*(supra) the continuance of the prosecution would amount to abuse of process of law. Consequently, the petition is allowed. The F.I.R. registered at Crime No. 11/13 and the order passed by the learned Magistrate directing registration of F.I.R. are hereby quashed.

Petition allowed.

I.L.R. [2013] M.P., 2747
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice N.K. Gupta
M.Cr.C. No. 7894/2013 (Jabalpur) decided on 1 November, 2013

SHAILABH JAIN & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

A. ***Information Technology Act, (21 of 2000), Section 46, Chapter XI, Section 78 - Criminal Prosecution*** **- Power to adjudicate u/s 46 of Act, 2000 are prescribed for civil liability and those provisions are not applicable in criminal matter - There is no bar in Act, 2000 that Civil and Criminal proceedings cannot be initiated simultaneously - Section 78 provides that investigation should be done by a police officer not below the rank of Inspector - After investigation charge sheet has to be filed - Filing of charge sheet under the provisions of Act, 2000 not illegal. (Paras 8 & 9)**

क. सूचना प्रौद्यौगिकी अधिनियम, (2000 का 21), धारा 46, अध्याय XI, धारा 78 – दाण्डिक अभियोजन – अधिनियम, 2000 की धारा 46 के अंतर्गत न्यायनिर्णित की शक्ति, सिविल दायित्व के लिए विहित की गई है और वे उपबंध दाण्डिक मामले में लागू नहीं होते – अधिनियम, 2000 में कोई वर्णन नहीं कि सिविल व दाण्डिक कार्यवाहियां एक साथ आरंभ नहीं की जा सकती – धारा 78 उपबंधित करती है कि अन्वेषण को निरीक्षक से अनिम्न पंक्ति के पुलिस अधिकारी द्वारा किया जाना चाहिए – अन्वेषण उपरांत आरोप पत्र प्रस्तुत किया जाना चाहिए – अधिनियम, 2000 के उपबंधों के अंतर्गत आरोप पत्र प्रस्तुत करना अवैध नहीं।

B. *Information Technology Act, (21 of 2000), Section 85 - Offences by Companies* - Applicants did not file the certificate of Registration of Company or Firm - In absence of any such certificate *prima facie* it shall be presumed that the applicants worked as an association of individuals with a particular name but it was not a registered Company - Prosecution of applicants without arraying the company as accused permissible - Even otherwise, if the Company is not added as an accused then, the charge sheet cannot be thrown - Company can be added as an accused if it is proved that the applicants were working for a particular company, which is a juristic person.

(Paras 10 & 11)

ख. सूचना प्रोद्यौगिकी अधिनियम, (2000 का 21), धारा 85 – कम्पनी द्वारा अपराध – आवेदकगण ने कम्पनी या फर्म का पंजीयन प्रमाण पत्र प्रस्तुत नहीं किया – ऐसे किसी प्रमाण पत्र की अनुपस्थिति में प्रथम दृष्टया यह उपधारणा की जायेगी कि आवेदकगण ने एक विशिष्ट नाम के साथ व्यक्तियों का संगम के रुप में कार्य किया, परन्तु वह पंजीकृत कम्पनी नहीं थी – अभियुक्त के रुप में कम्पनी को पक्षकार बनाये बिना आवेदकगण का अभियोजन अनुज्ञेय है – अन्यथा भी, यदि कम्पनी को अभियुक्त के रुप में जोड़ा नहीं गया तब भी आरोप पत्र को अस्वीकार नहीं किया जा सकता – कम्पनी को एक अभियुक्त के रुप में जोड़ा जा सकता है, यदि यह साबित किया जाता है कि आवेदकगण किसी विशिष्ट कम्पनी के लिये कार्य कर रहे थे जो कि एक विधिक व्यक्ति है।

C. *Criminal Procedure Code, 1973 (2 of 1974), Section 154 - Complaint to Inspector General of Police* - If the complaint is given to higher officer and F.I.R. is registered on their direction, it cannot be said that the complainants or higher officers have flouted the provisions of Cr.P.C.

(Para 13)

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – पुलिस महानिरीक्षक को शिकायत – यदि उच्च अधिकारी को शिकायत दी गई है और उनके निदेश पर प्रथम सूचना रिपोर्ट दर्ज की गई है, यह नहीं कहा जा सकता कि शिकायतकर्ताओं ने या उच्च अधिकारियों ने द.प्र.सं. के उपबंधों का उल्लंघन किया।

Cases referred :

AIR 2013 SC 1226, (2013) 2 MPLJ 212, AIR 2012 SC 2795, AIR

1984 SC 1824.

V.K. Jain, for the applicants.
S.D. Khan, G.A. for the non-applicant/State.

ORDER

N.K. GUPTA, J.:- The applicants have challenged the order dated 12.6.2013 passed by the learned 16th Additional Sessions Judge, Bhopal in S.T.No.575/2012, whereby an application under section 227 of the Cr.P.C. filed by the applicants was dismissed.

2. The prosecution's case, in short, is that, some of the complainants have lodged an FIR to IG, Bhopal Range, Bhopal that the applicants had committed cheating with them. The applicants with help of one Mahaveer Jain got their website uploaded with the scheme that if a consumer deposits a sum of Rs.7,500/- as a charge of membership fee then, through the business website of the applicants, he would get a sum of Rs.1,000/- per month for 11 months. However, 10% for banking and service charge shall be deducted from the amount given to the consumers. The complainants had deposited a huge amount with the applicants. The complainants intimated that a sum of Rs.45 Lacs was deposited by them by contacting the various consumers and creating their different IDs on the website but, nothing was received in by any of the consumers as promised by the applicants. Initially some SMSs were sent to the consumers that the amount is deposited in a particular bank but, no amount was found deposited in accordance with that SMS. In the month of June, 2011, the applicants shifted their branch office to another place and thereafter, no contact took place between the applicants and the consumers. Therefore, a case of fraud, cheating, forgery and various offences of Information Technology Act, 2000 (In short **"IT Act"**) was registered by the State Cyber Police, Bhopal. After due investigation, the charge-sheet was filed before the concerned Magistrate, who committed the case to the Courts of Sessions and ultimately it was transferred to the learned 16th Additional Sessions Judge, Bhopal.

3. The applicants have moved an application under section 227 of the Cr.P.C. with the request that they may be discharged from the charges appended against them in the charge-sheet.

4. The learned Additional Sessions Judge after considering the submissions made by the applicants and prosecution, passed a detailed order whereby the application under section 227 of the Cr.P.C. filed by the applicants was dismissed.

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

6. The learned counsel for the applicants has raised three main objections in the case. *Firstly*, it was submitted that according to section 46 of the IT Act, the matter was to be adjudicated according to the provisions of Chapter IX of IT Act and by bypassing the adjudicating officer, no such complaint could be filed before the Magisterial Court. The learned counsel for the applicants has submitted in detail through the reading of various provisions of Chapter IX of the IT Act and rules made under the Act in the year 2003. He explained about the scope and manner of holding the enquiry and the entire procedure by which the matter could be adjudicated. In this regard, the attention of this Court is invited to the judgment passed by Hon'ble the Apex Court in case of *"The Rajashthan State Industrial Development and Investment Corporation Vs. Subhash Sindhi Co-operative Housing Society Jaipur and Ors."*, [AIR 2013 SC 1226]. It is further submitted that the jurisdiction of civil Court is barred according to the provisions of section 61 of the IT Act and therefore, such provisions should be followed strictly. The learned counsel for the applicants has placed his reliance upon the order passed by the Division Bench of this Court in case of *"Ravindra Nath Tripathi Vs. Union of India and others"*, [(2013) 2 M.P.L.J. 212]. *Secondly*, it was submitted by the learned counsel for the applicants that it is alleged in the FIR that the applicants on behalf of a company made the deals with the consumers and therefore, prosecution could not be initiated without making that company to be a party in the case. In this regard, the learned counsel for the applicants has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"Aneeta Hada Vs. M/s Godfather Travels and Tours Pvt. Ltd."*, [AIR 2012 SC 2795]. *Thirdly*, it was submitted that the complainants made a direct complaint to IG Police, which is not according to the procedure of the Cr.P.C. The applicants could not be connected with the crime in the present matter and therefore, it is submitted that the impugned order may be set aside and the applicants

may be discharged from each and every offence shown in the charge-sheet.

7. The learned G.A. for the State has submitted that the applicants uploaded a website with help of Mahaveer Jain and not only committed various offences under the IT Act but, also committed an offence of cheating and forgery as mentioned in sections 420 and 468 of IPC. Therefore, they could not be discharged. He opposed the objections taken by the learned counsel for the applicants and prayed that the order passed by the learned Additional Sessions Judge may be confirmed.

8. After considering the submissions made by the learned counsel for the parties and looking at the various questions and disputes, it would be proper that each question be considered separately. The first question raised by the learned counsel for the applicants is that the prosecution was lodged by bypassing the adjudicating officer. If the provisions of section 61 of the IT Act are perused then, the jurisdiction of civil Court was barred. Hence, various provisions have been made to resolve the civil dispute between the parties under the IT Act and therefore, according to the provisions of section 46 of the IT Act, power to adjudicate was prescribed and the procedure was also given in the rules accordingly. If the provisions of section 46 (1) of the IT Act are perused, which are reproduced as under:-

> ***46. Power to adjudicate.***
>
> *(1) For the purpose of adjudging under this Chapter whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made thereunder the Central Government shall, subject to the provisions of sub-section (3), appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer' for holding an inquiry in the manner prescribed by the Central Government.*
>
> *[(1A) The adjudicating officer appointed under sub-section (1) shall exercise jurisdiction to adjudicate matters in which the claim for injury or damager does*

not exceed rupees five crore:

Provided that the jurisdiction in respect of the claim for injury or damage exceeding rupees, five crore shall vest with the competent Court.]

then, it would be apparent that those provisions are applicable only for the purpose of Chapter IX of the IT Act, whereas the provisions of offence relating to IT Act are given under Chapter XI of the IT Act and therefore, it would be apparent that provisions of Chapter IX are prescribed for the civil liability and those provisions are not applicable in the criminal matter. In Chapter XI, it is not mentioned anywhere that before lodging an FIR or initiation of the investigation, the opinion of an adjudicating officer should be taken. It is not mentioned anywhere in the IT Act that civil as well as criminal proceeding cannot be initiated simultaneously. It is not prescribed in any other law that if a civil procedure is initiated then, the criminal proceeding cannot be initiated. According to the entire scope of the IT Act, it appears that there is no bar on initiating any criminal proceeding in absence of a civil proceeding or in presence of the civil proceeding. Under such circumstances, objection raised by the learned counsel for the applicants has no effect on the present criminal case pending before the learned Additional Sessions Judge.

9. In the present case, charge-sheet is also filed for offence under section 468 of IPC and according to the M.P. amendment in the Cr.P.C., the offence under section 468 of IPC is triable by the Court of Sessions. Otherwise, if a case would have been triable by the Court of JMFC, still the criminal proceeding could be initiated without following the provisions of Chapter IX of the IT Act. There is no bar on criminal proceedings directed by the party itself or by some investigating officer. According to the provisions of section 78 of the IT Act, it is mentioned that if investigation is done then, it should be done by a police officer not below the rank of Inspector and therefore, if investigation is initiated by the police then, after due investigation, a charge-sheet is required to be filed before the Court which can take cognizance in the case. Under such circumstances, filing of the charge-sheet in the present case has no illegality as shown by the learned counsel for the applicants. The judgment passed by Hon'ble the Apex Court in case of *R.S.I.D.I. Corporation* (supra) is

relied to the adjudication of the matter and therefore, the law laid in that case is not at all applicable in the present case. The learned counsel for the applicants has also placed his reliance upon the order passed by the Division Bench of this Court in case of *Ravindranath Tripathi* (supra). If law laid in the case is directly applied then, certainly the jurisdiction of the criminal Court is not excluded and when investigation and prosecution is provided in the Chapter XI of the IT Act then, it cannot be said that the jurisdiction of the criminal Court was excluded.

10. The second contention raised by the learned counsel for the applicants is that the company is the necessary party in the present case. In this regard, the explanation appended in the provisions of section 85 of the IT Act may be read, which is as under:-

> *"85. Offences by companies.*
>
> *(1) .....*
>
> *(2) .....*
>
> *Explanation.—For the purposes of this section,—*
>
> *(i) "company" means any body corporate and includes a firm or other association of individuals; and*
>
> *(ii) "director", in relation to a firm, means a partner in the firm."*

By which it would be clear that a company includes any body, corporate or a firm or other association of individuals. For this purpose, the applicants were required to produce the Certificate of Registration of the company or firm before the trial Court. The learned Additional Sessions Judge has rightly held that no such certificate is produced by the applicants and therefore, *prima facie*, it shall be presumed that the applicants worked as an association of individuals with a particular name but, it was not a registered company. The law laid by Hon'ble the Apex Court in case of *Aneeta Hada* (supra) may be made applicable, if it is proved that the applicants were working for a company duly constituted under the Company Act. If no company or the partnership firm was registered then, certainly, it would be apparent that the applicants were

not working for any company but, they were working as "Association of Individuals". Since an Association of Individuals is not a jurist person therefore, it could not be added as an accused in the case. The learned Additional Sessions Judge has rightly rejected the contention raised by the applicants that the company should be added as an accused in the case.

11. In this regard, the judgment passed by Hon'ble the Apex Court in case of *Aneeta Hada* (supra) makes it clear that some portion of the judgment passed by Hon'ble the Apex Court in case of *"Shivratan Agrawal and another Vs. State of M.P."*, [AIR 1984 SC 1824] was overruled but, law laid in *Shivratan Agrawal's case* (supra) was followed since the year 1984 that there is no need to make the company as an accused and if it is decided in the year 2012 that the company is a necessary party then, an opportunity may be given to the prosecution to make the company a party if it is permitted by the limitation of the time to take cognizance in the case. In the present case, offence under section 468 of IPC is also appended against the applicants for which no limitation is prescribed to take cognizance and therefore, if it is found that the applicants were working for any company then, that company or firm may be added as an accused at any stage. If prosecution applies for such an addition and initiates a case and if the company is not added as an accused then, the charge-sheet cannot be thrown in the case. The company can be added as an accused in the present case, if it is proved that the applicants were working for a particular company, which is a jurist person.

12. Under such circumstances, where the applicants could not prove that they were working for a company duly registered under the Company Act, they cannot get any advantage of the law laid in case of *Aneeta Hada* (supra) passed by Hon'ble the Apex Court.

13. *Thirdly*, it is objected that the complainants made a complaint directly to the IG, Police. I don't believe that such objection can be raised according to the provisions of the Cr.P.C. Ultimately, the case was registered by the CID Branch of the Police at Bhopal, which is dealing with cyber crime. Looking at the gravity of offence, where a huge amount was alleged to be usurped by the applicants and their associates and

looking at the nature of the case, it was not possible for an SHO of a particular Police station to understand the case and therefore, if a complaint is made to the higher officer of the police and on his direction, if the case was registered then, certainly the FIR may be considered as an FIR lastly given to the SHO of concerned Police station and therefore, if a complaint is given to the higher officers of the police and on their direction it is registered then, it cannot be said that the complainants or the higher officers of the police flouted the provisions of the Cr.P.C. or that there is any illegality committed in registration of the crime. Under such circumstances, no advantage is received by the applicants if case is registered on the directions given by the IG, Police, Range Bhopal. Under such circumstances, objections raised by the learned counsel for the applicants are not sufficient to quash the proceedings of the trial Court and to discharge the applicants.

14. Before concluding the present order, it is to be mentioned that the provisions of section 227 of the Cr.P.C. is prescribed for the procedure of framing of the charges and if it is found that no charge can be framed then, the learned Additional Sessions Judge can discharge the accused for a particular charge or from all the charges. Under such circumstances, it is a due procedure which should be adopted by the learned Additional Sessions Judge in the sessions trial. No separate application under section 227 of the Cr.P.C. should be entertained at a preliminary stage. If the learned Additional Sessions Judge finds while considering the application under section 227 of the Cr.P.C. that the application is not acceptable then, can he discharge the applicants for a particular charge shown in the chargesheet? Certainly not; because no Court below the High Court has inherent jurisdiction under section 482 of the Cr.P.C. and no power of review is given to the Sessions Court, therefore, if an application under section 227 of the Cr.P.C. is filed then, it should be considered at the time when charges are to be framed. Now if any decision in the present case on the merits of the case is taken, it would be binding to the trial Court and it would cause a prejudice to the trial Court when the procedure of framing of the charges would be initiated before the trial Court. Under such circumstances, at present, where the trial court has still to frame charges against the applicants on the basis of the factual position then, it would be improper to give a view on the merits of the case, whereas in a

petition under section 482 of the Cr.P.C., if an application under section 227 of the Cr.P.C. is moved then, the entire factual position is to be considered by this Court as to whether the charge of any offence is made out against the applicants or not. Hence, it is necessary for the trial Court not to decide the application under section 227 of the Cr.P.C. separately. It should be decided when the proceedings of framing of charges are made and memo of charges is prepared.

15. Since the charges are yet to be framed, therefore, I decline to discuss the matter on merits, so that no prejudice shall be caused to the trial Court while framing of the charges. However, it is made clear that while framing of the charges, objections raised by the applicants in the application under section 227 of the Cr.P.C. shall not be considered because they are decided by the present order and the order is binding to the trial Court.

16. On the basis of the aforesaid discussion, it would be apparent that the learned Additional Sessions Judge has rightly rejected the application under section 227 of the Cr.P.C. filed by the applicants. There is no basis by which the petition under section 482 of the Cr.P.C. filed by the applicants may be accepted. Consequently, it is hereby dismissed.

17. A copy of the order be sent to the trial Court for information and compliance.

Petition dismissed.