



THE INDIAN LAW REPORTS

M.P. SERIES

CONTAINING-CASES DECIDED BY THE SUPREME COURT OF INDIA AND
THE HIGH COURT OF MADHYA PRADESH

Year-6

Vol.2



APRIL 2014

(pp. 881 to 1198) * (All Rights Reserved)

(Single Copy ₹40)

LAW REPORTING COMMITTEE OF ILR, M. P. SERIES

2014

PATRON

Hon'ble Shri Justice A.M. KHANWILKAR
Chief Justice

CHAIRMAN

Hon'ble Shri Justice RAJENDRA MENON

MEMBERS

Shri R. D. Jain, Advocate General, (*ex-officio*)
Shri Rajendra Tiwari, Senior Advocate
Shri P. R. Bhawe, Senior Advocate
Shri Kishore Shrivastava, Senior Advocate
Shri G.S. Ahluwalia, Advocate, Editor, Member & Secy. (*ex-officio*)
Shri Virender Singh, Principal Registrar (Judl.), (*ex-officio*)

SECRETARY

Shri Akhil Kumar Srivastava, Principal Registrar (ILR)

EDITOR
(*Part-time*)

:- Shri G.S. Ahluwalia, Advocate, Jabalpur

REPORTERS
(*Part-time*)

:- Shri Arun Shukla, Advocate, Jabalpur
Shri Aditya Choubey, Advocate, Jabalpur
Shri G.K. Sharma, (Honorary), Gwalior

IN-CHARGE
(*ILR Section*)

:- Shri Anil Pawar, Assistant Registrar

PUBLISHED BY

:- SHRI AKHIL KUMAR SRIVASTAVA,
PRINCIPAL REGISTRAR, (ILR)

TABLE OF CASES REPORTED

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

Ajoy Acharya Vs. State Bureau of Inv. Against Eco. Offence	(SC) ...915
Ali Hussain (Died) By Legal Heirs Vs. Shabbir Hussain	...1020
Alok Vs. Praveen Kumar	...1112
Anita Kanash (Solanki) (Dr.) (Smt.) Vs. State of M.P.	... 972
Ashok Diwan (Dr.) Vs. Smt. Shantibai	...993
Avinash Upmanyu Vs. State of M.P.	(DB) ...946
Commissioner of Income Tax, Jabalpur Vs. Vindhya Talalinks Ltd. Rewa	(DB)...1154
Daulat Singh Vishwakarma Vs. State of M.P.	...1123
Devendra Singh Kirar Vs. State of M.P.	...1031
Dhanraj Vs. Ashok Kumar	...1172
Dheeraj Pandey Vs. State of M.P.	(DB)...1027
Gariba @ Naresh @ Ramnaresh Vs. State of M.P.	...1135
Hari Narayan Sharma Vs. State of M.P.	...965
Hariom Vs. Manjulata Sahu	(DB)...1042
ICICI Lombard General Insurance Co. Ltd. Vs. Gopal Khatri	...1038
In Reference Vs. Rajesh	(DB)...1139
Jawahar Lal Nehru Krishi Vishwa Vidyalaya Vs. Municipal Corporation, Jabalpur	...998
Kamlesh Vs. Geeta	(DB)...1095
Kapil Kumar alias Boby Vs. State of M.P.	(DB)...1109
Madhav Sharma Vs. State of M.P.	...1120
Mahaprasad Vs. Badi Bai	...1079
Mahendra Singh Yadav Vs. State of M.P.	...985
Mahinder Kumar Vs. High Court of M.P. through Registrar General	(SC) ...881
Manvinder Singh Gill (Dr.) Vs. State of M.P.	...1176
Megha Gupta (Smt.) Vs. Vikas Gupta	(DB) ...*7

TABLE OF CASES REPORTED

3

Murti Shri Pandharinath Mandir Vs. Collector	...1061
Pisu Vs. State of M.P.	(DB)...1099
Pradeep Kumar Jain Vs. State of M.P.	...*8
Raees Vs. State of M.P.	...1192
Raghuveer Singh Vs. Bhoori Bai	...1128
Rahul Jain Vs. State of M.P.	...982
Rajeev Verma Vs. Santosh Kumar Kushwaha	(DB)...1073
Raju Vs. Central Bureau of Narcotics	...1102
Ramakant Gautam Vs. State of M.P.	...974
Rashid Ansari Vs. Smt. Surekha	...*9
S.L. Seth Vs. Union of India	...948
Satnam Singh Vs. Hukum Singh	...1083
Shanta Bai (Smt.) Vs. Kundlik	...1117
Shashkiya Mahavidhyalaya Shikshak Sangh Madhya Pradesh Vs. Shri V.S. Sampat	...1034
Souram Bai (Smt.) Vs. Babu Lal	(DB)...1068
State of M.P. Vs. Ankit Rathore	...1015
Surendra Vs. State of M.P.	...1134
Umesh Yadav Vs. State of M.P.	...1009

THE INDIAN LAW REPORTS M.P. SERIES, 2014
(VOL-2)
JOURNAL SECTION

APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Mr. Sushil Kumar Palo on his appointment as Additional Judge of the High Court of Madhya Pradesh. Mr. Sushil Kumar Palo took oath of the High Office on 15.04.2014.



HON'BLE MR. JUSTICE SUSHIL KUMAR PALO

Born on November 02, 1956 at Navrangpur (Odisha). Passed Matriculation Exam in the year 1973 from Raja Chaitanya Dev High School Navarangpur (Odisha). Obtained B.Sc. (Botany) Hons. Degree in the year 1977 from Vikaram Dev College, Jeypore, Behrampur University, Odisha. Obtained M.A. (Sociology) Degree in 1979 and LL.B. Degree in 1980 from Rani Durgawati Vishwavidyalaya, Jabalpur. Joined Madhya Pradesh Judicial Services on December 17, 1981 as Civil Judge Class-II. Promoted as Civil Judge Class-I and JMFC in the year 1988 and was posted as Civil Judge Class-I and Chief Judicial Magistrate, at Satna in the year 1991 and at Chhatarpur in the year 1994. Promoted as Additional District and Sessions Judge in September 1994 and was posted at Chhatarpur, Badwani and Chindwara. Was granted Selection Grade Scale w.e.f. 08.07.2000. Posted as Registrar, M.P. State Consumer Disputes Redressal Commission, Bhopal in the year 2002. Promoted as District and Sessions Judge, Guna in the year 2006. Was granted Super Time Scale w.e.f. 14.01.2008. Was posted as Member

J/2

Secretary, M.P. Legal Services Authority from the year 2008 to 2010. Was posted as District & Sessions Judge, Rewa, before elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh on 15.04.2014.

We wish His Lordship a successful tenure on the Bench.

OVATION TO HON'BLE MR. JUSTICE SUSHIL KUMAR PALO, GIVEN ON 15-04-2014, IN THE CONFERENCE HALL OF THE HIGH COURT OF M.P., AT JABALPUR.

Shri Purushaindra Kaurav, Addl. Advocate General, while felicitating the new Judge, said:-

I extend a hearty welcome to Hon'ble Mr. Justice Sushil Kumar Palo on his appointment as an Additional Judge of this Hon'ble High Court. I consider it a privilege to offer to your Lordship respectful felicitation on behalf of the State of Madhya Pradesh, the Law Officers of the State and on my own behalf.

My lord's appointment comes at a very exciting time when this grand institution is undergoing transition to kill the demons of delay and his lordship's appointment shall add a canon to the cause.

Born at Navrangpur in Odisha on 2nd of November 1956, your Lordship stands disciplined as a Bachelor of Science and Master of Arts but choose the path of his profession i.e a degree in law thereafter. My lord joined the judicial services on 17th of December 1981 and thereafter in different ascending capacities has been rendering justice since then. My lord was confirmed as Civil Judge w.e.f. 5th of May 1985 and then confirmed as a District Judge in Higher Judicial Services w.e.f. 4th of October, 1997. My lord's legal acumen coupled with administrative skills came to forefront when my lord was discharging his duties in the capacity of Registrar, M.P. State Consumer Disputes Redressal Commission, Bhopal and Member Secretary, M.P. Legal Services Authority. Before the elevation, my Lord was discharging the duties as District and Sessions Judge, Rewa.

With the vast knowledge and thorough juristic sense I believe that my Lord shall be an inspiration to all of us. My lord's appointment as an additional judge will play a significant role to meet the goal of speedy justice, which is

the mainspring of justice delivery system.

I, on behalf of State Government, the Law Officers of the State and on my own behalf once again congratulate Hon'ble Justice Sushil Kumar Palo on his appointment as Additional Judge of M.P. High Court and wish him a very meaningful & successful tenure.

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

This is the auspicious occasion of beginning of the odyssey of Your Lordship Shri Justice Sushil Kumar Palo on this golden floating vessel of Justice, like a cool breeze in this hot month of April in the portals of this High Court. Now this High Court within a few days has another 'Sushil Kumar' to glamorize its affection after adorning the high seat of Justice by My Lord Shri Justice Sushil Kumar Gupta. 'Sushil' is a term synonymous for a thorough gentleman, a quality which emerges from the very roots of visions, virtues and values. It is my proud privilege to extend a cordial welcome to your Lordship on behalf of the Members of M.P. High Court Bar Association and on my own behalf.

Your Lordship were born on 2nd November 1956 at Navrangpur in State of Orissa. Navrangpur is a town which symbolizes the character of having new shades of colours. This has brightened the vivid colours of your personality. Orissa is a State rich in history, heritage and holiness, the land of lord Jagannath. Your Lordship did your B.Sc., M.A. and LL.B. and joined Judicial Services of M.P. State on 17th December, 1981; promoted as Civil Judge, Class-I w.e.f. 3rd August, 1988. Thereafter, you were appointed as Chief Judicial Magistrate w.e.f. 31st October 1991; then promoted as officiating District Judge in Higher Judicial Service w.e.f. 16th September 1994. Your Lordship were granted selection grade scale w.e.f. 8th July 2000 and super-time scale w.e.f. 14th January 2008. Your Lordship have varied experience by working at different place like Balaghat, Jagadalpur, Durg, Satna, Chhatarpur, Badwani, Chhindwara, Bhopal, Guna, Jabalpur and at last in Rewa as District and Sessions Judge. We came in touch with Your Lordship's nobility when you had been appointed at Jabalpur as Member Secretary of M.P. Legal Services Authority w.e.f. 1st July 2008. The Fragrance of flowers spreads only in the direction of the wind, but the goodness of a person like Your Lordship spreads in all directions. It is a matter of pride for us that your wife Smt. Anjali Palo is a member of Higher Judicial Service.

Your Lordship have been a good Judge possessing variegated experience and knowledge, but now you have to play a greater role that of a master-functionary of the constitutional powers with sublime humanism and to ensure excellence and freedom from prejudice. Now Your Lordship are engaged in the task of pulling the carriage of Justice along the straight and narrow path and you have to keep the faith of people while imparting Justice. Lord Denning in his book 'The Closing Chapter' says:

"There is a Spirit in a man, quite separate from his body and from his intellect, which, when it reaches its highest and best, is but the reflection of the spirit of God."

Your Lordship are now on the wings of 'Administration of Justice' to scale the new horizon of knowledge and values, being more self-conscious and more introspective. To see Your Lordship adorning the Bench will be an affectionate experience and intellectual pleasure.

Bible says to Judges :-

"Ye are the salt of the earth; but if the salt have lost his savour, wherewith shall it be salted."

The life of a Judge is a rugged journey. It is an endeavour in a humble measure and a fresh call to service in the cause of 'Rule of Law' with newer challenges to insist upon the basic and equal rights of every citizen, even every individual to a really free and good life and to shoulder a vast range of responsibilities in upholding the Constitution and law through their odd turns and twists, by entering into its very soul. It is an odd adventure where the exciting forenoons are followed by the mellow afternoons. The great writer Solon says:-

"Laws are the spiders' webs; if some poor creature come up against them, it is caught; but a big one break through and get away."

It really is a face in Indian scenario where the laws grind the poor and rich man rule the law, as Oliver Goldsmith has observed; it is why in a State like Madhya Pradesh with a noticeable population of tribals, poor peasants and most of the people living at margins, there should be a departure from orthodox methodologies of Justice Delivery System and a heterodox approach to new horizons of people oriented Socio-economic Justice so that the down-trodden class people may also dare to knock the doors of Justice. This is the State of a Judicious King Vikramaditya of Ujjayani. Like him the Judges have

to be free from imbecilities of assertive ego or arrogance of Bench bravado; and to be moderate and modest. As the holders of High Judicial Offices are identified with the interests of Justice, they must forget their common human frailties and fallibilities.

We hope that Your Lordship will secure and serve the larger cause of humanity and keep your resolutions with due diligence, honesty and your great experience of human life and nature and true commitment to human dignity and values. Cicero says in 'De Legibus' -

"The people's good is the highest law."

Your Lordship will surely cherish the constellations of high ideals and values. Once again I welcome and congratulate Your Lordship for adorning this high Godly seat and wish you a successful and happy tenure as a Judge of this Court, with strong mind, great heart, and vast knowledge. In 'Atri Smriti' the role of a king as a Judge is described as

"दुष्टस्य दण्डः सुजनस्य पूजा ।

न्यायेन कोषस्य च संप्रवृद्धिः ॥

अपक्षपातोऽर्थिषु राष्ट्र रक्षा ।

पन्थैव यज्ञाः कथिता नृपाणाम् ॥

[To punish the wicked, to honour and protect the good, to enrich the treasury by just methods, to be impartial towards the litigants and protection of the country. These are the five Yajnas (Selfless duties) to be performed by a king in the role of a Judge.]

Shri D.K. Dixit, President, High Court Advocates Bar Association, Jabalpur, said :-

I extend heartily welcome to Hon'ble Justice Shri Sushil Kumar Palo on his elevation to the High Office of the Judge of this Court.

I welcome the appointment of Hon'ble Justice Shri Sushil Kumar Palo as a Judge of this Court. He is possessing all the good qualities of a Judge and I am sure that the bar will get proper treatment at his hands. I congratulate him at this juncture. I have seen my lord working with the legal services authority and found in him a very gentle, calm and quiet person. My Lord is in judiciary since last about 33 years and having vast experience in the field. The appointment of my Lord is going to be an asset for this great institution.

At present this court is not having the full strength of the judges and we are eagerly waiting to see the new appointments as early as possible to share the burden of my lords who are at present over loaded dispensing justice with their fullest capacity. At this time the appointment of my lord shall be quite helpful. I also assure fullest cooperation of members of our Bar Association.

I again welcome my lord and congratulate on his elevation as a Judge of this August institution on behalf of myself and also the members of M.P. High Court Advocate's Bar Association.

Shri Shivendra Upadhyay, Chairman, M.P. State Bar Council
said :-

न्यायाधिपति माननीय श्री सुशील कुमार पालो का न्यायिक सफर 17 दिसम्बर 1981 से शुरू हुआ। आपने मध्य प्रदेश व छत्तीसगढ़ राज्य के विभिन्न न्यायालयों में न्यायदान दिया है, जिससे आपको न्यायिक कार्य का एक लम्बा अनुभव है। वर्ष 2010 से न्यायाधिपति श्री पालो जी के साथ मुझे कार्य करने का अवसर मिला। मैंने उन्हें इस दौरान एक आदर्श न्यायाधीश के गुणों से परिपूर्ण पाया और उनकी स्थिति ठीक इसी तरह थी कि कमल पानी में रहकर भी अपने पोषक से संलिप्त नहीं होता व उससे पृथक् उसका अस्तित्व दिखता है। आप खेलकूद व सांस्कृतिक कार्यक्रमों में रुचि रखने के बाद भी उसका प्रभाव आपके निर्णयों में नहीं दिखा। जिस समय आपने न्यायदान किया उस समय न्यायदान में ही आपकी दृष्टि उसी तरह से रही जिस तरह से अर्जुन को मछली की आंख के अलावा अन्य बस्तु दिखाई नहीं देती थी। आपके इस न्यायिक दृष्टिकोण का लाभ पूरे मध्यप्रदेश के पक्षकार प्राप्त करेंगे। माननीय न्यायमूर्ति श्री पालो जी की न्यायिक समझ व निर्णयों को देखकर मुझे विगत 3-4 वर्षों में यह अनुभव हुआ कि आप विधि की सभी विधाओं में पारंगत हैं। यद्यपि आपने कई महत्वपूर्ण प्रकरणों का निपटारा किया है। उसमें आपकी विधि की सूक्ष्मता से विश्लेषण करने की क्षमता दिखी। आपकी यही बेदाग व निर्भीक छवि, अध्ययनशीलता म.प्र. के न्यायिक जगत को एक नया आयाम देगी। म.प्र. के विधिक जगत को थोड़ी देर से आपकी सेवाएं प्राप्त हुई हैं जिसका विधि जगत को अफसोस रहेगा। आपका पूरा परिवार न्यायिक जगत से जुड़ा है। आपकी पत्नि श्रीमती अंजली पालो जिला एवं सत्र न्यायाधीश हैं, वहीं आपकी बेटी व्यवहार न्यायाधीश के पद पर अपने कर्तव्य का निर्वाहन कर रही हैं।

आपके सफल व उज्ज्वल भविष्य की कामना करते हुए मैं मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से एवं अपनी ओर से आपका स्वागत, बंदन, अभिनंदन करते हुए नये पद पर पदस्थ होने पर शुभकामनाएं देता हूँ।

जय हिन्द, जय भारत

Shri Rashid Suhail Siddiqui, Asstt. Solicitor General, said:-

It gives me immense pleasure to extend hearty welcome to Hon'ble Shri Justice Sushil Kumar Palo on his appointment as Additional Judge of this Hon'ble Court.

Your Lordship was born on 02nd November 1956. After completing BSc., MA and LLB. he joined Judicial Service as Civil Judge, Class-II on 17 December 1981 at District - Balaghat. Before elevation Your Lordship was working as District and Session Judge, Rewa. Your Lordship also served as a Registrar, MP State Consumer Dispute Redressal Commission and also worked as a Member Secretary, MP Legal Services Authority.

Your Lordship is known for his sincerity, integrity and devotion towards the duty which is conferred upon him, on this count Your Lordship rose from lowest to the highest echelon of justice delivery system in the state. Your Lordship's entire family members are involved in the noble work of dispensation of Justice. Your lordship's wife Smt Anjuli Palo is serving as a District & Sésion Judge Dindori and daughter is also serving as a Civil Judge.

On this occasion, while greeting My lord for taking over the reins of the administration of justice of this court, I extend warm welcome and wish a successful tenure as a Judge of this Hon'ble High Court.

I on behalf of Union of India, my colleagues who are representing Union of India and my own behalf-welcome you.

Shri M.L. Jaiswal, President, Senior Advocates' Council, said:-

At the outset I congratulate My Lord Justice Sushil Kumar Palo on your elevation as an Additional Judge of the High Court of Madhya Pradesh. My Lord has been in sub-ordinate judiciary for a very long period and held various offices therein. My Lord was also Legal Aid Secretary for a number of years and made significant contribution in legal aid matters. My Lord was a District Judge at many districts. As learnt from the lawyers appearing before you that My Lord has all along been very cordial and treated the lawyers with respect and dignity and in return commanded respect from the legal fraternity. The Judge is an embodiment of all that goes with judicial norms, culture and decorum.

The great judicial temptation especially for high minded judges is to invoke judicial power and direction to resolve problems which are neglected by the executive and the legislature and which cry for immediate relief and we

lawyers try to assist them in achieving the said goal. Though the approach towards the work in High Court is a little different but with your Lordship's long experience in judicial field, it should not be difficult.

I, on behalf of Senior Advocates Council and on my own behalf extend my hearty felicitation and wish your Lordship a successful and happy tenure.

Reply to ovation, by Hon'ble Mr. Justice Sushil Kumar Palo:-

I bow in reverence to the Almighty God for bestowing upon me the pious responsibility to serve this noble institution and August Office.

For performing the arduous role of dispensation of justice, I pray for His blessings, to give me the strength to perform the pious duty with courage and vision, so that I live up to the sacred trust of the High Office.

My sincere thanks to the Learned Speakers for the kind and encouraging words spoken on this occasion. I feel very humble for all the prayers showered upon me by the esteemed speakers. I pledge to myself, to perform the work entrusted upon me with integrity, conviction, purity and dedication. I promise to strive ceaselessly to uphold the dignity of the High Office.

I would take this opportunity to express my heartfelt gratitude to my Lord Shri Justice K.K.Lahoti, the then Acting Chief Justice of this High Court and Members of the Collegium, Hon'ble Shri Justice Ajit Singh and Hon'ble Shri Justice Rajendra Menon for reposing confidence on me and recommending my name for elevation to the Bench of this August Court.

I am also grateful to all the Hon'ble Judges of this Court for their blessings and good wishes.

I am very thankful and very much indebted to all the Hon'ble Judges of the collegium of the Supreme Court for the kindness bestowed upon me.

I have the proud privilege to have administered the oath of office by Hon'ble the Chief Justice Shri A.M.Khanwilkar, a legal luminary, a jurist, and above all a great human being. I am very grateful to my lord the Chief Justice Shri A.M.Khanwilkar for his blessings, guidance and affection which I shall never forget in my life.

I take this opportunity to pay my sincere regards to my Lord Shri

Justice S.K.Dubey and Hon'ble Shri Justice N.K.Jain Former Judges of this High Court and Former Presidents, M.P. State Consumer Disputes Redressal Commission Bhopal, under whose kind guidance I served to the utmost sincerity as Registrar in the M.P. State Consumer Disputes Redressal Commission.

I am also deeply indebted and express my gratitude to Hon'ble Shri Justice Dipak Misra, Former Judge of this High Court and Former Executive Chairman M.P. State Legal Services Authority and presently Judge Supreme Court of India, Hon'ble Shri Justice Arun Mishra, Former Judge of this High Court and Former Executive Chairman M.P. State Legal Services Authority and presently Chief Justice of High Court of Calcutta, Hon'ble Shri Justice A.K.Patnaik, Former Chief Justice of this High Court and Former Patron, M.P. State Legal Services Authority and presently Judge Supreme Court of India, with whom I served as Member Secretary, M.P. State Legal Services Authority, for their kind guidance and affection bestowed upon me. Had it not been for their kind guidance and affection, I could not have given the best in me.

I would be failing in my duties, if I do not express my gratitude to my seniors, specially to Shri A.N.S. Shrivastava, the then Civil Judge and presently Retd. District Judge, under whose kind guidance I had my training in the formative years. I was a Research Scholar, hence I did not practice law, when I joined the service I was very raw. I had the privilege of being moulded as a Judge under his kind supervision. The valuable guidance and practical training given to me by Shri A.H.H. Abidi the then District Judge, Balaghat, helped me in shaping my career as a Judge. I also learnt many things from respected Shri J.A. Khare the then District Judge, Balaghat who helped me in inculcating judicial values in me. I express my gratitude to all the District Judges under whom I worked, for their able guidance and blessings. I am thankful to all my colleague Judges and subordinate Judges, with whom I worked for their cooperation, best wishes and affection bestowed upon me.

I express my gratitude to all the members of bar of the places where I was posted, which are Balaghat, Jagdalpur, Durg, Chhatarpur, Badwani, Chhindwara, Bhopal, Guna, Jabalpur and Rewa, for I have learnt so many things from them.

What I am and what I am going to be I owe it to my parents for their inspiration. They took every care to see that I am not inconvenienced during

J/10

my student days. Thanking them would be too formal. My father Late Capt. GD.Palo always encouraged me and guided me to develop in me the social values and the capability to face adversaries. I pay my humble tribute to my father.

My esteemed mother Smt. Satyavati Palo has been a great support to me throughout. My brothers Colonel Sunil Palo, Advocate Subhash Palo and youngest brother Sushant Kumar Palo have constantly remained strength of my life. I am grateful beyond degrees to my maternal grand- parents and all my uncles and aunts with whom I spent my childhood days. They were all my first teachers. They nurtured me in my childhood, I must pay thanks to them and pay respect to them.

I must also express my thanks to my father-in-law Shri Jagdish Sahay Saxena and other in-laws for their good wishes and prays for me. I am thankful to my daughters Ku.Shubhangi Palo, Civil Judge , Ku. Shefali Palo, a student of Christ University Bengaluru and son Er. Shubhashish Palo, for their cooperation and affection.

For the first time probably, I have words inadequate to express my feeling and this is when I have to thank my wife Smt. Anjuli Palo, Distt. Judge Dindori, without her support and inspiration I am sure, the shaping of my career, as well as careers of our children would have been little possible. Despite being very busy as a Judge herself, she offered excellent facilities and provided all the help to overcome the difficulties in certain adversary conditions.

Hon'ble Shri Justice R.C.Lahoti the then Chief Justice of India replying on the occasion of his ovation aptly said "Dispensation of justice is an attribute of God; Blessed are those on whom that Godly assignment has fallen; Still blessed are those who acquit themselves of the assignment with pride, dignity and honour." These lines would be my guidelines as well in my career ahead.

Thank you all Lordships, thank you all speakers, and thank you all august-guests present in this occasion.

AAJ HANUMAN JAYANTI HE, ISS AVSAR PAR ME AAP SABHI KO SHUBHKAMANA DETA HUN.

"असतो मा सद्गमयः
तमसो मा ज्योतिर्गमयः"

FAREWELL



HON'BLE MR. JUSTICE GIRIRAJ DAS SAXENA

Born on April, 02, 1952 at Mandsaur. Completed schooling and collegiate education at Mandsaur. Passed B.A. Degree in the year 1970 from Government Post Graduate College, Mandsaur. Obtained LLB Degree from Jawahar Lal Nehru Law College, Mandsaur. Joined Bar on November 19, 1973 and started practice on Civil side at Mandsaur. Joined Judicial Service as Civil Judge Class-II on 18-08-1979 and worked at Ratlam. Promoted as Civil Judge Class-I in the year 1987 and worked as Chief Judicial Magistrate Jhabua & Indore. Was promoted to Higher Judicial Service in the year 1992 and worked as ADJ at Alirajpur, Gwalior, & Bhopal. Was granted Selection grade on May 08, 1999. Was posted as Special Judge S.C./S.T. (Prevention of Atrocities) Act at Bhopal, Shahdol, and Sehore. Was granted Super Time Scale on February 26, 2006. Worked as District Judge Narsinghpur and Dewas. Worked as District Judge (Inspection & Vigilance) Indore. Worked as District & Sessions Judge, Dhar, before elevation.

Elevated as Judge of the High Court of Madhya Pradesh on 03.01.2011 and demitted office on 02.04.2014.

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

FAREWELL OVATION TO HON'BLE MR. JUSTICE G.D. SAXENA, GIVEN ON 01-04-2014, AT HIGH COURT OF M.P. GWALIOR BENCH, GWALIOR.

Hon'ble Mr. Justice S.K. Gangele, Administrative Judge, High Court of M.P., Bench Gwalior, bids farewell to the demitting Judge:-

Today, we have assembled here to honour and to give farewell/ovation to My Lord Hon'ble Mr Justice Giriraj Das Saxena, who after rendering his valuable services at this prestigious Constitutional Institution of Indian Judiciary is demitting the office of the Judge of the High Court of Madhya Pradesh on April 02, 2014.

To recapitulate, Justice Giriraj Das Saxena was born on April 02nd, 1952 at Mandsaur in a renowned family. His Lordship's grandfather Shri Babu Bachchan Lalji Saxena was an eminent lawyer at his time. After completing elementary education from Mandsaur, His Lordship obtained BA Degree in 1970 from Government Post Graduate College, Mandsaur and LLB degree from Jawahar Lal Nehru College, Mandsaur. My Lord started practice at Mandsaur under the able guidance of Shri M.L. Bhachawat, Advocate. Later, His Lordship joined the Judicial Service as Civil Judge Class II on April 13th, 1987. His Lordship was promoted to Civil Judge Class I and then appointed as Chief Judicial Magistrate on March 03rd 1992. His Lordship was then promoted to Higher Judicial Service and was appointed as Additional District Judge and then as Special Judge (Atrocities). His Lordship was District & Sessions Judge and was granted Selection Grade and Super Time Grade. Justice Saxena was elevated to the Bench and sworn in as a Judge of Madhya Pradesh High Court on January 03rd, 2011.

At the very tender age Justice Saxena lost the benevolent canopy of his father Shri Vallabh Das Saxena. His Lordship was brought up by his Grandfather Shri Babu Bachchan Lal Ji, who instilled high values of ethics and morals to him, besides guidance in legal field. His Lordship's mother was an idol of simplicity and this quality portraits from the very nature of My Lord. Justice Saxena worked relentlessly to make the dreams of His Grandfather and mother true. This goal His Lordship ultimately achieved when His Lordship was elevated to the highest rung of State Judiciary by appointment as a Judge of this Esteemed Institution.

Justice Saxena is calm like an Ocean, with deep introspection. Kindness kindles in his heart. These qualities are rare, particularly in a man who achieved the great height.

Judicial approach of Justice Saxena is par excellence and is well

known to all of us. The four fold responsibilities of a Judge in the words of Socrates are :

To hear courteously,
to answer wisely
to consider soberly and
to decide impartially,

Justice Saxena has proved himself on the anvil and touchstone of all these four qualities.

Justice Saxena has delivered many landmark judgments reflecting his legal acumen and approach. The judgments would enlighten the judicial fraternity and would be of great assistance to the Bench and Bar in the time to come.

During sitting in Division Bench My Lord handed down judgments in 150 cases. Three Death References [1/11, 2/11 and 1/12] were decided by the same Division Bench.

Death Reference [2/11] is important in which certain directions were issued while affirming the punishment of death to investigating agency all over the State of Madhya Pradesh for fair and speedy investigation in cases of violent attack on minor female/child and of brutal murders of innocent human creatures. It is this reference in which Constitutional Bench has been constituted by Hon'ble the Chief Justice of India. It is pending.

In WP.No.442/2012 (PIL), directions were issued to the State of Madhya Pradesh to monitor, examine the situation arises of Madhav Andhashram and take management for the welfare of Institution.

In WP.No.7677/2012 (PIL) directions were issued to the State of Madhya Pradesh to form Panel of eminent Food Scientists/Chemical Engineers etc. to examine the standard of food and issue necessary directions to food laboratories established under the State.

In WP. No.7410/2011 (PIL), in the matter of honour killing of a lady, directions were issued to the State of Madhya Pradesh for lodging the FIR in such cases without any lapse ensuring compliance under Section 157(2) of the Code of Criminal Procedure. The Senior Police Officers were directed to issue directions in "Hindi" language so the directions could be followed by their subordinates such as SHO, ASI and take steps as envisaged under Sections 82 to 84 of Cr.P.C. for arrest of the accused including security to the witnesses in the event of any threat by the side of accused.

J/14

In WP No.8528/2011 (PIL), directions were issued to the State of Madhya Pradesh to impound the vehicles for their use against the permit and seize them immediately. To recover tax from the owner of such vehicles which are being used for commercial purpose having registration of agriculture. Not to allow such vehicles for taking the minerals from the quarries / mining area.

My Lord Justice Saxena's reputation is founded on a rare combination of intellectual brilliance a vivid style of speaking and writing through judgments. An unquenchable zest for using the law to protect civil and constitutional rights of downtrodden, children and women. His interpretation of law is in which persons count.

I have a privilege of sitting with Justice Saxena in Division Bench for considerably long period. It was indeed a unique experience. His Lordship was very submissive. His approach in deciding cases was clear and I found Justice Saxena has a deep understanding of law. His Lordship had worked hard in delivering judgments. The Court is indebted to the valuable contribution rendered by Justice Saxena. I have gained a lot from Justice Saxena, while sitting with him in Division Bench and the vivid reminiscences of those days will remain with me for ever.

Parting is always painful, but it is inevitable. Today, when My Lord is demitting his office as a Judge of this Court, I on behalf of my Brother Judges and on my own behalf congratulate His Lordship for his successful judicial career and pray the Almighty God that he may live with a lot of joy, sound health, happiness, and enthusiasm in all the times to come.

Shri M.P.S. Raghuvanshi, Addl. Advocate General, bids farewell:-

Today, we have assembled here to bid farewell to Hon'ble Justice Shri G.D. Saxena, a dignified judge of this prestigious Institution.

My Lord born on 2nd April 1952 at Mandsaur in Advocate Family of Shri Babu Bachhan Ji Saxena, a renowned Advocate of his time. He completed his schooling and collegiate education at Mandsaur. My Lord obtained LL.B. Degree from Jawahar Lal Nehru Law College, Mandsaur and joined Bar on 19th November 1973 and started practice under the able guidance of Shri M.L. Bachawat, Advocate, from civil side at Mandsaur. My Lord thereafter joined the judicial services as Civil Judge, Class II and then promoted from time to time as Civil Judge Class I, C.J.M., A.D.J. and District Judge.

Gandhi Ji was correct when he said " Rights accrue automatically to him who duly performs his duty." And that was given to him on January 3rd, 2011 when he was elevated as the Judge of M.P. High court and made permanent on 1-1-2013.

My Lord while sitting in Division Bench and Single Bench , has rendered landmark judgements which will be guiding to entire legal fraternity time to come. Judge always speaks through his judgement. The Judgements rendered by My Lord reflects his lenient view towards weaker sections of the society. My lord has never compromised with the law of the land. He is known for the patience hearing . We have never seen any Advocate complaining about his behavior in the Court.

Since My Lord is demitting office of the Judge of this prestigious institution, we hope that My Lord will continue to serve the society through his legal experience and will be guiding to young advocates in future.

We wish My Lord Justice Shri G.D. Saxena, a prosperous and healthy life in future.

Thanks.

Shri J.P. Mishra, President, High Court Bar Association, Gwalior, bids farewell:-

Your Lordship Hon'ble Justice Shri Giriraj Das Saxena is completing his tenure as judge today.

Hon'ble Justice Shri Giriraj Das Saxena born on 2nd April, 1952 at Mandsaur (MP). His father late Shri Vallabh Das Saxena, Advocate died in early age and his grandfather, Shri Babu Bachchan Lal ji Saxena was renowned Advocate of his time.

Hon'ble Justice Shri Giriraj Das Saxena has completed School education from Mandsaur. He obtained B.A. degree in the year 1970 from Government Post Graduate College, Mandsaur.

He passed LLB degree from Jawahar Lal Nehru Law College, Mandsaur and started practice at Mandsaur on 19-11-1973 under the able guidance of Shri ML Bhachawat, Advocate. Later on his lordship joined the Judicial Service as Civil Judge, Class II and promoted on 13-04-1987 as Civil Judge, Class I and his lordship was then promoted as CJM on 03-03-1992. He was further promoted to Higher Judicial Service as was appointed as Additional District Judge and then was appointed as Special Judge SC and ST (Prevention of

Atrocities) Act. His lordship was granted Selection Grade on 01-08-1999 and Super Time Scale on 26-06-2006. His lordship also worked as District and Session Judge, Narsinghpur, Dewas and Dhar and also performed the work of District Judge Inspection & Vigilance, Indore.

Thereafter, Hon'ble Shri Justice Giriraj Das Saxena elevated as Additional Judge of the High Court of Madhya Pradesh on 03-01-2011 and permanent Judge on 01.01.2013.

Hon'ble Justice Shri Giriraj Das Saxena in his tenure of judicial services assured a patient hearing, earnest attention to the submissions made and courteous behavior. In a span of more than three years as a High Court Judge, his lordship pronounced several Judgements which reflect his versatile personality, due to which he always left a mark in the minds and hearts of the lawyer. The Attitude and behavior of my Lord towards the bar was always outstanding. My Lord dealt with civil, criminal and constitutional matters with equal proficiency. The polite and helpful nature of my Lord used to encourage juniors and young lawyers. He left such indelible prints which cannot be erased for years to come. The attitude of my Lord is cordial and good with the bar.

I, on behalf of myself and on behalf of High Court Bar Association, Gwalior wish your lordship and his family long, happy, healthy & prosperous life.

Shri Prem Singh Bhadoriya, Member, M.P. State Bar Council, bids farewell:-

आज का यह विशेष क्षण हम सभी के लिये अत्यंत महत्वपूर्ण है, जब हम म.प्र. उच्च न्यायालय के माननीय न्यायमूर्ति श्री जी.डी. सक्सेना जी के न्यायाधिपति के रूप में यशस्वी एवं सफल कार्यकाल पूर्ण होने पर उन्हें भावभीनी विदाई देने हेतु एकत्रित हुए हैं।

माननीय न्यायमूर्ति श्री जी.डी. सक्सेना जी का जन्म सुप्रसिद्ध अभिभाषक स्व. श्री बाबूबच्चन लालजी सक्सेना के प्रपौत्र के रूप में दिनांक 02 अप्रैल 1952 को मंदसौर म.प्र. में हुआ था।

माननीय न्यायमूर्ति द्वारा प्रारंभिक शिक्षा उपरांत बी.ए. की परीक्षा वर्ष 1970 में शासकीय स्नातकोत्तर महाविद्यालय मंदसौर एवं एल.एल.बी. की परीक्षा जवाहरलाल नेहरू विधि महाविद्यालय मंदसौर से वर्ष 1973 में उत्तीर्ण की थी।

माननीय न्यायमूर्ति द्वारा कर्मयोगी पुरुष की भांति न्यायदान में सहयोग का संकल्प लेते हुए 19 नवम्बर 1973 को म.प्र. राज्य अधिवक्ता परिषद में अपना पंजीयन कराते हुए मंदसौर के विख्यात अभिभाषक श्री एम.एल. भचावत जी के सानिध्य में विधि व्यवसाय प्रारंभ किया तदोपरांत न्यायिक सेवा में उनकी नियुक्ति व्यवहार न्यायाधीश वर्ग 2 के रूप में हुई।

माननीय न्यायमूर्ति के न्यायिक सेवा के दौरान आपको दिनांक 13 अप्रैल 1987 को व्यवहार

न्यायाधीश वर्ग 1 के रूप में पदोन्नत करते हुए झाबुआ एवं इंदौर में मुख्य न्यायिक दण्डाधिकारी के रूप में पदस्थ किया गया।

माननीय न्यायमूर्ति को दिनांक 3 मार्च 1992 को हायर ज्यूडीसियल सर्विस के पद पर पदोन्नत किया गया। माननीय न्यायमूर्ति ने अतिरिक्त जिला एवं सत्र न्यायाधीश के रूप में अलीराजपुर, ग्वालियर एवं भोपाल में अपनी सेवाएं दी।

माननीय न्यायमूर्ति को 08 मई 1999 को सिलेक्शन ग्रेड प्रदान किया गया सिलेक्शन ग्रेड प्रदान करते हुए विशेष न्यायाधीश अनुसूचित जाति एवं जनजाति न्यायाधीश के रूप में नियुक्ति भोपाल, शहडोल, एवं सिहोर में उन्होंने अपनी सेवाएं दी तदोपरांत उन्हें 26 फरवरी 2006 को सुपर टाईम स्केल का ग्रेड देते हुए जिला एवं सत्र न्यायाधीश नरसिंहपुर एवं देवास में माननीय न्यायमूर्ति द्वारा अपनी सेवाएं प्रदान की गई। माननीय न्यायमूर्ति, जिला न्यायाधीश सर्तकता इन्दौर के पद पर भी कार्यरत रहे।

माननीय न्यायमूर्ति को जिला एवं सत्र न्यायाधीश धार के पद पर रहते हुए माननीय न्यायमूर्ति की छवि एवं विधि ज्ञान के आधार पर दिनांक 03 जनवरी 2011 को इस न्याय मंदिर के अतिरिक्त न्यायमूर्ति के रूप में नियुक्त किया गया तथा माननीय न्यायमूर्ति स्थाई न्यायमूर्ति के रूप में 01.01.2013 को शपथ दिलाई गई।

माननीय न्यायमूर्ति द्वारा इस महान्याय मंदिर में न्यायमूर्ति के पद पर रहते हुए अत्यंत शालीनता व सादगी के साथ अपने कर्तव्यों का निर्वाहन करते हुए अनेकों न्याय दृष्टांत प्रतिपादित करते हुए पक्ष व विपक्ष के पक्षकारों के मन में संतोष का बोध कराया जो निश्चित ही आपकी कार्यशैली के प्रमुख अंग बन गए।

माननीय न्यायमूर्ति आपके व्यवहार में सहजता, मधुरता व अपनत्व की जो भावना झलकती थी वह सदैव हमारे लिये अत्यंत प्रेरणादायी रही।

आने वाले समय में आपकी अनुपस्थिति से जो शून्य व रिक्तता उत्पन्न होगी वह हमेशा हमें महसूस होती रहेगी।

न्यायदान में आपका योगदान अत्यंत अमूल्य एवं अभिनन्दनीय है आपके सफल कार्यकाल पूर्ण करने पर मैं आपसे यह अनुरोध करता हूँ कि इस अर्द्धविराम के पश्चात प्रभावमान होने वाले समय की गति के साथ साथ आप उसी सहजता एवं सुलभता के साथ देश के विधि व्यवसायियों एवं समाज के अन्य वर्गों के सामाजिक विकास में एवं दीनहीन की सेवा में अपना रचनात्मक योगदान देकर समाज के विकास में नई भूमिका का निर्वाहन करेंगे।

इन्हीं शुभकामनाओं के साथ मैं अपनी ओर से एवं म.प्र. राज्य अधिवक्ता परिषद के सभी सदस्यों एवं प्रदेश के विधि जगत की ओर से आपके प्रति कृतज्ञता तथा आभार व्यक्त करता हूँ एवं आपके उत्तम स्वास्थ्य एवं मंगल पारिवारिक जीवन की कामना इन्हीं शब्दों के साथ करता हूँ कि

फूलों का आफताव हो आपकी जिंदगी,
खुशियों का सरताज हो आपकी जिंदगी।
झलक उठे आसमान तक,
ऐसा सुंदर साझा हो आपकी जिंदगी।

Shri Ankur Mody, Asstt. Solicitor General, bids farewell:-

Justice GD Saxena demits office today as High Court Judge of this Court. We have gathered here to commemorate the distinguished contribution of Hon'ble Justice Giriraj Das Saxena ji to the Bench. But before we reminisce Justice Saxena's glorious tenure at the bench, it is imperative for us to reflect upon and appreciate/acknowledge the humble beginnings of his quest.

My Lord was born on 2nd April 1952 in Mandsaur. My Lord was son of Vallabhdas Saxena Adv. & grandson of Babu Bacchan Lal Saxena (Adv.), a renowned advocate.

He did his schooling & BA (in the year 1970) in Mandsaur and LLB in 1973 from Jawahar Lal Nehru College Mandsaur.

My Lord, practised under ML Bachawat and eventually joined judicial services as Civil Judge Class II and promoted to Civil Judge Class I in the year 1987 and was promoted as CJM in 1992.

Further promoted to higher Judicial Services as ADJ and was posted as DJ. Narsinghpur, Dewas and Dhar. Also worked as DJ Vigilance, Indore.

Hon'ble Justice Girrajji was elevated as Additional Judge of this High Court on 03.01.2011 and was made a permanent judge on 1.1.2013. His appointment as the judge of the Madhya Pradesh High Court was a humble reminder about how hard work, sincerity and diligence do not go unrewarded and unappreciated. However, it is said that the excellence of a judge comes not simply from his knowledge of law but also from the wisdom and understanding drawn from history, philosophy and above all - experience. Justice Saxena's deep understanding of the law coupled with his enormous experience was instrumental in him delivering many significant (path breaking) orders and judgments.

Though he is demitting office as a judge of this Court, his legacy will continue to inspire us and the generations to come. On behalf of the legal fraternity, I wish Justice Giriraj Das Saxenaji a long, happy and fulfilling life beyond the bench.

Farewell speech delivered by Hon'ble Mr. Justice Giriraj Das Saxena:-

To begin with let me first bow down on the lotus feet of Lord Krishna with all humility for bestowing upon me his divine blessings enabling me with courage

and strength to discharge divine, august and pious duties attached to a throne of justice impartially and with the best of my ability till now to the entire satisfaction of my heart and soul. Then, I bow before my respected Mother, sitting in the front line for breeding, bringing and shaping my life and character with utmost love and affection, resulting in my achievements in the judicial arena. After the sad demise of my father, during my infancy, my life and future was safe in the strong hands of my mother and grandpa Shri. Bachchan Lal Ji Saxena who was a lawyer of extraordinary acumen, a man of high moral and ethical values. His life style was simple, strict, and ascetic. My humble tribute to him. Without him and my mother, I would not have been as I am. At this juncture, I pay my tribute to my father Late Shri. Vallabh Das Saxena who unfortunately left for his heavenly abode in my infant age. I don't remember to have seen him but feel and do carry His presence and blessings in my life. The credit of my success also goes to the co-operation given to me through out in my march ahead in the judicial line by my wife, Smt. Sangeeta Saxena; my daughters Smt. Padmaja Saxena and Tarnija Nigam; my son Padmanabh Saxena, who is practising Advocate at Indore. I also cannot forget the co-operation of my sons-in-law Shri Umang Saxena practising Advocate at Jhabua, Shri Sudhir Nigam, Microsoft Engineer at Bengluru and my daughter-in-law Smt. Reena. I also pay my respect to my maternal uncle Shri N.B.S. Moriya, my father-in-law Shri A.P. Mowar and my mother-in-law Smt. Mandakini. I extend my thanks to all my brothers, sisters and brothers-in-law.

I also pay my tribute to my ancestors especially my grandmother Smt. Phoolwati Devi, my uncles late Prof. B.S. Jauhari, Shri S.P. Saxena and Shri S.N. Saxena, my respected late aunts and granduncle Late Prof. Madav Prasad Ji Saxena, who always showered blessings for my every success in life. However, I feel, they could not see me working on this present post of dignity in the High Court.

In 1973, after taking the degree of law at the age of 21, I was enrolled and entered in the Bar and to start with I joined the Chamber of Shri U.N. Bhachawat Sahib at Mandsaur who was elevated in 1974 to this Hon'ble High Court. I, then, continued attending the chamber of his brother Shri M.L. Bhachawat Sahib, Senior Counsel at Mandsaur. They taught me the lessons of truth, hard work and legal acumen which was necessarily go to make a man great in every walk of life especially in the judicial field. Then, I started practice independently at Mandsaur itself and took to my credit able guidance and cooperation from all the members of District Bar at Mandsaur and did my legal practice there very successfully.

J/20

In 1979, after selection, I entered in judicial service as Civil Judge on getting all promotions well in time, I was elevated to the High Court in 2011. Today, I am going to demit this honourable office of the Judge of this High Court. I feel, I was most lucky that I could get an opportunity of working under District Judges and Senior Judges who were well versed with law and were kind to me. They always led me in right directions. Their directions and well wishes are valuable to me which paved a long way for my promotions and also for elevation to this dignified post. I as such pay my best regards to them also.

At the very outset let me express my gratitude to Hon'ble Shri Justice S.K. Gangele, the Administrative Judge of this Bench of High Court for the kind words he expressed for me in his valued address given here, and now I feel I shall be failing in my duty if I don't express and particularly record my deep sense of gratitude to Hon'ble Shri Rafat Alam and Hon'ble Shri S.A. Bobde, the then Hon'ble the Chief Justices of this High Court and nevertheless Hon'ble Shri A.M.Khanwilkar Sahib, Hon'ble the Chief Justice for their Lordships' kind cooperation, assistance and able guidance, awarded to me in confidence throughout. I have also to express in the same line my gratitude to the Hon'ble Shri S.K.Harkauli and Hon'ble Shri K.K. Lahoti the then acting Chief Justices of this High Court. I express my gratitude to all sitting and retired judges came in my tenure for extending their confidence and cooperation to me throughout.

I am also extremely thankful to each one of you for your valued and generous comments given about me. Overwhelmingly, I feel myself honoured by the kind words expressed by you all.

Let me say, retirement by most of us is accepted with a heavy heart and this feeling of sadness comes naturally in most of us from the fact that after years of active life spent in discharging sovereign functions with honour, one suddenly finds oneself in wilderness. What next arises is the question ? but on reflection, one is bound to feel that it is not a good feeling. There is a positive side to it also. Retirement provides a cooling period before one embarks upon another journey. It gives you opportunity to reflect over your achievements and failures, making you well acquainted with the guidelines for your future journey. But surely it is not the end of the road. Retirement opens for you the door to a whole new world of enjoyment, adventure and happiness. It brings unto you everything, you are looking forward to have a good time. You therefore must enjoy this new beginning. Lokmanya Bal Gangadhar Tilak said, "A man can be a mission in himself provided he takes the life in that manner."

Friends ! after completing more than 35 years of service in the legal wing of the State I shall now be demitting my office.

I do not know how this long journey of around 35 years, I travelled so early. I feel just a few years ago, I joined as a Civil Judge and after promotions and elevation to the High Court, how soon I am going to retire. It is said, you never know and perceive how days pass and how the time rolls on, but surely by the Grace of God Almighty, I have passed such a long time of service, very smoothly and happily without any kind of inconvenience and difficulty. The credit indeed goes to you all and to all my esteemed colleagues, who are so nice, kind and congenial to me at all times, during the whole time of my stay. I shall definitely cherish this memorable time of my stay among all of you, in all times to come.

Friends ! The duty of administration of Justice is pious and hard too inasmuch as it is required to be totally devoid of any kind of fear or favour, relation or sympathy, ill-will or hatred, with the sole object, motto and mission to do Justice and Justice only. A Judge is always required to be impartial from the very core of his heart and soul. Life of a Judge is therefore tough. He judges and is judged. His role is to incinerate injustice with honesty, within the limits of Law and his goal is to 'live fully' for those who are wronged. The real test of Law is when it is asked to protect lamb from lions. The path of a Judge is therefore the path of devotion. Lord Krishna in his Divine Discourse Shrimad Bhagwatgita prescribes the fundamental attributes of a Devotee, in Verses 13 to 19 of Chapter-12. A devotee should be:-

1. Without ill-will towards beings
2. Without I and mine feelings
3. Content
4. With whom the world is at ease and who is at ease with the world.
5. Quit of jealousy and fear.
6. Independent, pure, clever and unconcerned.
7. Unattached and full of devotion.

However I have tried my utmost to perform my duties to the best of my abilities without ill-will and hatred. I am lucky that I got full support from the Bar in all places where I was posted. During my tenure as a Judge of High Court too I got the fullest support, cooperation and assistance from the Bar and I could not feel any kind of difficulty here. Nothing is infallible in this world. To err is human, but I am highly grateful to all of you that all along you have been kind and good enough to give me full support and cooperation, ignoring and overlooking my

shortcomings and failures. This is the sole reason that I could try to perform my duties the way I desire, to the entire satisfaction of the very core of my heart and soul, under the complete influence of the powerful thought that the God overhead is witnessing each and every doing and deed of every doer on this earth.

Because of the warm treatment I have received so far from the Bench and the Bar, I shall be missing the days I passed here during my tenure and the memories shall be no less than a worthy asset to me in my later part of life.

Friends! all parting in life is sad but where heart's deepest feelings are involved, the breaking of old ties and necessity of saying 'Good-bye' is as trying an ordeal that a man can be called upon to go through. Before parting therefore let us pledge solemnly that we shall not forget each other.

At last, I express my thanks to the Principal Registrar and to the officer of the Registry including officers and other staff-members posted in the Sections for rendering good services to me. I am thankful to my personal staff-members, namely, Shri Dhananjay Buchake, Private Secretary for his meritorious services rendered with top honesty, sincerity, efficiency and devotion, Shri Pawan Dharkar P.A. and Shri Arun Mishra P.A. who also performed their respective duties with utmost honesty and with full devotion. I am also thankful to Shri R.K. Sharma, Reader of the court for performing duties with sincerity and obedience. I am also thankful to my personal security staff-members, namely, Shri Vikas Pandey, Shri Yogendra Singh Jadon and all security staff-members deputed from SAF force who provided security at all times to me and my family at my residence. I would also convey my sincere thanks to all my staff including driver Shri Omprakash Sharma and others, posted at my residential bungalow who served me and my family with full devotion. At last, I convey my hearty thanks to Dr. R.K. Chaturvedi and Dr. R.K. Sharma both for attending the duty on every call as and when required.

Now, I seek permission from all of you to conclude after giving pause to my speech by the following verse :

अलविदा कहकर जब कोई

आँखों से दूर होता है

आँखें देखती रहती हैं

दिल मजबूर होता है

कोई कहे ना कहे जुबा से

पर दिल में दर्द जरूर होता है

Thanks once again to all.....

Short Note

***(7) (DB)**

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

F.A. No: 38/2012 (Gwalior) decided on 2 July, 2013

MEGHA GUPTA (SMT.)

...Appellant

Vs.

VIKAS GUPTA

... Respondent

Hindu Marriage Act, (25 of 1955), Section 28 - Enhancement of Maintenance amount - Held - Judicial Notice can be taken that now a days the education and other relevant expenses are very high and hence in such a circumstances the quantum of interim alimony may be enhanced.

हिंदू विवाह अधिनियम (1955 का 25), धारा 28 - भरण-पोषण रकम की बढ़ोत्तरी - अभिनिर्धारित - न्यायिक प्रज्ञान लिया जा सकता है कि वर्तमान समय में शैक्षणिक एवं अन्य सुसंगत खर्च बहुत अधिक हैं और इसलिए ऐसी परिस्थितियों में अंतरिम निर्वाह धन की मात्रा बढ़ायी जा सकती है।

The order of the Court was delivered by : U.C. MAHESHWARI, J.

Prashant Sharma, for the appellant.

Atul Gupta, for the respondent.

Short Note

***(8)**

Before Mr. Justice N.K. Mody

W.P. No. 6839/2011 (Indore) decided on 18 June, 2013

PRADEEP KUMAR JAIN

...Petitioner

Vs.

STATE OF M.P. & anr.

...Respondents

Arms Act (54 of 1959), Sections 13, 14, & 15(3), Arms Rule 1962 - Rules 54 & 56 - Renewal of Arms license - Inordinate delay in filing application for renewal of license - Held - Renewal of license is ordinary incidence and the refusal must be accompanied by reasons recorded in writing - Provisions of Sections 13 & 14 are applicable to renewal also - If prescribed authority was of view that application is delayed then he could have directed the petitioner to deposit late fee - Petition allowed.

आयुध अधिनियम (1959 का 54), धाराएं 13, 14 व 15(3), आयुध नियम 1962 - नियम 54 व 56 - शस्त्र अनुज्ञप्ति का नवीनीकरण - अनुज्ञप्ति के नवीनीकरण हेतु आवेदन प्रस्तुत करने में असीमित विलम्ब - अभिनिर्धारित - अनुज्ञप्ति का नवीनीकरण साधारण प्रसंग है और इससे इंकार किया जाना, लिखित रूप से कारणों के साथ अंकित होना चाहिए - धारा 13 व 14 के उपबंध, नवीनीकरण को भी लागू होते हैं - यदि विहित प्राधिकारी का मत है कि आवेदन विलम्ब से किया गया है तब वह याची को विलम्ब शुल्क जमा करने के लिए निदेशित कर सकता था - याचिका मंजूर।

Case referred :

1990 MPJR 205.

Archana Kher, for the petitioner.

Bhuvan Deshmukh, G.A. for the respondents.

Short Note

*(9)

Before Mr. Justice A.K. Shrivastava

Civil Rev. No. 194/2012 (Jabalpur) decided on 20 February, 2013

RASHID ANSARI

...Applicant

Vs.

SMT. SUREKHA

...Non-applicant

Accommodation Control Act, M.P. (41 of 1961), Section 23-A - Application for eviction - Suit premises was admittedly let out for non-residential purposes - Application for eviction on the ground of bonafide requirement for residential purposes not maintainable.

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धारा 23ए - बेदखली के लिए आवेदन - वाद परिसर-स्वीकृत रूप से अनिवासिक उद्देश्य के लिये किराये पर दिया गया - नैवासिक उद्देश्य के लिये वास्तविक आवश्यकता के आधार पर बेदखली के लिये आवेदन पोषणीय नहीं।

Sanjay Agrawal, for the applicant.

Rahul Rawat, for the Non-applicant.

I.L.R. [2014] M.P., 881

SUPREME COURT OF INDIA

*Before Mr. Altamas Kabir, Chief Justice of India, Mr. Justice Fakkir**Mohamed Ibrahim Kalifulla & Mr. Justice Vikramajit Sen*

W.P. (Civil) No. 289/2007 decided on 12 July, 2013

MAHINDER KUMAR & ors.

...Petitioners

Vs.

HIGH COURT OF MADHYA PRADESH

THROUGH REGISTRAR GENERAL & ors.

...Respondents

A. Service Law - Judiciary - Recruitment - Powers of High Court - In absence of challenge to Rule 7 or without any serious infirmity in said Rule, High Court is fully empowered to evolve its own procedure of selection for Direct recruitment and promotion in respect of entry level District Judge and can also specify such procedure depending on exigencies from time to time in terms of Rule 7 of Rules, 1994. (Paras 26 & 27)

क. सेवा विधि - न्यायपालिका - भर्ती - उच्च न्यायालय की शक्तियाँ - नियम 7 को चुनौती की अनुपस्थिति में या उक्त नियम में किसी गंभीर कमी के बिना, उच्च न्यायालय, प्रवेश स्तर जिला न्यायाधीश के संबंध में सीधी भर्ती एवं पदोन्नति हेतु स्वयं की चयन प्रक्रिया विकसित करने के लिये पूर्ण रूप से सशक्त है और नियम 1994 के नियम 7 की शर्तोंनुसार समय-समय पर आवश्यकतानुसार उक्त प्रक्रिया विनिर्दिष्ट भी कर सकता है।

B. Constitution - Articles 233 & 234 - Recruitment - Evaluation - Process of normalization - Considering the fact that near about 3000 candidates had appeared and answer sheets were evaluated by Several District Judges, the process of normalization was rightly adopted. (Paras 32 to 39)

ख. संविधान - अनुच्छेद 233 व 234 - भर्ती - मूल्यांकन - सामान्य बनाने की प्रक्रिया - यह तथ्य विचार में लेते हुए कि करीब 3000 अभ्यर्थी उपस्थित हुए और कई जिला न्यायाधीशों द्वारा उत्तर पुस्तिकाओं का मूल्यांकन किया गया, सामान्य बनाने की प्रक्रिया को उचित रूप से अपनाया गया था।

C. Service Law - Judiciary - Shetty Commission - Recommendations by Shetty Commission are guidelines only which High Court should keep in mind while making selection for Higher Judicial Service. (Para 69)

ग. सेवा विधि - न्यायपालिका - शेट्टी कमीशन - शेट्टी कमीशन की सिफारिशों केवल दिशा निर्देश हैं जिसे उच्च न्यायालय को उच्चतर न्यायिक सेवा के लिये चयन करते समय ध्यान में रखना चाहिए।

D. Interpretation of Statutes - Harmonious Construction - Para 9 (iv) and (vi) of advertisement - Para 9 (iv) and (vi) of advertisement provided that only those candidates would be called for interview as High Court would decide on the basis of evaluation of their performance in written examination and candidates would be selected on basis of aggregate marks in written examination - Held - Harmonious construction of these provisions mean that only those candidates who secure the qualifying marks in written examination would be called for interview and marks of such candidates would be aggregated to find out their position in merit list. (Paras 41 to 46)

घ. कानूनों का निर्वचन - समन्वयपूर्ण अर्थान्वयन - विज्ञापन की कंडिका 9 (iv) व (vi) - विज्ञापन की कंडिका 9 (iv) व (vi) उपबन्धित करती है कि केवल उन अभ्यर्थियों को साक्षात्कार हेतु बुलाया जाएगा जैसा कि उनके लिखित परीक्षा के प्रदर्शन के मूल्यांकन के आधार पर उच्च न्यायालय निर्णय लेगा और लिखित परीक्षा के कुल अंकों के आधार पर अभ्यर्थियों का चयन किया जायेगा - अभिनिर्धारित - इन उपबन्धों के समन्वयपूर्ण अर्थान्वयन का मतलब है कि केवल उन अभ्यर्थियों को साक्षात्कार हेतु बुलाया जायेगा जिन्होंने लिखित परीक्षा में अर्हक अंक प्राप्त किये हैं और योग्यता सूची में स्थान पाये जाने के लिये उक्त अभ्यर्थियों के अंकों को कुलयोग बनाया जायेगा।

E. Service Law - Judiciary - Interview Committee - Bona fides of members of committee not doubted - No Court, can venture to go behind assessment made by expert committee and substitute its own views by laying down different criterion by altering or fixing any benchmark. (Paras 60 to 61)

ड. सेवा विधि - न्यायपालिका - साक्षात्कार समिति - समिति के सदस्यों की सद्भाविकता पर कोई संदेह नहीं - विशेषज्ञ समिति द्वारा किये गये निर्धारण में कोई न्यायालय मध्यक्षेप नहीं कर सकता और किसी स्थिरबिन्दू में परिवर्तन करके या निश्चित करके भिन्न मापदंड प्रतिपादित करते हुए स्वयं का दृष्टिकोण प्रतिस्थापित नहीं कर सकता।

Cases referred :

(2002) 4 SCC 247, (2007) 3 SCC 720, (2008) 3 SCC 512, (2008) 7 SCC 11, (2010) 3 SCC 104, (2006) 6 SCC 395, (1974) 3 SCC 220.

J U D G M E N T

The Judgment of the Court was delivered by : **FAKKIR MOHAMED IBRAHIM KALIFULLA, J. :-** As the issues involved in these writ petitions and appeals are one and the same, the same are being disposed of by this common judgment.

2. In Writ Petition (C) No. 289 of 2007, the challenge is to the selection made by the High Court of Madhya Pradesh in the cadre of Madhya Pradesh Higher Judicial Service to the post of entry level District Judge in the selection process for the year 2006-07 in which the third respondent alone came to be selected for the 20 posts advertised. Petitioners and respondent Nos.4 to 8 were all unsuccessful candidates who participated in the said selection. Writ Petition No.178 of 2008 was also by one of the candidates who also participated in the selection of 2006-07 and has come forward with the similar relief as in Writ Petition (C) No. 289 of 2007. Civil Appeal No.7790 of 2011 and Civil Appeal No.7791 of 2011 have been preferred by two candidates who were also not successful in the very same selection and who approached the High Court by filing independent writ petitions in W.P. (C) No.4604 of 2007 and W.P.(C) No.4605 of 2007, which were disposed of by a common order dated 09.04.2007, by the Division Bench of Madhya Pradesh High Court. Both the writ petitions were dismissed. Those writ petitions were also filed challenging the very same selection made for the post of Madhya Pradesh Higher Judicial Service in the selection process of 2006-07. Since the challenge in both the writ petitions, as well as the civil appeals are relating to the same selection for the post of District Judge (Entry Level) of the Madhya Pradesh Higher Judicial Service, we dispose of all the above four cases by this common judgment.

3. Since the submissions made by Mr. Marlapalle, learned senior counsel appearing for the petitioners in W.P.(C) No.289 of 2007 were generally adopted by the other respective counsel, except for a few submission made by Mr. Annam D. N. Rao, learned counsel for the appellants in Civil Appeal No.7790 of 2011 and Civil Appeal No.7791 of 2011, we mainly refer to the submissions of Mr. Marlapalle, while considering the grievances of the petitioners in the writ petition, as well as the appellants in the civil appeals.

4. Mr. Marlapalle learned senior counsel, in his submissions referred to the advertisement dated 21.08.2006, calling for 20 posts of Higher Judicial Service of Madhya Pradesh, namely, the Entry Level District Judge post. The written examination was held on 17.12.2006, for two papers prescribed in

the advertisement. The learned senior counsel, after referring to the list of candidates who were called for interview and the ultimate resolution of the Selection Committee after normalization of the marks secured by the short-listed 15 candidates, who are the petitioners in Writ Petition (C) No. 289 of 2007, as well as respondent Nos.4 to 8 in that writ petition, submitted that the merit list could have been drawn solely based on the written examination marks and the interview marks put together, without adopting the normalization process as was done by the High Court, which was not mentioned in the advertisement. According to learned senior counsel, the procedure of normalization of marks adopted by the High Court after the holding of the written examination, was not permissible in law. The learned senior counsel contended that the condition of 50% of marks to be scored in the normalized marks along with marks secured in the interview, was neither mentioned in the advertisement, nor in the Rules, nor in the Shetty Commission recommendations and, therefore, such a condition could not have been prescribed at the fag end of the conduct of the selection. The learned senior counsel after referring to the resolution of the Selection Committee submitted that the same did not have the approval of the Full Court. By referring to the amended Rules 7 of the Rules relating to the recruitment for the post of Higher Judicial Service of Madhya Pradesh, learned senior counsel contended that if the High Court can formulate its own procedure as per the said Rule, then it should have been disclosed in the advertisement or at least before the written examination was conducted. The learned senior counsel would further contend that even in the counter affidavit filed before this Court, no reason was given for the decision taken by the High Court to resort to normalization of marks as mentioned in para 11(a) of the counter affidavit. The learned senior counsel would contend that having regard to such serious violations in the matter of selection, the whole selection was vitiated. The learned senior counsel in his submission contended that in the Shetty Commission Report, which was accepted by this Court in *All India Judges' Association and others vs. Union of India and others* (2002) 4 SCC 247, the Shetty Commission, recommended that there can be a benchmark of 120 marks out of 200 marks, i.e., 60%, for making the selection and that the High Court can provide a benchmark under the Rules for viva voce and without any such prescription it was not permissible for the High Court to prescribe a benchmark, while making the selection. The learned senior counsel also relied upon the decisions in *Sanjay Singh and another vs. U.P. Public Service Commission, Allahabad and another* - (2007) 3 SCC 720, *K. Manjusree vs. State of Andhra Pradesh and another*

- (2008) 3 SCC 512, *Hemani Malhotra vs. High Court of Delhi* - (2008) 7 SCC 11 and *Ramesh Kumar vs. High court of Delhi and another* - (2010) 3 SCC 104.

5. Mr. A.D.N. Rao, learned counsel appearing for the appellants in Civil Appeal No:7790 of 2011 and Civil Appeal No.7791 of 2011, referred to the advertisement and submitted that though specific posts were earmarked for reserved categories, when the ultimate select list was announced, reservation was given a go by. The learned counsel further contended that since the Rules were changed midway, the appellant got eliminated and, therefore, on that score the selection should be held to be vitiated.

6. As against the above submissions Mr. Shrivastava, learned senior counsel appearing for the High Court, dealing with the last of the contentions made by Mr. Marlapalle that the selection did not have the approval of the Full Court, pointed out that in the letter by which the selection was announced by the communication of the Registrar General dated 24.04.2007, there is a reference to the resolution of the Full Court meeting dated 22.04.2007, by which the selection was approved by the Full Court. The said submission was made by Mr. Shrivastava, apart from submitting that such a contention was never raised before the High Court, nor in the writ petition.

7. The learned senior counsel then referred to the amended Rule 7 and pointed out that as per the said Rule; whatever was not prescribed in the Rules was left to be decided by the High Court and that even as per para 9 of the advertisement and in particular Rule 9(iv), the High Court was empowered to follow its own procedure. The learned senior counsel then contended that the High Court in exercise of such powers vested in it, constituted a Committee of Judges to make the selection and that the Selection Committee determined the procedure to be followed as to how the eligibility of the candidates who participated in the examination, were to be determined for the purpose of the interview and that after following the due procedure resolved by the Selection Committee, the marks secured by the candidates in the written examinations, in both the papers, which were evaluated by different District Judges, were normalized by two common evaluators and that based on such normalized marks and the marks scored by the eligible candidates in the interview, the ultimate selection was made.

8. The learned senior counsel contended that the submission that there was midway change in the process of selection was not correct in the light of

the amended Rule 7 and the power vested in the High Court under Rule 9(iv), which enabled the High Court to follow its own procedure for making the selection. The learned senior counsel lastly contended that by following the due procedure prescribed by the High Court in the matter of the selection, which was in accordance with the prescribed Rules, the Selection Committee in its wisdom found that the third respondent alone was found meritorious and suitable for holding the post in Higher Judicial Service of Madhya Pradesh and in the absence of any other allegations striking at the route of the selection process or the Selection Committee or Interview Committee, the ultimate selection made by the High Court and the appointment of the third respondent based on such selection cannot be interfered with. The learned senior counsel relied upon the decisions reported in *All India Judges' Association and others* (supra), *KH. Siraj vs. High Court of Kerala and others* - (2006) 6 SCC 395 and *The State of Haryana vs. Subash Chander Marwaha and others* - (1974) 3 SCC 220 in support of his submissions.

9. Having heard the learned counsel for the respective parties and having perused the relevant Rules made by the High Court in its advertisement, as well as the judgment impugned in the civil appeals and other material papers, we feel that in order to appreciate the controversy raised and the correctness of the decision made by the High Court in the matter of selection and appointment of third respondent in Writ Petition (C) No.289 of 2007, reference to the relevant Rules, the clauses contained in the advertisement and the resolutions of the Selection Committee of the High Court and the proceedings of the Interview Committee have to be looked into. We also find that the procedure actually followed by the High Court and what it sought to explain in the counter affidavit, have to be referred in order to understand and clarify the procedure followed in the matter of selection.

10. By the advertisement at Annexure P-2, filed by respondent No.1 by way of counter affidavit dated 21.08.2006, the High Court of Madhya Pradesh called for applications to fill up 20 posts in Madhya Pradesh Higher Judicial Service by direct recruitment from the Bar, making it clear that it will be governed by the Madhya Pradesh Uchchatar Nyayik Seva (Bharti Tatha Seva Sharten) Niyam, 1994 (hereinafter called "the 1994 Rules") as amended by Madhya Pradesh Rajpatra. (ASADHARAN) dated 08.06.2005.

11. The advertisement stated that out of 20 posts, 11 posts were earmarked for general category candidates and three posts each reserved for Scheduled

Castes, Scheduled Tribes and Other Backward Classes candidates. It was also made clear that if sufficient number of suitable candidates belonging to the reserved categories were not available, such posts would be treated as unreserved. Para 9 of the advertisement which contains sub-clauses (i) to (vii) are relevant for our purpose. The same are required to be extracted, which read as under:

(i) The candidates may be short-listed at the preliminary stage i.e. before written examination, by the High Court:

(ii) Eligible candidates will be required to appear in Written Examination and interview at their own expenses before the High Court of Madhya Pradesh, Jabalpur, or at such other places as may be specified by the High Court.

(iii) The Written Examination shall consist of two papers, each of 3 hours' duration and of maximum 100 marks. The object of the written examination is to assess the knowledge of a candidate in Law and latest pronouncements. 1st paper shall relate to Constitution of India, Civil Procedure Code, Cr.P.C., I.P.C., Hindu Law, Transfer of Property Act, M.P. Accommodation Control Act, Limitation Act, Evidence Act and M.P. Land Revenue Code, Special Acts like N.D.P.S. Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, Prevention of Corruption Act, Negotiable Instrument Act.

Second paper will be in two parts, the First Part will contain factual data of a Civil Case and a Criminal Case on the basis of which the candidate shall prepare judgment in the Civil Case and Criminal Case. The Second Part will contain a passage in Hindi to be translated into English and a passage in English to translate into Hindi.

(iv) Only such candidates will be called for interview as the High Court may decide, on the basis of evaluation of their performance in the written examination.

(v) The interview shall carry 25 marks.

(vi) Candidates shall be selected on the basis of aggregate

marks obtained by them in both the written examination and interview.

(vii) On completion of the selection process, the result of examination (list of selected candidates) shall be published in M.P. Rajpatra and all the candidates both successful and unsuccessful shall be supplied mark sheets at their given addresses by ordinary post."

12. The said para 9 states as to how the short-listing of candidates at the preliminary stage itself before the written examination were to be made by the High Court, the requirement of the candidates to appear in the written examination consisting of two papers where, the maximum marks in each paper was 100 and the relevant laws in which the examination would be conducted in both the papers was also specified. In para 9(iv), it was specified that the High Court may decide on the basis of evaluation of their performance in the written examination for calling those candidates for interview. Under para 9 (v), the interview marks were specified as 25. In para 9(vi), it was mentioned that candidates would be selected on the basis of aggregate marks obtained by them, both in the written examination and the interview. The last paragraph of the amended Rule 7 is also relevant, which reads as under:

"The procedure of selection for direct recruitment and promotion shall be such, as may be specified by the High Court from time to time."

13. As per the advertisement at Annexure P-2, the last date for submission of application was 30.09.2006 and the date of examination was notified as 17.12.2006. In response to the advertisement, it is stated that 3556 number of applications were received and ultimately 2498 candidates appeared for paper I and 2494 candidates appeared for paper II. According to the High Court, in accordance with Rule 7, as well as paragraph 9 of the advertisement, the Selection Committee constituted by the High Court, monitored the whole selection and the ultimate appointment of the third respondent was also approved by the Full Court. The Selection Committee stated to have met on 22.03.2007, as per Annexure R- 1 in which the committee adopted the following resolutions in the matter of direct recruitment to the post of Additional District Judge through competitive examination. The resolutions are as under:

"1. On the basis of the evaluation made by District Judges

scheduled caste and scheduled tribe candidates must secure 35 per cent marks and other candidates must secure 40 per cent marks in the first paper and in the second paper to qualify for viva-voce.

2. While determining the merit of candidates finally, the marks secured by different candidates in the written examination in the first and second paper will be normalized on the basis of marks secured by them in the common evaluation by the same evaluator for each of the two papers.

3. To the marks so normalized by common Evaluators of both the papers, the marks secured in the viva-voce will be added and the merit position of the candidates will be determined."

14. Annexure R-2 filed along with counter affidavit of the High Court, consists of 15 candidates who were called for interview on the basis of the result of the written examination held on 17.12.2006. The date of interview was noted as 6th and 7th April, 2007 at 10 A.M. to 5 P.M. for all the candidates at the High Court of Madhya Pradesh, Jabalpur. All the 15 candidates found in Annexure R-2 are the petitioners and respondents 3 to 8, in Writ Petition (C) No. 289 of 2007 and it is relevant to state that Annexure P-6 to P-9 relate to them. Annexure P-6 filed by the petitioners in the said writ petition, is a true copy issued by the Registrar General of the High Court of Madhya Pradesh, which is stated to be the tabulation sheet of candidates on the basis of the marks awarded by District Judges prior to the process of normalization and who were selected for personal interview on the 6th and 7th of April, 2007. It will be necessary to note the marks found therein in the said statement and, therefore, the same is also extracted hereunder ;

S.No.	Roll No.	Name of the Candidates	Paper I	Paper. II
1	1030	Shri Axay Kumar Dwivedi	59	58
2	3202	Shri Radhe Shaym Sharma	65	64
3	3806	Shri Sanat Kumar Kashyap	58	45
4	1652	Shri Arvind Kumar Soni	53	57
5	4477	Shri Mahinder Kumar	50	59

6	4480	Shri Hemant Kumar Yadav	48	50
7	4484	Shri Jai Narayan Gupta	44	54
8	4463	Shri Praneet Sharma	42	52
9	4143	Shri Ravindra Kumar Agrawal	40	44
10	2571	Shri Akhilesh Shukla	43	45
11	1554	Shri Dharam Prakash Sharma	42	44
12	4402	Shri Niraj Kumar Shrivastava	47	41
13	1058	Raj Kumari Mishra	40	45
14	3048	Shri Deepak Kishanchand Wadhvani	40	41
15	2909	Shri Krishna Ballabha Kumar Pandey	43	40

15. Annexure P-7 is also a certified true copy issued by Registrar General, which contains the normalized marks awarded by the common evaluator of the candidates who were called for personal interview on the 6th and 7th of April, 2007, which is as under:

S.No.	Roll No.	Name of the Candidates	Normalized Marks by common Evaluators	
			I	II
1	1030	Shri Axay Kumar Dwivedi	50	56
2	3202	Shri Radhe Shaym Sharma	47	52
3	1652	Shri Arvind Kumar Soni	42	52
4	3806	Shri Sanat Kumar Kashyap	37	41
5	4477	Shri Mahinder Kumar	41	42
6	4480	Shri Hemant Kumar Yadav	29	50
7	1554	Shri Dharam Prakash Sharma	36	40
8	4143	Shri Ravindra Kumar Agrawal	23	44
9	2571	Shri Akhilesh Shukla	34	37
10	1058	Raj Kumari Mishra	26	40
11	4402	Shri Niraj Kumar Shrivastava	29	37

12	4484	Shri Jai Narayan Gupta	23	38
13	4463	Shri Praneet Sharma	24	36
14	3048	Shri Deepak Kishanchand Wadhwani	19	32
15	2909	Shri Krishna Ballabha Kumar Pandey	23	28

16. Annexure P-8 is another certified true copy of the tabulation sheet of candidates who were interviewed on the 6th and 7th of April, 2007, which disclosed the marks secured by them in the interview, which is as under:

S.No.	Roll No.	Name of the Candidates	Interview Marks
1	1030	Shri Axay Kumar Dwivedi	18.79
2	3202	Shri Radhe Shaym Sharma	5
3	1652	Shri Arvind Kumar Soni	1.92
4	3806	Shri Sanat Kumar Kashyap	12.71
5	4477	Shri Mahinder Kumar	1.29
6	4480	Shri Hemant Kumar Yadav	2042
7	1554	Shri Dharam Prakash Sharma	3.29
8	4143	Shri Ravindra Kumar Agrawal	9.28
9	2571	Shri Akhilesh Shukla	1.79
10	1058	Raj Kumari Mishra	3.93
11	4402	Shri Niraj Kumar Shrivastava	1
12	4484	Shri Jai Narayan Gupta	1.93
13	4463	Shri Praneet Sharma	1.79
14	3048	Shri Deepak Kishanchand Wadhwani	3.5
15	2909	Shri Krishna Ballabha Kumar Pandey	1.29

17. Annexure P-9 contains the list of total marks of candidates who were called for personal interview on the 6th and 7th of April, 2007, which disclose the aggregate marks obtained by the 15 candidates, both in the written examination, as well as in the interview and the percentage arrived for 225

marks, which was fixed for the written examination and interview (200+25).
The same is as under:

S.No.	Roll No.	Name of the Candidates	Marks Obtaines Written & Interview Out of 225	
			Total	%
1	1030	Shri Axay Kumar Dwivedi	124.79	55.46
2	3202	Shri Radhe Shaym Sharma	104	46.22
3	1652	Shri Arvind Kumar Soni	95.92	42.63
4	3806	Shri Sanat Kumar Kashyap	90.71	40.32
5	4477	Shri Mahinder Kumar	84.29	37.46
6	4480	Shri Hemant Kumar Yadav	81.42	36.19
7	1554	Shri Dharam Prakash Sharma	79.29	35.24
8	4143	Shri Ravindra Kumar Agrawal	76.28	33.90
9	2571	Shri Akhilesh Shukla	72.79	32.35
10	1058	Raj Kumari Mishra	69.93	31.08
11	4402	Shri Niraj Kumar Shrivastava	67.00	29.78
12	4484	Shri Jai Narayan Gupta	62.93	27.97
13	4463	Shri Praneet Sharma	61.79	27.46
14	3048	Shri Deepak Kishanchand Wadhwani	54.5	24.22
15	2909	Shri Krishna Ballabha Kumar Pandey	52.29	23.24

18. One other factor to be mentioned is that of the 15 candidates, respondent No.5 Shri Hemant Kumar Yadav, son of Ram Lal is the only candidate who belongs to the Other Backward Class category.

19. Having noted the above factors, in the first place, we wish to deal with the question as to whether the High Court was empowered to formulate its own procedure in the matter of selection for the post of Madhya Pradesh Higher Judicial Service. The initial contention raised on behalf of the petitioners,

as well as the appellants centres around the said question and we feel that the same should be addressed at the first instance.

20. In order to appreciate the said contention, the relevant factors to be noted are some of the provisions contained in the Rules, as well as the advertisement. Under the last paragraph of the un-amended Rule 7, it was stated that the procedure of selection for direct recruitment and promotion to Categories (a), (b), (c) and (d) of Rule 3(1), shall be such as may be prescribed by the High Court. Under Rule 3(1), five categories of service have been mentioned in the un-amended Rule. When the Rules came to be amended as published in the Madhya Pradesh Gazette dated 08.06.2005, Rule 3(1) came to be amended wherein, the category of District Judges was restricted to only three categories, namely, (a) District Judges (Entry level), (b) District Judges (Selection Grade) and (c) District Judges (Super time scale), as against four categories as it originally stood under the un-amended Rule 3(1). Therefore, in consonance with the amended Rule 3 (1), Rule 7 also came to be amended. The last para of Rule 7 also came to be amended, which though has been extracted earlier can be noted again. It reads as under:

"The procedure for selection for direct recruitment and promotion shall be such, as may be specified by the High Court from time to time."

21. Keeping the above provision, namely, the last paragraph of Rule 7 in mind, when we examine para 9 of the advertisement dated 21.08.2006, the relevant paragraphs to be noted are para 9 (i), (iv) and (vi). Para 9(i) empowers the High Court to shortlist the candidates at the preliminary stage, i.e., before the holding of the written examination. Para 9 (iv) empowers the High Court to decide as to such of those candidates who can be called for interview based on the evaluation of their performance in the written examination and para 9 (vi) provides as to how the ultimate selection of the candidates on the basis of aggregate marks obtained by them both in the written examination and interview are to be made.

22. Keeping the above Rule position, as well the prescription contained in the advertisement relating to power of the High Court as provided therein. in mind, when we examine the contention raised by Shri Marlapalle, learned senior counsel for the petitioners, the sum and substance of the submission was that under the Rules, there was no provision for adopting the procedure of normalization of the marks secured by the candidates in the written

examination and that, therefore, the said procedure adopted by the High Court cannot be sustained.

23. It was also contended that while making the final selection and appointment of the 3rd respondent, the prescription of 50% cut-off marks in the aggregate marks was again not prescribed either in the Rule nor in the advertisement and thus, such a prescription evolved by the High Court on its own was without any authority and, therefore, the ultimate selection and appointment of the 3rd respondent cannot be sustained. It was, therefore, contended that on the whole, the selection is liable to be set aside. To support his stand, Shri Marlapalle learned senior counsel, referred to the Shetty Commission Report, which was accepted by this Court where the benchmark of 120 out of 200 marks, i.e. 60%, was fixed, which in turn stated that the said prescription should be followed, unless or otherwise the High Court Rules provide for a different benchmark and the prescription of a benchmark for viva voce.

24. The stand of the High Court as submitted by Shri Shrivastava, learned senior counsel for the respondent High Court, was that by virtue of the enormous powers provided in Rule 7 of the 1994 Rules as amended in 2005, read along with para 9 (iv) and (vi), the High Court was well justified in formulating the procedure in making the selection.

25. In the case on hand, since Rule 7 specifically states that the procedure of selection for direct recruitment and promotion shall be such as maybe specified by the High Court from time to time, it will appropriate to examine as to what extent the said Rule can be interpreted, in order to state whether the procedure evolved by the High Court in the case on hand, can be said to be in consonance with the said power contained in Rule 7.

26. As contended by the learned senior counsel for the High Court, Rule 7 specifically deals with the direct recruitment of District Judges as provided for in Rule 3(1) of the amended Rules. Therefore, in the absence of any challenge to the said Rule 7 as prescribed or any serious infirmity pointed out in the said Rule, going by the Rule as it stands, it can be stated that the High Court has been vested with the required power to evolve its own procedure of selection for direct recruitment and promotion in respect of Entry Level District Judges and that the High Court can specify such procedure from time to time. In this respect, we find force in the submission of Shri Shrivastava, learned senior counsel for the High Court when he stated that the said Rule 7 fully empowered the High Court to evolve its own procedure.

27. It cannot be said that the said Rule 7 in anyway conflict with whatever that has been recommended in the Shetty Commission Report. The Shetty Commission Report, while prescribing a benchmark of 60% marks for the written examination, without any prescription of minimum marks in the viva voce, itself mentions that such recommendation was subject to prescription of any Rule; which operates in the respective High Courts. Therefore, so long as Rule 7 operates in the field and the said Rule does not conflict with any other constitutional or statutory provision or any other Rule or regulation governing the subject, the said Rule empowering the High Court to formulate its own procedure and specify such procedure from time to time, in our considered opinion, is valid and also justified. Such a provision does empower the High Court to formulate a procedure for the purpose of selection of direct recruitment to the post of Entry Level District Judges.

28. In this context, it will be appropriate to make reference to Articles 233-236, of Chapter VI of the Constitution, which exclusively deals with the appointment of District Judges, recruitment of persons other than District Judges to the judicial service, the control of the High Court over subordinate courts and other incidental matters connected with subordinate courts and the judges who man those courts. For our present purpose we only need to note Articles 233, 234, 235 and 236 falling under Chapter VI which are as under:

Chapter VI

Subordinate Courts

233. Appointment of district judges-(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment.

234. Recruitment of persons other than district judges to the judicial service - Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made

by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

235. Control over subordinate courts - The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

236. Interpretation - In this Chapter -

(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

29. Article 233(1) specifically states that the appointment of persons to be made, as well as the posting and promotion of District Judges in any state, can be made by the Governor of the state in consultation with the High Court exercising jurisdiction in relation to such a state. In other words, while the Governor of the respective state is the appointing authority of the District Judges, the selection for such appointments, as well as the subsequent aspects, namely, postings, promotions, etc. of the District Judges, are to be determined by the High Court in respect of the concerned state.

30. When such being the constitutional mandate, which empowers the respective High Court to deal with the selection of District Judges, within its jurisdiction and the ultimate appointment to be made by the concerned

Governor of such a State, a reading of Article 233(1) of the Constitution along with Rule 7 of the 1994 Rules, as amended in the year 2005, it will have to be held that the 1st respondent High Court is invested with every power and authority to evolve an appropriate procedure in the matter of selection for direct recruitment and promotion of Entry Level District Judges and that depending upon the exigencies, such procedures can also be specified by the 1st respondent High Court from time to time. Therefore, we have no difficulty in holding that the 1st respondent High Court was fully empowered under Rule 7 to prescribe the required procedure for selection of Entry Level District Judges by way of direct recruitment and specify such procedure from time to time according to the exigencies prevailing.

31. In this background of the Rule prevailing, when we examine the prescription contained in para 9(iv) of the advertisement dated 21.08.2006, we must state that such prescription contained therein, empowering the High Court to decide which of the candidates can be called for the interview based on the evaluation of their performance in the written examination, should also be held to be in consonance with Rule 7 and Article 233(1) of the Constitution.

32. Once we steer clear of the said position, the next submission of the learned senior counsel for the petitioner was that when assuming Rule 7 empowers the High Court to follow its own procedure, it should have been disclosed in the advertisement. The contention of the learned senior counsel was that whatever procedure evolved by the High Court should have been disclosed well in advance by the High Court or at least before the written examination was conducted. When we consider the said submission, we find that there is a clear indication in para 9 of the advertisement as to in what manner the High Court is going to conduct the selection process.

33. Rule 9(i) makes it clear that the candidates maybe shortlisted at the preliminary stage, i.e., before the written examination is held by the High Court. No one can find fault with such a prescription, inasmuch as such short listing will have to be necessarily made in order to ensure that only such of those candidates who satisfy the conditions in para 2-8 of the advertisement are duly complied with.

34. In fact, para 8 makes it clear that non-receipt of the forms of application, etc. in time by the candidate will not be accepted as an excuse for late submission of application forms. Meaning thereby, that any application for the post to be submitted before 30.09.2006, should be complete in all respects furnishing whatever

details which were required to be furnished and also satisfy the various conditions such as, age restriction, years of practice, character certificate, citizenship etc. If such conditions are not fulfilled, by exercise of such power contained under Rule 9(i), the High Court would be fully entitled to exclude the consideration of such candidates for participating in the written examinations.

35. In para 9(iii), it has been sufficiently indicated that each paper of the written examination will be for a duration of 3 hours, with a maximum of 100 marks to be scored. The object in holding the written examination in both the 1st and 2nd papers, have also been specifically highlighted in para 9(iii).

36. Once the written examination part is fulfilled, the High Court has to formulate a procedure by which the answer papers are to be evaluated in order to ascertain the marks scored by the respective candidates. Therefore, in para 9(iv) it has been specified that before calling any of the candidates for interview who appeared for the written examination, an evaluation will have to be made and based on the evaluation and performance, the High Court will decide as to who should be called for the interview.

37. The expression 'evaluation' would, therefore, take into its fold the minimum marks to be scored, the manner in which the evaluation is to be made and in the event of any requirement, to equalize the merits of the candidate in the written examination and follow any appropriate procedure in consonance with law, in order to ultimately arrive at a fair process by which the candidate can be called for interview, based on the evaluation of the marks in the written examination.

38. In a situation like this, where nearly 3000 candidates appeared for the written examination and the answer papers were evaluated by several District Judges, it cannot be held that there was every scope for variation in the assessment of the answers and the award of marks valued by different valuers. The High Court in exercise of its authority under Rule 7, read along with para 9(iv) adopted a fair procedure to normalize the marks of the candidates in order to assess their respective merits. Therefore, the expression evaluation used in para 9(iv), should be held to fully empower the High Court to even resort to such a step in a case like this, where more number of District Judges evaluated the answer sheets and thereby, it required the intervention of the High Court in its administrative side, to find a fair method by which the normalization of the marks could be worked out.

39. We are, therefore, in full agreement with the learned senior counsel for the High Court when he submitted that para 9(iv), read along with Rule 7, fully empowered the High Court to prescribe a procedure from the stage of

evaluating the answer sheets of the candidates, initially by different District Judges and after noticing different standard adopted by different District Judges in the matter of valuation of answer sheets of the candidates, for adopting the normalization process in order to streamline the whole selection in a fair manner. Therefore, the submission of Shri Marlapalle that every minute detail of the procedure, which the High Court followed in evaluating the answer sheets of the candidates, were not disclosed to them in the advertisement and on that the whole selection stood vitiated, cannot be accepted.

40. We have, therefore, no hesitation in holding that by virtue of Rule 7 and para 9(i), (iii), (iv) and (vi), there was enough prescription empowering the High Court to follow its own procedure in evaluating the answer sheets initially by the District Judges and subsequently by common evaluators, before holding the interview. We, therefore, reject the said submission made on behalf of the petitioners in attacking the procedure followed by the High Court in the matter of holding the selection pursuant to the advertisement dated 21.08.2006.

41. Having thus arrived at a conclusion that the High Court was empowered to formulate its own procedure, we proceed to find out whether the procedure evolved by the High Court can be held to be in any manner vitiated or not in consonance with any constitutional or statutory provisions or any of the principles as laid down by this Court cited before us.

42. In this context it is necessary to consider the judgment impugned in Civil Appeal No. 7790 and 7791 of 2011. Two of the candidates who competed in the selection and who were not among the 15 candidates selected for interview, challenged the selection before the High Court, which was considered by the Division Bench of the Madhya Pradesh High Court and by the impugned judgments, the contention raised on behalf of the appellants came to be rejected.

43. We are concerned with one of the contentions raised therein, namely, that in para 9 (iv) of the advertisement, it is prescribed that only such candidates will be called for interview as the High Court will decide on the basis of evaluation of their performance in the written examination, while in 9(vi) it is stated that the candidates will be selected on the basis of the aggregate marks in the written examination and the interview.

44. The contention raised on behalf of the appellant before the Division Bench was that sub-clauses (iv) and (vi) of para 9 of the advertisement, have to be harmoniously construed and such harmonious construction would lead to the conclusion that all candidates whose answer sheets were evaluated, will have to

be allowed to participate in the interview and that based on the Aggregate marks scored by them in the written examination and the interview, the ultimate selection should have been made. The Division Bench, while considering the said submission of the learned senior counsel, held as under in para 6.

"Mr. Nagrath submitted that both sub-clauses (iv) and (vi) of Clause 9 of the advertisement have to be harmoniously constructed. We agree with the learned counsel for the petitioner that sub-clauses (iv) & (vi) of Clause 9 have to be harmoniously constructed. Harmonious construction would mean such a construction as will ensure that both the sub-clauses (iv) and (vi) of Clause 9 are given effect to. If we construe sub-clause (vi) of clause 9 to mean that the number of candidates to be called for interview shall be twice the number of vacancies irrespective of their performance in the written examination as suggested by the learned counsel for the petitioner then sub-clause (iv) of Clause 9 which provides that only such candidates will be called for interview as the High Court may decide on the basis of valuation of their performance in the written examination, will be rendered nugatory. On the other hand, if we construe sub-clause (vi) of Clause 9 of the Advertisement to mean that aggregate marks in the written and interview obtained by only those candidates who are called for interview on the basis of their performance in the written examination are to be taken into consideration for the selection of the candidates then both the sub-clauses (iv) and (vi) of Clause 9 are given effect to. A harmonious construction of sub-clauses (iv) and (vi) of Clause 9 of the advertisement would thus mean that only candidates who secure the qualifying marks on the valuation of the written examination, are called for interview and the marks of such candidates called for interview are aggregated to find out their position in the merit list for the purpose of selection."

(Emphasis Added)

45. Having regard to our conclusions stated above, we find that the conclusion of the Division Bench is also well justified. One another contention, which was raised before the Division Bench was that one of the appellants, namely, the appellant in Civil Appeal No.7790 of 2011 belonged to OBC category and that when 3 post were reserved for OBC category, as mentioned in the advertisement, the appellant ought to have been selected in that category. The said contention

was also rejected by the Division Bench rightly by holding that the expression suitable candidates mentioned in the advertisement would mean candidates who qualify in the written examination for interview, in terms of subpara (iv) of para 9 of the advertisement and since the appellant did not even come within the zone of candidates who were called for interview, on the basis of valuation of his performance in the written examination, he was rightly found not suitable for the post reserved for OBC category. As we fully concur with the above conclusions of the Division Bench on the points raised before it, we do not find any merit in any of the contentions raised by the appellants in the above two Civil Appeals.

46. Having thus found and held that by virtue of Rule 7 and para 9 of the advertisement dated 21.08.2006, the High Court was fully empowered to evolve its own procedure for making selection for appointment to the post of Entry Level Judges, for which the advertisement was made in the year 2006, we now proceed to find out whether the procedure evolved by the High Court can in anyway be held to be vitiated and whether on that score the selection can be interfered with, while also determining whether the ultimate selection and appointment of the 3rd respondent by the High Court can be held to be valid in law.

47. While dealing with the said aspect of the challenge, we have to note the steps taken by the High Court after the advertisement was issued and after the exam was conducted on 17.12.2006. From the counter affidavit filed by the 1st respondent High Court, we find that the High Court constituted a Selection Committee, consisting of 6 Judges of the High Court, with whom the process of direct recruitment to the post of Addl. District Judges, through competitive examination was entrusted. The said Selection Committee held its meeting on 22.03.2007. In the said meeting, the Committee passed the necessary resolutions, which we have extracted in the initial part of our judgment.

48. Subsequently, an Interview Committee of Seven Senior Judges interviewed the short listed 15 candidates on the 6th and 7th April, 2007. Thereafter, the Selection Committee again met on 18.04.2007 and finalized the selection in which, it resolved to recommend the 3rd respondent for appointment to the post of District Judge in Higher Judicial Service by direct recruitment. Based on the resolution of the Selection Committee, the Registrar General forwarded the recommendation of the High Court to the Government of Madhya Pradesh for issuance of the necessary appointment order in favour of the 3rd respondent.

49. When we perused the initial resolution passed by the Selection Committee

902. Mahinder Kumar Vs. High Court of M.P.(SC) I.L.R.[2014]M.P.

dated 22.03.2007, we find that as per the 1st resolution, the Selection Committee decided that based on the evaluation made by the District Judges, a minimum of 35 % of marks in respect of SC/ST candidates and 40% of marks in respect of general candidates was required, in the I and II paper, to qualify for viva voce. Going by the said resolution, it is seen that the evaluation made by the District Judges was to be kept as the basis for ascertaining the marks secured by the candidates, both in the reserved category, as well as in the general category in order to become eligible for attending the interview.

50. As per the 2nd resolution of the Selection Committee, for the purpose of determining the merit of the candidates finally, it felt necessary to evaluate the papers of those candidates who were short listed for the purpose of interview by way of a common evaluation in which process the marks secured by the candidates in the written examination in the I as well as the II paper, would be normalized. The apparent purpose was, as stated by the 1st respondent in the counter affidavit that the valuation, which was carried out by the District Judges, were more in number and therefore, there was different yardsticks applied by those District Judge evaluators. It was, therefore, decided to make a further evaluation for the purpose of normalization in order to proceed with the final step of applying para 9 (vi) of the advertisement, to find out the aggregate of the marks secured by the candidates who were interviewed, in order to finalize the selection. It has been stated so by the High Court in para 10 of the counter affidavit. The relevant part of the said para 10 reads as under:

"10. That after the valuation carried out by the District Judges, a decision was taken by the Selection Committee on 22.3.2007 that a general candidate securing 40% marks and above in any of the two papers and the SC/ST candidates securing 35% marks and above in any of the two papers, shall be further evaluated for the purpose of normalization and after normalization is done, the marks awarded by the common evaluators and the marks secured in the viva voce would be added for the purpose of determination of merit position."

51. While noting the purpose for normalization, as per the second resolution of the Selection Committee passed on 22.03.2007, the above referred to stand of the first respondent can be noted. We have to, however, state that in the said statement, what has been stated about the first resolution, namely, the determination of the marks, 35% for reserved category, 40 % for general category, has not been correctly stated on behalf of the High Court. We have to clarify the said position in

order to efface any misunderstanding about the procedure followed by the Selection Committee. In other words, since the selection process was entrusted with a Selection Committee and the said process was carried out by the Selection Committee by passing an appropriate resolution and based on such resolution, the required statements were also prepared at the behest of the Selection Committee, we are of the view that it will be appropriate to state what exactly was the procedure actually followed by the High Court. Based on the materials placed before us, certain inconsistencies, which are found in the counter affidavit filed on behalf of the High Court as compared to the Annexures filed have to be stated. Therefore, in the above extracted part of the counter affidavit as found in para 10, as compared to the resolution of the Selection Committee, we find that as per the Selection Committee's resolution, the candidates who had secured 35% in the reserved category and 40 % in general category in each of the paper I and II, based on the evaluation made by the District Judge, was determined as the criteria to qualify for viva voce. To put it more precisely, a candidate in order to become eligible to participate in the viva voce should have secured, insofar reserved candidates is concerned, 35% marks and insofar as general category candidate is concerned 40% marks separately in the I paper and in the II paper and not in any one of the papers as sought to be explained in the opening sentence of the counter affidavit.

52. The said position can also be further ascertained by making reference to the certified true copy of the tabulation sheets issued by the Registrar General of the High Court, which has been filed as Annexure P-6. The said tabulation sheet makes it clear that it consists of names of candidates who were selected for personal interview to be held on the 6th and 7th of April, 2007, based on the marks awarded by the District Judges. The names of the petitioners and respondent Nos. 3 to 8, are mentioned in the said annexure P-6 and we also find that each one of those 15 candidates who ultimately participated in the interview, had secured more than 40% marks in paper I, as well as in paper II. Therefore, reading annexure P-6 along with the first resolution of the Selection Committee dated 22.03.2007, it can be safely concluded that the basis for ascertaining the candidates who were eligible to be interviewed, was based on the minimum marks of 35% in the reserved category and 40% in the general category, secured by the respective candidates in the evaluation made by the District Judges. In other words, the normalized marks were not the basis for determining their eligibility to participate in the viva voce. We specifically say so inasmuch as we find under Annexure P-7, which was also certified as a true copy, the Registrar General disclosed the names of the very

same 15 candidates, namely, the petitioners and respondent Nos. 3 to 8, whose normalized marks were awarded by the common evaluator of the candidates and who were interviewed by the Selection Committee on the 6th and 7th of April, 2007, were shown in that list and the normalized marks by the common evaluators were also disclosed in the said list. A perusal of the marks secured by the very same 15 candidates in paper I and paper II disclose that except in respect of four candidates, the remaining candidates did not secure 40% marks in both the papers. Therefore, reference to Annexure P-6 and P-7, read along with first resolution dated 22.03.2007, make the position abundantly clear that the marks awarded by the District Judge in their evaluation, were taken as the basis to ascertain the marks of the 15 Candidates, who secured the required minimum marks set by the Selection Committee, which made them eligible to participate in the viva voce.

53. We have also noted one other stand made on behalf of the High Court in paragraph 11 (a) and (b) and paragraph 12 of the counter affidavit. In para 11 (a) it has been stated that after the evaluation of the answer books by the District Judges, the answer books of those candidates who had secured 40% marks and above in any paper, were sorted out for common evaluation for normalization and that the number was 103. The said 103 papers were stated to have been sent to two evaluators. The first paper to one former Chief Justice of Punjab and Haryana High Court and the second paper was sent to another Retd. Judge of the Madhya Pradesh High Court, for such common evaluation for the purpose of rationalization and normalization. Since the said statement with particular reference to the number of candidates has been mentioned, no doubt can be entertained with reference to the said statement. However, having regard to our conclusion, stated in the earlier paragraph, based on the resolution of the Selection Committee dated 24.02.2007 and the Annexure P-6 and P-7, the certified true copies disclosing the marks secured by the 15 shortlisted candidates. It will have to be held that in the ultimate process, only those 15 candidates, namely, the petitioners and respondents 3 to 8, alone became eligible to participate in the viva voce. Any discrepancy in the said statement contained in para 11(a) and 11 (b) as well as para 12 of the counter affidavit, therefore, need not deter us from proceeding further for finding out the ultimate selection made by the Selection Committee, which was also approved by the Full Court in its resolution dated 22.04.2007. Our above conclusion is also fortified by the final communication forwarded by the Registrar General to the State Government dated

24.04.2007. In the second paragraph it has been specifically stated as under;

"as per the norms set out by the High Court candidates of general category were required to secure 40% marks in each paper of the written examination and other candidates related to OBC, SC and ST were required to secure 35 % in each paper of the written examination. On the basis of aforesaid norm only 14 candidates of general category and 1 candidate of OBC category have secured 40% and 35% marks respectively in each paper of the written examination, therefore, they were found eligible to be called for the interview."

(Underlining is ours)

54. The above statement found in the final communication addressed by the Registrar General to the State Government for the purpose of issuing necessary appointment order in favour of the 3rd respondent, also makes the position clear that the methodology followed by the High Court based on the resolution of the Selection Committee dated 24.04.2007, was that the 40% marks secured by general category candidates and 35 % marks secured by reserved category candidates in each of the papers evaluated by the District Judges was the basis to finalize the names of 15 candidates for the purpose of interviewing them on the 6th and 7th of April, 2007, by the Selection Committee and not based on the normalization of marks. Once again, at the risk of repetition, we want to thus, make the above position clear in order to dispel any confusion regarding the final list of 15 candidates who were shortlisted for attending their viva voce on- the 6th and 7th of April, 2007, based on the resolution of the Selection Committee dated 22.03.2007.

55. Once we steer clear of the abovesaid position by which the petitioners and respondents 3 to 8 were ultimately interviewed by the Selection Committee of Judges on the 6th and 7th of April, 2007, we have to now find out as to the subsequent stages of the process of selection made by the High Court, which ultimately resulted in selection and appointment of the third respondent: While the 15 candidates were interviewed by the interviewing committee on the 6th and 7th of April, 2007, each of the member of the interviewing committee, who were seven in number, awarded independent marks; while holding the interview for the 15 candidates. The marks obtained by the candidates in the interview, as noted by each of the Member of the Interview Committee was noted in Annexure R4, filed along with the counter affidavit Annexure P-8 is the certified true copy of the tabulation sheet of candidates, who were interviewed on the 6th and 7th of April,

2007, issued by the Registrar General of the High Court, which disclose the interview marks, namely, the average marks secured by each of the 15 candidates. Thereafter, the Selection Committee met on 18th April, 2007. Annexure P-9 contains the total marks of the candidates who were interviewed on the 6th and 7th of April, 2007, i.e., the total marks obtained in the written examinations and the viva voce and based on the said aggregate marks secured by the 15 candidates, the percentage of such marks was also arrived at and noted. As per Annexure P-9 while the third respondent had secured 55.46 %, the 15th candidate had secured 23.24 %. The first four candidates in the said list alone had secured more than 40% in the aggregate. The sixth candidate who belonged to OBC category had secured 36.19 % of the aggregate marks.

56. The Selection Committee, which met on 18.04.2007 in its resolution, ultimately decided to recommend the third respondent alone for being appointed as officiating District Judge in Higher Judicial Service, on the basis of the marks secured by him which was 55.46% in the aggregate and it further resolved that the remaining 14 candidates who were called for interview and who had secured less marks than the third respondent, were found not suitable for appointment. The said resolution was filed as Annexure R-5, along with the counter affidavit of the first respondent High Court. In fact, in Annexure R-6 to the counter affidavit, which is again a statement containing the total marks of the 15 candidates who were interviewed on the 6th and 7th of April, 2007, contained a note. The note reads as under:

"Shri Axay Kumar Dwivedi (Roll No.1030) who obtained more than 50 % marks as indicated above is found suitable to be recommended for appointment as District Judge on probation under Rule 5(1)(c) of M.P. Higher Judicial Service (Recruitment & Conditions of Service) Rules, 1994 after due police verification."

57. A reading of the said note gives an impression as though 50 percentage of aggregate marks was set as benchmark for a candidate to get selected for the post of entry level District Judge. Mr. Shrivastava, learned senior counsel appearing for the High Court, clarified that the said note made by the Registrar General, was not really a statement issued with the authority of the High Court. The learned senior counsel submitted that neither the resolution of the Selection Committee dated 18.04.2007, nor any of the earlier resolutions of the Selection Committee, ever decided that 50% of aggregate marks should be the laid down as a benchmark for the selection and appointment to the entry level of District Judges. Therefore, according to the learned senior counsel, the said

statement found in Annexure R-6, cannot be taken to have laid down any authentic criteria by the High Court, in order to find fault with the ultimate selection finalized by the first respondent High Court. We find considerable force in the submission of the learned senior counsel appearing for the High Court. As rightly pointed out by the learned senior counsel, any such criteria of fixing 50% of aggregate marks as the benchmark for making the selection, was neither resolved in any of the resolutions of the Selection Committee or any other proceedings of the High Court, nor was there anything stated in so many words in the counter affidavit of the first respondent High Court. Therefore, based on the said note appended to Annexure R-6, there is no scope to find fault with the ultimate selection and appointment made by the first respondent High Court.

58. In the light of our above conclusion, the only other question that remains to be considered is as to whether the selection and appointment of the third respondent, as recommended by the Selection Committee in its resolution dated 18.04.2007, which was approved by the Full Court in its meeting held on 22.04.2007, calls for interference on the footing that such a selection made by the High Court does not satisfy the legal requirement.

59. When we consider the said question, it will have to be borne in mind that in the various decisions placed before us, by both the parties, the common principle stated is that in the matter of selection to a post in the higher judiciary MERIT should be the fundamental criteria. No one can dispute with the said proposition. Therefore, what is to be ultimately examined is as to whether the process adopted by the High Court in the matter of selection of entry level District Judges, pursuant to the advertisement dated 21.08.2006, which led to the ultimate selection and appointment of the third respondent, while holding the rest of the 14 candidates as not found suitable for appointment, can be found fault with. It is relevant to mention that none of the aggrieved candidates have made any allegation of mala fides or lack of bona fides, as against any of the Selection Committee members or for that matter in the manner in which the interview was held by the interviewing committee or with regard to the valuation of marks arrived at either by the District Judges or in the normalization of marks ultimately arrived at by the common evaluators. The only submission was that the methodology adopted by the Selection Committee in resorting to the normalization process was a departure in the midway of the selection process and therefore, on that score the ultimate selection cannot be approved. As far as the said challenge is concerned we have held that having regard to the power vested in the High Court under Rule 7, as well as paragraph

9 of the advertisement, in particular para 9 (iv), the High Court was fully empowered to prescribe its own fair procedure for the purpose of evaluation of the marks of the candidates, in order to make the ultimate selection. Therefore, in the absence of any other attack to the selection process made by the High Court by constituting a Selection Committee and the procedure followed by the said Selection Committee, which ultimately arrived at the merit list of the 15 shortlisted candidates for finalizing the selection, it will have to be held that no flaw can be found in the said process adopted by the High Court.

60. In this context, reference can be made to *Ramesh Kumar* (supra). In para 11, while making reference to earlier decisions of this court, it has been held as under:

11. In *State of U.P. v. Rafiquddin, Krushna Chandra Sahu (Dr.) v. State of Orissa, Manjeet Singh v. ESI Corpn. and K.H. Siraj v. High Court of Kerala*, this Court held that the Commission/Board has to satisfy itself that a candidate had obtained such aggregate marks in the written examination as to qualify for interview and obtained "sufficient marks in viva voce" which would show his suitability for service. Such a course is permissible for adjudging the qualities/capacities of the candidates. It may be necessary in view of the fact that it is imperative that only persons with a prescribed minimum of said qualities/capacities should be selected as otherwise the standard of judiciary would get diluted and substandard stuff may get selected. Interview may also be the best mode of assessing the suitability of a candidate for a particular position as it brings out the overall intellectual qualities of the candidates. While the written test will testify the candidate's academic knowledge, the oral examination can bring out or disclose overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership, etc. which are also essential for a Judicial Officer.

(Emphasis Added)

61. With that, when we come to the last of the questions, namely, whether the ultimate selection of the third respondent alone leaving out the rest of the 14 candidates as not suitable, can be held to be justified. In this context, we will have to make a reference to a fair statement made by Mr. Marlapalle, learned senior

counsel who appeared on behalf of the petitioners that he is not for a moment raising any doubt or question the marks allotted by the interviewing committee members, to the various candidates based on the their appraisal of the candidates in the interview. In fact a perusal of the marks awarded by each of the Seven members of the Interview Committee disclose their identity of mind while awarding marks in the interview to each of the candidate interviewed by them. The interview committee's exercise, while interviewing the 15 candidates on the 6th and 7th of April, 2007 can thus be held to be above board. In the same breath, it will have to held that the Selection Committee's ultimate decision in their resolution dated 18.4.2007, in holding that in their fair assessment, the third respondent alone, who secured 55.46% marks in the aggregate, as the only suitable candidate for holding the post of entry level District Judge, cannot be assailed. It is by now well settled that no Court, including this Court can venture to go behind the said assessment made by an expert committee consisting of high level members of the judiciary of the State and state that the said decision should be varied by holding that the other candidates whose performance was also appraised by the said expert committee, should be held to be suitable on par with the selected candidate and that they should also be selected and appointed. This Court should never make even an attempt to go behind the ultimate decision of the Selection Committee in order to set at naught the final decision arrived at by it, which was approved by the Full Court or vary its decision by adding some more candidates in the list by laying down a different criteria, by altering or by fixing any benchmark for being appointed to the higher judiciary of the State. In the light of our above conclusion, we do not find any scope to grant any relief to the petitioners in the writ petitions or in the civil appeals.

62. When we refer to the decisions relied upon by learned counsel for the respective parties, we find that none of the decisions relied upon by the learned senior counsel for the petitioners can have any relevance to the selection and appointment made by the first respondent High Court, inasmuch as we have found that based on the Rule prevailing and the prescription found in the advertisement, the first respondent High Court scrupulously followed the procedure without giving room for any deviation. We have also held that there was no conflict with the Shetty Commission recommendation, which had the approval of this Court in the decision reported in *All India Judges' Association and others* (supra). In the light of the prevailing Rule relating to the selection and appointment to the post in the Higher Judicial Services of the State of Madhya Pradesh, Mr. Marlapalle learned senior counsel for the appellant, while referring

to the decision rendered by this Court in *K.H. Siraj* (supra), sought to distinguish the same by pointing out that in the advertisement issued by the High Court of Kerala, extracted in para 4 of the said judgment in sub para 10(3), the minimum marks to be secured by the candidates in order to become eligible for appointment having been stated, the procedure followed by the High Court was held to be justified. While appreciating the attempt made by the learned senior counsel to distinguish the said judgment with reference to the present facts of the case, we will have to note that in that very judgment, reference has been made to that very Rule, namely, Kerala Judicial Services Rules, 1991, in particular Rule 7, which also empowered the High Court by stating that;

"....the list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments...."

(Emphasis Added)

63. While applying the ratio of the above said judgment, we may refer to para 50, where Rule 7 of the Kerala Judicial Service Rules, 1991, was referred to state as to how the High Court was justified in relying upon its Rule 7, while evaluating its own procedure, while making the selection. Paragraph 50 reads as under:

"50. What the High Court has done by the notification dated 26-3-2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc.) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26-3-2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High

Court to evolve its own procedure as it is the best judge in the matter. It will not be proper in any other authority to confine the High Court within any limits and it is, therefore, that the evolution of the procedure has been left to the High Court itself. When a high-powered constitutional authority is left with such power and it has evolved the procedure which is germane and best suited to achieve the object, it is not proper to scuttle the same as beyond its powers. Reference in this connection may be made to the decision of this Court in *Union of India v. Kali Dass Batish* wherein an action of the Chief Justice of India was sought to be questioned before the High Court and it was held to be improper."

(Emphasis Added)

64. The learned senior counsel then relied upon the decision of this Court in *Sanjay Singh and another* (supra), wherein a question arose as to ***"whether 'scaling of mark's is contrary to Or prohibited by the relevant rules."*** While explaining what is scaling', this Court has held as under in para 25:

"25. Similarly, when marks are assigned to answer-scripts in different papers, say by Examiner 'A' in Geometry and Examiner 'B' in History, the meaning or value of the "marks" is different. Scaling is the process which brings the marks awarded by Examiner 'A' in regard to Geometry scale and the marks awarded by Examiner 'B' in regard to History scale, to a common scale. Scaling is the exercise of putting the marks which are the results of different scales adopted in different subjects by different examiners onto a common scale so as to permit comparison of inter se merit. By this exercise, the raw marks awarded by the examiner in different subjects are converted to a "score" on a common scale by applying a statistical formula....."

65. Having thus noted what scaling is, this Court held in para 44 that scaling system as adopted by the commission, was unsuited for the Civil Judge (Junior Division Examination). In fact in para 46 this court after summarizing the position regarding scaling in the previous para, stated that the demonstrated anomalies and absurdities arising from the scaling system used, the commission will have to identify a suitable system of evaluation and if necessary by appointing a committee of experts. It however, made it clear that till any such new system is in place, the commission may follow the moderation system set out in the said judgment, with appropriate modifications. Going by the above dicta of this court, it will have to

be held that the normalization process adopted by the High Court in this case where the initial evaluation was made by several evaluators in the rank of District Judges, by appointing common evaluators in the status of a Retd. Chief Justice and a Retd. Judge of the High Court, was a prudent step taken by the 1st respondent High Court and no fault could be found with that approach. The decision relied upon by the senior counsel therefore, does not appeal to us to interfere, either with the judgment of the Division Bench, or with the ultimate selection made by the 1st respondent High Court.

66. The learned senior counsel then relied upon *K. Manjusree* (supra), wherein a question arose as to whether the procedure adopted by the Full Court in preparing a fresh selection list by applying the requirement of minimum marks for an interview, was legal and valid. It was in that context this court ultimately held that introduction of minimum marks for interview, would amount to changing the rules of the game, after the game was played, which was clearly impermissible. At the very outset it will have to be pointed out that the facts of that case was entirely different with what we are concerned. In the present case, no such minimum Marks in the interview, was prescribed for the purpose of selection. What all was done by the Selection Committee based on the power vested in the High Court, under Rule 7 and what was prescribed in para 9 (iv) of the advertisement, was a pattern of selection in which the 25 marks allotted for interview was simply applied. No minimum marks to be secured in the interview, was prescribed afresh after the selection process commenced and thereby, for anyone to state that there was any change in the 'rule of the game' in order to interfere with the selection. We therefore, do not find any scope to apply the said decision also to the facts of this case.

67. The learned senior counsel then relied upon *All India Judges' Association and others* (supra), in particular para 37 to point out that:

"37. Subject to the various modifications in this judgment, all other recommendations of the Shetty Commission are accepted."

68. The learned senior counsel, while referring to the said para, relied on para 10.97 of the Shetty Commissions Report, which is extracted as under:

"10.97 The Commission has received innumerable complaints that the selection by only viva-voce has more often led to arbitrariness if not whimsical selection, unjust if not unreasonable. With respect to High Courts, we do not want to carry any such impression. But we do feel that there is less

transparency and objectivity in the selection process. We would, therefore, like to recommend the following procedure to reduce degrees of subjectivity and arbitrariness and to promote more fairness and objectivity:

(i). There shall be written examination followed by viva-voce.

(ii) Written Examination must carry 200 marks on the subject /subjects prescribed by the High Court. The paper should be of a duration of minimum two hours.

(iii) The cut off marks in the Written Examination should be 60% or corresponding grade for general candidates and 50% or corresponding grade for SC/ST candidates. Those who have secured the marks above the cut off marks shall be called for viva-voce test.

(iv) The viva-voce test should be in a thorough and Scientific Manner and it should be taken anything between 25 and 30 minutes for each candidate. The viva-voce shall carry 50 marks. There shall be no cut off marks in viva-voce test.

(v) The merit list will be prepared on the basis of marks/ grades obtained both in the Written Examination and viva-voce."

69. Sub para (i) - (v) have been set out to show how while holding a written examination and a viva voce examination, prescription of marks and other aspects are to be followed. In fact those sub paragraphs, contained in para 10.97 of the Shetty Commission Report, can at best be stated to be a guideline, which any High Court should keep in mind, while resorting to selection for filling up the posts in the higher judicial service. In this context, in para 28, this court while prescribing the extent to which a direct recruitment to the higher judicial service for the post of higher judicial service for the District Judges can be made, also said that appropriate rules should be framed by the High Courts at the earliest possible time. Therefore, once the Rules come into place it will have to held that what all that can be expected of the high Court, would be to follow the said Rules. We have in this judgment held that by virtue of Rule. 7 and para 9(iv), the 1st respondent High Court had every authority to prescribe the procedure, while making the selection to the post of higher judicial service and that such procedure followed was also rational.

70. The learned senior counsel then relied upon *Ramesh Kumar* (supra).

The said decision in fact followed the principle that the rule of the game cannot be changed after the game was over as has been held in *K. Manjusree* (supra). Therefore, the said decision does not improve the case of the petitioners.

71. Mr. Shrivastava, learned senior counsel appearing for the High Court, referred to para 27 of the decision reported in *All India Judges' Association and others* (supra), wherein this court has emphasized the necessity for ensuring a high degree of efficiency in the matter of recruitment to the higher judicial service, while holding the competitive examination and viva voce examination. There can be no two opinions about the said principle and for that very reason we have held that the selection and appointment finalized and made by the 1st respondent High Court, does not call for interference.

72. The learned senior counsel rightly placed reliance upon *KH. Siraj* (supra). In para 50, this court has highlighted as to how the High Court was justified in evolving its own procedure, while making a selection to fill up a post in the higher judicial service. Para 50 has already been extracted above.

73. Applying the principles laid down by this court, we find that the procedure adopted by the 1st respondent High Court was well in order and the same does not call for interference.

74. Having regard to our above conclusions, we do not find any merit either in Writ Petitions or in the Civil Appeals and the same are therefore dismissed.

Petition dismissed.

AS PER ALTAMAS KABIR, CJI. :- Having had the opportunity of going through the judgment prepared by my learned brother, Fakkir Mohamed Ibrahim Kalifulla, J., I fully concur with the same. I just, however, wish to emphasise the fact that there is no material on record in support of Ground 'D' taken in the Writ Petition, wherein it has been mentioned that "To top it all, the minimum percentage requirement for final selection was **increased** to 50% at the final stage." [Emphasis Supplied].

2. Nowhere in the advertisement inviting applications for filling up the 20 posts in the Madhya Pradesh Higher Judicial Service by direct recruitment from the Bar, has it been indicated as to what would be the minimum percentage of marks, which would be required for final selection. The only place where reference has been made to the said figure is in the Resolution of the Selection Committee adopted on 23rd March, 2007, wherein in paragraph it has been indicated that on the basis of the evaluation made by District Judges, Scheduled Castes and Scheduled Tribes candidates would have to secure 35% marks and other candidates

would have to secure 40% marks in the first paper and in the second paper in order to qualify for the viva-voce. Apart from the above, there is no mention anywhere in the materials placed before us that 40% marks was the bench-mark for the purpose of appointment in any of the vacant posts. It may be mentioned that all candidates who had obtained more than 40% marks in either of the two papers were called for the interview and were allotted separate marks in the interview.

3. Thereafter, on the aggregate of the marks obtained by the candidates, only Shri Axay Kumar Dwivedi, placed at Serial No.1 of the merit list, was found suitable to be recommended for appointment as a District Judge on probation. However, the problem was caused by the note written by the Registrar General of the High Court indicated at the bottom of the final Select List, wherein it was mentioned that Shri Axay Kumar Dwivedi, who had obtained more than 50% marks, was found suitable to be recommended for appointment. The said note has given cause for Ground 'D' to the Writ Petition, although, there is nothing, even in the note, to suggest that previously 40% of the total marks had been declared or accepted to be the bench-mark for appointment. The note is merely a statement which indicates that the selected candidate, Shri Axay Kumar Dwivedi, had obtained more than 50% marks. The same does not either indicate or pre-suppose that there was a lower bench-mark for the Petitioners to claim in Ground 'D' that the bench-mark had been increased to 50%.

4. In that view of the matter, the Writ Petitions and the Civil Appeals cannot succeed and have to be dismissed, as has been indicated by my learned brother, Fakkir Mohamed Ibrahim Kalifulla, J.

Petition dismissed.

I.L.R. [2014] M.P., 915

SUPREME COURT OF INDIA

*Before Mr. P. Sathasivam, Chief Justice of India & Mr. Justice
Jagdish Singh Khehar*

Cr. A. No. 1454/2013 decided on 17 September, 2013

AJOYACHARYA

...Appellant

Vs.

STATE BUREAU OF INV. AGAINST ECO. OFFENCE ...Respondent

**A. Prevention of Corruption Act (49 of 1988), Section 19 -
Sanction - Competent Authority - Plurality of offices - Where an accused
holds a plurality of offices, sanction is essential only at the hands of
competent authority of the office which has been allegedly misused - Other**

public offices held by accused where an accused holds a plurality offices are irrelevant for purposes of obtaining sanction. (Para 14)

क. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 - मंजूरी - सक्षम प्राधिकारी - एक से अधिक पद - जब अभियुक्त एक से अधिक पद धारक है, मंजूरी केवल उसी कार्यालय के सक्षम प्राधिकारी के हाथों आवश्यक है जिसका अभिकथित रूप से दुरुपयोग किया गया - जब अभियुक्त एक से अधिक पद धारक है, मंजूरी अभिप्राप्त करने के प्रयोजन हेतु अन्य लोक कार्यालय असंगत है।

B. Prevention of Corruption Act (49 of 1988), Section 19 - Sanction - Appellant holding the post of Industries Commissioner being a member of IAS Cadre - He was also nominated as Director of MPSIDC by notification issued by Governor - Nomination of appellant as Director was not by virtue of his posting as Industries Commissioner - Governor is the competent authority and not the President of India as the post of Industries Commissioner was not misused but the post of nominee Director was misused. (Para 14)

ख. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 - मंजूरी - अपीलार्थी, आई.ए.एस. कैडर का सदस्य होने के नाते औद्योगिक आयुक्त के पद पर कार्यरत था - उसे राज्यपाल द्वारा जारी की गयी अधिसूचना से एम.पी.एस.आई.डी.सी. के निदेशक के रूप में भी नामनिर्दिष्ट किया गया था - अपीलार्थी का निदेशक के रूप में नामांकन, उसके औद्योगिक आयुक्त के रूप में पदस्थ होने के कारण से नहीं किया गया था - राज्यपाल सक्षम प्राधिकारी है और न कि राष्ट्रपति क्योंकि औद्योगिक आयुक्त के पद का दुरुपयोग नहीं किया गया था बल्कि नामनिर्दिष्टित निदेशक के पद का दुरुपयोग किया गया।

C. Prevention of Corruption Act (49 of 1988), Section 19 - Sanction - Necessity - Appellant not holding the post of nominee Director as he had already relinquished the charge of office which he is alleged to have misused - No need to obtain sanction under Section 19 of Prevention of Corruption Act, 1988. (Para 15)

ग. भ्रष्टाचार निवारण अधिनियम (1988 का 49), धारा 19 - मंजूरी - आवश्यकता - अपीलार्थी नामनिर्दिष्ट निदेशक के पद पर नहीं जैसा कि उसने पहले ही उस पदभार का त्याग कर दिया था जिसका अभिकथित रूप से दुरुपयोग किया गया था - भ्रष्टाचार निवारण अधिनियम 1988 की धारा 19 के अंतर्गत मंजूरी अभिप्राप्त करने की आवश्यकता नहीं।

D. Parity in law - Parity in law can be claimed only in respect of action rightfully executed and not otherwise. (Para 17)

घ. *विधि में समानता* – विधि में समानता का दावा केवल उचित रूप से निष्पादित कार्यवाही के संबंध में किया जा सकता है और अन्यथा नहीं।

E. *Prevention of Corruption Act (49 of 1988), Section 13(1)(d), Negotiable Instruments Act (26 of 1881), Section 141* – Appellant had attended the meeting in which the resolution dated 19.04.1995 was passed contrary to the decision taken by the Cabinet - As the appellant allowed the Board of Directors to pass the resolution in spite of the earlier decisions at the hands of the Cabinet Review Committee, culpability of appellant would emerge from Section 141(2) of N.I. Act. (Para 19)

ड. *अष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी), परक्राम्य लिखत अधिनियम, (1881 का 26), धारा 141* – अपीलार्थी उस सभा में उपस्थित था जिसमें मंत्रिमंडल द्वारा लिये गये निर्णय के विपरीत संकल्प दि. 19.04. 1995 पारित किया गया था – चूंकि अपीलार्थी ने मंत्रिमंडल पुनर्विलोकन समिति के पूर्वतर निर्णय के बावजूद निदेशक मंडल को संकल्प पारित करने की अनुमति दी, अपीलार्थी की दोषिता, परक्राम्य लिखत अधिनियम की धारा 141(2) से उत्पन्न होगी।

F. *Prevention of Corruption Act (49 of 1988), Section 13(1)(d) - Misuse of Office* - Whether the appellant had adopted corrupt or illegal means or had abused his position as public servant to obtain any valuable thing or pecuniary advantage, either for himself or for the industries to whom MPSIDC extended short term loans is a mixed question of fact and law and determination of issue would be possible only after rival parties have adduced evidence to establish their respective claims - Appeal dismissed. (Para 20)

च. *अष्टाचार निवारण अधिनियम (1988 का 49), धारा 13(1)(डी) – पद का दुरुपयोग* – क्या अपीलार्थी ने या तो स्वयं के लिये या उन उद्योगों के लिये जिन्हें एम.पी.एस.आई.डी.सी. ने अल्पावधि ऋण दिया है, किसी मूल्यवान वस्तु या धन संबंधी फायदा अभिप्राप्त करने के लिये अष्ट या अवैध जरिया अपनाया या अपने लोक सेवक के रूप में पद का दुरुपयोग किया, यह तथ्य एवं विधि का मिश्रित प्रश्न है और विवाद्यक का निर्धारण केवल परस्पर विरोधी पक्षकारों द्वारा अपने अपने दावों को स्थापित करने के लिये साक्ष्य पेश किये जाने के पश्चात संभव होगा – अपील खारिज।

Cases referred :

(1984) 2 SCC 183, (2007) 1 SCC 1, (2009) 8 SCC 617, (2007) 5 SCC 403, (2010) 3 SCC 330, (2013) 1 SCC 205.

J U D G M E N T

The Judgment of the Court was delivered by : **JAGDISH SINGH KHEHAR, J. :-** Investigation into the affairs of the Madhya Pradesh Industrial Development Corporation (renamed as Madhya Pradesh State Industrial Development Corporation, hereinafter referred to as the 'MPSIDC') was ordered with effect from 3.1.1996, by the State Government. Thereupon, a first information report bearing no. 25 of 2004 was registered under Sections 409, 406, 467, 468 and 120B of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'PC Act'). The allegations levelled in the first information report generally were, that the functionaries of the MPSIDC had permitted investment by way of inter corporate deposits (hereinafter referred to as the 'ICD's') through a resolution of the Board of Directors (of the MPSIDC) dated 19.4.1995. By the instant resolution, the Board (of the MPSIDC) authorized its Managing Director, to extend short term loans (including ICD's) out of the surplus funds with the MPSIDC, on suitable terms and conditions. The gravamen of the accusation was, that the Board of Directors' resolution dated 19.4.1995 was passed in disregard of an earlier decision taken in the Cabinet Review Meeting held on 28.1.1994, wherein a decision was taken that the MPSIDC would not extend financial assistance to industries. The petitioner herein had admittedly attended the said meeting held on 28.1.1994. The accusation also included the insinuation, that after the decision of the Cabinet Review Committee dated 28.1.1994, the Board of Directors (of the MPSIDC) had passed an endorsing resolution dated 31.1.1994, wherein it was resolved by the MPSIDC to stop financing industries, from out of its surplus funds. The petitioner herein had even participated in the instant proceedings held on 31.1.1994. Based on the aforesaid factual position, it was sought to be suggested, that undeterred by the decision during the Cabinet Review Meeting dated 28.1.1994, and the resolution of the Board dated 31.1.1994 (which had prohibited extension of financial assistance to industries), the Board of Directors' resolution dated 19.4.1995, authorized its Managing Director to extend short term loans (including ICD's) to industries, out of surplus funds with the MPSIDC, on suitable terms and conditions. It was also alleged, that the above controversial Board resolution dated 19.4.1995 was passed in complete disregard to the mandate contained in Section 292 of the Companies Act, 1965. After the aforesaid Board resolution dated 19.4.1995, it was

alleged, that the MPSIDC had extended ICD's to a large number of companies, out of which 42 companies had committed default in repayments. In the abovementioned first information report, it was also alleged, that the abovementioned transactions executed by the MPSIDC were illegal and in violation of law.

2. The ICD's referred to in the foregoing paragraph were executed during the period between 1995 and 2004. It was alleged, that four senior functionaries of the MPSIDC who were then members of the Board of Directors of the MPSIDC had deliberately supported the resolution of the Board of Directors dated 19.4.1995, despite the fact that they were aware of the Cabinet Review Meeting decision dated 28.1.1994, as well as, the earlier resolution of the Board of Directors of the MPSIDC dated 31.1.1994. Without their participation and support, it was alleged, that the controversial Board resolution dated 19.4.1995 could not have been passed.

3. It would also be relevant to mention, that allegations were also levelled against 42 defaulting companies in the first information report dated 24.7.2004. The said 42 companies had defaulted by not making repayments of the ICD's released to them, in terms of their contractual obligations. The said first information report, however, did not make any reference to a large number of other companies in whose favour the MPSIDC had likewise extended ICD's, simply because the companies had returned the loaned amount to the MPSIDC, in consonance with their contractual obligations.

4. A brief description of the four senior functionaries of the MPSIDC, against whom allegations were levelled, is being delineated below:

- (i) Rajender Kumar Singh : He was the then State Minister in the Commerce and Industries Department. He was also the then Chairman of the MPSIDC, having been appointed as such on 7.4.1994.
- (ii) Ajoy Acharya : He was a member of the IAS cadre, belonging to the 1976 batch. While holding the charge of the office of Industries Commissioner, Government of Madhya Pradesh, he was nominated as a Director of the MPSIDC in 1993. He continued as

such till 1998. In June 1998, he was transferred as Joint Secretary, Department of Heavy Industries, Government of India, whereupon, he ceased to be on the Board of Directors of the MPSIDC.

(iii) J.M. Ramamurthy : He was also a member of the IAS cadre. He was appointed as Special Director, on the Board of the MPSIDC in 1993. He retired from the IAS on 30.6.1998. Thereupon, he ceased to be on the Board of Directors of the MPSIDC.

(iv) Munadutt Pillai Rajan : He was also a member of the IAS cadre. He was appointed as the Managing Director of the MPSIDC. He retired from the IAS on 7.5.2000. Thereupon, he ceased to be the Managing Director of the MPSIDC.

5. The first charge sheet was filed on 24.9.2007. The allegations against the petitioner herein, Ajoy Acharya, were as follows:

“a) The petitioner was present at the Cabinet Review Meeting dated 28.01.1994 and Board Meeting dated 31.01.1994, where the decision relating to discontinuance of project financing/providing financial assistance was taken, and thus, the instant factual position was within petitioner’s personal knowledge.”

b) The petitioner was present in the Board Meeting dated 19.04.1995 in which the Board Resolution was passed to engage itself in Investments by way of ICD, and also in other Board Meeting after 28.01.1994 where decision relating to equity participation was taken. The petitioner did not object to the passing of these resolutions despite of his having been aware of the contrary decision taken at the Cabinet Review Meeting which was endorsed at the Board Meeting dated 31.1.1994.

c) The petitioner did not act bonafidely as the Cabinet Review

Meeting had specifically stopped giving of any financial assistance to industries out of the surplus funds available with the MPSIDC.

- d) The Board Resolution dated 19.04.1995 empowering the Managing Director to invest in ICD was in violation of Section 292 of the Companies Act, and also, in violation of Memorandum of Association and Articles of Association.
- e) The petitioner facilitated the passing of the aforesaid allegedly illegal Board Resolution, which became the foundation for all illegal ICD's.
- f) The petitioner facilitated the passing of the resolutions referred to above, by attending the said Board Meetings, wherein he did not object to the proposed resolutions in the Board Meetings."

6. The first charge sheet dated 22.9.2007 was filed in Special Case no. 7 of 2007, and the Special Judge, Bhopal, took cognizance thereof. It is the contention of the petitioner Ajoy Acharya, that upon his having perused the charge sheet dated 22.9.2007 (and the documents enclosed therewith), he learnt that no sanction was applied for or obtained, before initiation of the above prosecution against him. Under the belief, that prior sanction was a pre-requisite under Section 19 of the PC Act, as well as, under Section 197 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'CrPC'), the petitioner filed a petition under Section 239 of the CrPC (as well as, Section 19 of the PC Act) seeking discharge on the ground, that prosecution had been initiated against him without seeking sanction of the competent authority. The petition filed under Section 239 of the CrPC was dismissed by the Special Judge, Bhopal, on 11.4.2008.

7. Dissatisfied with the aforesaid order dated 11.4.2008, the petitioner preferred Criminal Revision Petition no. 1422 of 2008, in the High Court of Madhya Pradesh (before its principal seat at Jabalpur, hereinafter referred to as the 'High Court'). The aforesaid Criminal Revision Petition was dismissed by a Division Bench of the High Court on 29.8.2011. Aggrieved by the order passed by the Special Judge, Bhopal (dated 11.4.2008), and the order passed by the High Court (dated 29.8.2011), the petitioner preferred Petition for Special Leave to Appeal (Criminal) no. 61 of 2012. This Court issued notice in the above matter (as also in a connected matter i.e., Special Leave to

Appeal (Criminal) no. 400 of 2012) on 6.1.2012. While issuing notice, an interim order came to be passed on 6.1.2012, staying proceedings before the Special Judge, Bhopal (in Special Case no. 7 of 2007).

8. We have concluded hearing in the matter. Leave is granted.

9. We shall endeavour to first adjudicate the principal contention advanced at the hands of the appellant, namely, that the initiation of prosecution against the appellant was not sustainable in law, since sanction of the competent authority was not obtained before cognizance in the matter was taken. The particulars of the allegations levelled against the appellant in the charge sheet filed against him (and others) are irrelevant for the determination of the present controversy. We have already recorded hereinabove briefly, an outline of the controversy which resulted in the filing of the charge sheet (dated 22.9.2007) involving the appellant. Despite our above determination, it is imperative at the cost of repetition to notice, that the pointed allegation in respect of the appellant's culpability is drawn from the resolution of the Board of Directors of the MPSIDC dated 19.4.1995. For all intents and purposes, therefore, our determination on the merits of the controversy, will be based on the culpability of the appellant on account of his participation in the meeting of the Board of Directors, wherein the resolution dated 19.4.1995 was passed, without his having objected to the same.

10. Having recorded the cause for his being arrayed as an accused, the next step in the process of the present adjudication is to determine whether the participation of the appellant in the meetings in question was based on his position as a nominee Director on the Board of Directors of the MPSIDC, and/or in his capacity as a member of the IAS cadre allocated to the State of Madhya Pradesh. The above determination, would make all the difference to the outcome on the principal issue canvassed on behalf of the appellant. If the appellant's position as nominee director of the MPSIDC was abused, then the holding of the said position itself would be relevant for deciding the present controversy. If however, the office of Industries Commissioner, Government of Madhya Pradesh was abused, the consideration would be different. In the latter situation, the appellant being a member of the IAS cadre, his said position would necessarily have a relevant nexus to the issue in hand. It is essential to notice, that besides being a nominee Director of the Board of Directors of the MPSIDC, the appellant was simultaneously nominated as a Director of six other companies. The nomination of the appellant as Director in the other

companies (besides the MPSIDC), has no nexus to the allegations levelled against him in the charge sheet dated 22.9.2007. However, there is some doubt about the fact, whether the appellant participated in the controversial meeting of the Board of Directors (of the MPSIDC) only because of his holding the office of Industries Commissioner of the Government of Madhya Pradesh, which position he occupied as a member of the IAS cadre of the State of Madhya Pradesh.

11. The case set up by the appellant was, that it was mandatory for the prosecution to obtain sanction before initiating prosecution against him, as he held a government post, namely, the post of Industries Commissioner, Government of Madhya Pradesh. It was also submitted on the appellant's behalf, that he was a public servant, and the President of India was his appointing authority, as also his dismissing authority. Even while he was discharging his duties as Industries Commissioner, Government of Madhya Pradesh, and thereafter, when he had proceeded on appointment by way of deputation to the Central Government, his appointing and dismissing authorities remained the same. Insofar as his being nominated as a Director on the Board of the MPSIDC is concerned, the case set up by the appellant was, that his nomination co-existed with his appointment as Industries Commissioner, Government of Madhya Pradesh. In this behalf it was asserted, that his being nominated as a Director (with the MPSIDC) was the outcome/consequence/result of his holding the office of Industries Commissioner, Government of Madhya Pradesh. It was submitted, that had he not held the office of Industries Commissioner, he would not have been nominated as a Director (with the MPSIDC). It was further asserted, that consequent upon his appointment by way of deputation to the Central Government, his successor on the post of Industries Commissioner, came to be nominated as a Director on the Board of the MPSIDC. It was therefore, sought to be canvassed, that the appellant's nomination as Director of the Board of the MPSIDC, was a fallout/sequel of his appointment as Industries Commissioner, Government of Madhya Pradesh. It was accordingly his contention, that he continued to occupy the same position as he had occupied while holding the office of Industries Commissioner, Government of Madhya Pradesh, even after cognizance was taken by the Special Judge, Bhopal. The submission projected was premised on the foundation, that the offices held by the appellant were the outcome of his appointment to the IAS cadre. As such, according to the appellant, his participation in the proceedings of the Board of Directors culminating in its

resolution dated 19.4.1995, must be deemed to have been taken in his capacity as a member of the IAS cadre.

12. On the pleas canvassed at the hands of the learned counsel for the appellant, as have been noticed in the foregoing paragraph, there can be no doubt that merely the position held by the appellant as Commissioner Industries, Government of Madhya Pradesh, would not have vested in him the right to participate in the affairs of the MPSIDC. It was only on account of the nomination of the appellant as director of the MPSIDC, that vested in him the authority to participate in the controversial meeting where the MPSIDC passed its resolution dated 19.4.1995. Likewise, his nomination as a Director in six other companies did not vest in him any right whatsoever, to deal with the affairs of the MPSIDC. It is only on account of his being a nominee Director of the MPSIDC, that he assumed the responsibility and the power, to deal with the affairs of the MPSIDC. His participation in the proceedings of the Board of Directors which passed its resolution dated 19.4.1995 was therefore exclusively on account of his having been nominated as a Director on the Board of the MPSIDC. We must therefore, first endeavour, to deal with the credibility of the submission canvassed on behalf of the appellant, that the appellant's nomination as Director (with the MPSIDC) was the outcome of his holding the office of Industries Commissioner, Government of Madhya Pradesh. It was not disputed during the course of hearing, that the appellant's nomination as Director (with the MPSIDC) emerges from clause 89(2) of the Memorandum and Articles of Association of the MPSIDC. Clause 89 aforementioned is being extracted hereunder:

- “89 (1) The number of Directors shall not be less than three and more than twelve but the number can be increased or decreased by the Governor subject to the provisions of the Act.
- (2) Unless otherwise determined by the Governor from time to time not more than five Directors shall be nominated by the Governor so long as the Government's share does not exceed Rs.26 lakhs. In the event of Government's share exceeding this amount, the number of Directors to be nominated by the Governor will increase. The number of Directors so increased will be in proportion to the Government's share in excess of Rs.26 lakhs and the shares held by persons other than Government. The Directors other than those nominated by the

Governor shall be appointed by the Company in the general meeting.

- (3) The tenure of all Directors including Chairman and excluding Managing Director shall be for the period as fixed or determined by the State Government from time to time. The Managing Director shall retire on his ceasing to hold the office of the Managing Director. A retiring Director shall be eligible for reappointment.
- (4) The Governor shall have the power to remove any Director appointed and nominated by him including the Chairman and the Managing Director from Office at any time in his absolute discretion.
- (5) The Governor shall have the right to fill any vacancy in the Office of a Director caused by retirement, removal, resignation, death or otherwise of the Directors nominated/appointed by him.

A perusal of sub-clause (2) of clause 89 reveals, that nominee Directors to the MPSIDC are appointed by the Governor. The Governor (under sub-clause (4) extracted above) is also vested with the absolute discretion to remove a nominee Director. But what needs emphasis is, that clause 89 of the Memorandum and Articles of Association of the MPSIDC, does not contemplate that the Industries Commissioner, Government of Madhya Pradesh would necessarily, or automatically, or as a matter of course, must be nominated as Director of the MPSIDC. Likewise, clause 89 aforementioned, does not require a nominee director to be drawn out of members of the IAS cadre. In fact, in our view, the Governor under clause 89 has the absolute discretion to nominate anyone suitable as per his wisdom, as nominee Director to the MPSIDC. In the above view of the matter, it is not possible to accept, that the appellant's nomination as Director of the MPSIDC, was the outcome of his holding the office of Industries Commissioner, Government of Madhya Pradesh, or on account of his being a member of the IAS cadre. In the above view of the matter it is natural to conclude, that the participation of the appellant in the meeting of the Board of Directors of the MPSIDC on 19.4.1995 was not on account of his holding the office of Industries Commissioner, Government of Madhya Pradesh, or on account of his being a member of the IAS cadre. Having so concluded, we shall now

endeavour to determine, on the basis of the law declared by this Court, the veracity of the assertion made by the appellant, that prior sanction was mandatory, and in its absence, the prosecution initiated against the appellant should be considered to be without jurisdiction.

13. We shall first endeavour to deal with the law declared by this Court on the proposition being canvassed before us. In this behalf, reference may first of all be made to *R.S. Naik vs. A.R. Antulay*, (1984) 2 SCC 183. Observations made by this Court, as are relevant to the proposition canvassed on behalf of the appellant, are being extracted hereunder :

“21. Re: (b) and (c): It was strenuously contended that if the accused has held or holds a plurality of offices occupying each one of which makes him a public servant, sanction of each one of the competent authorities entitled to remove him from each one of the offices held by him, would be necessary and if anyone of the competent authorities fails or declines to grant sanction, the court is precluded or prohibited from taking cognizance of the offence with which the public servant is charged. This submission was sought to be repelled urging that it is implicit in Section 6 that sanction of that authority alone is necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motives. Section 6(1)(c) is the only provision relied upon on behalf of the accused to contend that as M.L.A. he was a public servant on the date of taking cognizance of the offences, and therefore, sanction of that authority competent to remove him from that office is a sine qua non for taking cognizance of offences. Section 6 (1)(c) bars taking cognizance of an offence alleged to have been committed by public servant except with the previous sanction of the authority competent to remove him from his office.

xxx

xxx

xxx

xxx

23. Offences prescribed in Sections 161, 164 and 165 IPC and Section 5 of the 1947 Act have an intimate and inseparable relation with the office of a public servant. A public servant occupies office which renders him a public servant and occupying the office carries with it the powers conferred on

the office. Power generally is not conferred on an individual person. In a society governed by rule of law power is conferred on office or acquired by statutory status and the individual occupying the office or on whom status is conferred enjoys the power of office or power flowing from the status. The holder of the office alone would have opportunity to abuse or misuse the office. These sections codify a well-recognised truism that power has the tendency to corrupt. It is the holding of the office which gives an opportunity to use it for corrupt motives. Therefore, the corrupt conduct is directly attributable and flows from the power conferred on the office. This interrelation and interdependence between individual and the office he holds is substantial and not severable. Each of the three clauses of sub-section (1) of Section 6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and Section 6 requires a sanction before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office. Therefore, when a public servant is accused of an offence of taking gratification other than legal remuneration for doing or forbearing to do an official act (Section 161 IPC) or as a public servant abets offences punishable under Sections 161 and 163 (Section 164 IPC) or as public servant obtains a valuable thing without consideration from person concerned in any proceeding or business transacted by such public servant (Section 165 IPC) or commits criminal misconduct as defined in Section 5 of the 1947 Act, it is implicit in the various offences that the public servant has misused or abused the power of office held by him as public servant. The expression 'office' in the three sub-clauses of Section 6(1) would clearly denote that office which the public servant misused or abused for corrupt motives

for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused. This interrelation between the office and its abuse if severed would render Section 6 devoid of any meaning. And this interrelation clearly provides a clue to the understanding of the provision in Section 6 providing for sanction by a competent authority who would be able to judge the action of the public servant before removing the bar, by granting sanction, to the taking of the cognizance of offences by the court against the public servant. Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider. By a catena of decisions, it has been held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of government servants against frivolous prosecutions and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants. (See *Mohd. Iqbal Ahmad v. State of Andhra Pradesh*, [1979] 2 S.C.R. 1007). The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him, to judge whether a serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether prima facie it has been so done. That competent authority alone

would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant, against whom sanction is sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the legislature clearly provided that that authority alone would be competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office.

24. Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the other which is neither alleged to have been used nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to us. We fail to see how the competent authority entitled to remove the public servant from an office which is neither alleged to have been used or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the learned counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that office on the date

on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an interpretation is contrary to all canons of construction and leads to an absurd and product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rogue's charter. (See *Davis & Sons Ltd. v. Atkins*)

xxx

xxx

xxx

xxx

26. Therefore, upon a true construction of Section 6, it is implicit therein that sanction of that competent authority alone would be necessary which is competent to remove the public servant from the office which he is alleged to have misused or abused for corrupt motive and for which a prosecution is intended to be launched against him.

27. In the complaint filed against the accused it has been repeatedly alleged that the accused as Chief Minister of Maharashtra State accepted gratification other than legal remuneration from various sources and thus committed various

offences set out in the complaint. Nowhere, not even by a whisper, it is alleged that the accused has misused or abused for corrupt motives his office as M.L.A. Therefore, it is crystal clear that the complaint filed against the accused charged him with criminal abuse or misuse of only his office as Chief Minister. By the time, the court was called upon to take cognizance of the offences, so alleged in the complaint, the accused had ceased to hold the office of the Chief Minister. On this short ground, it can be held that no sanction to prosecute him was necessary as former Chief Minister of Maharashtra State. The appeal can succeed on this short ground. However, as the real bone of contention between the parties was whether as M.L.A. the accused was a public servant and the contention was canvassed at some length, we propose to deal with the same.

xxx

xxx

xxx

xxx

68. Re. (f) & (g): The learned Judge after recording a finding that M.L.A. is a public servant within the comprehension of clause (12)(a) and further recording the finding that as on the date on which the Court was invited to take cognizance, the accused was thus a public servant proceeded to examine whether sanction under Section 6 of the 1947 Act is a pre-requisite to taking cognizance of offences enumerated in Section 6 alleged to have been committed by him. He reached the conclusion that a sanction is necessary before cognizance can be taken. As a corollary he proceeded to investigate and identify, which is the sanctioning authority who would be able to give a valid sanction as required by Section 6 for the prosecution of the accused in his capacity as M.L.A.? We have expressed our conclusion that where offences as set out in Section 6 are alleged to have been committed by a public servant, sanction of only that authority would be necessary who would be entitled to remove him from that office which is alleged to have been misused or abused for corrupt motives. If the accused has ceased to hold that office by the date, the court is called upon to take cognizance of the offences alleged to have been committed by such public servant, no sanction

under Section 6 would be necessary despite the fact that he may be holding any other office on the relevant date which may make him a public servant as understood in Sec 21, if there is no allegation that office has been abused or misused for corrupt motives. The allegations in the complaint are all to the effect that the accused misused or abused his office as Chief Minister for corrupt motives. By the time the Court was called upon to take cognizance of those offences, the accused had ceased to hold the office of Chief Minister. The sanction to prosecute him was granted by the Governor of Maharashtra but this aspect we consider irrelevant for concluding that no sanction was necessary to prosecute him under Section 6 on the date on which the court took cognizance of the offences alleged to have been committed by the accused. Assuming that as MLA the accused would be a public servant under Section 21, in the absence of any allegation that he misused or abused his office as MLA that aspect becomes immaterial. Further Section 6 postulates existence of a valid sanction for prosecution of a public servant for offences punishable under Sections 161, 164, 165 IPC and Section 5 of the 1947 Act, if they are alleged to have been committed by a public servant. In view of our further finding that M.L.A. is not a public servant within the meaning of the expression in Section 21 IPC no sanction is necessary to prosecute him for the offences alleged to have been committed by him.”

(emphasis is ours)

The conclusions drawn by this Court in *R.S. Naik's case* (supra) were affirmed by this Court in *Prakash Singh Badal vs. State of Punjab*, (2007) 1 SCC 1, wherein this Court held as under:

- “23. Offences prescribed in Sections 161, 164 and 165 IPC and Section 5 of the 1947 Act have an intimate and inseparable relation with the office of a public servant. A public servant occupies office which renders him a public servant and occupying the office carries with it the powers conferred on the office. Power generally is not conferred on an individual person. In a society

governed by the rule of law power is conferred on office or acquired by statutory status and the individual occupying the office or on whom status is conferred enjoys the power of office or power flowing from the status. The holder of the office alone would have opportunity to abuse or misuse the office. These sections codify a well-recognised truism that power has the tendency to corrupt. It is the holding of the office which gives an opportunity to use it for corrupt motives. Therefore, the corrupt conduct is directly attributable and flows from the power conferred on the office. This interrelation and interdependence between individual and the office he holds is substantial and not severable. Each of the three clauses of Sub-section (1) of Section 6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and Section 6 requires a sanction before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office. Therefore, when a public servant is accused of an offence of taking gratification other than legal remuneration for doing or forbearing to do an official act (Section 161 IPC) or as a public servant abets offences punishable under Sections 161 and 163 (Section 164 IPC) or as public servant obtains a valuable thing without consideration from person concerned in any proceeding or business transacted by such public servant (Section 165 IPC) or commits criminal misconduct as defined in Section 5 of the 1947 Act, it is implicit in the various offences that the public

servant has misused or abused the power of office held by him as public servant. The expression 'office' in the three Sub-clauses of Section 6(1) would clearly denote that office which the public servant misused or abused for corrupt motives for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused. This interrelation between the office and its abuse if severed would render Section 6 devoid of any meaning. And this interrelation clearly provides a clue to the understanding of the provision in Section 6 providing for sanction by a competent authority who would be able to judge the action of the public servant before removing the bar, by granting sanction, to the taking of the cognizance of offences by the court against the public servant. Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider. By a catena of decisions, it has been held that the authority entitled to grant sanction must apply its mind to the facts of the case, evidence collected and other incidental facts before according sanction. A grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of Government servants against frivolous prosecutions and the aforesaid requirements must therefore, be strictly complied with before any prosecution could be launched against public servants. (See *Mohd. Iqbal Ahmad v. State of A.P.*, (1979) 4 SCC 172). The Legislature advisedly conferred power on the authority competent to remove the public servant from the office to grant sanction for the obvious reason that that authority alone would be able, when facts and evidence are placed before him, to judge whether a

serious offence is committed or the prosecution is either frivolous or speculative. That authority alone would be competent to judge whether on the facts alleged, there has been an abuse or misuse of office held by the public servant. That authority would be in a position to know what was the power conferred on the office which the public servant holds, how that power could be abused for corrupt motive and whether prima facie it has been so done. That competent authority alone would know the nature and functions discharged by the public servant holding the office and whether the same has been abused or misused. It is the vertical hierarchy between the authority competent to remove the public servant from that office and the nature of the office held by the public servant against whom sanction is sought which would indicate a hierarchy and which would therefore, permit inference of knowledge about the functions and duties of the office and its misuse or abuse by the public servant. That is why the Legislature clearly provided that that authority alone would be competent to grant sanction which is entitled to remove the public servant against whom sanction is sought from the office.

24. Now if the public servant holds two offices and he is accused of having abused one and from which he is removed but continues to hold the other which is neither alleged to have been used (sic) nor abused, is a sanction of the authority competent to remove him from the office which is neither alleged or shown to have been abused or misused necessary? The submission is that if the harassment of the public servant by a frivolous prosecution and criminal waste of his time in law courts keeping him away from discharging public duty, are the objects underlying Section 6, the same would be defeated if it is held that the sanction of the latter authority is not necessary. The submission does not commend to us. We fail to see how the competent

authority entitled to remove the public servant from an office which is neither alleged to have been used (sic) or abused would be able to decide whether the prosecution is frivolous or tendentious. An illustration was posed to the Learned Counsel that a Minister who is indisputably a public servant greased his palms by abusing his office as Minister, and then ceased to hold the office before the court was called upon to take cognizance of the offence against him and therefore, sanction as contemplated by Section 6 would not be necessary; but if after committing the offence and before the date of taking of cognizance of the offence, he was elected as a Municipal President in which capacity he was a public servant under the relevant Municipal law, and was holding that office on the date on which court proceeded to take cognizance of the offence committed by him as a Minister, would a sanction be necessary and that too of that authority competent to remove him from the office of the Municipal President. The answer was in affirmative. But the very illustration would show that such cannot be the law. Such an interpretation of Section 6 would render it as a shield to an unscrupulous public servant. Someone interested in protecting may shift him from one office of public servant to another and thereby defeat the process of law. One can legitimately envisage a situation wherein a person may hold a dozen different offices, each one clothing him with the status of a public servant under Section 21 IPC and even if he has abused only one office for which either there is a valid sanction to prosecute him or he has ceased to hold that office by the time court was called upon to take cognizance, yet on this assumption, sanction of 11 different competent authorities each of which was entitled to remove him from 11 different public offices would be necessary before the court can take cognizance of the offence committed by such public servant, while abusing one office which he may have ceased to hold. Such an

interpretation is contrary to all canons of construction and leads to an absurd and product which of necessity must be avoided. Legislation must at all costs be interpreted in such a way that it would not operate as a rogue's charter. (See *W. Davis & Sons Ltd. v. Atkins*, (1977) 3 All ER 40.

50. The offence of cheating under Section 420 or for that matter offences relatable to Sections 467, 468, 471 and 120B can by no stretch of imagination by their very nature be regarded as having been committed by any public servant while acting or purporting to act in discharge of official duty. In such cases, official status only provides an opportunity for commission of the offence.”

(emphasis is ours)

14. The judgments referred to in paragraph 13 above, were relied upon by the Courts below to reject the contention advanced at the hands of the appellant, that sanction was essential before the appellant could be prosecuted. It would be pertinent to mention, that extracts from the judgments referred to in paragraph 13 reproduced above, deal with two pointed situations. Firstly, whether sanction before prosecution is required from each of the competent authorities entitled to remove an accused from the offices held by him, in situations wherein the accused holds a plurality of offices. The second determination was in respect of the requirement of sanction, in situations where the accused no longer holds the office, which he is alleged to have abused/misused, for committing the offence (s) for which he is being blamed. In answer to the first query, it has unambiguously been concluded, that if an accused holds a plurality of offices, each one of which makes him a public servant, sanction is essential only at the hands of the competent authority (entitled to remove him from service) of the office which he had allegedly misused. This leads to the clear inference, that other public offices held by the accused wherein an accused holds a plurality of offices, are irrelevant for purposes of obtaining sanction prior to prosecution. On the second issue it was concluded, that sanction was essential only if, at the time of taking cognizance, the accused was still holding the public office which he had allegedly abused. If the legal position determined in the above judgments is taken into consideration, there is certainly no doubt, that in the facts and circumstances of this case, sanction

if required, ought to have been obtained from the Governor of the State of Madhya Pradesh. The instant determination is premised on the fact, that the appellant is stated to have misused his position while discharging his responsibilities as a nominee Director of the MPSIDC. It is clear to us, specially from the deliberation recorded hereinabove, that the appellant's participation in the Cabinet Review Meeting dated 28.1.1994, and in the relevant meetings of the Board of Directors (of the MPSIDC) had no nexus to the post of Industries Commissioner, Government of Madhya Pradesh, or the subsequent office held by him as Joint Secretary, Department of Heavy Industries, Government of India. Accordingly, in our considered view, sanction of the authorities with reference to the post of Industries Commissioner, Government of Madhya Pradesh and Joint Secretary, Department of Heavy Industries, Government of India held by the appellant, was certainly not required. We therefore, hereby reject the submission advanced at the hands of the learned counsel for the appellant, that since the appellant continued to hold the above-mentioned public office(s) in his capacity as a member of the IAS cadre, at the time the first charge sheet was filed on 24.9.2007, prosecution could be proceeded with, and cognizance taken, only upon sanction by the competent authority(ies) of the said two offices (Industries Commissioner, Government of Madhya Pradesh and Joint Secretary, Department of Heavy Industries, Government of India), as wholly misconceived.

15. The abuse/misuse of authority, alleged against the appellant pertains to the discharge of his responsibilities as a nominee Director (on the Board of the MPSIDC). Therefore, the further question which arises for our consideration is, whether sanction at the hands of the Governor of the State of Madhya Pradesh, (who had the power to remove any Director appointed or nominated by him under clause 89 of the Memorandum and Articles of Association of the MPSIDC), was a prerequisite before taking cognizance in the matter. In the facts and circumstances of this case, we are of the view, that answer to the instant question has also to be in the negative. Our aforesaid determination is based on the fact that the appellant remained a nominee Director of the MPSIDC from 1993 to 1998. The first charge sheet in the matter was filed on 24.9.2007. Well before the filing of the first charge sheet, the appellant had relinquished charge of the office which he is alleged to have abused/misused (i.e. the office of nominee Director of the MPSIDC). In the above view of the matter, since the appellant was not holding the public office which he is alleged to have abused, when the first charge sheet was filed, in

terms of the law declared by this Court (referred to in the judgments extracted in paragraph 13 above), there was no need to obtain any sanction before proceeding to prosecute the appellant, for the offences alleged against him.

16. It would be relevant to mention, that during the course of hearing learned counsel for the appellant placed emphatic reliance on the judgment rendered by this Court in *State of Madhya Pradesh vs. Sheetla Sahai & Ors.*, (2009) 8 SCC 617. It is not necessary for us to refer either to the factual position in the judgment relied upon, or even the conclusions recorded thereon. We say so because, the issues canvassed and determined in the aforesaid judgments were not the ones on the basis whereof we have recorded our conclusions, in the foregoing paragraphs. It is sufficient for us to note, that the judgment rendered by this Court in *State of Madhya Pradesh vs. Sheetla Sahai & Ors.* (supra), does not carve out any exception, to the two propositions relied upon for the conclusions drawn by us, from the judgments referred to in paragraph 13 above.

17. The second contention advanced at the hands of the learned counsel for the appellant, was based on the determination rendered by this Court in *Soma Chakravarty vs. State through CBI*, (2007) 5 SCC 403. Pointed reliance was placed by the learned counsel for the appellant on paragraph 23 which is being extracted hereunder:-

“23. In a case of this nature, the learned Special Judge also should have considered the question having regard to the 'doctrine of parity' in mind. An accused similarly situated has not been proceeded against only because, the departmental proceedings ended in his favour. Whether an accused before him although stands on a similar footing despite he having not been departmentally proceeded against or had not been completed exonerated also required to be considered. If exoneration in a departmental proceeding is the basis for not framing a charge against an accused person who is said to be similarly situated, the question which requires a further consideration was as to whether the applicant before it was similarly situated or not and/or whether the exonerated officer in the departmental proceeding also faced same charges including the

charge of being a party to the larger conspiracy.”

(emphasis is ours)

It was the vehement contention of the learned counsel for the appellant, that sanction to prosecute another co-accused similarly situated as the appellant, having been obtained, it was not permissible to treat the appellant differently. We find no substance in the second contention advanced at the hands of the learned counsel for the appellant. Having concluded on the basis of the law declared by this Court, that prior sanction for prosecuting the appellant was unessential, it is futile to suggest that sanction ought to have been obtained all the same. The instant submission needs no further consideration in view of the deliberations recorded by us hereinabove. Parity in law can be claimed only in respect of action rightfully executed. And not otherwise. Having concluded that sanction was not required in the case of the appellant, it is not possible for us to accept on the analogy of the submission advanced at the hands of the learned counsel for the appellant, that merely because sanction was obtained in respect of another co-accused, it needed to have been obtained in the appellant's case as well.

18. The next contention advanced at the hands of the learned counsel for the appellant was based on Section 141 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'NI Act'). Section 141 aforementioned is being extracted hereunder:-

“141. Offences by companies.- (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this subsection shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated

as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

- (2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.--For the purposes of this section,--

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm."

Relying on sub-Section (1) of Section 141 extracted above, it was the vehement contention of the learned counsel for the appellant, that the appellant was not in charge of the conduct of the business of the MPSIDC. It was also his submission, that the appellant was not responsible to the MPSIDC for the conduct of its day to day activities. In this behalf it was sought to be asserted, that the appellant was not aware of the fact, that the functionaries of the MPSIDC were extending short term loans (including ICD's) out of the surplus funds of the MPSIDC to industrial establishments. It was also pointed out, that the appellant had neither examined nor approved any financial assistance extended to industries, out of the surplus funds of the MPSIDC, on the basis of the resolution of the Board of Directors dated 19.4.1995. As such it was asserted, that the accusations levelled against the appellant were misconceived. Insofar as the instant aspect of the matter is concerned, learned counsel for the appellant relied on the decision rendered by this Court in *National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal & Anr.*, (2010) 3 SCC 330. Learned counsel invited our pointed attention to the following

observations recorded therein:-

“6. In the connected appeal, the appellant - DCM Financial Services Ltd., entered into a hire purchase agreement on 25.2.1996 with M/s International Agro Allied Products Ltd. At the time of entering into contract, the Company handed over post-dated cheques to the appellant towards payment of monthly hire/rental charges. Respondent No. 1, Dev Sarin was one of the Directors of the said Company. The cheque issued by International Agro and Allied Products Ltd. in favour of the appellant was duly presented for payment on 28.10.1998 and the same was returned unpaid for the reason that the Company had issued instructions to the bankers stopping payment of the cheque.

12. It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. It follows from the fact that if a Director of a Company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable for a criminal offence under the provisions. The liability arises from being in charge of and responsible for the conduct of the business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company.”

(emphasis is ours)

19. We have given our thoughtful consideration to the contention advanced at

the hands of the learned counsel for the appellant, as has been noticed in the foregoing paragraph. We are of the view, that the appellant's reliance on Section 141 of the NI Act, as also, the judgment rendered by this Court in *National Small Industries Corporation Ltd.* (supra), is misconceived. The appellant is not being blamed for the implementation of the resolution of the Board of Directors of the MPSIDC dated 19.4.1995. The appellant is being blamed for having allowed the aforesaid resolution dated 19.4.1995 to be passed despite the earlier decision taken in the Cabinet Review Meeting held on 28.1.1994, as also, the earlier resolution of the Board of Directors of the MPSIDC dated 31.1.1994. It is not a matter of dispute before us, that the appellant had participated in the decision making process in the meeting of the Cabinet Review Committee dated 28.1.1994, as also, the resolution of the Board of Directors of the MPSIDC dated 31.1.1994. The charge against the appellant is based on the fact, that the appellant allowed the Board of Directors of the MPSIDC to pass the resolution dated 19.4.1995, inspite of the earlier decisions at the hands of the Cabinet Review Committee (in meeting dated 18.1.1994) and the consequential resolution of the Board of Directors (dated 31.1.1994). We, therefore, reject the submission advanced at the hands of the learned counsel for the appellant based on Section 141 of the NI Act. All the same, it would be relevant to notice, that the second proviso under Section 141(1) of the N.I. Act is inapplicable to the facts of this case, because the appellant was not nominated as a Director of the MPSIDC on account of holding the office of Industries Commissioner, Government of Madhya Pradesh. The appellant's appointment as nominee Director of the MPSIDC was based on the determination of the Governor of Madhya Pradesh under clause 89 of the Memorandum and Articles of Association of the MPSIDC. If the factual position alleged against the appellant is correct, the culpability of the appellant would emerge from sub-Section (2) of Section 141 of the N.I. Act. The instant inference is inevitable, because it is not disputed on behalf of the appellant, that he had actually participated in the Cabinet Review Meeting dated 28.1.1984, as well as, in the meetings of the Board of Directors leading to the passing of the resolutions dated 31.1.1994 and 19.4.1995. In the facts of the present case, the accusation implicating the appellant, is directly attributable to the appellant, as nominee Director of the MPSIDC. The aforesaid inference has been drawn by us, to negate the submission of the learned counsel for the appellant based on Section 141 of the N.I. Act. In our view, the instant issue does not arise for adjudication in the present controversy in view of the conclusions already drawn hereinabove, that the culpability of the appellant, lies in the mischief of passing the resolution dated 19.4.1995. The implementation of the said resolution is the consequential effect

944 A.Acharya Vs. S. B. of Inv. Agai. Eco. Offe. (SC) I.L.R.[2014]M.P.
of the said mischief.

20. For the last contention advanced on behalf of the appellant, learned counsel placed reliance on a decision rendered by this Court in *C.K. Jaffer Sharief vs. State* (through CBI), (2013) 1 SCC 205. Our pointed attention was drawn to the following observations recorded therein:-

“17. It has already been noticed that the appellant besides working as the Minister of Railways was the Head of the two public sector undertakings in question at the relevant time. It also appears from the materials on record that the four persons while in London had assisted the appellant in performing certain tasks connected with the discharge of duties as a Minister. It is difficult to visualise as to how in the light of the above facts, demonstrated by the materials revealed in the course of investigation, the appellant can be construed to have adopted corrupt or illegal means or to have abused his position as a public servant to obtain any valuable thing or pecuniary advantage either for himself or for any of the aforesaid four persons. If the statements of the witnesses examined under Section 161 Cr.P.C. show that the aforesaid four persons had performed certain tasks to assist the Minister in the discharge of his public duties, however insignificant such tasks may have been, no question of obtaining any pecuniary advantage by any corrupt or illegal means or by abuse of the position of the appellant as a public servant can arise. As a Minister it was for the appellant to decide on the number and identity of the officials and supporting staff who should accompany him to London if it was anticipated that he would be required to perform his official duties while in London. If in the process, the rules or norms applicable were violated or the decision taken shows an extravagant display of redundancy it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue

pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under Section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in *M. Narayanan Nambiar v. State of Kerala*, AIR 1963 SC 1116 while considering the provisions of Section 5 of Act of 1947.”

(emphasis is ours)

Based on the aforesaid determination, it was the contention of the learned counsel for the appellant, that the allegations levelled against the appellant do not lead to the inference, that the appellant had adopted corrupt or illegal means, or had abused his position as a public servant to obtain any valuable thing or pecuniary advantage, either for himself or for the industries to whom the MPSIDC extended short term loans (including ICD's). We are of the view, that the last contention advanced at the hands of the learned counsel for the appellant is a mixed question of fact and law. Determination of the instant issue would be possible only after the rival parties have adduced evidence to establish their respective claims. At the said juncture, it would be possible to record factual conclusions. It would then be possible for the concerned Court(s) to draw inferences on the basis of the established factual position, whether the accused is guilty of the accusation levelled against him. Therefore, it is neither proper nor possible for us to deal with the last contention advanced at the hands of the learned counsel for the appellant, at the present juncture.

21. No further contention was advanced at the hands of the learned counsel for the appellant.

22. For the reasons recorded hereinabove, we find no merit in the instant appeals. The same are accordingly hereby dismissed. While disposing of the instant appeals, we consider it just and appropriate to direct the trial Court to expedite the trial, keeping in mind, that the charge sheet in the matter was filed as far back as in 2007. On account of the proceedings initiated at the hands of the appellant, no further proceedings were taken by the Special Judge, Bhopal. In the above view of the matter, we consider it appropriate to direct the trial Court to hold proceedings for the disposal of Special Case No. 7 of 2007 on a weekly basis.

Appeal dismissed.

I.L.R. [2014] M.P., 946

WRIT APPEAL

Before Mr. Justice Sheel Nagu & Mr. Justice M.K. Mudgal

W.A. No. 78/2014 (Gwalior) decided on 9 April, 2014

AVINASH UPMANYU.

...Appellant

Vs.

STATE OF M.P. & anr.

...Respondents

Constitution - Article 226, Policy of Rehabilitation dt. 21.09.1972 - Benefit to the families who have suffered depredation at the hands of dacoits - The policy is extended as succour to the family who are facing mental, physical and financial hardship on account of depredation - It cannot be used as a perennial source of employment for all the subsequent generations to come - Further held, grandson of the person who was not directly affected by depredation caused by the dacoits, cannot be permitted to claim rehabilitation. (Paras 6/7)

संविधान - अनुच्छेद 226, पुनर्वास पॉलिसी दि. 21.09.1972 - डकैतों के हाथों लूटपाट सहन करने वाले परिवारों को लाभ - लूटपाट के कारण जो परिवार मानसिक, शारीरिक एवं आर्थिक कठिनाई का सामना कर रहे हैं, उन्हें सहायता के रूप में पॉलिसी लागू होती है - इसका उपयोग सभी आने वाली पश्चात्तर्वर्ती पीढ़ियों के लिये नियोजन का चिरस्थायी जरिया के रूप में नहीं किया जा सकता - आगे अभिनिर्धारित किया गया कि, ऐसे व्यक्ति का पौत्र जो डकैतों द्वारा कारित लूटपाट से सीधे प्रभावित नहीं हुआ था, पुनर्वास का दावा करने की अनुमति नहीं दी जा सकती।

*Prashant Sharma, for the appellant.**Praveen Newaskar, Dy. G.A. for the respondents.*

O R D E R

The Order of the Court was delivered by :
SHEEL NAGU, J. :- This writ appeal under Section 2(1) of the Madhya Pradesh Uchch Nyayalya (Khand Nyay Peeth Ko Appeal) Adhiniyam, 2005 assails the final order dated 29.10.2013 passed by learned Single Judge in W.P.No. 7726/2013, whereby the petition in question seeking employment by way of rehabilitation under the policy of rehabilitation of dependants of surrendered Dacoits and as well as families who have suffered depredation at the hands of dacoits has been dismissed.

2. Learned counsel for the rival parties are heard on the question of admission.

3. Learned counsel for the appellant contends that the writ court ought to have atleast directed for consideration of representation made by the petitioner/appellant for benefit under the policy of rehabilitation dated 21.09.1972. It is further submitted by learned counsel that the writ court could not have dismissed the petition in question since the functionaries of the State / respondents failed to discharge their obligation of considering the case of petitioner/appellant under the said policy of rehabilitation.

4. The writ court rejected the petition by holding that the case is unfit for exercise of discretionary jurisdiction under Article 226 of Constitution of India solely on the ground that the benefit under the rehabilitation scheme cannot be extended after lapse of 42 years arising out of the incident of abduction of grand father of the petitioner/appellant by the Dacoit.

5. It is undisputed that after grand father of the petitioner/appellant was abducted sometime in 1972 and, therefore, the policy of rehabilitation of 1972 could have been invoked for the benefit of the family of the grand father i.e. his wife and his children (petitioner's grandmother, father and uncles).

6. The policy of rehabilitation is extended as succor to the family who are facing mental, physical and financial hardship on account of depredation. This policy cannot be used as a perennial source of employment for all the subsequent generations to come. If so applied the policy would deviate from it's object of affording prompt respite and relief to the ravaged family members. Policy meant for giving instant succor would degenerate into an instrument of appeasement in the hands of the executive vulnerable to be misused at will.

7. The petitioner/appellant is the grand son of the person who was not directly affected by depredation caused by the dacoits. The petitioner/appellant has pulled on since last 40 years and, therefore, now cannot be permitted to rise from his stupor to claim rehabilitation at this late stage when the scars of the depredation are healed by passage of time.

8. Denial by the learned Single Judge of exercise of discretionary jurisdiction under Article 226 of Constitution of India cannot be found fault with.

9. In view of above, this writ appeal deserves to be and is therefore, dismissed.

10. No order as to cost.

Appeal dismissed.

I.L.R. [2014] M.P., 948

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 2608/2009 (Jabalpur) decided on 28 February, 2013

S.L. SETH & ors.

...Petitioners

Vs.

UNION OF INDIA & ors.

...Respondents

A. Cantonment Act (2 of 1924), Section 181(3)(4) - Refusal of building permission - Rejection of application was not on specific ground but on such grounds which were not available - Lease deed was granted for the residential purposes, permission was also sought for construction of residential building - Held - If the mutation of the land in dispute was accepted, there is no question for asking the petitioner to surrender the original lease deed and to obtain sub-lease deed separately - It was the responsibility of the authority to issue the sub-lease deed in favour of the petitioners. (Para 11)

क. छावनी अधिनियम (1924 का 2), धारा 181(3)(4) - निर्माण की अनुमति अस्वीकार की जाना - आवेदन की अस्वीकृति किसी विनिर्दिष्ट आधार पर नहीं की गयी बल्कि उन आधारों पर जो उपलब्ध नहीं थे - निवासीय प्रयोजन हेतु पट्टा विलेख प्रदान किया गया था, निवासीय भवन के निर्माण हेतु अनुमति भी चाही गयी थी - अभिनिर्धारित - यदि वादग्रस्त भूमि के नामांतरण को स्वीकार किया जाता है, तब याची को मूल पट्टा विलेख का समर्पण करके पृथक रूप से उप पट्टा विलेख अभिप्राप्त करने के लिये कहने का कोई प्रश्न नहीं - याचीगण के पक्ष में उप पट्टा विलेख जारी करने की जिम्मेदारी प्राधिकारी की थी।

B. Cantonment Act (2 of 1924), Section 181(3)(4) - No objection certificate - Once no objection certificate was issued, no power was available with the Board to refer the matter to the next Higher Authority or anybody - Power u/s 181 of 1924 Act is required to be exercised before sanctioning the execution or re-execution of the building on the land, which is under the management of Military Estates Officer. (Para 12)

ख. छावनी अधिनियम (1924 का 2), धारा 181(3)(4) - अनापत्ति प्रमाण पत्र - एक बार अनापत्ति प्रमाण पत्र जारी करने के बाद, उच्चतर प्राधिकारी या किसी को मामला निर्देशित करने की शक्ति बोर्ड के पास उपलब्ध नहीं थी - मिलिट्री इस्टेट ऑफिसर के प्रबंधन के अधीन भूमि पर भवन के निष्पादन या पुनर्निष्पादन

को मंजूरी देने से पूर्व, अधिनियम की धारा 181 के अंतर्गत शक्ति का प्रयोग अपेक्षित है।

C. Cantonment Act (2 of 1924), Section 181(3)(4) - Decision on application - Application submitted by the petitioners were either to be granted or to be rejected on valid reasons as mentioned in sub-section (4) of Section 181 of 1924 Act - Applications/Notices of execution of building were to be considered only and only under the scheme of 1924 Act. (Paras 12 & 16)

ग. छावनी अधिनियम (1924 का 2), धारा 181(3)(4) - आवेदन का विनिश्चय- यांचीगण द्वारा प्रस्तुत आवेदन को वैध कारणों पर या तो स्वीकार या अस्वीकार करना चाहिये था, जैसा कि अधिनियम 1924 की धारा 181 उप धारा (4) में उल्लिखित किया गया है - भवन के निष्पादन के आवेदन/नोटिस को केवल और केवल अधिनियम 1924 की स्कीम के अधीन ही विचार में लिया जाना चाहिए था।

Brian D'Silva with Sanjay Agrawal, for the petitioners.

Vikram Singh, for the respondents No. 1, 2, 3 & 5.

S.S. Chouhan, for the respondent No.4.

ORDER

K.K. TRIVEDI, J. :-The petitioners herein are said to be the persons, who have obtained the lease on transfer from the original lessee and are aggrieved by the action of the respondents, rejecting their application for grant of building permission. During the pendency of the writ petition certain members of the family have died and substitution of legal representatives has been ordered.

2. Brief facts giving rise to filing of present writ petition are that the land measuring 2.60 acres known as Bungalow No.5 situated at Theater Road bearing survey No. 13, Cantonment, Jabalpur, was allotted way back on 28.03.1930 to the erstwhile lessee Shri C.F. Billby. The terms and conditions mentioned in the said lease is available on record as Annexure P-1. Later on the said property was purchased by registered sale deed by Shri J.N. Seth and the petitioners herein Shri S.L. Seth, Shri K.K. Seth and Shri V.K. Seth (since deceased) and other members of family namely Shri J.M. Seth, Shri K.L. Seth and late Smt. Indira Devi Seth. Apparently such purchase was made with the sanction of the competent authority of respondents, therefore the names of these persons were duly mutated in the **General Land Register** (hereinafter referred to as 'GLR'). It appears that the original purchaser Smt.

Indira Devi Seth had died and the property fallen in her share has been inherited by petitioner No.5, Kamal Kumar Seth.

3. Some time in the year 1973, the partition took place in the family and a registered partition deed was executed. An area admeasuring 19080 Sq. feet was allotted to Dr. J.N. Seth in the said partition and the remaining area was held by the members of the family jointly. The letter was issued accepting such partition by the Military Estates Officer on 21.05.1974 saying that subject to the terms and conditions of the original lease in Schedule VIII dated 28.03.1930, the assignment is accepted and that being so, in fact virtually sub division of leased land was accepted saying that assigned portion on the plot will continue to be governed by the original lease dated 28.03.1930. Yet another letter was issued on 14th October 1974 which refers to the aforesaid partition deed by the Military Estates Officer saying that the registered partition deed confers on each members independent and absolute right on the plot of land under the provisions of the original lease deed therefore, it be treated as sub lease of the original deed. It was reiterated that the terms and conditions of the original lease shall be applicable to this sub lease also and any contravention of the terms of the lease by any other previous co-sharer shall have no effect of default on the family members. On 4th November, 1975 specific area as demonstrated by the members of the family through another application was recored with the consent of the Cantonment authority and thereby in fact the partition amongst the family members was duly accepted by the Military Estates Officer. Again the same condition was reiterated with respect to the application of the same terms and conditions of the original deed dated 28.03.1930.

4. The family members of the petitioners then decided to have their separate residential portions in the said land and for the said purposes after making of the plan of construction they submitted applications before the respondents. As during the said period certain deaths have taken place in the family, applications were made by persons like petitioner No.5 for mutation of his name on the share so obtained by the original family member late Smt. Indira Devi Seth. It appears that persons like petitioners were in need of NOC from the concerned authorities before making the application under the provisions of the Cantonment Act, 1924 seeking building permission, therefore such an application was made by the persons like petitioners. Such application when was submitted, the matter was referred to the Defence Estates Officer, Jabalpur, Circle, by the Cantonment Executive Officer. Certain spot inspection was done, reports were submitted and NOCs were issued by the competent

authorities. However, later on the matter was proceeded and certain guidance was sought from the Director, Defence Estates, Central Command. Despite issuance of the NOC, it was said that matter was required to be re-examined with reference to the letter dated 19.04.2006 and separate lease deeds were required to be executed in respect of each lessee of sub divided portion. This exercise be initiated and then only application may be considered. With reference to the aforesaid, the impugned communication was issued on 1st May, 2007 and ultimately the claim made by the petitioners was rejected, against which they file an appeal but the said appeal have been dismissed, therefore, the writ petition is required to be filed.

5. It is contended by learned Senior counsel appearing for the petitioners that once the partition was duly accepted by the authorities of the respondents, sub division of the leased land was accepted, it was not open to them to say that sub lease have not been executed. If formally any action was required to be taken to execute the sub lease deed that was required to be done by the respondents as the original owners of the land and not by the petitioners. If that was not done, by conduct the respondents were liable to be estopped to say that sub lease deed were not granted. It is further put forth that mutation of the name of family members was already directed and in fact the names of persons who have purchased the land in question, were already required to be recorded in the GLR. That was again the action on the part of the respondents-authorities and this was not to be done by the petitioners. However, petitioners were found to be in continuous possession of the land in question and that being so, only for the purposes of construction of separate residential units if a proposal was made by the petitioners, it was not to be rejected in the manner indicated in the order. It is vehemently contended that when the building plan applications were submitted, the provisions of Cantonment Act, 1924 were applicable. The new Act came into force in the year 2006 only. Having considered the applications of the petitioners under the new Act, wrong was committed by the respondents and the same was rejected on the flimsy ground, which were not made out. Taking this Court to the order dated 11.09.2007 (Annexure P-14), learned Senior counsel would contend that the rejection of the application of the petitioners was not on the specific ground, but on such grounds which were not available. It was illegally said that erection/re-erection of building on the land held on lease could be termed as breach of the conditions of the original lease. It is submitted by learned Senior counsel that neither the sub lease was required to be granted

by the petitioners nor could it be said that the said sub lease is refused to be sanctioned by the Government. Similarly, it is pointed out that NOC as was granted under the provisions of old Act was misconstrued and was treated to be one in violation of the Cantonment Act, 2006. The instructions issued after the grant of NOC were not to be made applicable with retrospective effect and no such condition could have been imposed on the petitioners. Lastly, it is submitted that the building plan submitted by the petitioners cannot be said to be violative of any of the provisions of the Cantonment Act, 2006, as the application or the plan was submitted much before coming into force of the said Act. It is further contended that at any rate neither the provisions of Cantonment Act, 2006 were applicable nor could the provisions of Public Premises Eviction Act, 1971 be made applicable in the present claim made by the petitioners. This being so, it is contended that rejection of the claim of the petitioners was not on any justified reason but was made on imaginary ground. It is further contended that when an appeal in detail was filed against such action of respondents, appellate authority instead of deciding the appeal in appropriate manner dismissed the same on imaginary grounds. Thus it is contended that the entire action taken by the respondents is bad in law and impugned orders are liable to be quashed.

6. Respondents No.4 and 5 on receipt of the notices of the writ petition, have filed their return. The respondent No.4 has contended that the disputed land is situated outside the notified civil area of Jabalpur Cantonment and, therefore, is under the management of Defence Estates Officer, Jabalpur. The lease of the land was granted in favour of the original lessee, who after obtaining necessary permission from the competent authority, transferred the land in favour of 12 persons and their occupancy rights have been duly recorded in the relevant register. The lease is granted in perpetuity. The application was submitted by the petitioners in five separate forms under the provisions of Section 179 of the Cantonments Act, 1924 (herein after referred to as '1924 Act'). Since the land is situated outside the notified civil area of the cantonment, under the provisions of Section 181(3) of the 1924 Act, the plans were referred to the Defence Estates Officer for obtaining no objection certificate. A no objection certificate was issued from the land point of view. However, the objection was raised by the C.E.O. of the respondent No.4 to grant of no objection certificate and the matter was referred to the Principal Director, Defence Estates Central Command, Lucknow. The said authority issued the direction that no such sanction of the building plan was to be accorded and,

therefore, the no objection certificate issued by respondent No.5 was withdrawn. Against such an order, the appeal was preferred and the appellate authority has directed the petitioners to resubmit the plan. In view of this, it is contended that the power of Board has rightly been exercised and, therefore, no illegality can be alleged against the respondent No.4. However, the respondent No.4 has contended that action was taken under the Cantonments Act, 2006 (herein after referred to as '2006 Act'). Similarly, the respondent No.5 by filing a separate return, has contended that there was assignment of the original lease. However, in terms of Schedule-VIII of the original lease deed, the information of any assignment was to be given within a period of one month from the date of assignment. As it was agreed when the letters were issued that any such assignment would be governed by the terms and conditions of original lease deed dated 28.03.1930, till proper mutation is done, all objections are decided, no objection certificate was not to be granted. Error was committed and, therefore, the no objection certificate was withdrawn. It is also put forth that one of the assignees namely Shri Kanhaiya Lal Seth was called upon by letter dated 10th September, 1999 to surrender the original lease deed for the purposes of issue of a sub lease deed in terms of the assignment. Copy of the said letter was endorsed to all assignees for the similar action. However, nothing was done by the petitioners in compliance of such a memo and, therefore, no objection certificate was not to be issued. In such circumstances, on the direction of the superior authorities, the no objection certificate was rightly withdrawn. It is contended that in case such a building plan is not sanctioned by the Board, no wrong is committed.

7. By filing the rejoinder, the petitioners have contended that Schedule-VIII of the lease nowhere contemplates a condition that on any such condition of assignment, the original lease deed would be surrendered for the purposes of issue of a sub lease. Whatever is provided under the lease, originally granted, was complied with. Even the transfer of properties on sites held on lease in Schedule-VIII is not barred in terms of the instructions issued by the competent authority and, therefore, merely because the original lease deed was not surrendered, it was not open to recall the no objection certificate once it was granted after full enquiry. Meeting out such allegations made in the rejoinder, an additional return is filed by respondent No.4 wherein it is contended that petitioners have further transferred the land in dispute in the names of several persons and thereby have violated the original lease condition and as such if the permission is refused by the Cantonment Board, in the given circumstances,

the petitioners would not be entitled to the relief claimed.

8. Heard learned Counsel for the parties at length and minutely perused the record.

9. First of all this Court is required to examine whether any law is made with respect to the land situated within the cantonment area in terms of the provisions of 1924 Act. The entire Act nowhere prescribes any procedure to be followed in the matter of grant of lease of land situated within the cantonment area. The Act is silent on the said question. However, 1924 Act prescribes grant of sanction to erect or re-erect the building on any land in a cantonment with the previous sanction of the Board. The Act applies to the cantonment area as notified by the Central Government. It is the authority of the Government under sub-section (2) of Section 3 of the 1924 Act to issue a notification defining limits of any cantonment. A land not exclusively in the civil area of a cantonment, would still be within the limits of the cantonment if it falls within the limits notified by the Central Government in the Gazette. Therefore, provisions for grant of sanction to erect a building would be squarely applicable to any such building which is erected or re-erected within the cantonment area. Chapter-XI of the 1924 Act deals with such control and power over the buildings, street and boundaries etc. by the Board. Section 178-A, 179, 180 and 181 of the 1924 Act are relevant for the purposes of consideration of the controversy involved in the present writ petition, therefore, the same are reproduced for the convenience :

“178A.Sanction for building. -No person shall erect or re-erect a building on any land in a cantonment except with the previous sanction of the Board, nor otherwise than in accordance with the provisions of this Chapter and of the rules and bye-laws made under this Act relating to the erection and re-erection of buildings.

179. Notice of new buildings. - (1) Whoever intends to erect or re-erect any buildings in a cantonment shall apply for sanction by giving notice in writing of his intention to the Board.

(2) For the purposes of this Act, a person shall be deemed to erect or re-erect a building who-

(a) makes any-material alteration or enlargement of any building, or

(b) converts into a place for human habitation any building not originally constructed for human habitation, or

(c) converts into more than one place for human habitation a building originally constructed as one such place, or

(d) converts two or more places of human habitation into a greater number of such places, or

(e) converts into a stable, cattle-shed or cow-house any building originally constructed for human habitation, or

(f) makes any alteration which there is reason to believe is likely to affect prejudicially the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene, or

(g) makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building, or which reduces the cubic capacity of any room in the building below the minimum prescribed by any byelaw made under this Act.

180. Conditions of valid notice. - (1) A person giving the notice required by section 179 shall specify the purpose for which it is intended to use the building to which such notice relates.

(2) No notice shall be valid until the information required under sub-section (1) and any further information and plans which may be required under bye-laws made under this Act have been furnished to the satisfaction of the Board along with the notice.

181. Power of Board to sanction or refuse. - (1) The Board may either refuse to sanction the erection or re-erection, as the case may be, of the building, or may sanction it either absolutely or subject to such directions as it thinks fit to make

in writing in respect of all or any of the following matters, namely: -

(a) the free passage or way to be left in front of the building;

(b) the space to be left about the building to secure free circulation of air and facilitate scavenging and the prevention of fire;

(c) the ventilation of the building, the minimum cubic area of the rooms and the number and height of the storeys of which the buildings may consist;

(d) the provision and position of drains, latrines, urinals, cesspools or other receptacles for filth;

(e) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(f) the line of frontage with neighboring buildings if the building abuts on a street;

(g) the means to be provided for egress from the building in case of fire;

(h) the materials and method of construction to be used for external and party walls for rooms, floors, fire-places and chimneys;

(i) the height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on; and

(j) Any other matter affecting the ventilation and sanitation of the buildings, and the person erecting or re-erecting the building shall obey all such written directions in every particular.

(2) The Board may refuse to sanction the erection or re-erection of any building either on grounds sufficient in the opinion of the Board affecting the particular building or in pursuance of a general scheme sanctioned by the officer Commanding-

in-chief, the Command, restricting the erection or re-erection of building within specified limits for the prevention of overcrowding or in the interest of persons residing within such limits or for any other public purpose.

(3) The Board, before sanctioning the erection or re-erection of a building on land which is under the management of the Military Estates Officer, shall refer the application to the [Military Estates Officer for ascertaining whether there is any objection on the part of Government to such erection or re-erection; and the Military Estates Officer shall return the application together with his report thereon to the Board within thirty days after it has been received by him.

(4) The Board may refuse to sanction the erection or re-erection of any building-

(a) when the land on which it is proposed to erect or re-erect the building is held on a lease from the Government, if the erection or re-erection constitutes a breach of the terms of the lease, or

(b) when the land on which it is proposed to erect or re-erect the building is not held on a lease from the Government, if the right to build on such, land is in dispute between the person applying for sanction and the Government.

(5) If the Board decides to refuse to sanction the erection or re-erection of the building, it shall communicate in writing the reasons for such refusal to the person by whom notice was given.

(6) Where the Board neglects or omits, for one month after the receipt of a valid notice, to make and to deliver to the person who has given the notice any order of any nature specified in this section; and such person thereafter by a written communication sent by registered post to the Board calls the attention of the Board to the neglect or omission, then, if such neglect or omission continues for a further period of fifteen days from the date of such communication the Board shall be

deemed to have given sanction to the erection or re-erection, as the case may be, unconditionally:

Provided that, in any case to which the provisions of sub-section (3) apply, the period of one month herein specified shall be reckoned from the date on which the Board has received the report referred to in that sub-section."

10. Undisputedly originally the lease was obtained by Mr. C.F. Billby way back on 28th March, 1930. The conditions as appended to Schedule-VIII were reflected in the lease deed granted in favour of the said person. The relevant provisions made in the said lease deed, as reflected in Schedule-VIII are reproduced for ready reference :

"I. AND THE LESSEE DOTH hereby covenant with the Secretary of State -

XXX

XXX

XXX

(6) Not to make any alterations in the plan or elevation of the said dwelling house without such consent as aforesaid nor to use the same or permit the same to be used for any purpose other than that of a dwelling house without the consent of the Cantonment Authority.

XXX

XXX

XXX

(8) *(Not to assign transfer or under – let the premises hereby demised or any part thereof without the previous consent in writing of the Cantonment Authority and) upon every assignment transfer or sub-lease of the premises hereby demised or any part thereof or within one calendar month thereafter to deliver a notice of such assignment transfer or sub-lease to the Military Estates Officer setting forth the names and description of the parties to every such assignment transfer or sub-lease and the particulars and effect thereof."

It is also not in dispute that after the execution of the said lease deed, the land in question was obtained by the present petitioners on an assignment by the original holder vide Annexure P-2. Admittedly, this was done with the previous approval of the competent authority and there was no violation of any terms and conditions of the original lease deed. This is why such an assignment was

duly accepted by memo dated 21st May, 1974 by the Military Estates Officer in the following manner :

“To,
Dr. J.N. Seth,
5 Theatre Road,
JABALPUR

Subject :- BUNGALOW NO.5 THEATRE ROAD
JABALPUR CANTT

Reference : Your application dated 8.5.74.

The consent of the Cantonment Authorities i.e. the undersigned accorded for assignment of the portion of the site such portion measuring 19080 Sq.Ft. (out of 2.60 acres) in your name. The remaining portion will be in the names of Six others.

The assignment is subject to the terms and conditions of the original lease in Schedule VIII dated 28.03.1930. You will effect now the assignment and inform us one month of that i.e. partition which document should clearly state interalia that the assigned portion and the balance will continue to be governed by the original lease terms dated 28.3.1930.

Sd/-
Military Estates Officer
M.P. Circle Jabalpur
(BHARAT BHUSHAN)”

A further communication was made on 14th October, 1974 accepting the partition deed between the family members of the petitioners. This was also done in the manner, which left no doubt that the same was fully accepted by the Military Estates Officer. The letter dated 14th October, 1974 reads thus:

“To,
Dr. J.N. Seth,
5 Theatre Road,
Jabalpur Cantt

**SUBJECT :- BUNGALOW NO.5 THEATRE ROAD -
JABALPUR CANTT**

Reference : Your application dated 14.10.74.

2. An area measuring 19080 Sqft. out of the total area of 2.60 acres from Bungalow No.5 Theatre Road Jabalpur Cantt (building lease in perpetuity Schedule VIII) has already been assigned to you by this office under the terms of Registered Partition deed submitted by you. This assignment by itself confers on you independent and absolute right on this plot of land under the provisions of the original lease and should therefore be treated as a sub-lease of the original. The terms and conditions of the original lease shall be applicable to this sub-lease also. Any contravention of the terms of the lease by any other previous co-partner shall have no effect of default on you.

Sd/-
MILITARY ESTATES OFFICER
M.P. CIRCLE-JABALPUR
(M.H. ALAVI)"

Further division of the land in dispute was accepted by letter dated 01.11.1975 reflecting the names of all those family members, who have effected the partition of land in dispute amongst them. This letter further makes a note in the following manner :

1. The plot referred to above are those as shown in the plan attached to deed.
2. Plot area includes the road area proposed to be constructed as shown in the plan.
3. The above assignment are subject to the terms and conditions of the original lease in Schedule VIII dated 28-3-1930. You will effect now the assignments and inform us within one month of the partition through addendum to the memorandum of partition dated 10-5-1975 that the assigned portion will continue to be governed by the terms and conditions of the original lease dated 28-3-1930."

11. This Court fails to understand if the mutation of the bungalow concerned and the land in dispute in this writ petition, was accepted way back, where was the question asking the petitioners to surrender the original lease deed and to obtain sub-lease deed in their respect separately. Virtually it was the responsibility of the granting authority, i.e. the Chief Executive Officer of the Cantonment, Jabalpur, to issue the sub-lease deed in favour of persons like petitioners. If that was not done on their end, the petitioners were not to be held responsible for the same.

12. On the strength of these documents, the petitioners moved the application indicating their desire that each of them were willing to construct a separate residential unit on the land in dispute, which falls exclusively in the share of each person. Obviously the lease deed was granted in respect of the land, originally also for the residential purposes and the building permission was sought only for the purposes of construction of a residential building and not otherwise that too under the provisions of the 1924 Act, which were in vogue at the relevant time. Of course since the land in dispute falls out of the civil area of the Cantonment, Jabalpur, the matter was referred to the Military Estates Officer for grant of relevant no objection certificate, which according to the respondents, was issued. Once such a no objection certificate was issued, what was the authority of the Chief Executive Officer of the Board to refer the matter to the higher authorities. No such provision was made in the relevant Act at the relevant time. Nothing is provided in the entire scheme of the 1924 Act to refer the matter to any authority by the Chief Executive Officer. Once the notice is given under Section 179 of the 1924 Act, the power under Section 181 of the 1924 Act is required to be exercised. Only under sub-section (3) of Section 181 of the 1924 Act, the Board before sanctioning the erection or re-erection of the building on the land, which is under the management of Military Estates Officer, is required to refer the said application to the said officer for ascertaining whether there is any objection on the part of the Government to such erection or re-erection. The Board has only two grounds on which sanction for erection or re-erection of any building can be refused. None of these contingencies were there nor there was any power available with the Board to refer the matter to the next higher authority or anybody. The applications submitted by the petitioners were either to be granted or to be rejected on valid reasons as mentioned in sub-section (4) of Section 181 of 1924 Act. How and why a letter was sent by the Board on 1st May, 2007 to the Principal Director, Defence Estates Central Command,

Lucknow, is not known. What was the reasons for such applications and why guidance was required when there was already a no objection certificate issued by the competent authority, i.e. the Military Estates Officer. The only requirement was obtaining of a no objection certificate, that too from the land point of view as prescribed under Section 181(3) of 1924 Act.

13. The competent authority instead of looking into all these aspects, examining the records or even the law applicable, sent back the application of the petitioners and letter of refusal was issued by respondent No.4, the Cantonment Board, on 11th September, 2007. The entire consideration was done by the higher authority as well as by the Cantonment Board as if application was made under 2006 Act as is clear from the perusal of the impugned order dated 11th September, 2007. How the Public Premises Eviction Act, 1971 became applicable in such a situation was not even tested and this was said that the construction will be treated as unauthorized and action will be taken under the provisions of 2006 Act and Public Premises Eviction Act, 1971 at the risk and cost of the petitioners, which may include demolition of unauthorized construction. This particular aspect is challenged by the petitioners and they say that this was beyond the jurisdiction of the respondents. When a detailed appeal was filed by the petitioners before the competent appellate authority, instead of considering the appeal in appropriate manner, the appellate authority virtually re-produced the entire grounds raised by the appellants in their memo of appeal and passed the order in paragraphs 5 and 6 of the impugned order in the following manner :

“5. I, therefore, after considering the Appeal filed, written arguments forwarded by the Appellants and on hearing the submission of the parties, direct that the Applicants may submit Revised Plans after complying with/rectifying the observations raised by Cantonment Board Jabalpur vide letter No.RBP/Svy No.113(Part)B.No.5/07/659 dated 11 Sep 2007, once their names are mutated in the GLR and a fresh No Objection Certificate is given by the DEO, Jabalpur Circle, Jabalpur.

6. The Applicants are also advised to approach Principal Director Defence Estates Central Command to seek the status of their case, presently under reference to Director General Defence Estates (MoD) for confirmation.”

14. Again this Court completely fails to understand where was the authority

available with the respondents to ask the petitioners to make an application under the 2006 Act. It is trite that if an application is made before repealing of any enactment and if the application remains pending, even after repeal, the same has to be considered only under the repealed provisions and not otherwise. Even otherwise 2006 Act contains the Repeals and Savings under Section 360 of the 2006 Act, which protects the application, the notice of erection of building submitted by the petitioners. However, analogous provisions are made under Section 234 of the 2006 Act. Under sub-section (4) of Section 238 of the 2006 Act, yet another ground has been added for refusal to grant sanction to erect or re-erect any building but in sum and substance the said ground is also not different than the ground prescribed under the old Act. Similar is the provision made with respect to obtaining no objection certificate from the Military Estates Officer. The only difference is that instead of Military Estates Officer, the designation is shown to be Defence Estates Officer. However, again 2006 Act prescribes no provision for grant of lease of the land and the lease remained under the same provisions of law, which were in vogue when the original lease deed was granted in favour of the erstwhile original lessee. From this it is clear that when the appeal was filed before the respondent Appellate Authority by the petitioners, the same was not rightly considered in appropriate manner as prescribed under the relevant Act. Even the respondent No.4-Cantonment Board communicated to the petitioners that in case the suitable action is not taken and any construction is made by the petitioners, action under the provisions of the 2006 Act as also the Public Premises Eviction Act, 1971 would be initiated against the petitioners. This Court again completely failed to understand as to how the provisions of Public Premises Eviction Act, 1971 would be attracted in such a case where the erection of the building is done in terms of the provisions of 1924 Act or 2006 Act. In any such circumstances, action was to be taken only and only under the relevant Act and not otherwise. Such a refusal letter is, therefore, not sustainable. The appellate authority has also not taken note of these facts while passing the order and, therefore, the order passed by the Appellate Authority is equally bad in law.

15. It is vehemently contended by learned Counsel for the respondents that in fact there was gross violation of the terms and conditions of the lease granted to the petitioners, inasmuch as the petitioners have sub-divided the plot, have executed the sale-deeds in favour of several persons. While filing a counter affidavit, the respondents have placed on record a circular issued

by the competent Government to the extent that in case it is found that any violation of the lease conditions is committed, any sub-division of the land granted on lease is done, strict action would be taken. It is further stated that before a sub-division is permitted, the competent authority's sanction for transfer of the site was mandatory but without obtaining any such sanction, the petitioners have executed the sale-deed of the land in dispute in respect of various persons. Copy of some of the sale-deeds have been placed on record by the respondents. Though this affidavit was filed by the respondents on 21.08.2012, copy of which was already served on the petitioners, yet it appears that supplementary affidavit has not been filed by the petitioners. However, during the course of arguments learned senior Counsel for the petitioners has contended that all such sale-deeds were executed only and only after obtaining sanction from the respondents-authorities and without obtaining such a sanction, the sale-deed was not to be registered by the Registering Authority. This being so, it is contended that not a single violation of lease conditions was committed by the petitioners and as such the entire allegations made by the respondents in their return are vexatious. It is contended that since appropriate action was not taken, the respondents-authorities were head strong, were dealing in arbitrary manner with the application submitted by the petitioners, the action taken on their part was vitiated. It is further contended that all the sale-deeds, if are minutely examined, were executed after filing of the present writ petition and, therefore, frivolous allegations have been made against the petitioners to cause a prejudice against them.

16. This Court is not required to go into such disputed facts. However, if any violation of the lease conditions is committed by the petitioners, that has to be examined and looked into by the respondents-authorities. At any rate, rejection of notice of erection of the building on the ground that sub-leases were not granted to the petitioners or that the mutation of the names of the petitioners was not done in the G.L.R. is not justified or proper. As has been discussed herein above, in fact the applications/notices of erection of building were to be considered only and only under the scheme of 1924 Act, which was in vogue at the time when the applications were submitted by the petitioners.

17. In view of the aforesaid discussion, the impugned orders are liable to be quashed. Resultantly, this writ petition is allowed. The impugned order dated 11.09.2007 (Annexure P-14) and the order dated 13.09.2008 (Annexure P-19) are hereby quashed. The matter is remitted back to the respondent No.4 for properly considering the application/notice of erection

of building made by the petitioners. The Defence Estates Officer, Jabalpur will also consider the matter afresh in terms of the previous no objection certificates granted by the said authority to accord sanction of erection of building to the petitioners. The respondents will also examine whether any transfer of the land in dispute has been made by the petitioners without obtaining the sanction from the competent authority. However, the respondents will not insist the petitioners to submit the original lease-deed for the purposes of grant of sub-lease to the petitioners and will not refuse the sanction to erect the building only on the ground of not granting the sub-lease of land to the petitioners or mutation of their names in the G.L.R. Expeditious action be taken in this respect within a period of three months and necessary orders be passed.

18. 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. [2014] M.P., 965

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 13325/2003 (Jabalpur) decided on 22 March, 2013

HARI NARAYAN SHARMA

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

***Service Law - Promotion* - On successfully passing trade training petitioner's name was brought in the fit list for promotion - In terms of GOP which was in vogue he was not required to appear in the trade test once again - In the year 1995 GOP was amended providing that person who were placed in the fit list but have not been promoted are required to take part in the Trade Test once again - There is nothing to disclose that the petitioner was informed about a change in GOP - Twice suspension of the petitioner was also held illegal by Higher Authority - Held - Petitioner was not offered full opportunity to take part in the Trade Test - Trade Test be conducted for him separately and after passing of the test his name be included in the fit list for the year in which the juniors were brought in the fit list for promotion - In case petitioner found fit, necessary orders with all consequential benefit be**

issued within 6 months - Petition allowed.

(Paras 2, 8 & 9)

सेवा विधि - पदोन्नति - ट्रेड प्रशिक्षण सफलतापूर्वक पूर्ण करने पर याची के नाम को पदोन्नति हेतु योग्यता सूची में रखा गया - जीओपी की विद्यमान शर्तोंनुसार उसे पुनः ट्रेड परीक्षा में उपस्थित होना अपेक्षित नहीं था - वर्ष 1995 में जीओपी में संशोधन किया गया कि वे व्यक्ति जिन्हें योग्यता सूची में रखा गया था किन्तु पदोन्नत नहीं किया गया था, उन्हें पुनः ट्रेड परीक्षा में हिस्सा लेना अपेक्षित है - यह प्रकट करने के लिये कुछ नहीं कि जीओपी में बदलाव की जानकारी याची को दी गयी थी - याची का दो बार निलंबन भी उच्चतर प्राधिकारी द्वारा अवैध ठहराया गया था - अभिनिर्धारित - याची को ट्रेड परीक्षा में हिस्सा लेने का पूर्व अवसर प्रस्तावित नहीं किया गया था - उसके लिये पृथक से ट्रेड परीक्षा करायी जावे तथा परीक्षा उत्तीर्ण करने पर उसका नाम उस वर्ष की योग्यता सूची में शामिल किया जावे, जिस वर्ष पदोन्नति हेतु कनिष्ठ व्यक्तियों को योग्यता सूची में रखा गया था - यदि याची योग्य पाया जाता है, सभी परिणामिक लाभ सहित आवश्यक आदेश 6 माह के भीतर जारी किये जावें - याचिका मंजूर।

Udayn Tiwari, for the petitioner.

*S.S. Bisen, G.A. & Vandana Shrivastava, P.L. for the respondents/
State.*

ORDER

K.K. TRIVEDI, J. :- This petition was originally filed as O.A. No.173/1999 before the M.P. State Administrative Tribunal and came on transfer to this Court after closer of the Tribunal and is registered as writ petition.

2. The grievance of the petitioner is that while he was working on the post of Constable (Trade-Welder) in the Motor Transport Workshop of Police Department at Rewa, he took part in the trade training for the purposes of his inclusion in the fit list for promotion on the post of Head Constable. On successfully passing the said training, the name of the petitioner was brought in the fit list for promotion. It appears that owing to want of vacancies, the petitioner was not promoted. However, in terms of the GOP, which was in vogue at the relevant time, petitioner was not required to appear in the trade test once again for his inclusion in the select list. The DPC if was convened, the name of the petitioner was not considered. In the year 1997 the petitioner could know that certain juniors to him have been given the placement in the fit list and they have been promoted, therefore, he made representation before the authorities. The said representation was not being considered, therefore, he was required to approach the Tribunal. It is contended that since in the year 1995 the GOP was further

amended and it was provided that those who have earlier passed the trade test and have been brought in the fit list, if have not been promoted, they were required to take part in the trade test once again for re-consideration of their case for bringing them in the fit list afresh. It was said in the said GOP that the validity of the fit list was 18 months only or till the promotions are made, which ever is earlier. If the petitioner was required to take part in the trade test, he should have been informed about such fact so that he could have taken part in the said test once again. Thus, it is contended that in fact the petitioner was denied the lawful claim in illegal and arbitrary manner and juniors to him have been promoted, therefore, action on the part of the respondents is bad in law. In view of the aforesaid, the petitioner has claimed the following reliefs :

“That by issuance of a writ in the nature of :

- I) Certiorari quashing the select list of 1997.
- II) Certiorari quashing the order dt. 3.9.1997 promoting the respondents No.6 & 7 superseding the petitioner.
- III) Mandamus directing the respondents to include the petitioner's name in the select list of 1997 above respondents No.6 & 7.
- IV) Mandamus commanding the respondents to consider the petitioner for promotion after inclusion of his name in the select list of 1997 and promote him accordingly prior to respondents No.6 & 7.
- V) Mandamus commanding the respondents to promote the petitioner one day before the date of the promotion of respondents No.6 & 7 assigning him proper seniority above the respondents No.6 & 7 and pay him all arrears of salary for the entire period from the date of his promotion i.e. one day prior to the promotion of Respondents No.6 & 7.
- VI) Any other writ order or direction as the Hon'ble Tribunal deem fit in the circumstances of the case together with awarding cost of the petition.

That by issuance of a writ in the nature of certiorari, this Hon'ble court may kindly be pleased to quash the select

list dt. 3.8.96 so far it relates to the respondents No.8 and 9.

That by issuance of a writ in the nature of certiorari, this Hon'ble court may kindly be pleased to direct to hold the trade test for the petitioner as per norms as existed on 3.8.06 and if the petitioner passes/qualifies in the trade test, direct the respondents to include the petitioner's name in the select of 1996, above the respondent no.8 and 9 giving him the consequential benefits including seniority."

3. On receipt of the notice of the original application, the respondents have filed their return and have refuted the allegations made in the petition. It is contended that in fact the GOP No.56/1993 was issued on 20.10.1993 wherein it was provided that if a Constable has passed the trade test, he would not be required to pass the said test once again for bringing his name in the fit list. However, the said GOP was amended vide order dated 25.02.1995 and it was specifically provided that those who have been brought in the fit list on account of passing of the trade test, but have not been promoted on the promotional post for want of vacancy, will require to take part in the trade test once again if the fit list prepared has lost its validity on expiry of 18 months period. The petitioner was required to take part in the trade test after the expiry of the fit list prepared in the year 1991. He did not participate in the said test and, therefore, his name was not brought in the fit list. The petitioner since has not passed the training as was required, his representation was rejected by the D.I.G., SAF, Jabalpur on 22.09.1999. As far as the others are concerned, it was contended that those persons have passed the trade test and their names were brought in the fit list of the trade in which the petitioner was also working. All these persons have been promoted in accordance to their seniority and placement in the fit list. Thus, it is contended that no illegality whatsoever is committed in passing the order in respect of the other respondents. It is contended that the petition is liable to be dismissed.

4. A rejoinder has been filed by the petitioner controverting such statements and stating that if the DPC had met prior to 25.02.1995, in terms of the unamended GOP of the year 1993, the petitioner was not required to take part in the trade test once again for inclusion of his name in the fit list. Once he was already brought in the fit list and if any fit list was prepared after expiry of the fit list in which the name of the petitioner was included, without even passing the trade test, the name of the petitioner was required to be included in the said fit list. Had it

been done, the petitioner would have been promoted when the juniors to him were promoted. It is further contended that in the year 1997 the select list was issued on the basis of consideration done in the year 1995 and in the said DPC the claims of two juniors to the petitioner were considered and they were promoted subsequently by the order referred to herein above. It is contended that both the juniors belongs to reserved category and as only two vacancies were there in the trade concerned, in fact the policy of reservation was violated and 100% reservation was given by promotion of reserved category candidates. To these submissions of the petitioner, an additional return has been filed but again nothing much is said except making allegations against the petitioner saying that he was placed under suspension because he ran away from the training and absconded for a period of 99 days. Again he was suspended because of misconduct and that being the conduct of the petitioner, he was not entitled to grant of promotion. The petitioner has filed an additional rejoinder placing on record certain orders passed by the concerned authority with respect to suspension of the petitioner. It is contended that the petitioner was harassed by the Deputy Commandant of SAF, who was after the petitioner because of certain personal reasons. It is pointed out that both the suspension orders were set aside by the higher authorities saying that they were not legally issued in accordance to the provisions of the law. Thus, it is contended that the petitioner was deliberately denied the promotion and as such was entitled to the reliefs claimed in the petition.

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

6. It was the specific case of the petitioner that his name was brought in the fit list in the year 1991. It is the admitted position that the validity of the fit list was 18 months. How the fit list was again prepared, has not been spelled out by the respondents in their return. If the fit list was prepared before 25.02.1995, the provisions of unamended GOP No.56 of 1993 would be applicable. This has not been demonstrated by the respondents whether the fit list was revived after the date on which the amendment in the GOP was made. It is necessary to be examined and clarified because the right of the petitioner could not have been taken away in that manner. If the fit list was prepared prior to 25.02.1995 under the unamended provision of GOP No.56 of 1993, the effect would be, the petitioner would be brought in the fit list once again without forcing him to go for the trade training as he had already passed the trade training once and his name was already brought in the fit list of the year 1991.

This is more so important because it is the specific stand of the respondents in their return, that when the name of the petitioner was brought in the fit list, he was at S.No.4. As there were only three vacancies available, on the strength of the fit list of the year 1991, prepared on 30th October, 1992, and the petitioner was at S.No.4 of the select list, only his three seniors were promoted on 27.08.1993. The fit list itself is brought on record by the respondents as Annexure R-1 which indicates that the petitioner had not only completed the trade training within time and was working in the trade at the relevant time but was found fit in all respect for promotion on the next higher post. If that was the situation, the validity of the fit list was for a period of 18 months and, therefore, if any vacancy occurred in between, the petitioner was required to be promoted. It is not disclosed by the respondents that after the expiry of the fit list, the petitioner was informed about a change in the GOP No.56 of 1993, asking him to take part in the trade test once again for the purposes of revival of his name in the fit list. Merely because the petitioner had not passed the trade test once again, could it be said that he was not found fit for inclusion of the name in the fit list without asking the petitioner to take part in the trade test. This being so, there is sufficient force in the submissions made by learned Counsel for the petitioner.

7. Apart from this, if the vacancies were there, it was the general duty of the respondents to inform the persons, who were earlier in the fit list but could not be promoted on account of non-availability of the post with respect to any change made in the criteria for consideration for bringing a person in the fit list again. The validity of the fit list was fixed by the respondents. They were aware of the fact that the validity of the fit list would be over on a particular date. They were required to inform all those, who were already brought in the fit list to take part in the trade training once again. It is also to be seen that trade training is also provided only and only by the department and it cannot be obtained by any employee on his own. This being so, the petitioner was in fact denied an opportunity to take part in the promotional process, despite the fact that once he had successfully completed the said process and was brought in the fit list for promotion. The contention raised by the learned Govt. Advocate cannot be accepted that the petitioner was responsible on his own to take part in the trade test and since he had not taken part in the said test, he was not entitled to be included in the fit list. Such submissions of learned Govt. Advocate are to be discarded outrightly.

8. The other submissions made by learned Govt. Advocate also have no

force. The orders placed on record by the petitioner with his additional rejoinder are not controverted. On first occasion when the petitioner was suspended, the allegation was made against him that he has not joined the training at Gwalior and ran away and because of such reason, he was placed under suspension. The entry made in the service roll of the petitioner has been produced on record as Annexure R-6, which indicates that the petitioner was placed under suspension vide order dated 25.10.1996. The reason of suspension is only this much that he avoided to join the training and on false pretext of illness remained absent for a period of 99 days. To this when the order passed by the competent authority revoking the suspension of the petitioner is examined, as has been placed on record as Annexure P-6, it reveals that the suspension of the petitioner was set aside by the Deputy Inspector General of SAF, Jabalpur saying that it was ordered by the Deputy Superintendent of Police without following the instructions of the higher authorities and the order passed was against the law. On second occasion when the petitioner was placed under suspension on 03.06.1997, the said order was also interfered by the higher authorities saying that the same is also not found in accordance to law. Not only this, the petitioner was attached at Jabalpur and the record relating to complaint made against him was summoned by the Commandant of the SAF. This being so, such a submission made by learned Govt. Advocate that looking to the conduct of the petitioner he was not entitled to grant of promotion, cannot be accepted. The fact remains that the petitioner was not offered full opportunity to take part in the trade test for the purposes of inclusion of his name in the fit list for promotion on the post of Head Constable (Trade-Welder).

9. In view of the discussions made herein above, the writ petition is allowed. Since the petitioner was required to take part in the trade test, in terms of the amended provisions of GOP No.56 of 1993, trade test be conducted for him separately and after passing of the said test, the name of the petitioner be included in the fit list for the year in which the juniors of the petitioner were brought in the fit list for the purposes of promotion on the post of Head Constable (Trade-Welder). In case the petitioner is found fit for such promotion, necessary orders of promotion be issued in favour of the petitioner promoting him on the said post with all consequential benefits, such as pay, allowances and seniority. Let the aforesaid exercise be completed within six months from the date of the order.

10. 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. [2014] M.P., 972

WRIT PETITION

Before Mr. Justice N.K. Mody

W.P. No. 5673/2012 (Indore) decided on 18 June, 2013

ANITA KANASH (SOLANKI) (DR.)(SMT.) ...Petitioner

Vs.

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

Service Law - Seniority - Petitioner was duly selected and was appointed as Assistant Professor (Zoology) vide order dated 27.06.2005 - The probation period came to an end on 09.07.2008 after extension - Fresh appointment order has been issued to the petitioner - Held - Seniority of the petitioner has to be counted from the date of appointment and not from the date of confirmation - Petitioner is entitled to get the benefit of service rendered by him w.e.f. 09.07.2005 when the petitioner joined the service. (Paras 2 & 3)

सेवा विधि - वरिष्ठता - याची को सम्पूर्ण रूप से चयनित किया गया और सहायक प्रोफेसर (जूलॉजी) के रूप में आदेश दिनांक 27.06.2005 द्वारा नियुक्त किया गया - परीक्षा अवधि, बढ़ाये जाने के पश्चात् 09.7.2008 को समाप्त हो गयी - याची को नया नियुक्ति आदेश जारी किया गया - अभिनिर्धारित - याची की वरिष्ठता की गणना नियुक्ति की तिथि से की जानी चाहिए और न कि स्थाईकरण की तिथि से - याची, उसके द्वारा दी गयी सेवा का लाभ 09.07.2005 से प्रभावी रूप से प्राप्त करने का हकदार है जबसे उसने पदभार ग्रहण किया।

Case referred :

AIR 1990 SC 1607.

Rahul Sethi, for the petitioner.

Mukesh Porwal, P.L. for the respondents.

ORDER

N.K.Mody, J. :- The prayer in the petition is that the order dated 15/3/2012 (Annx.P/4) issued by the respondent No.1 be modified by deleting the averment of fresh appointment of the petitioner under Rule 8 of the M.P.C.S. (General Conditions of Service) Rule, 1961 and it be further directed that the petitioner will get the seniority since 2005 itself for the post of Assistant Professor (Zoology) on the basis of Merit List prepared by the M.P.Public Service Commission at the time of selection made in the year 2005.

2. Learned counsel for petitioner submits that petitioner was duly selected and was appointed as Assistant Professor (Zoology) vide order dated 27/6/2005. The probation period was for a period of two years. In compliance of the order dated 27/6/2005, petitioner joined the service on 9/7/2005. The period of probation completed on 9/7/2007 but the same was extended for a period of another one year which came to an end on 9/7/2008. It is submitted that vide order Annx.P/4, a fresh appointment order has been issued to the petitioner. It is submitted that petitioner is entitled to get the benefit of service rendered by him w.e.f. 9/7/2005 when the petitioner joined the service.

3. Learned counsel for respondent submits that keeping in view Rule 8 of M.P.Civil Services (General Conditions of Service) Rules 1961, the length of service shall be counted from the date when the probation period was completed by the petitioner. Rule 8 deals with Probation. As per sub rule (1) of Rule 8, a person appointed to a service or post by direct recruitment shall ordinarily be placed on probation for such period as may be prescribed. As per sub rule(2) the appointing authority may, for sufficient reasons, extend the period of probation by a further period not exceeding one year. As per sub rule (7) of Rule 8, a probationer, who has neither been confirmed, nor a certificate issued in his favour under sub-rule (6), nor discharged from service under sub-rule(4), shall be deemed to have been appointed as a temporary Government servant with effect from the date of expiry of probation and his conditions of service shall be governed by the Madhya Pradesh Government Servants (Temporary and Quasi Permanent Service) Rules, 1960. Rule 12 of Civil Services (General Conditions of Service) Rules 1961 deals with Seniority of Direct Recruits and Promotees. According to sub rule (a) of rule (1) of Rule 12, the seniority of persons directly appointed to a post according to rules shall be determined on the basis of the order of merit in which they are recommended for appointment irrespective the date of joining. This rule further lays down that persons appointed as a result of an earlier selection shall be senior to those appointed as a result of subsequent selection. In the matter of *The Direct Recruit class-II Engineering Officer's Association Vs. State of Maharashtra*, AIR 1990 SC 1607 the Hon. Apex Court has observed that seniority of the petitioner has to be counted from the date of appointment and not from the date of confirmation.

4. Keeping in view the aforesaid position of law and the fact that petitioner joined the services w.e.f. 9/7/2005, the petition is allowed. The order Annx.P/1

is quashed with a direction to the respondent to count the service of the petitioner with effect from the date of joining the probation period which is 9/7/2005. Petitioner shall also be entitled for consequential benefits, if any.

Petition allowed.

I.L.R. [2014] M.P., 974

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 11244/2009 (Jabalpur) decided on 1 July, 2013

RAMAKANT GAUTAM

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law- Admission - Dismissal - Petitioner who was working as clerk admitted that bonafidely he had added certain lines in the order - If an employee, working in the establishment of a subordinate court for a long period of 18 years was unaware of the fact that he was not required to add anything in the order sheet of the court on his own without the permission of the Presiding Judge and if he has done so, which fact he has admitted in his reply, it cannot be said that it would not amount to admission of the guilt including the misconduct - **Petition dismissed.** (Paras 1 & 13)

सेवा विधि - स्वीकृति - बर्खास्तगी - याची जो क्लर्क के रूप में कार्यरत था, ने स्वीकार किया कि उसने आदेश में सद्भावनापूर्वक कतिपय पंक्तियां जोड़ी थीं - यदि कोई कर्मचारी जिसने 18 वर्ष की लंबी अवधि तक अधीनस्थ न्यायालय की स्थापना में कार्य किया है, वह इस तथ्य से अवगत नहीं था कि उसे न्यायालय की आदेश पत्रिका में, पीठासीन न्यायाधीश की अनुमति के बिना स्वयं से कुछ भी जोड़ना अपेक्षित नहीं और यदि उसने ऐसा किया, जिस तथ्य को उसने अपने जवाब में स्वीकार किया है, यह नहीं कहा जा सकता कि यह अपराध की स्वीकृति, जिसमें अवचार समाविष्ट है, की कोटि में नहीं आयेगा - याचिका खारिज।

Cases referred :

AIR 1960 SC 409, AIR 1961 SC 1070, AIR 1985 SC 1416, (2008) 5 SCC 569,

Sanjay K. Agrawal, for the petitioner.

Yogesh Dhande, Dy. G.A. for the respondent No.1.

Shobha Menon with C.A. Thomas, for the respondents No. 2 & 3.

ORDER

K.K.TRIVEDI, J. :- By this petition under Article 226 of the Constitution of India the petitioner ex-employee of the establishment of District and Sessions Judge, Satna, has assailed the order passed by the disciplinary authority, dismissing him from the service from the post of Executing Clerk and by subsequent orders dated 13/08/2008 and 16/07/2009 appeals preferred by the petitioner have been dismissed.

2. Brief facts of the case, giving rise to filing of this petition are, the petitioner who was working in the establishment of District and Sessions Judge, Satna on the post of executing clerk at the relevant time was assigned the duty in the Court of Additional Chief Judicial Magistrate, Satna. The petitioner was a reader assigned to look after the cases of jurisdiction. A list was made available to the petitioner by the Presiding Officer of the Court indicating that certain cases were to be withdrawn by the State Government and for the said purposes the application made by the State Government/prosecuting agency permission to withdraw the prosecution was granted. The petitioner was called upon to prepare the disposal of such cases and deposit the same in the record room of the Court. In one of the cases, after the type written order sheet dated 06/09/2005 certain interpolation were done by the petitioner and it was recorded as if the case was withdrawn and the same was to be deposited in the record room. However, later on the fact came to the notice of the authorities that such a case registered against one of the accused person was not to be closed withdrawn by the State Government as the evidence was available against accused person for commission of such offence and therefore such a prayer made by the State Government/ prosecution agency was rejected. However, only because the order sheet was so written, duly signed by the Presiding Officer, the case was deposited in the record room.

3. When these facts came to the notice of the authorities, an inquiry was directed and the Forth Additional District and Sessions Judge, Satna was ordered to conduct a preliminary inquiry. The said Judge conducted a preliminary inquiry submitted a report before the District and Sessions Judge, Satna that infact the Presiding Officer of the Court had refused the prayer of the prosecuting agency to grant permission to withdraw the prosecution in the said case but only because of interpolation made in the order sheet by the petitioner in his own hand writing, such a case was deposited in the record room as disposed of whereas the trial of the case was to be conducted. After

receipt of this report the District and Sessions Judge, Satna issued him a charge sheet on 04/01/2008. Three charges were leveled against the petitioner which are translated in English by the Court for the purposes of convenience in following manner:

1. That you Ram Gautam (petitioner) while was working as Executing Clerk on 06/09/2005 in the Court of Additional Chief Judicial Magistrate, Satna was infact incharge of all criminal cases pending in the Court.
2. That in criminal case no.1544/2002 (*State of M.P. Vs. Aslam*) under Section 25 of Arms Act the Presiding Officer of the Court has refused to grant permission to withdraw the prosecution as sought by the prosecution under Section 321 of Cr.P.C and passed an order on 06/09/2005 which was type written, directing that the case be put up on the date already fixed.
3. That you Ram Gautam (petitioner) added in the said order by ink on your own handwriting:
"accused is discharged from the offence under Section 25-B of Arms Act, the bail bonds of the accused are discharged, the result of the case be recorded and case be deposited in the record room".

By this act you committed gross indiscipline and gave (sic. grave) misconduct, unbecoming of a government servant. It was categorically said in the charge sheet that such a misconduct is covered by the provisions of Rule 3(1)(2)(3) of M.P. Civil Services (Conduct) Rules, 1965 and is punishable under the provisions of Rule 10 of M.P. Civil Services (Classification, Control and Appeal) Rules, 1966 (hereinafter referred to as 1966 Rules for brevity).

4. On receipt of this charge sheet the petitioner submitted his reply and categorically stated in para 1 that the petitioner has received the documents referred in the charge sheet. In para 2 of his reply the petitioner mentioned that he is submitting reply to charge no.1,2.& 3 referred to hereinabove. In sub para 1 of paragraph 2 of the reply the petitioner categorically admitted the charge no.1. In sub para 2 of paragraph 2 of reply the petitioner contended that the petitioner has no knowledge about certain facts stated in the said charge. He even denied that order was passed by the Presiding Judge in the

criminal case No.1544/2002 (*State Vs. Aslam*) registered under Section 25(B) of Arms Act. However, in the last line of this para he admitted the fact that the order so passed was type written. As far as the charge no.3 is concerned in sub para 3 of para 2 of reply the petitioner categorically contended that he had added the sentences, as have been translated hereinabove in the order sheet dated 06/09/2005. However, he said that this was not done by the petitioner on his own will but since the said case number was mentioned in the list duly sent by the Presiding Officer of the Court, after signature of the said Presiding Officer for depositing of the listed cases in the record room after recording the results, by mistake such addition was done by the petitioner in the order sheet dated 06/09/2005 and since this was not done with any deliberate intention, no misconduct or indiscipline was committed by the petitioner. The petitioner further explained such facts in his reply but ultimately he contended that this was done under a bonafide belief that by mistake such a direction as was contained in other cases was not recorded in the particular case referred to hereinabove and therefore under this belief such a fact was recorded by the petitioner. He stated that it was not intentionally done and he could realize his mistake only when the Additional Sessions Judge, Satna conducted the preliminary inquiry and asked the petitioner about addition in the said order sheet dated 06/09/2005. After reading the bail order the petitioner could realize that he has committed a mistake by making addition in the said order of the Court. He contended that this was done under the heavy pressure of work. The petitioner regretted for the said act and assure that he would not commit the said mistake in future.

5. When such reply was received by the disciplinary authority i.e District and Sessions Judge, Satna the same was taken into consideration. The said authority came to the conclusion that once the petitioner has admitted the charge leveled against him regarding interpolation or addition in the order sheets of the Court, no further inquiry was required to be conducted. Even then the petitioner was called upon to appear before the disciplinary authority and after hearing the said person, recording these reasons the disciplinary authority passed the order holding that the petitioner has admitted his guilt that he has tampered with the Court record. If there was no such direction for depositing of the case in the record room, atleast the petitioner was required to ask the Presiding Officer as to whether such direction was required to be added in the said order sheet or not. He was not competent to add anything or delete anything from the order sheet. In view of this, after reaching to such

conclusion, the disciplinary authority impose the major penalty of dismissal from service against the petitioner vide order dated 11/03/2008.

6. Assailing this order the petitioner preferred an appeal before the Registrar General of the High Court. The appeal was considered by the Administrative Judge of this Court and while specifically dealing with such situation, it was categorically held that such an act of the petitioner was not justified in any manner. It was held that since the petitioner has already admitted the charge, no further proceedings were required to be conducted in accordance to Rule 14(5) (a) of the 1966 Rules. In view of this, the Appeal filed by the petitioner was dismissed. The review application was filed by the petitioner before Hon'ble the Chief Justice of this Court under the provisions of Rule 29 of 1966 Rules but since the same has also been dismissed, the present writ petition is required to be filed.

7. Learned counsel for the petitioner vehemently contended that taking note of the provisions of Rule 14(5) of 1966 Rules even if the charge was admitted by the petitioner, evidence was required to be produced to show that there was justified reasons to level such a charge against the petitioner and the charge itself was amounting to a misconduct. It is contended by learned counsel for the petitioner that, admission as has been made by the petitioner with respect to certain facts stated in charge no.3, will not constitute to admit the misconduct, and therefore without the proof of the misconduct penalty could not have been imposed on the petitioner. Further it is emphatically contended by learned counsel for the petitioner that words used in sub rule 5(a) of the Rule 14 of the 1966 Rules makes its application mandatory as it is categorically said that where all articles of charges have been admitted by the government servant in his written statement of defence, the disciplinary authority shall record its finding on each charge after taking such evidence as it may think fit and shall act in the manner laid down in Rule 15. It is contended that the finding in this respect have not been given by the disciplinary authority and as such the impugned order of penalty was not to be sustained in appeal. The appellate authority has not followed the procedure laid down under Rule 27 of the 1996 Rules wherein the procedure is prescribed for consideration of an appeal. It is contended that such an act was done under bonafide belief, and in view of the law laid down by the Apex Court in the case of *Om Prakash VS. State of U.P.*, AIR 1960 SC 409 and in the case of *Jagdish Prasad Saxena Vs. State of Madhya Bharat (Now Madhya Pradesh)*, AIR 1961 SC 1070, the admission alone was not enough to impose the punishment that

too the maximum punishment of dismissal from service on the petitioner. Learned counsel for the petitioner has placed the reliance in the case of *Union of India and another Vs. Tulsiram Patel*, AIR 1985 SC 1416, and has submitted that in view of the law laid down by the Apex Court, on the basis of such contention of petitioner in his reply alone the petitioner could not be visited with such a penalty.

8. Per contra, learned Senior counsel appearing for the respondents no.2 and 3 contended that there was no requirement of recording any evidence as it depends on circumstances. The disciplinary authority is required to examine each and every case and if it is of the opinion that the guilt of the petitioner is proved by his own admission, no further evidence is required to be recorded. It is further contended by learned senior counsel for the respondents 2 and 3 that despite the fact that the petitioner has admitted the guilt, the disciplinary authority gave an opportunity of hearing to the petitioner by calling him before passing the order of penalty, though it was not necessary. Once the petitioner has admitted the charges, there was no requirement of conducting any further inquiry or getting facts proved by recording the evidence of any witness. The fact remains that the petitioner has himself admitted that he came to know during the preliminary inquiry that he committed a mistake in making interpolation/addition in the order sheet of the Court without any authority or direction of the Presiding Officer. This being a serious misconduct, the penalty was rightly imposed on the petitioner. It is further contended by learned senior counsel for the respondents no. 2 & 3 that the Appellate authority has taken note of all these facts, and the administrative Judge of this Court has examined the every provisions of the rules and has rightly contended that there was no force in the appeal of the petitioner. If this was done in rightful manner, there is no violation of Rules 27 of the 1966 Rules and as such the orders impugned are not to be interfered with. Learned senior counsel for the respondents has relied on a decision of the Apex Court in the case of *Chairman and Managing Director, VSP and others VS. Gopa Raju Sri Prabhakara Hari Babu* (2008)5 SCC 569 and contended that the scope of judicial review in such a case, in exercise of power under Article 226 of the Constitution of India is very limited and the Court would not interfere in the order of penalty or the appellate order. Thus, it is contended that the petition is liable to be dismissed.

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

10. Such a statement of the petitioner that it was a bonafide mistake, cannot

be accepted at all. The petitioner was an executing clerk in the Court. He was having sufficient experience of 18 years working in the Court. If the petitioner was of the opinion that some directions were left out in the order in particular case which was included in the list of cases which were to be deposited in the record room of the Court, he was required to obtain the instructions from the Presiding Judge of the Court. At least these facts should have been pointed out to the Judge immediately. At any rate the petitioner was not authorized to write anything in the order sheet which was already type written, on his own hand writing. This being so, the seriousness of the misconduct of the petitioner cannot be ignored. What he tried to explain in his reply was that since the case in question was also included in the list of those cases which were to be deposited in the record room and since the list was duly signed by the Presiding Judge, the petitioner under the bonafide belief that by mistake some sort of direction regarding the depositing of the case in the record room was not type written, in particular order sheet of abovesaid particular case which was required to be deposited in the record room, he added such a direction on his own handwriting by pen. In fact, this was not to be done by the petitioner rather he was required to seek instructions from the Presiding Judge immediately and then only to act according to instructions. On his own nothing was required to be done by the petitioner. The fact as have been pointed out in the reply do not make out a case that the petitioner has not admit his guilt. Case remained in the record room for a long time because of such an act of the petitioner and therefore by no imagination could it be said that it was done on account of bonafide mistake.

11. The impugned order dated 17/03/2008 discloses each and every fact. The Disciplinary authority has taken note of each and every statement made in the charge sheet and has also taken into consideration the reply submitted by the petitioner with respect to the charges. Before recording the fact that the admission was made by the petitioner in his reply and simply imposing a penalty, the disciplinary authority thought it better to grant an opportunity of hearing to the petitioner and thereafter passed a detailed order therefore in the considered opinion of this Court, no inquiry whatsoever was required to be conducted under the provisions of Rule 14(5)(a) of 1966 rules. The cases relied by learned counsel for the petitioner are not applicable in the facts and circumstances available in the present case. In the case of *Om Prakash* (supra) the provisions of Section 24 of Indian Evidence Act in context of provisions of Section 161, 164, 165 & 109 of Indian Penal Code and the provisions of Section

537, 164 & 225 of the Code of Criminal Procedure were being looked into. The settled law is that hard and fast rules of evidence would not be attracted in domestic disciplinary inquiry which is infact a fact finding inquiry. Thus, there is no question of distinction between confession and admission, as was considered by the Apex Court in the said case. In the case of *Jagdish Prasad Saxena*(supra) the Apex Court was dealing with a situation where the inquiry was conducted against a delinquent employee after recording of his statement in a different departmental inquiry. In context of that, the Apex Court has said that admission of guilt could not be treated to be made by the delinquent, freely and therefore without holding any enquiry no penalty was to be imposed. In such circumstances, the same would be violative to Article 311(2) of the Constitution of India. Such are neither circumstances in the present case nor the petitioner is charge sheeted in the departmental inquiry on the basis of certain statement made by him. Therefore, the law laid down by the Apex Court in the aforesaid cases would not be attracted at all.

12. As far as the law laid down by the Apex Court in the case of *Union of India Vs. Tulsiram Patel* (supra) again it has to be seen that the Apex Court was examining the provisions of dispensing with the inquiry in some circumstances. Herein the case in hand, specific provisions are already made under Rule 14(5)(a) of the 1966 Rules where the disciplinary authority shall require to record finding in respect of the each charges but taking of evidence is discretionary power of the disciplinary authority. It is required to be exercised only if the disciplinary authority is of the opinion that despite the admission of the delinquent employee, the recording of evidence would be necessary. In the present case the petitioner has admitted the charge unambiguously and rather he tried to explain why he has done so and under what belief, as alleged in the charge sheet. However, in view of the aforesaid findings, something done without the jurisdiction of the authority of law was admitted by the petitioner and that being the situation, it is to be held that the petitioner has admitted the charge levelled against him including his misconduct. For this reason it was not necessary for the disciplinary authority to record any further evidence.

13. The Apex Court in the case of *Chairman and Managing Director* (Supra) has categorically dealt (sic. dealt) with such a situation. In case of absence of employee in that case on certain occasion, no inquiry was conducted and the employee was granted opportunities to improve. However, ultimately again after unauthorized absence the said employee admitted that

he was unauthorizedly absent. Even in such circumstances, the Apex Court has held that admission of the guilt was sufficient and in such circumstances, the penalty could have been imposed. Even the power of the Court to see whether the penalty was proportionate or not could not be exercised in exercise of power under Article 226 of Constitution of India as has been held by the Apex Court. This being so, if an employee working in the establishment of a subordinate Court for a long period of 18 years was unaware of the fact that he was not required to add anything in the order sheet of the Court on his own without the permission of the Presiding Judge and if he has done so, which fact he has admitted in his reply, it cannot be said that it would not amount to admission of the guilt including the misconduct. These facts were considered by the Appellate Authority in the appeal filed by the petitioner and appeal and review application have rightly been rejected. The grounds raised by the petitioner were already considered by the Appellate Authority and have rightly been rejected.

14. For the discussion hereinabove, no error is found in the order of appellate authority and in the order of disciplinary authority in imposing the penalty on the petitioner.

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

Petition dismissed.

I.L.R. [2014] M.P., 982

WRIT PETITION

Before Mr. Justice N.K. Mody

W.P. No. 6937/2013 (Indore) decided on 4 July, 2013

RAHUL JAIN

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Service Law - Termination of service - Petitioner was appointed on the post of District Programme Officer on contractual basis - Without giving any opportunity of hearing and without holding any departmental enquiry as per clause 6 of agreement services of the petitioner were terminated - Held - No enquiry at all was conducted in the present case and also no decision was taken by the State Health Committee, Bhopal who was party to the agreement - Order passed by CMHO is without

jurisdiction - Petition allowed.**(Paras 2 & 7)**

सेवा विधि - सेवा समाप्ति - याची को जिला प्रोग्राम अधिकारी के पद पर, संविदा आधार पर नियुक्त किया गया - करार के खंड 6 के अनुसार सुनवाई का अवसर दिये बिना और विभागीय जांच किये बिना, याची की सेवा समाप्त की गयी - अभिनिर्धारित - वर्तमान प्रकरण में कोई जांच संचालित नहीं की गयी और न ही राज्य स्वास्थ्य समिति भोपाल द्वारा कोई निर्णय लिया गया जो करार का पक्षकार था - सीएमएचओ द्वारा पारित आदेश बिना अधिकारिता के है - याचिका मंजूर।

Case referred :

2001(3) MPLJ 616.

A.K. Sethi with Rishabh Sethi, for the petitioner.*Mukesh Parwal*, G.A. for the respondents / state.**ORDER**

N.K. Mody, J. :- The prayer in the petition is for quashment of order dated 27/05/13 (Annexure P/10) issued by respondent No.6 on the recommendation dated 24/05/13 (Annexure P/9) issued by respondent No.2 and on the basis of decision dated 21/05/13 passed by District Health Committee, Khargone.

2. Short facts of the case are that the petitioner was appointed on the post of District Programme Officer vide order dated 24/12/05 for a period of two years. The period of contractual appointment was extended vide order dated 15/04/08 for a period of one year. The period was further extended vide order dated 24/12/09 till completion of project. The case of the petitioner is that the petitioner was discharging his duties bonafidely right from 2005, but all of a sudden on 31/10/12 show cause notice was issued to the petitioner wherein it was alleged that why the services of the petitioner should not be terminated on account of violation of Clause-6 of agreement whereby petitioner was appointed on contractual basis. Detailed reply was filed by the petitioner on 03/11/12. After submission of reply without giving any opportunity of hearing and without holding any departmental enquiry, services of the petitioner were terminated vide order dated 27/05/13.

3. Learned counsel for the petitioner submits that the order passed by the respondents whereby services of the petitioner were discontinued is illegal, incorrect and deserves to be quashed. It is submitted that it is true that petitioner was on contractual basis, but at the same time the services of the petitioner

could have been terminated as per terms of contract. It is submitted that Clause-6 of the agreement reads as under:-

6. द्वितीय पक्षकार अनुबंधित कार्य के प्रति कर्तव्यनिष्ठ नहीं रहता है तो उसे अपना पक्ष प्रस्तुत करने का अवसर देने के उपरांत अनुबंध समाप्त करने का अधिकार प्रथम पक्षकार को होगा।

4. It is submitted that as per aforesaid clause itself it is evident that before terminating the services, opportunity ought to have been given to the petitioner. It is submitted that in the case of petitioner only reply was taken wherein all the allegations made in the show cause notice was denied and thereafter no opportunity of hearing was given to the petitioner. It is submitted that from the reply submitted by the respondents it is evident that the matter was placed before the District Health Committee, who recommended the case of the petitioner for discontinuation of services to the State Health Committee, Bhopal, but before receiving any instruction from the State Health Committee, Bhopal, services of petitioner were discontinued. Learned counsel placed reliance on a decision in the matter of *Rahul Tripathi Vs. Rajeev Gandhi Shiksha Mission, Bhopal*, 2001(3) MPLJ 616 wherein order of termination was stigmatic, this Court held that it cannot be regarded as termination simpliciter. It was also held that order without holding enquiry has to be quashed. It is submitted that in the facts and circumstances of the case petition filed by the petitioner be allowed and impugned order be set aside.

5. Learned counsel for respondents submits that no illegality has been committed by the respondents in passing the impugned order. It is submitted that the petitioner was contractual employee. It is submitted that show cause notice was given to the petitioner on 31/10/12 and after receipt of reply on 03/11/12 the matter was placed before the District Health Committee and after going through the reply the committee unanimously held that the case of the petitioner be recommended to the State Health Committee for discontinuation of the services of the petitioner. It is submitted that the petition be dismissed.

6. From perusal of the record it is evident that the services of petitioner were allowed to continue till completion of project and the petitioner was in job right from 2005, while services were discontinued in the year 2013 i.e. after eight years. The services can be terminated as per agreement. From plain reading of Clause-6 it is evident that opportunity of hearing ought to

have been given to the petitioner as the petitioner was going to be terminated on account of misconduct.

7. Keeping in view the law laid down in the matter of *Rahul Tripathi* (Supra) it appears that some sort of enquiry was necessary. From perusal of the record it is evident that no enquiry at all was conducted in the present case and also no decision was taken by the State Health Committee, Bhopal who was party to the agreement. It appears that the order passed by respondent No.6 is without jurisdiction as it was the State Health Committee, Bhopal who was to decide whether the petitioner should be allowed to continue or not, therefore, petition filed by the petitioner is allowed and impugned order dated 27/05/13 whereby services of the petitioner were discontinued stands quashed.

8. With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2014] M.P., 985

WRIT PETITION

Before Mr. Justice K.K. Trivedi

W.P. No. 11722/2008 (Jabalpur) decided on 8 July, 2013

MAHENDRA SINGH YADAV

...Petitioner

Vs.

STATE OF M.P. & ors.

...Respondents

Lokayukt Evam Up-Lokayukt Adhiniyam, M.P. (37 of 1981), Sections 2 & 9 to 12 - Recovery of the amount - Petitioner was appointed as Chairman of the M.P. Rajya Beej Avam Farm Vikas Nigam - He has been given the status of a Cabinet Minister - He is entitled to get all the facilities which are provided to a Cabinet Minister - Petitioner has taken certain facilities at the cost of the corporation expenses without any authority and thereby has caused financial loss to the corporation - Held - If the Corporation has earlier resolved to grant certain facilities to the Chairman of the Corporation and in view of such a decision any facility was obtained by the petitioner, it cannot be said that such a facility was obtained by abuse of his position by the petitioner - Nothing has been placed on record to indicate that such a fact was found proved even remotely - Such direction was issued to

make recovery from the petitioner, is wholly unjustified - Petition allowed. (Paras 1 & 11)

लोकायुक्त एवं उप-लोकायुक्त अधिनियम, म.प्र. (1981 का 37), धाराएं 2 व 9 से 12 - रकम की वसूली - याची को म.प्र. राज्य बीज एवं फार्म विकास निगम का अध्यक्ष/चेयरमेन नियुक्त किया गया था - उसे मंत्रिमंडल सदस्य का दर्जा दिया गया है - वह उन सभी सुविधाओं को प्राप्त करने का हकदार है जो मंत्रिमंडल सदस्य को प्रदान की जाती हैं - याची ने निगम के खर्चों से कतिपय सुविधाएं बिना प्राधिकारिता के ली हैं और इससे निगम को वित्तीय हानि कारित हुई है - अभिनिर्धारित - यदि निगम ने पूर्व में संकल्प पारित किया था कि निगम के अध्यक्ष को कतिपय सुविधाएं प्रदान की जायेंगी और उक्त निर्णय को दृष्टिगत रखते हुए याची द्वारा किसी सुविधा को प्राप्त किया गया था, यह नहीं कहा जा सकता कि याची द्वारा उक्त सुविधा को अपने पद के दुरुपयोग से प्राप्त किया गया था - अभिलेख पर यह दर्शाने के लिये कुछ नहीं कि उक्त तथ्य को लेशमात्र भी साबित पाया गया - याची से वसूली करने के लिये जारी किया गया उक्त निदेश पूर्णतः अनुचित - याचिका मंजूर।

Cases referred :

AIR 2013 SC 48, 2011(1) MPHT 20.

D.K. Dixit, for the petitioner.

Amit Sharma, P.L. for the respondents No. 1 & 2.

Aditya Adhikari, for the respondents No. 3 & 4.

Sanjay Singh, for the respondent No.5.

O R D E R

K.K. TRIVEDI, J. :- By this petition under Article 226 of the Constitution of India, the petitioner has sought to challenge the report submitted by the respondent No.3 for taking an action against the petitioner for recovery of the amount, said to be spent unauthorizedly for the purpose of taking certain facilities. The petitioner was appointed as Chairman of the Madhya Pradesh Rajya Beej Avam Farm Vikas Nigam (herein after referred to as 'Corporation') vide notification dated 18.05.2004. According to the petitioner, he has been given the status of a Cabinet Minister by an order of the State Government issued on 5th August, 2004. According to the petitioner, he is entitled to get all the facilities which are provided to a Cabinet Minister. He was further appointed for a year as Chairman of the aforesaid Corporation vide notification dated 10th May, 2007. The said period was extended by order dated 21st May, 2008 for a further period of two years. Certain actions were taken by

the petitioner because of his strong administration against some of the erring officers. Out of prejudices and bias because of such strict action taken by the petitioner, a frivolous complaint was made before the Lokayukt alleging that the petitioner has taken certain facilities at the cost of the Corporation expenses without any authority and thereby has caused financial loss to the Corporation. Many other allegations were also made with respect to financial irregularities. Upon making of such a complaint, a case was registered by the Lokayukt, comments and replies were called from the Corporation, which were submitted. It was categorically contended by the Corporation that such facilities were extended to the petitioner at the cost of Corporation in view of the resolutions passed by the Corporation, in the past. It was said that no irregularity was committed by the petitioner. However, a show cause was issued to the petitioner of which the reply was submitted by him categorically denying all such allegations supported by documentary evidence but instead of considering such a reply of the petitioner in appropriate manner, the Lokayukt has given a report under Section 12 of the Madhya Pradesh Lokayukt Evam Up- Lokayukt Adhiniyam, 1981 (herein after referred to as 'Act'), to the State Government with a recommendation that amount spent by the petitioner for obtaining such facilities be recovered from him and information be given to the Lokayukt under the provisions of Section 12(2) of the Act aforesaid, therefore, the present writ petition is required to be filed.

2. It is contended that in view of such acts of Lokayukt since the petitioner is made to suffer financial loss, he is required to approach this Court by way of filing this writ petition. It is contended by the petitioner that he has not committed any alleged misconduct or offence nor any financial loss is caused to the Corporation by the petitioner in any manner, therefore, such a report is bad in law and liable to be quashed.

3. The petition was entertained by this Court and while issuing notices to the respondents, vide order dated 07.11.2008 it was directed that no coercive steps be taken to recover the amount in question from the petitioner. By filing a return, the Lokayukt, respondent No.3, has denied the allegations made in the petition. It is contended that since a complaint was received by the Lokayukt with respect to such illegal acts of the petitioner, enquiry was conducted, opportunity of hearing was given to the petitioner and after examining all the records, instructions of the State Government as also the circulars so issued from time to time, the Lokayukt came to the conclusion that petitioner has availed all such facilities in his capacity as Chairman of the

Corporation, which otherwise were not available to him under the orders of the State Government. Since on account of availing such facilities, financial loss was caused to the Corporation, said amount was required to be deposited by the petitioner. Holding as such, a report was submitted before the State Government to take appropriate action against the petitioner. This being so, it is contended that no illegality whatsoever is committed by respondent No.3 in submitting the report or asking the State Government to comply with the suggestions made by the Lokayukt. In view of this, it is contended that the writ petition is wholly misconceived and deserves to be dismissed.

4. Respondents No.1 and 2 have filed their return and have contended that since charges levelled against the petitioner have been found proved, a report is submitted by the Lokayukt under the provisions of Section 12(1) of the Act, the State Government will make the recovery of the amount from the petitioner as suggested by the Lokayukt and will submit a compliance report under Section 12(2) of the Act. It is contended that while doing so since the opportunity of hearing was given to the petitioner, it cannot be said that any illegality was committed by the Lokayukt in giving such findings. After receipt of the report of the Lokayukt, the respondent No.1 has already directed the competent authority to initiate appropriate proceedings for recovery of the amount found due against the petitioner. In view of these submissions, it is contended that the writ petition is misconceived and deserves to be dismissed.

5. A return has been filed by the respondent No.5 and he has categorically contended that there were several irregularities committed by the petitioner while he was functioning as Chairman of the Corporation and because of said reason, a complaint was made to the police for registering a criminal offence. An F.I.R. has been registered against the erring person only after obtaining an audit report, which makes it clear that the petitioner has in fact committed a criminal offence by misusing the funds of the Corporation for his personal use. It is, thus, contended that the petition is liable to be dismissed.

6. Shri D.K. Dixit, learned Counsel for the petitioner vehemently contended that in terms of the provisions of the Act, no power is available to the Lokayukt to investigate such a complaint, which does not constitute commission of an act causing financial loss to the Corporation as no personal gain to the petitioner on account of such act is alleged. It is contended that the charges of corruption are also not alleged nor are found proved by the Lokayukt and, therefore, the Lokayukt would not be having the jurisdiction to

look into such complaint. No report whatsoever was to be submitted before the State Government nor any action was required to be taken by the State Government to make any recovery from the petitioner. It is contended by learned Counsel for the petitioner that by passing the resolutions even before the appointment of the petitioner as Chairman of the Corporation, it was decided to grant certain facilities such as accommodation, expenses towards the electricity and telephone charges and the expenses towards the petrol consumption for the tours to be conducted by the Chairman. In terms of those resolutions if any facility was extended, which fact was categorically admitted by the Corporation-authorities in their reply before the Lokayukt, it was necessary on the part of the Lokayukt to close the enquiry against the petitioner. Instead a report is drawn and sent against the petitioner alleging that in terms of the instructions of the State Government, he was not entitled to certain benefits which he has obtained and, therefore, amount should be recovered from the petitioner and be deposited in the accounts of the Corporation. It is contended that since the Corporation is an autonomous body and it could have been resolved to extend certain more facilities than prescribed by the State Government to the Chairman of the Corporation, nothing wrong was committed if such facilities were made available to the petitioner at the cost of Corporation after passing of the resolutions. The Lokayukt is not required to function like Auditor and to ascertain whether any financial irregularity was committed by the petitioner while working as Chairman of the Corporation. It is, thus, submitted with vehemence that the report submitted by the Lokayukt is wholly unjustified.

7. Per contra it is submitted by learned Counsel appearing for the Lokayukt that the complaint made against the petitioner contains allegation and that being so, in terms of the Rules made by the State Government, investigation was conducted and a report was submitted. If such a report is given holding that the petitioner has spent more money than his entitlement while working as Chairman of the Corporation, the said money is required to be deposited by the petitioner. That being so, it is contended that the writ petition is liable to be dismissed.

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

9. First of all it has to be seen whether an investigation could be initiated by the Lokayukt on a complaint made to it by the respondent No.5 against

the petitioner or not and whether such allegations would constitute a cause for making enquiry or investigation under the Act ? Section 2(a) of the Act defines the word 'allegation' in the following manner :

“2.(b) “allegation” in relation to a public servant means any affirmation that such public servant,-

- (i) has abused his position as such to obtain any gain or favour to himself or to any other person or to cause undue harm to any person.
- (ii) was actuated in the discharge of his functions as such public servant by improper or corrupt motives;
- (iii) is guilty of corruption; or
- (iv) is in possession of pecuniary resources or property disproportionate to his known source of income and such pecuniary resources or property is held by the public servant personally or by any member of his family or by some other person on his behalf.

Explanation.- For the purpose of this sub-clause 'family' means husband, wife, sons and unmarried daughters living jointly with him;”

First sub-clause of this definition prescribes that in case any public servant has abused his position as such to obtain any gain or favour to himself, it would amount to an allegation, which is required to be enquired into by the Lokayukt. Since the other clauses mentioned in this sub-clause are not relevant, the same are not referred in detail but suffice it to say that there were no allegations that the petitioner, a public servant, was actuated in discharge of his functions by improper or corrupt motives as there are no allegations with respect to the charges of corruption and having in possession of pecuniary resources or property disproportionate to his known source of income.

10. The broader sense is attached to the word 'allegation' in the definition. If the petitioner was holding the post of Chairman of the Corporation, a definite allegation should have been made to the effect that he has abused his position as such to obtain any gain or favour to himself. From this aspect if the resolutions passed by the Corporation are seen, it would be clear from such resolutions that as back as in the year 1997 a resolution was passed by the

Corporation to sanction Rs.7500/- per month as rent for the bungalow provided to the Chairman of the Corporation. Yet another resolution of the Corporation is brought to the notice where it was said that except the vehicles allotted to the Chairman and Vice-Chairman of the Corporation, the limit for providing petrol would be 60 liters per month. This fact that the electricity, water supply and other miscellaneous expenses on a bungalow provided to the Chairman would be borne by the Corporation was also brought to the notice of the Lokayukt. The entire allegation against the petitioner was that expenses were incurred in using the bungalow allotted to the petitioner in his capacity as Chairman of the Corporation and loss was caused to the Corporation. The findings in this respect given by the Lokayukt are required to be seen. It is held in the report that the petitioner was entitled to the house rent at the rate of Rs.4000/- per month whereas the amount was spent at Rs.6750/- per month. Similarly, it was found that the petitioner has used 1450 liters petrol more than the allotted quantity of petrol and, thus, cost of petrol was also to be recovered from him. For reaching to such a conclusion in the report only this much was said that the limits were fixed by the circulars of the State Government and exceeding the said limits, expenses were done, therefore, the same was required to be recovered from the petitioner. However, in the entire report though the contentions of the petitioner were recorded but findings have not been given by the Lokayukt. If the Board of Directors of the Corporation have decided to extend certain facilities to the petitioner, while he was functioning as Chairman of the Corporation, at least it could not have been said that the petitioner was responsible or instrumental to such an act nor could it be said that he has abused his position as such to obtain any gain or favour. There is nothing on record to show that this particular aspect was examined, investigated and a finding was recorded in this respect by the Lokayukt or the officer, who has conducted investigation. Thus, such a finding cannot be accepted.

11. Now it has to be seen whether after enquiry if it was found that the allegation with respect to abuse of position as Chairman by the petitioner for obtaining any gain or favour was not proved, any report was required to be given by the Lokayukt against the petitioner or not. For the purposes, the scope of conducting such investigation by the Lokayukt is required to be examined. The Madhya Pradesh Lokayukt Evam Up-Lokayukt (Investigation) Rules, 1982 (herein after referred to as 'Rules') have been framed in this respect. The word 'investigation' is defined in Rule 2(iv) of the Rules, which

reads thus :

“2(iv) “Investigation” means any enquiry or other proceeding in connection with the complaint, but does not include a preliminary enquiry.”

Again the word 'complaint' is mentioned in Rule 6 of the Rules. The power to regulate proceedings in investigation is conferred on Lokayukt and Up-Lokayukt under Rule 15 of the Rules and then the provisions are made in Rule 17 of the Rules for direction by the Lokayukt or Up-Lokayukt. If while conducting the investigation it was found that element of abuse of position so as to obtain any gain or favour was not established against the petitioner, specific direction could have been given by the Lokayukt in this respect to the investigating authority. It was required to be inquired whether any such decision was taken by the Corporation only because the petitioner was asking for making such a decision. If the Corporation has earlier resolved to grant certain facilities to the Chairman of the Corporation and in view of such a decision any facility was obtained by the petitioner, how could it be said that such a facility was obtained by abuse of his position by the petitioner. Nothing has been placed on record to indicate that such a fact was found proved even remotely. Therefore, to say that the allegations made against the petitioner to the extent referred in the order of the Lokayukt were made out and, therefore, such a direction was issued to make recovery from the petitioner, is wholly unjustified. In view of this, it cannot be said that the report drawn by the Lokayukt against the petitioner was just and proper or that any action was required to be taken by the State Government in compliance of the report submitted by the Lokayukt.

12. Learned Counsel for the petitioner has put his reliance heavily in the case of *C.K. Jaffer Shariief vs. State*, AIR 2013 SC 48, and has contended that without there being any element of dishonest intention to gain something, it could not have been said that the allegations made against the petitioner in complaint were even remotely proved. It is contended that on the basis of the material available on record if the allegations are examined, it will be clear that the complaint made against the petitioner was in fact nothing but a complaint actuated on prejudices and bias by some of the employees of the Corporation. That being so, the investigation initiated against the petitioner was required to be closed. The factum of law laid-down by the Apex Court in the case of *C.K. Jaffer Shariief* (supra) may not be applicable in the present case in view

of the fact that the investigation in the said case was under Section 13(1)(d) of the Prevention of Corruption Act and not under the provisions of investigation of a complaint by the Lokayukt. Hard and fast rule of evidence may not be applicable in such circumstances because in fact the investigation conducted in respect of such complaint is not strictly an investigation as has to be conducted in a case of corruption. However, it was the authority of the Lokayukt to make the investigation in respect of the complaint made against the petitioner, as has been held by the Division Bench of this Court in the case of *Kanhaiyalal Vishwakarma vs. State of M.P. and others*, 2011(1) MPHT 20. It cannot be said that the investigation conducted by the Lokayukt was beyond the jurisdiction of the Lokayukt.

13. In view of the discussions made herein above, this Court would not be in a position to grant a stamp of approval to the report submitted by the Lokayukt to the State Government to make recovery from the petitioner for alleged loss caused to the Corporation. Such a report submitted by the Lokayukt is, thus, liable to be quashed.

14. Consequently, this writ petition is allowed. The letter dated 19.08.2008 and the report annexed with it for taking action against the petitioner for making recovery of the amount said to be spent unauthorizedly by the petitioner is hereby quashed. However, there shall be no order as to costs.

Petition allowed.

I.L.R. [2014] M.P., 993

WRIT PETITION

Before Mr. Justice A.K. Shrivastava

W. P. No. 1021/2010 (Jabalpur) decided on 10 July, 2013

ASHOK DIWAN (DR.)

...Petitioner

Vs.

SMT. SHANTIBAI & ors.

...Respondents

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Application for amendment of plaint - Pleading by lawyer practicing in mufasil court - Not to be considered strictly - Nature of suit would not change on allowing amendment - Application allowed. (Paras 9 & 10)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 - वादपत्र में संशोधन हेतु आवेदन - मुफ्सील न्यायालय में व्यवसाय कर रहे वकील द्वारा

अभिवचन - कठोरता से विचार में नहीं लिया जाना चाहिए - संशोधन मंजूर करने पर वाद का स्वरूप नहीं बदलेगा - आवेदन मंजूर।

Cases referred :

AIR 1962 SC 406, AIR 1937 Nagpur 345.

Sankalp Kochar, for the petitioner.

S.P. Sharma, for the respondents.

ORDER

A.K.SHIVASTAVA, J. :- This petition under Article 227 of Constitution of India has been filed by the plaintiff against the order dated 9.11.2009 passed by learned First Additional District Judge, Khurai in Civil Suit No.38-A/07 by which his application under Order VI Rule 17 of C.P.C for amendment in the plaint has been dismissed.

2. The facts necessary for disposal of this petition lie in a narrow compass. Suffice it to say that a suit for specific performance of contract has been filed by the plaintiff/petitioner on the basis of a document of agreement of sale dated 6/12/05. According to the plaintiff, first defendant/respondent No.1, Smt.Shanti Bai entered into an agreement of sale with plaintiff to sell the property in question for a consideration of Rs.2,00,000/-. The Plaintiff paid advance payment of Rs.50,000/- on 6.12.2005, the date on which document of agreement of sale was written. Since the first defendant did not sale the property in question and has sold it to defendant No.2 and 3 on 23/3/2006 therefore, present suit has been filed for specific performance of the contract.

3. Joint written statement has been filed by all defendants denying the plaintiffs averments. In para (2) there is specific denial that no document in writing of agreement of sale was executed and the same is a fictitious document. The other averments in the plaint have also been denied. In the additional pleadings it has been specifically pleaded by the defendants that alleged agreement of sale said to have been executed on 6/2/2012 is forged document and has been manufactured in order to grab the property to respondent No.1 who is an old lady of 70 years.

4. Issues have been framed but the evidence is yet to begun. The application under Order VI Rule 17 CPC is filed by plaintiff/petitioner praying to amend the para 2,8 and 10 of the plaint. This application has been rejected

by the trial court by the impugned order. In this manner this petition under Article 227 of the Constitution of India has been filed by the plaintiff.

5. The contention of the learned counsel for the petitioner is that looking to the averments made in the application for amendment it cannot be said that the nature of suit is changed. It has also been contended by him that indeed the proposed amendment is a clarification in the plaint. Learned counsel further submitted that although in para 2 of the plaint it has been pleaded that a written agreement was executed on 6.12.2005 between plaintiff and first defendant but in fact on this date a written receipt was issued in favour of the petitioner by first defendants which was attested by two witnesses in which the first defendant agreed to sell the property in question to the plaintiff. It is also submitted that the agreement of sale was oral but on 6/12/2005 a receipt was issued by first defendants accepting that she had obtained a sum of Rs.50,000/- as advance from the plaintiff and balance amount will be received at the time of registration of the sale deed. Learned counsel submitted that Civil Suit is filed in Khurai which is a Tehsil headquarter and therefore strict law of pleading should not be applied and some latitude should be given when the suit is filed at Tehsil level. Learned counsel further submits that the lawyer who is conducting the case has not correctly drafted the plaint and has written that an agreement of sale in writing was executed on 6.12.2005. In support of his contention he has placed reliance upon decision of Supreme Court in the case of *Abdul Kadir Vs. Madhav Prabhakar* AIR 1962 SC 406. Hence it has been prayed that amendment application be allowed and impugned order be set aside by allowing this petition.

6. On the other hand Shri Sharma, learned counsel for the defendants/respondent argued in support of the impugned order and submitted that cogent reasons have been assigned by the trial court rejecting the application and there is no scope for interference under article 227 of the Constitution of India. He has further submitted that very specifically it has been pleaded by the defendants that no documents of agreement of sale was executed and even if it is filed in the court it is nothing but a forged document. Learned counsel further submits that now the plaintiff wants to withdraw his admission in the plaint that the agreement of sale was in writing and in its place he wants to put altogether a different case by changing the nature of the plaint that

agreement of sale took place orally which is not permissible under the law.

7. It has been further propounded by him that there is specific pleading of defendant in para 16 that there is nothing in the plaint to demonstrate when property in question was agreed to be sold and the pleading of plaintiff is totally silent in regard of the description of the property in question. Further it has been put forth by him that application has been filed at a belated stage and it cannot be allowed. Thus, it has been prayed that the petition may be dismissed.

7. Having hearing learned counsel for the parties, I am of the considered view that amendment application and the petition deserves to be allowed. It appears that suit is in its preliminary stage because evidence is yet to begun and therefore proviso to Order VI Rule 17 is not attracted, in this case.

8. I have to advert now if the amendment application is allowed whether the nature of suit will be changed and further whether there is any withdrawal of admission of the plaintiff. On a bare perusal of the para 2 of the plaint this court finds that there is specific pleading in the plaint that a written document of agreement of sale was executed on 6/12/2005 for a consideration of Rs.2,00,000/- and plaintiff paid a sum of Rs.50,000/-towards advance money to the first defendant who after receiving the said amount signed the agreement and said that when the plaintiff will pay the balance amount of consideration the sale deed will be executed. However in the amendment application plaintiff is raising the plea that agreement of sale took place orally but after oral transaction of agreement of sale a receipt of Rs.50,000/-was issued by the first defendant in favour of the plaintiff/ petitioner and further she acknowledged that whenever the balance amount of consideration will be paid to her she will execute the sale deed.

9. On bare perusal of the receipt Annexure P-4, this court finds that date 6.12.2005 is written and further there is signature of the first defendant. The execution of this document has been denied by the defendant and she has also denied her signature upon it in the written statement, but in the document of receipt dated 6.12.05 it has been mentioned that she had received a sum of Rs.50,000/-on 6.12.05. It is argued by respondents that plaintiff has now changed his stand that the agreement of sale took place orally. However, the date 6.12.05 which is

pleaded in para (2) of the plaint also find place in the said receipt. Hence, this contention of learned counsel for the plaintiff appears to be correct that agreement of sale took place orally although the written receipt was executed on 6.12.05 upon which the signature of first defendant is there. Indeed instead of pleading in para 2 of the plaint that the document of agreement of sale is in writing, it should have been pleaded that a written receipt acknowledging the receipt of advance money Rs.50,000/-the defendant had agreed to sell the land.

10. According to me the lawyer who drafted the plaint belong to Tehsil place and suit has been filed in the Civil Court at Tehsil Khurai. Therefore, according to me mufassil pleadings should not be considered too strictly and some latitude should be given to it. In this regard I am placing reliance on the Division Bench decision in the case of *Arjuna Vs. Mohanlal*, AIR 1937 Nagpur 345. Same view has also been taken by the Supreme Court in *Abdul Kadir* (supra) which has been relied by the learned counsel for the petitioner/plaintiff. On a bare perusal of the para 10 of the said decision this court find that the Supreme court has held that pleadings in mufassil courts cannot be considered too strictly. Thus, I am of the view that if the amendment application of the plaintiff is allowed nature of suit will not change and, therefore, when the trial of the suit is yet to begun the amendment application should not have been rejected.

11. So far as the contention of the learned counsel for the respondent that document of receipt is a forged and first defendant did not sign it nor received any consideration is concerned, suffice it to say that this issue shall be decided by the trial court after recording the evidence and nothing can be stated in this regard at this stage.

12. For the reasons stated above this petition is allowed, the impugned order is set aside and the amendment application is allowed on payment of cost of Rs.1000/-. The amount of cost be deposited on or before 19th August, 2013. The defendant shall be free to withdraw the said amount of cost. It is made clear that if the amount of cost is not deposited by 19th August, 13 the impugned order passed by the trial court rejecting the application shall stand and this petition shall stand dismissed.

Order accordingly.

I.L.R. [2014] M.P., 998

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 21854/2011 (Jabalpur) decided on 20 August, 2013

JAWAHAR LAL NEHRU KRISHI VISHWA VIDYALAYA ...Petitioner
Vs.

MUNICIPAL CORPORATION, JABALPUR & anr. ...Respondents

Municipal Corporation Act, M.P. (23 of 1956), Sections 132, 135 & 138 - Property Tax - "Whether the residential blocks situated within the precincts of the petitioner University to house the teachers and staff of the University would be subject to property tax u/s 132 & 135 of the M.P. Municipal Corporation Act, 1956"- Held - Property being transferred by the State Government in favour of the petitioner vide sub-section (1) of Section 55 of 1963 Act is for achieving the object for which the University has been brought into existence - Thus, there is no vesting in title as would create any ownership of property in favour of the petitioner - The ownership continues with the State which leads to a necessary corollary that being a property owned by State, it is exempted from Property Tax as per Section 136(a)(ii) of 1956 Act - For this reason also the respondents are not justified in imposing the impugned property Tax - Petition allowed. (Paras 1 & 26)

नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराएं 132, 135 व 138 - सम्पत्ति कर - "क्या विश्वविद्यालय के शिक्षकों और कर्मचारियों को रहने के लिये याची विश्वविद्यालय की सीमा के भीतर स्थित निवासीय ब्लॉक, म.प्र. नगरपालिक निगम अधिनियम, 1956 की धारा 132 व 135 के अंतर्गत सम्पत्ति कर के अधीन होंगे - अभिनिर्धारित - अधिनियम 1963 की धारा 55 की उपधारा (1) द्वारा याची के पक्ष में राज्य सरकार द्वारा सम्पत्ति का अंतरण, उस उद्देश्य को प्राप्त करने के लिये किया गया है, जिसके लिये विश्वविद्यालय को अस्तित्व में लाया गया है - अतः, कोई हक निहित नहीं होता जो याची के पक्ष में सम्पत्ति के किसी स्वामित्व को सृजित करता हो - स्वामित्व, राज्य के पास निरंतर है, जो इस आवश्यक निष्कर्ष की ओर ले जाता है कि सम्पत्ति का स्वामी राज्य होने के नाते वह अधिनियम 1956 की धारा 136(a)(ii) के अनुसार सम्पत्ति कर से मुक्त है - इस कारण भी प्रत्यर्थांगन द्वारा आक्षेपित सम्पत्ति कर अधिरोपित करना न्यायोचित नहीं - याचिका मंजूर।

Cases referred :

AIR 1957 SC 344, (1977) 1 SCC 155, 1991 Supp.(2) SCC 228,

(2001) 8 SCC 143, (2003) 1 SCC 6.

P.N. Dubey, for the petitioner.

Anshuman Singh, for the respondents.

ORDER

SANJAY YADAV, J. :- Solitary issue raised for consideration vide this writ petition under Article 226 of the Constitution of India is as to whether the residential blocks situated within the precincts of the petitioner-University to house the teachers and staff of the University would be subject to property tax under sections 132 and 135 of the Madhya Pradesh Municipal Corporation Act, 1956, when the other buildings and lands and portions thereof used exclusively for educational purposes have been exempted under Section 136 of the 1956 Act. In other words can the residential quarters constructed for teachers and staff be said to be exclusively used for educational purposes, is the precise issue.

2. Challenge in the petition is to the communication dated 04.11.2011 whereby the petitioner has been informed that a property tax under section 132, 135 and 138 of 1956 Act has been imposed on the residential quarters and space occupied by the staff, police station and the bank as tenant and an amount of Rs.1,75,74,913/- for the period from 1997-98 to 2011-12 has been assessed to be paid.

3. Taking into consideration the solitary issue raised in the petition as noted in the beginning, the constitution and the purposes for which the petitioner-University has been established may first be noted before dwelling on the rival contentions.

4. Petitioner-University, owes its existence to the Jawaharlal Nehru Krishi Vishwa Vidyalaya Act, 1963 enacted to establish and incorporate a Vishwa Vidyalaya for Agriculture and Allied Science at Jabalpur to provide for education and prosecution of research in Agriculture and Allied Sciences, extension and other matters ancillary thereto. It is a body corporate (under Section 3) Section 5 empowers the University, besides other things as mentioned therein, to maintain colleges, schools of studies and hostels in the manner prescribed in the statutes; to institute teaching research and extension posts required by the university and to appoint persons to such posts; to supervise and control the residence, conduct and discipline of students of the

University and to make arrangements for promoting their health development and general welfare; to create administrative ministerial and other necessary posts and to make appointments thereto; to do all such other acts and things, whether incidental to the powers or not as may be requisite in order to further the objects of the University.

5. That by virtue of sub-section (1) of section 55 of 1963 Act, all Government colleges imparting instructions in Agriculture and Veterinary science and Animal Husbandry for bachelors degree on above and all research stations within the areas specified in sub-section (1) of section 6 operated for carrying out research in Agriculture and Allied Sciences together with lands, hostels and other buildings, furniture, library, books, laboratories, stores, instruments, apparatus, appliances and equipments and live stocks belonging to such colleges and stations and the budget programme made for them has been transferred to and vest in the University with coming into force of 1963 Act.

6. Sub-section (3) of Section 55 of 1963 Act further stipulates that nothing in Section 55 shall be deemed to authorize the University to sell, lease, exchange or otherwise dispose of any land or building of any college or research station transferred to the University under sub-section (1) except with prior concurrence of the State Government.

7. That, as per provisions contained under Section 37 of 1963 Act, the State Government has framed statutes which besides other things provide for staff housing, student hostels and other accommodation vide chapter IX; clause 70 where under stipulates:

“70. Employee Housing and other Accommodations:

(1) The Vishwa Vidyalaya may procure, construct, own, take on lease, and use houses for Vishwa Vidyalaya employees as determined by the Board to be necessary for the proper functioning of the Vishwa Vidyalaya. Administrative Council shall make up and adopt Regulations for the proper administration of staff housing matter.

(2) As recommended by the Administrative Council the Board may provide and operate for employees of the Vishwa Vidyalaya health, recreational and other ancillary facilities. All Such Facilities shall be administered as provided in regulations

prepared and adopted by the Administrative Council.”

RIVAL CONTENTIONS:

8. Two folds contention have been put forth on behalf of the petitioner, firstly, that, the residential accommodations/quarters being for the purpose of housing the teachers and others engaged exclusively in furtherance to achieve the object for which the University has been established for which no rent has been charged, except certain charges to meet out the expenses for electricity, water and other amenities, the same is exemptable under section 136(c) of 1956 Act. Secondly, that the property though transferred by the State Government and vest in the University, such vesting, it is urged, is limited to the extent of its being managed and administered to achieve the object for which the University has been constituted i.e. for education and prosecution of research in Agriculture and Allied Sciences, extension and other matters ancillary thereto. It is contended that with the stipulation as contained under sub-section (3) of section 55 of 1963 Act, the State Government has retained its ownership thereon. That being so, it is contended, the buildings and lands owned by the State Government is exempted from imposition of property tax vide clause (a)(ii) of section 136.

9. Respondents on their turn refute the contentions put forth by the petitioner. In respect of the contention that no rent is charged for the accommodation given to the staff, it is urged that the same having not been pleaded should not be taken into consideration as the respondents have already assessed the same being leased out to the tenants, therefore, has been assessed to property tax. It is next urged that, the residential accommodation though occupied by the staff is not exclusively used for educational purpose and since the same is rented out and occupied by tenants, the properties having been assessed to the property tax. Regarding the contention that the ownership of the property transferred and vested with the University is retained by the State Government, it is urged by the learned counsel for respondents that the vesting of property in the University is absolute in nature and the stipulations contained in sub-section (3) of section 55 of 1963 does not curtail the ownership right of the over the property. It is accordingly contended that the property transferred and vested in the University belongs to Petitioner-University and not the State as would attract the exemption clause : section 136(a)(ii).

10. Considered the rival submissions.

11. At the outset it may be noted that though there is no averment in the petition or the rejoinder filed by the petitioner, that no rent is being charged from the staff occupying the residential. The submissions that only charges towards electricity and water supply are recovered from the occupant were made during course of argument. The respondent Corporation has also not come forward with any material on the basis whereof they have ascertained and have arrived at a conclusion that the quarters are occupied by the University staff as tenants and the lease rent is being charged. In absence of any cogent material on record to establish the fact that the employees/teaching staff are occupying the quarters as tenants and the rent is being charged from them, petitioner's contention has to be accepted that no rent is being charged from the employees occupying these quarters, except the electricity, water and charges towards other amenities.

12. Clause (a) of sub-section (1) of section 132 of 1956 Act provides that for the purpose of Act, the Corporation shall subject to any general or special order which the state Government may make in this behalf, impose the whole or in any part of the Municipal area a tax payable by the owners of buildings or lands situated within the city with reference to the gross annual letting value of the buildings or lands called the property tax, subject to the provisions of sections 135, 136 and 138.

13. Section 136 exempts certain class of properties mentioned therein from property tax levied under section 135. Clause (a) provides for buildings and lands owned by or vesting in (i) the Union Government (ii) the State Government (iii) the Corporation; whereas clause (c) provides for buildings and lands or portions thereof used exclusively for educational purposes including schools, boarding houses, hostels and libraries of such buildings and land or portions thereof are either owned by the educational institutions concerned or have been placed at the disposal of such educational institutions without payment of any rent.

14. In the case at hand there is no dispute that the petitioner University has been brought into vogue by virtue of enactment, viz, the Jawaharlal Nehru krishi Vishwa Vidyalaya Act, 1963 with an object to provide for education and prosecution of research in Agriculture and Allied Sciences extension and other matters ancillary thereto. Thus, it is beyond any cavil that it is an educational institution. It is also not in dispute that entire lands and buildings has been transferred by virtue of provisions contained under Section 55 of

1963. That, the college, boarding houses, hostels, libraries are not subjected to Property tax is also not disputed. It is only the staff quarters which are been subjected to property tax on the anvil, as apparent from the assessment order, that, the occupants are tenant. This aspect is seriously disputed by the petitioner that the staff occupying the quarters by virtue of they being employed for imparting education or in furtherance to achieve the object for which the University has been brought in existence.

15. When a staff is engaged to impart education and for that purpose the residential quarters are constructed or taken on lease, as the case may be, to accommodate such staff, then these residential accommodation becomes the integral part of the college with which it is attached. Merely because some amount is charged towards the electricity, water and other amenities, will not entitle the respondents to treat those occupants as tenant in absence of direct evidence of rent being charged from them.

16. In view whereof the respondents are not justified in segregating the residential quarters occupied by the staff which include the teachers and other employees and by bank and police station for being subjected to property tax. The decision of assessing the residential quarters in question to property tax is set aside and the demand raised thereon vide order dated 24.10.2011 passed by respondent No.1 and the communication dated 04.11.2011 are liable to be quashed.

17. Another issue is whether the property in question is owned by the petitioner-University or the ownership despite of its transfer is refrained by the State.

18. Emphasis has been laid on behalf of University that the property including the land and buildings in the possession is because of the transfer thereof by the State Government vide sub-section(1) of section 55 of 1963 Act. It is urged that though the property as per said provision vests in the University, the vesting is only for the purpose of management and to achieve the object for which the University has been constituted because of the stipulation under Section 55(3) which indicates that the ownership is retained by the State Government.

19. Question is with the vesting of property the University owns the same as its owner.

20. The expression 'vest' takes its meaning from the context.

21. In *Fruit and Vegetable Merchants Union v. Delhi Improvement Trust* : AIR 1957 SC 344 on the question whether vesting of najul land belonging to the Government with the Delhi Improvement Trust under the scheme for construction of markets would create an absolute right. It was held that placing the property at the disposal of the trust did not signify that the Government had divested itself of the title to the property and transferred the same to the Trust. It has been held:

“19. That the word “vest” is a word of variable import is shown by the provisions of Indian statutes also. For example, S.56 of the Provincial Insolvency Act (5 of 1920) empowers the Court at the time of the making of the order of adjudication or thereafter to appoint a receiver for the property of the insolvent and further provides that “such property shall thereupon vest in such receiver”. The property vests in the receiver for the purpose of administering the estate of the insolvent for the payment of his debts after realising his assets. The property of the insolvent vests in the receiver not for all purposes but only for the purpose of the Insolvency Act and the receiver has no interest of his own in the property. On the other hand, Ss.16 and 17 of the Land Acquisition Act (Act 1 of 1894), provide that the property so acquired, upon the happening of certain events, shall “vest absolutely in the Government free from all encumbrances”. In the case contemplated by Ss. 16 and 17 the property acquired becomes the property of Government without any conditions or limitations either as to title or possession. The legislature has made it clear that the vesting of the property is not for any limited purpose or limited duration. It would thus appear that the word “vest” has not got a fixed connotation, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. The provisions of the Improvement Act, particularly Ss. 45 to 49 and 54 and 54-A when they speak of a certain building or street or square or other land vesting

in a municipality or other local body or in a trust, do not necessarily mean that ownership has passed to any of them.”

22. In *Maharaj Singh v. State of Uttar Pradesh & ors* : (1977) 1 SCC 155 it has been held:

“16. It is reasonable to harmonize the statutory provisions to reach a solution which will be least incongruous with legal rights we are cognisant of in current jurisprudence. Novelty is not a favoured child of the law. So it is right to fix the estate created by Section 117 into familiar moulds, if any. Such an approach lends to the position that the vesting in the State was absolute but the vesting in the sabha was limited to possession and management subject to divestiture by Government. Is such a construction of 'vesting' in two different senses in the same section, sound? Yes. It is, but 'vesting' is a word of slippery import and has many meanings. The context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. That is why even definition clauses allow themselves to be modified by contextual compulsions. So the sense of the situation suggests that in Section 117(1) of the Act 'vested in the State' carries a plenary connotation, while 'shall vest in the Gaon Sabha' imports a qualified disposition confined to the support is forthcoming, for this meaning. Black's Law Dictionary gives as the sense of 'to vest' as 'to give an immediate fixed right of present or future enjoyment, to clothe with possession, to deliver full possession of land or of an estate, to give seisin'. Webster's Third International Dictionary gives the meaning as 'to give to a person a legally fixed immediate right of present or future enjoyment'.

23. In *Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu and others*: 1991 Supp(2) SCC 228 it has been held:

“10. The word 'vest' clothes varied colours from the context and situation in which the word came to be used in a statute or rule. In Chamber's Mid-Century Dictionary at p. 1230 defined "vesting" in the legal sense 'to settle,

secure, or put in fixed right of possession; to endow, to descend, devolve or to take effect, as a right'. In Black's Law Dictionary, 5th Edition at p. 1401, the word, 'vest', to give an immediate, fixed right of present or future enjoyment, to accrue to, to be fixed, to take effect, to clothe with possession, to deliver full possession of land or of an estate, to give seisin to enfeoff. In Stroud's Judicial Dictionary, 4th Edition, Vol. 5 at p. 2938, the word 'vested' was defined in several senses. At p. 2940 in item 12 it is stated thus 'as to the interest acquired by public bodies, created for a particular purpose, in works such as embankments which are vested in them by statute, see *Port of London Authority v. Canvey Island Commissioners*, [1932] 1 Ch. 446 in which it was held that the statutory vesting was to construct the sea wall against inundation or damages etc. and did not acquire fee simple. Item 4 at p. 2939, the word 'vest', in the absence of a context, is usually taken to mean vest in interest rather than vest in possession'. In item 8 to 'vest', "generally means to give the property in". Thus the word 'vest' bears variable colour taking its content from the context in which it came to be used."

24. In *Municipal Corporation of Greater Bombay and others v. Hindustan Petroleum Corporation and another* (2001) 8 SCC 143 it has been held:

"15. We are, therefore, of the view that the word "vest" means vesting in title, vesting in possession or vesting in a limited sense, as indicated in the context in which it is used in a particular provision of the Act."

25. In *Bharat Coking Coal Ltd. v. Karam Chand Thapar & Bros. Pvt. Ltd. and others* (2003) 1 SCC 6 it has been held:

"3. The word 'vest' in common English acceptation mean and imply conferment of ownership of properties upon a person and in the similar vein it gives immediate and fixed right of present and future enjoyment. Significantly, however, the expression 'vest' is a word of variable import since it has no

fixed connotation and the same has to be understood in different contexts under different set of circumstances. The decision of this Court in *The Fruit & Vegetable Merchants Union v. The Delhi Improvement Trust* (AIR 1957 SC 344) lends concurrence to the same. It is in this context a later decision of this Court (*Dr. M. Ismail Faruqui, etc. v. Union of India & Ors.* : AIR 1995 SC 604 at 645) ought also to be noticed, wherein this Court stated :

"96. (4) The vesting of the said disputed area in the Central Government by virtue of Section 3 of the Act is limited, as a statutory receiver, with the duty for its management and administration according to Section 7 requiring maintenance of status quo herein under sub-section (2) of Section 7 of the Act. The duty of the Central Government as the statutory receiver is to hand over the disputed area in accordance with Section 6 of the Act, in terms of the adjudication made in the suits for implementation of the final decision therein. This is the purpose for which the disputed area has been so acquired.

(5) The power of the courts in making further interim orders in the suits is limited to, and circumscribed by, the area outside the ambit of Section 7 of the Act.

(6) The vesting of the adjacent area, other than the disputed area, acquired by the Act in the Central Government by virtue of Section 3 of the Act is absolute with the power of management and administration thereof in accordance with sub-section (1) of Section 7 of the Act, till its further vesting in any authority or other body or trustees of any trust in accordance with Section 6 of the Act. The further vesting of the adjacent area, other than the disputed area, in accordance with Section 6 of the Act has to be made at the time and in the manner indicated, in view of the purpose of its acquisition.

(7) The meaning of the word "vest" in Section 3 and

Section 6 of the Act has to be so understood in the different contexts.

(8) Section 8 of the Act is meant for payment of compensation to owners of the property vesting absolutely in the Central Government, the title to which is not in dispute being in excess of the disputed area which alone is the subject matter of the revived suits. It does not apply to the disputed area, title to which has to be adjudicated in the suits and in respect of which the Central Government is merely the statutory receiver as indicated, with the duty to restore it to the owner in terms of the adjudication made in the suits."

26. In the case at hand, the property being transferred by the State Government in favour of the petitioner vide sub-section (1) of Section 55 of 1963 Act is for achieving the object for which the University has been brought into existence. With the transfer of property, the University is placed in possession because as per sub-section (3) of Section 55, it is beyond the power of the University to sell, lease, exchange or otherwise dispose of any land or building of any college or research station without prior concurrence of the State Government. Thus, there is no vesting in title as would create any ownership of property in favour of the petitioner. The ownership continues with the State which leads to a necessary corollary that being a property owned by State, it is exempted from property tax as per section 136(a)(ii) of 1956 Act. For this reason also the respondents are not justified in imposing the impugned property tax.

27. Conclusion, inevitable is, that on both counts i.e. under Section 136(a)(ii) and (c) the respondents cannot levy the property tax on the property of petitioner-University including the residential quarters occupied by the staff, police station, Bank free of rent.

28. Consequently, the assessment of property tax of these accommodations and the demand notice thereon are hereby quashed.

29. Petition is allowed to the extent above. No costs.

Petition allowed.

I.L.R. [2014] M.P., 1009

WRIT PETITION

Before Mr. Justice Sanjay Yadav

W.P. No. 9504/2013 (Jabalpur) decided on 18 September, 2013

UMESH YADAV

...Petitioner

Vs.

STATE OF M.P.

...Respondent

Arms Act (54 of 1959), Sections 13 & 14 - Application for grant of arms license rejected by licensing authority taking note of the fact that the petitioner has no danger from any group or person - Held - Provisions contained u/s 13 (2A) read with Section 14(1)(b)(i)(3) provide that recording of reason in refusing to grant the license is not postulated - Licensing Authority being satisfied in a given facts that there is no threat from any group or person to the petitioner's life or property was within his right to refuse the grant of license - No interference is warranted - Petition dismissed. (Paras 5, 13 & 14)

आयुध अधिनियम (1959 का 54), धाराएं 13 व 14 - शस्त्र अनुज्ञप्ति प्रदान किये जाने हेतु आवेदन को अनुज्ञप्ति प्राधिकारी द्वारा इस तथ्य को ध्यान में रखकर अस्वीकार किया गया कि याची को किसी समूह या व्यक्ति से खतरा नहीं है - अभिनिर्धारित - धारा 13(2ए) सहपठित धारा 14(1)(बी)(i)(3) के उपबंध उपबंधित करते हैं कि अनुज्ञप्ति प्रदान करने से इंकार करने में कारण अभिलिखित किया जाना परिकल्पित नहीं है - प्रस्तुत तथ्यों में अनुज्ञप्ति प्राधिकारी की संतुष्टि कि याची के जीवन या संपत्ति को किसी समूह या व्यक्ति से कोई आशंका नहीं, अनुज्ञप्ति प्रदान करने से इंकार करना उसके अधिकार में था - किसी हस्तक्षेप की आवश्यकता नहीं - याचिका खारिज।

Case referred :

AIR 1987 Patna 122.

Atul Chaudhary, for the petitioner.*S.S. Bisen*, G.A. for the respondent.**ORDER**

SANJAY YADAV, J. :- Heard.

1. Order dated 28.4.2012 passed by the State of Madhya Pradesh is being assailed vide this petition under Article 226 of the Constitution of India.

2. Vide impugned order, the application for grant of arms license has been rejected.
3. The rejection order is in following terms:

मध्यप्रदेश शासन
गृह विभाग
मंत्रालय, वल्लभ भवन, भोपाल
--आदेश:-

भोपाल, दिनांक 2012

क्रमांक एफ0 16-166/2012/दो/बी-1-शासन द्वारा श्री उमेश यादव पिता श्री अयोध्या प्रसाद यादव निवासी 1098, साऊथ सिविल लाईन, पंचपेढी, जिला जबलपुर को एक अवर्जित बोर पिस्टल/रिवाल्वर शस्त्र लायसेंस सहमति बाबत प्रस्ताव का परीक्षण किया गया । आवेदक को किसी व्यक्ति/समूह विशेष से खतरा नहीं होने से शासन की नवीन शस्त्र नीति के अंतर्गत पात्रता नहीं आती है । अतएव प्रस्ताव औचित्यपूर्ण एवं समाधानकारक न पाये जाने के फलस्वरूप पूर्ण विचारोपरांत अमान्य (Reject) किया जाता है ।

मध्यप्रदेश के राज्यपाल के नाम से
तथा आदेशानुसार
(राजेश ओगरे)
अवर सचिव
म0प्र0 शासन, गृह विभाग

4. Petitioner applied for license of pistol/revolver to the State of Madhya Pradesh whereon the report was called upon from the District Magistrate Jabalpur vide letter No. F-16-498/बी -1/दो दिनांक 26.3.2011. The District Magistrate furnished his report on 3.2.2012, wherein without making any mention in Clause 17 regarding danger from any group or person and merely stating that the weapon is sought for self protection, recommended for grant of licence. The report also reveals that the petitioner's brother is already in possession of licence No.34/07/DM/Jabalpur for twelve bore gun. The Commissioner, Jabalpur Division, Jabalpur vide his communication dated 14.2.2012 endorsed the District Magistrate's recommendations.

5. The licensing authority i.e. State Government taking note of the fact that the petitioner has no danger from any group or person rejected petitioner's

application by impugned order, which is being questioned on the ground that the same is a non-speaking order and the rejection order is wrongly passed without appreciating the recommendations of the District Level Authorities. It is urged that if there is no adverse report then incumbent it is upon the respondent-State to have granted the licence to the petitioner as sought for as it was for protection of one's life and property. It is urged that in absence of any adverse report, the grant of arm's license is a rule rather an exception.

6. On these grounds, petitioner seeks quashment of impugned order dated 28.4.2012 and a suitable direction to respondents.

7. Learned Government Advocate who appear on advance notice supports the order passed by the State. It is urged that the order contains reasons and not a cryptic order. The reasons it is urged need not be in paragraphs and could be in single line. It is contended that the discretion being vested with the licensing authority who having considered the report and finding that the arm is required for personal protection is well within its right to hold that in absence of threat from any group or person, the grant of license is unwarranted.

8. Considered the submissions.

9. In India, right to carry arms is a privilege conferred by the Act, it is not a fundamental right. The Act which enables a person who has completed twenty-one years of age, has not been sentenced on conviction of any offence involving violence or moral turpitude to imprisonment for any term at any time during a period of five years after the expiration of the sentence who has not been subjected to execute under Chapter VIII of the Code of Criminal Procedure 1973, a bond for keeping the peace or for good behaviour for the period of such time and of sound mind or if not found fit (Section 9(1)(a) and Section 14 A of the Arms Act 1959).

10. Sub-Section (1) of Section 3 of the Act stipulates that:-

(1) No person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of this Act and the rules made thereunder.

11. Sub-Sections (1), (2) and (2 A) of Section 13 of the Act stipulates :-

“13 Grant of licenses.-(1) An application for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.

(2) On receipt of an application, the licensing authority shall call for the report of the officer in charge of the nearest police station on that application, and such officer shall send his report within the prescribed time.

(2A) The licensing authority, after such inquiry, if any, as it may consider necessary, and after considering the report received under sub-Section (2), shall, subject to the other provisions of this Chapter, by order in writing either grant the license or refuse to grant the same.

Provided that where the officer in charge of the nearest police station does not send his report on the application within the prescribed time, the licensing authority may, if it deems fit, make such order, after the expiry of the prescribed time, without further waiting for that report.

Section 14 of the Act provides that :

14. Refusal of licenses-

1. Notwithstanding anything in section 13, licensing authority shall refuse to grant-

(a) a license under section 3, section 4, or section 5 where such license is required in respect of any prohibited arms or prohibited ammunition:

(b) A license in any other case under Chapter II,-

(i) where such license is required by a person whom then licensing authority has reason to believe-

(1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or

(2) to be of unsound mind, or

(3) to be for any reason unfit for a license under this Act, or

(ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such license.

2. The licensing authority shall not refuse to grant any license to any person merely on the ground that such person does not own or possess sufficient property.

3. Where the licensing authority refuses to grant a license to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

12. Thus, besides there being a legal bar of acquiring, possessing or carrying any firearm, the provisions contained under Section 13(2 A) gives the expansive discretion to licensing Authority "either grant the license or refuse to grant the same". While exercising the power, licensing authority is not bound by the report sought for and furnished under sub-Section (2) of Section 13 of the Act. It is still within its discretion to refuse the grant of license for any reason unfit for a license under the Act. In this context, a reference can be had of the decision of a full Bench of Patna High Court in *Kapil Dev Singh V. State of Bihar and others* AIR 1987 Patna 122 wherein it is held :

"It would be manifest from the aforesaid provisions that under the Act there is first a legal bar for having in possession or carrying a firearm unless a valid license is first secured in accordance with the provisions of the Act. Secondly, even the original grant under Section 13 (2A) is vested entirely in the licensing authority and it seems that the widest discretion has been given to it. Even after conforming to the procedural requirements, the licensing authority may, as regards the general category of arms, either grant the licence or refuse to grant the same. This discretion in this context has perhaps been deliberately kept untrammelled. Further, under Section 14 the law mandates

a refusal to grant licence even where the licensing authority has reason to believe that the applicant is for any reason unfit for licence under the Act. The larger tilt of the law in this context is thus somewhat too plain to call for further elaboration.”

13. Furthermore, regarding the contention that the order refusing the grant does not record reasons and, therefore, stands vitiated. It is observed from the provisions contained under Section 13(2A) read with Section 14(1)(b) (i)(3) that recording of reason in refusing to grant the license is not postulated. Thus in a case as the present one if the licensing authority is satisfied in a given facts that there is no threat from any group or person on the life or property of the applicant, is within its right in refusing the grant of license. It has been succinctly observed in Principles of Statutory Interpretation : 13th Edn. 2012, by the learned Author, in the present context, : “But if the statute does not require either the recording of satisfaction or the reasons therefor, an order made without recording the satisfaction as to fulfillment of the conditions on which the exercise of the power depends, does not make the order invalid. In such cases it is the fact of satisfaction of the authority which gives rise to jurisdiction and not the recording of the satisfaction. The difference only is this, that if the satisfaction has been recorded, a presumption will arise that the authority was really satisfied and the person who disputes the existence of such satisfaction will have to establish the non-existence thereof; whereas if the satisfaction has not been recorded and a person challenges the existence of satisfaction, the authority will have to establish that it was in fact satisfied before passing the order. This principle will apply whether the order in question is executive or in the nature of subordinate legislation”. (Chapter V Synopsis 6 Page 438).

14. In the case at hand, the licensing authority being satisfied in the given facts that there is no threat from any group or person to the petitioner's life or property was within his right to refuse the grant of license as would warrant an interference.

15. In the result, petition fails and is dismissed. No costs.

Petition dismissed.

I.L.R. [2014] M.P., 1015**WRIT PETITION***Before Mrs. Justice S.R. Waghmare*

W.P. No. 8520/2013 (Indore) decided on 25 February, 2014

STATE OF M.P.

... Petitioner

Vs.

ANKIT RATHORE

...Respondent

Constitution - Article 227 & Van Upaj Vyapar (Viniyaman) Adhiniyam, M.P. (9 of 1969), Section 15(6) - Confiscation of vehicle owing to its involvement in Commission of forest offence - Held - Under Section 15(6) of the Act burden is cast upon the owner of the vehicle to prove that his vehicle was being used for commission of forest offences without his knowledge and not with his connivance - Owner has lodged F.I.R. against driver, he has aided and helped the Forest Officials in recovering the accused person - Court rightly released the vehicle - Writ by State dismissed. (Paras 3 & 5)

संविधान - अनुच्छेद 227 व वन उपज व्यापार (विनियमन) अधिनियम, म.प्र. (1969 का 9), धारा 15(6) - वन अपराध कारित करने में शामिल होने से वाहन की जब्ती - अभिनिर्धारित - अधिनियम की धारा 15(6) के अंतर्गत वाहन के स्वामी पर यह साबित करने का भार है कि वन अपराध कारित करने में उसके वाहन का उपयोग उसकी जानकारी के बिना किया गया और न कि उसकी मौनानुमति से - स्वामी ने वाहन चालक के विरुद्ध प्रथम सूचना रिपोर्ट दर्ज की, उसने अभियुक्त व्यक्ति को पकड़ने में वन कर्मचारियों की सहायता और मदद की - न्यायालय ने उचित रूप से वाहन को मुक्त किया - राज्य की रिट खारिज।

Cases referred :

ILR (2008) MP 3112, 2009 (2) MPHT 535, AIR 1997 SC 1017, 1991(1) MPWN 82, M.P. 2006 (2) MPLJ 67.

Pramod Meetha, G.A. for the petitioner/State.

O.P. Solanki, for the respondent.

ORDER

MRS. S.R. WAGHMARE, J. :- By this writ petition under Article 227 of the Constitution of India, the Petitioner State on behalf of the Chief Conservator of Forest has challenged the order dated 15/5/2013 passed by the District & Sessions Judge, Ujjain in Revision No.366/2012.

2. Briefly stated; the facts of the prosecution case are that on 5/4/2011 at 12.40 p.m. in the forest region of Kannod at forest check post Barrier Siyaghat, the person in-charge of the check post along with the staff were checking vehicles and found that one Tata 207 pickup loading vehicle bearing registration No. MP 09 GE 2261 was carrying teakwood illegally; 47 logs weighing 1.619 square meters were recovered. The driver of the vehicle Bhura @ Imran and his two companions Irfan and Faheem however, abandoned the vehicle and ran away taking the advantage of the darkness. On inspecting the vehicle, the chassis numbers was noted and the wood was seized. However, there were no papers in the vehicle according to the seizure memo. The offence was registered and Regional Forest Officer and the Dy. Forest Ranger Kannod informed the competent authority of the Forest Department and upon completion of investigation a complaint was filed against driver Bhura @ Imran and his two companions Irfan and Faheem and they were arrested and vehicle was seized and the teakwood was also seized. The competent authorities were informed about the same and the confiscating proceedings were started by letter dated 23/8/2011. The competent authority received written statement from the respondent owner and present respondent Shri Ankit Rathore took up the defence that on 4/4/2011 approximately at 08.00 am in the morning driver Bhura and his two companions had taken his vehicle for transportation. At 12.00 noon since the driver did not return the vehicle; the owner tried to contact him on the mobile phone and he could not be contacted and he felt something foul and started searching. On the way at Ashtha at around 1.00 pm he informed the Thana Kotwali Sehore in writing; that his driver, had taken his vehicle without informing him and might have met with an accident and the owner was not responsible for any consequence. After considering the defence statement; the competent authority come to a conclusion that the seized vehicle was being used for transporting the teak wood illegally and informed the authorized Forest Officer that there was violation of Section 15 (4) and passed the order dated 15/5/12. Being aggrieved the accused owner filed an appeal before the appellate authority/ the Chief Forest Conservator Ujjain. The Appellate Court by the impugned order dismissed the appeal upholding the findings of the trial Court. Being aggrieved the appellant owner filed a revision petition before the Special Judge Ujjain and the Revisional Court set aside the orders and directed the return of the vehicle to the owner Ankit Rathore and hence the present petition under Article 227 of the Constitution of India by the State Government.

3. Counsel for the petitioner/State has vehemently urged the fact that the revisional Court had erred in holding that the **owner** was entitled to the vehicle primarily because the authorized officer of the trial Court had on appreciation of the evidence found that the petitioner had knowledge about the seizure of the vehicle and had not taken any steps promptly to claim the possession of his vehicle and thus, there was indirect involvement of the petitioner in commission of forest offence. Placing reliance in the case of *Rakhiya Bai vs. Conservator of Forest and others* ILR (2008)mp 3112, 2009(2) MPHT 535. Counsel prayed that the impugned order of the revisional court be set aside. Counsel also placed reliance in the case of *State of M.P. vs. Suresh Kumar* AIR 1997 SC 1017 whereby the Apex Court had held that under Section 15(6) of M.P. Van Upaj (Vyapar Viniyaman) Act, 1969 casts burden upon owner of truck to prove that his truck was used for illegal activities without his knowledge and not with his connivance and when the respondent did not produce any other materials on record to discharge burden under Section 15(6) and the High Court had totally misread and misinterpreted provisions of Section 15(6) and therefore, the Apex Court had allowed the appeal of the State and held that the respondent owner had failed to satisfy the competent authority; and the appellate authority as required under Section 15(6) of the Act. It upheld the order of confiscation of the truck. Counsel for the State submitted that in the present case also there was no FIR filed by the owner of the vehicle as is being alleged. The Station Officer of Sehore has not been examined to prove that the FIR has been filed by him as alleged. And hence revisional Court had erred in holding that there was no collusion or connivance between the owner and the driver and he had taken all the necessary precaution as per Section 15(6) of the Act. Counsel for the petitioner/State prayed that the order of the revisional court be set aside and the order of the trial Court and the appellate Court be restored.

4. Per Contra, Counsel for the respondent owner Ankit Rathore has vehemently urged the fact that there was no findings at all against the respondent owner and he was entitled to protection under the Act and that the confiscation is not at all justified and the vehicle be released. Moreover, the concurrent fact recorded against the respondent owner that the respondent had knowledge that the vehicle was being used for the forest offence is a pure misreading of the evidence. Drawing attention of this Court to the fact that the statement of A.K. Shrivastava the Forest Officer of Udaynagar Van Mandal Dewas, he stated that respondent Ankit Rathore had informed him that his vehicle was

missing and when he had been called to Kannod, it was he who have given the name of the driver and his address, besides the owner had also accompanied the police officials at the time of identification and had helped to serve notice on the driver by affixture (chuspa). The respondent owner has identified the driver after being arrested and he has remained steadfast in his statement in Court. Similarly the driver was arrested from Pithampur and produced before the District Judge, Kannod and had been taken on remand. Besides driver Imran has been cross-examined by the Counsel for the respondent owner and has categorically stated that the owner had helped in arresting the driver and in the last question he has categorically stated that he has no implication of the owner in the offence and there was no collusion with the driver. Besides Counsel stated that the FIR was filed at police station Sehore and the application has been filed by the owner to summon the FIR along with the receipt. The defence witness has also completely supported the owner of the vehicle and the documentary evidence was available on record and in the instant case Counsel submitted that the case of *Rakhiya Bai vs. Conservator of Forest and others* (supra) would of no help to the petitioner State Government. Counsel placed reliance in the case of *State of M.P. vs Ram Gopal Sharma* 1991(1) MPWN 82 and *Sarjoo Prasad vs. State of M.P.* 2006 (2) MPLJ 67 whereby the Apex Court had held that when the owner proving ignorance of commission of forest offence then the vehicle cannot be confiscated under Section 15 of the Van Upaj (Vyapar Viniyaman) Adhiniyam, 1969. Similarly in the matter of *Sarjoo Prasad* (supra) the Court has categorically held that when there is concurrent finding of the fact that it was **not** in the knowledge of the petitioner that his tractor and trolley was being used to commit any forest offence then the vehicle cannot be confiscated and the petitioner is, therefore, entitled to the protection provided to him under Section 52(5) of the Act.

5. On considering the above submissions, I find that the sole question arises for adjudication of the present petition is whether the respondent owner Ankit Rathore was in the knowledge that his vehicle was being used in forest offence by the accused driver Bhura @ Imran along with his two companions Irfan and Faheem, I find that the present petition is without merit on this count alone since as pointed out by the Counsel for the respondent owner; the testimony of Forest Officer A.K. Shrivastava clearly indicated that owner respondent had filed the FIR against the driver. He was also questioned in the trial Court thus:

प्रश्न:— क्या प्रकरण की जॉच में आरोपियों के कथन से वाहन मालिक की क्या संलिप्तता पाई गई ?

उत्तर:— प्रमाणितता नहीं पाई गई।

प्रश्न:— फरार आरोपी फहीम की गिरफ्तारी हेतु कौन-कौन दो गये थे और उनका क्या सहयोग रहा था ?

उत्तर:— सीहोर के नजदीक ग्राम में गिरफ्तारी हेतु पतासाजी के दौरान परिक्षेत्र सहायक कुसमान्या, श्री जगदीश पटेल परिक्षेत्र सहायक खातेगांव, अन्य सुरक्षा श्रमिक तथा वाहन मालिक निशान देही हेतु साथ थे श्री राठौर की निशान देही हेतु साथ में मौजूद थे।

प्रश्न:— आरोपी इरफान को गिरफ्तारी हेतु टी. आई. सीहोर से हतकड़ी जारी कराते समय टी. आई. ने वाहन मालिक की रिपोर्ट के संबंध में क्या बताया था?

उत्तर:— टी. आई. सीहोर से आरोपी हेतु हतकड़ी जारी करवायी गई थी इस दौरान टी. आई. सीहोर ने वाहन गायब होने की सूचना प्राप्ति बाबद जानकारी दी थी।

In fact he has aided and helped the Forest Officials in recovering the accused persons; then under the circumstances it cannot be said that there was connivance with the driver or the other accused persons by the owner. There was ample evidence on record in the examination of defence witness of D.S. Shakya, Vanpal ECO Tourism also. I find that the trial Court had erred in holding that the FIR was not proved in the Court by the owner. However, his bonafides should not have been in doubt when the receipt of having filed FIR was produced in Court by the owner. The police officials themselves have stated that the information regarding the accused driver Imran has been supplied by the respondent owner himself. The appellate Court as well as Trial Court had committed error which was rightly set aside by the revisional Court. I also place reliance on *Sarjoo Prasad* (supra), whereby the Court held thus;

“Concurrent finding of fact recorded by authorized officer as well as appellate authority that it was not in the knowledge of the petitioner that his tractor and trolley was used in the forest offence since there is no finding at all against the petitioner, the petitioner is entitled to the protection and confiscation not justified.”

The impugned tractor and trolley shall stand released from confiscation.

So also the Apex Court in the matter of *State vs. Suresh* (Supra) categorically held thus:

“Under Sub-section 15 (6) burden is cast upon the owner of the truck to prove that his truck was used for illegal activities without his knowledge and not with his connivance.”

And in the said case the owner failed to discharge this burden.

6. Hence, 'mens rea' or culpability is very important for conviction of the co-accused owner as against accused driver. And in the present case the culpability cannot be fastened on the owner on the basis of the discussion above.

7. Consequently, I find that there was no infirmity in the order of revisional Court. It is based on sound appreciation of evidence and provisions of law which have been properly interpreted. The Writ Petition filed by the State Government is without merit and it is **dismissed** as such.

8. The order of the revisional Court is upheld and restored. The petitioner State is directed to hand over the vehicle as per terms and conditions directed by the revisional Court on proper application by the owner. Needless to say that this Court is not making any comment on merits of the case.

9. The petition is dismissed as being without merit.

Petition dismissed.

I.L.R. [2014] M.P., 1020

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 1343/2004 (Gwalior) decided on 12 March, 2014

ALI HUSSAIN (DIED), BY LEGAL HEIRS

...Petitioner

Vs.

SHABBIR HUSSAIN & ors.

...Respondents

A. *Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Proviso to Rule 17 was incorporated in 2002 - Suit was filed in 1988 - Proviso to Rule 17 does not apply.* (Para 8)

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – नियम 17 का परंतुक, 2002 में सम्मिलित किया गया – वाद 1988 में प्रस्तुत किया गया – नियम 17 का परंतुक लागू नहीं होता।

B. Civil Procedure Code (5 of 1908), Order 8 Rule 6(A) - Counter claim by defendant - At the stage of closure of defence evidence, counter claim is not permissible. (Para 14)

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6(ए) – प्रतिवादी द्वारा प्रतिदावा – बचाव साक्ष्य के समापन के प्रक्रम पर, प्रतिदावा अनुज्ञेय नहीं।

Cases referred :

(2009) 2 SCC 409, 2009 (1) MPWN 23, AIR 2001 Karnataka 10, 2006(6) MHLJ 728, (1997) 8 SCC 174, (2009) 12 SCC 689, (1987) 3 SCC 265, (2008) 13 SCC 179, AIR 1991 Karnataka 283, AIR 2003 Madras 416, (2003) 7 SCC 350, (2006) 12 SCC 734.

N.K. Jain with A.K. Jain, for the petitioners.

D.D. Bansal, for the respondents (except respondents No. 1(B), 2 & 3.).

ORDER

SUJOY PAUL, J. :- These petitions filed under Article 227 of the Constitution are directed against the same impugned order passed in Civil Suit No.. 15A / 92 by the Additional District Judge, Mungawali, dated 28.11.2000. On joint request, matters were analogously heard and decided by this common order.

WP No. 1343/2004

2. Shorn of unnecessary details, the relevant facts are that the petitioner / plaintiff filed a civil suit against Inayat Hussain. Inayat Hussain died during the pendency of the suit and his legal heirs were brought on record along with respondents No. 2 to 13 and their legal representatives. The suit was filed for declaration and permanent injunction with further prayer of restoration of possession. The plaintiff stated that suit house is situated at ward No. 2, Jawahar Marg, Mungawali, Distt. Guna.

3. It is the case of the plaintiff that plaintiff's father Kurwan Hussain had four sons, namely, Ali Hussain (plaintiff), Inayat Hussain, Noor Hussain and Abbas Hussain. Abbas Hussain died in the year 1966 and his legal heirs are

defendants No. 2 to 9. Another brother of the plaintiff, Noor Ali died in the year 1984 and his legal heirs were impleaded. According to the plaintiff, there was a partition between the brothers during the life time of the father and the suit house fell to the share of plaintiff. After two years of the partition, father of the plaintiff Kurwan Hussain died and plaintiff became the sole owner of the property. According to the plaintiff, out of two shops, one shop had fallen to the share of plaintiff and the other to the share of defendant No.1. This portion of the property is situated at Naya Bazar, Mungawali. The plaintiff further stated that Inayat Hussain was carrying on his business at Ashok Nagar as well, but he had shifted to Mungawali before 20 years and wanted to carry on his business at Mungawali. In this suit, defendant No.1 filed his written statement, thereafter, the Court below has framed the issues. The plaintiff lead his evidence. Thereafter, the defendant also examined himself. Certain other witnesses of the defendant entered the witness box and deposed their statements. Before completion of defense evidence, the defendant moved an application under Order 6 Rule 17 C.P.C. on 28.09.2000. In addition, he filed counter claim on the ground that he had acquired right by virtue of adverse possession and the legal heirs of the defendant No.1 acquired the right by virtue of adverse possession being in possession for more than 12 years as the owner of the suit property. The application for amendment and counter claim were opposed by the present petitioner. The Trial Court after hearing parties on this aspect allowed the amendment application and partly allowed the counter claim. This order of Court below dated 28.11.2000 is called in question in both the petitions. The Court below has disallowed the part of the counter-claim in which the defendants intended to include a different property than the suit property. In other words, the suit was filed pertaining to a property situated at Mungawali. A part of counter claim which has been rejected contains a property situated at Ashok Nagar. The Court below opined that by counter claim the scope of suit cannot be extended.

4. Shri N.K. Jain, Senior counsel, criticized the order whereby the Court below has allowed the amendment application at the stage of almost closure of defense evidence. Learned counsel heavily relied on proviso to Order 6 Rule 17 C.P.C. and the judgment of Supreme Court in the case of (*Vidyabai and others Vs. Padmalatha and another*) reported in (2009) 2 SCC 409 . He also relied on 2009 (1) MPWN 23 (*Indus Colonisers (P) Ltd. Vs. Shadab Grih Nirman Sahkari Samiti, Bhopal and another*). It is contended that after insertion of proviso, unless due diligence is established, amendment

cannot be allowed. Criticizing the order, whereby counter claim is partly allowed, learned senior counsel relied on AIR 2001 Karnataka 10 (*Hanumanthagouda Vs. Bandu @ Bandeppa Venkatesh Kulkarni and others*). By placing reliance on para 13 of this judgment, it is contended that issues are framed and recording of evidence has commenced and, therefore, it was not open for the court below to even partly accept the counter claim. He contends that at the stage counter claim was filed, it was not maintainable.

WP No. 5876 /2007

5. WP No. 5876 /2007 is also directed against the same order. The petitioners / defendants is aggrieved by the portion of the order whereby his counter claim is disallowed. Shri D.D. Bansal, learned counsel for the petitioner, submits that under Order 8 Rule 6 (A) of C.P.C., the counter claim can be entertained till closure of the evidence of the parties. In support of this contention, he also relied on AIR 2001 Karnataka 10 (*Hanumanthagouda Vs. Bandu @ Bandeppa Venkatesh Kulkarni and others*). He placed heavy reliance on the finding wherein, the Karnataka High Court opined that the Court must lean in favour of full and complete justice and, therefore, the principle decided by the Division Bench can be extended to a case where the evidence is not completely closed by the parties and before the matter is reserved for judgment. He also relied on 2006 (6) MhLj 728 (*Sheshrao S/o Bhaurao Sable Vs. Ganesh S/o Mahadeorao Sable*) in this case Bombay High Court has relied on the Judgment of Karnataka High Court in *Hanumanthagouda* (supra). He also relied on Bombay High Court's judgment passed in Civil Revision No. 286 /1988 (*Datta Bandu Sadale and others Vs. Skidhar Payagonda Patil and Others*). Lastly, he relied on (1997) 8 SCC 174 (*Smt. Shanti Rani Das Dewanjee Vs. Dinesh Chandra Day (Dead)* by LRs).

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

7. The impugned order makes it clear that application filed by the defendants for amendment is allowed. In addition, counter claim filed by the defendant is partly allowed. In view of rival contention advanced, following questions emerge for decision :-

- (i) Whether the Court below has erred in allowing the amendment application?

(ii) Whether at the stage of almost closure of defense evidence, counter claim under Order 8 Rule 6 (A) C.P.C was entertainable?

(iii) Whether the Court below has erred in partly disallowing the counter claim?

Point No. (i)

8. The amendment application is admittedly filed at belated stage. Contention of Shri Jain, Senior counsel, is based on proviso to Order 6 Rule 17 C.P.C. This proviso was inserted in the year 2002. In the considered opinion of this Court, the judgment of *Vidyabai* (Supra) and judgment of this Court reported in 2009 (1) MPWN 23 (*Indus Colonisers (P) Ltd. Vs. Shadab Grih Nirman Sahkari Samiti Maryadit, Bhopal and another*) will not apply in the facts and circumstances of the present case. Admittedly, the suit in question was instituted in November, 1988. The Apex Court in (2009) 12 SCC 689 (*Sumesh Singh Vs. Phoolan Devi and Ors.*) opined that in a case where suit is filed before insertion of proviso (by Act 22 of 2002 w.e.f. 01.07.2002) proviso shall not apply. *Vidyabai* (supra) is based on the proviso, since it was held in *Sumesh Singh* (supra) that proviso itself will not apply in the suits which are filed prior in time, the judgment of Supreme Court in *Vidyabai*, based on said proviso, is of no assistance to the petitioner in WP No. 1343 / 2004. Before amendment and insertion of proviso to Order 6 Rule 17 C.P.C, the amendment applications were required to be considered leniently. Party seeking amendment was not required to establish due diligence. The Court below, in my opinion, has rightly allowed the amendment application by imposing costs because it was belatedly filed. Thus, point (i) is decided in favour of the defendants.

Points No. (ii) and (iii) :-

9. The decision of point No. (iii) will depend on the decision of point No. (ii). If point No. (ii) is decided in favour of the petitioner / plaintiff, there would be no need to decide point No. (iii). Before dealing with the rival contentions on this point, I deem it proper to reproduce Order 8 Rule 6(A) C.P.C, which reads as under:-

“ Order 8 Rule 6 (A) Counter-claim by defendant- (1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against

the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defense has expired, whether such counter-claim is in the nature of a claim for damages or not:

(2)

(3)

(4)

(Emphasis supplied)

10. Contention of Shri D.D. Bansal is founded upon the judgment of Karnataka High Court in case of *Hanumanthagouda* (supra). Although he relied on (1997) (8) SCC 174 (*Smt. Shanti Rani Das Dwanjee Vs. Dinesh Chandra Day (Dead) By LRs*), in the considered opinion of this Court, the said judgment has no application in the facts and circumstances of the present case. Similarly, reliance on 1987 (3) SCC 265 (*Mahendra Kumar and another Vs. State of M.P. & ors.*) is also of no help because in the said case the counter claim was held to be not entertainable by the High Court, when it was filed after filing written statement. In *Mahendra Kumar* (supra) the fact situation was different, it was not a case where counter claim is filed at the fag end of the trial and at the stage of almost closure of evidence of the defendant. Similarly, judgment reported in 2008 (13) SCC 179 (*Bollepanda P. Ponacha and Another Vs. K.M. Madapa*) has no application in the facts and circumstances of the present case. Para 11 of this judgment shows that it is based on different facts and circumstances.

11. A simple reading of order 8 Rule 6 (A)(1) C.P.C makes it clear that counter-claim against the claim of the petitioner can be filed before the defendant has delivered his defence or before the time limited for delivering defence has expired. Karnataka High Court in AIR 1991 Karnataka 283 (*Smt. Parvathamma Vs. K.R. Lokhnath and others*) opined that counter claim cannot be permitted to be filed once recording of the evidence commences. In (AIR 2003 Madras 416) (*Southern Ancillaries Pvt. Ltd. Vs. Southern Alloy Foundaries Pvt. Ltd.*) A Division Bench of Madras High Court opined that the defendant can make a counter-claim even after filing the written statement, but that should be filed before the commencement of recording of

evidence.

12. Thus, there appears to be some difference of opinion in the view taken by different High Courts. The judgments cited by Shri D.D. Bansal are in his favour, whereas aforesaid judgments of Karnataka and Madras High Courts are somewhat different. However, in view of subsequent judgments of Supreme Court, curtains are finally drawn on this point. The Apex Court considered this issue in (2003) 7 SCC 350 (*Ramesh Chand Ardawatiya Vs. Anil Panjwani*). In para 28 the Apex Court opined that “Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced.”

The aforesaid finding was given by the Apex Court on the consideration that if the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging the trial, complicating the otherwise smooth flow of the proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the court, the court would be justified in not exercising its discretion in favour of permitting a belated counter-claim. The framers of the law never intended pleading by way of counter claim to be utilized as an instrument for forcing the reopening of the trial by pushing back the progress of the proceedings.

13. The Apex Court in (2006) 12 SCC 734 (*Rohit Singh and others Vs. State of Bihar (Now State of Jharkhand) and others*) has held that “a counter-claim, no doubt, could be filed even after the written statement is filed, but that does not mean that a counter-claim can be raised after issues are framed and the evidence is closed. Therefore, the entertaining of the so-called counter-claim of Defendants 3 to 17 by the trial court, after framing of issues for trial, was clearly illegal and without jurisdiction. On that short ground the so-called counter-claim, filed by the Defendants 3 to 17 has to be held to be not maintainable”.

14. In view of plain reading of Order 8 Rule 6(A) C.P.C. and the judgments of Supreme Court in *Ramesh Chand Ardawatiya and Rohit Singh* (supra), it is clear that filing of counter-claim at the stage of conclusion of defence evidence is not permissible. This point needs to be decided in favour of the

plaintiff. As analyzed above, the Court below has erred in even partially allowing the counter-claim at the stage of almost conclusion of defence evidence. To this extent, the order needs to be interfered with. Since, counter-claim was held to be not maintainable / entertainable at said stage, point (iii) aforesaid need not to be decided.

15. Resultantly, the impugned order dated 28.11.2000 to the extent amendment application was allowed, is affirmed. The impugned order to the extent counter-claim was partially taken on record, is set aside.

16. Accordingly, WP No. 1343 / 2004 is partially allowed in terms of aforesaid and WP No. 5876 / 2007 is dismissed. No costs.

Petition partially allowed.

I.L.R. [2014] M.P., 1027

WRIT PETITION

Before Mr. Justice Rajendra Menon & Mr. Justice A.K. Sharma

W.P. No. 22034/2013 (Jabalpur) decided on 5 April, 2014

DHEERAJ PANDEY & anr.

...Petitioners

Vs.

STATE OF M.P. & ors.

...Respondents

A. Constitution - Article 226 - Revaluation of Answer Sheets - In absence of any statutory rules and regulations, revaluation of answer sheets and issuance of Mandamus is not permissible - However, if the material available prima facie demonstrates that a case of gross negligence or irregularity in evaluation of answer sheets is made out, a Writ of Mandamus can always be issued. (Para 3)

क. संविधान - अनुच्छेद 226 - उत्तर पुस्तिकाओं का पुनर्मूल्यांकन -
 "किसी कानूनी नियम एवं विनियमन की अनुपस्थिति में, उत्तर पुस्तिकाओं का पुनः मूल्यांकन एवं परमादेश का जारी करना अनुज्ञेय नहीं - किन्तु, यदि उपलब्ध सामग्री प्रथम दृष्ट्या यह दर्शाती है कि उत्तर पुस्तिकाओं के मूल्यांकन में घोर लापरवाही या अनियमितता का प्रकरण गठित होता है, तब परमादेश याचिका को निश्चित जारी किया जा सकता है।"

B. Constitution - Article 226 - Revaluation of Answer Sheets - Petitioner must averr that what was the material on which the petitioner answered the question, what was the answer given by the petitioner and how the petitioner says that the answer books are not

evaluated properly.

(Para 3)

ख. संविधान - अनुच्छेद 226 - उत्तरपुस्तिकाओं का पुनर्मूल्यांकन - याची को प्रश्न करना चाहिए कि याची ने प्रश्न का उत्तर किस सामग्री के आधार पर दिया है, याची द्वारा दिया गया उत्तर क्या था और याची कैसे कहता है कि उत्तर पुस्तिकाओं का उचित रूप से मूल्यांकन नहीं किया गया।

C. *Right to Information Act (22 of 2005), Section 6 - Answer Sheets* - Petitioners have a right to get their answer sheets under the Act, 2005 - After obtaining they can always say as to what was the answer given by them, the material based on which they say that their answer is correct and demonstrate as to how the evaluation is not correct - Petitioners may take recourse to remedy of obtaining the answer sheets under Act, 2005 and thereafter may make fresh claim - Petition disposed off. (Paras 4 & 5)

ग. सूचना का अधिकार अधिनियम (2005 का 22), धारा 6 - उत्तरपुस्तिकाएँ - अधिनियम 2005 के अंतर्गत अपनी उत्तर पुस्तिकाएँ प्राप्त करने का याचीगण को अधिकार है - अभिप्राप्ति पश्चात् वे निश्चित रूप से कह सकते हैं कि उनके द्वारा दिया गया उत्तर क्या था, आधारित सामग्री जिसके आधार पर वे कहते हैं कि उनका उत्तर सही है और दर्शा सकते हैं कि कैसे मूल्यांकन सही नहीं - याचीगण, अधिनियम 2005 के अंतर्गत उत्तर पुस्तिकाएँ अभिप्राप्त करने के उपचार का अवलंब ले सकते हैं और तत्पश्चात् नया दावा कर सकते हैं - याचिका का निपटारा किया गया।

Cases referred :

AIR 2007 MP 235, (2011) 8 SCC 497.

Ashish Pandey, for the petitioners.

K.S. Wadhwa, for the respondent No.1.

Sisodiya, for the respondent No.2.

ORDER

The Order of the Court was delivered by :
RAJENDRA MENON, J. :- Petitioners were students of Gyan Ganga Institute of Technology, Jabalpur and appeared in the B.E. second semester examination conducted by the respondent-University. The petitioners appeared in the examination conducted for the academic session in June, 2013 and thereafter, in certain subject which are indicated in the writ petition, the petitioners received zero marks. It is the case of the petitioners that they have a bright past and in

all the semester examinations and other examinations previously conducted they have received more than 80 marks and they contend that because the petitioners have received less marks than expected, it is apprehended that the answersheets have not been properly valued. Making an allegation that their answersheets have not been properly valued, they sought for revaluation of the answersheets. However, as the rules do not permit revaluation, it seems that re-totalling of marks was done and a result of no change was communicated to the petitioners.

2. Learned counsel for the petitioners submitted that the petitioners are bright students and they have an apprehension that their answersheets have not been valued properly and therefore they have filed a writ petition seeking a Mandamus to the respondents to evaluate the answersheets properly. Inviting out attention to a judgment rendered by a Division Bench of this Court in the case of *Priyanka Pandey vs. Secretary, Board of Secondary Education* AIR 2007 MP 235, learned counsel argued that even though the statutory rules do not permit revaluation, still in exceptional cases where a student is found to be extraordinarily brilliant with bright academic career and if gross negligence has resulted in awarding of less marks, it is said that revaluation can always be ordered by this Court. Inviting our attention to the principles laid down in the said case, learned counsel sought for interference. On the contrary, learned counsel for the respondents submitted that in the absence of their being any statutory rules for revaluation of the answersheets, no Mandamus can be issued for revaluation.

3. We have heard learned counsel for the parties at length and we do not have any hesitation in holding that in the absence of any statutory rules and regulations being available, revaluation of the answersheets and issuance of Mandamus is not permissible. However, there are exceptions to the normal rule and one of the exception is that if the material available on record prima facie demonstrates that a case of gross negligence or irregularity in evaluation of answersheets is made out, a Mandamus can always be issued by this Court. However, the burden of discharging this liability is on the student concerned who makes a plea of irregular evaluation or negligence in the matter of evaluation. The student is required to discharge this burden by producing prima facie evidence in support of the contention. In the present case, the petitioner has not done anything, except for making vague allegation that the answersheets were not valued properly, no specific averment as to what was

the material based on which the petitioner answered the question, what was the answer given by the petitioner and how the petitioner says that the answer books are not evaluated properly is indicated. For applying the case of *Priyanka Pandey* (supra) relied upon by the learned counsel for the petitioners, prima facie material has to be adduced by the petitioners. The petitioners having failed to do so in this petition. Merely on the basis of vague allegation, unsupported by any cogent material, a roving enquiry cannot be conducted by directing for revaluation.

4. Now, after the judgment of the Supreme Court in the case of *Central Board of Secondary Education and another vs. Aditya Bandopadhyay* 2011 (8) SCC 497, petitioners have a right to get their answersheets under the Right to Information Act and after obtaining the answersheets, they can always say as to what was the answer given by them, the material based on which they say that their answer is correct and demonstrate as to how the valuation is not correct. Until and unless such an exercise is not undertaken by the petitioners and a prima facie case is made out to show that the answersheets were not valued properly, merely on the basis of vague and unspecified allegation, no direction can be issued. If the contention of the petitioners as made is accepted by this Court then a Pandora Box will be opened and in every case based on unspecified and vague allegation, this Court will be required to direct the university or the examining bodies to re-evaluate all the answersheets, this is not permissible. Only in such cases where the student prima facie demonstrates that there is an error or negligence in valuation that a direction for revaluation can be ordered and now after the rights available to a student under the Right to Information Act, they have to demonstrate by obtaining the answer books under the Right to Information Act as to how they say that the answersheets have not been valued properly. As the petitioners have failed to discharge this burden in the present case, we see no reason to interfere into the petition.

5. Granting liberty to the petitioners to take recourse to the remedy of obtaining the answersheets under the Right to Information Act and thereafter making a fresh claim by demonstrating that their answersheets have not been valued properly, the appeal stands disposed of.

Appeal disposed of.

I.L.R. [2014] M.P., 1031

WRIT PETITION

Before Mr. Justice Sujoy Paul

W.P. No. 136/2013 (Gwalior) decided on 22 April, 2014

DEVENDRA SINGH KIRAR

...Petitioner

Vs.

STATE OF MADHYA PRADESH & ors.

...Respondents

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Section 69 - Whether Panchayat Secretary can be placed under suspension by the Collector - Held - Collector is the Appointing Authority of Panchayat Secretary - Sec. 69 is still in the Statute Book - Enabling provision to appoint the Panchayat Secretary by the Collector is not taken away or deleted - Rules are framed under the Adhiniyam are in aid to the Adhiniyam - Hence, Collector continues to be the Appointing Authority and is empowered to place the petitioner (Panchayat Secretary) under suspension. (Paras 1/8/9/10)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धारा 69 - क्या कलेक्टर द्वारा पंचायत सचिव को निलंबन में रखा जा सकता है - अभिनिर्धारित - पंचायत सचिव का नियुक्त प्राधिकारी कलेक्टर है - धारा 69 अंगी कानून की किताब में मौजूद है - कलेक्टर द्वारा पंचायत सचिव को नियुक्त करने के सामर्थ्यकारी उपबंध हटाये या निकाले नहीं गये हैं - अधिनियम के अधीन विरचित नियम, अधिनियम को सहायता प्रदान करते हैं - अतः, कलेक्टर नियुक्ता प्राधिकारी बना रहता है और याची (पंचायत सचिव) को निलंबन में रखने के लिये सशक्त है।

Case referred :

2009(2) MPHT 372.

D.P. Singh, for the petitioner.*Nidhi Patankar*, G.A. for the respondent/State.

None for the respondent No.4.

ORDER

SUJOY PAUL, J. :- Since the common question of law is involved in these matters, the matters are analogously heard and decided by this common order.

2. The core issue needs to be decided in this matter is whether the petitioners, Panchayat Secretaries, can be placed under suspension by the Collector ?

3. It is the common ground raised by the petitioners that the petitioners are Panchayat Secretary, whose service conditions are governed by Madhya Pradesh Panchayat Service (Gram Panchayat Secretary Recruitment and Conditions of Service) Rules, 2011. As per these rules, the appointing authority of the petitioners is Chief Executive Officer. The petitioners are already absorbed as per these 2011 Rules. Thus, as per M.P. Panchayat Service (Discipline and Appeal) Rules, 199 (sic. 1999) (for brevity, the "D&A Rules"), the Collector is not competent to place the petitioner under suspension.

4. Shri D.P.Singh and Shri D.S.Raghuvanshi, learned counsel for the petitioners, placed reliance on the definition of "appointing authority" in 2011 Rules. It reads as under:-

"Appointing Authority" with respect to Gram Panchayat Secretary means the Chief Executive Officer, Zila Panchayat".

5. The attention is also drawn on the Schedule appended to these Rules to bolster the submission that under these rules the appointing authority is Chief Executive Officer and, therefore, the Collector has no authority, jurisdiction and competence to place the petitioners under suspension:

6. *Per Contra*, the stand of the State is that the order is passed by the competent authority.

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

8. The Panchayat Secretary is appointed under Section 69 of the Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (for brevity, the "Adhiniyam"). It is not in dispute that in the present case the petitioners were appointed by the Collector under Section 69 of the Adhiniyam. Whether or not, the petitioners were appointed by the Collector, the fact remains that the Collector continues to be the appointing authority of the Panchayat Secretary. Section 69, in clear terms, shows that the State Government or the Prescribed Authority may appoint a Secretary in a Gram Panchayat. The Prescribed Authority for the purpose of relevant section is appointed by way of notification. Item 35 of this notification

(Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993, page 177-179) shows that the Collector is the "Prescribed Authority".

9. Subsequently 2011 Rules came into being. Chief Executive Officer is shown as appointing authority. However, it is important to note here that Section 69 is still in the Statute Book. Thus, the basic enabling provision to appoint Panchayat Secretary by the Collector is not taken away or deleted. In addition, by Rules Chief Executive Officer is declared as appointing authority. The Rules are framed under the Adhiniyam and are in aid to the Adhiniyam. Thus, under the Adhiniyam Collector continues to be the appointing authority.

10. A Division Bench of this Court in 2009 (2) MPHT 372 (*Kamlesh Dubey vs. State of MP*) opined that as per Section 69 (1) of the Adhiniyam, the Collector is the appointing authority of the Panchayat Secretary. This Court opined that as per rule 4 of D&A Rules, the Collector was empowered to suspend the petitioner from the post of Panchayat Secretary and not from the post of Panchayatkarmi. Rule 4 of D&A Rules makes it clear that the disciplinary authority or the appointing authority can place the petitioner under suspension. Thus, it can be safely concluded that the Collector being the appointing authority is empowered to place the petitioner under suspension.

11. Shri D.S.Raghuvanshi also argued on merits. It is contended that the petitioner is placed under suspension on incorrect grounds. In the opinion of this Court, the correctness of allegations cannot be gone into at this stage. The suspension is not a punishment. Correctness of allegations will be gone into in the disciplinary proceedings by the enquiry officer. At this stage, there is no occasion for this Court to examine the correctness of the allegations. A Panchayat Secretary can be placed under suspension during pendency of an investigation, enquiry or trial. The only thing which needs to be examined at this stage is whether the conditions/ingredients for placing the petitioner under suspension are satisfied. Since the respondents intended to conduct a disciplinary enquiry against the petitioner, it cannot be said that the order of suspension is beyond the powers available to the appointing authority under the D&A Rules. Thus, I find no reason to interfere with the suspension order.

12. Petitions have no substance and are hereby dismissed. No costs.

Petition dismissed.

I.L.R. [2014] M.P., 1034

CONTEMPT PETITION*Before Mr. Justice Rohit Arya*

Cont. Pet. No. 30/2014 (Gwalior) decided on 16 April, 2014

SHASHKIYA MAHAVIDHYALAYA SHIKSHAK SANGH

MADHYA PRADESH

...Petitioner

Vs.

SHRI V.S. SAMPAT & ors.

...Respondents

Contempt of Courts Act (70 of 1971) - Whether Contempt petition can be filed at Gwalior bench alleging non compliance of the orders passed by the Principal Seat at Jabalpur? - Held - Territorial jurisdiction of the principal seat at Jabalpur and benches at Indore and Gwalior has already been assigned - Hence, Contempt petition arising out of the order passed by the principal seat can be filled only at principal bench - Contempt proceedings cannot be initiated on mere asking without factual foundation of jurisdictional nature - Constitutional power is conferred upon High Court to ensure majesty of law on the touchstone of rule of law as no one is above the rule of law. (Paras 4/9)

न्यायालय अवमान अधिनियम (1971 का 70) - क्या जबलपुर मुख्यपीठ द्वारा पारित किये गये आदेशों का अनुपालन नहीं किये जाने का अभिकथन करते हुये अवमानना याचिका को खंडपीठ ग्वालियर में प्रस्तुत किया जा सकता है? - अभिनिर्धारित - मुख्यपीठ जबलपुर और खंडपीठ इन्दौर एवं ग्वालियर का क्षेत्राधिकार पहले से नियत है - अतः, मुख्यपीठ द्वारा पारित किये गये आदेश से उत्पन्न होने वाली अवमानना याचिका को केवल मुख्यपीठ में प्रस्तुत किया जा सकता है - क्षेत्राधिकार के स्वरूप के तथ्यात्मक आधार के बिना, केवल ऐसा चाहने मात्र से अवमानना कार्यवाही आरंभ नहीं की जा सकती - उच्च न्यायालय को विधि की प्रभुसत्ता, विधि के नियम की कसौटी पर सुनिश्चित करने के लिये संवैधानिक शक्ति प्रदान की गयी है क्योंकि कोई भी विधि के नियम से ऊँचा नहीं।

Prashant Sharma, for the petitioner.*D.K. Katare*, for the respondents No. 1 & 2.*M.P.S. Raghuvanshi*, for the respondent No.3.*Raghvendra Dixit*, for the respondent No.4.**ORDER****ROHIT ARYA, J. :-** This contempt petition is filed by Shashkiya

Mahavidhyalayin Shikshak Sangh, Madhya Pradesh through its President Rakesh Shrivastava alleging non-compliance of order dated 21/11/2013 passed in W.P. No. 20357/2013 in the case of *Smt. Kirshna Sharma & others Vs. State of M.P. & others*) by the learned single Judge sitting at Principal Seat, Jabalpur.

2. Having perused the order complained of, three fold questions prima facie arise viz. (i) Whether, contempt petition can be filed at Gwalior alleging non-compliance of the order passed by the Principal Seat at Jabalpur; (ii) Whether, such contempt petition can be filed by a person who is neither petitioner nor respondent in the order passed by the Principal Seat, Jabalpur; and (iii) Whether, such contempt petition can be filed against persons who were not party to the writ petition decided by Principal Seat, Jabalpur by the order complained of.

3. As regards the first question, learned counsel for the petitioner submits that since the order complained of has applicability throughout the State of Madhya Pradesh, therefore, contempt petition can be filed at Gwalior. Secondly, since the petitioner is a Shashkiya Mahavidhyalayin Shikshak Sangh and therefore, even if, individuals had approached the Principal Seat in W.P.No. 20357/2013 (s) wherein, the order was passed, the contempt filed by Shashkiya Mahavidhyalayin Shikshak Sangh can be maintained against the order complained of. Thirdly, counsel for the petitioner has submitted that respondents arrayed are either the officials of the Election Commission or the State Government functionaries, therefore, accountable for non-compliance of the order, even if, they were not parties in the writ petition.

4. Having considered the submissions put forth, this Court is of the opinion that as per the notifications dated 28th November, 1968 and 23rd June, 1971 issued by President of India in exercise of the powers conferred under Sub-section (2) of Section 51 of the State Reorganization Act, 1956 the territorial jurisdiction of the Principal Seat at Jabalpur and Benches at Indore and Gwalior has already been assigned, therefore, contempt petition arising out of an order passed by Principal Seat, Jabalpur, in the opinion of this Court can be filed only before the Principal Seat and not at Benches established at Indore and Gwalior.

5. Secondly, Shashkiya Mahavidhyalayin Shikshak Sangh was not a party in W.P. No. 20357/2013 (S). Petitioners in that writ petition were

individuals, posted and working at Jabalpur. Besides averments made and prayer sought in the aforesaid writ petition, were in their behalf. Collector-cum-District Election Officer, Jabalpur and Up Zila Nirvachan Adhikari, District Jabalpur were arrayed as respondents No. 4 and 5. Further, in the normal parlance, the order passed is to be understood in the context of petitioners in the petition. Even otherwise, if the petitioner claimed non-compliance of the order, ought to have filed a contempt petition before the Principal Seat where the order was passed, that has not been done, therefore, present petitioner in the contempt petition cannot take undue advantage of its status as Sangh to prefer contempt petition at Gwalior Bench of the High Court other than the Principal Seat alleging non-compliance of the order passed at Principal Seat. Further, if the petitioner had any grievance, he ought to have taken recourse to independent proceedings in accordance with law for ventilating its grievance before the appropriate forum, that has also not been done. Therefore, contempt petition at the instance of Sangh is found to be not maintainable on the ground of territorial jurisdiction.

6. Further, admittedly respondent No. 3 was not party to the writ petition filed at Jabalpur. Besides, there is nothing on record to suggest that he has any role to play in the context of the order complained of, more so, after enforcement of Code of Conduct by the Election Commission. That apart, upon perusal of the contempt petition, it is well explicit that no grievance of any individual or group of individuals is made to maintain the aforesaid contempt petition in context whereof order passed by Principal Seat and annexed in the contempt petition. Moreover, not a single representation appears to have been filed for ventilating of any grievance, before the appropriate authority, as such, the proceedings instituted is based on skeleton petition. Even otherwise, it is explicit after having gone through the order passed on 21/11/2013 in W.P. No. 20357/2013, Coordinate Bench at Principal Seat, Jabalpur has issued directions for adherence to the guidelines issued by the Court in judgments quoted therein.

7. Respondents have submitted that the Election Commission of India has already issued a circular on 9/8/2004 to Chief Election Officer of all States directing that seniority of the officials be taken into consideration while assigning election duties and the principles mentioned therein should be followed strictly.

8. Further a Division Bench of this Court, at Indore Bench while deciding W.P. No. 1536/2004 has already taken note of the guidelines issued by the Election commission in para 8 of the order and based thereupon has disposed of the writ petition by directing petitioner therein to make a representation to State Election Commission in the context of Municipal and Panchayat Elections for redressal of his grievances. On record the respondents have also referred the guidelines issued by the Election Commission vide circular dated 9/8/2004, which are applicable uniformly.

9. Constitutional Power under Article 215 of the Constitution of India read with Section 12 of Contempt of Courts Act is independent, original and penal in nature. Therefore, need to be exercised with due care and caution. Action complained of must have the tendency to obstruct administration of justice tantamounting to lowering the prestige of Court and majesty of law to justify initiation of contempt proceedings. Contempt proceedings are not initiated on mere asking without factual foundation of jurisdictional nature. Constitutional power is conferred upon the High Court to ensure majesty of law on the touchstone of rule of law as no one is above the rule of law. Consequences flowing from such proceedings culminate into serious consequences, hence, power under the constitutional provision to punish for contempt is to be exercised sparingly and with circumspection, to ensure that the orders passed by the High Court are obeyed in right perspective and the mandates issued by this Court are duly abide by and respected.

Turning to the factual matrix of the case in hand as indicated above, in absence of jurisdictional facts to invoke the contempt jurisdiction, the instant petition sans merits.

10. In the light of overall discussions, it appears that the instant proceedings have been instituted with populous approach misusing the process of law without any reasons and justification. Petition is therefore, dismissed being misconceived with cost of Rs. 5,000/- (Rs. Five Thousand Only) payable to the Legal Aid Services of the High Court of M.P. within a period of four weeks from the date of passing of the order.

Petition dismissed.

I.L.R. [2014] M.P., 1038

APPELLATE CIVIL

Before Mr. Justice N.K. Mody

M.A. No. 615/2011 (Indore) decided on 22 January, 2013

ICICI LOMBARD GENERAL INSURANCE CO. LTD. ...Appellant

Vs.

GOPAL KHATRI & ors.

...Respondents

A. Motor Vehicles Act (59 of 1988), Sections 147, 173 - Liability - Jeep in which deceased was travelling dashed against a stationary truck which was not in a position to move due to mechanical failure - Spot map shows that where truck was standing sufficient space was there for passing of other vehicles - Tribunal rightly exonerated the driver, owner and Insurance Company of truck - Appeal dismissed. (Paras 5 & 6)

क. मोटर यान अधिनियम (1988 का 59), धाराएं 147, 173 - उत्तरदायित्व - जीप, जिसमें मृतक यात्रा कर रहा था, खड़े ट्रक से टकराई जो तकनीकी खराबी के कारण हिलने की स्थिति में नहीं था - घटनास्थल नक्शा दर्शाता है कि जहां ट्रक खड़ा था, वहां अन्य वाहनों को आने-जाने के लिये पर्याप्त जगह थी - अधिकरण ने उचित रूप से ट्रक के वाहन चालक, स्वामी और बीमा कम्पनी को विमुक्त किया - अपील खारिज।

B. Motor Vehicles Act (59 of 1988), Section 173 - Cross-objection - Cross objection for enhancement of compensation filed without payment of court fee - No case for enhancement is made out. (Para 7)

ख. मोटर यान अधिनियम (1988 का 59), धारा 173 - प्रत्याक्षेप - न्यायालय फीस का भुगतान किये बिना, प्रतिकर बढ़ाये जाने हेतु प्रत्याक्षेप प्रस्तुत किया गया - प्रतिकर बढ़ाये जाने का प्रकरण नहीं बनता।

Cases referred :

2008 ACJ 2326, 2005 ACJ 831.

Manoj Jain, for the appellant.

G.K. Nema, for the respondents No 1 to 3.

S.V. Dandwate, for the respondent No. 8.

ORDER

N.K. Mody, J. :- Being aggrieved by the award dated 8.11.2010 passed by MACT, Shajapur in Claim Case No.28/2009, whereby claim petition filed by respondents No.1 to 3 was allowed and compensation of Rs.5,13,000/- was awarded and respondents No.4,5 and the appellant were held liable for payment of compensation, present appeal has been filed.

2. Short facts of the case are that respondents No.1 to 3 filed a claim petition before the learned Tribunal alleging that on 11.2.2008 deceased Parvatibai Khatri was traveling in a Jeep bearing No.MP-09-LG- 2030 as passenger alongwith members of her family. It was alleged that at 5.30 AM the Jeep met with an accident with a truck bearing registration No.MP-15-G-0525, which was being driven by respondent No.7, owned by respondent No.4 and insured with appellant. It was alleged that at the relevant time respondent No.7 was driver of the offending truck while respondent No.6 was the owner and insured with respondent No.8. It was alleged that offending truck was a stationery on the middle of the road without any indication with the result the Jeep in which Parvatibai was traveling met with the accident from back side with the result Parvatibai sustained injuries. It was prayed that claim petition be allowed and compensation be awarded. The claim petition was contested by the appellant on various grounds including on the ground that truck was wrongly parked on the middle of the road, therefore, appellant be exonerated. The claim petition was also contested by respondent No.8 on various grounds including on the ground that accident occurred because of negligence of the driver of the Jeep. It was prayed that claim petition be dismissed against of respondent No.8. After framing of issues and recording of evidence learned Tribunal allowed the claim petition and exonerated respondents No.6 to 8 and held respondents No.4, 5 and appellant liable for payment of compensation against which present appeal has been filed.

3. Learned counsel for appellant argued at length and submits that the impugned award, so far as it relates to appellant, is illegal, incorrect and deserves to be set aside. Learned counsel submits that criminal case was registered against respondent No.5, who was driver of the Jeep and also against respondent No.7, who was driver of the offending truck. It is submitted that on the middle of the road axle of the truck was broken and the truck was not in a position to move. It is submitted that respondent No.7 was acquitted in the criminal case registered against the respondent

No.7. It is submitted that it has also come in evidence that at the time of accident it was dark and there was no indication of the parking of the vehicle as the tale lights of the offending truck were not blinking. It is submitted that respondent No.5 examined himself to prove that in what circumstances accident occurred. It is submitted that statement of respondent No.5 is well supported by the statement of eye witness Deepak Namdeo. It is submitted that in the facts and circumstances of the case learned Tribunal was not justified in exonerating respondent No.8. Reliance is placed on a decision in the matter of *Oriental Insurance Co.Ltd Vs. Chetna*, reported in 2008 ACJ 2326, wherein this Court had an occasion to consider the apportionment of inter se liability. In this case Tempo Trax dashed against truck parked on middle of the road, 7 passengers in Tempo Trax sustained injuries and 5 out of them succumbed to their injuries. In this case claimants stated that Tempo Trax was being driven rashly and negligently and the truck was parked on the middle of the road in the night, Tribunal appreciated the evidence and held that both the drivers were equally negligent and liable for compensation in equal share, this Court held that Tribunal was justified in apportioning the liability between the parties of the two vehicles when the claimants have impleaded all of them and adduced evidence against them.

4. Learned counsel further placed reliance on a decision in the matter of *Sushila Bhadoriya Vs. M.P.State Road Transport Corporation*, reported in 2005 ACJ 831, wherein Full Bench of this Court has held that claimant may implead owner, driver and insurance company of both the vehicles or any one of them. It was also held by this Court that it is necessary to apportion inter se liability of joint tort feors and in case both the joint tort feors are impleaded as party and if there is sufficient material on record, the question of apportionment can be considered by the Tribunal It is submitted that in view of the aforesaid position of law and the facts of the case appeal filed by the appellants be allowed and the findings regarding liability be set aside.

5. Shri S.V.Dandwate, learned counsel for respondent No. 8, submits that after due appreciation of evidence learned Tribunal found that it was respondent No.5, who was rash and negligent in driving the vehicle, which caused accident. It is submitted that respondent No.7 Kamlesh was driver on the offending vehicle, entered in witness box and stated that the truck was parked on the side of the road and there was sufficient space from where number of vehicles were passing. He has further stated that all the

indicators were on and he has further stated that there was mechanical break down, therefore, the vehicle was not in a position to move. Learned counsel submits that statement of Kamlesh is well supported with the spot map, which is on record. It is submitted that at the relevant time the Jeep was carrying 22 passengers as is evident from the FIR and the list of injured persons, which contains the names of all the injured persons, who were 19 in number. It is submitted that in the facts and circumstances of the case appeal filed by the appellant has no merits and the same be dismissed.

6. Spot map is on record, which Ex.P/4. In the map the place where truck is shown as stationary, sufficient space is left for passing of other vehicles. The Jeep has dashed the truck from the left side. It has also come in evidence that the offending Jeep was following the bus. It has also come in evidence that bus passed from the place where truck was stationary. In the facts and keeping in view that the Jeep was carrying more than 20 passengers, which was having the capacity of 9 passengers, it appears that findings recorded by the Tribunal, whereby respondents No.6 to 8 were exonerated, required no interference. Hence the appeal stands dismissed.

7. Shri G.K.Nema, learned counsel for respondents No.1 to 3, submits that in a death case the amount awarded is inadequate, which deserves to be enhanced for which cross-objections has been filed by respondents No.1 to 3. It is submitted that Tribunal has assessed income @Rs.3,000/- per month and after deducting 1/3rd towards personal expenses applied the multiplier of 17. It is submitted that application of multiplier is on lower side, which ought to have been 18. Similarly income assessed by the learned Tribunal is also on lower side as the deceased was the working woman. It is submitted that cross-objections filed by respondents No.1 to 3 be allowed and amount be enhanced.

8. Keeping in view the amount awarded and the fact that no appeal has been preferred by respondents No.1 to 3 and it is only the cross-objections, which has been filed without payment of Court fees. In view of this no case for enhancement is made out. In view of this appeal filed by the Insurance Company and the cross-objections filed by respondents No.1 to 3 stand dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1042

APPELLATE CIVIL

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

F.A. No. 228/2008 (Indore) decided on 20 February, 2013

HARIOM

...Appellant

Vs.

MANJULATA SAHU

...Respondent

Family Courts Act (66 of 1984), Section 19, Hindu Marriage Act (25 of 1955), Sections 13(1)(a) & 28 - Divorce petition - By Husband - Cruelty and adultery - Efforts made to reconcile differences failed - Held - Conduct of respondent/wife even if it may not be said to be adulterous, but certainly amounts to infliction of mental cruelty upon the appellant - She was found alone with one 'L' in a closed room, who was wearing underwear and banyan only - Leaves no room for doubt - Thus, respondent/wife treated the appellant with cruelty - Marriage between the parties is dissolved u/s 13(1)(a) of the Hindu Marriage Act. (Para 31)

कुटुम्ब न्यायालय अधिनियम (1984 का 66), धारा 19, हिन्दू विवाह अधिनियम (1955 का 25), धाराएं 13(1)(ए) व 28 - विवाह विच्छेद याचिका - पति द्वारा - क्रूरता और जारकर्म - मतभेदों को दूर करने के लिये किये गये प्रयास विफल रहे - अभिनिर्धारित - प्रत्यर्थी/पत्नी का आचरण भले ही यदि जारतापूर्ण नहीं कहा जा सके परंतु निश्चित रूप से अपीलार्थी पर मानसिक क्रूरता कारित करने की कोटि में आता है - उसे बंद कमरे में एक 'एल' के साथ पाया गया जो केवल अंतर्वस्त्र एवं बनियान पहने था - संदेह के लिये कोई जगह नहीं छोड़ता - अतः प्रत्यर्थी/पत्नी ने अपीलार्थी के साथ क्रूरता का व्यवहार किया - पक्षकारों के मध्य विवाह का हिन्दू विवाह अधिनियम की धारा 13(1)(ए) के अंतर्गत विघटन किया गया।

Case referred :

(2001) 4 SCC 250.

Manoj Manav, for the appellant.

C.B. Patne, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
M.C. GARG, J. :- This judgment shall dispose of the present first appeal filed under section 19 of the Family Court Act, 1984 read with section 28 of Hindu

Marriage Act, 1955, whereby the appellant / husband has challenged the decree passed by the 2nd Additional District Judge, Biora, District – Rajgarh, in HMA no. 14-A/2005 filed by the appellant husband against his wife for dissolution of marriage between the parties on the ground of cruelty as well as adultery, which has been dismissed by the impugned judgment.

2. Brief facts giving rise to filing of this appeal are that the parties were married according to the Hindu Rites at Biora on 11th December, 1988; out of the marriage, three children namely Ruchi Sahu, Pravin Sahu and Navin Sahu were borne. After the marriage, the parties lived together for a period of two years in joint family. In this period, the respondent treated the appellant with cruelty. Efforts made to reconcile differences failed. The respondent was not caring for the matrimonial relation between the parties. She even developed extra marital relation with other persons, even indulged in sexual intercourse with other persons and on account of that, the appellant suffered extreme mental cruelty. The appellant was also treated with utmost disrespect in his community. Efforts made by him for changing her behaviour were of no consequence. The respondent /wife served a notice upon the appellant on 05th of June, 2005 alleging that she was turned out of the house by leveling baseless allegations. In this circumstance, the appellant filed a suit for dissolution of marriage which suit was registered as HMA NO. 14-A/2005. The said suit after recording the evidence of the parties has been dismissed by the Additional District Judge vide order dated 05th of February, 2008. It is against that judgment, the appellant has filed the present appeal.

3. According to the appellant, the judgment of the lower Court in having given findings that the appellant has not been able to prove the cruelty by the respondent on him is contrary to record. The evidence available on record categorically establishes that the respondent treated the appellant with cruelty. In this regard, the appellant examined number of witnesses who proved the case of the appellant. The appellant has relied upon his own statement as well as the statements given by Dinesh PW-2, Madhosingh PW-3, Pravin Sahu PW-4, Khushilal PW-5, Navin Sahu PW-6, Ruchi Sahu PW-7 on his behalf. He also relied upon the statement made by respondent where she admits her behaviour which tantamounts to living in adultery. It is therefore, submitted that taking into consideration the total evidence which has come on record, the appellant was able to prove his case that the respondent was not only treating the appellant with cruelty, but was also living in adultery:

4. It is submitted that the evidence has come on record that on 04th of November, 2003 in the building belonging to Balseth, the respondent was found in compromising position with one Laxman. She was caught by Rambabu, brother of respondent in the room where they were indulging in the act of adultery. At that time, Khushilal, Punamchand, Dinesh Sahu were also present who appeared as witnesses and have supported the case of the appellant. It is therefore submitted that the trial Court has simply ignored the relevant evidence which came on record.

5. It is also submitted that as far as the respondent is concerned, she even annoyed her family members in as much as her brother and Bhabhi were also not happy with her behaviour and in fact left her on account of her adulterous behaviour. It is therefore, submitted that the entire conduct of the respondent was such that she has to be held guilty of causing mental as well as physical cruelty upon the appellant and the judgment of the trial Court is therefore liable to be set aside and reversed.

6. We have heard the learned counsel for the parties and have also perused the judgment given by the 2nd Additional District Judge. On the basis of pleadings of the parties, following issues were framed by the learned lower Court.

क. वाद प्रश्न	निष्कर्ष
1. क्या अनावेदिका का व्यवहार आवेदन के प्रति क्रूरतापूर्ण रहा है ?	प्रमाणित नहीं
2. क्या अनावेदिका ने आवेदक से विवाह के पश्चात् अन्य किसी व्यक्ति से स्वेच्छा संभोग किया ?	प्रमाणित नहीं
3. सहायता एवं व्यय ?	वाद सव्यय निरस्त किया गया।

7. The evidence which came on record as well as Ex.-P/1 which is the notice sent on behalf of the respondent to the appellant has also been considered by the learned trial Judge. In the said notice, allegations have been made by the respondent. It has been alleged by the respondent that the appellant was making false allegations that she was living with adultery.

8. The other witnesses examined, included the appellant, his brother Dinesh who appeared as PW-2 and son of the appellant namely Pravin Sahu, Navin Sahu and Ruchi Sahu as PW-4, PW-6 and PW-7; Khushilal who witnessed the incident of 04th of November, 2003.

9. On the other hand, the respondent examined herself and Madanlal Jain and Purushottam.

10. The trial Court has disbelieved the case of the appellant by simply disbelieving even the statement made by brother of the respondent as well as her own daughter. Paragraphs no. 21 and 22 of the impugned judgment are relevant which read as under ;

21. जहां तक आवेदक के भाई का यह कथन कि उसके भाई की अनुपस्थिति में उसके भाई के घर आना जाना लगा रहता था तो उसने कभी भी लक्ष्मण को अपने भाई के घर देखा है ऐसा उसके कथनों से नहीं पाया जाता है। पुत्र प्रवीण के कथन पर विचार किया जावे तो अवकाश के दिन लक्ष्मण को घर पर देखा था इस पर विचार किया जावे तो स्वाभाविक रूप से यदि इस तरह की महिला रहेगी तो वह यदि किसी अन्य पुरुष से कोई अनैतिक संबंध रहेंगे तो भी मना कर देगी कि बच्चे और पति घर पर रहेंगे ऐसे संबंध बनाने वाला व्यक्ति भी अवकाश के दिन घर पर नहीं आवेगा जब जैसा कि पुत्र प्रवीण यह कथन करे कि उसने अवकाश के दिन लक्ष्मण को घर पर देखा था विश्वास किए जाने योग्य नहीं रह जाता है बल्कि पिता के द्वारा बताए जाने पर सोच विचार करके अपनी मां के विरुद्ध ही कथन देना पाया जाता है क्योंकि यदि वास्तव में अवकाश के दिन लक्ष्मण को घर पर देखा होता तो उसका पिता भी घर रहता परंतु पिता को किसी काम से अवकाश के दिन स्कूल में कागज लेने के लिए जाना बताया परंतु यह कथन स्वाभाविक नहीं लगता कि क्योंकि पिता को ऐसी क्या आवश्यकता आ गई कि पिता को अवकाश के दिन कागज लेने स्कूल जाना पड़ा इसलिए इस बिंदु पर प्रवीण का कथन विश्वसनीय नहीं रह जाता है।

22. रुचि साहू के कथनों पर विचार किया जावे तो उसे भाई ने बताया कि लक्ष्मण टांग पर पड़ा हुआ था। रुचि साहू का कथन भाई के बताए जाने पर आधारित होने से अनुश्रुत साक्ष्य श्रेणी में आने से साक्ष्य अधिनियम में ग्राह्य नहीं है वहीं उसने अपनी मां की गंदी हरकतों का व्याख्यान किया है उस विचार किया जावे तो स्वाभाविक है जब पुत्री सयानी हो जाती है तो ऐसी हरकतों का प्रभाव पड़ता है। मां भली भांति समझती है क्योंकि कोई भी मां अपनी पुत्री पर गंदी हरकतों का प्रभाव पड़ने देना नहीं चाहेगी बल्कि वह चाहती है कि उसकी पुत्री का चरित्र साफ सुथरा हो तब यह संभव नहीं है कि कोई महिला अपनी सयानी पुत्री के समक्ष अन्य पुरुष के साथ गंदी हरकतें करे जिससे पुत्री का यह कथन विश्वसनीय नहीं रह जाता है कि मां ने अन्य पुरुष के साथ उसकी उपस्थिति में गंदी हरकतें कीं जैसा कि साक्ष्य से पाया जाता है कि मंजूलता जो बीमा कंपनी में एजेंट है यदि ऐसी कोई हरकत उसे करना होती तो वह अपने इस काम से बाहर रहकर भी कर सकती थी। जिससे रुचि

साहू का कथन तार्किक दृष्टिकोण से विश्वसनीय नहीं रह जाता है।

11. The reasoning given by the trial Court in disbelieving the statement of the aforesaid two witnesses is hypothetical. The very fact that the brother of the respondent and daughter of the appellant have stated that the respondent was keeping questionable relationship with Laxman and the statement of Navin Sahu which is also disbelieved by the trial Court, the reasonings given are flimsy. The relevant observation made in para – 23 and 24 of the impugned judgment are reproduced hereunder :

23. नवीन साहू के कथनों से मात्र इतना पाया जाता है कि लक्ष्मणसिंह पीछे से दरवाजे से आता था तब स्वाभाविक है जहां लक्ष्मण का भाई माधव ने लक्ष्मण को नशीली पदार्थ का सेवन करना बताया है यदि ऐसे नशीले पदार्थ का सेवन करना बताया है यदि ऐसे नशीले पदार्थ के सेवन की हालत में होकर मकान मालिक किराएदार के मकान में प्रवेश कर ले तो ऐसे में मंजूलता का कोई दोष नहीं रह जाता है क्योंकि किराएदार जो बेबस तरीके का होता है क्योंकि वह मजबूरी वश दूसरों के मकान में ही जीवन यापन करता है स्वतः माधवसिंह के कथनों से स्पष्ट है कि उसने मंजूलता को आपत्तिजनक अवस्था में नहीं देखा जब यह कैसे मान लिया जावे कि मंजूलता लक्ष्मण के बीच अनैतिक संबंध रहा है यदि मंजूलता ऐसे चरित्र की होती तो निश्चित रूप से आपत्तिजनक अवस्था में पाई गई होती।

24. जहां तक खुशीलाल का यह कथन कि जब वह आवेदक, रामबाबू व पूनमचंद के साथ आवेदक बालसेठ के मकान में गया दरवाजे को धक्का देकर खोला गया तो मंजूलता अन्य व्यक्ति के साथ पाई गई इस कथनों की विश्वसनीयता पर विचार किया जावे तो स्वाभाविक रूप से यदि कोई महिला को किसी पर पुरुष के साथ अनैतिक संबंध बनाना है तो वह दरवाजे की शाकल लगाकर बनाएगी ताकि कोई उसे धक्का देकर खोल न सके और अंदर प्रवेश न कर सके यदि वास्तव में ऐसे होता तो दरवाजे में शाकल लगी होती क्योंकि सामान्य बुद्धि का व्यक्ति इतनी समझदारी अवश्य रखता है कि इस तरीके के संबंध बनाए जाने के समय दरवाजे की शाकल लगाकर संबंध बनाए जावे न कि दरवाजा लुढ़काकर क्योंकि इतना ज्ञान वह रखता है कि यदि इस तरीके के संबंध में लिप्त पाया गया तो कोई भी व्यक्ति दरवाजा खोलकर आसानी से प्रवेश कर सकता है तब यह संभव नहीं है कि मंजूलता दरवाजा लुढ़काकर इस तरीके के संबंध पर पुरुष से बनाएगी इसके अतिरिक्त यदि ऐसा पाया जाता तो उस संबंध में सार्वजनिक साक्ष्य वह होता कि कोई व्यक्ति अपनी आंखों से मंजूलता को घर पर पुरुष के घर में जाते देखे फिर वह मंजूलता के पति व अन्य लोगों को बतावेगा एवं उसके बाद सभी लोगों को एकत्रित करके दरवाजा खटकाकर खुलवाएगा और उसके बाद यदि मंजूलता बाहर

निकली होती तथी उस आधार पर निष्कर्ष निकालने की उपधारणा होती कि वह चरित्र से कमजोर महिला है तब आवेदक और उसके साक्षियों के द्वारा दी गई साक्ष्य मात्र कपोल कल्पित आधारों पर ही रह जाती है कि उन्होंने मंजूलता को लक्ष्मण व अन्य व्यक्ति के साथ आपत्ति जनक अवस्था में देखा जिससे यह नहीं पाया जाता है कि पत्नी का व्यवहार पति के प्रति क्रूरतापूर्ण रहा है।

12. The trial Court has failed to appreciate that a lady who is not living with her husband and stay in the house of someone else, will not care even to lock the door, because she is not afraid of anyone. The very fact that Laxman was found at the time of incident without paint and shirt with the respondent itself is sufficient to prove that his presence in the house of respondent at the relevant time was questionable.

13. It would also be appropriate to take note of the statement of other witnesses to understand the real meaning of their statements coupled with the cross-examination conducted on behalf of the respondent.

14. The first witness is the appellant who filed his affidavit by way of evidence. Relevant portion of his statement was part of examination-in-chief after tendering of the affidavit in particular para-4 of his examination-in-chief. The same is reproduced hereunder :

4. मैं शपथपूर्वक सत्यकथन करता हूँ कि मैं मेरी पत्नि के जारतापूर्ण व्यवहार से दुखी होकर मकान बदल देता। इस प्रकार ब्यावरा में बलवीर चौधरी का मकान, शहीद कालोनी में पी.एस. खटाना, सुमेरसिंह का मकान, विवेक टाकीज के पास नागर सा. का मकान बदले, किन्तु सभी मकानों में रहते हुए मेरी पत्नि के व्यवहार व चाल चलन में कोई परिवर्तन नहीं आया। मेरे स्कूल चले जाने के थोड़ी देर बाद ही बच्चों को पत्र लिखकर लक्ष्मण नामक व्यक्ति को बुलवा लेती है, व उसके साथ जारतापूर्ण जीवन बिताती। मेरे लाख समझाने पर भी नहीं मानती। उल्टा लड़ाई झगड़ा करती व भोजन भी बनाकर नहीं देती। एक दिन मैंने मेरी पत्नी पर नजर रखने हेतु स्कूल जाने का बहाना बनाकर घर से चल दिया व थोड़ी देर बाद वापस घर आया तो मेरी पत्नी ने पत्र लिखकर लक्ष्मण को बुलाने हेतु बच्चों को पत्र देकर भेजा। उसी समय मैंने आकर बच्चे से पत्र ले लिया व पढ़ने लगा तो अकस्मात् मेरे से झूम कर पत्र झपट कर फाड़ दिया व भयंकर तरीके से लड़ना शुरू कर घर छोड़ कर चली गई, तो मैंने व मेरे छोटे भाई दिनेश, साले रामबाबू आदि ने तीन चार घंटे तक लगातार ढूँड़ा। शंका होने पर कृष्णा गढ़वाल नामक महिला, जिसने भी अपने पति को तलाक देकर ब्यावरा में ही बालसेठ के मकान में किराये से रहती है, के यहां मैंने गवाह खुशीलाल एवं पूनमचंद जाटव गांव बालचिड़ी वालों को भी साथ लेकर गये तो, वहां पर कृष्णा गढ़वाल के मकान में मेरी

पत्नी लक्ष्मन के साथ मिली। फाटक धकेलकर देखा व समझाया व मेरे साले रामबाबू ने अपनी बहन मंजुलता को काफी समझाया व कहा कि लक्ष्मन के साथ रह-रहकर कुकर्म कृत्य कर हमारी जाति समाज व रिश्तेदारी व पहचान वालों की नजर में नाक कटवा दी, बदनामी भी करवा दी है। तो मेरी पत्नि ने कहा कि मैं तो लक्ष्मन के साथ ही पत्नी बनकर रहूंगी। यही मेरा जीवन निर्वाह करेगा। लक्ष्मन ने भी कहा कि मैं भी मंजुलता को जीवन भर जीवन संगिनी बनाकर रखूंगा। पूर्व में भी मेरी पत्नी भाग गई थी, जिसे मेरा साला व हंसराज छोड़कर गये थे। इस प्रकार मेरी पत्नि मेरे साथ न आकर अपने मायके चली गई व अपने भाईयों व गवाहों को लेकर थाने पर मुझे बुलाया। जहां डरा-धमका कर मेरे साथ न रहने बावत् लिखा-पढ़ी करवाकर सभी के हस्ताक्षर करवाये व हुए।

5. मैं शपथ-पूर्वक सत्यकथन करता हूँ कि मेरी पत्नि को अलग रहते हुए लगभग तीन साल हो गये हैं, जिससे मैं सहवास से भी वंचित हुआ, जिससे मानसिक क्रूरता होती है। सभी प्रयास संग रहने के विफल हो गये। उसके बाद मेरी पत्नि ने मुझे दिनांक 09.06.2005 को नोटिस दिया। उसमें भी पदकम 2 में मेरे उपर अनैतिक कृत्य एवं पर पुरुषगमन हेतु रूपया कमाने का असत्य लांछन लगाया। भरण-पोषण के आवेदन में भी मेरे चरित्र हनन संबंधी तथ्यों का असत्य उल्लेख किया, जिसे पढ़ने से मुझे घोर मानसिक पीड़ा हुई। जिसने भी पढ़ा उसकी नजर में भी मेरे मान-सम्मान को ठेस पहुंची है।

15. From the aforesaid, it is apparent that the respondent was found along with Laxman in the house of Krushna Gadwal, after four hours missing from the house of the appellant and she had stated to the appellant that she would live along with Laxman as his wife.

16. It would be relevant to see his cross-examination on this point.

यह सही है कि मैंने अनावेदिका के साथ दि. 4-11-03 तक सहवास किया। यह कहना गलत है कि दिनांक 4-11-03 को मैं स्वयं अनावेदिका को छोड़ने गया। यह कहना गलत है कि मैंने अनावेदिका से यह कहा था कि एक दो माह में स्थिति ठीक हो जावेगी तब साथ रहेंगे। यह कहना गलत है कि अनावेदिका एवं उसके भाईयों ने साथ रहने के प्रयास किये। यदि अनावेदिका मेरे साथ दाम्पत्य संबंध बनाना चाहे तो मैं नहीं रख सकता। यह सही है कि अनावेदिका ने अलग रहकर उसके एवं बच्चों के खर्च के लिये 1500/रु. प्रतिमाह देने की मांग की थी। बच्चे अपनी इच्छा से अनावेदिका के साथ रहना नहीं चाहते। यह कहना गलत है कि अनावेदिका से बच्चे जब भी टेलीफोन पर बात करते थे तब डांटता व डराता था। यह कहना गलत है कि मैंने अनावेदिका को बदनाम करने के लिये उसकी इज्जत उछाली है।

10— मैं माया साहू को नहीं जानता, यह कहना गलत है कि मैं माया साहू के साथ आज भी रह रहा हूँ, यह कहना गलत है कि मेरा अन्य महिलाओं से अवैध संबंध था जिसको लेकर अनावेदिका मुझसे झगड़ा करती थी। मैं अरविन्द गुप्ता एवं महेन्द्रसिंह राठौर को जानता हूँ मैं अरविन्द गुप्ता के पिता का नाम नहीं जानता यह कहाँ रहता है मैं नहीं जानता, मैं अरविन्द गुप्ता को जब मैं रामू छीणा के मकान में किरायेदार था उस समय अरविन्द गुप्ता भी उसी मकान में किरायेदार था तब से जानता हूँ। महेन्द्रसिंह जब से रेशमबाई के मकान में था वह भी पास में रहता था तब से जानता हूँ। यह सही है कि माधोसिंह एवं लक्ष्मणसिंह भाई हैं, मेरी लड़की रुचि के पास लाली, पिकी, पूजा आती थी, मैं नहीं कह सकता कि वह सहेली थी। यह कहना गलत है कि मेरी लड़की के साथ उक्त लड़कियाँ दिनभर साथ रहती थीं। यह स्वाभाविक है कि यदि मकान मालिक एवं किरायेदार में संबंध अच्छे हो तो एक दूसरे के यहाँ आना-जाना रहता है। मैंने अनावेदिका के कोई प्रेमपत्र, फोटो आदि प्रकरण में पेश नहीं किये हैं। अनावेदिका के बारे में लोग कहते भी थे और मैंने गलत काम करते देखा भी है मैंने कई बार अनावेदिका के साथ लक्ष्मण सिंह महेन्द्रसिंह राठौर को आपत्तिजनक स्थिति में देखा। बाकी लोगों की मुझे जानकारी नहीं है। मैंने अरविन्द गुप्ता को भी अपने मकान से बाहर निकलते देखा है। यह सही है कि अनावेदिका का भाई वकील है। मैं कृष्णा गढ़वाल के यहाँ 4-11-03 को गया था। यह कहना गलत है कि उक्त दिनांक को मेरे द्वारा मारपीट करने के कारण ही अनावेदिका कृष्णा गढ़वाल के यहाँ गई थी। मैं जब कृष्णा गढ़वाल के घर गया तब वह मौजूद नहीं थी। यह कहना गलत है कि मैंने दावा अनावेदिका को प्रताड़ित करने के लिये पेश किया है। मैंने अपने दावे में सभी बातें लिखाई हैं। यह कहना गलत है कि मैंने भरण पोषण राशि अदा न करना पड़े इस कारण दावा लगाया है। यह कहना गलत है कि मेरे माता-पिता जब मैं अलग रहता था तब एक दो माह के लिये मेरे साथ रहते थे। यह सही है कि मेरे पिताजी कभी-कभी मेरे घर आते थे। मेरी अनुपस्थिति में भी आते-जाते थे।

11— यह कहना गलत है कि मैं आज झूठा बयान दे रहा हूँ। यह कहना गलत है कि मैं अपनी पत्नी को मानसिक पीड़ा पहुँचाने के उद्देश्य से झूठा बदनाम कर रहा हूँ।

17. The aforesaid cross-examination does not show that the allegations made by the appellant in his statement about adulterous conduct of the respondent are denied; she has leveled allegations against the appellant of living with adultery with Maya Sahu, which is not her case. Moreover, making such allegations also amounts to infliction of cruelty upon the appellant.

Now coming to the statement made by Dinesh PW-2 who is the

brother of the appellant who has filed an affidavit and in para – 3 thereof, he has stated :

3. मैं शपथपूर्वक सत्यकथन करता हूँ कि भाई साब ने भाभी के चाल-चलन व व्यवहार से परेशान होकर बदनामी से बचने हेतु कई मकान बदले किन्तु भाभी के व्यवहार में कोई परिवर्तन नहीं आया। व लक्ष्मण नामक व्यक्ति जो शहीद कालोनी में रहता है, के साथ जारता में रहने लगी व भाई साहब से झगड़ कर घर से भाग गई। दिनभर तलाश किया, जो बाल सेठ के मकान में कृष्णा गड़वाल नामक महिला जो किराये से रहती है, उसके यहां शाम को 6 बजे के लगभग मिली। भाई साहब व उनके साले रामबाबू मेरी दुकान पर आये। जहां बालचिड़ी के खुशीलाल एवं पूनमचंद भी मेरी दुकान पर थे। तीनों को लेकर बालसेठ के मकान पर गये, जहां अन्दर मकान में कृष्णा गड़वाल के यहां मेरी भाभी व लक्ष्मण फाटक बंद कर अंदर मिले तो मेरी भाभी के भाई रामबाबू ने मेरी भाभी को काफी भला-बुरा कहा कि मैं तो लक्ष्मण के साथ ही पति बनकर रहूंगी। मेरी मर्जी है। लक्ष्मण ने भी कहा कि मैं भी जीवन भर मंजूलता को पति बनाकर रखुंगा व सुखी रखुंगा। भाई साहब के साथ न जाकर अपने भाई के साथ चली गई, जो लगभग 3 साल से अलग ही रह रही है।

18. His examination-in-chief also shows that the respondent was found in the company of Laxman in the house of Laxman after she was searched and at that time, she had stated that she wanted to live with Laxman as his wife. In the cross-examination, on the aspect that she was found alone with Laxman, there is no cross-examination. There is also no cross-examination that she stated about living with Laxman as his wife.

19. In the next affidavit, which has been filed by Madhosingh who has been examined on behalf of the appellant, it has been stated that

3. मैं, शपथपूर्वक सत्यकथन करता हूँ कि श्रीमति मंजूलताबाई साहू एवं लक्ष्मण के अवैध अनैतिक संबंधों को लेकर आस-पड़ोस तथा सभी जगह हरिओम साहू की बहुत बदनामी हुई, बल्कि मंजूलता व लक्ष्मण कहते थे कि हम दोनों एक दूसरे के साथ जीवन भर रहेंगे।

4. मैं, शपथपूर्वक सत्यकथन करता हूँ कि हरिओम साहू की अनुपस्थिति में श्रीमति मंजूलताबाई साहू मेरे भाई लक्ष्मण को अपने कमरे में बुलाती और बच्चों को बाहर भेजकर दरवाजा बंद कर लेती थी। अत्यधिक बदनामी होने के कारण मैंने भी इस संबंध में जांच की तो 1-2 बार आपत्तिजनक अवस्था मेरे सामने आई तो हमने मंजूलताबाई साहू से अपना मकान खाली करा लिया।

20. Pravin Sahu who was also examined as a witness in this case has deposed that

2. मैं, शपथपूर्वक सत्यकथन करता हूँ कि मेरी माता मंजूलताबाई जिस समय अलग हुई उस समय मेरी उम्र 13 वर्ष की थी, मेरे पिता जब स्कूल पढ़ाने चले जाते थे तब मेरी मां मुझे एक चिट्ठी देकर एक लक्ष्मण नामक व्यक्ति को बुलाने भेजती थी, फिर लक्ष्मण व मेरी माता हमें बाहर भेज देती और मकान का दरवाजा लगा लेती थी फिर उल्टे सीधे काम करते और अश्लील हरकतें करते थे।

3. मैं, शपथपूर्वक सत्यकथन करता हूँ कि एक बार मेरे पापा अचानक घर आ गये उस समय लक्ष्मण नाम का व्यक्ति हमारे घर पर ही था उस व्यक्ति को मेरी माता ने घर की टान पर चढ़ा दिया और मेरे को डराकर बोली कि पापा को मत बताना, मेरी माता का व्यवहार हमारे साथ व हमारे पिता के साथ अच्छा नहीं रहा, मेरी माता हर किसी बात पर मेरे पापा से झगड़ा करती थी, मेरी माता एक बार घर छोड़कर चली गई और कृष्णा गढ़वाल नाम की महिला के यहां चली गई थी, जिसको मेरे मामा रामबाबू व मेरे चाचा तथा अन्य दो व्यक्तियों ने देखा था, मेरी माता को मेरे मामा ने समझाया था इस पर मेरी माता ने कहा कि मैं तो लक्ष्मण के साथ पत्नि बनकर रहूंगी उसके बाद से आज तक मेरी माता घर नहीं आई हम दोनों भाई और बहन हैं, अब हम अपने पिता के पास रहते हैं हमारा भरण-पोषण हमारे पिता जी ही करते हैं।

4. मैं, शपथपूर्वक सत्यकथन करता हूँ कि मेरी माता मंजूलताबाई का चाल-चलन हमेशा से ही ठीक नहीं रहा और पापा हमेशा समझाते थे कि ऐसा गलत काम मत करो मम्मी झगड़ा करती थी और गलत काम करने की कहती थी मुझे भी व मेरी बहन को मारती थी।

21. Affidavit of Khushilal also establishes that on 04th of November, 2003 when search was made about the respondent, she was found inside the house alongwith Laxman alone and that her own brother Rambabu scolded her at that time.

Navin Sahu who appeared as PW-6 has deposed that

1. मेरी मम्मी अभी मामा के यहां रहती है। मेरी मम्मी हमें चिट्ठी दे देकर लक्ष्मण नामक आदमी के पास भेजती थी, जबकि वे हमारे साथ रहती थी। जब हम विवेक टाकीज के पास रहते थे तब लक्ष्मण नामक व्यक्ति पीछे से घर में आया। किसी काम से मेरे पापा घर आ गये तो मेरी मां ने उसे टान पर टंकी में छुपा दिया। मम्मी ने बताने से मना किया, हमें धमकाया और पैसे देकर बाहर भेज दिया। जब पापा चले गये तब रजाई गद्दा बिछाकर एक-दूसरे को पम्पी देते रहे थे और रजाई ओढ़ ली थी। मैंने पीछे जाकर खिड़की में से छेद में से देखा था। मेरी मां मुझे और मेरे भाई को बार-बार चिट्ठी देकर भेजती थी। लक्ष्मण नामक व्यक्ति के कारण हमने बार-बार घर बदले। जब लक्ष्मण हमारे

घर आता था तो आसपास के लोग नजर रखते थे। मेरी मां ने मेरे पिता पर दारू पीने आदि के जो आरोप लगाये हैं वे सब झूठे हैं, मेरे पिता सुपारी तक नहीं खाते।

22. Nothing material which may discredit the testimony of witness has come in the cross-examination of the witnesses conducted on behalf of the respondent.

23. Now coming to the statement of Ruchi, daughter of the parties aged about 17 years, we found that in her examination-in-chief, she has deposed that

1. मम्मी चार पांच साल से अलग रहती है। जब अनावेदिका मेरी मां मंजूबाई और हम लोग साथ-साथ रहते थे तब मेरी मां का व्यवहार अच्छा नहीं था, डांटती थी, मारती थी, गंदी हरकतें करती थी, आदमी को बुलाती थी। मेरे पापा सुबह 9, 10 बजे ड्यूटी पर जाते थे और शाम को 6, 7 बजे आते थे। पापा जब घर पर नहीं रहते थे तब मेरी मां हरकतें करती थी। हमारे सामने भी करती थी। मुझे अच्छा नहीं लगता था। मेरी मां लक्ष्मण को बुलाती थी वे लोग साथ साथ बैठते थे, बातें करते थे। एक दूसरे के बहुत करीब बैठ जाते थे। एक दूसरे को छूते थे। ये लोग बहुत ज्यादा पास बैठते थे जो हम लोग नहीं देख सकते थे। यह बातें हमने अपने पिता को नहीं बताई क्योंकि मम्मी डांटती थी। मेरी मां का मेरे पिता के साथ अच्छा व्यवहार नहीं था, लड़ती थी, झगड़ती थी। लक्ष्मण के साथ मेरे मां के बैठने की बात मेरे भाई बहन के अलावा मोहल्ले के लोगों को भी पता थी।

25. Again in her cross-examination, nothing material which may discredit her testimony has been found.

26. On the other hand, coming to the statement made by respondent Majulata (sic. Manjulata), we found about the incident that on 04th of November, when she was found with Laxman alone, she has not stated anything to deny those allegations. She has been cross-examined by the appellant on this issue wherein she admitted going to the house of Krushna Gadwal.

14. यह सही है कि मैं अपने पति के साथ विवेक टाकीज के पास रहती थी उस समय देवउठनी ग्यारसी का त्यौहार भी उसी मकान में मनाया था। यह कहना गलत है कि मैंने उस दिन अपने लड़के को लक्ष्मण के यहां भेजा था। मैं लक्ष्मण को जानती हूँ क्योंकि हम उनके मकान में रहते थे। जहां करीब 2-3 साल तक रहे। यह कहना गलत है कि मेरे पति ने जब मेरे लड़के को लक्ष्मण के यहां जाने से रोका तो मैंने अपने पति के साथ इसी बात पर झगड़ा किया था। यह सही है कि इसी बात पर से मैं अपने पति से झगड़ा होने के कारण उसी दिन कृष्णा गढ़वाल के पास चली गई थी। यह सही है कि देवउठनी

ग्यारसी पर मैं अपने ससुराल 12 से 4 बजे तक पूजा के समय तक नहीं पहुँची थी। यह कहना गलत है कि मेरे पति, देवर एवं अन्य लोगों ने कृष्णा गढ़वाल के यहां मुझे लक्ष्मण के साथ पाया था। यह सही है कि उसी दिन मेरा भाई रामबाबू, कृष्णा गढ़वाल के यहां आ गया था। उस समय मेरे पति भी आये हो तो मैं नहीं बता सकती। यह कहना गलत है कि मेरे भाई ने मुझे समझाया था कि तुम लक्ष्मण से मिलने क्यों आती हो। यह कहना भी गलत है कि मेरे भाई ने उस समय मुझे डांटा था। यह कहना गलत है कि मेरा भाई मुझे गुस्से में लक्ष्मण के साथ देखने पर अपने घर ले गया था।

27. Considering the evidence, which has come on record, it can certainly be said that even if it is presumed that adultery has not been proved, the overall conduct of the respondent is such which comes within the definition of mental cruelty which is certainly a ground for dissolution of marriage within the meaning of section 13(1)(a) of the Hindu Marriage Act. It would be appropriate to take note of the following judgments in this regard.

28. Hon'ble Supreme Court in the case of *Chetan Das Vs. Kamla Devi* reported in (2001) 4 SCC 250 has observed that :

"Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

In *Savitri Pandey v. Prem Chandra Pandey* reported in (2002) 2 SCC 73, the Court stated as under: "Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore,

postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other."

This Court in the case of *Gananath Pattnaik v. State of Orissa* reported in (2002) 2 SCC 619 observed as under:

"The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. "Cruelty" for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case."

The mental cruelty has also been examined by this Court in *Parveen Mehta v. Inderjit Mehta* reported in (2002) 5 SCC 706 at pp.716-17 [para 21] which reads as under:

"Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the

question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other." In this case the Court also stated that so many years have elapsed since the spouses parted company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably.

In *A. Jayachandra v. Aneel Kaur* reported in (2005) 2 SCC 22, the Court observed as under: "The expression "cruelty" has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be

mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

29. . Hon'ble Supreme Court in the case of *Samar Ghosh Vs. Jaya Ghosh* delivered on 26th of March, 2007 discussed the concept of mental cruelty in the following words :

The term "mental cruelty" has been defined in the

Black's Law Dictionary [8th Edition, 2004] as under: "Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse."

The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists."

In 24 American Jurisprudence 2d, the term "mental cruelty" has been defined as under:

"Mental Cruelty as a course of unprovoked conduct toward one's spouse which causes embarrassment, humiliation, and anguish so as to render the spouse's life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse."

In the instant case, our main endeavour would be to define broad parameters of the concept of 'mental cruelty'. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts.

This Court has had an occasion to examine in detail the position of mental cruelty in *N.G. Dastane v. S. Dastane* reported in (1975) 2 SCC 326 at page 337, para 30 observed as under :-

The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent."

30. The same judgment was relied upon by the Hon'ble Supreme Court and was approved in later judgment delivered on 11th of December, 2012 in the case of *U.Sree Vs. U. Srinivas* in the following words :

20. In *Samar Ghosh v. Jaya Ghosh* a three-Judge Bench, after dealing with the concept of mental cruelty, has observed thus:-

"99. ... The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate

the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances....”

21. In *Ravi Kumar v. Julmidevi* this Court has expressed thus: “In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite variety—it may be subtle or even brutal and may be by gestures and words.”

22. Recently, this Court, in *Vishwanath Agrawal*,

s/o Sitaram Agrawal v. Sarla Vishwanath Agrawal while dealing with the conception of cruelty, has stated that it has inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperament and emotions that have been conditioned by the social status. The two-Judge Bench referred to the decisions in *Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasikhan Shobha Rani* (supra), *Sheldon v. Sheldon V. Bhagat v. D. Bhagat, Parveen Mehta* (supra), *Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate*, *A. Jayachandra v. Aneel Kaur, Vinita Saxena v. Pankaj Pandit, Samar Ghosh* (supra) and *Suman Kapur v. Sudhir Kapur*, and opined that when the evidence brought on record clearly establish a sustained attitude of causing humiliation and calculated torture on the part of the wife to make the life of the husband miserable, it would amount to mental cruelty. Emphasis was laid on the behavioral pattern of the wife whereby a dent is created in the reputation of the husband, regard being had to the fact that reputation is the salt of life.

23. In the case at hand, the husband has clearly deposed about the constant and consistent ill-treatment meted out to him by the wife inasmuch as she had shown her immense dislike to his "sadhna" in music and had exhibited total indifference and, in a way, contempt to the tradition of teacher and disciple. It has graphically been demonstrated that she had not shown the slightest concern for the public image of her husband on many an occasion by putting him in a situation of embarrassment leading to humiliation. She has made wild allegations about the conspiracy in the family of her husband to get him re-married for the greed of dowry and there is no iota of evidence on record to substantiate the same. This, in fact, is an aspersion not only on the character of the husband but also a maladroit effort to malign the reputation of the family. The learned Family Judge as well as the High Court has clearly analysed the evidence and recorded a finding that the wife had treated the husband with mental cruelty. True it is, there is some

reference in that regard to the photostat copy of the letter which we have not accepted as admissible in evidence but the other evidence brought on record clearly support the findings recorded by the learned Family Judge and the High Court and the said finding remains in the realm of fact.

31. Applying the aforesaid principles to the facts of this case as discussed above, we are satisfied that the conduct of the respondent / wife even if it may not be said to be adulterous, but certainly amounted to infliction of mental cruelty upon the appellant in as much as she admittedly was found alone with one Laxman in a closed room; Laxman was only wearing underwear and banyan when the persons reached at the spot while searching the respondent, leaves no room for doubt that the conduct of the respondent was such which certainly causes mental cruelty. Moreover, her utterance in the presence of the witnesses have come in the witness box that she wanted to live along with Laxman and was not willing to live with the appellant which was also the act of causing mental cruelty. Thus, we are satisfied that it is a fit case where the respondent treated the appellant with cruelty. As such, the appellant is entitled to dissolution of marriage on the ground of cruelty under section 13(1)(a) of the Hindu Marriage Act

32. In view of the aforesaid, we set aside the judgment and decree passed by the trial Judge and dissolve the marriage between the parties by a decree of divorce under section 13(1)(a) of the Hindu Marriage Act with no order as to costs.

Order accordingly,

I.L.R. [2014] M.P., 1061

APPELLATE CIVIL

Before Mr. Justice A.K. Shrivastava

S.A. No. 508/2005 (Indore) decided on 9 April, 2013

MURTI SHRI PANDHARINATH MANDIR & ors. ...Appellants

Vs.

COLLECTOR & anr. ... Respondents

A. Civil Procedure Code (5 of 1908), Section 100, Land Revenue Code, M.P. (20 of 1959), Section 158 (1)(b), Inaam Inquiry Rules 1926, Rule 20 & Evidence Act (1 of 1872), Section 90 - Second Appeal - Land in question was given in "Inaam" to the ancestor of the second plaintiff by then Holkar State to offer "Pooja" on 24.12.1930

-As per direction of the State Government, name of Collector has been endorsed as Vyavasthapak (Manager) - Plaintiff claimed that he became the Bhoomiswami - Circular is applicable for Government temple and not for private temple - Hence, claimed that name of Collector as Manager be removed from revenue record - Held - Revenue records cannot be corrected without holding any inquiry and giving opportunity of hearing to the plaintiff - Since the suit land was given in "Inaam", plaintiff acquired Bhoomiswami right after coming into force of the Land Revenue Code u/s 158 (1)(b) of the Code - Thus, 1st question of law answered in favour of the plaintiff. (Paras 10,11 & 12)

क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100, भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 158(1)(बी), ईनाम जांच नियम 1926, नियम 20, साक्ष्य अधिनियम (1872 का 1), धारा 90 - द्वितीय अपील - तत्कालीन होलकर राज्य द्वारा प्रश्नगत भूमि को द्वितीय वादी के पूर्वज को "ईनाम" में "पूजा" अर्पित करने के लिये 24.12.1930 को दी गयी थी - राज्य सरकार के निर्देशानुसार, कलेक्टर का नाम, व्यवस्थापक (मैनेजर) के रूप में पृष्ठांकित किया गया है - वादी ने दावा किया कि वह भूमिस्वामी बन गया - परिपत्र सरकारी मंदिर को लागू होता है और न कि निजी मंदिर के लिये - अतः, यह दावा किया गया कि मैनेजर के रूप में कलेक्टर का नाम, राजस्व अभिलेख से हटाया जाये - अभिनिर्धारित - बिना किसी जांच के और वादी को सुनवाई का अवसर दिये बिना राजस्व अभिलेख में कोई सुधार नहीं किया जा सकता - चूंकि वाद भूमि "ईनाम" में दी गयी थी, संहिता की धारा 158(1)(बी) के अंतर्गत, भू राजस्व संहिता प्रभावी होने के पश्चात, वादी ने भूमिस्वामी अधिकार अर्जित किया - अतः, विधि का प्रथम प्रश्न वादी के पक्ष में उत्तरित किया गया।

B. *Evidence Act (1 of 1872), Section 90* - Presumption as to the genuineness of the documents which are more than 30 years old cannot be doubted specially when there is no document of rebuttal in this regard - Judgment and decree is not found to be justified - Same therefore is set aside. (Paras 10 & 13)

ख. साक्ष्य अधिनियम (1872 का 1), धारा 90 - 30 वर्ष से अधिक पुराने दस्तावेजों की सत्यता के बारे में उपधारणा पर संदेह नहीं किया जा सकता, विशेष रूप से तब जब इस संबंध में खंडन का कोई दस्तावेज नहीं - निर्णय एवं डिक्ली न्यायोचित नहीं पायी गयी - अतः उक्त को अपास्त किया गया।

Cases referred :

2012(1) MPLJ 672, 1947 PC 15.

C.L. Yadav with Manish Yadav for the appellants.

Sanjay Guha, P.L. for the respondents/State.

J U D G M E N T

A.K. SHIRIVASTAVA, J. :- Feeling aggrieved by the judgment and decree dated 15.3.2005 passed by learned Third Additional District Judge, Indore in Civil Appeal No.22/2004 whereby the judgment and decree dated 10.4.2003 passed by learned Civil Judge, Class-II, Depalpur in Civil Suit No.44-A/2002 decreeing the suit of plaintiffs has been reversed and set aside.

2. No exhaustive statements of fact are required to be narrated for the purposes of disposal of this appeal since they have been elaborately mentioned in the impugned judgment passed by learned First Appellate Court. For ready reference it would be sufficient to mention here that plaintiffs sought following relief in the plaint:

- अ) वादी के हित में तथा प्रतिवादीगण के विरुद्ध इस आशय की घोषणा का निर्णय एवं जयपत्र पारित किया जावे कि दाविया भूमि इनाम की भूमि होने से धारा 158 म.प्र. भूरा. संहिता के अन्तर्गत भू-स्वामी स्वत्व मध्यप्रदेश भू-राजस्व संहिता के प्रभावी होने के दिनांक 02-10-59 से ही निर्मित हो चुके हैं तथा वादी दाविया भूमि का भूमि स्वामी है।
- ब) वादी के हित में तथा प्रतिवादीगण के विरुद्ध इस आशय का घोषणा का निर्णय एवं जयपत्र पारित किया जावे कि एस.डी.ओ. द्वारा आदेश प्र.क्र.82/अ74/99-2000 दिनांक 3-6-00 द्वारा वादी का धारा 57 (2) म.प्र. भू-राजस्व संहिता का आवेदन निरस्त किया गया है, वह आदेश शून्यवत है।
- स) वादी के हित में तथा प्रतिवादीगण के विरुद्ध इस आशय का निर्णय एवं जयपत्र पारित किया जावे कि प्रतिवादी क्रमांक 1 कलेक्टर महोदय का नाम, प्रबंधक की हैसियत से दाविया भूमि के बी-1 व खसरा-रिकार्ड पर दर्ज किया गया है, उक्त इन्द्राज भी म.प्र. भू-राजस्व संहिता के विपरीत होने से अवैध व शून्यवत है। परिणमतः इस आशय की आदेशात्मक निषेधाज्ञा की प्रतिवादी क्रमांक 1 कलेक्टर महोदय का नाम प्रबंधक की हैसियत से राजस्व रिकार्ड में से हटाया जावे तथा वादी का नाम भू-स्वामी की हैसियत से दर्ज किया जावे।
- द) इस आशय की स्थाई निषेधाज्ञा का निर्णय एवं जयपत्र वादीके हित में जारी किया जावे कि प्रतिवादीगण स्वयं या अपने अधीनस्थ कर्मचारियों के माध्यम से वादी के दाविया भूमि के कब्जे में दखल

नहीं देवें तथा दाविया भूमि को नीलाम या अन्य किसी भी स्वरूप में किसी अन्य को सौंपने या अलाट करने की कार्यवाही नहीं करें।

इ) वादी को प्रतिवादीगण से इस वाद का सम्पूर्ण न्यायालयीन व्यय दिलाया जावे।

एफ) वादी के हित में तथा प्रतिवादीगण के विरुद्ध अन्य योग्य सहायता जो माननीय न्यायालय उचित समझे व दिलवाई जावे।"

The case of the plaintiffs is that the land in question was given to second plaintiff's forefather in *Inaam*, therefore, on coming into force of the M.P. Land Revenue Code, 1959 (in short "the Code") the plaintiffs became *Bhumiswami* of the land in question. The name of the Collector has been wrongly endorsed as *Vyavasthapak* (Manager) as per the direction of the State Government, but, that circular is applicable only for the temples which are government temples and not for private temple. It is also pleaded that the plaintiff is the *Bhumiswami* of the land and the temple in question is not a government temple or public temple. It is the further case of the plaintiffs that the order dated 3.6.2000 passed by the Sub-Divisional Officer dismissing the application of the plaintiffs under Section 57(2) of the Code be declared null and void and the name of the Collector be removed from the revenue record from the column of *Vyavasthapak* (Manager).

3. The defendants-State Government filed written-statement and refuted the plaint averments and pleaded that rightly the name of the Collector has been endorsed as *Vyavasthapak* (Manager) in the revenue record. It has been further pleaded that the application under Section 57(2) of the plaintiffs has been rightly dismissed and thus, prayed that the suit be dismissed.

4. Learned Trial Court framed necessary issues and after recording the evidence of the parties decreed the suit. However, the judgment and decree of learned Trial Court has been reversed by the learned First Appellate Court and dismissed the suit of plaintiffs. In this manner this second appeal has been filed by the plaintiffs which was admitted on 9.5.2006 on the following substantial questions of law:

- i) Whether the land in question after the application of M.P. Land Revenue Code is to be considered falling within the *Bhoomiswami* rights of the plaintiffs since it was an *Inam* land bestowed upon the ancestors of the plaintiffs?

- ii) Whether the judgment and decree passed by the learned first Appellate Court is not justified by law?

5. The contention of learned senior counsel for the appellants is that looking to the material documents Ex.P-1 to P-4 which go to the root of the matter it is clear that the land in question was given to ancestor of second plaintiff Prahladdas in *Inam* for *Devsthan*. Learned senior counsel by placing reliance upon the decision of this Court *State of M.P. vs. Vijaya Bai*, 2012 (1) MPLJ 672 has submitted that this decision is squarely applicable in the present case. The documents (Ex.P-1 to P-4) which are the foundation stone of the case and are verbatim identical to the document in question in the case of *Vijaya Bai* (supra) wherein this Court has held that the land was given in *Inam* by the Holkar State and not to the deity and therefore, firstly the second plaintiffs forefather and after his death the plaintiff became the *Bhumiswami* on coming into force of the Code.

6. On the other hand, Shri Guha, learned Panel Lawyer appearing for the respondents-State argued in support of the impugned judgment and submitted that cogent reasons have been assigned by learned First Appellate Court dismissing the suit of plaintiffs and by allowing the appeal of the State and therefore, no interference is called for. Hence, it has been prayed that this appeal be dismissed.

7. 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.(a)

8. Learned senior counsel for the appellants by placing reliance upon documents Ex.P-1 to P-4 which are the basic document of *Inam* (Sanad) dated 24.12.1930 has submitted that the name of second plaintiff's ancestor Ramratan Das has been mentioned as *Inamdar* and nowhere the *Inamdar* has been shown to be the deity, and therefore, the suit land was given to second plaintiffs forefather in *Inam* by the then Holkar State. For ready reference, it would be relevant to quote the document Ex.P-1 in verbatim which is the foundation stone of the case, which reads thus:-

परचा बाबत तहकीकात इनाम जमीन

नाम मौजा सुनाला महाल देपालपुर जिल्हा इन्दौर

होलकर स्टेट

नाम इनामदार	खसरा नंबर इनामी खेतों के	रकबा	इनाम का प्रकार	शरायत अगर कोई हो	रकम दामी जो वाजीब हो	कैफियत
1	2	3	4	5	6	7
राम रतनदास वल्लद धनीरामदास बैरागी सा. देपालपुर	637	7.73	इनाम देवस्थान	मौजे क. देपालपुर में श्री पंढरीनाथ देवस्थान के पूजन अर्चन बावद	इनाम इन्कायरी रू.नं. के मुताबिक 30 के मुजब दामी माफ	
मिनान	1	7.73				

The contents of this document Ex.P-1 on the rear side are also being reproduced hereunder:-

“इनामदार मजकूर को वाजे हो कि उपर बतलाया हुआ इनाम बाद चौकसी, सन 1926 के इनाम ईन्कायरी रूल्स के दफा 20 के मुताबिक जनाब सेटलमेंट ऑफिसर साहेब के हुक्म से तुम्हारे नाम कायम रखा गया है, लिहाजा, इनाम इन्कायरी रूल्स दफा 35 के मुजब यह पर्चा तुम्हें अदा किया जाता है”

On bare perusal of the column No.1 which is the column of *Inamdar* to whom the land is given, the name of second plaintiff's forefather Ramratan Das is mentioned. In column No.2 the Khasra number of the field has been given, column No.3 pertains to the area of the field. Column No.4 is in respect of what kind of *Inam* land is and in this column Devsthan has been endorsed. Column Nos.5 and 6 are very important. In column No.5 which is in respect of conditions, if any, it has been mentioned to "*offer Pooja of Murti Shri Pandharinath*". In column No.6 it has been mentioned that *Inam* land has been given in terms of Rule 20 of the *Inaam Inquiry Rules* and land revenue has been exempted. On the rear side of this document it has been mentioned that the land is given to *Inamdar* i.e. second plaintiff's forefather by the Settlement Officer in terms of Rule 20. The signature of the Settlement Officer is also there on this document. Similar type of the documents are Ex.P-2, P-3 and P-4 and except the area of the land and the survey numbers, all these four documents are verbatim similar. According to me, if the land would have been given to the deity *Shri Pandharinathji* then certainly the name of deity would have been mentioned in column No.1 but in the said column the name of Ramratan who is the forefather of second plaintiff has been mentioned and

therefore, I am of the view that land was given to forefather of second plaintiff in *Inaam* by the then Holkar State to offer *pooja* of temple of *Shri Pandharinathji* and thus, it cannot be said that the land was given to deity.

9. Since the land in question was given to plaintiff's ancestor in *Inaam* on coming into force of the Code on 2.10.1959, under Section 158(1)(b) of the Code the plaintiff became *Bhumiswami*. That apart, the plaintiff has examined himself as PW-1 and he has proved this document. No document in rebuttal has been filed and proved by the State of M.P.- defendants. Although two witnesses have been examined Harinarayan (DW-1) and Rajendra Kumar (DW-2), both are Patwaris. These two witnesses have stated that because subsequently the name of the Collector has been endorsed as *Vyavasthapak* (Manager) therefore, they are saying that the land is government land. Both of them have admitted that they have not seen the old revenue record and whose name has been entered as owner and *Bhumiswami* they cannot say. Further they have put their ignorance that if the land in question was given in *Inaam* to the ancestor of the second plaintiff by the then Holkar State, they cannot say.

10. Thus, looking to these very old documents, which are more than 30 years old, under Section 90 of Indian Evidence Act it is presumed that signature and every other part of such documents which purports to be in the hand-writing of any particular person is in that person's hand-writing. Needless to say from the proper custody of plaintiffs this document has been produced in evidence and proved. Hence the genuineness of these documents cannot be doubted specially when there is no document of rebuttal in this regard. On this point I may place reliance upon the decision of the Privy Council, *Munnalal, minor, and others v. Mst. Kashibai and others*, 1947 PC 15 wherein the Will in question of that case was found to be duly attested on the basis of statutory presumption under section 90 of the Evidence Act.

11. That apart, the name of the Collector as *Vyavasthapak* (Manager) cannot be endorsed in the revenue record without holding any inquiry and affording opportunity of hearing to the plaintiffs. Section 115 of the Code contemplates about the wrong entry in Khasra and any other land records by superior officers. According to this provision, if any Tehsildar finds that a wrong or incorrect entry has been made in the land records prepared under Section 114 by an officer subordinate to him, he shall direct necessary changes to be made therein in red ink after making such enquiry from the person concerned as he may deem fit after due written notice. Admittedly, in the

present case, no enquiry was conducted and notice of hearing was not given to the plaintiffs. Hence, I am of the view that merely the State Government has directed to mention the name of Collector as *Vyavasthapak* (Manager) it would not jeopardise the right of the plaintiffs and the revenue record cannot be corrected without holding any inquiry and giving opportunity of hearing to the plaintiffs. Hence, I am of the view that learned First Appellate Court erred in reversing the judgment and decree passed by learned Trial Court.

12. The substantial question of law No.(a) is thus, answered in favour of the appellants that the suit land after coming into force of the Code is to be considered to be in the *Bhumiswami* right of the plaintiffs since the land in question was given as *Inaam* land to the ancestor of the second plaintiff.

Regarding Substantial Question of Law No.(b)

13. For the reasons stated herein-above, the impugned judgment and decree passed by learned First Appellate allowing the appeal and thereby dismissing the suit is not found to be justified and in accordance with law and therefore, the said judgment is hereby set aside.

14. Resultantly, this appeal succeeds and is hereby allowed. The impugned judgment and decree passed by learned First Appellate Court is hereby set aside and the judgment and decree passed by learned Trial Court is hereby restored. No costs.

Appeal allowed.

I.L.R. [2014] M.P., 1068

APPELLATE CIVIL

Before Mr. Justice Rajendra Menon & Smt. Justice Vimla Jain

F.A. No. 382/1998 (Jabalpur) decided on 2 August, 2013

SOURAM BAI (SMT.)

...Appellant

Vs.

BABU LAL

...Respondent

Hindu Marriage Act (25 of 1955), Sections 13(1)(a) & 13(1)(ia)
- Divorce - Cruelty and desertion - After the marriage appellant's behaviour was not co-operative with husband and his family - She used to visit parental house without husband's consent - They had been living separately for considerable length of time - She also made allegation of illicit relation - Held - Allegation of illicit relation cannot be lightly ignored which caused mental agony - Appellant's behaviour was also

not proper - She was not doing any household work - Appellant is responsible for mental agony which amounts to cruelty - There had been irretrievable break down of their marriage - No illegality in the impugned order granting divorce - Appeal dismissed.

(Paras 11, 14 & 15)

हिन्दू विवाह अधिनियम (1955 का 25), धाराएं 13(1)(ए) व 13(1)(ia) - विवाह विच्छेद - क्रूरता एवं परित्याग - विवाह के पश्चात अपीलार्थी का व्यवहार पति एवं उसके परिवार के साथ सहयोगात्मक नहीं था - वह पति की सहमति के बिना मायके जाती थी - वे काफी लंबी अवधि से अलग रह रहे हैं - उसने अवैध संबंध का भी अभिकथन किया है - अमिनिर्धारित - अवैध संबंध के अभिकथन की साधारण रूप से उपेक्षा नहीं की जा सकती जो मानसिक यातना का कारण है - अपीलार्थी का व्यवहार भी उचित नहीं था - वह कोई घरेलू कार्य नहीं करती थी - अपीलार्थी मानसिक यातना की दोषी है जो क्रूरता की श्रेणी में आता है - उनके विवाह में असुधारयोग्य अवरोध उत्पन्न हो गया है - विवाह विच्छेद का आदेश देने में कोई अवैधता नहीं - अपील खारिज।

Cases referred :

AIR 1982 Delhi 240, AIR 1994 SC 710, 2006(3) MPLJ 1.

Imtiaz Hussain, for the appellant.

None for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
SMT. VIMLA JAIN, J. :- The appellant, being aggrieved by the judgment and decree dated 27/06/1998 passed by First Additional District Judge Sehore in Hindu Marriage Case No.29-A/1996, filed First Appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act').

2. Brief facts of the appeal are that the marriage of appellant-wife was solemnized with the respondent-husband in the year 1966 at Village Lasoodiya Sookha and out of their wedlock, two children were born one is son and other is daughter. The respondent/husband alleged that the appellant/wife misbehaved with his parents and repeatedly left his home without information. He also alleged that she used to quarrel and insult him on false grounds. He further alleged that she had deserted him for one and half years with her both the children. Then he had filed a petition of divorce on 31/03/1985, but the same was dismissed on the assurance of good and responsible behaviour by the appellant/wife on 07/09/1990.

They started to live together, but appellant/wife did not change her behaviour and started to quarrel and misbehave again. She made allegation that he had illicit relations with the wife of his younger brother and due to this reason his younger brother started to live separately. He also alleged that in the year 1990 itself, she again left him and since then deprived him of her conjugal company. Being dissatisfied with her, he filed a suit under Section 13 of the Act for seeking divorce or in the alternative judicial separation against the respondent on the ground that both of them are living separately and there is no possibility of amicable settlement between them in future.

3. The appellant/wife accepted the birth of son and daughter out of their wedlock but denied all other allegations and claimed that she never treated the respondent/husband and his parents with cruelty. She mentioned that she saw him in an objectionable position with his brother's wife. She stated that she was willing to live with him and perform her conjugal duty. She contended that she was not living separately on her own accord but in fact, she was forced to live separately because the appellant/husband was not ready and willing to live with her because she is illiterate and not good looking.

4. On the basis of the pleadings of the parties, the issues were framed by the trial Court. Appellant/wife and respondent/husband adduced the evidence. After appreciation of the evidence led by the parties, the Court below allowed the application for divorce by recording a finding that the respondent/husband had proved that the appellant/wife treated him with cruelty and deserted him without any reasonable cause since 1990.

5. It is submitted by the learned counsel for the appellant/wife that the findings recorded by the Court below are perverse and hypothetical and the decree of divorce passed on such findings cannot be sustained.

6. No one appeared on behalf of the respondent/husband..

7. We have heard learned counsel for the appellant/wife and gone through the record of the case. We find that in order to establish the ground of cruelty and desertion, the respondent/husband examined himself as (AW.1) and his friend Rishi Pal Singh (AW.2) whereas appellant/wife has examined herself as (DW.1), her son Dinesh Kumar (DW.2) and Umrao Singh (DW.3).

8. Cruelty is a ground of divorce under Section 13(1)(a) of the Hindu Marriage Act. We will now consider whether this ground has been proved or not?

9. In *Smt. Maya vs. Brij Nath*, AIR 1982 Delhi 240, while dealing with the concept of cruelty in the Hindu Marriage Act, the Court observed as under:

"Cruelty has not been defined in the Act. But it is now well settled that the conduct should be grave and weighty so as to make cohabitation virtually unendurable. It must be more serious than the ordinary wear and tear of marriage. The cumulative conduct taking into consideration the circumstances and the background of the parties has to be examined to reach a conclusion whether the act amounts to cruelty. The petitioner in a divorce petition has to prove that he was treated with cruelty. The burden of proving the cruelty lies on him."

10. The Supreme Court in the case of *V. Bhagat vs. Mrs. D. Bhagat*, AIR 1994 SC 710, has defined mental cruelty in the following manner:

"Mental cruelty in section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made."

11. Now coming to the ground of cruelty, the respondent husband Babulal (AW.1) stated that after the marriage appellant's behaviour was not cooperative

with him and his family members. She also misbehaved with them. She did not cooperate in household works. He also stated that appellant wife went to her parental house from time to time without his consent and in the year of 1985 she went to parental house with both children. She refused to come back. She had filed a case for maintenance. After compromise, she returned back in the year 1990. After 10-15 days she again went to her parental house. During this period, she also used to raise unnecessary quarrel and dispute with him. He further stated that appellant used to refuse for preparation of food. She made allegations that he was having illicit relation with the wife of his younger brother. Appellant/wife has been residing separately at her parental house from the year 1990.

12. Rishi Pal Singh (AW.2), who is the friend of respondent/husband, supported the evidence of respondent about erratic behaviour of the appellant with her husband. He stated that appellant used to fight with him without any reason. She did not use to prepare food in time therefore, respondent used to take food in hotel. She made allegations against the respondent about illicit relation with his younger brother's wife. Due to this allegation respondent had felt embarrassed.

13. On the contrary, the appellant wife stated that she was beaten by respondent and respondent did not want to keep her because she is illiterate and not good looking. Dinesh Kumar (DW.2) and Umrao Singh (DW.3) supported the evidence of appellant. Appellant admitted in her cross-examination that after marriage, they could not understand each other. There was a daily quarrel between them. She also admitted that due to quarrel, respondent went hungry on duty.

14. On appreciation of evidence produced on behalf of the respondent husband, it is proved that appellant made allegations against the respondent that he had illicit relations with his younger brother's wife. This allegation cannot be lightly ignored as in matrimonial matters, such allegation causes great mental agony and pain resulting in cruelty to husband. It is also proved that her behaviour was not proper and she was not doing any household work. In this way it is proved that appellant/wife is responsible for the mental agony of respondent which amounts to cruelty. Thus, ground under Section 13 (ia) is made out and it is proved that appellant has treated the respondent with cruelty.

15. It also appears from the evidence led by the parties that they had been living separately for considerable length of time. It indicates that their marriage had been broken down. Appellant admittedly, had been living separately from

her husband for 23 years without making any endeavour to revive her matrimonial relationship with the respondent. In these circumstances, the statement made by the appellant/wife that she is willing to live with the respondent/husband cannot be believed. Thus, it appears that there had been irretrievable break down of their marriage.

16. The Apex Court in the case of *Naveen Kohli vs. Neelu Kohli* reported in 2006(3) MPLJ page 1 para 72, has observed as under :-

"Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The Court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties."

17. Having regard to the facts and circumstances of the case, we do not find any irregularity or illegality in the impugned order dated 27/6/1998 passed in Hindu Marriage Case No. 29-A/1996 by the learned First Additional District Judge Sehore in allowing the divorce petition filed by the respondent-husband.

18. In the result, the appeal is dismissed. Parties to bear their own costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1073

APPELLATE CIVIL

Before Mr. Justice Rajendra Menon & Smt. Justice Vimla Jain

M.A. No. 2073/2006 (Jabalpur) decided on 10 September, 2013

RAJEEV VARMA

...Appellant

Vs.

SANTOSH KUMAR KUSHWAHA

...Respondent

Guardians and Wards Act (8 of 1890), Sections 10 & 47 - Appointment as the guardian of minor - Ward was born out of wedlock of appellant and his deceased wife who committed suicide - Respondent who is maternal grand father of ward has been looking after her since

her birth and after the death of her mother - There is possibility of second marriage of appellant who does not have any female support to look after the girl - Held - In considering the question of custody of a minor, the court has to be guided by the only consideration of the welfare and interest of the minor - There is no illegality in impugned order in appointing the maternal grand father as guardian - Appeal is dismissed. (Paras 15, 19 to 21)

संरक्षक और प्रतिपाल्य अधिनियम (1890 का 8), धाराएं 10 व 47 - नाबालिग के संरक्षक की नियुक्ति - अपीलार्थी एवं उसकी मृत पत्नी जो आत्महत्या कर चुकी के वैवाहिक बंधन के फलस्वरूप प्रतिपाल्य का जन्म - प्रत्यर्थी जो कि प्रतिपाल्य का नाना है, उसके जन्म के बाद एवं उसकी मां की मृत्यु के उपरांत से उसकी देखभाल कर रहा है - चूंकि लड़की की देखभाल के लिये किसी महिला का सहयोग न होने के कारण अपीलार्थी के द्वितीय विवाह की संभावना है - अभिनिर्धारित - नाबालिग के संरक्षण के प्रश्न का विचार करते समय न्यायालय को केवल नाबालिग का हित और उसके कल्याण का ध्यान में रखना होगा - नाना की संरक्षक के रूप में नियुक्ति के आक्षेपित आदेश में कोई अवैधता नहीं - अपील खारिज।

Cases referred :

AIR 2001 SC 1056, AIR 1961 Punjab 51, (1982) 2 SCC 544, AIR 1982 SC 1276.

A.P. Singh, for the appellant.

Neeraj Vegad, for the respondent.

ORDER

The Order of the Court was delivered by :
SMT. VIMLA JAIN, J. :- This is an appeal filed by Rajeev Verma, appellant/ non-applicant/father of minor child Ku. Roshani under Section 47 of the Guardian & Wards Act, 1890 (hereinafter referred to as the 'Act'), being aggrieved by the order dated 27.3.2006 passed by First Additional District Judge, Satna in Misc. case No. 2/2004, thereby allowing the application filed by Santosh Kumar Kushwaha, respondent/applicant/ maternal grand father of the minor under Section 10 of the Act, for his appointment as the Guardian of minor child Ku. Roshani.

2. The brief facts of the case may be summarized that Premlata Verma, daughter of the respondent/applicant was married to the appellant/non-applicant on 6.12.2000 as per Hindu rites and ward Ku. Roshani was born out of their

wedlock on 15.09.2001 at Gupta Clinic Satna. Premrata Verma, committed suicide on 3.5.2003 by taking poison. Since then the respondent, who is the maternal grandfather of the ward Ku. Roshani has been looking after her. Appellant was prosecuted in Sessions trial No. 110/03 under Sections 498-A, 304-B, 306, 302 or 302/34 of IPC. He also intends for his second marriage. The minor child has been residing with respondent, who has been maintaining her. She likes to live with him. Therefore he filed an application under Section 10 of the Act on the aforesaid facts.

3. The appellant/father of minor child denied claim of respondent and pleaded that when he was in jail, respondent/applicant had taken forceful custody of his minor daughter and submitted that he is a practicing lawyer at District Court, Sidhi and also earns substantial income from his computer center, therefore he can look after her well. He had no role in death of his wife therefore he had been acquitted in Sessions Trial No. 110/2003. He is father and natural guardian of his minor daughter. Thus, he prayed for custody of his minor daughter.

4. The first additional District Judge, Satna examined the matter, considered all relevant factors for the welfare of the minor and ordered to give custody of minor child Roshani to the respondent/applicant.

5. Aggrieved by the said order the appellant has carried the matter to this Court by filing this appeal.

6. We have heard learned counsel appearing for the parties, and perused the record as well as impugned order dated 27.3.2006.

7. Learned counsel for the appellant/non-applicant submitted that the entire approach of the trial Court in the matter has been grossly erroneous. The trial Court has ignored the essential material facts, that the appellant is father and natural guardian of the minor child. He further submitted that appellant and his family are financially sound and he can properly protect the interests of her minor child. In his submission he referred the case *R. V. Srinath Prasad v. Nandamuri Jayakrishna and others* AIR 2001 SC 1056.

8. Learned counsel of respondent/applicant supported the finding of the Court below and contended that the Court below, considering welfare of the child who is staying with her maternal grand father since her birth and after the death of her mother, rightly allowed the petition.

9. Now the question is whether it would be in the welfare of the child to keep him in the custody of the appellant (father) or respondent (maternal grand father).

10. For the sake of convenience, Section 7 of the Guardians & Wards Act, 1890 is reproduced herein:-

7. Power of the Court to make order as to guardianship-

(1) Where the Court is satisfied that is for the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property or both, or

(b) declaring a person to be such a guardianship.

The Court may make an order accordingly.

(2) an order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

11. The respondent/applicant Santosh Kumar stated before the trial Court that being the maternal grand father of the minor Roshani, it would be appropriate to grant her custody to him. He has been taking care of the minor child Roshani right from her birth. He and his family members have been looking after the child with great care and affection from the time of her birth and after death of her mother. He also stated that the child is prosecuting her studies in English medium and also attending dance class. His family members are well educated and they take care of her. Appellant/non-applicant had been prosecuted for murder of her mother. An appeal is pending in High Court against his acquittal. His statement is also supported by his wife Siyadulari (AW-1) and two independent witnesses Ramkali Singh (AW-3) and Jag Prasad Garg (AW-4).

12. The appellant/non-applicant (NAW-1) Rajeev Verma stated that being father and natural guardian of the child, he has an un-fettered right to claim back her custody from the hands of her maternal grand father. He and his family are in a better financial position in comparison of respondent and the child will be protected in his custody. In support of his version he had examined two witnesses namely Dej Raj Verma (NAW-2) and Mohd. Jahagir Ansari (NAW-3).

13. The principles in relation to custody of a minor child are well settled. In determining the question as to who should be given custody of a minor child, the paramount consideration is the "welfare of the child" and not rights of the father.

14. The Apex Court held in *Rattam Amol Sing Vs. Kamaljit Kaur* AIR 1961 Punjab 51, as follows:-

"The father's right to the custody of his minor child is not absolute; nor is it indefeasible in law; it is circumscribed by the consideration of the benefit and welfare of the minor."

15. In *Thrity Hoshie Dolikuka v. Hoshiam Shavaksha Dolikuka* 3(1982) 2 SCC 544, AIR 1982 SC 1276, Apex Court held as under:-

"17. The principles of law in relation to the custody of a minor appears to be well established. It is well settled that any matter concerning a minor, has to be considered and decided only from the point of view of the welfare and interest of the minor. In dealing with a matter concerning a minor, the Court has a special responsibility and it is the duty of the Court to consider the welfare of the minor and to protect the minor's interest. In considering the question of custody of a minor, the Court has to be guided by the only consideration of the welfare of the minor."

16. In *R.V. Srinath Prasad Vs. Nandamuri Jayakrishna and others* AIR 001 (sic. 2001) SC 1056, this Court held as under:-

"Custody of minor children is a sensitive issue. It is also a matter involving sentimental attachment. Such a matter is to be approached and tackled carefully. A balance has to be struck

between the attachment and sentiments of the parties towards the minor children and the welfare of the minors which is of paramount importance.”

17. We have to take into consideration the fact that admittedly the appellant is a single person and does not have any female support to look after the girl child. The mother of child is no more. Bringing up a girl child does not provide only pleasure but also involves the discharge of great responsibility. In this case respondent Santosh (AW-2) and his wife Siyadulari (AW-1) expressed their willingness to take up responsibility to bring up minor girl child. They are taking her care from her birth. Under their guardianship and guidance she has been growing for last 13 years and apparently the child is sentimentally attached with them.

18. It appears to us that it is not safe to handover the child to the appellant who admittedly had been prosecuted for the murder of her mother. We conclude that it would not be in the interest of the minor child to take her back from the care and custody of the active and loving maternal grand father and grand mother. In these circumstances, we find no compelling reasons that would justify our cutting off this bond of emotional attachment and security between the child and her maternal grand father. We therefore, consider that in the peculiar circumstances of this case, it would not be just and proper to direct the girl child to be handed over to the appellant at this stage.

19. The appellant father is young man. He certainly intends for his second marriage. In the present circumstances, child has been getting and can hope to get greater warmth and affection in the company of her maternal grand parents than that of her father who is alone now. It is our considered opinion that it would be in the best interest of the minor, keeping in view her emotional attachment, safety, well being and her all round physical, moral, emotional, religious, social and educational development, to allow her to live with her maternal grand parents. The child has been living with them for about thirteen years and has been growing up well in an atmosphere which is conducive to her growth. Her strong bond of love and affection has been established with her maternal grand parents. Therefore, it shall not be proper at this stage to divert the child from the existing environment to which she became used to during last thirteen years.

20. The appellant's allegation that the respondent is not financially sound

to bring up the child, cannot be accepted. The respondent is working on the post of R.A.E.O., in the Agriculture Department of State of MP. His family members are well educated. In these circumstances, we do not have any doubt that the interest of the minor child would suffer in any way due to financial stringency by keeping her in the custody of the respondent.

21. In view of the above discussion, we have reached to the inevitable conclusion that there is no irregularity or illegality in impugned order dated 27.3.2006 passed by the learned First Additional District Judge, Satna, thereby allowing the application filed by respondent under Section 10 of the Act for his appointment as the guardian of minor girl Roshani.

22. However, we do not want the child to grow without experiencing the love and affection of his father who too has a natural right to love her, to meet her and to play his role in shaping her life and career. Therefore we permit the appellant to meet Ku. Roshani and to take her to his home in Sidhi during one weekend in a month. He may take her on friday evening or saturday morning but he must ensure that she reaches back Satna by sunday evening. This is subject to the condition that her education does not suffer adversely. The respondent should not prevent the child from meeting the appellant/father and accepting any gift offered by him.

23. In result the appeal is dismissed in the above terms. Parties to bear their own costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1079

APPELLATE CIVIL

Before Mr. Justice Alok Aradhe

S.A. No. 1370/2010 (Jabalpur) decided on 17 September, 2013

MAHAPRASAD

...Appellant

Vs.

BADI BAI & ors

...Respondents

Evidence Act (1 of 1872), Section 90 & Succession Act (39 of 1925), Section 63(c) - Will - Execution of - Will shrouded by suspicious circumstances - At the time of mutation of the land in question the Will (Ex.P/20) was not produced - What was stated by the plaintiff at that time was that he had purchased the suit land - But, copy of the alleged

sale deed has not been filed - Held - The alleged execution of Will is thus shrouded in suspicion - Section 90 of Evidence Act, confers a discretion on the court to draw a presumption with regard to its genuineness - Appeal dismissed. (Paras 7 & 8)

साक्ष्य अधिनियम (1872 का 1), धारा 90 व उत्तराधिकार अधिनियम (1925 का 39), धारा 63(सी) - वसीयत - का निष्पादन - वसीयत संदेहास्पद परिस्थितियों से घिरी है - प्रश्नगत भूमि के नामांतरण के समय वसीयत (प्रदर्श पी/20) प्रस्तुत नहीं की गई - उस समय वादी ने जो कथन किया वह यह था कि उसने वाद भूमि क्रय की थी - किन्तु, अभिकथित विक्रय विलेख की प्रति प्रस्तुत नहीं - अभिनिर्धारित - वसीयत का अभिकथित निष्पादन इसलिए संदेह से घिरा है - साक्ष्य अधिनियम की धारा 90, न्यायालय को उसकी सत्यता के संबंध में उपधारणा निकालने के लिये विवेकाधिकार प्रदान करती है - अपील खारिज।

Cases referred :

1966 J LJ S.N. 126, 1958 MPLJ 198 = AIR 1958 MP 246.

A.L. Patel, for the appellant.

Dēpendra Mishra, for the respondent No. 1.

Sumant Bhattacharya, for the respondent No.2.

J U D G M E N T

ALOK ARADHE, J. :- This appeal is by the plaintiff, which was admitted by a Bench of this Court on following substantial question of law:-

“Whether the will Ex.P/20 dated 27.2.1961 being a 30 year old document and was filed by plaintiff from his (proper) custody should be presumed that it was validly executed by the testator and was validly attested by the witnesses in absence of any evidence in rebuttal under Section 90 of the Evidence Act as per the decision of *Munnalal, minor and others Vs. Mst. Kashibai and others*, AIR 1947 Privy Council, 15 as well as the Division Bench decision of this Court in *Rameshwar Prasad Vs. Krishna Mohanath Raina and others*, AIR 1969 Madhya Pradesh ?”

2. Facts giving rise to filing of the appeal briefly stated are that the plaintiff filed the suit on the ground that plaintiff's father-in-law namely Sevak was owner of the land admeasuring 4.524 hectares, who had three daughters namely

Badi Bai, Halki Bai and Chunni. It was further pleaded that plaintiff and Halki Bai, who was his wife, used to reside with Sevak and used to take care of him, as he had no male issue and therefore, Sevak out natural love and affection executed a will dated 27.2.1961 (Ex.P/20) in favour of plaintiff and after the death of Sevak, plaintiff's name was mutated in the revenue records. It was also pleaded that since then the plaintiff is in possession of the suit land as owner thereof. However, the defendants in a clandestine manner on 25.9.2005 got the name of the plaintiff deleted from the revenue records. Alternatively, the plaintiff also claimed title in respect of suit land by adverse possession. Accordingly, the plaintiff filed the suit seeking the relief of declaration of title and permanent injunction.

3. The defendants No.1 and 2 filed the written statement in which inter-alia the claim set-up by the plaintiff was denied. It was pleaded that plaintiff is in possession of one-third share of the suit land i.e. the share of his wife. It was further pleaded that no order of mutation was made in favour of the plaintiff. The plaintiff got his name mutated in the revenue records fraudulently, which was subsequently set aside vide order dated 25.9.2005 and the defendants No.1 and 2 as well as plaintiff's wife's name was directed to be recorded in respect of one-third share each in the suit land.

4. The trial Court vide judgment and decree dated 30.4.2010 inter-alia held that though the plaintiff has based his claim on the basis of will dated 27.2.1961 (Ex.P/20), yet in evidence, in paragraph 19, it has been averred that he had purchased the suit land from Sevak and on that basis he got his name mutated in the revenue records. It was further held that the plaintiff has not examined any attesting witnesses to prove the will. Accordingly, the trial Court came to the conclusion that the execution of the will has not been proved in accordance with Section 68 of the Indian Evidence Act, 1872 as well as Section 63(C) of the Indian Succession Act, 1925. The aforesaid decree was affirmed in appeal.

5. Learned counsel for the appellant submitted that the will dated 27.2.1961 (Ex.P/20) is a document which was 30 years old and was produced before the trial Court from proper custody, therefore, the Courts below grossly erred in not drawing the presumption with regard to its genuineness under Section 90 of the Indian Evidence Act, 1872. On the other hand, learned counsel for respondents submitted that the judgment and decree passed by the Courts below is perfectly just and legal and does not call for any interference

by this Court in exercise of power under Section 100 of the Code of Civil Procedure.

7. I have considered the respective submissions made by learned counsel for the parties and have perused the record. Section 90 of the Indian Evidence Act provides where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. Thus, Section 90 of the Evidence Act confers a discretion on the Court to draw a presumption with regard to its genuineness. See: *Taiba Khatoon Vs. Hammo*, 1966 J.L.J. S.N.126. In the case of *Kamalnarayan Ramsaranlal Agrawal Vs. Ram Kishorelal and another*, 1958 MPLJ 198 = AIR 1958 MP 246, a Division Bench of this Court has held that in dealing with old documents, the first enquiry which is legitimate is when the document was first disposed. If it was not mentioned in earlier proceeding where it was material, its genuineness can be held to be doubtful. It is equally well settled legal proposition that where suspicious circumstances will be alleged, it would be dangerous to attach presumption on such document under Section 90 of the Evidence Act. Thus, it is evident that under Section 90 of the Act, the Court is not under an obligation to draw an inference with regard to genuineness of will.

8. In light of the aforesaid well settled legal position, the facts of the case may be seen. In the instant case, in paragraph 19 of his evidence, the plaintiff has stated that he has purchased the suit land from Sevak and got his name mutated on the basis of the sale deed. The version of the plaintiff is corroborated from Ex.P/2 i.e. *Khasra Panchshala* which contains an entry that the name of the plaintiff was mutated in the revenue records on the basis of the sale deed executed in his favour. It is pertinent to mention here that if a will was executed in favour of the plaintiff by late Sevak, there was no reason why he would not have sought his mutation in the revenue records on the basis of the will and had sought the mutation on the basis of the sale deed. It is also pertinent to mention here that the copy of the sale deed has not been filed by the plaintiff. Due to aforesaid conduct of the plaintiff, the execution of the will is shrouded in suspicion. The plaintiff ought to have produced the will at the time of mutation proceeding. Neither any explanation has been offered for

non-production of the will in mutation proceeding, nor the copy of sale deed has been produced on the basis of which plaintiff got his name mutated in the revenue record. Therefore, in the facts of the case, I am inclined to draw the presumption with regard to validity of the will. I have carefully gone through the judgment of the Privy Council in the case of *Munnalal*, minor and others, supra, and the Division Bench decision of this Court in the case of *Rameshwar Prasad*, supra. The aforesaid decisions nowhere lay down that when the will which is 30 years old is produced from proper custody, the Court is duty-bound to draw a presumption with regard to its genuineness.

9. For the aforementioned reasons, the substantial question of law framed by this Court is answered in the negative and against the appellant.

10. In the result, the appeal fails and is hereby dismissed with cost.

Appeal dismissed.

I.L.R. [2014] M.P., 1083

APPELLATE CIVIL

Before Mr. Justice Prakash Shrivastava

S.A. No. 402/1980 (Indore) decided on 29 October, 2013

SATNAM SINGH & anr.

...Appellants

Vs.

HUKUM SINGH & ors.

...Respondents

A. *Civil Procedure Code (5 of 1908), Order 6 Rule 2 - Pleadings* - Although, plaintiff had not used the word "Adverse Possession" in plaint but pleaded all necessary facts - Trial court also framed issue regarding adverse possession - Parties also led evidence on this issue - It cannot be said that there was no clear pleading of adverse possession. (Para 11)

क. *सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 2 - अभिवचन* - यद्यपि वादी ने वादपत्र में "प्रतिकूल कब्जा" शब्द का उपयोग नहीं किया है किन्तु सभी आवश्यक तथ्यों का अभिवाक् किया है - विचारण न्यायालय ने भी प्रतिकूल कब्जा संबंधी विवाद्यक विरचित किया - इस विवाद्यक पर पक्षकारों ने साक्ष्य भी प्रस्तुत किये - यह नहीं कहा जा सकता कि प्रतिकूल कब्जे का स्पष्ट अभिवाक् नहीं था।

B. *Limitation Act (36 of 1963), Article 65 - Adverse possession - Proof* - Plaintiff claiming title over suit land by adverse

possession - Plaintiffs had raised the plea that they were in possession of the suit land by virtue of unregistered/oral sale - Held - Plaintiffs were in hostile and continuous possession and had perfected their title by way of adverse possession. (Paras 12 & 13)

ख. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 65 - प्रतिकूल कब्जा - सबूत - वादी, प्रतिकूल कब्जा द्वारा वाद भूमि पर हक का दावा करता है - वादीगण ने अभिवाक् किया कि वाद भूमि, अपंजीकृत/मौखिक विक्रय द्वारा उनके कब्जे में थी - अभिनिर्धारित - वादीगण, विरोधी एवं निरंतर कब्जा धारक थे तथा प्रतिकूल कब्जा के जरिए अपना हक पूर्ण कर लिया है।

Cases referred :

2004 (10) SCC 779, AIR 2009 SC 103, 2012 RN 133, AIR 1964 SC 1254, 2006(7) SCC 570, AIR 2007 SC 1753, AIR 1966 SC 735, AIR 2003 SC 1905, 1993 RN 94, AIR 1967 SC 978, AIR 1963 SC 70, 1987 JLJ 159, 2004(3) MPLJ 72, AIR 1962 MP 141, AIR 1963 SC 302, AIR 2006 SC 1975.

G.M. Chaphekar with Vishal Baheti, for the appellants.

B.L. Pavecha & M.L. Agrawal, for the respondents.

J U D G M E N T

PRAKASH SHIRIVASTAVA, J. :- This appeal under Section 100 of the C.P.C. is at the instance of the defendant no.1 and 2 in the suit challenging the judgment of the First Appellate Court dated 18.2.1980, by which Civil Appeal No.3A/1975 filed by the respondents no.1 to 5 (plaintiffs) was allowed and the Civil Suit No.24A/1970 was decreed. The trial Court by the judgment dated 11.1.1975 had dismissed the C.S. No.24A/1970.

2/ The respondents no.1 to 5 (plaintiffs) had filed the suit for declaration and permanent injunction pleading that Kunwarji and Bhuri Wd/o Heera were owner of the land admeasuring 50 Bigah 1 Biswa situated at village Ahirkheda. Bhuri had gone in 'Natra' during the lifetime of Kunwarji, therefore, her rights on the land had come to an end and Kunwarji remained the sole owner of the land. In 1933 Kunwarji had sold a part of the land in his ownership admeasuring 31 Bigah 11 Biswa (suit land) to the respondents no.6 and 7 Narayan and Ghisalal for consideration of Rs.5,00/- and in the record the name of the respondent no.7 Ghisalal was entered and possession of the suit land was handed over to him. In 1937-38 Ghisalal had sold the suit land to Bhagwan

Singh (plaintiffs-respondents no.1 to 5 are the legal heirs of Bhagwan Singh). The sale by Ghisalal in favour of Bhagwan Singh was oral sale and in pursuant thereto, Bhagwan Singh and thereafter his legal representatives respondents no.1 to 5 had continued in possession of the suit land. It was further pleaded that the sole legal heir of Kunwarji was his daughter Nandi Bai and after her death, her son Narayan (respondent no.6) had become the legal heir. It was further pleaded that Hari Singh had got his name mutated illegally and surreptitiously whereas Tehsildar of the Jagir had no power to pass mutation order dated 17/3/1948. The remaining land of Kunwarji admeasuring 19 Bigah was inherited by Narayan. Defendant Hari Singh had initiated proceedings for possession under Section 250 of the Land Revenue Code claiming possession of suit land, which were dismissed by the Tehsildar by order dated 23.3.1964 and the appeal was dismissed by the S.D.O. by order dated 31.7.1968, and Hari Singh had thereafter executed a bogus sale deed dated 10.4.1970 in favour of the appellants whereas Hari Singh was neither owner nor he was in possession of the suit land. Since the appellants had tried to interfere in the possession of the respondents no.1 to 5, therefore, they had filed the present suit.

3/ The appellants by filing the written statement had denied the plaint averment. They had denied the sale by Kunwarji in favour of Ghisalal and Bhagwan Singh. It was pleaded that Kunwarji had died in 1946 and in 1948 the suit properties were mutated in the name of Hari Singh. It was further pleaded that Hari Singh was son of Kunwarji's brother's son Ram Singh. The possession of Ghisalal on the suit land was denied. It was further denied that Bhagwan Singh had received any title on the basis of the sale deed executed by Ghisalal. It was further pleaded that Bhagwan Singh on 27.8.1958 had filed an application for rights of Pakka Krishak in respect of the suit land disclosing himself to be sub-tenant and that the plaintiffs had not raised earlier any plea of adverse possession.

4/ The trial Court by the judgment dated 11.1.1975 had dismissed the suit on reaching to the conclusion that the plaintiffs had failed to prove that Kunwarji had sold the suit land to Narayan and Ghisalal in 1933, and Ghisalal had sold the suit land to Bhagwan Singh and given him the possession of the suit land. It was further found that the plaintiffs had failed to prove that they had perfected their title by way of adverse possession. The trial Court also found that Hari Singh, defendant no.3, was the heir of Kunwarji and that appellant No.1 is not a bonafide purchaser for value without notice.

5/ The first appellate court by the judgment dated 18.2.1980 has reversed the findings recorded by the trial Court and has decreed the suit. The first appellate court has found that the suit properties were undisputedly in the name of Kunwarji. It was held that the onus was on the appellant, who had purchased the suit property from Hari Singh, to prove that Hari Singh was legal heir of Kunwarji but in this regard the appellant had not produced any cogent evidence. The first appellate court has found that it was not proved that Hari Singh was son of the nephew of Kunwarji and has held that Hari Singh was not the legal heir of Kunwarji. It was also found by the first appellate court that the suit land was sold by Kunwarji to Ghisalal and in 1937-38 Ghisalal had sold the suit land to Bhagwan Singh, and thereafter Bhagwan Singh had continued in possession of the suit land. The first appellate court alternatively also found that the plaintiffs had perfected their title by way of adverse possession, since they had continued in possession of the suit land for more than 12 years. The first appellate court accordingly decreed the suit by declaring the plaintiffs owner of the suit land and restraining the defendants from interfering in possession of the plaintiffs.

6/ This Court had earlier allowed the Second Appeal by setting aside the judgment of the first appellate court and restoring the judgment of the trial Court by the judgment dated 26.9.2001. The Civil Appeal No.2937/2003 was allowed by the Supreme Court making observations in respect of the question which arise in the appeal and claim and counter claim of the parties and remanding the matter back to this Court to frame the substantial question of law that may arise in the case, and hear the parties and answer the same. This court thereafter on 2.5.2013 had framed following substantial questions of law :-

(1) Whether the First Appellate Court has erred in law to prove the alleged oral two sales; first in favour of Gheesalal and another in favour of Bhagwan Singh for consideration of Rs.500/- without having any registered instrument and as such the plaintiff confers valid title on the basis of such sales, whereupon the suit filed by the legal heirs of Bhagwan Singh has rightly been decreed?

(2) Whether the finding recorded by the first Appellate Court about acquisition of title on the basis of adverse possession in pursuance of oral sale of the suit land stands

vitiated for want of requisite pleadings?

(3) Whether lower Appellate court committed an error to hold that Harisingh is not the legal heir of Kunwarji reversing the well considered finding of the trial Court, however such finding is perverse?

(4) Whether the learned First Appellate Court has erred in law in holding that by means of the long possession of the first respondent Hukumsingh and his predecessors, they have acquired title to the suit lands?

(5) Whether the learned First Appellate Court has failed to notice the established principle of law that in a suit based upon title, the plaintiff must success on the basis of his own strength and cannot take advantage of any weakness in the defendant's title?

The above questions are answered as under :-

Question No.1 :-

7/ The first appellate court has accepted the plea of the plaintiffs that Kunwarji had sold the suit land to Ghisalal for consideration of Rs.500/- and a document in writing was prepared by Mangilal, in which PW-2 Sardar Singh and PW-6 Ghasiram had signed as witness. The first appellate court on that basis has recorded the finding of fact that Kunwarji had sold the suit land to Ghisalal in the year 1935. Ghisalal thereafter had cultivated the land and had sold the suit land in the year 1937-38 by way of oral sale to Bhagwan Singh for consideration of Rs.500/-. Both the sales; first by Kunwarji in favour of Ghisalal and second by Ghisalal in favour of Bhagwan Singh, were for consideration of Rs.500/-. In terms of Section 54 of Transfer of Property Act, 1882 the sale of suit land which was admittedly of the value of more than Rs.100/-, could have been made only by a registered instrument. Since the aforesaid two sale transactions were made without executing the registered sale deed, therefore, no title had passed to Ghisalal and Bhagwan Singh on the basis of the unregistered and oral sale made in their favour. Though on the basis of the evidence on record, it has been proved before the first appellate court that the suit property was sold in favour of Ghisalal and then Bhagwan Singh, but the sale was not a valid sale having been done in contravention of the provisions contained in Section 54 of the Transfer of Property Act and

such a sale would not confer valid title to the respondents-plaintiffs, therefore, the first appellate court was not right in law in holding the plaintiffs to be the title holders on the basis of above sales.

Question No.2 & 4 :-

8/ Counsel for the appellants has submitted that the plea of adverse possession has not been raised in the plaint and necessary ingredients of adverse possession have not been proved, whereas the counsel for the respondents no.1 to 5 has submitted that all the material facts were pleaded in the plaint and since the plaintiffs had continued in possession of the suit land on the basis of the invalid sale deed, therefore, their possession was adverse to the appellants and they had perfected their title by way of adverse possession. It has also been submitted that the finding of adverse possession is a finding of fact.

9/ So far as the submission of counsel for the respondents no.1 to 5 that the finding relating to adverse possession is a finding of fact is concerned, such a submission can not be accepted because the question of adverse possession is not a pure question of fact or of law but a blended question of fact and law, and the person who is claiming the adverse possession is required to establish the necessary ingredients of adverse possession, failing which the finding of adverse possession can not be upheld. [See: *Karnataka Board of Wakf Vs. Government of India and others*, 2004 (10) SCC 779 and *Hemaji Waghji Jat Vs. Bhikhabhai Khengarbhai Harijan and others*, AIR 2009 SC 103]. The reliance of counsel for the respondents on the Single Bench Judgment of this Court in the matter of *Ratanlal Vs. Kishanlal and others* reported in 2012 RN 133 is of no help to the respondents, since in that judgment in paragraph 15 observations have been made about the general findings recorded by the courts below being pure findings of fact, but it has not been laid down in so many words in that judgment that the finding of adverse possession is a finding of fact.

10/ It is the settled position in law that a party claiming adverse possession, must prove that his possession is "*nec vi, nec clam, nec precario*" i.e. peaceful, open and continuous. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. The possession must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the true owner. Physical fact of exclusive possession and the *animus possidendi* to hold as owner in exclusive possession to the

actual owner is important. A person claiming adverse possession is required to establish: (a) the date he came in possession, (b) nature of his possession, (c) If the factum of possession was known to the other party, (d) period of his continuous possession and (e) that his possession was open and undisturbed. [See: *Karnataka Board of Wakf Vs. Government of India and others*, 2004 (10) SCC 779]. He is also required to show at least when the possession became adverse so that the starting point of limitation against the party affected can be found. [See: *S.M. Karim Vs. Mst. Bibi Sakina*, AIR 1964 SC 1254]. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action. [See: *T. Anjanappa and others Vs. Somalingappa and another*, 2006(7) SCC 570]. Adverse possession right is not a substantive right but a result of the waiving (wilful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy, that does not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence. [See: *P.T. Munichikkanna Reddy and others Vs. Revamma and others*, AIR 2007 SC 1753].

11/ In the present case an objection has been raised by the appellants that the respondents-plaintiffs have not clearly pleaded adverse possession. By a catena of judgments it has been settled that the plea relating to the adverse possession must be made and proved. [See: *S.M. Karim Vs. Mist. Bibi Sakina*, AIR 1964 SC 1254]. Since the person claiming adverse possession tries to defeat the right of the true owner, therefore, he has to clearly plead and establish all facts necessary to establish his adverse possession. [See: *Karnataka Board of Wakf Vs. Government of India and others*, 2004 (10) SCC 779]. In the present case a perusal of the plaint reveals that the respondents-plaintiffs though had not used the word "adverse possession" but had pleaded all the necessary facts making out the plea of adverse possession. The trial Court had also framed the Issue No.3 relating to acquisition of title by the plaintiffs by way of adverse possession. Both the parties had led evidence on this issue and thereafter the findings have been recorded by the two courts below on this issue after appreciating the evidence placed on record. Even otherwise if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea

was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. [See: *Bhagwati Prasad Vs. Chandramaul*, AIR 1966 SC 735]. In view of this the submission of counsel for the appellants that the plea of adverse possession can not be raised for want of clear pleading in the plaint, is rejected.

12/ The counsel for the respondents-plaintiffs has submitted that since the respondents have been found to be in continuous possession of the suit land since 1937-38 on the basis of the invalid sale deed, therefore, their possession was open and hostile denying the title of the lawful owner, hence they have perfected their title by way of adverse possession.

13/ In the matter of *Bondar Singh and others* reported in AIR 2003 SC 1905 in a case where the plaintiffs had raised the plea that they were in possession of the suit land by virtue of unregistered unstamped sale deed executed in favour of their predecessors in title and the defendants had alleged the plaintiffs to be the trespassers and the possession of the plaintiff was established, the Supreme Court has found that the plaintiffs were in hostile and continuous possession and had perfected their title by way of adverse possession. This Court also in the matter of *Mangilal Vs. Sundar Bai* reported in 1993 RN 94 referring to the judgment of the Supreme Court in the matter of Soni Lalji Jetha (deceased) through his *LRS Vs. Soni Kalidas Devchand and others* reported in AIR 1967 SC 978, in the matter of *Padma Vithoba Chakkayya Vs. Mohd. Multani and another* reported in AIR 1963 SC 70 and of this Court in the matter of *Sukhibai and others Vs. Limye and others* reported in 1987 J LJ 159 has held that continuous possession of the transferee for more than the statutory period on the basis of unregistered sale deed which is voidable, is adverse to real owner and title accrues on the basis of such possession. The Division Bench of this Court in the matter of *Hotam Singh and others Vs. Sewaram and others* reported in 2004(3) MPLJ 72, has held that if the sale is void, the suit for possession must be brought within 12 years of dispossession and when a party claims to be in possession under an invalid document, then also his possession is adverse to the true owner.

14/ In the present case, it has been found by the first appellate court that the Bhagwan Singh, the predecessor of the plaintiffs-respondents no.1 to 5, was placed in possession of the suit land in the year 1937-38 on the basis of the oral sale deed. The earlier sale in the year 1935 by Kunwarji, who was

undisputedly the lawful owner of the suit property, to Ghisalal was also contrary to section 54 of the Transfer of Property Act. Bhagwan Singh and Ghisalal in the mutation proceedings had filed the application on 20.3.1958 showing that they were in possession of the suit land for last several years on the basis of the sale, therefore, all the facts were within the knowledge of defendant Hari Singh yet he had not filed any suit for possession, and Bhagwan Singh and the respondents-plaintiffs claiming through him had continued in possession of the suit land denying the title of Hari Singh. Thus the respondents-plaintiffs had continued in possession of the suit land on the basis of the invalid sale denying the title of the appellants and the respondent Hari Singh, therefore, in terms of the above judgments the respondents No.1 to 5 (plaintiffs) had perfected their title by way of adverse possession.

15/ Counsel for the appellants has referred to the documents Ex.D/11, D/4, D/17 & D/14 had submitted that in these documents Bhagwan Singh had claimed himself to be sub-tenant, therefore, he was stopped from claiming adverse possession. Bhagwan Singh has not been found to be sub-tenant by any competent court. The plea of sub-tenancy if raised by Bhagwan Singh in different set of proceedings in different circumstances, that would not affect his right in the present proceedings. Even otherwise, it is found that the appellants and defendant Hari Singh had also raised the conflicting plea claiming the respondents-plaintiffs as encroacher. The Division Bench of this Court in the matter of *Bhawarlal Vs. Mathura Prasad* reported in AIR 1962 MADHYA PRADESH 141 has taken the view that a party can show that either the admission by him was made under a mistake or under different circumstances, and unless there has been a prejudice to the opposite party on account of the admission having been acted upon or on account of any representation made by the admitting party, it would not bind the party unless it amounted to an estoppel. Further where each party makes admission detrimental to itself, the mutual admissions cancel each other, with the result that the question for consideration may have to be decided on the material on record irrespective of such alleged admissions. In view of this, on the basis of Ex.D/4, D/14 & D/11 it can not be held that the respondents-plaintiffs were in permissive possession of the suit land or were in possession as sub-tenant ignoring the other material evidence on record, on the basis of which the first appellate court has found that the appellants were placed in possession of the suit land on the basis of unregistered/oral sale.

16/ The respondents-plaintiffs in the present case have established the

date on which they had come in possession, the nature of their possession and the fact that their possession based upon sale was known to the other party. They have established their continuous possession from 1937-38 and that their possession was open and undisturbed. Thus, the necessary facts which were required to be proved by the respondents-plaintiffs for establishing their plea of adverse possession in terms of the judgments of the Supreme Court noted above, have been proved in the matter.

17/ Hence the finding recorded by the first appellate court about acquisition of title on the basis of adverse possession in pursuance of the oral sale of the suit land is not vitiated for want of requisite pleadings. So far as the finding of the first appellate court in respect of acquisition of title to the suit land by respondent no.1 Hukum Singh and his predecessors only on the basis of long possession is concerned, it is not disputed by the counsel for the respondents-plaintiffs that mere long possession will not establish adverse possession, but in view of the above analysis since this Court has found that the respondents no.1 to 5 (plaintiffs) had perfected their title by adverse possession being it continuous and hostile possession on the basis of the invalid sale, therefore, the finding of the first appellate court about perfection of title by way of adverse possession is upheld though for the different reasons which have been assigned above. Question No.2 and 4 are answered accordingly.

Question No.3 :-

18/ This question relates to the claim of the appellants that Hari Singh was the legal heir of Kunwarji. The trial Court had found that Hari Singh was the legal heir of Kunwarji, whereas the first appellate court has reversed the said finding of fact by holding that the appellants could not prove that Hari Singh was the legal heir of Kunwarji.

19/ The first appellate court which is the final fact finding court, has reversed the finding of the trial Court in this regard after elaborately dealing with the evidence led by the parties on this issue. Though the appellants and the original defendant Hari Singh have claimed that Hari Singh was son of Ram Singh, who was son of Kunwarji's brother, meaning thereby it was claimed that Hari Singh was grand son of the brother of Kunwarji but the appellants have failed to plead or disclose by way of evidence the name of the brother of Kunwarji whose grand son was Hari Singh. The first appellate court has rightly noted that the appellants had not disclosed whose son was Ram Singh. Since the appellants were claiming that Hari Singh was legal heir of Kunwarji, therefore,

the onus to prove this fact has rightly been placed by the first appellate court to the appellants. The first appellate court while recording the finding in this regard, has considered the evidence of the plaintiffs' witnesses PW-1 Ghisalal, PW-2 Sardar Singh, PW-3 Onkar Singh, PW-5 Umrao Singh, PW-8 Amar Singh, PW-9 Shankar Singh as also the evidence of the appellant Satnam Singh and the pleadings in this regard and also examined the documentary evidence such as Ex.P/26, D/10, D/13, D/22, D/23, D/24, D/21, D/1, D/2, D/20, D/11, D/15 to D/19, D/27 & D/28. The oral and documentary evidence which was considered by the trial Court while recording a finding that Hari Singh was the legal heir of Kunwari, has duly been considered by the first appellate court while reversing the said finding and coming to the conclusion that Hari Singh was not the legal heir of Kunwarji.

20/ The Supreme Court in the matter of *V. Ramchandra Ayyar and another Vs. Ramalingam Chettiar and another* reported in AIR 1963 SC 302 has held that in second appeal High Court can interfere if there is a substantial error or defect in procedure provided by the code or by any other law for the time being in force which may produce error or defect in the decision of the case upon merits, but even if the appreciation of evidence by the lower appellate court is patently erroneous and the finding of fact recorded in consequence is grossly erroneous, that cannot be said to introduce a substantial error or defect in the procedure but if in dealing with the question of fact the lower appellate court has placed onus on a wrong party and its finding of fact is the result, substantially, of this wrong approach, that may be regarded as defect in procedure or if in dealing with the question of fact the lower appellate court discards evidence on the ground that it is inadmissible and the High Court is satisfied that the evidence was admissible, that may introduce an error or defect in procedure, or if the lower appellate court fails to consider an issue which has been tried and found upon by the trial Court and proceeds to reverse the trial Court's decision without the consideration of such issue, that may be regarded as an error or defect in procedure; or if the lower appellate court allows a new point of fact to be raised for the first time before it, or permits a party to adopt a new plea of fact, or makes out a new case for a party, that may, in some cases, be said to amount to a defect or error in procedure, but the High Court can not interfere with the conclusions of fact recorded by the lower appellate court, however erroneous the said conclusions may appear to be to the High Court. The Supreme Court in the matter of *Gurdev Kaur and others Vs. Kaki and others* reported in AIR

2006 SC 1975 has reiterated that the legislative intention behind the amended Section 100 of the CPC is clear that legislature never wanted Second Appeal to become “third trial of facts” or “one more dice in the gamble”.

21/ In the present case, counsel for the appellants has failed to point out any cogent ground which would permit this Court in the limited exercise of the second appellate jurisdiction in terms of the above judgments to interfere in the finding of fact recorded by the first appellate court in regard to the proof of legal heirship of Hari Singh. Counsel for the appellants has submitted that the first appellate court has not considered Ex.P/4 to P/7 and P/9 & P/10 while considering this issue, but a perusal of these exhibits reveal that they are the Khasra entries for different periods from 1958 to 1970 recording the name of Hari Singh in the revenue record. But from these Khasra entries it can not be inferred that Hari Singh was legal heir of Kunwarji, specially when Hari Singh is neither son or grand-son of Kunwarji and Hari Singh has failed to disclose the name of the person through whom he is claiming his relation with Kunwarji.

22/ Alternatively it has also been submitted by counsel for the respondents no.1 to 5 that Dhar State Land Revenue and Tenancy Act, 1941 applies and if Kunwarji had died prior to 1950, Kunwarji's daughter Nandi Bai was alive and she would inherit the suit property and if Kunwarji had died after 15.8.1950, Madhya Bharat Tenancy Act, 1950 would apply and Kunwarji's daughter Nandi Bai or Nandi Bai's son Narayan would inherit the suit property and, therefore, Hari Singh can not be held to be the legal heir of Kunwarji.

23/ In view of the above analysis, it is held that the finding of the lower appellate court that Hari Singh is not the legal heir of Kunwarji, needs no interference by this Court and the lower appellate court has not committed any error in reversing the finding of the trial Court in this regard and the finding of the lower appellate court is not perverse. The question no.3 is answered accordingly.

Question No.5 :-

24/ Learned counsel for both the parties have not disputed to the settled position in law that the plaintiff must succeed on the basis of his own stand and can not take the advantage of any weakness in the defendant's title. Since in the present case the first appellate court by appreciating the evidence led by both the parties has recorded the positive finding that Hari Singh was not

the legal heir of Kunwarji and Ghisalal-respondent No.7 had purchased the suit land from Kunwarji in the year 1933 and Bhagwan Singh through whom the respondents no.1 to 5 are claiming, had purchased the suit land from Ghisalal in the year 1937-38 and thereafter they had continued in possession of the suit land continuously denying the title of Hari Singh or the appellants, therefore, they have perfected their title by way of adverse possession. This Court has also upheld the finding of the adverse possession on the ground that the possession on the basis of the invalid sale was adverse to the appellants. Since the first appellate court has not decreed the suit on the basis of the weakness of the defendants title but has decreed the suit finding the plea of the respondents no.1 to 5 to be proved, therefore, the first appellate court has not committed any error of ignoring the established principle of law that in a suit based upon title, the plaintiff must succeed on the basis of his own stand and can not take advantage of the weakness of the defendant's title. The question no.5 is answered accordingly.

25/ Counsel for the parties have not made any submission before this Court to frame any other additional question of law and this Court has decided the questions of law which are formulated in the appeal.

26/ In view of the aforesaid analysis, I do not find any merit in the appeal which is accordingly dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1095

APPELLATE CIVIL

Before Mr. Justice Rajendra Menon & Mr. Justice Anil Kumar Sharma

F.A. No. 281/2006 (Jabalpur) decided on 24 March, 2014

KAMLESH

...Appellant.

Vs.

GEETA

...Respondent

Hindu Marriage Act (25 of 1955), Section 25 - Permanent Alimony - Marriage between the parties was declared as null and void under Section 5(2) of Act, 1955, on the ground of non-consummation of marriage due to impotency of wife - Wife not entitled for maintenance as the marriage was void.
(Para 5)

हिन्दू विवाह अधिनियम (1955 का 25), धारा 25 - स्थाई निर्वाह व्यय -

पत्नी की नपुंसकता के कारण विवाह संपूर्ण नहीं के आधार पर अधिनियम 1955 की धारा 5(2) के अंतर्गत पक्षों के मध्य विवाह अकृत एवं शून्य घोषित – शून्य विवाह होने के कारण, पत्नी मरण पोषण की हकदार नहीं।

Case referred :

AIR 1999 AP 19

Malti Dadariya, for the appellant.

Sangeeta Naidu, for the respondent.

J U D G M E N T

The Judgment of the Court was delivered by :
ANIL KUMAR SHARMA, J. :- The appellant/husband has filed this first appeal under Section 28 of the Hindu Marriage Act, 1955, challenging the judgment and decree dated 20.02.2006 passed in Civil Suit No. 9-A/2005 by learned Additional District Judge, Beohari, District Shahdol (M.P).

2. The brief facts of the case are that appellant was married to the respondent/wife (Geeta Choudhrey) on 29.04.2004 at village Masiyari, their marriage has not been consummated owing to the impotency of respondent (Geeta Choudhrey) as her genital parts in the body were absent. On filing petition under Section 12 of the Hindu Marriage Act, challenging the marriage on the ground of contravention of the conditions specified in Class (2) of Section 5, the learned Trial Court, allowed the suit and passed the decree of nullity and granted Rs. 500/- per month for maintenance of wife and the appellant has challenged the said order of the learned Trial Court granting awarding maintenance.

3. Learned counsel for the appellant has submitted that the learned Trial (sic. Trial) Court is not justified in awarding maintenance amount to the respondent/wife when the marriage was declared null and void. The maintenance can be awarded to legally wedded wife. Where the marriage is void *ab initio* and the woman cannot get the status of wife nor the male gets the status of husband.

4. Learned counsel for the appellant has drawn attention towards the judgment passed by Hon'ble Full Bench of Andhra Pradesh High Court, in the matter of *Abbayaolla M. Subba Reddy v. Padamamma* (AIR 1999 A.P. 19) in which considering the provision of Section 25 of the Hindu Marriage Act, it has been held that where the marriage admittedly is nullity, hence, Section 25

of the Hindu Marriage Act has no application. It is further held that the said relief of maintenance cannot be granted by invoking of Section 151 of CPC.

The relevant para 27 of the judgment is reproduced below :-

"27. Section 25 of the Hindu Marriage Act as it now stand after amendment by Act 68/76 is reproduced hereunder:

"25. Permanent alimony and maintenance :-

(1) Any Court exercising jurisdiction under this Act may at the time of passing any decree or any time subsequent thereto, on application made to it for the purpose of either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum of such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant (the conduct of the parties and other circumstances of the case), it may seem to the Court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.

(2) If the Court is satisfied that there is change in the circumstances of either party at any time after it has made an order under sub-section (1) it may at the instance of either party, vary modify or rescind any such order in such manner as the Court may deem just.

(3) If the Court is satisfied that the party in whose favour an order has been made under the section has re-married or if such party is the wife that she has not remained chaste, or if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may, at the instance of the other party, vary, modify or rescind any such order in such manner as the Court may deem just."

It is clear from this provision that it confers a statutory right on the wife and the husband and confers jurisdiction on the Court to pass an order of maintenance and alimony in proceedings under Section 9 to 14 of the Hindu Marriage Act.

At any time before or after the decree is passed in such a proceeding, therefore, the wife or husband could make such a claim and the conditions of Section 25(1) will have to be satisfied. There must be a matrimonial petition filed under the Hindu Marriage Act, then, on such a petition a decree must be passed by the Court concerning the martial status of the wife or husband. It is only when such a decree is passed that the right accrues to the wife or the husband and confers jurisdiction on the Court to grant alimony. Till then, such a right does not take place. Not only that the Court retains the jurisdiction even subsequent to passing of such a decree to grant permanent alimony when moved by an application in that behalf of a party entitled to, the Court further retains the power to change or alter the order in view of the changed circumstances. Thus, the whole exercise is within the gamut of a broken marriage. Thus, the legislature while codifying the Hindu Marriage Act, reversed the right of permanent maintenance in favour of the husband or the wife as the case may be depending on the Court passing a decree of the kind as envisaged under Section 14 of the Act. Thus, Section 25 should not be construed in such a manner as to hold that notwithstanding the nullity of the marriage, the wife retains her status for purposes of applying for alimony and maintenance. In our view, the proper construction of Section 25 would be that where a marriage admittedly is a nullity this Section will have no application. But, where the question of nullity is in issue and is contentious, the Court has to proceed on the assumption until the contrary is proved, that the applicant is the wife. It is in that sense Section 25 should be appreciated. Further, in the instant case, there are no proceedings between the parties and there is no decree of the kind as envisaged under Section 14 of the Act disrupting the martial status of the respondent with appellant. Hence, the respondent is not entitled to invoke the provisions under Section 25 of the Act. On the other hand, the respondent is seeking maintenance under Section 18 of Hindu Adoption and Maintenance Act. When the marriage of the respondent is void *ab initio*, she is not entitled to claim maintenance under the said Act. Hence, it is not open to the Court to grant relief

of maintenance under Section 25 of Hindu Marriage Act in the proceedings initiated under the provisions of Hindu Adoption and Maintenance Act, as held by the Apex Court is "*Smt. Chand Dhawan v. Jawaharlal Dhawan*" 1993 (3) Scale 1 : (1993 AIR SCW 2548). As is evident, both these statutes are codified laws on the respective subjects and by liberality of interpretation, inter-changeability cannot be permitted so as to destroy the distinction on the subject of maintenance."

5. Therefore, considering the fact that marriage of appellant with the respondent has been declared null and void on the ground that wife is not only impotent but she has not been unfortunately blessed with the female genital parts. Learned Trial Court is not justified in awarding the amount of maintenance to the respondent wife.

6. Therefore, appeal is allowed and the judgment of learned trial Court, so far as it relates to grant of maintenance of Rs. 500/- is hereby set aside. The judgment of learned trial Court shall remain modified accordingly, decree be prepared accordingly.

No order as to costs.

Appeal allowed.

I.L.R. [2014] M.P., 1099
APPELLATE CRIMINAL

Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
Cr. A. No. 769/2002 (Indore) decided on 21 June, 2013

PISU

...Appellant

Vs.

STATE OF M.P.

...Respondent

Penal Code (45 of 1860), Sections 302 & 304 Part-I - Murder or culpable homicide not amounting to murder - Held - Deceased tried to intervene in the quarrel of appellant and another person - Appellant dealt three successive blows from the blunt side of the Axe - It is not a case of heat of passion on account of which it can be said that the appellant inflicted blows - Case does not fall under exception of 4 of Section 300 of IPC.
(Para 5)

दण्ड संहिता (1860 का 45), धाराएं 302 व 304 भाग I – हत्या या हत्या की कोटि में न आने वाला आपराधिक मानव वध – अभिनिर्धारित – मृतक ने अपीलार्थी और अन्य व्यक्ति के झगड़े में हस्तक्षेप करने का प्रयास किया – अपीलार्थी ने कुल्हाड़ी के पिछले हिस्से से लगातार तीन बार किये – यह भावनावेग का प्रकरण नहीं जिससे कि यह कहा जा सके कि अपीलार्थी ने क्षतियां पहुंचाई – प्रकरण भा. द.सं. की धारा 300 के अपवाद 4 के अंतर्गत नहीं आता।

Case referred :

2001 (II) MPWN-76.

M.I. Khan, for the appellant.

R.S. Bais, Dy. G. A. for the respondent/State.

ORDER

The Order of the Court was delivered by :
SHANTANU KEMKAR, J. :- The appellant has filed this appeal under Section 374 of the Code of Criminal Procedure against the judgment passed by the Sessions Judge, Jhabua in Session Trial No.334/2000 convicting him for offence under Section 302 of the Indian Penal Code and sentencing him for life imprisonment for commission of murder of Savsingh.

2. In short, the prosecution case may be stated as under:

On 16.05.2000, a quarrel took place between appellant-Pisu and his brother Vajesingh, as Pisu was objecting the proposed mortgage of land by Vajesingh on account of need of money. After altercation, he started inflicting blows by the blunt side of the axe on Vajesingh. Hearing the cry, Savsingh, who was residing nearby, reached to the spot. He tried to restrain the appellant from beating Vajesingh and took the side of Vajesingh about mortgaging the land for the need of money. On this, the appellant felt aggrieved and asked the deceased not to say anything in the matter, at the same time, the appellant inflicted three successive blows of the axe from the blunt side on Savsingh. As a result, Savsingh fell down and succumbed to the injuries. The F.I.R. (Ex.P8) of the incident was lodged by Vajesingh and after conducting investigation, police filed the charge-sheet against the appellant for commission of the offence as alleged.

3. The conviction of the appellant is based upon the eye witness account of Humabai (PW3) and Rajiya (PW7). The incident as alleged, the death of Savsingh in the same has no (sic. not) been disputed by the appellant, but the

only point urged by the learned counsel for the appellant is that the trial court should not have convicted the appellant under Section 302 of the Indian Penal Code, as on the basis of evidence on record at the most offence under Section 304 part-I was made out against the appellant. In support of his submission, learned counsel for the appellant has placed reliance on the judgment of this Court delivered in the case of *Lalaram Vs. State of M.P.* reported in 2001 (II) M.P. Weekly Notes, 76.

4. In order to consider the aforesaid submission made by the learned counsel for the appellant, we have carefully scanned the evidence on record. Humabai (PW3) made a categorical statement that when her husband-Savsingh was at home, Vajesingh and the appellant were quarreling with each other on account of dispute regarding mortgage of the land. On hearing the quarrel, her husband deceased-Savsingh went to the place of incident. She also followed her husband. On reaching the place of incident, Savsingh tried to pacify both of them and asked Pisu if Vajesingh wants to mortgage his land, he may take the land and give him money. On this, the appellant became angry and told the deceased not to interfere in the matter and inflicted repeatedly three blows of the axe on him. As a result Savsingh fell down and died. Rajiya S/o Chain Singh (PW7) has also stated that he and the deceased while trying to pacify the quarrel the appellant became angry and dealt with three blows on deceased Savsingh. The evidence of these eye witnesses about injuries is duly corroborated by Dr. P.C. Agrawal (PW1), who medically examined the injuries of the deceased and conducted postmortem.

5. Keeping in view the aforesaid evidence available on record, we are of the view that it is not a case which can fall under Section 304 part-I of the I.P.C.. The appellant dealt with three successive blows from the blunt side of the axe, which has caused the death of Savsingh. It is also not a case of heat of passion on account of which it can be said that the appellant inflicted blows.

6. As regard the judgment passed in the case of *Lalaram* (supra), we find that same has got no applicability to the facts and circumstances of the present case and the same is quite distinguishable. In the case of *Lalaram* (supra), the deceased Shyamlal was having illicit relations with the wife of the accused. Accused objected to the affairs, but the deceased told him that he shall continue his affairs with the wife of the accused. On this, some hot talks took place and accused had given four blows by hammer on the head of the deceased. The Division Bench of this court considering the aforesaid facts of

the incident opined that it occurred all of sudden and the accused/ appellant had assaulted the deceased in a heat of passion as the deceased provoked by telling he shall continue his affairs with the wife of the accused. However, in the present case, as observed, there was no question of provocation by the deceased or heat of passion to the appellant so as to inflict successive blows and kill Savsingh. No case is made out to set aside the conviction of the appellant under Section 302 and to convict him for an offence under Section 304 Part I of the Indian Penal Code.

7. Accordingly, we are of the view that the conviction of the appellant under Section 302 of the I.P.C., which is based upon the sound appreciation of evidence needs no interference and no case is made out to convert it into the conviction under Section 304 Part I of Indian Penal Code.

8. As a result, the appeal fails and is hereby dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1102

APPELLATE CRIMINAL

Before Mrs. Justice S.R. Waghmare

Cr.A. No. 270/1997 (Indore) decided on 21 November, 2013

RAJU

...Appellant

Vs.

CENTRAL BUREAU OF NARCOTICS

...Respondent

Criminal Procedure Code, 1973 (2 of 1974), Section 374, Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Sections 8/19 & 26 - Appellant was having the license to grow opium - Land was being cultivated by co-accused on lease - Co-accused admitted that opium was kept in his house - However, appellant failed to inform the official - Held - Since there is clear admission by co-accused that opium was kept in his house after weighment - Appellant was responsible for breach of conditions of license which is punishable u/s 26 of the Act - Conviction of the appellant was altered to u/s 26 instead of Section 8/19 of the N.D.P.S. Act and sentenced to 3 years R.I. with fine of Rs. 30,000/-. (Paras 8 to 9)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 374, स्वापक औषधि और मनः प्रमादी पदार्थ अधिनियम (1985 का 61), धाराएं 8/19 व 26 - अपीलार्थी के

पास अफीम उगाने की अनुज्ञप्ति थी – सह अभियुक्त द्वारा पट्टे पर भूमि जोती जा रही थी – सह अभियुक्त ने स्वीकार किया कि अफीम उसके घर रखी गई – किन्तु अपीलार्थी शासन को सूचित करने में असफल रहा – अभिनिर्धारित – क्योंकि यहां सह अभियुक्त ने स्पष्ट रूप से स्वीकार किया है कि तौल के बाद अफीम उसके घर रखी गई थी – अपीलार्थी, अनुज्ञप्ति की शर्तों को भंग करने का उत्तरदायी जो कि अधिनियम की धारा 26 के अंतर्गत दण्डनीय है – धारा 8/19 के अंतर्गत अपीलार्थी की दोषसिद्धि स्वापक औषधि और मनः प्रमादी पदार्थ अधिनियम की धारा 26 में परिवर्तित एवं 30,000/- रुपये जुर्माने के साथ 3 वर्ष के कठोर कारावास से दण्डादिष्ट किया गया।

Case referred :

(2011) Cr.L.R. (SC) 530.

Abhay Saraswat, for the appellant.

Manoj Soni, for the respondent/Department.

J U D G M E N T

MRS. S.R. WAGHMARE, J. :- This criminal appeal has been filed under Section 374 of the Cr.P.C. being aggrieved by the judgment dated 29.01.1997 passed by Sessions Judge, Mandsaur in S.T. No.69/2005, whereby appellant Raju has been convicted for offence punishable under Section 8/19 of N.D.P.S. Act and sentenced him to ten years rigorous imprisonment with fine of Rs.1,00,000/- in default he was to undergo further two years rigorous imprisonment.

02. Brief facts necessary for elucidation are that on the date of incident i.e.16.04.1995 at village Bahi Parshavnath, District – Mandsaur the weighment process in Pipliyamandi by Central Narcotic Bureau was carried by officer at Neemuch when accused Raju was present and was getting the opium weighed in the Pipliyamandi Weighment Centre, for the year 1994-95; he had the licence to grow said opium for *aree* issued by the District opium officer Neemuch third Division. The accused produced 11.400 kg. of opium for the year 1994-95 in the area so allotted to him and the daily entry was made by the chief in the daily register on 15.04.1995. The opium had actually been weighed and found to be 11.500 kg. The weighment was properly verified and signed by accused. However, on the next day i.e.16.04.1995 opium was found to be only 9.130 kg. and it was alleged by the department that 2.370 kg. of opium was misappropriated and on the dispute the Weighment Center appointed an Inspector Krapashankar Yadav, who had recorded the statement

of accused in front of witnesses and it was alleged that the accused was violating the conditions of licence; the accused had handed over the area for cultivating opium to another accused Rameshwar and he admitted to have cultivated the said opium. Hence on completion of investigation the charge sheet was put up before the competent Court. The accused was duly arrested and committed to his trial.

03. The accused appellant abjured his guilt and stated that he was falsely implicated in the matter. The Trial Court on considering the evidence, convicted and sentenced the accused as herein above indicated and hence the present appeal.

04. Counsel for the appellants has vehemently stressed the fact that the prosecution had actually failed to prove that the appellant had not given total produced yield of the opium and had defaulted in giving the entire amount. However nothing had been recovered from the accused and hence he could not be implicated with the default. The trial was also vitiated because there has been misreading of the evidence. Counsel urged that there was clear admission by the present accused Raju vide Ex.P/4, P/5 and P/6 [recorded by the inspector Kripa Shankar P.W.5 on 16.04.1995 and 21.04.1995] that the weighment of opium on the previous date i.e. 15.04.1995 had been correctly noted by the Department Official to be 11.500 kg in weighment register vide Ex.P/1 but on the next day i.e. on 16.04.1995 it was found to be 9.370 kg. He stated thus:-

“मैं राजू पिता भंवरलाल शर्मा निवासी ग्राम बही पार्श्वनाथ, तहसील मल्हारगढ़, थाना पिपलिया मंडी, जिला मंदसौर । आज दिनांक 16.04.1995. को सत्य-सत्य कथन करता हूँ कि मैंने सन् 1994-95 के लिये सरकार से बीस एअर का लाइसेन्स प्राप्त किया था । मैंने अपने लाइसेंस पर स्वयं कास्त न करके अपने ही ग्राम के श्री रामेश्वर पिता वजेराम से उन्हीं के खेत में अफीम की कास्त करवाई थी । फसल की देखरेख, निराई, गुड़ाई, सिंचाई एवं लुनाई सब कुछ श्री रामेश्वर ने ही की थी, और अफीम भी उसने अपने स्वयं के घर पर ही रखी थी । मुखिया जी के अफीम लिखने के रजिस्टर पर मैंने हस्ताक्षर किया है परंतु ठीक दिन उस रजिस्टर पर श्री रामेश्वर ने हस्ताक्षर किया है । आज सेन्टर पर अफीम श्री रामेश्वर ही अपने साथ लाये थे । मैं अलग से साइकिल से आया हूँ । अपनी वाल्टी से अफीम सरकारी टगाड़ में डालने के बाद श्री रामेश्वर घर चले गये और तब से तौल तक अफीम मेरे कंधों में रही है जो सरकारी कांटे पर मेरे सामने माम 9.130 किलोग्राम हुई है जो कल शाम की तौल से 2.370 किलोग्राम कम पाई गई है । मैंने अपने लाइसेंस पर खुद कास्त न करके दूसरे से कास्त कराई जिसके कारण उसे (श्री रामेश्वर

को) सरकार की 2.370 किलोग्राम अफीम चुराने का मौका मिला इसके लिये मुझे क्षमा करने का कष्ट करें।”

05. He however categorically stated in the statement that the opium had been brought to the Centre by co-accused Rameshwar and it was also admitted that the opium was cultivated by Rameshwar then under the circumstances such clear admission that he had not cultivating the opium but he had alleged agreement between him and Rameshwar to cultivate the said land clearly established the fact that it was Rameshwar alone who was responsible for the deficit of 2.370 kg opium. He stated that offence u/S.8/19 could not be made out against him and the embezzlement has been only by co-accused Rameshwar. Moreover under the peculiar facts and circumstances of the case co-accused Rameshwar has died on 27.08.2007 during the pendency of his appeal bearing No.181/1997, the appeal against him has abated. He also candidly admitted that this appeal has been filed by appellant Raju alone. In the light of these facts, Counsel prayed that the conviction be set aside since the accused appellant Raju was neither responsible for cultivation nor the loss of opium as is being alleged by the prosecution.

06. Counsel for the respondent/State on the other hand has opposed the submissions of the Counsel for the appellant and submitted that the judgment of the trial Court was impeccable and did not call for any interference. Primarily the license was given to appellant Raju s/o Bhanwarlal to cultivate the said opium and according to the rules the weighment has been made by Lambardar on each day according to Rule 13 of the Rules, 1985 each of these collection has to be noted and the record is maintained by Lambardar. Then from the testimony of Rameshwar P.W.1, accused Raju had been given him to cultivate *patta* for the year 1994-95, to grow opium. He had however failed to inform the officials that the land was being cultivated by co-accused Rameshwar on lease [also named Rameshwar]. He also admitted that when accused Raju did not attend the weighment the signature of co-accused Rameshwar were taken down. He admitted to have put his signature on weighment on 15.04.1995 in the daily register vide Ex.P/1 then the opium weighed 11.500 kg. His testimony duly supported by Bherulal P.W.2 and Kuberram P.W.4. All these witnesses have however, admitted that they had not informed the Department regarding the opium being cultivated on lease by co-accused Rameshwar.

Inspector Krupa Shankar Yadav P.W.5 was appointed by Shri Kuberram P.W.4, District opium officer to conduct the investigation. He had recorded the statement of accused Raju on the said day. He also noted that

on 15.04.1995 opium weighed to be 11.400 kg and that vide Ex.P/4 the statement of accused Raju was recorded by him. Accused Raju has admitted that 2.370 kg of opium had been stolen by co-accused Rameshwar on cross examination, this witness admitted that it was not accused Raju, who has embezzled the opium and the default lay squarely on the shoulders of co-accused Rameshwar. Counsel submitted that admissions were permissible to be admitted in evidence under the N.D.P.S. Act and undoubtedly the accused Raju had committed breach of condition of license. The discrepancy in the weightment and his presence on the spot cannot be doubted on the basis of the above and the accused cannot be acquitted from the offence. Counsel placed reliance in the matter of *Daulat Ram & Another v. CBN Mandsaur*, M.P.[(2011) Cr.L.R. (SC) 530] whereby the Apex Court held thus:

4. we have considered the arguments advanced by the learned Counsel. It is true, as contended by Mr. Sharma, that an over all accounting of the opium has to be made after the notification has been issued identifying the percentage of opium that should be in the hands of a producer. However, there is an obligation under Rule 13 of the Rules, 1985 to make a declaration to the Lambardar as to the quantity of opium produced everyday. There is no evidence or suggestion to show that the opium which has been recovered had been declared or accounted for before the Lambardar. On the contrary the fact that it had been buried three feet underground and far away from the residence of the appellants clearly shows that the intention was to stash away the opium for sale in an un authorized way.

5. Mr. Sharma, has, however, cited *Bheru Lal Vs. State of Rajasthan*, RLW 2003 (2) Raj 1056 to contend that till the final quantification had been made the opium could not be said to be contraband. We find that some of the conclusions drawn in the cited judgments are too far reaching and basically ignore Rule 13 which requires a day to day accountability before the Lambardar. On facts, it is also apparent that the opium in *Bheru Lal's* case had been recovered from the residential house of the accused. In the case before us, as per the prosecution story, the opium had been recovered from 3 feet underground.

6. It is equally true that no independent witness has

supported the prosecution story. The evidence of the official witnesses is, however, supported by the recovery of the opium and also by the confessions made by the appellants.

7. The appeal is, accordingly, dismissed.

Counsel submitted that the documentary evidence is available on record and hence Counsel prayed that the appeal is without merit and same be dismissed.

07. On considering the above submissions and evidence available on record, I find that sole question that arises for consideration before this Court is whether admission by the accused Raju Ex.P/6 absolved the accused of his guilt and conviction for offence u/S.8/19 of the Act needed to be set aside. Considering Section 19 of the Act, reads:

19. Punishment for embezzlement of opium by cultivator- Any cultivator licensed to cultivate the opium poppy on account of the Central Government who embezzles or otherwise illegally disposes of the opium produced or any part thereof, shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh but which may extend to two lakh rupees.

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.

08. The point emerged the vehemently discussion between the parties was that the appellant Raju had not cultivated the opium. The accused Raju was not responsible for the deficit in the weighment of opium since there is clear admission by Rameshwar also that the opium was kept in the house of Rameshwar after weighment and on 16.04.1995 the next day, both the accused persons had come separately to the office of the respondent/ Department and accused Raju has categorically stated that co-accused Rameshwar threw the opium into Government enclosure (sarkari tagad) then can the conviction of accused Raju be upheld ?

I find that it is an admitted fact that the license under the Act was

given to accused Raju alone to cultivate the opium, he has sub leased it and was only looking after the cultivation. However in the light of *Daulat Ram* (supra) the opium was recovered from the physical possession of accused Raju at the time of weighment. Undoubtedly the missing contraband has not been recovered from him but being the owner of the *patta* and the licence and his presence on the spot at the time of the weighment does not exonerated from him from the provisions of law and in this light, I find that the trial Court ought to have been more than circumspect at the time of imposing charge. It has not considered S.29 of the N.D.P.S. Act in which there is imposition of punishment for the offence under the Act for abetment or criminal conspiracy. Counsel for the respondent/Department at this juncture stated that the said section 29 of the Act could not be invoked in the present case since the offence is one u/S.8/19 of the N.D.P.S. Acts is in reference of licensee holder. Under the circumstances, I find that trial Court has also erred in not considering S.26 of the Act which pertains to the offence committed by the licence holder. It reads thus:-

S. 26 "Punishment for certain acts by licensee or his servants- if the holder of any licence, permit or authorisation granted under this Act or any rule or order made thereunder or any person in his employ and acting on his behalf-

(a)

(b)

(c)

(d) wilfully and knowingly does any act in breach of any of the conditions of licence, permit or authorisation for which a penalty is not prescribed elsewhere in this Act,

he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both."

09. On considering the above said submissions and preposition; accused appellant Raju has been convicted for offence u/S.8/19 of the NDPS Act. The conviction of the accused for the aforesaid offences is hereby set aside. Instead he is now convicted for offence u/S.26 of the NDPS Act and sentenced to three years R.I. with fine of Rs.30,000/- to be paid by the accused/appellant Raju

I.L.R.[2014]M.P. K.Kumar alias Bobby Vs. State of M.P. (DB) 1109

within a period of two months from this order. Failure to pay the said amount and he shall to undergone further rigorous imprisonment of three months.

12. The Trial Court is directed to verify the period of custody and release the appellant also under intimation in writing to this Court, if he has already undergone the sentence on payment of fine.

13. With the aforesaid observation and modification, the appeal is allowed to the extent herein above indicated.

Cc. as per rules.

Appeal allowed.

I.L.R. [2014] M.P., 1109

APPELLATE CRIMINAL

Before Mr. Justice Brij Kishore Dube & Mr. Justice B.D. Rathi

Cr.A. No. 435/1998 (Gwalior) decided on 3 December, 2013

KAPIL KUMAR ALIAS BOBY

...Appellant

Vs.

STATE OF M.P.

... Respondent

Penal Code (45 of 1860), Section 302 - Sentence for murder - Juvenile the convict is found to be of 17 years 6 months and 21 days old i.e. juvenile at the date of incident - Cannot be sent back to jail to suffer remaining part of jail sentence. (Para 10)

दण्ड संहिता (1860 का 45), धारा 302 - हत्या के लिये दण्डादेश - दोषसिद्ध किशोर 17 वर्ष 6 माह एवं 21 दिन की आयु का पाया गया अर्थात् घटना दिनांक को वह किशोर था - कारावास के शेष भाग को भुगतने हेतु वापस जेल नहीं भेजा जा सकता।

Cases referred :

2013(1) SCC (Cri) 83, (2012) 8 SCC 763, (2005) 3 SCC 592, (2010) 1 SCC (Cri) 987, 2012 CR.L.J. 4244.

D.R. Sharma, for the appellant.

Mukund Bhardwaj, P.P. for the respondent.

J U D G M E N T

**The Judgment of the Court was delivered by :
B.D.RATHI, J. :- This appeal under Section 374(2) of the Code of Criminal**

Procedure, 1973 (in short "the Code") has been preferred by the appellant being aggrieved from the judgment of conviction dated 30-06-1998 passed by learned First Additional Sessions Judge, Gwalior in S.T. No.264/1988, whereby appellant has been convicted under Section 302/34 of Indian Penal Code (in short "IPC") and sentenced to undergo Life Imprisonment with fine of Rs.500/- with default stipulation.

2- The prosecution story, in brief, is that on 26-05-1998 at about 8:30 pm at Jangipura, Dabra District Gwalior on account of previous dispute of removing the tree belonged to Sheetal Prasad (since deceased) by daughter of Arjun Singh (appellant No.2), appellants have assaulted Sheetal Prasad by using sharp edged weapon -knife. FIR Ex-P/12 was lodged on the same day. Crime No.118/1998 was registered at police station Dabra District Gwalior. During treatment, Sheetal Prasad had died. After completion of investigation, charge-sheet was filed in the matter.

3- During trial, the charge under Section 302/34 IPC was framed. The accused persons pleaded not guilty to the charge and contended that they had been falsely implicated.

4- Arjun Singh (appellant No.2) has died during pendency of appeal before this Court, hence this appeal to the extent of appellant No.2 (Arjun Singh) stands abated vide order dated 29-10-2013.

5- It is argued by learned counsel that appellant -Kapil does not want to press his appeal against the conviction, as it is well merited. It was further submitted that the appellant -Kapil was juvenile on the date of incident, and even on conviction he cannot be sent back to the jail to suffer remaining part of jail sentence, in view of the principle laid down by the Apex Court in the case of *Abuzar Hossain alias Gulam Hossain Vs. State of West Bengal* (2013) 1 SCC (Cri) 83, *Vijay Singh Vs. State of Delhi* (2012) 8 SCC 763, *Upendra Kumar Vs. State of Bihar* (2005) 3 SCC 592, *Hari Ram Vs. State of Rajasthan and another* (2010) 1 SCC (Cri) 987 and *Kallu alias Amit Vs. State of Haryana* 2012 CRI.L.J. 4244.

6- Learned Public Prosecutor on the other hand defended the conviction and sentence of the appellant -Kapil.

7- To bring home the charge prosecution has examined as many as 12 witnesses, namely, Babulal Shrivastava (PW-1), Harprasad Sharma (PW-2),

Dr.S.K. Saxena (PW-3), Lakhan Singh (PW-4), Naresh (PW-5), Mukesh Kumar (PW-6), Pradeep Kumar (PW-7), Sanjeev Kumar Mishra (PW-8), Asha Devi (PW-9), Chandrapal Singh (PW-10), Rambaran Singh (PW-11) and Hukum Singh Yadav (PW-12) and in defence Jahur Veg was examined by the appellant as DW-1.

8- Having regard to the arguments advanced by the parties, we have perused the entire evidence and material available on record as well as the impugned judgment of trial Court.

9- After taking into consideration the evidence of all the prosecution witnesses, it was held by the trial Court that murder of Sheetal Prasad was committed by Arjun Singh (died during pendency of this appeal) and Bobby alias Kapil Kumar. We have also gone through the evidence of the aforesaid witnesses and all the witnesses have categorically deposed that on account of removing of tree belonged to Sheetal Prasad by the daughter of Arjun Singh, the appellants had assaulted Sheetal Prasad, inflicted injuries by knife blow and Sheetal Prasad had died during treatment. In the aforesaid premises, in our considered opinion, the impugned conviction and sentence of trial Court is well merited.

10- So far as sentence part of appellant -Kapil is concerned, in view of order dated 15-04-2013 passed by this Court, enquiry report dated 12-07-2013 has been received from the Court of First Additional Sessions Judge, Gwalior and as per the report, on the date of incident i.e. on 26-03-1988, appellant -Kapil was 17 years 6 months and 21 days' old, meaning thereby he was juvenile on the date of incident, therefore, in the light of principle laid down by the Supreme Court in the judgments cited above, appellant -Kapil cannot be sent back to jail to suffer remaining part of jail sentence. He has already undergone more than one and half years' jail sentence therefore, the remaining part of jail sentence is hereby set aside.

11- With the aforesaid, this appeal is decided accordingly. Copy of this judgment along with the record be sent to the trial Court for information and necessary compliance. Appellant -Kapil is on bail, his bail bonds stand discharged.

Order accordingly.

**I.L.R. [2014] M.P., 1112
APPELLATE CRIMINAL**

Before Mr. Justice B.D. Rathi

Cr. A. No. 319/2006 (Gwalior) decided on 28 March, 2014

ALOK

...Appellant

Vs.

PRAVEEN KUMAR

...Respondent

A. Negotiable Instruments Act (26 of 1881), Section 138 - Dishonour of cheque for insufficiency etc. - Offence under this section can be said to be committed by the drawer of the cheque on an account maintained by him with the banker but not by any other person.

(Para 7)

क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 - अपर्याप्त इत्यादि होने के आधार पर चेक का अनादरण - इस धारा के अंतर्गत अपराध को चेक के आहर्ता द्वारा बैंकर के साथ उसके खाते पर कारित किया जाना कहा जा सकता है किन्तु किसी अन्य व्यक्ति द्वारा नहीं।

B. Constitution - Article 20(2) - Double Jeopardy - Offence u/s 138 of Negotiable Instruments Act is altogether different from the offence punishable u/s 420 of IPC - Ingredient of both the offences are different, hence conviction in both offences separately is not prohibited under Article 20(2).

(Para 14)

ख. संविधान - अनुच्छेद 20(2) - दोहरा संकट - परक्राम्य लिखत अधिनियम की धारा 138 के अंतर्गत अपराध, मा.द.सं. की धारा 420 के अंतर्गत दण्डनीय अपराध से बिल्कुल भिन्न है - दोनों अपराधों के घटकांग भिन्न हैं, अतः अनुच्छेद 20(2) के अंतर्गत दोनों अपराधों में पृथक दोषसिद्धि प्रतिषिद्ध नहीं।

Prashant Sharma, for the appellant.

S.K. Tiwari, for the respondent.

O R D E R

B.D. RATHI, J. :- Initially on 13-04-2006, appeal under Section 378 of Code of Criminal Procedure, 1973 (in short 'the Code') has been preferred by the appellant making challenge to the judgment of acquittal dated 28-02-2006 passed by learned Judicial Magistrate First Class, Guna in Criminal Case No.201/02 by which the respondent -Praveen

Kumar was acquitted of the offence punishable under Section 138 of Negotiable Instruments Act. Thereafter, when the objection was raised to the effect that without seeking leave to appeal, directly no appeal under Section 378 of the Code can be entertained and it is not maintainable. Faced with this objection, the application under Section 378(4) of the Code seeking leave to appeal has been preferred by the appellant.

2- Under wrong notion this appeal has been registered by the Office while firstly the matter is required to be heard on the application regarding leave to appeal, therefore, present matter is being heard on I.A.No.6695/2006, an application seeking leave to appeal.

3- Shri Sharma, learned counsel for the appellant firstly took this Court to paragraph 9 of impugned judgment in which learned trial Court has held that the cheque in question was signed and issued by the respondent/accused -Praveen Kumar to discharge his legal debt and liability in favour of present appellant. It is further submitted that merely on the ground that no account in the name of respondent was found in the Bank (State Bank of Indore, Branch Guna) in regard to the cheque issued by the respondent, therefore, only on this ground it could not be held that the offence under Section 138 of Negotiable Instruments Act was not committed by the respondent. Acquittal was bad in law and liable to set aside.

4- Further submission has been made by Shri Sharma learned counsel for the appellant that once it was proved by the complainant that the cheque in question was signed and issued by the respondent in favour of appellant to discharge his legal debt or liability and the same was dishonoured, it is nugatory whether the account in the concerned Bank in the name of respondent was there or not.

5- Combating the submissions of learned counsel for the appellant, Shri Tiwari respondent's learned counsel submitted that from perusal of opening word of Section 138 of Negotiable Instruments Act it seems that for the purpose of entertaining the matter under Section 138 of Negotiable Instruments Act, there must be an account in the Bank and the same should be maintained by the person who has drawn the cheque in question in favour of complainant. In absence of any of these ingredients, provisions of Section 138 of Negotiable Instruments Act cannot be attracted.

6- This Court after giving anxious consideration to the rival contentions put forth by learned counsel for the parties, entire record has been perused.

7- In order to adjudicate the issue in hand, bare reading of provisions of Section 138 of Negotiable Instruments Act is imperative which reads as under:

"138. Dishonour of cheque for insufficiency, etc., of funds in the account.- Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid. either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both."

Plane reading of aforesaid provision, makes it clear that the offence under the said Section can be said to be committed by the drawer of the cheque on an account maintained by him with the Banker but not by any other person. Exceptions are given under Section 141 of Negotiable Instruments Act which reads as under:

"141. Offences by companies.- (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or

that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government as the case may be he shall not be liable for prosecution under this chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

8- Since company is artificial person and would be run by human being, Section 141 of Negotiable Instruments Act lays down as to who would be liable for punishment if offence under Section 138 of Negotiable Instruments Act is committed by the company. Except Section 141 of Negotiable Instruments Act, there is no other provision in chapter XVII of the Act which fasten criminal liability on a person other than drawer of the cheque for an offence under Section 138 of Negotiable Instruments Act.

9- From perusal of record of trial Court it seems that the appellant has examined himself as PW-1 and Santosh Kumar as PW-2 who was Deputy Manager posted in State Bank of Indore, Branch Guna. Santosh Kumar (PW-2) in his statement deposed that the cheque in question bearing No.4161897 to the tune of Rs.5,10,000/- was received in his Bank from UCO Bank, Guna for payment but the same was dishonoured because of insufficiency of fund. It was further deposed by him that this cheque does not belong to the respondent but was having concern with

account No.01600050161 which belongs to firm "Manakchand Moolchand". He has further deposed that respondent is neither partner of firm "Manakchand Moolchand" nor his signature is found in the record of Bank to operate the account. Taking aid of this deposition made by Santosh Kumar (PW-2), learned trial Court in paragraph 14 has held that the disputed cheque has no concern with the account belonged to respondent.

10- In the aforesaid premises and after going through the provisions of Sections 138 and 141 of Negotiable Instruments Act and evidence produced by the appellant/complainant, in the considered view of this Court, learned trial Court has not committed any error in acquitting the respondent and the judgment of acquittal passed by learned trial Court is well merited, therefore, no interference in it is warranted.

11- Resultantly, in view of the above cumulative reasons and factual matrix stated above, the application (I.A.No.6695/2006) seeking leave to appeal is dismissed being bereft of merits and Criminal Appeal registered as 319/2006 is also dismissed as it has been wrongly registered without affording leave of this Court under Section 378(4) of the Code.

12- At this stage, by twisting the relief Shri Sharma learned counsel for the appellant submitted that appellant has proved that the cheque in question is bearing the signature of respondent and it was issued by the respondent in discharge of legal debt or liability while on dishonouring of said cheque, the prosecution of accused under Section 138 of Negotiable Instruments Act has been aborted on the ground that account number written on the cheque in question does not exist in the Bank, in the said eventuality the case for the offence under Section 420 of IPC is made out as the respondent has cheated the appellant.

13- Rebuttal of this prayer has been made by learned counsel for the respondent on that ground that no person shall be prosecuted or punished for the same offence more than once as enshrined under Article 20(2) of Constitution of India.

14- Certainly, in this case the order of remand cannot be passed because for the purpose of framing the charge under Section 420 of IPC necessary ingredients and pleadings are not there in the complaint preferred by the appellant for the offence under Section 138 of Negotiable Instruments Act.

So far as objection raised by respondent's learned counsel regarding double jeopardy is concerned, in the opinion of this Court the offence under Section 138 of Negotiable Instruments Act is altogether different from the offence punishable under Section 420 of IPC, ingredients of both the offences are different, therefore, conviction in both the offences separately is not prohibited under Article 20(2) of Constitution of India. Instead of prosecuting and convicting a person under Section 138 of Negotiable Instruments Act there will be no constitutional bar to prosecute the said person for the offence punishable under Section 420 of IPC as the ingredients exist and case is made out.

15- In the light of aforesaid discussions, taking in view the alternative prayer made by appellant's counsel and its opposition, liberty is granted to the appellant to take his course of action to prosecute the respondent for the offence punishable under Section 420 of IPC before the competent Court of jurisdiction, if so desires.

Copy of the order be sent to the trial Court along with record for necessary information.

Order accordingly.

I.L.R. [2014] M.P., 1117

CIVIL REVISION

Before Mr. Justice A.K. Shrivastava

Civil Rev. No. 446/2006 (Jabalpur) decided on 27 February, 2013

SHANTA BAI (SMT.) & anr.

...Applicants

Vs.

KUNDLIK & ors.

...Non-applicants

Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 107 & 108, Civil Procedure Code (5 of 1908), Order 7 Rule 11, Specific Relief Act (47 of 1963), Section 38 - Maintainability - Suit for declaration and mandatory injunction - Application under Order 7 Rule 11, C.P.C. filed that the Civil Suit is barred looking to the provisions contained in Section 108 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam, 1993 - Held - Provision of Section 108 of Adhiniyam, 1993 and by paying heed to sub-section (3) this court finds that bar would not apply to the suit

instituted u/s 38 of the Specific Relief Act - Present suit is of permanent and mandatory injunction only - Bar is not applicable - Revision dismissed. (Paras 2, 3 & 5)

पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराएं 107 व 108, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 7 नियम 11, विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 38 - पोषणीयता - घोषणा और आज्ञापक व्यादेश हेतु वाद - सि.प्र.सं. के आदेश 7 नियम 11 के अंतर्गत आवेदन प्रस्तुत किया गया कि म.प्र. पंचायत राज एवं ग्राम स्वराज अधिनियम, 1993 की धारा 108 में वर्णित उपबंधों को देखते हुए सिविल वाद वर्जित है - अभिनिर्धारित - अधिनियम, 1993 की धारा 108 का उपबंध और उप धारा (3) का ध्यान रखते हुए यह न्यायालय पाता है कि विनिर्दिष्ट अनुतोष अधिनियम की धारा 38 के अंतर्गत संस्थित वाद पर वर्जन लागू नहीं होगा - वर्तमान वाद केवल स्थायी एवं आज्ञापक व्यादेश का है - वर्जन लागू नहीं होता - पुनरीक्षण खारिज।

Pushpendra Dubey, for the applicants.

None for the non-applicant No.1.

Akhilesh Singh, P.L. for the non-applicants No. 2 to 4.

ORDER

A.K. SHrivastava, J. :- This revision application under Section 115 of CPC has been filed at the instance of defendants against the order dated 06.10.2006 passed by learned Civil Judge, Class-I, Multai District Betul whereby an application under Order VII Rule 11 CPC filed on behalf of applicants has been dismissed.

2. A suit for declaration and mandatory injunction has been filed by the plaintiff-respondent no.1 which is pending in the Trial Court. The allegation made in the plaint is that *mala fidely* and against the interest of Gram Panchayat the defendants are carrying on the business affairs of the Gram Panchayat and hence the complaint was also made to Sub Divisional Officer in that regard but of no avail and therefore the present suit has been filed for mandatory injunction.

3. After the defendants-applicants were served, an application under Order VII Rule 11 CPC has been filed that the civil suit is barred looking to the provisions contained in Section 108 of the M.P. Panchayat Raj Avam Gram Swaraj Adhiniyam 1993 (in short "Adhiniyam 1993"). This application has been dismissed by learned Trial Court holding that points which are raised

in the application are having nexus with the facts and at the threshold it cannot be decided.

4. In this manner this revision application has been filed by the defendants-applicants. The contention of learned counsel for applicants is that looking to the specific bar envisaged under Section 108 of the Adhiniyam 1993 the civil suit is not maintainable and if that is the position the provision of Order VII Rule 11(d) CPC has been rightly prayed to be invoked by the defendants by filing such application in the Trial Court and that Court has committed illegality with material irregularity in exercise of its jurisdiction in rejecting the application of the applicants.

5. Considered the submissions. On bare perusal of the provision of Section 108 of Adhiniyam 1993 and by paying heed to sub-section (3) this Court finds that bar would not apply to the suit instituted under Section 38 of the Specific Relief Act. Needless to say that the present suit is of permanent and mandatory injunction only, therefore, according to me the said bar is not applicable. Even otherwise in the entire plaint, the pleadings of plaintiff are that arbitrarily with a *mala fide* intention in order to misappropriate the public money the office bearers of Gram Panchayat are functioning for which he also made certain complaints to the Sub Divisional Officer but nothing has been done so far. According to me, the protection under Section 107 of the Adhiniyam 1993 is given to office bearer only when they are serving bona fide. Since the allegations are of *mala fide* and arbitrariness which require investigation, therefore, these pleadings are to be read in the context to Section 108(3) of the Adhiniyam of 1993 which permits to file suit for injunction. Thus, according to me learned Trial Court has rightly rejected the application on that ground.

6. I have gone through the reasonings assigned by the learned Trial Court and I do not find any illegality or perversity in it. It has been then contended by learned counsel for applicants that now term of office bearers of Gram Panchayat is over and the suit has become infructuous. If such an application is filed by the defendants-applicants in the Trial Court, the same shall be decided in accordance with law by that Court.

7. Accordingly, this revision application is dismissed. No costs.

Revision dismissed.

I.L.R. [2014] M.P., 1120

CRIMINAL REVISION

Before Mr. Justice U.C. Maheshwari

Cr. Rev. No. 178/2013 (Jabalpur) decided on 8 February, 2013

MADHAV SHARMA

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 294 - No formal proof of certain documents - Applicant was not permitted to produce the aforesaid document photographs in cross-examination of said material witnesses of the case - Held - Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all - It is wrong to think that this is merely a technical Rule of evidence - It is a rule of essential justice, it serves to prevent surprise at trial and mis-carriage of justice - Impugned order is held to perverse and deserves to be set aside - Revision allowed. (Paras 3 & 4)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 294 - कतिपय दस्तावेजों का कोई औपचारिक प्रमाण नहीं - आवेदक को उपरोक्त दस्तावेज फोटोग्राफ, प्रकरण के उक्त महत्वपूर्ण साक्षीगण के प्रति-परीक्षण में प्रस्तुत करने की अनुमति नहीं दी गई - अभिनिर्धारित - जब भी प्रति-परीक्षण में विरोधी ने अपने आवश्यक एवं महत्वपूर्ण प्रकरण को रखने के अवसर का अवलंब लेने से इंकार करता है, इसका अर्थ होगा कि उसे विश्वास है कि दिये गये परिसाक्ष्य को विवादित बिल्कुल नहीं किया जा सकता - यह सोचना गलत है कि यह साक्ष्य का मात्र तकनीकी नियम है - यह आवश्यक न्याय का नियम है, वह विचारण के समय अप्रत्याशितता एवं न्याय हानि रोकने का कार्य करता है - आक्षेपित आदेश विपर्यस्त अभिनिर्धारित और अपास्त किये जाने योग्य - पुनरीक्षण मंजूर।

Case referred :

AIR 1961 Cal. 359.

Abhay Jain, for the applicant.*Punit Shroti*, P.L. for the non-applicant/State.

ORDER

U.C. MAHESHWARI, J. :- Looking to the nature of question involved in this revision instead to hear the argument on the question admission, with the consent of the parties this revision is heard finally on merits.

2. The applicant has preferred this revision being aggrieved by the order dated 08.1.2013 passed by 5th Additional Sessions Judge, Jabalpur, whereby his application filed on 10.9.2012 for permission to produce some photographs in the cross-examination of the prosecution witnesses has been dismissed with the observation that applicant may produce the same at the time of recording his defence evidence.

3. It also appears from the impugned order that on earlier occasion in the course of the cross-examination of Smt. Malti Sahu the prosecutrix on 6.9.2012 such photographs were produced along with an application under Section 294 of Cr. P. C. but neither such application was allowed nor such photographs were taken on record, as such the applicant was not permitted to produce the aforesaid document photographs in cross-examination of said material witnesses of the case.

4. It is settled proposition of law that in the cross-examination of the witnesses of the prosecution in order to prove the defence version the relevant documents could be produced by the accused. As per settled proposition the cross-examination of the witnesses of the adverse party is a valuable implement in the hand of the partie whereby he may ask the question by producing the relevant documents from such witness. My aforesaid view is fully fortified by the decision of the Calcutta High Court in the matter of *A.E.G. Carapiet, v. A.Y. Derderian*, reported in AIR 1961 Cal. 359, in which it was held as under.

10. The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual

case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses, it has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

5. It is also mentioned that in the course of arguments P. L. could not justify the impugned order of the trial Court. Thus in view of the aforesaid discussion in the available circumstances the impugned order is held to perverse and deserves to be set aside.

6. Therefore, by allowing this revision by setting aside the impugned order the application of the applicant dated 10.9.2012 as well as of dated 6.9.2012 respectively are allowed in part and the applicant is permitted to produce the alleged photographs along with its negative or concerning CD in which from the Camera stick such photographs were taken out, in the cross-examination of Smt. Malti Sahu (P. W.1) and of other relevant witnesses of the prosecution.

7. Let a copy of this order be sent to the trial Court immediately. The applicant's counsel is also directed to submit the certified copy of this order in such Court within seven days from today.

8. The revision is allowed as indicated above. Consequently, IA No.2498/13, an application for grant of stay does not require any further consideration; hence the same is hereby disposed of.

Revision allowed.

I.L.R. [2014] M.P., 1123**CRIMINAL REVISION***Before Mr. Justice U.C. Maheshwari*

Cr. Rev. No. 6/2013 (Jabalpur) decided on 26 March, 2013

DAULAT SINGH VISHWAKARMA & ors.

...Applicants

Vs.

STATE OF M.P. & anr.

...Non-applicants

Penal Code (45 of 1860), Sections 406, 409 & 420, Criminal Procedure Code, 1973 (2 of 1974), Section 227 - Framing of charge - Complainant entered into an agreement to purchase house with M.P. Housing Board - Complainant paid entire installments - Housing Board was under obligation to execute sale deed in favour of complainant - However, on the basis of affidavit in some Civil Proceedings Housing Board issued NOC in favour of another accused - Held - Housing Board at the best could have executed sale deed in favour of complainant - Complainant had also cancelled the agreement with another accused - Housing Board could not have issued NOC in favour of another accused - Charge rightly framed as NOC was fabricated against Rules and Regulations to extend benefit to another accused - Revision dismissed.

(Paras 6 & 8)

दण्ड संहिता (1860 का 45), धाराएं 406, 409 व 420, दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 227 - आरोप विरचित किये जाना - शिकायतकर्ता ने मकान क्रय करने के लिये म.प्र. हाउसिंग बोर्ड के साथ करार किया - शिकायतकर्ता ने संपूर्ण किश्तों का भुगतान किया - शिकायतकर्ता के पक्ष में विक्रय विलेख निष्पादित करने के लिये हाउसिंग बोर्ड बाध्यताधीन था - किन्तु, किसी सिविल कार्यवाही में शपथ पत्र के आधार पर हाउसिंग बोर्ड ने एन.ओ.सी. अन्य अभियुक्त के पक्ष में जारी की - अभिनिर्धारित - हाउसिंग बोर्ड अधिक से अधिक शिकायतकर्ता के पक्ष में विक्रय विलेख निष्पादित कर सकता था - शिकायतकर्ता ने अन्य अभियुक्त के साथ का करार भी निरस्त किया था - हाउसिंग बोर्ड अन्य अभियुक्त के पक्ष में एन.ओ.सी. जारी नहीं कर सकता था - आरोप उचित रूप से विरचित क्योंकि अन्य अभियुक्त को लाभ प्रदान करने के लिये नियमों एवं विनियमन के विरुद्ध एन.ओ.सी. मिथ्यागदंत है - पुनरीक्षण खारिज।

Cases referred :

AIR 1987 SC 955, AIR 1992 SC 1815, Appeal (Cr.) 744/08 decided by the Apex Court on 28.04.2008

Anil Khare with Harjas Singh for the applicants.

Punit Shroti, P.L. for the non-applicants.

ORDER

U.C. MAHESHWARI, J. :- The applicants/co-accused namely (1) Daulat Singh Vishwakarma (2) Nikhil Kumar Deshpande and (3) Narayan @ Satyanarayan have filed this revision under Section 397/401 of Criminal Procedure Code (in short "the Code") for quashment of the order dated 5.11.2011 passed by 2nd Additional Sessions Judge, Sagar in S. T. No. 179/2010, whereby the charges for the offence punishable under Sections 468 and 471 of IPC have been framed against each of the applicants.

2. The facts giving rise to this revision in short are that respondent No.2 herein initially filed a private complaint (Ann. P.2) on 16.6.2008 in the Court of JMFC Sagar against the applicants No.2 and 3 herein along with other co-accused Devendra Singh Thakur, Arvind Singh and one R. K. Upadhyay for taking the cognizance of the offence punishable under Sections 406, 409, 419, 420, 468, 471/34 r/w 120-B of IPC against them. Subsequent to filing such complaint another complaint dated 25.11.2008 (Ann. P.3) was also filed in the same Court by the respondent No.2 against the applicants herein and aforesaid Devendra Singh Thakur, Arvind Singh Thakur and R. K. Upadhyay for taking the cognizance of the same offence of Section 406, 409, 419, 420, 468, 471/34 r/w 120-B of IPC against them.

3. After filing the aforesaid initial first private complaint by the respondent No.2 the JMFC Sagar instead to proceed further under Section 200 and 202 of the Code vide order dated 27.6.2008 directed to call the report through Police Station Civil Lines Sagar. Subsequent to such direction the aforesaid second complaint was filed on 25.11.2008 by the respondent No.2, the same was annexed with aforesaid earlier complaint vide order dated 31.8.2009. Both the complaints were related with the same offences but in subsequent complaint some additional accused were impleaded with some additional averments. The JMFC Sagar vide order dated 31.8.2009, directed to sent a copy of the complaint to the Police Station Civil Lines, Sagar with further direction to call the report under Section 156 (3) of the Code. In compliance of such direction the requisite report was sent by the Police Station Civil Lines Sagar to the Court of JMFC Sagar on 29.9.2009. Thereafter, the case was fixed for further proceeding on 9.10.2009 as stated in the order sheet of

such Court. On such date the case was adjourned and same was taken up for hearing on 30.3.2010. On consideration it was found that in compliance of the aforesaid direction given by the JMFC under Section 156 (3) of the Code a Crime No.187/09 (FIR) for the offence punishable under Section 406, 409, 419, 420, 468, 471/34 r/w 120-B of IPC was registered and after holding investigation of the same on establishing the ingredients of the aforesaid alleged offence against the applicants and other co-accused, they have been charges sheeted for their prosecution before the Court having territorial jurisdiction. Pursuant to it, vide order dated 30.3.2010 above mentioned private complaints were amalgamated and consolidated with the case of aforesaid charge sheet filed along with the police report under Section 173 of the Code.

4. After filing the aforesaid charge sheet in the Court of Judicial Magistrate First Class, Sagar for the offence of Section 406, 409, 419, 420, 468, 471/34 r/w 120-B of IPC against the applicants the same was registered as criminal, case No.1211/10 and the alleged offence being triable by Sessions Court was committed to such Court along with all the papers of the private complaints.

5. After committal of the case on evaluation of the charge sheet along with the police report filed under Section 173 of the Code by impugned order the charges of the above mentioned offence were framed against the applicants. The same is under challenge in this revision.

6. After taking me through the papers placed on record along with both the complaints (Ann. A. 2 and A.3), filed by the respondent No.2 in the trial Court, so also FIR registered under Section 154 of the Code in compliance of the direction of the JMFC Sagar given under Section 156 (3) of the Code along with police report filed under Section 173 of the code (Ann. A.4), the proceeding of the private complaints and the charges framed by the trial Court the applicants' counsel has argued that on taking into consideration the averments of the FIR and interrogatory statements of the witnesses, recorded under Section 161 of the Code, so also other available documents which are the part of the charge sheet as accepted in its entirety on their face value even then the offence of Section 468 and 471 of IPC are not made out against any of the applicants of this revision. In continuation he said that in the available circumstances the impugned no objection certificate (NOC) for executing the sale deed should have been issued in the name of respondent No.2 because initially he had entered into an agreement with M. P. Housing Board (in short "the Board") on 17.7.1985 to purchase MIG type house under the scheme of

higher purchase, which were being constructed at 41, Tilinaka Sagar and according to the terms and conditions of such agreement installments of the sum were also deposited by him, but in view of some order of the Civil Court so also the affidavit of respondent No.2, according to which he entered in to an agreement with other co-accused to sell the aforesaid house, the applicants had issued NOC to execute the sale deed directly in favour of the purchasers mentioned in the agreement executed by the respondent No.2. In such premises it could not be said that any of the present applicants have committed the alleged offence of fabricating any documents i. e. NOC in the shape of valuable security or in any other manner. In such premises, it could not be deemed that with intention to cause loss of the revenue to the State, they have forged and fabricated the documents to execute the sale deed directly in favour of the purchaser from the respondent No.2 without taking the consent of the respondent No.2 knowingly that alleged respondent No.2 had cancelled the agreement which was executed in favour of such person in whose favour NOC was issued by the applicants. He further said that whatsoever act was carried out by the applicants the same was done by them in discharging of their official duties and not more than that. In such premises mere on issuing NOC to the prospective purchaser from the original allottee the applicants could not be treated to be the accused of the matter and pursuant (sic. pursuant) to it alleged charges of Section 468 and 471 of IPC are not sustainable against them and prayed for quashment of the FIR and its charge sheet along with all proceeding till the extent of the applicants by admitting and allowing this revision. He also placed his reliance on the decisions of the Apex Court in the matter of *Param Hans Yadav Vs. State of Bihar* reported in AIR 1987 SC 955, in the matter of *Punjab National Bank and ors Vs. Surendra Prasad Sinha* reported in AIR 1992 SC 1815 and in the matter of *Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra* decided by the Apex Court on 28.4.2008 in Appeal (Cr.) No.744/08.

7. Having heard the counsel at length keeping in view his arguments, I have carefully gone through the papers available on record including the private complaints, copies of the FIR, police report and other papers along with the impugned order, so also the proceedings drawn up by the JMFC in respect of the private complaints filed by the respondent No.2. After perusing the aforesaid, I am of the considered view that in the available factual matrix of the matter and papers of the charge sheet including the averments of the FIR and interrogatory statements of the witnesses recorded under Section 161 of

the Code, the trial Court has not committed any error in framing the aforesaid charges for the offence of Sections 468 and 471 of IPC against the applicants. In view of availability of prima-facie ingredients of the alleged offence in the papers of the impugned charge sheet against the applicants, the aforesaid case laws cited by the applicants' counsel are not helping to the applicants to discharge them from the impugned offence. So far the principle laid down by the Apex Court in the aforesaid cited cases are concerned, this Court did not have any dispute regarding the principle laid down in the same but same being distinguishable on facts, in the present matter is not giving any help to the applicants to discharge them from the alleged charges.

8. It is undisputed fact from the FIR and other papers available on the record that respondent No.2/ complainant entered into an agreement with the Board on 17.7.1985 to purchase MIG type house under the scheme of higher purchase, which were being constructed at 41, Tilinaka Sagar and according to the terms and conditions of such agreement the respondent No.2 had deposited it's regular installments up to 4.6.2002 and after making such entire payment by respondent No.2 the Housing Board and its official had to execute a sale deed of the aforesaid house in favour of the respondent No.2 and unless such sale deed is executed in favour of the respondent No.2 mere on the basis of aforesaid affidavit of some proceeding of the Civil Court no NOC could have been issued by the applicants or any other official of the Housing Board in favour of other persons except the allottee respondent No.2. For the sake of argument if it is taken into consideration that any agreement if was executed by the respondent No.2 in favour of the co-accused Devendra Singh Thakur under the mediator-ship of Arvind Singh Thakur, who is brother in law of such Devendra Singh, even then to defeat the interest of the State Government with respect of the revenue without executing the sale deed in favour of the respondent No.2 the applicants did not have any authority to issue NOC to transfer the property in favour of Devendra Singh Thakur directly by the M. P. Housing Board because the consideration was never deposited with the Housing Board by the accused Devendra Singh. The investigating agency also collected the evidence which prima-facie show that the agreement which had taken place between respondent No.2 and said Devendra Singh has been cancelled by respondent No.2 and the amount of earnest money/ the part consideration was also returned to the above mentioned prospective purchaser. So there was no circumstance in existence to issue any NOC to transfer the aforesaid property to Devendra Singh Thakur directly

from the Housing Board. But mere to defeat the interest and title of the respondent No.2 without his consent, so also with intention to cause the wrongful loss to the Government revenue, which could have been received by the State on execution of one sale deed in favour of the respondent No.2 and thereafter in favour of the purchaser Devendra Singh Thakur (if the agreement had not been cancelled), the applicants by misusing their power and authority with dishonest intention had forged and fabricated the NOC contrary to the rules and regulations just to extend the benefit to Devendra Singh Thakur the co-accused and thereby prima-facie (sic. facie) they have committed the alleged offence for which the charges have been framed by the trial Court.

9. In the aforesaid premises, at this stage I have found sufficient prima-facie circumstance against the applicants in the charge sheet for framing the above mentioned charges against them. So, in such premises in the lack of any perversity or illegality in the order impugned this revision being devoid of any merits deserves to be and is hereby dismissed at the stage of motion hearing.

10. The revision is dismissed as indicated above.

Revision dismissed.

I.L.R. [2014] M.P., 1128

CRIMINAL REVISION

Before Mr. Justice B.D. Rath

Cr. Rev. No. 329/2010 (Gwalior) decided on 28 November, 2013

RAGHUVVEER SINGH & ors.

...Applicants

Vs.

BHOORI BAI & anr.

...Non-applicants

Criminal Procedure Code, 1973 (2 of 1974), Section 397 - Power of Session Court to call and examine the record - Revisional Court has jurisdiction to reverse the findings of the lower trial court and give its own finding - Revisional powers are to be read and construed together and not in isolated water tight compartment - Sections 398 & 399 of Code would have to be read together as one integral whole - It would be immaterial to investigate as to which specific provision has been actually invoked by it. (Para 12)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397 - सत्र न्यायालय की अभिलेख बुलाने एवं परीक्षण करने की शक्ति - पुनरीक्षण न्यायालय को यह

अधिकारिता प्राप्त है कि निम्न विचारण न्यायालय के निष्कर्ष को उलट दे और स्वयं अपना निष्कर्ष दे – पुनरीक्षण शक्तियों को एक साथ पढ़ना और अर्थान्वयन करना चाहिए और न कि अलग-अलग करके – संहिता की धाराएँ 398 व 399 को एक साथ, अखंड पूर्णता के रूप में पढ़ा जाना चाहिए – यह तत्वहीन होगा कि उसके द्वारा वास्तविक रूप से किस विनिर्दिष्ट उपबंध का अवलंब लिया गया इसकी विवेचना की जावे।

Cases referred :

2007 (I) MPWN 103, 2004 (3) MPLJ 485, 1991 CR.L.J. 141, 1981 CR.L.J. 796.

Pradeep Katare, for the applicants.

D.D. Bansal, for the non-applicant No.1.

Pramod Pachauri, P.P. for the non-applicant No. 2/State.

ORDER

B.D.RATHI, J. :- Heard.

1. The petitioners have preferred this Criminal Revision under Section 397 read with Section 401 of Code of Criminal Procedure [hereinafter referred to as “the Code”] against the order dated 30-03-2010, passed by learned Additional Sessions Judge, Chachoda, District Guna (MP) in Criminal Revision No.10/2008, directing the Court of Judicial Magistrate First Class, Chachoda to take cognizance under Sections 494/109 and 120-B of IPC against the six accused persons including, present petitioners on a private complaint filed by respondent No.1 Bhoori Bai in that Court.

2. In brief, the facts of the case is that a private complaint filed by complainant Bhoori Bai (herein respondent No.1) before the Court against all six accused persons, including present petitioners for commission of offences punishable under Sections 494/109 and 120-B of IPC, to the effect that she was married with co-accused Santosh seven or eight years back in the village Ashakhedi according to Hindu rites and rituals. From their wedlock, one son, namely, Aditya aged about four years was born. After some time of the marriage, accused persons including, the present petitioners used to harass her and demanded dowry of Rs.1,00,000/- . Her husband is not keeping her with him and threatened to marry again if she did not fulfill demand of Rs.1,00,000/-. The petitioners alongwith other co-accused hand in gloves conspired to marry Santosh with co-

accused Rekha Bai. Co-accused Narayan Singh is father of co-accused Rekha Bai. Co-accused Preetam and Mahesh (herein petitioners No. 2 and 3) are brothers of co-accused Santosh and their father is Raghuveer Singh (herein petitioner No.1). The marriage of co-accused Santosh took place in Ujjain knowing the fact that the complainant and co-accused Santosh have already married each other. Their marriage is still in existence and no divorce took place between them. Despite the fact of first marriage, the petitioners alongwith co-accused conspired and abetted second marriage between co-accused Santosh and Rekha.

3. Learned trial Court after recording evidence of the complainant and of the witnesses under Sections 200 and 202 of Cr.P.C. passed an order dated 11/12/2007 in Criminal Case No.977 of 2007, for taking cognizance only against co-accused Santosh (husband of respondent No.1 Bhoori Bai). Against the aforesaid order, then the respondent No.1 Bhoori Bai filed a revision for taking cognizance against remaining accused persons including present petitioners before the Sessions Court. The learned Additional Sessions Judge, Chachoda vide order dated 01/02/2008 allowed Criminal Revision No.10/2008 partially by modifying the order passed by trial Court and directed the trial Court to take cognizance against petitioner No.1 Raghuveer Singh and two other co-accused persons, namely, Narayan Singh and Rekha Bai under Sections 109 and 120-B of IPC and further directed to register a complaint against them and to try them according to law.

4. Thereafter, petitioner No.1 Raghuveer Singh preferred a revision before this Court, which was registered as Criminal Revision No. 227/2008. This Court vide order dated 15-05-2008 allowed the said revision and set aside the order dated 01/02/2008 passed by learned Additional Sessions Judge, Chachoda in Criminal Revision No.10/2008 and directed the trial Court to pass a fresh order after affording opportunity of hearing to five co-accused persons including present petitioner Nos.2 and 3 against whom the revision has been filed. The learned Additional Sessions Judge in Criminal Revision No.10/2008 vide order dated 30-03-2010 directed the trial Court to take cognizance against all the accused persons, including present petitioners under Sections 494/109 and 120-B of IPC. Hence, this revision.

5. It is submitted by Shri Katare, learned counsel for the petitioners

that as per provision of Section 398 of the Code, the Sessions Judge cannot take cognizance by invoking the revisional powers under Section 397 of the Code. Apart that, it is further submitted that from perusal of the evidence of PW1 Bhuri Bai, PW2 Gopal Singh and PW3 Sagar Singh, no *prima facie* case was made out against the petitioners. Learned counsel for the petitioners further submitted that there is no evidence on record to *prima facie* prove the case that the petitioners have conspired with co-accused Santosh in regard to performing the second marriage with co-accused Rekha Bai. The complainant has utterly failed to adduce evidence to prove *prima facie* any offence is made out against the petitioners, so that Additional Sessions Judge directing the trial Court for taking cognizance under Sections 494/109 and 120-B of IPC against the petitioners. Therefore, on these grounds, this revision deserves to be allowed and the order in regard to taking cognizance passed by learned Additional Sessions Judge, Chachoda in Criminal Revision No.10/2008, is liable to be quashed.

6. In support of his contentions, Shri Katore, learned counsel for the petitioners has placed reliance on a decision of this High Court in *Subodh Shukla (Major) vs. R. S. Dudee*, 2007 (1) MPWN 103.

7. On the contrary, it is submitted by Shri Bansal, learned counsel for the respondent No.1 that provision of Section 398 of the Code cannot be read independently. This provision has to be read along with the provision of Sections 399 and 401(1) of Code. It is also submitted that there was ample evidence produced by the complainant during enquiry under Sections 200 and 202 of the Code. Therefore, the learned Additional Sessions Judge has rightly passed the order for taking cognizance against the petitioners. The order is being based on sound reasonings. No interference is called for. Hence, prayed for dismissal of this revision.

8. In support of his contentions, Shri Bansal, learned counsel for the respondent No.1 has placed reliance on the decision of this High Court in *Hansraj Sharma @ Hansu vs. Shivcharan Sharma*, 2004 (3) MPLJ 485; on the decision of Delhi High Court in *Narinder Pal Sood & Anr. vs. State (Delhi Admn.) & Anr.*, 1991 Cr.L.J. 141 and also the decision of Punjab and Haryana High Court in *Bal Kishan Jain & Ors. vs. Indian Overseas Bank & Ors.*, 1981 Cr.LJ. 796.

9. Heard the arguments advanced by learned counsel for the parties and also perused the entire documents available on record.

10. Having given my anxious consideration to the evidence available on record, it is evidentially clear that the second marriage of co-accused Santosh was solemnized with co-accused Rekha at the instigation of the petitioners (who are father and brothers of co-accused Santosh). They had knowingly arranged second marriage of co-accused Santosh with co-accused Rekha and had actively participated in the marriage of co-accused Santosh. So, it is apparent as the instigation and in pursuance of their conspiracy second marriage was performed and consequently, the act committed by the petitioners comes within the purview of Sections 494/109 and 120-B of IPC for which the learned Additional Sessions Judge cannot be said to have applied wrong approach in directing the learned trial Court for taking cognizance under Sections 494/109 and 120-B of IPC against all the accused persons including present petitioners. Therefore, the arguments advanced by learned counsel for the petitioners, on this count, cannot be accepted and the same is hereby rejected.

11. Now, the only point remains for consideration before this Court is whether the Additional Sessions Judge has exercised wrongly the powers for taking cognizance against the petitioners under Section 397 of the Code, specially in view of provision of Section 398 of the Code.

12. In regard to powers to be exercised by the revisional Court under revisional jurisdiction, this Court in the case of *Hansraj Sharma @ Hansu* (supra) has observed as under:-

“The Court of Session is now clothed with the revisional powers under both Sessions 398 and 399 of the new Code. It is well settled that the revisional powers are to be read and construed together and not in isolated water tight compartment. Therefore, Sections 398 and 399 of the new Code would have to be read together as one integral whole. Therefore, when a Court of Session exercises its revisional jurisdiction, the power under both Sections 398 and 399 of the Code could be exercised by it and it would be immaterial to investigate as to which specific provision has been actually invoked by it. The revisional powers of the

Court of Session by virtue of Section 399 of the Code could be substantially equated with those of the High Court under Section 401(1) of the new Code of Criminal Procedure. The words "further enquiry" used in Section 398 do not envisage within it the power to direct that person wrongly discharged be summoned or that a charge under any particular Section or Sections of Indian Penal Code or any other enactment be framed against him and he be put on trial. Therefore, such a direction could not be given under Section 398 of the Code of Criminal Procedure. Nevertheless, direction of such nature could legally be given under Section 399 read with Section 401(1) of the Code of Criminal Procedure which is repository of the larger powers vested in the Court of Sessions. In the light of the aforesaid discussion, the direction given by the Additional Sessions Judge seems to be well within his jurisdiction in exercise of revisional powers."

13. Having thus considered the matter in its entirety and on going through the material available on record, this Court is of the view that the learned Additional Sessions Judge in Criminal Revision No.10/2008 has not committed any error in directing the learned trial Court for taking cognizance against all the accused persons, including present petitioners for commission of offences under Sections 494/109 and 120-B of IPC. In other sense, the direction given by learned Additional Sessions Judge is well-merited and warrants no interference in exercising the revisional jurisdiction of this Court.

14. It is made clear that the findings or observations made herewith by this Court shall not affect further proceedings of the trial Court. It is directed that the petitioners shall remain present before the trial Court and the trial Court is free to proceed further in accordance with law.

15. Consequently, this Criminal Revision fails and is hereby dismissed.

16. Let copy of this order be sent to the concerned Court for necessary information and compliance.

Revision dismissed.

I.L.R. [2014] M.P., 1134

CRIMINAL REVISION

Before Mr. Justice B.D. Rathi

Cr. Rev. No. 486/2010 (Gwalior) decided on 2 December, 2013

SURENDRA & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

Probation of Offenders Act, (20 of 1958), Section 3 - Powers of court to release certain offenders after admonition - Petitioners convicted u/s 294 IPC and sentenced to pay fine of Rs. 200/- each by the trial court - No previous conviction proved - Entitled to be admitted to the benefit of Section 3 of the Act. (Paras 1 & 4)

अपराधी परीक्षा अधिनियम (1958 का 20), धारा 3 - चेतावनी के बाद कुछ अपराधियों को मुक्त करने की न्यायालय की शक्तियां - विचारण न्यायालय ने याचीगणों को भारतीय दंड संहिता की धारा 294 के अंतर्गत दोषसिद्ध करते हुए प्रत्येक को 200/-रु. जुर्माना अदा करने हेतु दंडादिष्ट किया - पूर्व की दोषसिद्ध साबित नहीं - अधिनियम की धारा 3 का लाभ पाने के हकदार।

Pooran Kulshreshtha, for the applicants.

A.K. Shrivastava, P.L. for the non-applicant/State.

ORDER

B.D.RATHI, J. :- With the consent of parties matter is finally heard.

1. This revision petition has been preferred by the petitioners under Sections 397 and 401 of Code of Criminal Procedure, 1973 (in short 'the Code') being aggrieved by the impugned judgment dated 01-04-2010 by learned Sessions Judge, Bhind in Criminal Appeal No.145/2009 affirming the judgment of conviction and sentence dated 30-11-2009 passed by learned Chief Judicial Magistrate, Bhind in Criminal Case No.183/2006 by which the petitioners have been convicted for the offence under Section 294 of IPC and sentenced to pay fine of Rs.200/- each.

2. Learned counsel for the petitioners submitted that petitioners do not want to press the conviction and sentence as it is well merited but prayed for dismissal of this petition to the extent of petitioner No.3 Sukhram and extending the benefit of Probation of Offenders Act to petitioners No.1 and 2 with a further direction that the conviction would not affect the service career of

petitioners No.1 and 2 as they are in Government service.

3. Looking to the facts and circumstances of the case and after going through the impugned judgment, in the considered view of this Court, the impugned judgment of conviction and sentence passed by learned trial Court is well merited and no interference is called for, therefore, the petition so far as it is concerned with petitioner No.3 is dismissed.

4. So far as petitioners No.1 and 2 are concerned, there is no material on record to indicate that petitioners No.1 and 2 had any previous conviction. In absence of such evidence, petitioners No.1 and 2 are first offenders and they are entitled to be admitted to the benefits of probation under Section 3 of Probation of Offenders Act, 1958 taking into consideration; circumstances of the case, nature of the offence and character of petitioners No.1 and 2. While maintaining their conviction, it is directed that petitioners No.1 and 2 be released on probation of good conduct under Section 4 of the Act. The CJM before whom petitioners No.1 and 2 are directed to appear within four weeks from today, shall release them after due admonition. I do not consider it necessary to direct them to enter into a bond in the facts of the case.

5. In the peculiar facts and circumstances of the case, the conviction of petitioners No.1 and 2 shall not affect their service career.

6. With the aforesaid, this petition stands disposed of.

Petition disposed of.

I.L.R. [2014] M.P., 1135

CRIMINAL REVISION

Before Mr. Justice D.K. Paliwal

Cr. Rev. No. 197/2014 (Gwalior) decided on 15 April, 2014

GARIBA @ NARESH @ RAMNARESH & ors.

...Applicants

Vs.

STATE OF M.P.

...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Section 311 -
Recalling of Prosecution Witness - Held - Once the witness is
examined as a prosecution witness, he cannot be recalled merely
because he filed an affidavit. (Para 12)***

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 311 - अभियोजन साक्षी को

वापस बुलाया जाना – अभिनिर्धारित – एक बार जब साक्षी का परीक्षण, अभियोजन साक्षी के रूप में किया जाता है, तब मात्र इसलिए कि उसने शपथपत्र प्रस्तुत किया है, उसे वापस नहीं बुलाया जा सकता।

Cases referred :

1997(1) MPWN 138, 1988(1) Crimes 245, AIR 2004 SC 4209, (2005)10 SCC 701, 2005(4) MPLJ 136.

Sushil Goswami, for the applicants.

Rajeev Upadhyay, P.L., for the non-applicant/State.

ORDER

D.K. PALIWAL, J. :- The petitioners have knocked the door of this Court by preferring this revision petition under Section 397 & 401 of Cr.P.C., 1973 being dis-satisfied with the order dated 12.2.2014 passed by the Special Judge, Bhind in Special Case No.122/2010, whereby application of the petitioners filed under Section 311 of Cr.P.C. for recalling the prosecution witnesses for further cross-examination has been rejected.

2. Brief facts giving rise to this petition are that the petitioners are facing trial for the charges under Section 302 and 324 read with Section 34 of IPC before the Special Judge, Bhind. The prosecution has examined the prosecution witnesses. Thereafter, the petitioners have preferred an application under Section 311 of the Code for recalling the prosecution witnesses Anantram and Raghuveer for further cross-examination. The petitioners have preferred Cri. Revision No.269/2013 before this Court challenging the said order, which has been disposed of vide order dated 30.1.2014 with the following observations:-

“After hearing learned counsel for the parties, no case for interference is made out at this stage. Hence, this petition is disposed of with direction that petitioners shall be at liberty to file a fresh petition/application at the appropriate stage of the trial, if law permits, which shall be considered and decided by the trial Court, on its own merits.”

3. In view of the aforesaid the petitioners have preferred an application under Section 311 of Cr.P.C. for recalling the prosecution witnesses Anantram and Raghuveer on the ground that they have filed their affidavits denying witnessing the incident. The learned trial Court has dismissed the application

holding that earlier also the application was made for recalling the witnesses for cross-examination, which was dismissed on considering the merits, no new ground is made out to allow the application. Being aggrieved this revision petition has been preferred.

4. It is submitted by learned counsel that the impugned order is illegal, arbitrary and contrary to the law, hence deserves to be set aside. The prosecution witnesses Anantram and Raghuveer are the relatives of deceased Jiwarem and they have been pressurized by the Police to give false statements claiming to be an eye witnesses, however, they were not present at the time of incident. Thus, they are not the eye witnesses and under these circumstances they have filed affidavits that they were not on the spot and under the pressure of the Police they have given statements. In view of this they should have been recalled for cross-examination. It is prayed that the impugned order be set aside.

5. Learned counsel for the State supported the impugned order.

6. I have considered the rival submissions of the learned counsel for the parties and perused the record.

7. From the copies of the statements of the witnesses Anantram and Raghuveer, it appears that they have stated that they witnessed the incident. The accused persons have given beating to Jiwarem and Raghuveer, who have been died. In their affidavits both these witnesses have stated that they were not present at the spot, they have not witnessed the incident, but when they received the information regarding incident, then they reached the spot.

8. Learned counsel for the petitioners placing reliance on the decision of the Single Bench of this Court rendered in the case of *Mangilal Vs. State of M.P.*, reported in 1997(1) MPWN 138, submitted that learned trial Court ought to have recalled the witnesses in the light of their affidavits for further cross-examination. The reliance has also been placed in Allahabad High Court's judgment rendered in the case of *Sukkhani and another Vs. State of U.P.*, reported in 1988(1) Crimes 245, wherein it has been held that when the affidavit has been sworn by the first informant denying having seen the occurrence, he should be called for further cross-examination and be confronted with the statement contained in the affidavit.

9. The Hon'ble Apex Court in the case of *Yakub Ismailbhai Patel Vs. State of Gujrat*, reported in AIR 2004 SC 4209, has held as under. -

“Significantly this witness, later on filed an affidavit wherein he had sworn to the fact that whatever he had deposed before Court as PW-1 was not true and it was so done at the instance of Police.

The averments in the affidavits are rightly rejected by the High Court and also the Sessions Court. Once the witness is examined as a prosecution witness, he cannot be allowed to perjure himself by resiling from testimony given in Court on oath. It is pertinent to note that during the intervening period between giving of evidence as PW-1 and filing of affidavit in Court later he was in jail in a narcotic case and that the accused persons were also fellow inmates there.”

10. In the case of *Mishrilal Vs. State of M.P.*, reported in (2005) 10 SCC 701, Hon'ble Apex Court has observed as under. -

“In our opinion, the procedure adopted by the Sessions Judge was not strictly in accordance with law. Once the witness was examined-in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the Court, even though that witness had given an inconsistent statement before any other Court or Forum subsequently. A witness could be confronted only with a previous statement made by him. At the time of examination of PW-2 Mokam Singh on 6.2.1991, there was no such previous statement and the defence counsel did not confront him with any statement alleged to have been made previously. This witness must have given some other version before the Juvenile Court for extraneous reasons and he should not have been given a further opportunity at a later stage to completely efface the evidence already given by him under oath. The Courts have to follow the procedures strictly and cannot allow a witness to escape the legal action for giving false evidence before the Court on mere explanation that he had given it under the pressure of the Police or for some other reason. Whenever the witness speaks falsehood in the Court, and it is proved satisfactorily, the Court should take a serious action against such witnesses.”

11. The learned Single Judge of this Court relying on a decision of Apex Court in the case of *Yakub Ismailbhai Patel Vs. State of Gujrat*, reported in AIR 2004 SC 4209 (supra), In the case of *Manghi @ Narmada Vs. State of M.P.*, reported in 2005(4)MPLJ 136, has held that once the witness is examined as prosecution witness, he cannot be recalled merely because he has filed affidavit contrary to the deposition made before the trial Court.

12. In the instant case, admittedly the witnesses Anantram and Raghuveer were examined and after lengthy cross-examination they were discharged and thereafter for the reasons best known to them they have sworn the affidavits just contrary to the statements made before the trial Court. Their affidavits were submitted before the trial Court and an application was moved by the petitioners for recalling of these witnesses for cross-examination in respect of their affidavits. In view of the aforesaid Hon'ble Apex Court's decision, once the witness is examined as a prosecution witness, he cannot be recalled merely because he filed an affidavit.

13. In view of above discussion the citation relied upon by the petitioners does not give any strength to the submissions advanced on behalf of the petitioners. I do not find any perversity, illegality or impropriety committed by the learned trial Court while dismissing the application. The revision petition sans substance, hence it is dismissed.

Revision dismissed.

**I.L.R. [2014] M.P., 1139
CRIMINAL REFERENCE**

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg
Cr. Ref. No. 1/2013 (Indore) decided on 16 July, 2013

IN REFERENCE

...Applicant

Vs.

RAJESH & anr.

...Non-applicants

A. Penal Code (45 of 1860), Sections 302, 376(2)(f), 377 - Murder - Rape - Minor child was given in custody of the appellant as he had no child - She was mercilessly beaten by appellant on number of occasions - Number of injuries were found on her body - Postmortem report reveals that she was subjected to both natural and unnatural sexual assault - DNA of appellant matched with vaginal swab, clothes and anal swab of deceased - Chain of circumstances complete - Appellant

guilty of committing offence.

(Para 16)

क. दण्ड संहिता (1860 का 45), धाराएं 302, 376(2)(एफ), 377 – हत्या – बलात्कार – अपीलार्थी को अवयस्क बालिका की अभिरक्षा सौंपी गई क्योंकि उसकी कोई संतान नहीं थी – अपीलार्थी द्वारा उसे कई अवसरों पर बेरहमी से पीटा गया – उसके शरीर पर कई चोटें पायी गई – शव परीक्षण प्रतिवेदन प्रकट करता है कि उस पर नैसर्गिक एवं अनैसर्गिक दोनों प्रकार का लैंगिक हमला किया जाता था – अपीलार्थी के डीएनए का मृतक के वैजाइनल स्वेब, कपड़े और ऐनल स्वेब से मिलान होता है – परिस्थितियों की श्रृंखला पूर्ण होती है – अपीलार्थी अपराध कारित करने का दोषी।

B. Penal Code (45 of 1860), Sections 302, 376(2)(f), 377 & 120B - Death sentence - Rarest of rare case - Circumstantial evidence - When the accused who was close to the family of the deceased to whom the victim used to call "uncle" had committed rape and murdered the innocent hapless girl of 7 years, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases.

(Paras 3 & 18)

ख. दण्ड संहिता (1860 का 45), धाराएं 302, 376(2)(एफ), 377 व 120बी – मृत्युदण्ड – विरलतम से विरल प्रकरण – परिस्थितिजन्य साक्ष्य – जब अभियुक्त, जो मृतिका के परिवार का करीबी था, जिसे पीड़िता “अंकल” पुकारा करती थी, ने 7 वर्षीय अबोध अमागी बालिका का बलात्कार करके हत्या कारित की, तब अपराधी का उद्देश्य, पीड़िता की भेद्यता, अपराध पाशविकता और इसका निष्पादन हमें यह धारणा करने के लिये प्रेरित करता है कि यह “विरलतम से विरल” प्रकरण है।

Cases referred :

AIR 1952 SC 343, AIR 1984 SC 1622, (2005) 3 SCC 114, 2007 CR.L.J. 1806, AIR 1958 SC 465, AIR 1996 SC 2800, JT 2013 (6) 225, 2013 CR.L.J. 1460, 1980(2) SCC 684 = 1980 SCC (Cri) 580, JT 2012(2) SC 560, JT 2002 (3) SC 264, 1983 (3) SCC 470.

Deepak Rawal, G.A. for the applicant/State.

Rekha Shrivastava, for the non-applicants.

J U D G M E N T

The Judgment of the Court was delivered by :
SHANTANU KEMKAR, J. :- This judgment will decide Criminal Reference No.01/

2013, Criminal Appeal No.617/2013 and Criminal Appeal No.655/2013, as all these cases arise out of the same judgment.

2. The Seventh Additional Sessions Judge, Indore by the impugned judgment dated 12.03.2013 passed in Sessions Trial No.05/2013 has awarded the death sentence to the appellant Rajesh of Criminal Appeal No.617/2013 and has made a reference under Section 366 (1) of the Code of Criminal Procedure, 1973 of the proceedings for confirmation of death sentence by this Court. Feeling aggrieved by his conviction and sentence awarded by the impugned judgment, the appellant Rajesh has preferred Criminal Appeal No.617/2013. The co-accused Baby Singh has also filed Criminal Appeal No.655/2013 against the judgment on her being convicted and sentenced for life imprisonment and 10 years RI. The trial Court convicted and sentenced the appellants as follows: -

S.No.	Name of the accused	Conviction under Section	Sentences	Sentences with default stipulation
1.	Rajesh s/o Nanhe Singh Sengar	302 IPC 376(2)(f) IPC 377 IPC	Death Penalty LI with fine of Rs.2,000/- LI with fine of Rs.2,000/-	1 year RI 1 year RI
2.	Baby Singh w/o Rajesh Singh	302 IPC 120-B IPC	LI with fine of Rs.2,000/- 10 years RI with fine of Rs.2,000/-	1 year RI 1 year RI

3. The relevant facts are as follows: -

The victim of the incident :- a minor girl, aged seven years, was the daughter of Param Singh s/o Chandrabhan Singh Sengar. She was residing with her parents at Village Bavain, Tahsil and District Orैया (UP). The

appellant Rajesh is cousin (Mausera Bhai) of Param Singh. Appellants Rajesh and Baby Singh are husband and wife. They are not having any issue. The appellants visited the place of residence of Param Singh at UP and requested him to handover the custody of his daughter (victim) to them for being treated like their daughter. Keeping in view the relationship, Param Singh accepted the proposal and handed over the custody of his minor daughter to the appellants for being taken with them to Indore (MP). Initially, for few days the appellants kept the child properly, but soon started *mar-pit* with her. On being treated with cruelty and being beaten by the appellants, the victim used to cry. The residents (neighbours) of the locality hearing the cry, whenever inquired from the appellant Baby Singh, she used to give lame excuses like as the child urinates in underwear and as she is not studying, she is being beaten. The cruelty with the victim was continued till the ill fated day.

4. On 26.09.2012 Balram Rathor, neighbour of the appellants, lodged a report, which was registered as Marg Report Ex.P/3 to the effect that at about 10.00 PM he met appellant Rajesh, carrying the victim in his arms. On being asked by him to appellant as to what happened to her, the appellant informed him that she was taken to hospital and that she has died. On the basis of Marg Intimation Ex.P/3, the Police prepared Panchayatnama Ex.P/2 of the body. The dead body of the victim was then sent for postmortem examination, which was conducted by Dr. A.K. Rastogi (PW-15), Dr. S.K. Dadu and Dr. Deepak Gawli. The team of the doctors found the following injuries as per the postmortem report Ex.P/12 on the body of the victim:-

“Injuries: -

1. After shaving scalp hair scalp contusion of size 3.0 x 1.0 cm present over right parietal region.
2. After shaving scalp hair scalp contusion of size 3.0 x 2.0 cm present over left parietal region.
3. Contusion of size 3.0 x 2.0 cm present over right frontal region.
4. Contusion of size 3.0 x 3.0 cm present over left frontal region.
5. Contusion of size 2.0 x 1.0 cm present on right cheek.
6. Contusion of size 2.0 x 1.0 cm present on chin which is

more right to midline.

7. Contusion of size 3.0 x 2.0 cm present on left cheek.

8. Multiple small contusion area covered 20 x 10 cm present over the chest.

9. Old healed scar mark of size 2.0 x 1.0 cm present just above umbilicus.

10. Old healed scar mark of size 3.0 x 1.0 cm present on left iliac region.

11. Contusion of size 12 x 10 cm present on back side of chest.

12. Contusion of size 20.0 x 12.0 cm present over the antero lateral aspect of chest, on dissection intercostals muscles of ribs ecchymosed.

13. Contusion of size 3.0 x 2.0 cm present on right iliac.

14. Contusion of size 14 x 4.0 cm present on left arm postero lateral aspect.

15. Contusion of size 7.0 x 5.0 cm present on left forearm anteriorly.

16. Contusion of size 4.0 x 2.0 cm present on right forearm anteriorly.

17. Contusion of size 2.5 x 1.0 cm present on right arm posteriorly.

18. Contusion of size 3.0 x 1.0 cm present on right forearm anteriorly.

19. Scar mark of size 1.0 x 0.5 cm present on right forearm anteriorly.

20. Contusion of size 1.0 x 0.75 cm present on anterior aspect of the base of middle finger in right hand.

21. Contusion of size 1.0 x 1.0 cm present on right hand's index finger.

22. Contusion of size 1.0 x 1.0 cm present on right thumb.
23. Superficial Burn injury in healing phase of size 2.0 x 1.0 cm present over upper and lateral part of right arm with intervening healing area 0.5 cm area wide.
24. Multiple contusion of size 8.0 x 6.0 cm over Lt Buttock.
25. Multiple contusion of size 14 x 6.0 cm present on antero lateral aspect of right thigh.
26. Contusion of size 4.0 x 1.0 cm present just below right knee joint.
27. Multiple contusion of size 6.0 x 3.0 cm present over right knee joint.
28. Multiple contusion of size 3.0 x 2.0 cm present over medial aspect of left knee.
29. Contusion of size 16 x 3.0 cm present antero lateral aspect of left thigh.
30. Contusion of size 4.5 x 1.0 cm present on antero medial aspect of left thigh.
31. Contusion of size 6.0 x 2.0 cm present on posterior aspect of ankle joint.

Note: -

- (1) Injury no.1, 2, 3, 5, 6, 20, 21 and 22 bluish in colour, duration of injury few hrs. since death.
- (2) Injury no.4, 7, 12, 14, 15 and 25 bluish purple in colour duration of injury about 02 days since death.
- (3) Injury no.11, 16, 17, 18, 28, 30, 31 bluish black in colour duration of injury about 3 days since death.
- (4) Injury no.8, 24, 26, 27 and 29 brown in colour duration of injury about 4 to 5 days since death.
- (5) Injury no. 13 greenish in colour duration of injury about 5 to 7 days since death.

(6) Injury no.9, 10 and 19 were scars, so exact duration of injury could not be ascertained.

(7) Injury no.23 caused by heated object.

Anal Findings: -

Faecal matter soiling over buttocks coming out through anal opening, which after cleaning showing widely dilated anal opening with easily admitting two fingers, Surrounding area showing darkening with old healed scarring of old healed tear at 1, 2 and 11'o clock position placed radially similarly radially placed mucosal tear at 2 and 3'o clock position with reddish discolouration internally anal canal showing some yellowish white deposition along with faecal matter, finding suggestive of repeated sexual assault."

On the inspection of the private part of the dead body of victim, the team of the doctors found: -

"On separation of thighs and labia majora, labia minora showing reddish black discoloration and white thick deposition in inter labial fold. Vaginal opening showing old torn hymen, easily admits one finger with yellowish white deposition in cannal, Reddish contusion present on 5 to 7'oclock position. Finding suggestive of repeated sexual assault."

The following was the relevant portion of opinion given by the doctors:-

"Opinion: -

● Death was due to asphyxia as a result of aspiration of gastric content in the air passage.

● Evidence of multiple injuries of various duration over the body present caused by hard and blunt object, suggests a case of battered child.

● Evidence of sexual assault both natural and un-natural present.

● Time since death was 18 to 36 hrs since post mortem examination."

5. The appellant Rajesh was arrested by the Police and was medically

examined. His semen slide, pubic hair and underwear were taken and sealed in the presence of Constable Lokendra at MY Hospital and was brought at Police Station, of which panchnama Ex.P/15 was prepared.

6. The sealed articles collected and seized, after the postmortem of the victim and after medical examination of the appellant Rajesh, were sent to State Legal Medicine & Forensic Science Laboratory, DNA Fingerprint Unit, Sagar vide letter Ex.P/22. The report received from the State Legal Medicine & Forensic Science Laboratory, DNA Fingerprint Unit, Sagar Ex.P/23 confirms that the articles were received in sealed condition. The relevant portion of the report Ex.P/23 reads thus: -

“

- मृत्तिका शिवानी के स्त्रोत प्रदर्श ए बी एवं सी (फीमेल फ़ेक्शन) से महिला Autosomal STR DNA Profile प्राप्त हुई ।
- मृत्तिका शिवानी के स्त्रोत एनल स्वाब स्लाइड प्रदर्श सी (R-6356) से मिश्रित Autosomal STR DNA Profile प्राप्त हुई जो कि एक से अधिक व्यक्तियों की हैं ।
- मृत्तिका शिवानी के स्त्रोत एनल स्वाब प्रदर्श सी (R-6356) से प्राप्त मिश्रित डीएनए प्रोफाइल के प्रत्येक जेनेटिक मार्कर पर पाये गये, एलील्स में काले बोल्ड अंडरलाइन्ड अंकित आरोपी राजेश के स्त्रोत रक्त सेम्पल प्रदर्श F (R-6359) से प्राप्त Autosomal STR DNA Profile के प्रत्येक जेनेटिक मार्कर पर पाये गए एलील जोड़े, भी उपस्थित हैं ।

अर्थात् मृत्तिका शिवानी के स्त्रोत (प्रदर्श सी) से प्राप्त मिश्रित डीएनए प्रोफाइल के आधार पर मृत्तिका के प्रदर्श पर आरोपी राजेश (प्रदर्श एफ) के शारीरिक द्रव्य की उपस्थिति की पुष्टि होती है ।

- आरोपी राजेश के स्त्रोत अंडरवियर प्रदर्श E (R-6358) से प्राप्त Autosomal STR DNA Profile मिश्रित डीएनए प्रोफाइल है, इसके प्रत्येक जेनेटिक मार्कर पर पाये गए एलील्स में, काले बोल्ड, मृत्तिका शिवानी के स्त्रोत प्रदर्श ए बी एवं सी से प्राप्त महिला डीएनए प्रोफाइल के एलील जोड़े भी उपस्थित हैं ।
- आरोपी राजेश के स्त्रोत यूरेथ्रल स्मीयर स्वाब स्लाइड प्रदर्श E(R-6358) से आंशिक पुरुष डीएनए प्रोफाइल प्राप्त हुई ।

अभिमत

डीएनए प्रोफाइलिंग हेतु प्राप्त प्रदर्शों पर किये गये परीक्षण एवं प्राप्त परिणामों के आधार पर निम्नलिखित निश्चयात्मक परिणाम प्राप्त हुये हैं ।

मृतिका शिवानी के स्त्रोत प्रदर्श (सी) से प्राप्त पुरुष डीएनए प्रोफाइल, आरोपी राजेश के स्त्रोत (प्रदर्श एफ) की है ।

7. On completion of the investigation, the Police filed charge sheet against the appellants. The trial Court, after appreciation of the material brought on record held the appellant Rajesh guilty of rape and carnal sex with the victim and also held him and the appellant Baby Singh guilty of committing murder of the victim. Having regard to the nature of the crime committed by the appellants, the trial Court convicted and sentenced the appellant Rajesh with death penalty for offence under Section 302 of the IPC and also convicted him to imprisonment for life for offence under Sections 376 (2) (f) and 377 of the IPC. The trial Court convicted the appellant Baby Singh for offence under Sections 302 and 120-B of the IPC and sentenced her, as aforesaid.

8. Ms. Rekha Shrivastava, learned counsel for the appellant Rajesh has strenuously argued that the charge of murder leveled against appellant Rajesh has not been found to be proved. According to her, the injuries, which have been found to be proved, were not of such a nature, which could cause death of the victim. She argued that in the Panchayatnama Ex.P/2 there is no mention of faecal matter soiling over buttocks coming out through anal opening, whereas the same does find place in the postmortem report. In the circumstances, according to her, the findings recorded in the postmortem report about the sexual assault are not reliable. She also argued that taking into consideration the nature of the injuries, it cannot be held that the appellant Rajesh had intention of causing death of the victim. Shri Pankaj Sohani, learned counsel appearing for the appellant Baby Singh has supported the submissions made by Ms. Rekha Shrivastava and contended that there is no direct evidence to implicate appellant Baby Singh for commission of the offence, as alleged. According to learned counsel for both the appellants, the case is based upon circumstantial evidence and in the absence of a complete chain the conviction of the appellants is not sustainable. Ms. Rekha Shrivastava, learned counsel for appellant Rajesh also argued that the facts of the case do not warrant the sentence of death, as the case is not falling within the category of "rarest of rare case".

9. Shri Deepak Rawal, learned Government Advocate, on the other hand, supported the impugned judgment of conviction and the sentence. He submitted that the appellants were near relatives of the victim, taking advantage of the trust of the victim, they subjected her to cruelty to such an extent, which has caused her death. He argued that the witnesses of the locality have unequivocally deposed that the appellants used to treat the victim with great extent of cruelty and as a result, she used to cry and hearing her cry whenever Baby Singh was being asked for the reason, she used to give improbable explanation. The various injuries caused on the victim are of different durations, which corroborate the evidence of the witnesses about cruelty and continuous *mar-pit* with her. He argued that on the basis of the postmortem report and the oral evidence of Dr. A.K. Rastogi (PW-15) stating therein that the death was caused due to asphyxia, which may not be possible while taking the meals, but can be a cause when someone is beaten up while taking meals and his statement that the cause of death may be cumulative effect of all the injuries on the victim, keeping in view her age, the conviction of appellants is well founded and needs no interference.

10. There is no eye witness to the incident and the entire case of the prosecution is based on circumstantial evidence. It has been consistently laid down by the Supreme Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. In a case based upon circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature and all the circumstances should be complete and there should be no gap left in the chain of evidence. The conviction can be based solely on the basis of circumstantial evidence. (See *Hanuman Govind Nargundkar & another v. State of Madhya Pradesh* AIR 1952 SC 343, *Sharad Birdhichand Sarda v. State of Maharashtra* AIR 1984 SC 1622 and *State of UP v. Satish* (2005) 3 SCC 114 and *Shivu and another v. RG, High Court of Karnataka* 2007 Cr.L.J. 1806)

11. In order to examine as to whether the chain of evidence proves the guilt of the appellants beyond reasonable doubt in committing the crime, we have carefully scanned the evidence led by the prosecution. The prosecution has examined the witnesses of the locality, who are neighbours of the appellants,

namely Yogita Sharma (PW-1), Balram Rathore (PW-2), Premlata (PW-3), Rakesh (PW-4), Rajesh Dabar (PW-5), Kanchan (PW-7), Prakash Dixit (PW-8), Savita (PW-9), Sanjay Kashyap (PW-10), Yogesh (PW-11) and Arvind Raghuvanshi (PW-12). These witnesses of the locality are consistent in their version. All of them have unequivocally deposed that the minor girl was always being treated by the appellants with extreme cruelty. They used to beat her and on hearing her cry whenever they used to ask the appellant Baby Singh, she used to give some or other lame explanation. Even the day prior to the date of the incident, she was badly beaten by the appellants. Premlata (PW-3), neighbour of the appellants, hearing the cry asked appellant Baby Singh as to why the victim was being beaten and why she is crying, Baby Singh said that “अरे अब ये नहीं जायेगी तो इसे बोरी मे भरके भेजेगे इसने बहुत परेशान कर दिया है।” Premlata further stated that on the date of incident, again appellant Rajesh, after returning from work, had beaten the victim. The evidence of all the witnesses of the neighbourhood is consistent about the cruel treatment being given by the appellants to the victim. There is nothing on record to suggest that these witnesses have any enmity with the accused persons. In his statement under Section 313 of the Cr.P.C. appellant Rajesh only said about the enmity with only one of the witnesses Sanjay Kashyap, but there is no explanation as to why all the witnesses of the locality are against him so as to falsely implicate the appellants for such an offence.

12. The prosecution has also examined Param Singh (PW-6) father of the victim, who had stated that he had handed over the custody of his daughter to the appellants as they had no issue. On 21.06.2012, the appellants had brought his daughter from his village to Indore. He also deposed that once the victim on telephone had informed to his wife that appellant Rajesh does wrong things with her and both the appellants used to beat her.

13. On a close scrutiny of the statement of the aforesaid witnesses, we find that all the witnesses have consistently stated that the appellants used to treat the victim with extreme cruelty. We find that the evidence of the aforesaid witnesses has been properly marshaled by the trial Court and we find no reason to take a different view in regard to the findings recorded by the trial Court on that basis. The aforesaid evidence of the residents of the locality about cruelty and beating is fully corroborated by the postmortem report Ex.P/ 12 confirming as many as 31 injuries on the body of the deceased proved by the evidence of Dr. A.K. Rastogi (PW-15) stating therein that: -

“इस केस में श्वासावरोध जिस प्रकार से हुआ है वह खाना खाते खाते संभव नहीं है, लेकिन यदि उसके साथ खाना खाते खाते मारपीट की गई हो तो संभव है। यह सही है कि उसके शरीर पर आई समस्त चोटों का सामूहिक प्रभाव बच्ची की उम्र को देखते हुये मृत्यु का कारण हो सकता है।”

14. Thus, the trial Court has rightly held that the cause of death was the cumulative effect of multiple injuries caused to a tender aged child, as has been opined in the postmortem report that the Injuries No.1, 2, 3, 5, 6, 20, 21 and 22 were just few hours before the death. Out of these injuries, Injuries No.1, 2 and 3 are on the parietal scalp and right frontal area.

15. As regards the charge of rape and unnatural sex, in the postmortem report, there is finding of availability of evidence of sexual assault both natural and unnatural. The vaginal opening showed old torn hymen, easily admitting one finger. As regards the vaginal examination, anal examination report and the head injury, Dr. A.K. Rastogi in his evidence has clearly stated that: -

“उसके दोनों पैरों और लेबिया मेजोरा को फैलाकर देखने पर हमने पाया था कि लेबिया मेनोरा पर रेडिस ब्लेक कलर का था और सफेद दृव्य उसके इंटर लेवियल फोल्ड के मध्य मौजूद था। उसमें रेडिस नील घाव जो कि उसमें 5 और 7 बजे घड़ी की पोजिसन पर थे, यह परीक्षण कई बार सेक्सुअल असाट करना इंगित करता है।

मृतिका के मल द्वार से आये मल द्वारा उसके पुठे सने हुये थे। मल को हटाने के बाद उसका मलद्वार चौड़ा था एवं उसमें आसानी से दो उंगलियां जा रही थी। उसके मलद्वार के आसपास का एरिया ब्लेकिस अर्थात डार्क और पुराना फटा हुआ घाव जो कि 1,2 और 11 बजे घड़ी की पोजिसन पर था, जो कि रेडिस डिसकलरेसन मलद्वार पर था, उसमें पीले सफेद रंग का कुछ दृव्य मल से सना हुआ जमा था, यह परीक्षण यह बताता है कि मृतिका के साथ कई बार सेक्सुअल असाट किया गया था।

उसकी खोपड़ी के स्काल्प में खून जमा था। उसके दिमाग की झिल्ली स्वस्थ थी। ब्रेन कंजस्टेड था।

उसके शरीर पर कई घाव थे, जो कि विभिन्न समय के थे, यह घाव हार्ड एवं ब्लंड आब्जेक्ट से पहुंचाना जाना पाया गया था, उसका रेडियोलॉजिकल परीक्षण किया गया। मृतिका पर दोनों तरह के प्राकृतिक और अप्राकृतिक लेगिंग कृत्य किया गया था।”

16. Thus, the entire oral evidence as also the postmortem report Ex.P/12, the DNA report Ex.P/23 and the evidence of Dr. A.K. Rastogi (PW-15)

completely connects appellant Rajesh with the commission of the crime of rape, carnal sex and murder. The evidence of the residents of locality coupled with the postmortem report connects appellant Baby Singh for offence of murder. In the absence of any explanation by the appellants in whose custody the minor child was, to the aforesaid 31 injuries as described in the postmortem report, we have no hesitation to hold that the appellant Rajesh and Baby Singh are guilty of commission of murder of the victim a girl aged 7 years, who was residing with them in their home. The conviction of appellant Rajesh for offence under Sections 376 (2) (f) and 377 IPC is also rightly held to be proved by the trial Court, as no explanation has been offered about the findings regarding vaginal opening showing old torn hymen and also as to how in the anal swab of the victim, Y chromosomes of appellant Rajesh were found and in the underwear of the appellant Rajesh, DNA obtained from vaginal swab, clothes and anal swab of victim were matched. The opinion in the postmortem about sexual assault both natural and unnatural when she was all the time in the custody of the appellants leads to the only conclusion that the appellant Rajesh has committed the said offence of rape and carnal sex. Thus, in our considered view, the appellants having failed to explain the injuries, the findings of medical and the DNA report, the trial Court has committed no error in convicting the appellants, as aforesaid. We find that all the circumstances enumerated in paragraph 42 of the judgment by the trial Court have rightly been found to be proved against the appellants.

17. The submission of the learned counsel for the appellant Rajesh regarding faecal matter soiling over buttocks coming out through anal opening which does not find place in the postmortem report, cannot be a ground to disbelieve the findings recorded by the team of doctors, who had performed the postmortem; more particularly when no cross examination of Dr. A.K. Rasgoti was done on this aspect. The omission of the same in the panchayatnama will not lead to disbelieve the findings recorded in the postmortem report supported by oral evidence of Dr. A.K. Rastogi. Her contention that there was no intention of the appellants to cause death as the injuries were not of such nature, has no merit, in view of the law laid down by the Supreme Court in the case of *Virsa Singh v. State of Punjab* 1958 AIR 465, (sic. AIR 1958 S.C. 465) in which it has been held that once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of

nature to cause death. In the present case, Dr. A.K. Rastogi has clearly opined that looking to the tender age of the child, the cumulative effect of the injuries, which were caused to her, can be a cause of death. In the circumstances, we find no force in this contention.

18. Now, the question which requires consideration is whether the present case would fall in the category of "rarest of rare case", so as to justify awarding of capital punishment to appellant Rajesh. In the case of *Kamta Tiwari v. State of MP* AIR 1996 SC 2800 in somewhat similar circumstances, when the accused who was close to the family of the deceased to whom the victim used to call 'uncle' had committed rape and murdered the innocent hapless girl of 7 years, the Supreme Court while maintaining the award of death sentence by treating the case as "rarest of rare case" has held that when an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes.

19. In the case of *State of UP v. Satish* (2005) 3 SCC 114, the Supreme Court upheld the death sentence in a case where the victim aged less than 6 years, was raped and thereafter murdered, treating it to be "rarest of rare case".

20. In a recent judgment delivered in the case of *Shankar Kisanrao Khade v. State of Maharashtra* JT 2013 (6) 225, considered various judgments of the Supreme Court on the issue, including *Gurvail Singh v. State of Punjab* 2013 Cr.L.J. 1460, *Bachan Singh v. State of Punjab* [1980 (2) SCC 684 = 1980 SCC (Cri) 580], *Rajendra Pralhadrao Wasnik v. State of Maharashtra* [JT 2012 (2) SC 560], *Devender Pal Singh v. Government of NCT of Delhi* [JT 2002 (3) SC 264], *Kamta Tiwari v. State of MP* [AIR 1996 SC 2800] and *Machhi Singh and other v. State of Punjab* [1983 (3) SCC 470], it has been held by the Supreme Court that aggravating circumstances (crime test) and mitigating circumstances (criminal test) were to be taken into account while deciding the issue of imposition of death penalty. It held that to award death sentence, even if both the tests are

satisfied as against the accused, the Court has to finally apply “rarest of rare case test”, which depends on perception of the society and not judge centric i.e. whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying this test, the Court has to look into variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of cases like rape and murder of minor girls intellectually challenged, suffering from physical disability old and infirm women with those disabilities etc. The Courts award death sentence because situation demands due to constitutional compulsion, reflection by the will of the people and not judge centric. It was further held the aggravating circumstances, to name few are that the offence was committed on the victim, who is innocent helpless or a person relies upon the trust of relationship like a child helpless woman and is inflicted with the crime by such a person. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society. Some of the mitigating circumstances enumerated in the case of *Shankar Kisanrao Khade v. State of Maharashtra* (supra) are the manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course as well as the chances of the accused of not indulging in commission of the offence against and the probability of the accused being reformed and rehabilitated and the condition of the accused shows that he was mentally disturbed. The Supreme Court clarified that the aggravating and mitigating circumstances shown are not exhaustive but are only illustrative.

21. Keeping in view the legal position as emerges from the various pronouncements of the Supreme Court, we have to examine as to whether the present case is a fit case calling for award of capital punishment.

22. Param Singh (PW-6) father of the victim stated that since the appellant Rajesh was his brother and he having demanded custody of the victim on account of his being issueless, he handed over custody of the victim to the appellants. The victim, on being handed over the custody of her to her uncle, accompanied them from her village at UP to Indore. The deceased was helpless girl aged about 7 years. Both the appellants continuously tortured her as would be clear from the injuries of various durations. They treated her with great extent of cruelty. The appellant Rajesh caused rape and carnal sex with her many times, as is clear from the postmortem report and DNA report. Their repeated beating to the victim caused multiple injuries all over her body, the

cumulative effect of which was her death. In our opinion, the crime was committed in cruel, diabolic and brutal manner. The innocent girl aged 7 years was subjected to such a barbaric treatment by the appellants, who were in a position of gaining her trust. Having regard to the vulnerability of the victim and the gruesome nature of the crime, we have no hesitation in holding that this case falls in the category of "rarest of rare case" where the sentence for death of appellant Rajesh has rightly been awarded by the trial Court and such a sentence eminently was desirable, which in our considered view, not only deters others from committing such atrocious crime, but also manifest society's abhorrence of such crime. This case not only shocks the judicial conscience but even the conscience of the society and in our view, the nature of crime and the situation demands award of death sentence to the appellant Rajesh.

23. In the circumstances, the reference made by the trial Court in regard to the death sentence awarded by it to appellant Rajesh is answered in affirmative and we hereby confirms the same. His conviction under Sections 302, 376 (2) (f) and 377 of the IPC is affirmed. The conviction of appellant Baby Singh under Sections 302 and 120-B of the IPC and her sentence of life imprisonment and 10 years RI respectively are also affirmed. Both the appeals filed by the accused / appellants are hereby dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 1154

INCOME TAX APPEAL

Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice Subhash Kakade

I.T.A. No. 112/1999 (Jabalpur) decided on 3 January, 2014

COMMISSIONER OF INCOME TAX, JABALPUR

...Appellant

Vs.

VINDHYA TALALINKS LTD. REWA

...Respondent

Income Tax Act (43 of 1961), Sections 143(3), 251, 263 - Limitation - Whether limitation for passing an order u/s 263 of Income Tax Act would be two years from the financial year 1994-95 in which the assessment order dt. 23.11.1994 was passed or shall be two years from the date of financial year 1995-96 in which the appellate order was given effect to on 04.04.1995 - Held - Limitation of two years, for

passing an order u/s 263 shall reckon from original assessment order u/s 143(3) of the Act and not from the order u/s 251 of the Act by which the order passed by the Commissioner, Income Tax (Appeals) was given effect to - Order u/s 263 was barred by limitation - Appeal dismissed.
(Paras 4 & 16)

आयकर अधिनियम (1961 का 43), धाराएं 143(3), 251, 263 - परिसीमा - क्या आयकर अधिनियम की धारा 263 के अंतर्गत आदेश पारित करने के लिये परिसीमा, वित्तीय वर्ष 1994-95, जब निर्धारण आदेश दि. 23.11.1994 पारित किया गया था, से दो वर्ष होगी या वित्तीय वर्ष 1995-96 जब अपील आदेश को 04.04.1995 को प्रभावी बनाया गया था, से दो वर्ष होगी - अभिनिर्धारित - धारा 263 के अंतर्गत आदेश पारित करने के लिये परिसीमा के दो वर्ष, अधिनियम की धारा 143(3) के अंतर्गत मूल निर्धारण आदेश से आरंभ होगी और न कि अधिनियम की धारा 251 के अंतर्गत आदेश से, जिसके द्वारा आयकर आयुक्त (अपील) द्वारा पारित आदेश को प्रभावी बनाया गया था - धारा 263 के अंतर्गत आदेश परिसीमा द्वारा वर्जित - अपील खारिज।

Cases referred :

(1995) 212 ITR 639 (SC), (1996) 159 ITR 57 (KR), (2003) 259 ITR 420 (Raj.).

Sanjay Lal, for the appellant.

C.S. Agrawal with *Vikram Singh*, for the respondent.

ORDER

The Order of the Court was delivered by :
KRISHN KUMAR LAHOTI, J. :- This appeal is directed against an order dt.31.5.1999 passed by the Income Tax Appellate Tribunal, Jabalpur Bench, Jabalpur in Case No. ITA/132/Jab/1998, by which an appeal preferred by the respondent, against an order dt.25.3.1998 by the CIT, Jabalpur u/s 263 of the Income Tax Act 1961, was allowed and the order of Commissioner of Income Tax was set aside.

2- This appeal was admitted on 22.10.2001 on the following substantial question of law:

"Whether the Income Tax Appellate Tribunal was justified in coming to the conclusion that the order of

Commissioner passed under Section 263 of the Act was barred by time ?”

3- Learned counsel for the appellant submitted that the Tribunal erred in setting aside the order passed by the CIT, Jabalpur merely on the ground that the order passed u/s 263 was barred by limitation. The limitation shall commence from the date of order passed by the assessing officer in compliance of the order passed by the appellate authority and the order of CIT was well within the time. Reliance is placed to a judgment of Apex Court in *Hind Wire Industries Ltd. Vs. Commissioner of Income Tax*, (1995) 212 ITR 639(SC) and also to a Division Bench of Karnataka High Court in *Commissioner of Income Tax vs. Mysore Iron & Steel Ltd.*, (1996) 159 ITR 57 (KR).

4- Shri C.S.Agrawal, learned Sr.counsel opposed the aforesaid contention on the ground that in fact the limitation had commenced from the date of assessment order passed by the assessing officer and not from the date on which the appellate order was given effect to. It was submitted that to consider this aspect, the entire order of the CIT may be looked into and from perusal of the entire order it can very well be ascertained that in fact it was an original order passed by the assessing officer, which the CIT had set aside in revision. He has placed reliance to a judgment of *Rajasthan High Court in Commissioner of Income tax vs. Hemraj Udyog*, (2003) 259 ITR 420 (Raj) and submitted that the Tribunal has rightly set aside the order passed by the Commissioner, in which there is no error. It was submitted that the question of law as framed does not arise.

5. To appreciate the rival contentions of the parties, it would be appropriate if the factual position in the case is stated. In this case, assessment order was passed on 23.11.94. Against this order an appeal was filed before the CITA, which was allowed on 7.2.95. The appellate order was given effect to by the assessing officer on 4.4.95. The audit had raised an objection that the order of the assessing officer dt.23.11.94 was prejudicial to the interest of revenue. On such an objection, the CIT Jabalpur had initiated proceedings u/s 263 of the Income Tax Act and passed an order on 25.3.98. The question which arises in this appeal is whether the limitation for passing an order u/s 263 of the Income Tax Act would be two years from the financial year 1994-95 in which the assessment order dated 23.11.1994 was passed or shall be

two years from the date of financial year 1995-96 in which the appellate order was given effect to on 4.4.95. The CIT Jabalpur had found that as the appellate order was given effect to on 4.4.95 so an order u/s 263 could have been passed within two years from the date of assessment year and accordingly the order was passed on 25.3.98 while the contention of the assessee was that the order dt.4.4.95 was u/s 251 of the Income Tax Act by which only appellate order was given effect to and in fact was not an assessment order, so there was no question of initiating proceedings u/s 263 against such an order and assessment order u/s 143(3) of the Act was passed on 23.11.94, so order u/s 263 was barred by limitation.

6- To appreciate the aforesaid contention it would be appropriate if the relevant provisions, as contained u/s 143(3), 251 and 263 of the Income Tax Act are referred which read thus :

“143. (3) On the day specified in the notice,—

(i) issued under clause (i) of sub-section (2), or as soon afterwards as may be, after hearing such evidence and after taking into account such particulars as the assessee may produce, the Assessing Officer shall, by an order in writing, allow or reject the claim or claims specified in such notice and make an assessment determining the total income or loss accordingly, and determine the sum payable by the assessee on the basis of such assessment;

(ii) issued under clause (ii) of sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment:

Provided that in the case of a—

(a) research association referred to in clause (21) of section

10;

(b) news agency referred to in clause (22B) of section 10;

(c) association or institution referred to in clause (23A) of section 10;

(d) institution referred to in clause (23B) of section 10;

(e) fund or institution referred to in sub-clause (iv) or trust or institution referred to in sub-clause (v) or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via) of clause (23C) of section 10,

“which is required to furnish the return of income under sub-section (4C) of section 139, no order making an assessment of the total income or loss of such research association, news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, shall be made by the Assessing Officer, without giving effect to the provisions of section 10, unless—

(i) the Assessing Officer has intimated the Central Government or the prescribed authority the contravention of the provisions of clause (21) or clause (22B) or clause (23A) or clause (23B) or sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, as the case may be, by such research association, news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, where in his view such contravention has taken place; and

(ii) the approval granted to such research association or other association or fund or trust or institution or university or other educational institution or hospital or other medical institution has been withdrawn or notification issued in respect of such news agency or fund or trust or institution has been rescinded:

Provided further that where the Assessing Officer is satisfied

that the activities of the university, college or other institution referred to in clause (ii) and clause (iii) of sub-section (1) of section 35 are not being carried out in accordance with all or any of the conditions subject to which such university, college or other institution was approved, he may, after giving a reasonable opportunity of showing cause against the proposed withdrawal to the concerned university, college or other institution, recommend to the Central Government to withdraw the approval and that Government may by order, withdraw the approval and forward a copy of the order to the concerned university, college or other institution and the Assessing Officer.”

“251. Powers of the Commissioner (Appeals).- (1) In disposing of an appeal, the Commissioner (Appeals) shall have the following powers—

(a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment;

(aa) in an appeal against the order of assessment in respect of which the proceeding before the Settlement Commission abates under section 245HA, he may, after taking into consideration all the material and other information produced by the assessee before, or the results of the inquiry held or evidence recorded by, the Settlement Commission, in the course of the proceeding before it and such other material as may be brought on his record, confirm, reduce, enhance or annul the assessment;

(b) in an appeal against an order imposing a penalty, he may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty;

(c) in any other case, he may pass such orders in the appeal as he thinks fit.

(2) The Commissioner (Appeals) shall not enhance an assessment or a penalty or reduce the amount of refund unless

the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction.

Explanation.—In disposing of an appeal, the Commissioner (Appeals) may consider and decide any matter arising out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the appellant.”

“263. Revision of orders prejudicial to revenue. - (1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

Explanation.—For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,—

(a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include—

(i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorised by the Board in this behalf under section 120;

“(b) “record” shall include and shall be deemed always to have

included] all records relating to any proceeding under this Act available at the time of examination by the Commissioner;"

"(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988], the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended] to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

(emphasis supplied)

7- First question which arises for our consideration is whether, order passed u/s 251 can be treated as an order u/s 143 of the Income Tax Act and if such an order is passed u/s 143, the order dt.4.4.95 would merge in the original order. To appreciate the aforesaid, it would be appropriate if the order Annexure-P/2 dt.25.3.98 passed u/s 263 of the Income Tax Act by the CIT, Jabalpur may be looked into :

"9. I am satisfied that the assessment order passed u/s 143(3) by the Assessing Officer for above assessment year

is erroneous in so far as it is prejudicial to the interest of revenue. In exercise of the powers conferred on me under section 263 of the Income tax Act, I set aside the assessment order for the assessment year 1993-94 passed u/s 143(3) with the direction that it should be completed afresh after examining whether right issue expenses of Rs.12.17 lakhs can be treated as capital expenses and added to the disclosed income and whether deduction u/s 80I needed recomputation in view of section 80I(6) of the Income tax Act. The assessment should be completed after according reasonable opportunity to the assessee and as per law.”

8- Against the initial order of assessment, the assessee had filed an appeal before the Commissioner of Income Tax (Appeals) Jabalpur which was decided on 7.2.1995 by an order Annexure-R/1, which reads thus :

“ The first ground in this case is regarding disallowance of relief U/s 80HH & 80 I on Interest Receipts of Rs.27,65,523/-. Shri H.S. Shrivastava, Advocate who appeared before me on behalf of the appellant stated that the facts of the case were the same as in earlier years and on similar set of circumstances appeal in earlier years has been allowed. Following my order No.J/DCIT(A)/47/93-94 dtd.16.2.1994 in the case of the appellant for the Assessment Year 1992-93 appeal on this issue is allowed. The Assessing Officer shall allow relief u/s 80HH & 80I of the I.T. Act after including the interest Receipts of Rs.27,523/- in the Industrial income eligible for benefit of relief U/s 80HH & 80I of the I.T. Act.

2. The next ground is regarding relief U/s 80I. The Assessing Officer has allowed such relief after allowing deduction u/s 80HH on the residue of income. In this regard it was stated that the appeal on this issue was also allowed in the earlier years. Following my order dtd.16.2.1994 for the A.Y.1992-93 in the case of the appellant appeal on this issue is allowed. The Assessing Officer shall allow relief u/s 80I of

the I.T. Act independent of deduction u/s 80HH. Appeal on this issue succeeds.

3. The next ground is regarding disallowance at Rs.11,052/- on account of Marriage Expenses of staff. It was stated that the expenditure was in the nature of Staff welfare Expenditure for maintaining good employer-employee relations and a specific sum on the occasion of marriage of Company's employee or their off-springs was contribution by the Company in this regard and that this was on allowable expenditure. It is seen that the Assessing Officer has made the disallowance keeping in view the past history of the case wherein such disallowance was confirmed in appeal also. It is seen that, last year such contribution was at Rs.48,450/- which was disallowed and upheld in appeal. The expenses this year at Rs.11,052/- appear to be quite reasonable and therefore, they deserve to be allowed. Appeal on this issue is allowed.

4. The next ground is regarding Festival expenses at Rs.51,968/-. In this regard it was stated that the expenditure was on various social and religious festivals and therefore, it was not disallowable. The Assessing Officer in his order in this regard has observed that the expenses were neither varifiable nor they constitutes business necessity. Therefore, he disallowed 1/3rd of the claim as in the earlier year. Following my order for the A.Y.1992-93 in the case of the appellant dtd.16.2.1994, this disallowance is upheld.

5. Lastly disallowance of expenses at Rs.1,17,192/- on running of I.T.I. At Rewa is contested. In this regard the submissions made before the Assessing Officer were reiterated before me. The Assessing Officer on the claim of these expenses has observed that the running of I.T.I. Where the benefit was extended to general public and employee's dependents also may be a laudable object but it is not a business necessity. The business necessity of running of the I.T.I. by the appellant is not established. Therefore, the order

of the Assessing Officer on this issue is upheld.

In the result the appeal is partly allowed.”

9- In compliance of the order Annexure-R/1 dt.7.2.1995 the Assessing Officer had passed an order Annexure-R/2 dt.4.4.1995 which reads thus :

“ORDER UNDER SECTION 251 OF THE INCOME TAX
ACT, 1961

Consequent to the appellate order of C.I.T. (appeals)/I.T.A.T., bearing Appeal No. J/ Dy. CIT (Asstt) /136/ 94-95 dated 7-2-95 the assessment order, for the above asstt. Year, is revised accordingly.

The revised total income is computed as under :-

Total income originally assessed Rs.8,24,56,810/-

Less : Relief allowed in appeal :

Para 1	Deduction u/s 80HH
	18,23,09,374
	<u>37,042</u>
	18,24,72,332
	<u>(-) 11,052</u>

80 HH 20% 18,24,61,280

	3,64,92,264/-	
Para 2 80I 25% of 18,24,77,322/-	<u>4,56,15,320/-</u>	
	<u>8,29,12,544/-</u>	
Less already allowed	<u>7,18,82,950/-</u>	1,02,24,634
		<u>11,052</u>
		<u>7,22,24,124</u>

Issue revised demand notice and challan. Give Credit for taxes paid as per I.T.M.S. 150 and challans on record.”

10- From perusal of the aforesaid, it is apparent that the order Annexure-R/2 was passed u/s 251 of the Income Tax Act and it was an order to give effect to the order passed by the CIT (appeals) dt.7.2.95 and as per the aforesaid order the income was recalculated. From perusal of the order

dt.25.3.98, it is apparent that the order was revised by the CIT on the ground that the assessee had debited Rs.12.17 lakhs to profit and loss accounts being expenditure of issue of share, but aforesaid expenditure was wrongly debited while it was incurred to raise capital. This expenditure was debited in the original assessment order and there was nothing in the order Annexure-P/2 that the cognizance was taken to the order dated 4.4.1995 by which the appellate order was given effect to.

11- The Commissioner of Income Tax had issued a notice on 27.2.1998 (Annexure-R/3) intimating that the order dt.4.4.1995 u/s 143(3) of the Income Tax Act was erroneous as it was prejudicial to the interest of revenue. The relevant portion of notice reads as under :

“Sir,

Sub: Notice u/s 263 of the Income Tax Act, 1961-
A. Yr.1993-94.

....

On examination of your income tax records for the A. Yr. 1993-94, I found that the order(s) of assessment passed in your case for that/those year(s) on 04.04.1995 u/s 143(3) of the I.T. Act, 1961 is/are erroneous in so far following respects:

Assessment year 1993-94 was the first assessment year in which a positive income of Rs.8,65,59,094/- was offered claiming deductions under section 80HH & 80I without deducting past years losses. Total deductions of Rs.3,98,51,592/- were allowed to the assessee u/s 80HH & 80I for the unit II which was not correct. After adjusting the past years losses of Rs.3,89,87,494/- of the unit II the income is worked out to Rs.4,95,71,600/- on which deductions u/s 80HH is Rs.99,14,320/- and 80I is Rs.1,23,92,50/- were to be allowed. The mistake resulted in excess allowance of deductions of Rs.1,75,44,390/- for the period from 4/93 to 11/94, Interest allowed for refunds Rs.3,25,879/- in May 1994 was also required to be withdrawn.

2. It has been judicially held that the expenditure on the issue of right issue is not deductible u/s 37(1) of the I.T. Act, being of Capital Nature. Expenditure of issue of right issue is 12.17 lacs debited to the P & L Account was neither disallowed while processing the return u/s 143(1)(a) on 10.05.94 nor at the time of making regular assessment of revising the assessment u/s 250 on 04.04.95.

In exercise of the powers conferred on me by section 263 of the I.T. Act, 1961, I propose to suitably revise the order(s) of assessment. Before doing so I would like to afford you an opportunity to explain your case. Your case is fixed for hearing on 17.03.1998 at 11.00 am at my office in Central Revenue Building, Napier Town, Jabalpur. You may attend in person or through an authorised representative. Any written representation sent by you in this regard will also be considered.

Please note that in case none appears nor any representation is received it will be presumed that you have no objection to the proposed action, and the case will be decided on merits."

From perusal of the aforesaid, it is apparent that it was original assessment order u/s 143(3) of the Income Tax Act, to which the Commissioner of Income Tax took cognizance u/s 263 of the Income Tax Act and issued the aforesaid notice Annexure-R/3. So far as the order Annexure-R/2 is concerned, it was an order u/s 251 of the Income Tax Act and was not an order (sic. order) of assessment and in fact it was an order by which the appellate order Annexure-R/1 was given effect to.

12- Now in the light of the aforesaid factual position, the legal position as finds place in section 263 may be looked into. Section 263 specifically provides the revisional powers of the Commissioner in respect of orders prejudicial to the revenue. Sub-section (3) of section 263 specifically provides that an order in revision under this section may be passed at any time in case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal,

the High Court or the Supreme Court. But, the Legislation in its wisdom has not included an Appellate order of Commissioner in the said provision, meaning thereby if an order of Commissioner in appeal has been given effect to, such order has been specifically not included in sub-section (3). The aforesaid provision specifically provides the order passed by the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court, meaning thereby that if the order passed by the Commissioner of Income Tax (Appeals) has been given effect to, the aforesaid orders shall not be a ground for revision u/s 263 of the Income Tax Act. The word 'Commissioner of Income Tax' has not been provided in sub-section (3) of section 263 of the Act. Appellate Tribunal has been defined in section 2(4) of the Income Tax Act, which reads thus :

“2(4) “Appellate Tribunal” means the Appellate Tribunal constituted under section 252;”

The aforesaid definition refers the Appellate Tribunal as provided in section 252 of the Act. Section 252 of the Act reads thus :

“252. Appellate Tribunal

(1) The Central Government shall constitute an Appellate Tribunal consisting of as many judicial and accountant members as it thinks fit to exercise the powers and discharge the functions conferred on the Appellate Tribunal by this Act.

(2) A judicial member shall be a person who has for at least ten years held a judicial office in the territory of India or who has been a member of the Central Legal Service and has held a post in Grade 1 of that Service or any equivalent or higher post for at least three years or who has been an advocate for at least ten years.

Explanation.- For the purposes of this sub- section,-

(i) in computing the period during which a person has held judicial office in the territory of India, there shall be included any period, after he has held any judicial office, during which the person has been an advocate

or has held the office of a member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law;

(ii) in computing the period during which a person has been an advocate, there shall be included any period during which the person has held judicial office or the office of a member of a Tribunal or any post, under the Union or a State, requiring special knowledge of law after he became an advocate.

(2A) An accountant member shall be a person who has for at least ten years been in the practice of accountancy as a chartered accountant under the Chartered Accountants Act, 1949 (38 of 1949), or as a registered accountant under any law formerly in force or partly as a registered accountant and partly as a chartered accountant, or who has been a member of the Indian Income- tax Service, Group A, and has held the post of Commissioner of Income- tax or any equivalent or higher post for at least three years.]

(3) The Central Government shall ordinarily appoint a judicial member of the Appellate Tribunal to be the President thereof.

(4) The Central Government may appoint one or more members of the Appellate Tribunal to be the Vice- President or, as the case may be, Vice- Presidents thereof.

(4A) The Central Government may appoint one of the Vice- Presidents of the Appellate Tribunal to be the Senior Vice- President thereof.

(5) The Senior Vice- President or a Vice- President] shall exercise such of the powers and perform such of the functions of the President as may be delegated to him by the President by a general or special order in writing. "

From perusal of these provisions, it is apparent that the order passed by the CIT(A) has not been included in the definition of Appellate Tribunal so the

provision of sub-section (3) of Section 263 will not be applicable to an order giving effect to the appellate order passed by the CIT(A).

13- In the present case, contents of the notice specifically state that against the assessment order, the powers were exercised by the Commissioner, Income Tax u/s 263 of the Act. Even the order which has been passed u/s 263 specifically shows that the aforesaid powers were exercised against the original assessment order and not against the order which was given effect to by the assessing officer. Apart from this, in the order u/s 251, there was nothing, except to give effect to the order Annexure-R/1. In the aforesaid circumstances, the limitation as provided u/s 263(2) would be applicable from the order passed by the assessing officer. The assessment order was passed on 23.11.1994 and the financial year which was relevant for the aforesaid order was 1994-95. Meaning thereby the limitation of two years was available from 31.3.1995 i.e. upto 31.3.1997. But, in the present case, notice u/s 263 was issued on 27.2.1998 which was beyond the period of limitation. Apart from this cognizance was taken by the Commissioner on the report of Audit, which was in respect of Assessment order dated 23.11.1994.

14- A Division Bench of Rajasthan High Court in *Hemraj Udyog* (supra) considering the legal position held thus :

“6. The admitted facts are that original assessment order has been made on 16th Dec., 1988. Assessee thereafter filed the appeal before the CIT(A) but no ground was taken regarding deduction under s.32AB of the Act. Thereafter, CIT(A) has issued notice and passed order under s.263 on 26th Feb., 1992, directing the AO to withdraw the deduction allowed under s.32AB of the Act.

7. Mr. Singhal, learned counsel for the assessee, has brought to our notice the decision of apex Court in the case of *CIT vs. Shri Arbuda Mills Ltd.* (1998) 147 CTR (SC) 474, wherein their Lordships held “item 5, which are not subject-matter of the appeal in view of retrospective insertion of Explan.(c) to sub-s.(1) of s.263, the powers of CIT shall extend and shall be deemed always to have extended to them because

the same had not been considered and decided in appeal filed by the assessee.”

8. It is true that CIT has the power to revise the order of the AO on the issues which are not taken in appeal before the CIT(A), but if the limitation has expired, CIT cannot revise the original order of ITO beyond the period of limitation. Period of limitation in this case is two years from the date of order sought to be revised i.e. 16th Dec., 1988, but the order of CIT under s.263 is dt. 26th Feb., 1992 i.e., beyond two years.”

The aforesaid order of Rajasthan High Court is applicable in the facts of the present case and the powers u/s 263 could have been exercised within a period of two years from the end of financial year on 31.3.1995.

15- So far as judgment of the Apex Court in *Hind wire* (supra) is concerned, in the aforesaid case the factual position was entirely different. It was an order of rectification by the assessing officer and the Apex Court considering the position held that the rectification order merges in the original assessment order and limitation would start from the date when the rectification order was passed. The Apex Court in para 7 of the aforesaid report clarified the position thus :

“7. In view of these authorities taking the view that the word 'any' in the expression “order sought to be amended” would mean even the rectified order, we are satisfied that the High Court was wrong in setting aside the decision of the Tribunal. Shri G. Vishwanath Iyer, learned senior counsel cited before us the decisions of the Calcutta, Gujarat, Madras and Orissa High Courts in *Bharat Textile Works & Ors. vs. ITO* 1978 CTR (Guj) 435 : (1978) 114 ITR 28 (Guj), *Ahmedabad Sarangpur Mills Co.Ltd. vs. A.S. Manohar*, *ITO* (1976) 102 ITR 712 (Guj), *Kothari (Madras) Ltd. vs. Agri. ITO* (1988) 74 CTR (Mad) 73 : (1989) 177 ITR 538 (Mad) and *CIT vs. Kalinga Tubes* (1991) 187 ITR 394 (Ori) respectively in support of his contention that the word 'order' used in the expression “order sought to be amended” would mean the original order of the assessment. As against this, Dr. Shankar

Ghose, learned senior counsel referred us to the decisions of the Patna and Karnataka High Courts in *Bihar State Road Transport Corpn. vs. CIT* (1986) 55 CTR (Pat) 270 : (1986) 162 ITR 114 (Pat) and *CIT vs. Mysore Iron & Steel Ltd.* (1985) 46 CTR (Kar) 93 : (1986) 157 ITR 531 (Kar) respectively which decisions have taken the contrary view. However, in view of the decisions of this Court referred to above, we are of the opinion that the view taken by the Tribunal in the present case is the correct one."

But, in the present case, the original assessment order was neither rectified nor was amended, the assessing officer had given effect to the order passed by the appellate authority and virtually it was a compliance order u/s 251 of the Income Tax Act, and not an order by which the original assessment order was rectified. So far as the judgment of Karnataka High Court is concerned, the Karnataka High Court was considering the legal position where an assessment was reopened, held that then the initial order of assessment automatically stands canceled and order of re-assessment takes place of original assessment order. In the aforesaid circumstances, period of limitation, therefore, to be reckoned from the date of re-assessment order and not from the date of original assessment order or earlier rectification order.

16- In the present case, the position is entirely different, the subsequent order of assessing officer was neither an order of re-assessment nor an order of rectification, but, was an order by which the order passed by the Commissioner of Income Tax (Appeals) Annexure-R/1 was given effect to and virtually it was an order u/s 251 of the Income Tax Act. This order cannot be treated as an order of re-assessment or rectification order. The Judgment of Karnataka High Court is not applicable. As stated hereinabove the Legislation in its wisdom has not included in section 263(3) the order of Commissioner if it was given effect to, relevant for the purpose of section 263 of the Income Tax Act, then there was no question of reckoning the limitation from the date when the order of Commissioner was given effect to. Apart from this, logically when the Commissioner of Income Tax (Appeals) had decided the appeal and aforesaid order is to be given effect to, than the same authority could not have taken cognizance u/s 263 of the Income Tax Act on

the ground that the aforesaid order was prejudicial to the interest of revenue. It is original order of assessment which could have caused to the Commissioner to invoke the powers of revision if it was found that the order was prejudicial to the interest of revenue and in any case in the present case it was original assessment order against which such powers were exercised. The order u/s 263 of the Income Tax Act itself reveals that the aforesaid powers were exercised against the original assessment order and not against the order u/s 251. The Legislation when in its wisdom has not included the aforesaid order relevant for the purpose of section 263 of the Income Tax Act then the Commissioner was not entitled to reckon limitation from the date when the order passed by the Commissioner, Income tax (Appeals) was given effect to. In the aforesaid circumstances, the Income Tax Appellate Tribunal was right in holding that the order u/s 263 was barred by limitation and rightly set aside the order of the Commissioner, Income tax.

17- In the aforesaid circumstances, the substantial question of law as framed on 22.10.2001, is decided against the appellant and in favour of the assessee. Resultantly, this appeal is found without merits and dismissed with no order as to costs.

Appeal dismissed.

I.L.R. [2014] M.P., 1172

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice U.C. Maheshwari

M.Cr.C. No. 14676/2012 (Jabalpur) decided on 21 March, 2013

DHANRAJ

... Applicant

Vs.

ASHOK KUMAR

... Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Negotiable Instruments Act (26 of 1881), Section 138 & General Clauses Act (10 of 1897), Section 27 - Service of notice - Notice regarding demand of sum of the cheque sent by complainant within prescribed period at the correct address of the applicant and concerning official of the post office has placed the same for its delivery at the correct address of the applicant - At this stage contrary to the aforesaid

provision of presumption no inference could be drawn in the matter by invoking the inherent power of this court enumerated u/s 482 of Cr.P.C. - Petition dismissed. (Paras 3 & 7)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, परक्राम्य लिखित अधिनियम (1881 का 26), धारा 138 व साधारण खण्ड अधिनियम (1897 का 10), धारा 27 - नोटिस की तामीली - शिकायतकर्ता ने चेक की रकम की मांग से संबंधित नोटिस आवेदक के सही पते पर विहित अवधि के भीतर भेजा और डाक कार्यालय के संबंधित कर्मचारी ने आवेदक के सही पते पर उसे भेजे जाने के लिये उसे रखा - इस प्रक्रम पर उपधारणा के उपरोक्त उपबंध के विपरीत, मामले में द.प्र.स. की धारा 482 के अंतर्गत प्रदत्त इस न्यायालय की अंतर्निहित शक्ति का अवलंब लेकर कोई निष्कर्ष नहीं निकाला जा सकता - याचिका खारिज।

Ajay Kumar Jain, for the applicant.

Ramesh Tamrakar, for the non-applicant.

ORDER

U.C. MAHESHWARI, J. :- The applicant/ accused has filed this petition under Section 482 of Cr. P. C. being aggrieved by the order dated 28.9.2012 passed by 1st Additional Sessions Judge, Gadarwara District Narsinghpur in Criminal Revision No.104/12 affirming the order dated 2.9.2009 passed by JMFC Gadarwara in Criminal Case No.1076/2009, whereby in a private complaint filed by the respondent for prosecution of the applicant the cognizance of the offence of Section 138 of Negotiable Instruments Act has been taken.

2. Petitioner's counsel after taking me through the papers placed on record and the averments of the petition argued that the impugned cognizance was taken by the trial Court without following the procedure prescribed under Section 200 and 202 of Cr. P. C. As such neither the statement of complainant nor his witnesses were recorded and only on the basis of some affidavit of complainant the cognizance of the aforesaid offence was taken, which is not permissible under the law. In continuation he said that as per averments of the complaint the statutory notice to make the demand of sum of the cheque, as alleged was sent through the registered post but the same was not served on the applicant as reflected from the acknowledgment due receipt but taking into consideration such acknowledgment due receipt the trial Court has taken

the cognizance, such approach of the trial Court is not sustainable under the law and prayed for quashment of the impugned complaint by admitting and allowing this petition.

3. On the other hand responding aforesaid arguments by justifying the impugned order Shri Ramesh Tamrakar, learned counsel of the respondent argued that the approach of the trial Court being based on proper appreciation of the evidence available on the record so also in compliance of the provision of Section 145 of Negotiable Instruments Act as well as in accordance with provisions of presumption regarding service of notice through registered post on addressee enumerated under the General Clauses Act, Post Office Act and Evidence Act do not require any interference and prayed for dismissal of this petition.

4. Having heard keeping in view their arguments advanced, I have carefully gone through the papers placed on record along with the above mentioned acknowledgment due receipt (Ann. P.2.).

5. True it is that the impugned order has been passed by the trial Court by taking into consideration the affidavit of the complainant filed under Section 145 of the Negotiable Instruments Act and not after recording the statement of the complainant as well as his witnesses under Section 200 and 202 of Cr. P. C. but I am of the considered view that the provision of Section 145 of Negotiable Instruments Act is enacted by the Legislature to hold early trial of the case and when such affidavits are filed in support of the complaint then in that circumstance it was not necessary for the trial Court to record the statement of the complainant and his witnesses under Section 200 and 202 of Cr. P. C. So, I am not agree with the argument advanced by the petitioner's counsel in this regard. Hence, such argument is hereby failed.

6. So far other objection of the petitioner's counsel regarding service of the registered notice is concerned, it is apparent fact on record that statutory notice to make the demand of the sum of the disputed cheque was sent by the complaint through registered post within the prescribed limitation. True it is that as per acknowledgment due receipt the same is not signed by the applicant but signed by some other person. It is undisputed fact on record that such registered notice was sent on a correct address of the applicant, as the same

is also mentioned on the array of the petition by the applicant himself and to hold the service of notice send through registered post some provisions of the nature of presumption have been enacted by the Legislature in the above mentioned enactment referred by the respondent counsel. Out of them Section 27 of the General Clauses Act is read as under :

Section 27 in The General Clauses Act, 1897

27. [Meaning of service by post.- Where any [Central Act] or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression " serve" or either of the expressions " give" or " send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre- paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Apart the aforesaid the provision of Clause (e) of Section 114 of Evidence Act being relevant is read as under :

114. The Court may presume--

(e) that judicial and official acts have been regularly performed;

Besides the aforesaid under Clause (c) of Section 3 of Post Office Act the following provision has has been enacted :

(c) The delivery of a postal article at the house or office of the addressee, or to the addressee or his servant or agent or other person considered to be authorized to receive the article according to the usual manner of delivering postal articles to the addressee, shall be deemed to be delivery to the addressee.

7. In view of the above mentioned provisions if the case at hand is examined then prima-facie it is apparent that above mentioned statutory notice regarding demand of sum of the cheque has been sent by the complainant within the prescribed period on the correct address of the applicant and

concerning official of the post office has placed the same for its delivery at the correct address of the applicant. Hence, at this stage contrary to the aforesaid provision of presumption no inference could be drawn in the matter by invoking the inherent power of this Court enumerated under Section 482 of Cr. P. C.

8. In the aforesaid premises, at present I have not found any substance or circumstance in the matter requiring any interference by this Court under Section 482 of Cr. P. C. Hence, this petition is hereby dismissed. However, it is made clear that the petitioner shall be at liberty to rebut the aforesaid presumption as stated in the petition at the stage of trial, as the presumption is always rebutted by adducing the evidence.

9. The petition is dismissed as indicated above, with liberty aforesaid.

Petition dismissed.

I.L.R. [2014] M.P., 1176

MISCELLANEOUS CRIMINAL CASE

Before Mr. Justice J.K. Maheshwari

M.Cr.C. No. 4393/2013 (Indore) decided on 4 July, 2013

MANVINDER SINGH GILL (DR.)

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Pre-conception and Pre-natal diagnostic Techniques (Prohibition of Sex Selection), Adhiniyam, (57 of 1994), Section 28 - Quashing of complaint - Whether Additional Collectors, who filed the private complaints are authorized to file it as per Section 28 of the Adhiniyam, or they have been notified as appropriate authority - Held - Appointment of appropriate authority or officer authorized shall be as per the provisions of the Adhiniyam by the Central or the State Government - The order of nomination passed by the District Magistrate cannot be termed the order of appointment of appropriate authority or the officers authorized for the purpose of Section 17(2)(3)(b) and for the purpose of Section 28(1)(a) of the PC & PNDT Adhiniyam - Private complaints filed by Additional Collectors are not filed by the appropriate authority or the officer authorized - Complaint is not maintainable. (Paras 4 & 14)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, गर्भधारण पूर्व और प्रसवपूर्व निदान तकनीक (लिंग चयन का प्रतिषेध) अधिनियम (1994 का 57), धारा 28 – शिकायत को अभिखंडित किया जाना – अतिरिक्त कलेक्टर, जिन्होंने व्यक्तिगत शिकायतें प्रस्तुत की हैं क्या वे उसे अधिनियम की धारा 28 के अनुसार प्रस्तुत करने के लिये प्राधिकृत हैं अथवा उन्हें समुचित प्राधिकारी के रूप में अधिसूचित किया गया है – अभिनिर्धारित – समुचित प्राधिकारी या प्राधिकृत अधिकारों की नियुक्ति, केन्द्र या राज्य सरकार के अधिनियम के उपबंधोंनुसार होगी – जिला मजिस्ट्रेट द्वारा पारित नामांकन के आदेश को धारा 17(2)(3)(बी) एवं पीसी व पीएनडीटी अधिनियम की धारा 28(1)(ए) के प्रयोजन हेतु समुचित प्राधिकारी अथवा प्राधिकृत अधिकारी का नियुक्ति आदेश होना नहीं माना जा सकता – अतिरिक्त कलेक्टर द्वारा प्रस्तुत व्यक्तिगत शिकायतें समुचित प्राधिकारी या प्राधिकृत अधिकारी द्वारा प्रस्तुत नहीं – शिकायत पोषणीय नहीं।

Cases referred :

(1986) 4 SCC 326.

Sudha Shrivastava, for the applicant.

C.R. Karnik, G.A. for the non-applicant.

Satish Joshi, Nodal Officer under PC & PNDDT Adhiniyam, Indore.

ORDER

J.K. MAHESHWARI, J. :- Both these petitions have been filed under Section 482 of the Cr.P.C. seeking quashment of the complaint, not filed by the appropriate authority or officer authorised, and also the order taking cognizance passed by the trial Court in the complaint Case Nos.1839/2011 and 19564/2007.

02. In both these cases indicating the violations of the provisions of Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection), Adhiniyam 1994 (hereinafter be referred as 'PC & PNDDT Adhiniyam'), the complaints were filed against petitioners. Learned counsel Smt. Sudha Shrivastava referring the provisions of Section 28 of the Adhiniyam, put forth that the cognizance of an offence can be taken by the Court, on a complaint made by the appropriate authority concerned or filed by any officer authorized by the Central or State Government as the case may be or by the appropriate authority. If the complaint has not been filed by the aforementioned

authority, it is not maintainable. Counsel submits that in case any social organization, recognized as person has filed a complaint it may be maintained after giving a notice of 15 days to the appropriate authority. In the present case the complaints have been filed by the Additional Collectors, who are not the appropriate authority or authorized officer by notification of the Central or State Government, however the order passed by the Court taking cognizance on such complaint is unsustainable and liable to be set aside. Although other grounds have also been raised in this petition, but it is not required to be dealt with as this Court has proceeded to decide the issue of the competency of filing of the complaint, and of taking cognizance by the Court on such complaint.

03. On raising the issue of competence this Court vide order dated 19.06.2013 directed the Government Advocate to file the notification for declaration of the appropriate authority or the officer authorized for the purpose of filing of the complaint in district Indore. In furtherance to such directions the document notifying the appropriate authority by the State Government dated 04.04.2007 to the District Magistrate, Indore has been filed. The order passed by the District Magistrate, Indore dated 12.04.2007 and 28.7.2010 has also been filed whereby the Additional Collectors were nominated to help him in monitoring. It is submitted by learned Govt. Advocate that the complaints have been filed by the Officers nominated by the District Magistrate, therefore, it may be maintained and the Court below has rightly taken cognizance against petitioners.

04. Shri Satish Joshi, Nodal Officer, appointed under the PC & PNDT Adhiniyam present in the Court, was asked by the Court, whether Smt Renu Pant & Shri Anand Sharma Additional Collector, who filed the private complaints are authorized to file it as per Section 28 of the Adhiniyam, or they have been notified as appropriate authority. It is fairly conceded by him that they were authorized only for the monitoring, by the Collector, District Indore and not appointed as appropriate authority or officer authorized by the Central or the State Government by issuing notification. It is also admitted that up to this time as per notification dated 04.04.2007, District Magistrate, Indore is the only notified as appropriate authority and no other officer is authorised for the purpose of Section 28.

05. At this stage learned Govt. Advocate submits that the officer nominated

by Collector for the purpose of monitoring can file private complaint and the Court has rightly taken the cognizance. In M.Cr.C. No.4395/2013, it is contended that in the said case vide order dated 05.07.2007 on framing the charge against the applicant, he has accepted the guilt and deposited the fine amount of Rs.1000/, however at this stage after acceptance of the guilt, the plea of maintaining the complaint, filed by the incompetent authority is not entertainable.

06. After hearing learned Counsel appearing on behalf of the parties and to advert the rival contentions the relevant provisions of the Adhiniyam and the rules is required to be seen. Chapter-5 and Section 17 of the PC and PNDDT Adhiniyam specifies the Appropriate Authority and Advisory Committee. Chapter 7 relates to offences and penalties wherein Section 28 deals the issue how the cognizance of offences under the Adhiniyam may be taken by the Court. For the purpose of the present case, the aforesaid provisions are relevant, therefore, the relevant extract of Sections 17 of the PC and PNDDT Adhiniyam is reproduced as thus:

“17. Appropriate Authority and Advisory Committee.(1)

The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.

(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

(3) The officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be,

(a) when appointed for the whole of the State or the Union territory, consisting of the following three members:

(i) an officer of or above the rank of the Joint Director of Health and Family Welfare-Chairperson;

(ii) an eminent woman represent women's organisation; and

(iii) an officer of Law Department of the State or the Union territory concerned:

Provided that it shall be the duty of the State or the Union territory concerned to constitute multi-member State or Union territory level Appropriate Authority within three months of the coming into force of the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:

Provided further that any vacancy occurring therein shall be filled within three months of the occurrence;]

(b) when appointed for any part of the State or the union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

(4) the Appropriate Authority shall have the following functions, namely:

(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and make immediate action; and

(d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5), on application for registration and on complaints for suspension or cancellation of registration;

(e) to take appropriate legal action against the use of any sex selection technique by any person at any place, *suo motu* or brought to its notice and also to initiate independent investigations in such matter;

(f) to create public awareness against the practice of sex selection or pre-natal determination of sex;

(g) to supervise the implementation of the provisions of the Act and rules;

(h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;

(i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.]

(5) The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.

(6) The Advisory Committee shall consist of

(a) three medical experts from amongst gynaecologists, obstetricians, paediatricians and medical geneticists;

(b) one legal expert;

(c) one officer to represent the department dealing with information and publicity of the State Government or the Union Territory, as the case may be;

(d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organisations;

(7) xxxxxxxxxxxxxxxxxxxxxxx

(8) xxxxxxxxxxxxxxxxxxxxxxx"

07. Section 28 of the PC & PNDT Adhiniyam specifies that how the cognizances of the offence may be taken, however its language is relevant, which is reproduced as under :

"28. Cognizance of offences.(1) No court shall take

cognizance of an offence under this Act except on a complaint made by

(a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority; or

(b) a person who has given notice of not less than [fifteen days] in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.

Explanation.For the purpose of this clause “person includes a social organisation.

(2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.”

08. The Rules has also been framed which are known as Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter referred as the Rule of 1996). The said rule specifies the procedure regarding registration of the Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, registration of machines, its sale purchase, validity and renewal of registration. It further specifies how the record can be maintained and preserved and the circumstances in which pre-natal diagnostic may be made. It further clarifies the procedure for search and seizure by the appropriate authority or the officer authorized etc. Thus, either under the PC & PNDT Adhiniyam or Rules, it has not been clarified that who shall be the appropriate authority for

the purpose of Section 28 of the Adhiniyam. On the basis of the material available on record, it reveals that the State Government through Public Health and Family Welfare Department, Bhopal by a notification dated 4th April, 2007 appointed the District Magistrate, Indore as appropriate authority in exercise of the powers conferred under Section 17(2)(3)(b) of the Adhiniyam. The said notification is relevant, however it is reproduced as under :

लोक स्वास्थ्य एवं परिवार कल्याण विभाग मंत्रालय, वल्लभ भवन, भोपाल

भोपाल, दिनांक 4 अप्रैल, 2007

क्र.एफ-10-63-2001-सत्रह-मेडि-2.-इस विभाग के आदेश क्रमांक एफ-10-63-2001-सत्रह-मेडि-2 दिनांक 11 जुलाई 2001 को अतिष्ठित करते हुए, राज्य शासन, एतद् द्वारा भ्रण लिंग पता करने के लिये गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक का दुरुपयोग रोकने एवं इसके औचित्यपूर्ण प्रयोजनों के लिये उपयोग को विनियमित करने के उद्देश्य को ध्यान में रखते हुए, भारत सरकार, स्वास्थ्य एवं परिवार कल्याण मंत्रालय के पत्र क्र. 24026-111-06 दिनांक 12 फरवरी 2007 में दिये गये निर्देशों के पालन में गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक अधिनियम, 1994 की कंडिका 17 की उपकंडिका 2,3 (ब) के तहत जिला स्तर पर जिला मजिस्ट्रेट को उनकी अधिकारिता के जिले के लिये सक्षम प्राधिकारी (एप्रोप्रियेट अधिकारी) नियुक्त करता है।

जिला मजिस्ट्रेट गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक अधिनियम, 1994 के क्रियान्वयन की मानिट्रिंग में सहयोग हेतु यदि आवश्यक समझे तो उनके अधीन कार्यरत किसी एक्जीक्यूटिव मजिस्ट्रेट को नामांकित कर सकेंगे।

मध्यप्रदेश के राज्यपाल के नाम से तथा आदेशानुसार

ए.के. श्रीवास्तव, उपसचिव

09. In the above said notification the District Magistrate has been appointed as appropriate authority for their district and further authorized to nominate one Executive Magistrate for monitoring. The District Magistrate, Indore vide order dated 12.04.2007 has nominated Smt Renu Pant, Additional Collector to help him in monitoring in district Indore, however it is reproduced as under:

कार्यालय कलेक्टर, जिला इन्दौर म0प्र0

क्रमांक: अ. क. / स्वा / 07, इन्दौर, दिनांक 12 अप्रैल, 07

आदेश

1. म.प्र. शासन, लोक स्वास्थ्य एवं परिवार कल्याण विभाग, मंत्रालय, भोपाल की अधिसूचना क्रमांक: / एफ 10 / -83 / 2001 / सत्रह / मेडि-2, दिनांक 04 अप्रैल, 2007 द्वारा भ्रूण लिंग पता करने के लिए गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक का दुरुपयोग रोकने एवं इसके औचित्यपूर्ण प्रयोजनों के लिए उपयोग को विनियमित करने के उद्देश्य को ध्यान में रखते हुए गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक अधिनियम 1994 की कंडिका-17 की उपकंडिका 2.3 (ब) के तहत जिला स्तर पर जिला मजिस्ट्रेट को उनकी अधिकारिता के जिले के लिए सक्षम प्राधिकारी (एप्रोप्रियेट अधिकारी) नियुक्त किया गया है।

2. जिला मजिस्ट्रेट गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक अधिनियम, 1994 के क्रियान्वयन की मानिट्रिंग में सहयोग हेतु श्रीमति रेनु पन्त, अपर जिला दण्डाधिकारी, इंदौर को नामांकित किया जाता है।

जिला दण्डाधिकारी

जिला इंदौर

10. On transfer of Smt. Renu Pant, Additional Collector, the District Collector, Indore vide order dated 28.7.2010 further nominated Shri Anand Sharma, Additional Collector to help him in monitoring. The said order is reproduced as under :

कार्यालय कलेक्टर, जिला इन्दौर

क्रमांक / 222 / पी.एन.डी.टी / 10 इन्दौर, दिनांक 28 / 07 / 2010

// आदेश //

1. मध्यप्रदेश शासन, लोक स्वास्थ्य एवं परिवार कल्याण विभाग, मंत्रालय, भोपाल की अधिसूचना क्रमांक / एफ 10 / -83 / 2001 / सत्रह / मेडि-2, दिनांक 4 अप्रैल, 2007 द्वारा भ्रूण लिंग पता करने के लिए गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक का दुरुपयोग रोकने एवं इसके औचित्यपूर्ण प्रयोजनों के लिए उपयोग को विनियमित करने के उद्देश्य को ध्यान में रखते हुए गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक अधिनियम 1994 की कंडिका-17 की उपकंडिका 2.3 (ब) के तहत जिला स्तर पर जिला मजिस्ट्रेट को उनकी अधिकारिता के जिले के लिए सक्षम प्राधिकारी (एप्रोप्रियेट अधिकारी) नियुक्त करता है।

2. गर्भधारण पूर्व एवं प्रसव पूर्व निदान तकनीक अधिनियम 1994 के कियान्वयन की मॉनिटरिंग में सहयोग हेतु श्री आनंद शर्मा, अपर जिला दण्डाधिकारी इन्दौर को नामांकित किया जाता है।

जिला दण्डाधिकारी

जिला इन्दौर

11. In view of the language of Section 28, it is apparent that the cognizance by the Court can be taken for an offence under the PC & PNDDT Adhiniyam, on a complaint made by the Appropriate Authority concerned or any officer authorised in this behalf by the Central or the State Governments as the case may be or by the Appropriate Authority. As per Section 17 of the Adhiniyam, it is clear that the Central Government or the State Government by notification in the official gazette may appoint one or more Appropriate Authorities for each of the Union Territories or for whole or part of the State for the purpose of the said Adhiniyam. In case the Appropriate Authority has been appointed for whole of the State or the Union Territory it shall consist with three members which includes the Joint Director of Health and Family Welfare, eminent woman representing the Womens Organisation and an Officer of the Law Department of the Central or the State. But simultaneously the State Government has also conferred the power under Section 17(3) (b) to appoint any officer, for any part of the State. It appears that by the notification dated 4.04.2007 the District Magistrate, Indore was appointed as Appropriate Authority as per Section 17(3)(b) of the PC & PNDDT Adhiniyam, in Sub-Section 4 of Section 17 the functions of the Appropriate Authority has been specified. Section 17(4) (e) has been introduced by 14th amendment in 2003, by which the Authority may take appropriate legal action against the use of any such selection technique, suo motu or bringing it to the notice to the said authority or he may initiate the independent investigation in a manner as prescribed. On the conjoint reading of Section 17 & 28, it is clear that the appointment of Appropriate Authority for the purpose of Section 17(3)(a) or (b) shall be by the Central or State Government as the case may be, by issuing a notification in the official gazette. It further reveals, why the legislation has used the word "appropriate authority concerned" and "appropriate authority" again in Section 28 (1) (a). In the said context it is hereby explained that if the appropriate authority has been declared as per Section 17(3)(a) then the word "appropriate authority

concerned” is relevant but in cases of Section 17(3)(b) the word “appropriate authority” as used in Section 28(a) would be relevant. On reading Section 28(1) (a) it further reveals that the Central or the State Government can also appoint any officer authorized in this behalf, but the cognizance of an offence under the PC & PNDT Adhiniyam can be taken by the court only when a complaint is made by the “appropriate authority” or “by any officer authorized” by Central or State Government, otherwise not. It is relevant to note here that as per Section 28(1)(b) in case a social organization has filed a complaint being juristic person as explained in the explanation, then it may be maintained by giving 15 days notice to the Appropriate Authority indicating the intention of filing a complaint in the Court. As per Section 28 (3) on issuance of the notice by the person against whom the complaint is made the documents used against him shall be supplied. In the facts of the present case the provision of Section 28(1)(a) applies and Section 28(1)(b) is not attracted, however, it is not discussed in detail.

12. In both the above mentioned petitions, the record of the trial Court has been called. On perusal of the record of the private complaint No.1839/2011 in M.Cr.C. No.4393/2013 it is clear that the said private complaint has been filed by one Shri Anand Sharma, Additional Collector, Indore indicating himself as Competent Officer under the PC & PNDT Adhiniyam as per order dated 28.07.2010 issued by the Collector, District Indore. Similarly in M.Cr.C. No.4395/2013 the private complaint No.19564/07 has been filed by Smt. Renu Pant, Additional Collector specifying herself to be the Appropriate Authority or officer authorized under the PC & PNDT Adhiniyam as per order dated 12.04.2007 passed by the District Magistrate, Indore. In both these complaints the evidence before charge has not yet been recorded. The Court has passed the order of taking cognizance on the said private complaints, therefore, the issue to maintain such complaint and the order taking cognizance has been assailed before this Court.

13. In view of the notification issued by the State Government dated 4.4.2007, it is clear that in exercise of the power conferred under Section 17(2)(3)(b) the District Magistrate, Indore has been appointed as appropriate authority. No other order/notification issued by the State Government for appointment of appropriate authority or officer authorized, in favour of Smt

Renu Pant or Shri Anand Sharma, Additional Collectors has been filed. By the order passed by the Collector on 12.4.2007 and 28.7.2010 they have been nominated to help the appropriate authority in monitoring for execution of the PC & PNDT Adhiniyam. As per the requirement of law, in view of the language of Section 28(1)(a) the complaint may be maintained either by the appropriate authority or by the officer authorized by the Central or State Government. On the basis of nomination order of Collector in favour of Smt. Renu Pant and Shri Anand Sharma, they cannot be treated to be the appropriate authority or officers authorized for the purpose of Section 28 of the Adhiniyam

14. As per the discussion made herein above and looking to the notifications and the orders filed by the State Government, it is clear that the notification dated 4.4.2007 issued by the State Government declaring the District Magistrate, Indore as appropriate authority for the purposes of District Magistrate is in consonance to the provisions contained under Section 17(3)(b) of the PC & PNDT Adhiniyam. The orders passed by the Collector, District Indore nominating Smt. Renu Pant and Anand Sharma, Additional Collectors to help him in monitoring on 12.4.2007 and 28.7.2010 are not the orders of appointment of appropriate authority or the officers authorized to maintain the complaint. As discussed herein above the appointment of appropriate authority or officer authorized shall be as per the provisions of the Adhiniyam by the Central or the State Government. The order of nomination passed by the District Magistrate cannot be termed the order of appointment of appropriate authority or the officers authorized for the purpose of Section 17(2)(3)(b) and for the purpose of Section 28(1)(a) of the PC & PNDT Adhiniyam. Thus, it is to be held that the aforesaid private complaints filed by Smt. Renu Pant and Shri Anand Sharma, Additional Collectors are not filed by the appropriate authority or the officer authorized, therefore the said complaint is not maintainable. The order taking cognizance passed by the Court on such complaint is also unsustainable as per Section 28(1)(a) of the PC & PNDT Adhiniyam.

15. In view of the foregoing discussion, the view taken by this Court fortifies from the judgment of Hon'ble Apex Court in the Case of *A.K. Roy and another Versus State of Punjab and others* reported in (1986) 4 SCC

326. Hon'ble Apex Court in Paras 9, 10 & 11 has observed as under:

"09. It is common ground that the prosecution in the instant case has not been launched either by or with the written consent of the Central Government or the State Government. It therefore, becomes necessary to ascertain whether the Food Inspector, Faridkot was duly authorised to launch a prosecution. The Food Inspector had been conferred powers of the State Government under Section 20(1) of the Act viz. to initiate prosecutions for an offence under the Act, by the Food (Health) Authority i.e. the Director of Health Services. A mere perusal of the impugned notification dated September 7, 1972 makes it manifest that it was the Director of Health Services and not launch prosecutions for an offence under the Act. It is therefore clear that the Food Inspector is not a person who has been authorised by any general or special order issued by the Central Government or the State Government. There would be no problem if the State Government were to issue a notification under Section 20(1) of the Act conferring authority on the Food Inspector, Faridkot under Section 20(1) to launch prosecutions for an offence under the Act as is the practice in the other States.

10. A careful analysis of the language of Section 20(1) of the Act clearly shows that it inhibits institution of prosecutions for an offence under the Act except on fulfillment of one or the other of the two conditions. Either the prosecutions must be instituted by the Central Government or the State Government or a person authorised in that behalf by the Central Government or the State Government, or the prosecutions should be instituted with the written consent of any of the four specified categories of authorities or persons. If either of these two conditions is satisfied, there would be sufficient authority for the institution of such a prosecution for an offence under the Act. The provision contained in Section 20(1) of the Act does not contemplate the institution of a prosecution by any person.

other than those designated. The terms of Section 20(1) do not envisage further delegation of powers by the person authorised, except that such prosecution may be instituted with the written consent of the Central Government or the State Government or the person authorised. The use of the negative words in Section 20(1) "No prosecution for an offence under this Act shall be instituted except by or with the written consent of" plainly make the requirements of the section imperative. That conclusion of ours must necessarily follow from the well known rule of construction of inference to be drawn from the negative language used in a statute stated by Craies on Statute Law, 6th edn., p.263 in his own terse language: If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding.

(emphasis supplied)

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. The intention of the legislature in enacting Section 20(1) was to confer a power on the authorities specified therein which power had to be exercised in the manner provided and not otherwise.

11. The first part of Section 20(1) of the Act lays down the manner of launching prosecutions for an offence under the Act, not being an offence under Section 14 or Section 14-A. The second part provides for delegation of powers by the Central Government or the State Government. It enables that prosecutions for an offence under the Act can also be instituted with the written consent of the Central Government or the State Government or by a person authorised in that behalf, by a general or special order issued by the Central Government or

the State Government. The use of the words 'in this behalf' in Section 20(1) of the Act shows that the delegation of such power by the Central Government or the State Government by general or special order must be for a specific purpose, to authorise a designated person to institute such prosecutions on their behalf. The terms of Section 20(1) of the Act do not postulate further delegation by the person so authorised; he can only give his consent in writing when he is satisfied that a prima facie case exists in the facts of a particular case and records his reasons for the launching of such prosecution in the public interest."

16. It is relevant to observe here that the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Adhiniyam & Rules is special enactment. The said Adhiniyam has been introduced with an object to prohibit the sex selection. The legislature intent is to restrain the sex determination before or after conception and for regulation of Pre-natal Diagnostic Techniques for the purpose of and detecting genetic abnormalities and metabolic disorder or chromosomal or certain technical male formation or sex link disorder and for prevention of their misuse or sex determination leading to female foeticide. In this regard, the stringent provision has been made and the procedure has also been specified codifying all the possibilities. On commission of the offence and after conviction, jail sentence and suspension or cancellation of the registration of the Genetic Counselling Center, Generic Laboratory or Genetic Clinic is there. In case the Central Government by enacting the law making stringent provisions want to implement it, then the Central or State Government are also bound to follow the procedure as prescribed in the Adhiniyam. If the action is taken by the State authorities in violation to the statutory provisions and the procedure as prescribed, it can be writ large. It is a settled principle of law that no one can be deprived by the right without following the procedure established under the law. However, in the present case without following the provisions and the procedure prescribed under PC& PNDT Adhiniyam the private complaint has been filed by the State authorities whereupon the cognizance has been taken by the Court which cannot be regarded as per law and on account of violation of the statutory provisions the Court can pass the appropriate order for quashing such

complaints and by setting aside the order taking cognizance, in exercise of power under Section 482 of Cr.P.C.

17. At this stage the argument advanced by the learned Government Advocate regarding acceptance of the guilt in the private complaint of M.Cr.C. No.4395/2013 as per order dated 05.07.2007 while framing the charge requires consideration. It is not in dispute the said order was passed at the stage of framing of charge on moving an application for plea bargaining under Section 265 (d) of the Cr.P.C. As per section 265 (a) of the Cr.P.C. the provisions of the plea bargaining would not be attracted in socio economic offences. In addition to the aforesaid, the order accepting the guilt in plea bargaining passed by the Chief Judicial Magistrate, Indore has been set aside by the Sessions Court vide order dated 04.04.2008 on filing a revision by the petitioner. Thereafter, the revisional Court has directed to accused to appear on 21.04.2008, and since then the case is pending for evidence before charge. In such circumstances, even at the stage of recording of evidence before charge the question of maintainability of the complaint, not filed by the competent person can be raised. Thus the arguments so advanced by the learned Govt. Advocate, to take different view in M.Cr.C. No.4395/13 is hereby repelled..

18. In view of the foregoing discussion, in the considered opinion of this Court, M.Cr.C. Nos.4393/2013 and 4395/2013 both are allowed. Private complaints filed by the Additional Collectors are held to be incompetent to initiate the action against the petitioners for the purpose of Section 28 of the Adhiniyam. It is to be further held that the orders of nomination dated 12.04.2007 and 28.07.2010 passed by the District Magistrate, Indore, cannot be treated the orders of appointment of the Appropriate Authority or an officer authorized to file private complaints. In consequence if the complaint has not been filed by the appropriate authority or the officer authorized by the Central or the State Government as required under Section 28(1)(a) of the Adhiniyam the order taking cognizance passed by the Court is also not in conformity to the law, therefore set aside. However, the State Government or the appropriate authority is at liberty to take recourse of law as per the discussion made herein above and after following the procedure prescribed under the PC & PNDT Adhiniyam if law permits. In the facts and circumstances of the case, parties to bear their own costs.

Petition allowed.

I.L.R. [2014] M.P., 1192

MISCELLANEOUS CRIMINAL CASE*Before Mr. Justice J.K. Maheshwari*

M. Cr. C. No. 1102/2013 (Indore) decided on 4 July, 2013

RAEES

...Applicant

Vs.

STATE OF M.P.

...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 451 & 482 - Custody and disposal of property pending trial - Applicants sought interim custody of the vehicles used for an offence registered u/s 4, 5, 6 & 9 of the M.P. Govansh Vadh Pratishedh Adhiniyam, 2004 and Section 11-D of the Prevention of Cruelty to Animals Act, 1960 while transporting the alleged cattle, cow-progeny and beef - Held - Application u/s 451 of the Cr.P.C. filed by any person aggrieved, seeking interim custody of the vehicle, cow progeny and beef can be entertained by the criminal courts during the pendency of confiscation proceedings.
(Paras 1 & 6)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराएं 451 व 482 - विचारण के लंबित रहते सम्पत्ति की अभिरक्षा एवं व्ययन - आवेदकगण ने म.प्र. गौवंश प्रतिषेध अधिनियम, 2004 की धारा 4,5,6 व 9 तथा पशुओं के प्रति क्रूरता का निवारण अधिनियम 1960 की धारा 11डी के अंतर्गत, अभिकथित पशु, गौवंश एवं गौमांस का परिवहन करते समय पंजीबद्ध अपराध में प्रयुक्त वाहनों की अभिरक्षा चाही - अभिनिर्दिष्ट - अधिहरण कार्यवाही के लंबित रहने के दौरान दण्डिक न्यायालय, वाहन, गौवंश एवं गौमांस की अंतरिम अभिरक्षा चाहते हुये किसी पीड़ित व्यक्ति द्वारा द.प्र. स. की धारा 451 के अंतर्गत प्रस्तुत किये गये आवेदन को ग्रहण कर सकता है।

Cases referred :

AIR 2003 SC 638, 2000 (I) MPLJ 289, M.Cr.C. 8765/2012 decided on 09.08.2012.

Shahid Sheikh, for the applicant.

C.R. Karnik, G.A. for the non-applicant/State.

ORDER

J.K. MAHESHWARI, J. :- Both these petitions are arising out of the orders passed by the Judicial Magistrate First Class, rejecting the applications under Section 451, Cr.PC. refusing the interim custody of the vehicles used for an offence registered under Section 4, 5, 6 and 9 of the Madhya Pradesh Govansh Vadh Pratishedh Adhiniyam, 2004 (hereinafter it referred the Adhiniyam, 2004) and Sec. 11-D of the Prevention of Cruelty to Animals Act, 1960 while transporting the alleged cattle, cow-progeny and beef. The orders passed by the Revisional Court affirming such order has also been assailed invoking the jurisdiction under Section 482, Cr.PC. by filing both these petitions.

2. On perusal of the orders passed by the two Courts it is apparent, that in Misc. Criminal Case No.4938/2013 interim custody of the vehicle bearing no. MP-09-GF 4269 was refused; while in Misc. Criminal Case NO.1102/2013 interim custody of vehicle bearing registration no. MP-41-GA-0685 was refused. The Courts below have rejected the application merely on account of receiving the initiation of pendency of confiscation proceeding before the District Magistrate while passing the orders impugned, which are under challenge in these petitions.

3. Learned counsel representing petitioners contends that as per the Adhiniyam of 2004 the power of confiscation has been conferred to the District Magistrate under Section 11 (5) in a manner prescribed by law, but the jurisdiction of the criminal Court to grant interim custody of the property pending trial has not been ousted, however, the order passed by the trial Court refusing interim custody of the vehicles affirmed by the Revisional Court is not in conformity to law. It is submitted that either in the Adhiniyam of 2004 or in the Rules after commencement of the confiscation proceeding or on receiving the intimation to the Court from the confiscating Authority the jurisdiction of the Court is not ousted. In support reliance has been placed on a Judgment of Hon'ble the Apex Court in the case of *Sunderbhai Ambalal Desia Vs. State of Gujarat*, reported in AIR 2003-SC 638, and the Full Bench judgment of this Court in the case of *Madhukar Rao S/o Malik Rao Vs. State of M.P and other*, reported in [2000 (1) M.P.L.J. 289] and also the order passed in M.Cr.C. No.8765/2012 [*Moh. Amjad S/o Asgar Husain*]

Vs. State of M.P and others], decided on 09.08.2012 by the Principal Seat of this Court wherein the vehicle was seized under the provisions of Adhiniyam of 2004 was released. In view of the aforesaid, it is urged that the refusal of the interim custody by the two Court below is illegal, however, the orders impugned may be set aside and the direction to release the vehicle on Supurdgi may be issued during the trial.

4. Per contra Shri Karnik, learned Government Advocate representing the State submits that as per Section 11 (5) of the Adhiniyam of 2004 the District Magistrate is having power to confiscate the vehicle or cow progeny and beef in a manner so prescribed.. The State Government has framed the Rules in exercise of the powers conferred under Section 17 of the Adhiniyam which is known as Madhya Pradesh Govansh Vadh Pratishedh Niyam, 2012 (hereinafter referred to as 'the Rules of 2012'). Rule-5 specifies confiscation, by the District Magistrate, of the vehicles, cow progeny and beef. Thus, when the proceedings of confiscation is pending before the District Magistrate recourse under Section 451, Cr.PC. for grant of interim custody by the Court is not permissible. It is his submission that after confiscation the person aggrieved may file appeal as per Rule-6 to the Divisional Commissioner, therefore, two Courts below have rightly refused the interim custody by passing the orders impugned. At this stage it is his contention that as per the M.P Excise Act, 1915 when the vehicle in question has been involved in commission of the offence of the said Act, after initiation of the pendency of confiscation proceedings, by the Court power under Section 451, Cr.PC. is arrested. However, applying the similar analogy in the present case the prayer so made in these petitions may be refused, upholding the orders of Courts below.

5. After hearing the rival submissions advanced, by the learned counsel for the parties and to advert such contention the relevant provision of Adhiniyam of 2004 is required to be seen. As per Section 11 (5) of the Adhiniyam of 2004 it is clear that in case of any violation of Section 4, 5, 6A and 6B, the Police Authorities is empowered to seize the vehicle or cow progeny and beef. The District Magistrate is having power to confiscate the same in a manner prescribed. Rule 5 and 6 of the Rules of 2012, which deals, confiscation, and appeal are relevant, however, it is reproduced as under: -

"Rule-5 Confiscation by District Magistrate,

In case of any violation of section 4, 5, 6, 6A and 6B, the police shall be empowered to seize the vehicles, cow progeny and beef as per the provisions of section 100 of Criminal Procedure Code, 1973 (No. 2 of 1974) in following manner :-

- (i) He shall take possession of the vehicle;
- (ii) He shall intimate the Veterinary Department to take in custody of the cow-progeny and beef.
- (iii) The beef of cow-progeny shall be disposed of by the 'department by such procedure as he deems fit.

Rule-6 Manner of Appeal.- Any person aggrieved by an order of confiscation under sub-section (5) of section 11 of the Act, may prefer an appeal in writing to the Divisional Commissioner within thirty days of the date of knowledge of such order. Every appeal shall be made under sub-section (1) of section 11-A of the Act.

6. On perusal of the aforesaid it is apparent that in the aforesaid rules the procedure has been prescribed for confiscation and against the said order the appeal may be maintained before the Divisional Commissioner. After going through the provisions of "the Adhiniyam of 2004" as well as the "Rules of 2012" the bar of jurisdiction of the criminal Court to grant interim custody of property as specified in Section 451 of Cr.PC. is not there. Similarly under the Prevention of Cruelty to Animals Act, 1960, there is no bar to grant interim custody. Therefore, it is to be held that the application under Section 451 of the Cr.PC. filed by any person aggrieved, seeking interim custody of the vehicle, cow progeny and beef can be entertained by the Criminal Courts. Here to deal with the argument of learned Government Advocate that grant of interim custody on receiving intimation of confiscation is not proper; it is relevant to note that in Madhya Pradesh Excise Act, 1951 Section 47-A specifies the confiscation of seized intoxicant article, equipments, utensils, characters and materials. Section 47-D creates a bar of jurisdiction of the Criminal Court under the circumstance when an intimation as per Clause (a) of Sub-section (3) of Section 47-A of the said Act has been sent to the Court by Collector

then the power of criminal Court to grant interim custody is ousted. But as stated herein above either in the Adhiniyam of 2004 or in the Rules of 2012 or under the Prevention of Cruelty to Animals Act, 1960 no such statutory bar over the criminal Court to entertain the application under Section 451, Cr.P.C. is, there, however the said argument is not supported by law, hence repealed.

7. In the sequel of the aforesaid fact and after going through the provisions of Adhiniyam of 2004 and the Rules of 2012 it is clear that the District Magistrate is having power to confiscate the vehicle, cow progeny and beef in a manner prescribed. The rules specifies the procedure for confiscation and after passing the order of confiscation an appeal shall lie to Divisional Commissioner. Until the order of confiscation is passed by the District Magistrate, the initiation of action for confiscation is not assailable by filing the appeal. Thus, after seizure of vehicle for the offences under the Adhiniyam 2004 or the Prevention of Cruelty to Animals Act, 1960 during pendency of the trial or proceedings for confiscation if an application under Section 451, Cr.P.C. has been filed, the criminal Courts are competent to pass the order of interim custody in accordance with law.

8. In the present case looking to the observations made by the two Courts below it is clear that the order of confiscation has not yet been passed by the District Magistrate and the proceedings are pending before him, however, refusal of the interim custody by the two Courts below is unsustainable in law. It is relevant to note here that even after passing an order of confiscation statutory bar to entertain the application for interim custody by the Criminal Court has not been specified in the Rules, but looking to the fact, against the order of confiscation passed by District Magistrate, the recourse of filing an appeal has been specified, in Rule 6 to the Divisional Commissioner, therefore, the Criminal Court may refrain to grant the interim custody of the vehicle, cow progeny and beef after passing the order of confiscation, however, applying the self imposed restrictions and taking note of the procedure prescribed after the order of confiscation, until and unless, the exceptional circumstances is prevalent, order passing the interim custody ought to be avoided by the Criminal Courts. After the confiscation order parties may be relegated to take recourse as permissible under the provisions of the Adhiniyam and the Rules.

9. It is to be noted here that keeping the custody of the vehicle, cow

progeny and beef for a long time with the prosecution agency, is also not in the fair administration of the justice. Hon'ble the Apex Court in the case of *Sunderbhai Ambalal Desia* (supra) has emphasized the need for disposal of the property pending trial. It has been observed by the Apex Court that the Court should exercise such power expeditiously and judiciously because it would serve various purposes namely: -

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation ;
2. Court or the police would not be required to keep the article in safe custody;
3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary evidence could also be recorded describing the nature of the property in detail; and
4. The jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

10. This Court in a case of *Moh. Amjad* (supra) has directed to release the vehicle, which was seized under Section 11 (5) of the Adhiniyam of 2004. Thus considering the legal position as enumerated in the judgment of *Sunderbhai Ambalal* (supra) and also looking to the fact that statutory bar to release the vehicle, cow-progeny and beef is not within the Adhiniyam and on considering the existing need to release the interim custody of the property may be directed by the Court in view of the foregoing observations. In the facts of this case, order of refusal of interim custody of the vehicles passed by the Judicial Magistrate, First Class and affirmed by the revisional Court are set aside.

11. In view of the discussions made herein above both these petitions filed by the petitioners are hereby allowed. The orders impugned passed by the Judicial Magistrate First Class and the Revisional Court are hereby set aside. It is directed that on furnishing the Supurdginama by the petitioners to

the sum of Rs.5,00,000/- each with one surety in the like amount to the satisfaction of Chief Judicial Magistrate concerned, the seized vehicles, bearing registration nos.MP-09-GF 4269 and MP-41-GA 0685 be released subject to complying the following conditions: -

- (i) That, applicant shall produce the same before the trial Court as and when directed to do so.
- (ii) That, in the meantime, they shall not alienate the vehicle or make use of vehicle for any unlawful purpose; and
- (iii) That, they shall not carry out any change in the colour and outward appearance of the vehicle.

Cc as per rules.

Petition allowed.