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.4

DECEMBER 2014 (pp. 3067 to 3318) (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 S.K. SETH

MEMBERS

Shri Ravish Chandra Agarwal, Advocate General, *(ex-officio)*
Shri Rajendra Tiwari, Senior Advocate
Shri P. R. Bhave, Senior Advocate
Shri Kishore Shrivastava, Senior Advocate
Shri G.S. Ahluwalia, Advocate, Editor, Member & Secy.*(ex-officio)*
Shri Manohar Mamtani, 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)

THE HIGH COURT OF MADHYA PRADESH JABALPUR 2014

(From 01-01-2014 to 31-12-2014)

CHIEF JUSTICE

Hon'ble Shri Justice Ajay Manikrao Khanwilkar
Chief Justice

PUISNE JUDGES

Hon'ble Shri Justice K.K. Lahoti	(Retired on 06-03-2014)
Hon'ble Shri Justice Ajit Singh	
Hon'ble Shri Justice Rajendra Menon	
Hon'ble Shri Justice A.K. Shrivastava	(Retired on 31-01-2014)
Hon'ble Shri Justice S.S. Kemkar	
Hon'ble Shri Justice S.K. Seth	
Hon'ble Shri Justice U.C. Maheshwari	
Hon'ble Shri Justice S.K. Gangele	
Hon'ble Shri Justice P.K. Jaiswal	
Hon'ble Smt. Justice S.R. Waghmare	
Hon'ble Shri Justice R.S. Jha	
Hon'ble Shri Justice J.K. Maheshwari	
Hon'ble Shri Justice Sanjay Yadav	
Hon'ble Shri Justice S.C. Sharma	
Hon'ble Shri Justice Prakash Shrivastava	
Hon'ble Shri Justice M.C. Garg	
Hon'ble Shri Justice Alok Aradhe	
Hon'ble Shri Justice B.K. Dube	(Retired on 20-01-2014)
Hon'ble Shri Justice G.S. Solanki	

Hon'ble Shri Justice N.K. Gupta

Hon'ble Shri Justice Anil Kumar Sharma (Retired on 01-10-2014)

Hon'ble Smt. Justice Vimla Jain (Retired on 11-05-2014)

Hon'ble Shri Justice G.D. Saxena (Retired on 02-04-2014)

Hon'ble Shri Justice T.K. Kaushal

Hon'ble Shri Justice K.K. Trivedi

Hon'ble Shri Justice Sheel Nagu

Hon'ble Shri Justice Sujoy Paul

Hon'ble Shri Justice Subhash Raosaheb Kakade

Hon'ble Shri Justice B.D. Rathi

Hon'ble Shri Justice M.K. Mudgal

Hon'ble Shri Justice D.K. Paliwal

Hon'ble Shri Justice Rohit Arya

Hon'ble Shri Justice S.K. Gupta

Hon'ble Shri Justice J.K. Jain

Hon'ble Shri Justice S.K. Palo

Hon'ble Shri Justice Alok Verma

Hon'ble Miss Justice Vandana Kasrekar

Hon'ble Shri Justice Rajendra Mahajan

Hon'ble Shri Justice Chandrahas Sirpurkar

TABLE OF CASES REPORTED

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

Adhunik Transport Organization Ltd. (M/s.) Vs. Assistant Commissioner, Commercial Tax (DB)...3116

Anjana Mathur (Smt.) Vs. State of M.P. ...3102

Avinash Dubey Vs. State of M.P. (DB)...2507

Awadhesh Prasad Shukla Vs. State of M.P. (DB)...2884

Banwari Singh Gurjar Vs. State of M.P. ...3064

Bhagwan Motors Pvt. Ltd. (M/s.) Vs. Madhya Pradesh Trade & Investment Facilitation Corporation Ltd. (DB)...2509

Bharat Heavy Electricals Ltd., Bhopal (M/s.) Vs. Commissioner, Customs & Central Excise, Bhopal (DB)...3257

Chhotelal Gupta Vs. Smt. Seema Agrawal ...2782

Dashrath Singh Vs. State of M.P. ...2789

Dashrath Vs. Deceased Raju Bai through L.Hs. ...2684

Deepak Kumar Soni Vs. Ashok Kumar ...3267

Dilip Sagorkar (Dead) Through L.R. Vs. State of M.P. (DB)...2694

Ghasiram Dehariya Vs. Anakhlal Dehariya ...3114

Grasim Industries Ltd., Neemuch Vs. State of M.P. (DB)...2959

Guman Singh Vs. State of M.P. (DB)...3059

Gyanesh Vs. Central Bureau of Investigation ...3274

Haribabu Vs. Himmat Singh (DB)...3160

Hukum Singh Vs. Assistant Engineer, P.H.E. ...3135

Ideal Minerals vs. State of M.P. ...2766

Jagmohan Vs. State of M.P. ...2714

Jeevan Lal Rathore Vs. Deepchand ...3263

Kalibai Vs. Ajay ...3100

Kamal Kant Bhardwaj Vs. State of M.P. (DB)...2491

Kanchanbag A Partnership Firm Vs. Union of India (DB)...2837

Keshav Chouhan Vs. Kiran Singh ...2744

Kodar Singh Vs. State of M.P. ...3190

Krishna Oil Extraction Ltd.(M/s.)
Vs. State Appellate Forum (DB)...2848

Kulwant Singh Vs. State of M.P. ...3153

Lalla Kumhar Vs. Dhaniram Kumhar ...3108

Laxmi Cycle Vs. Subhu Kumar Jain ...3111

Madan Lal Vohra Vs. Smt. Nirmala Dubey ...2697

Mahesh Kumar Vs. Himmat Singh ...3179

Mohd. Aasim Vs. Anil Kumar Saraf ...2718

National Insurance Co. Ltd. Vs. Santosh ...3023

Naveen Gupta Vs. State of M.P. ...2701

Naveen Vs. State of M.P. ...3310

Neelima Saraf (Ku.) Vs. State of M.P. ...2763

Pernod Ricard India (P) Ltd. (M/s.) Vs. State of M.P. ...3149

Praduman Lal Kushwaha Vs. State of M.P. ...3254

Prakash Sahu Vs. State of M.P. ...3293

Pratap Singh Mandeliya Vs. State of M.P. ...2792

Pratibha Singh (Minor) (Ku.) Vs. State of M.P. (DB)...2514

PRL Projects & Infrastructure Ltd. Vs. State of M.P. ...*17

TABLE OF CASES REPORTED

Procter & Gamble Hygiene & Health Care Ltd. Vs. Additional Divisional Deputy Commissioner of Commercial Tax (DB)...3122

R.K. Parashar Vs. M.P. Power Management Company ...3088

R.P. Singh Vs. State of M.P. ...2728

Radheshyam Vs. State of M.P. ...3289

Rajeev Lochan Singh Vs. State of M.P. (DB)...3231

Rajendra Singh Vs. State of M.P. ...2709

Rajendra Vs. State of M.P. (DB)...3247

Raju Vs. State of M.P. ...3308

Ram Kalesh Singh Vs. State of M.P ...2801

Ram Krishna Kothari Vs. State Bar Council of M.P. ...3095

Ram Lakhan Tripathi Vs. Chief Municipal Officer ...3143

Ram Narayan Vs. Arvind ...3201

Rambeti Jain (Smt.) Vs. Smt. Meena Devi Tomar ...3020

Ramesh Goyal Vs. Gayatri ...3197

Ranchodlal Vs. State of M.P. (DB)...2840

Rani (Smt.) Vs. State of M.P. ...3055

Rayees Khan Vs. Smt. Jahida Bi ...3049

Rohit Vs. State of M.P. (DB)...3203

S.K. Gupta Vs. State of M.P. ...2497

S.P. Singh Vs. West Central Railway ...3138

Saba Vs. C.B.I., Bhopal ...*18

Sadhe Prasad Vs. Santosh Kumar ...3313

Santosh Kumar Vs. C.B.I. (DB)...3047

Satendra Sharma Vs. State of M.P. ...2749

Shantimal Bhandari Vs. State of M.P. ...2841

Sharif Khan (Deceased) Through His L.Rs. Vs. Union of India ...3183

Shrawan Kumar Chaurasia Vs. Chief Municipal Officer ...3146

Shyam Babu Agrawal Vs. State of M.P. ...2756

Singh Cold Storage Pvt. Ltd., Ujjain Vs. Parle Biscuits Pvt. Ltd., Mumbai ...3033

Sona (Mrs.) Vs. Subhash ...2865

Sonali Thanawala (Smt.) Vs. M/s. Rahul Ginning Industries ...2739

State of M.P. Vs. Late Abdul Gani Through L.Hs. (DB)...2690

State of M.P. Vs. Mannulal ...*19

State of M.P. Vs. Suresh Narayan Vijayvargiya (SC)...3077

State of Rajasthan Vs. Bhagwan Das Agrawal (SC)...3067

Sudha Jain (Dr.) Vs. M.P. Housing and Infrastructure Development ...2806

Suresh Vs. State of M.P. ...3303

Themis Medicare Ltd. Vs. The Asstt. Labour Commissioner ...3126

Uday Bhan Vs. State of M.P. (DB)...2722

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

COMPARATIVE TABLE

Other Journals=ILR (M.P Series) 2014

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

2014 (1) MPLJ 94		I.L.R. (2014) M.P.	327
"	198	"	1270
"	203	"	424
"	218	"	1743
"	348(FB)	"	1698
"	363	"	214
"	455	"	2149
"	514	"	3183
"	573	"	993
"	620	"	2792
"	630	"	2806
"	680	"	1879
"	710	"	184
2014 (2) MPLJ 17		I.L.R. (2014) M.P.	2789
"	43	"	*5
"	48	"	380
"	59	"	1756
"	82	"	375
"	84	"	371
"	86	"	1831
"	95	"	1838
"	116	"	1330
"	126	"	105
"	137	"	2466
"	168	"	2763
"	184	"	1771
"	239	"	13
"	286	"	481
"	387	"	3114
"	395	"	819
"	407	"	1073
"	411	"	733
"	429	"	69
"	436	"	100
"	455	"	73
"	459	"	108
"	464	"	384
"	466	"	2865
"	524	"	1531
"	530	"	1537
"	586	"	2076
"	610	"	2840
"	611	"	8
2014 (3) MPLJ 21		I.L.R. (2014) M.P.	1961
"	47	"	716
"	51	"	392
"	117	"	1031
"	120	"	3033
"	133	"	1034
"	137	"	1629
"	147	"	1027
"	149	"	712
"	174	"	1346
"	190	"	1095
"	193	"	2085
"	211	"	1339
"	234	"	974
"	252	"	1483

COMPARATIVE TABLE

"	" 256	"	" *10	"	" 73 (DB)	"	" 1911
"	" 268	"	" 985	"	" 128	"	" 1580
"	" 283	"	" 388	"	" 167(DB)	"	" 2224
"	" 334	"	" 1293	"	" 196	"	" 184
"	" 356	"	" 2509	"	" 225(SC)	"	" 1979
"	" 415	"	" 695	"	" 262(DB)	"	" 26
"	" 418	"	" 2837	"	" 318	"	" 1879
"	" 433	"	" 3116	"	" 324	"	" 3114
"	" 546	"	" 3122	"	" 326(DB)	"	" 1073
"	" 552	"	" 2353	"	" 331(DB)	"	" 13
"	" 561	"	" 1296	"	" 461(DB)	"	" 2407
"	" 574	"	" 1679	"	" 473(DB)	"	" 69
"	" 593	"	" 2341	"	" 506	"	" 1838
"	" 612	"	" 2348	"	" 515	"	" 1632
"	" 618	"	" 2338	2014 (2) MPHT 23		I.L.R. (2014) M.P. 75	
"	" 634	"	" 3020	"	" 34 (DB)	"	" 695
"	" 670	"	" 1020	"	" 38 (DB)	"	" 2837
"	" 675	"	" *15	"	" 44 (DB)	"	" 2722
"	" 709	"	" 1702	"	" 82	"	" 100
"	" 717	"	" 1753	"	" 145	"	" 380
2014 (4) MPLJ 91		I.L.R. (2014) M.P. 2091		"	" 160	"	" 598
"	" 109	"	" 2279	"	" 305	"	" 105
"	" 177	"	" 2271	"	" 329	"	" 1641
"	" 184	"	" 2096	"	" 335(DB)	"	" 8
"	" 355	"	" 2002	"	" 338(DB)	"	" 378
"	" 369	"	" 341	"	" 346	"	" 1961
"	" 510	"	" 3146	"	" 362	"	" 2076
"	" 573	"	" 2106	"	" 369(DB)	"	" 11
"	" 610	"	" 2174	"	" 370	"	" 3143
2014 (1) MPHT 20		I.L.R. (2014) M.P. 2806		"	" 381	"	" 1015
"	" 69 (DB)	"	" 763	"	" 389(DB)	"	" 2840

COMPARATIVE TABLE

"	" 439	"	" 3088
"	" 449	"	" 858
"	" 526	"	" 873
"	" 540	"	" 1667
2014 (3) MPHT 1 (SC)		I.L.R. (2014) M.P. 1209	
"	" 13 (DB)	"	" 716
"	" 23	"	" 1739
"	" 42	"	" 1629
"	" 45	"	" 392
"	" 48	"	" 1531
"	" 62 (DB)	"	" 1706
"	" 72	"	" 733
"	" 91	"	" 871
"	" 103	"	" 3289
"	" 136(DB)	"	" 1027
"	" 139	"	" 1393
"	" 142	"	" 867
"	" 151	"	" 1537
"	" 175(DB)	"	" 673
"	" 178	"	" 819
"	" 186	"	" 1831
"	" 192	"	" 1384
"	" 199(DB)	"	" 1095
"	" 212	"	" 384
"	" 216	"	" 712
"	" 261(DB)	"	" 371
"	" 277(DB)	"	" 10
"	" 293	"	" 388
"	" 302	"	" 277
"	" 382	"	" 1396
"	" 390	"	" 1451
"	" 398	"	" 189
"	" 406(DB)	"	" 1610
"	" 423	"	" 1020
"	" 441	"	" 481
"	" 464	"	" 1296
"	" 470	"	" 1355
"	" 476	"	" 1675
"	" 480	"	" 1976
"	" 485	"	" 1679
"	" 492	"	" 2431
2014 (4) MPHT 45 (DB)		I.L.R. (2014) M.P. 2085	
"	" 89(DB)	"	" 2091
"	" 133	"	" 2749
"	" 156	"	" 2348
"	" 165	"	" 2714
"	" 173(DB)	"	" 2279
"	" 184	"	" 3020
"	" 212(DB)	"	" 2441
"	" 232	"	" 3308
"	" 237(DB)	"	" 1483
"	" 245(DB)	"	" 2487
"	" 301	"	" 2744
"	" 311	"	" 2709
"	" 316(DB)	"	" 2415
"	" 374	"	" 2271
2014 (5) MPHT 81		I.L.R. (2014) M.P. 2739	
"	" 99 (DB)	"	" 2012
"	" 133(DB)	"	" 2002
"	" 158	"	" 2684
"	" 182	"	" 2341
"	" 233(DB)	"	" 3247
"	" 255(DB)	"	" 1702
"	" 297	"	" 2338

COMPARATIVE TABLE

"	" 339	"	" 2106
"	" 426	"	" 3146
2014 (I) MPJR 100		I.L.R. (2014) M.P. 2728	
"	" 110	"	" 73
"	" 122	"	" 2792
"	" 131	"	" 1706
"	" 162	"	" 2722
"	" 196	"	" 2789
"	" 276	"	" 785
"	" 315	"	" 24
"	" SN 7	"	" 690
"	" SN 12	"	" 1128
"	" SN 24	"	" 993
2014 (II) MPJR 65		I.L.R. (2014) M.P. 2841	
"	" 135	"	" 26
"	" 138	"	" 455
"	" 169	"	" 1838
"	" SN 4	"	" 1916
"	" SN 5	"	" 1923
2014 (III) MPJR 62		I.L.R. (2014) M.P. 720	
"	" 72	"	" 75
"	" 92	"	" 1396
"	" 127	"	" 2080
"	" 146	"	" 1355
"	" 172	"	" 2085
"	" 178	"	" 2514
2014 (IV) MPJR 46		I.L.R. (2014) M.P. 2487	
"	" 49	"	" 877
"	" 52	"	" 1293
"	" 71	"	" 1135
"	" 75	"	" 1034
"	" 105	"	" 726
"	" 154	"	" 2739
"	" SN 16	"	" 1483
"	" SN 21	"	" 547
2014 (1) JLJ	92 (FB)	I.L.R. (2014) M.P. 1698	
"	" 140	"	" 1339
"	" 246	"	" 1979
"	" 301(SC)	"	" 1694
"	" 365(SC)	"	" 1687
2014 (2) JLJ	25	I.L.R. (2014) M.P. 858	
"	" 69	"	" 13
"	" 90 (SC)	"	" 3077
"	" 168	"	" 733
"	" 233	"	" 214
"	" 341	"	" 1015
"	" 397	"	" 1355
"	" 434	"	" 851
"	" 439	"	" 1296
"	" 444	"	" 3303
2014 (3) JLJ	16	I.L.R. (2014) M.P. 1610	
"	" 33	"	" 2701
"	" 52	"	" 2756
"	" 58	"	" 2353
"	" 91	"	" 2749
"	" 97	"	" 2341
"	" 104	"	" 2012
"	" 130	"	" 3231
"	" 150	"	" 2279
"	" 163	"	" 2002

INDEX

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

Accommodation Control Act, M.P. (41 of 1961), Sections 23-A, 23-C & 23-E(2) – **Eviction order passed on the ground that applicants have not obtained leave of the court to defend as required u/s 23-C of the Act and the objections raised in respect of the maintainability were already decided – Held – Since the applicants have never applied for grant of leave to defend in terms of Section 23-C of the Act they were not to be heard. [Madan Lal Vohra Vs. Smt. Nirmala Dubey] ...2697**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराऐं 23ए, 23सी व 23ई(2) – बेदखली का आदेश इस आधार पर पारित किया गया कि आवेदकगण ने बचाव के लिये न्यायालय से अनुमति नहीं ली जैसा कि अधिनियम की धारा 23सी के अंतर्गत अपेक्षित है और पोषणीयता से संबंधित उठाये गये आक्षेपों को पहले ही निर्णित किया गया था – अभिनिर्धारित – चूंकि आवेदकगण ने अधिनियम की धारा 23सी की शर्तों नुसार बचाव के लिये अनुमति प्रदान किये जाने हेतु आवेदन नहीं दिया, उन्हें सुना नहीं जा सकता। (मदनलाल वोहरा वि. श्रीमती निर्मला दुबे) ...2697

Accommodation Control Act, M.P. (41 of 1961), Sections 23-A, 23-C & 23-E(2) – **Record of the court was manipulated by inserting the application seeking leave to appeal – No evidence that such application was ever filed – Applicants also tried to mislead this court by placing reliance on such a manipulated document – Such a litigant is not entitled to any relief – Revision is dismissed with cost of Rs. 10,000/-. [Madan Lal Vohra Vs. Smt. Nirmala Dubey] ...2697**

स्थान नियंत्रण अधिनियम, म.प्र. (1961 का 41), धाराऐं 23ए, 23सी व 23ई(2) – न्यायालय के अभिलेख में अपील के लिये अनुमति चाहते हुए आवेदन रखकर छल साधन किया गया था – कोई साक्ष्य नहीं कि उक्त आवेदन कभी प्रस्तुत भी किया गया था – आवेदकगण ने उक्त छल साधन के दस्तावेज पर विश्वास रखकर न्यायालय को दिग्भ्रमित करने का प्रयास किया है – ऐसा मुकदमेबाज किसी अनुतोष का हकदार नहीं – रु. 10,000/– के व्यय के साथ पुनरीक्षण खारिज। (मदनलाल वोहरा वि. श्रीमती निर्मला दुबे) ...2697

Advocate Act (25 of 1961), Section 35 – See – Constitution – Article 226 **[Ram Krishna Kothari Vs. State Bar Council of M.P.] ...3095**

अधिवक्ता अधिनियम (1961 का 25), धारा 35 – देखें – संविधान –

अनुच्छेद 226 (राम कृष्ण कोठारी वि. स्टेट बार काउंसिल ऑफ एम.पी.) ...3095

Central Excise Act (1 of 1944), Section 35 H(1) & Central Excise Rules, 1944, Rule 57-1 – Show Cause Notice – **Issued by an unauthorized person – Superintendent could not issue the show cause notice in relation to the recovery of MODVAT credit after disallowing it and it was only the Assistant Collector or Collector who could issue the notice – Entire action initiated is unsustainable, *void ab initio* and stands vitiated. [Bharat Heavy Electricals Ltd, Bhopal (M/s.) Vs. Commissioner Customs & Central Excise, Bhopal]** (DB)...3257

केन्द्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 35एच(1) व केन्द्रीय उत्पाद–शुल्क नियम, 1944, नियम 57-1 – कारण बताओ नोटिस – अप्राधिकृत व्यक्ति द्वारा जारी किया गया – एमओडीव्हीएटी जमा राशि, नामंजूर किया जाने के पश्चात उसकी वसूली के संबंध में कारण बताओ नोटिस, अधीक्षक जारी नहीं कर सकता और वह केवल सहायक जिलाधिकारी या जिलाधिकारी है जो नोटिस जारी कर सकता है – आरंभ की गई संपूर्ण कार्यवाही अपोषणीय, आरंभ से शून्य और दूषित है। (भारत हेवी इलेक्ट्रिकल्स लि., भोपाल (मे.) वि. कमिश्नर कस्टम्स एण्ड सेन्ट्रल एक्साईज, भोपाल) (DB)...3257

Central Excise Rules, 1944, Rule 57-1 – See – Central Excise Act, 1944, Section 35 H(1) **[Bharat Heavy Electricals Ltd, Bhopal (M/s.) Vs. Commissioner Customs & Central Excise, Bhopal]** (DB)...3257

केन्द्रीय उत्पाद–शुल्क नियम, 1944, नियम 57-1 – देखें – केन्द्रीय उत्पाद–शुल्क अधिनियम, 1944, धारा 35एच(1) (भारत हेवी इलेक्ट्रिकल्स लि., भोपाल (मे.) वि. कमिश्नर कस्टम्स एण्ड सेन्ट्रल एक्साईज, भोपाल)(DB)...3257

Civil Procedure Code (5 of 1908), Section 11 – See – Hindu Marriage Act, 1955, Sections 24 & 26 **[Sona (Mrs.) Vs. Subhash]**...2865

सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – देखें – हिन्दू विवाह अधिनियम, 1955, धाराऐं 24 व 26 (सोना (श्रीमती) वि. सुभाष) ...2865

Civil Procedure Code (5 of 1908), Section 96, Land Acquisition Act (1 of 1894), Section 28-A – Redetermination of compensation – Second Application **– Appellants filed application before Land Acquisition Officer for re-determination of compensation amount which was allowed and**

compensation was enhanced to Rs. 80,000/- per acre on the basis of judgment passed by reference Court in another case – In separate case arising out of same acquisition proceedings High Court in appeal awarded compensation @ Rs. 1 lacs per acre – Appellants filed second application for re-determination of compensation in the light of judgment of High Court – Second Application u/s 28-A not maintainable – Appeal dismissed. [Kodar Singh Vs. State of M.P.] ...3190

सिविल प्रक्रिया संहिता (1908 का 5), धारा 96, भूमि अर्जन अधिनियम (1894 का 1), धारा 28-ए – प्रतिकर का पुनर्निधारण – द्वितीय आवेदन – अपीलार्थीगण ने प्रतिकर की रकम के पुनर्निर्धारण हेतु भू अर्जन अधिकारी के समक्ष आवेदन प्रस्तुत किया, जिसे मंजूर किया गया और अन्य प्रकरण में निर्देश न्यायालय द्वारा पारित किये गये निर्णय के आधार पर प्रतिकर रु. 80,000/– प्रति एकड़ बढ़ाया गया – समान अर्जन कार्यवाही से उत्पन्न पृथक प्रकरण में उच्च न्यायालय ने अपील में रु. 1 लाख प्रति एकड़ की दर से प्रतिकर अवार्ड किया – उच्च न्यायालय के निर्णय के आलोक में अपीलार्थीगण ने प्रतिकर के पुनर्निर्धारण हेतु द्वितीय आवेदन प्रस्तुत किया – धारा 28-ए के अंतर्गत द्वितीय आवेदन पोषणीय नहीं – अपील खारिज। (कोदर सिंह वि. म.प्र. राज्य) ...3190

Civil Procedure Code (5 of 1908), Section 100 – Second Appeal **– Land in question initially belonged to grand father of plaintiff – It was not included in the partition proceedings and, therefore, the right of the respondents/plaintiffs in land in dispute to the extent of half share therein is undisputed – In view of provisions of Order VIII Rule 7 and Order XVI Rule 33 of the C.P.C., the Courts below have rightly decreed the suit filed by the respondents/plaintiffs to the extent of half share in land in dispute – No substantial question of law arises for adjudication. [Mahesh Kumar Vs. Himmat Singh]** ...3179

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – प्रश्नगत भूमि पहले वादी के दादा की थी – उसे विभाजन कार्यवाही में शामिल नहीं किया गया और इसलिए प्रत्यर्थीगण/वादीगण का वाद भूमि में आधे हिस्से की सीमा तक का अधिकार अविवादित है – सिविल प्रक्रिया संहिता के आदेश VIII नियम 7 व आदेश XVI नियम 33 के उपबंधो को दृष्टिगत रखते हुए, निचले न्यायालयों ने प्रतिवादीगण/वादीगण द्वारा प्रस्तुत वाद को प्रश्नगत भूमि में आधे हिस्से की सीमा तक उचित रूप से डिक्रीत किया – न्यायनिर्णित करने के लिए विधि का सारवान प्रश्न उत्पन्न नहीं होता। (महेश कुमार वि. हिम्मत सिंह) ...3179

Civil Procedure Code (5 of 1908), Order 2 Rule 2 – Civil Suit for injunction simplicitor was filed and injunction was granted – Plaintiffs could have sought relief of specific performance of contract in the first Suit – Subsequent suit is barred under Order 2 Rule 2 C.P.C. [Haribabu Vs. Himmat Singh] (DB)...3160

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2 – सादा व्यादेश हेतु सिविल वाद प्रस्तुत किया गया और व्यादेश प्रदान किया गया – वादीगण, प्रथम वाद में संविदा के विनिर्दिष्ट पालन का अनुतोष मांग सकते थे – पश्चातवर्ती वाद, सि.प्र.सं. के आदेश 2 नियम 2 के अंतर्गत वर्जित। (हरिबाबू वि. हिम्मत सिंह) (DB)...3160

Civil Procedure Code (5 of 1908), Order 6 Rule 17 – Amendment in the written statement – Suit for eviction on the ground of bonafide need – Petitioner wants to plead information regarding acquisition of alternate accommodation during pendency of the case – Held – Rent Controlling Authority ought to have allowed the aforesaid application and after incorporating such amendment, opportunity to make consequential amendment should have been extended to the respondent – Such question should have been decided after recording evidence – Such procedure has not been adopted by the R.C.A. – Impugned order is perverse, same is hereby set aside. [Laxmi Cycle Vs. Subhu Kumar Jain] ...3111

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – लिखित कथन में संशोधन – वास्तविक आवश्यकता के आधार पर बेदखली हेतु वाद – याची प्रकरण लंबित रहने के दौरान वैकल्पिक स्थान के अर्जन से संबंधित जानकारी का अभिवाक् करना चाहता है – अभिनिर्धारित – भाड़ा नियंत्रण प्राधिकारी को उपरोक्त आवेदन मंजूर करना चाहिए था और उक्त संशोधन समाविष्ट करने के पश्चात, प्रत्यर्थी को परिणामिक संशोधन करने का अवसर देना चाहिए था – उक्त प्रश्न का विनिश्चय, साक्ष्य अभिलिखित किये जाने के पश्चात करना चाहिए था – भाड़ा नियंत्रण पाधिकारी द्वारा उक्त प्रक्रिया का अवलंब नहीं लिया गया – आक्षेपित आदेश विपर्यस्त है और उसे एतद् द्वारा अपास्त किया गया। (लक्ष्मी साइकिल वि. सुभू कुमार जैन) ...3111

Civil Procedure Code (5 of 1908), Order 6 Rule 17 – Proviso – Application for amendment of plaint – Amendment application cannot be allowed unless the application is filed with due diligence – No

application for amendment can be allowed after commencement of trial. [Dashrath Vs. Deceased Raju Bai Through L.Hs.] ...2684

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – परंतुक – वादपत्र में संशोधन हेतु आवेदन – संशोधन के आवेदन को मंजूर नहीं किया जा सकता जब तक कि आवेदन, सम्यक तत्परता के साथ प्रस्तुत न किया गया हो – विचारण आरंभ होने के पश्चात संशोधन हेतु आवेदन मंजूर नहीं किया जा सकता। (दशरथ वि. मृतक राजू बाई द्वारा विधिक उत्तराधिकारी) ...2684

Civil Procedure Code (5 of 1908), Order 8 Rule 6-C – Maintainability of counter claim **– Mere on account of withdrawal of the counter claim by one of the defendant and on filing the application by plaintiff for withdrawal of the suit, counter claim of the other defendant could not be excluded from consideration, the same could be proceeded and adjudicated on merits against the plaintiff even after withdrawal of the suit – No perversity in the order passed by the trial court – Petition dismissed. [Lalla Kumhar Vs. Dhaniram Kumhar] ...3108**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6-सी – प्रतिदावे की पोषणीयता – मात्र इसलिए कि एक प्रतिवादी द्वारा प्रतिदावा वापस लिये जाने से और वादी द्वारा वाद वापस लिये जाने हेतु आवेदन प्रस्तुत किये जाने पर, अन्य प्रतिवादियों का प्रतिदावा विचारण से वंचित नहीं किया जा सकता, वाद वापस लिये जाने के पश्चात भी, उक्त को वादी के विरुद्ध गुणदोषों पर कार्यवाही कर न्यायनिर्णित किया जा सकता है – विचारण न्यायालय द्वारा पारित आदेश में कोई विपर्यस्तता नहीं – याचिका खारिज। (लल्ला कुम्हार वि. धनीराम कुम्हार)...3108

Civil Procedure Code (5 of 1908), Order 9 Rule 9 – See – Constitution – Article 227 **[PRL Projects & Infrastructure Ltd. Vs. State of M.P.] ...*17**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 – देखें – संविधान – अनुच्छेद 227 (पी आर एल प्रोजेक्ट एण्ड इन्फ्रास्ट्रक्चर लि. वि. म.प्र. राज्य) ...*17

Civil Procedure Code (5 of 1908), Order 20 Rule 11 – Payment by Instalments **– Executing Court on application of judgment debtors fixed four monthly instalments of Rs. 50,000/- each and last instalment of Rs. 40,000/- – Order challenged by judgment debtor on the ground of inability to pay instalment, so fixed by Executing Court – Held – In**

absence of providing minimum factual foundation relating to inability to satisfy the decretal amount, no enquiry needs to be ordered – No fault can be found in the order of the court below who in its discretion has fixed the instalments. [Rambeti Jain (Smt.) Vs. Smt. Meena Devi Tomar] ...3020

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 20 नियम 11 – किश्तों द्वारा भुगतान – निष्पादन न्यायालय ने निर्णित ऋणी के आवेदन पर रु. 50,000/– प्रत्येक की चार मासिक किश्तें निश्चित की और अंतिम किश्त रु. 40,000/– – निष्पादन न्यायालय द्वारा इस तरह निश्चित की गई किश्त का भुगतान करने के लिये अक्षमता के आधार पर निर्णित ऋणी द्वारा आदेश को चुनौती दी गई – अभिनिर्धारित – डिक्रीत रकम की संतुष्टि की अक्षमता से संबंधित न्यूनतम तथ्यात्मक आधार प्रस्तुत किये जाने के अभाव में, जांच आदेशित करने की आवश्यकता नहीं – निचले न्यायालय के आदेश में कोई दोष नहीं पाया जा सकता, जिसने अपने विवेकाधिकार में किश्तें निश्चित की। (रामबेटी जैन (श्रीमती) वि. श्रीमती मीना देवी तोमर) ...3020

Civil Procedure Code (5 of 1908), Order 23 Rule 3 – Compromise of Suit – Scope **– Property which is not the subject matter of the suit but related to the parties to the suit, for that property also compromise may be arrived at in the court and a compromise decree can be passed, if it is arrived at by a lawful agreement. [Jeevanlal Rathore Vs. Deepchand] ...3263**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 3 – वाद का समझौता – व्याप्ति – सम्पत्ति जो वाद की विषय वस्तु नहीं किन्तु वाद के पक्षकारों से संबंधित है, उस सम्पत्ति हेतु भी न्यायालय में समझौता किया जा सकता है और समझौता डिक्री पारित की जा सकती है, यदि विधिपूर्ण करार द्वारा उसे किया जाता है। (जीवनलाल राठौर वि. दीपचन्द) ...3263

Civil Procedure Code (5 of 1908), Order 26 Rule 9 – Appointment of Commissioner to ascertain who is in possession **– Held – Suit is at the initial stage – Evidence is yet to be recorded – No party can be permitted to use the procedure of the court to collect the evidence in support of his case – No interference is required – Petition dismissed. [Ghasiram Dehariya Vs. Anakhlal Dehariya] ...3114**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – किसका कब्जा है यह सुनिश्चित करने के लिए कमिश्नर की नियुक्ति – अभिनिर्धारित – वाद

आरंभिक प्रक्रम पर है – साक्ष्य अभिलिखित किया जाना बाकी है – किसी पक्षकार को अपने प्रकरण के समर्थन में साक्ष्य एकत्रित करने हेतु न्यायालय की प्रक्रिया का उपयोग करने की अनुमति नहीं दी जा सकती – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज। (घासीराम डेहरिया वि. अनखलाल डेहरिया) ...3114

Civil Procedure Code (5 of 1908), Order 39, Rule 1 & 2 and Specific Relief Act (47 of 1963), Section 41(b) – **Injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. [Ramnarayan Vs. Arvind]** ...3201

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39, नियम 1 व 2 एवं विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 41(बी) – किसी व्यक्ति को किसी ऐसे न्यायालय में कोई कार्यवाही संस्थित करने या अभियोजित करने से अवरूद्ध करने हेतु व्यादेश प्रदान नहीं किया जा सकता जो उस न्यायालय के अधीनस्थ नहीं जिससे व्यादेश चाहा गया है। (रामनारायण वि. अरविन्द) ...3201

Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 – Grant of Injunction – **Appellant has entered into an agreement with respondent No.1 – Pursuant to the agreement they have also executed two Bank Guarantees amounting to Rs. 96 lacs – There was outstanding of Rs. 184 lacs against the appellant which was not disputed – Appellant has also offered a payment schedule to respondent No. 1 – Bank Guarantees are certainly less than the admitted amount – Held – The Bank Guarantee is an independent contract between the Bank and respondent No. 1 – It is unconditional irrevocable one – The balance of convenience is in fact in encashment of the Bank Guarantees – There is no jurisdictional error nor the order suffers from any patent illegality – No interference is warranted – Bank is directed to encash the Bank Guarantees forthwith. [Singh Cold Storage Pvt. Ltd., Ujjain Vs. Parle Biscuits Pvt. Ltd., Mumbai]** ...3033

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – व्यादेश प्रदान किया जाना – अपीलार्थी ने प्रत्यर्थी क्र. 1 से करार किया – करार के अनुसरण में उन्होंने रु. 96 लाख की रकम की दो बैंक गारंटियां भी निष्पादित की – अपीलार्थी के विरुद्ध रु. 184 लाख का बकाया था, जिसे विवादित नहीं किया गया – अपीलार्थी ने प्रत्यर्थी क्र. 1 को भुगतान की समयसारणी भी प्रस्तावित की है – बैंक गारंटियां निश्चित रुप से स्वीकृत रकम से कम है – अभिनिर्धारित – बैंक

गारंटी, बैंक और प्रत्यर्थी क्र. 1 के बीच की एक स्वतंत्र संविदा है – यह बिना शर्त अपरिवर्तनीय है – वास्तव में सुविधा का भार बैंक गारंटियों को भुनाने में है – अधिकारिता की त्रुटि नहीं और न ही आदेश किसी प्रत्यक्ष अवैधता से ग्रसित है – हस्तक्षेप की आवश्यकता नहीं – बैंक गारंटियों को अविलम्ब भुनाने के लिए बैंक को निदेशित किया गया। (सिंग कोल्ड स्टोरेज प्रा. लि., उज्जैन वि. पारले बिस्किट प्रा. लि., मुंबई) ...3033

Constitution – Article 226, Advocate Act, (25 of 1961), Section 35 – Professional misconduct – **Petitioner was suspended from practicing as an advocate for a period of five year – Bar council of India reduced the period of suspension from 5 years to one year – Petitioner preferred an appeal before the Apex Court, and finally the appeal was allowed by the Apex Court and the period of suspension was reduced from one year to 6 months – It is alleged that since the order passed by the Apex Court was not communicated to the petitioner, the petitioner continued to practice – Held – Petitioner has stated on affidavit that petitioner is not practicing since 15.10.2011 – It is further stated that petitioner did not practice till the date of filing of petition which was filed on 24.04.2012 – Thus, the petitioner did not practice for six months – There is no evidence in rebuttal – No counter affidavit has been filed by the respondent – There is no reason to disbelieve the statement of petitioner which is on affidavit – In view of this subsequent notification dated 21.01.2012 and also show cause notice dated 03.10.2011 issued by respondent stands quashed – It is clarified that now the petitioner is entitled to practice as suspension period of six months was over long back – Petition disposed of. [Ram Krishna Kothari Vs. State Bar Council of M.P.]** ...3095

संविधान – अनुच्छेद 226, अधिवक्ता अधिनियम (1961 का 25), धारा 35 – वृत्तिक अवचार – याची को पाँच वर्ष की अवधि के लिए अधिवक्ता के रुप में व्यवसाय करने से निलंबित किया गया – भारत की अधिवक्ता परिषद ने निलंबन की अवधि 5 वर्ष से घटाकर एक वर्ष की – याची ने सर्वोच्च न्यायालय को अपील की और अंतिमतः सर्वोच्च न्यायालय द्वारा अपील मंजूर की गई और निलंबन की अवधि एक वर्ष से घटाकर छः माह की गई – यह अभिकथित किया गया है कि चूंकि सर्वोच्च न्यायालय द्वारा पारित आदेश, याची को संसूचित नहीं किया गया, याची ने व्यवसाय जारी रखा – अभिनिर्धारित – याची ने शपथ पत्र पर कथन किया है कि याची 15.10.2011 से व्यवसाय नहीं कर रहा है – आगे यह कथन है कि याची ने

याचिका प्रस्तुत करने की तिथि तक जिसे 24.04.2012 को प्रस्तुत किया गया था, व्यवसाय नहीं किया – अतः याची ने छः माह तक व्यवसाय नहीं किया – खंडन में कोई साक्ष्य नहीं – प्रत्यर्थी द्वारा प्रति शपथ पत्र प्रस्तुत नहीं किया गया – याची का कथन जो शपथ पत्र पर है, उस पर अविश्वास करने का कोई कारण नहीं – इसे दृष्टिगत रखते हुए पश्चातवर्ती अधिसूचना दिनांक 21.01.2012 और प्रत्यर्थी द्वारा जारी किया गया कारण बताओ नोटिस दिनांक 03.10.2011 अभिखंडित – यह स्पष्ट किया जाता है कि अब याची व्यवसाय करने का हकदार है, क्योंकि छः माह की निलंबन अवधि बहुत पहले पूरी हो गई है – याचिका का निपटारा किया गया। (राम कृष्ण कोठारी वि. स्टेट बार काउंसिल ऑफ एम.पी.) ...3095

Constitution – Article 226 – Alternative Remedy **– Despite availability of alternative remedy the petition can be entertained – It is a matter of policy/discretion and is not of a compulsion depends upon the circumstances of each case – One such ingredient for entertaining the petition is violation of principle of natural justice. [Shantimal Bhandari Vs. State of M.P.]** ...2841

संविधान – अनुच्छेद 226 – वैकल्पिक उपचार – वैकल्पिक उपचार की उपलब्धता के बावजूद, याचिका ग्रहण की जा सकती है – यह नीति/विवेकाधिकार का मामला है और न कि बाध्यता का, यह प्रत्येक प्रकरण की परिस्थितियों पर निर्भर होता है – याचिका ग्रहण करने के लिए एक ऐसा ही घटक है, नैसर्गिक न्याय के सिद्धांत का उल्लंघन। (शांतिमल भण्डारी वि. म.प्र. राज्य) ...2841

Constitution – Article 226 – Exemption – Industrial Policy of the State of M.P. – Capital Investment **– State Level Committee refused to grant benefit of exemption to the petitioner under Notification No. 43 dated 06.06.1995 in respect of Capital investment made by the petitioner during the period from 01.04.1992 to 31.03.1994 despite conversion of its unit into an exporting unit and there being nothing in the notification to fix such cut-off date – Held – No dispute that the unit of the petitioner has been qualified by a 100% exporting unit within time framed, which has been permitted by the notification, they are entitled to claim benefit of fixed Capital assets as prayed for by the petitioner – Order of the State Appellate Forum is modified to the extent that the petitioner shall be entitled to the benefit of exemption towards fixed Capital assets to the tune of Rs. 232.41/- lacs as claimed by them and to that extent, the order of the State Appellate Forum stands modified. [Krishna Oil Extraction**

Ltd. (M/s.) Vs. State Appellate Forum] (DB)...2848

संविधान – अनुच्छेद 226 – छूट – म.प्र. राज्य की औद्योगिक नीति – पूंजी निवेश – याची द्वारा 01.04.1992 से 31.03.1994 तक की अवधि के दौरान किये गये पूंजी निवेश के संबंध में अधिसूचना क्र. 43 दिनांक 06.06.1995 के अंतर्गत छूट का लाभ याची को प्रदान करने से राज्य स्तरीय समिति ने इंकार किया, यद्यपि उसकी इकाई को निर्यात इकाई में परिवर्तित किया गया था और अधिसूचना में उक्त अंतिम तिथि निश्चित करने के लिए कुछ नहीं है – अभिनिर्धारित – कोई विवाद नहीं कि याची की इकाई ने समयावधि के भीतर 100 प्रतिशत निर्यात इकाई द्वारा अर्हता प्राप्त कर ली है, जो अधिसचूना द्वारा अनुज्ञेय है, वे निश्चित पूंजी परिसम्पत्तियों के लाभ का दावा करने के लिए हकदार है, जैसा कि याची द्वारा निवेदन किया गया है – राज्य अपीली फोरम के आदेश को इस सीमा तक परिवर्तित किया गया कि याची निर्धारित पूंजी परिसम्पत्यिों की ओर रु. 232.41/– लाख की छूट के लाभ का हकदार होगा जैसा कि उनके द्वारा दावा किया गया है और उस सीमा तक राज्य अपीली फोरम का आदेश परिवर्तित किया गया। (कृष्णा ऑयल एक्सट्रेक्शन लि. (मे.) वि. स्टेट अपीलियेट फोरम) (DB)...2848

Constitution – Article 226, Penal Code (45 of 1860), Sections 420, 467, 468, 471, 120-B, 34 & Prevention of Corruption Act (49 of 1988), Sections 13(1)(d) r/w Section 13(2) – Grant of sanction for prosecution – **Recommendation of the department is not binding against the sanctioning authority – The sanctioning authority can consider the matter after taking into consideration the entire available record including the recommendation given by the department – Recommendation given by the department cannot be the ground to quash the impugned sanction order. [Avinash Dubey Vs. State of M.P.]** (DB)...2507

संविधान – अनुच्छेद 226, दण्ड संहिता (1860 का 45), धाराऐं 420, 467, 468, 471, 120बी, 34 व भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराऐं 13(1)(d) सहपठित धारा 13(2) – अभियोजन हेतु मंजूरी प्रदान की जाना – विभाग की अनुशंसा, मंजूरी प्रदान करने वाले प्राधिकारी के विरुद्ध बंधनकारक नहीं – मंजूरी प्रदान करने वाला प्राधिकारी, संपूर्ण उपलब्ध अभिलेख, जिसमें विभाग द्वारा दी गई अनुशंसा समाविष्ट है, को विचार में लेने के पश्चात मामले का विचार कर सकता है – विभाग द्वारा की गई अनुशंसा, आक्षेपित मंजूरी आदेश को अभिखंडित करने का आधार नहीं हो सकता। (अविनाश दुबे वि. म.प्र. राज्य) (DB)...2507

Constitution – Article 226 **– Petitioner is seeking direction to the respondents to cut-short the Schedule of Panchayat Election so**

that it can be completed within the shortest duration – He has directly approached the court without making representation to the authority competent to decide the same – Held – As the petitioner has directly filed the petition without approaching the Competent Authority by making a clear, plain and unambiguous demand – Petition dismissed. [Ranchodlal Vs. State of M.P.] (DB)...2840

संविधान – अनुच्छेद 226 – याची पंचायत चुनाव की समयसारणी को कम करने के लिए प्रत्यर्थीगण को निदेश चाहता है जिससे कि वह कम से कम समयावधि में पूरा हो सके – उक्त के विनिश्चय हेतु सक्षम प्राधिकारी को अभ्यावेदन दिये बिना वह सीधे न्यायालय आया है – अभिनिर्धारित – चूंकि याची ने सक्षम प्राधिकारी के समक्ष स्पष्ट, सीधी और असंदिग्ध मांग किये बिना सीधे याचिका प्रस्तुत की है – याचिका खारिज। (रनछोड़ लाल वि. म.प्र. राज्य) **(DB)...2840**

Constitution – Article 226 – Recovery of the arrears of commercial tax **– Petitioner's application for registration for grant of benefits under the scheme was rejected on the grounds (a) that it is not a new industry; and (b) that there are dues of commercial tax on the earlier unit which has been purchased by the petitioner – Held – The intention of the scheme is not to deny the benefits to the genuine new industrial undertakings – That the literal construction of the clauses of negative list as has been tried to make by the respondents would result in defeating the very purpose of the scheme – The respondents in place of taking into consideration that the petitioner is a bonafide auction purchaser of the erstwhile unit and had nothing to do with the earlier unit or its dues have attempted to bring the petitioner in the negative list merely because the petitioner has established its unit by purchasing the earlier unit – Such an approach of the respondents is contrary to the spirit of the scheme and as such cannot be allowed to sustain. [Bhagwan Motors Pvt. Ltd. (M/s.) Vs. Madhya Pradesh Trade & Investment Facilitation Corporation Ltd.] (DB)...2509**

संविधान – अनुच्छेद 226 – वाणिज्यिक कर के बकाया की वसूली – योजना के अंतर्गत लाभ प्रदान किये जाने हेतु पंजीयन के लिये याची का आवेदन इन आधारों पर अस्वीकार किया गया (ए) कि वह नया उद्योग नहीं ; और (बी) पूर्ववर्ती संयंत्र, जिसे याची द्वारा क्रय किया गया था, पर वाणिज्यिक कर देय है – अभिनिधारित – योजना का उद्देश्य, वास्तविक नये औद्योगिक प्रतिष्ठान को लाभ से

वंचित करना नहीं है – नकारात्मक सूची के खंडो का शाब्दिक अर्थान्वयन जैसा कि प्रत्यर्थी द्वारा लगाने का प्रयास किया गया है, के परिणामस्वरुप योजना के प्रयोजन को ही विफल बनायेगा – प्रत्यर्थीगण ने इसको विचार में लेने की बजाए कि याची, तत्कालीन संयत्र का वास्तविक नीलामी क्रेता है और पूर्वतर संयत्र या उसके देयकों से कोई लेना देना नहीं, याची को नकारात्मक सूची में लाने का प्रयास किया है, मात्र इसलिए कि याची ने पूर्वतर संयत्र को क्रय करके अपना संयत्र स्थापित किया है – प्रत्यर्थीगण का उक्त दृष्टिकोण योजना के आशय के विपरीत है और इस कारण उसे कायम रखने की अनुमति नहीं दी जा सकती। (भगवान मोटर्स प्रा.लि. (मे.) वि. मध्यप्रदेश ट्रेड एण्ड इन्वेस्टमेन्ट फेसिलिटेशन कारपोरेशन लि.) **(DB)...2509**

***Constitution – Article 226 – Transfer of Investigation to CBI* – Merely because of immense amount of public interest, public outcry and public demand, investigation cannot be transferred to CBI. [Awadhesh Prasad Shukla Vs. State of M.P.] (DB)...2884**

संविधान – अनुच्छेद 226 – सी.बी.आई. को जांच अंतरित की जाना – मात्र इसलिए कि बहुत अधिक पैमाने का लोक हित, जन आक्रोश एवं सार्वजनिक मांग है, जांच सी.बी.आई. को अंतरित नहीं की जा सकती। (अवधेश प्रसाद शुक्ला वि. म.प्र. राज्य) **(DB)...2884**

***Constitution – Article 226 – VYAPAM Scam* – Investigation transferred by State Govt. to STF headed by ADGP – Merely because STF is one of the wing of State Government, does not mean that it will not carry out investigation independently and impartially or will act on the instructions of the Higher Authorities – After analysis of material produced, the STF is proceeding in right direction and without any bias – However the option of monitoring investigation done by STF by the Court is adopted – Petition disposed off. [Awadhesh Prasad Shukla Vs. State of M.P.] (DB)...2884**

संविधान – अनुच्छेद 226 – व्यापम घोटाला – जांच को राज्य सरकार द्वारा ए.डी.जी.पी. की अध्यक्षता में एस.टी.एफ. को अंतरित किया गया – मात्र इसलिए कि एस.टी.एफ., राज्य सरकार का एक अंग है, इसका अर्थ यह नहीं होगा कि वह जांच को स्वतंत्र रुप से या निष्पक्ष रुप से नहीं करेगी या उच्च प्राधिकारियों के अनुदेशों पर कार्य करेगी – प्रस्तुत की गई सामग्री का अवलोकन करने के पश्चात, एस.टी.एफ. सही दिशा में और बिना भेदभाव के कार्यवाही कर रही है – किन्तु एस.टी.एफ. द्वारा की गयी जांच पर न्यायालय की निगरानी के विकल्प को अपनाया गया – याचिका का निपटारा किया

गया। (अवधेश प्रसाद शुक्ला वि. म.प्र. राज्य) (DB)...2884

Constitution – Article 227, Civil Procedure Code (5 of 1908), Order 9 Rule 9 – **Plaintiff's suit dismissed in default – He brought another suit on same prayer – Order 9 Rule 9, C.P.C. attracted – Second suit barred. [PRL Projects & Infrastructure Ltd. Vs. State of M.P.]** ...*17

संविधान – अनुच्छेद 227, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 – व्यतिक्रम से वादी का वाद खारिज किया गया – उसी प्रार्थना पर उसने अन्य वाद पेश किया – सि.प्र.सं. का आदेश 9 नियम 9 आकृष्ट होता है – द्वितीय वाद वर्जित। (पी आर एल प्रोजेक्ट एण्ड इन्फ्रास्ट्रक्चर लि. वि. म.प्र. राज्य)...*17

Contempt of Courts Act (70 of 1971), Section 12 – **Contemnors have filled up the entire 150 seats available for the year 2011-12, without sharing of MBBS seats between the respondent private Medical College and the State Government, violating the orders of court dated 27.05.2009 and 27.01.2011 – Held – Once there is an order in force binding on the parties, they cannot violate or ignore that order, taking shelter under a statutory provision – If any modification of the order is warranted parties should have approached the court and sought for clarification or modification of the order – Parties cannot get away merely by tendering an unconditional and unqualified apology after enjoying the fruits of their illegality – Contemnors are directed to pay Rs. 50 Lakhs. [State of M.P. Vs. Suresh Narayan Vijayvargiya]** (SC)...3077

न्यायालय अवमान अधिनियम (1971 का 70), धारा 12 – प्रत्यर्थी प्राईवेट मेडिकल कॉलेज और राज्य सरकार के बीच एमबीबीएस सीटों का हिस्सा बांटे बिना, अवमानकर्ताओं ने न्यायालय के आदेश दिनांक 27.05.2009 और 27.01.2011 का उल्लंघन करते हुए वर्ष 2011–12 के लिए उपलब्ध संपूर्ण 150 सीटों को भर दिया – अभिनिर्धारित – एक बार जब पक्षकारों पर बाध्यकारी आदेश मौजूद है, वे कानूनी उपबंध के अंतर्गत आश्रय लेकर उस आदेश का उल्लंघन या अनदेखी नहीं कर सकते – यदि आदेश का उपांतरण आवश्यक था, पक्षकारों को न्यायालय में जाना चाहिए था और आदेश का स्पष्टीकरण या उपांतरण चाहना था – पक्षकार अपनी अवैधता के फल का उपभोग करने के पश्चात, मात्र बिना शर्त क्षमा याचना करके बच नहीं सकते – अवमानकर्ताओं को 50 लाख रूपये अदा करने के लिए निदेशित किया गया। (म.प्र. राज्य वि. सुरेश नारायण विजयवर्गीय) (SC)...3077

Court Fees Act (7 of 1870)(As applicable in M.P. State), Section 7 (iv)(c) – **Plaintiff filed suit that the sale deed is not binding on him – Transaction is voidable – Plaintiff is required to pay ad valorem court fee upon it. [Jeevanlal Rathore Vs. Deepchand] ...3263**

न्यायालय फीस अधिनियम (1870 का 7), (जैसा कि म.प्र. राज्य में लागू है), धारा 7(iv)(सी) – वादी ने वाद प्रस्तुत किया कि विक्रय विलेख उस पर बंधनकारी नहीं – संव्यवहार शून्यकरणीय है – वादी को उस पर मूल्यानुसार न्यायालय फीस अदा करना अपेक्षित है। (जीवनलाल राठौर वि. दीपचन्द) ...3263

Criminal Procedure Code, 1973 (2 of 1974), Section 154 – Delay in F.I.R. – **F.I.R. lodged within 3 hours of incident – Outpost 12 kms. away from place of incident – F.I.R. was lodged promptly. [Rajeev Lochan Singh Vs. State of M.P.] (DB)...3231**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना रिपोर्ट में विलम्ब – घटना के 3 घंटे के भीतर प्रथम सूचना रिपोर्ट दर्ज की गई – घटनास्थल से चौकी 12 किमी की दूरी पर – प्रथम सूचना रिपोर्ट तत्परता से दर्ज की गई। (राजीव लोचन सिंह वि. म.प्र. राज्य) (DB)...3231

Criminal Procedure Code, 1973 (2 of 1974), Sections 173(2)(ii), 190 – Final Report – Notice to Complainant – **Police filed Khatma report after giving notice to complainant – Court upon objection filed by complainant recorded statements of witnesses and took cognizance – No fault with the order passed by trial Magistrate. [Shyam Babu Agrawal Vs. State of M.P.] ...2756**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 173(2)(ii), 190 – अंतिम प्रतिवेदन – शिकायतकर्ता को नोटिस – पुलिस ने शिकायतकर्ता को नोटिस देने के पश्चात खात्मा रिपोर्ट प्रस्तुत की – शिकायतकर्ता द्वारा आक्षेप प्रस्तुत करने पर न्यायालय ने साक्षियों के कथन अभिलिखित किये और संज्ञान लिया – विचारण मजिस्ट्रेट द्वारा पारित किये गये आदेश में कोई दोष नहीं। (श्याम बाबू अग्रवाल वि. म.प्र. राज्य) ...2756

Criminal Procedure Code, 1973 (2 of 1974), Sections 207 & 482 – **Supply of image copy of electronic documents pending trial – When the prosecution itself has not relied on such articles or implements then mere on the request or the whims of the applicant**

contrary to the provisions of Section 173(5) and Section 207 of the Code, the prosecution agency could not have been directed to supply the mirror copy, image copy or any such type of documents, which is not the part of the charge sheet and its record – No interference could be drawn in the matter by invoking the inherent power of this court enumerated u/s 482 of Cr.P.C. – Petition dismissed. [Guman Singh Vs. State of M.P.] (DB)...3059

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 207 व 482 – विचारण लंबित रहते इलेक्ट्रॉनिक दस्तावेज की ईमेज प्रति को प्रदाय किया जाना – जब अभियोजन ने स्वयं उक्त वस्तुओं या साधनों पर विश्वास नहीं किया है, तब संहिता की धारा 173(5) व धारा 207 के उपबंधों के विपरीत आवेदक के मात्र निवेदन या सनक पर, प्रतिबिंब प्रति, ईमेज प्रति या ऐसे किसी प्रकार का दस्तावेज जो आरोप पत्र एवं उसके अभिलेख का हिस्सा नहीं है, को प्रदाय किये जाने के लिये अभियोजन एजेंसी को निदेशित नहीं किया जा सकता था – द.प्र.सं. की धारा 482 के अंतर्गत इस न्यायालय की अंतर्निहित शक्ति का अवलंब लेकर मामले में हस्तक्षेप नहीं किया जा सकता – याचिका खारिज। (गुमान सिंह वि. म.प्र. राज्य) **(DB)...3059**

***Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 – Framing of charge* – If prima-facie case is made out charge has to be framed –Not necessary to appreciate evidence at the stage of framing charge – Revision dismissed. [Saba Vs. C.B.I., Bhopal] ...*18**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 227 व 228 – आरोप विरचित किया जाना – यदि प्रथम दृष्ट्या प्रकरण बनता है, तब आरोप विरचित किया जाना चाहिए – आरोप विरचित करने के प्रक्रम पर साक्ष्य का मूल्यांकन करना आवश्यक नहीं – पुनरीक्षण खारिज। (सबा वि. सी.बी.आई., भोपाल) ...*18

***Criminal Procedure Code, 1973 (2 of 1974), Section 228 – Framing of Charge* – Held – That once the court decides to frame the charge u/s 228 there is no question of discharging him at a later stage by exercising the power u/s 227 – Further held, once charge has been framed, the trial has to proceed accordingly and it cannot be put to back gear for discharging u/s 227. [Naveen Gupta Vs. State of M.P.] ...2701**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किया जाना – अभिनिर्धारित – एक बार जब न्यायालय धारा 228 के अंतर्गत आरोप विरचित करने का निर्णय लेता है, उसे धारा 227 के अंतर्गत शक्ति का प्रयोग करते

हुए बाद के प्रक्रम पर आरोपमुक्त किये जाने का कोई प्रश्न नहीं उठता – आगे अभिनिर्धारित, एक बार आरोप विरचित किये जाने पर, विचारण की कार्यवाही तद्नुसार होनी चाहिए और धारा 227 के अंतर्गत आरोपमुक्त किये जाने हेतु उसे पीछे नहीं ले जाया जा सकता। (नवीन गुप्ता वि. म.प्र. राज्य) ...2701

Criminal Procedure Code, 1973 (2 of 1974), Section 228 – See – Penal Code, 1860, Sections 304-B, 302/34 [Rani (Smt.) Vs. State of M.P.] ...3055

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – देखें – दण्ड संहिता, 1860, धाराऐं 304बी, 302/34 (रानी (श्रीमती) वि. म.प्र. राज्य) ...3055

Criminal Procedure Code, 1973 (2 of 1974), Section 319 – Power to summon additional accused – Held – Court should not pass order u/s 319 of Cr.P.C. unless a higher standard of evidence for the purpose of forming an opinion to summon a person is available – In extraordinary case such jurisdiction be invoked sparingly – No prima facie evidence against the applicants – No sufficient and cogent reason has been assigned for summoning the applicant, impugned order is not sustainable, same is set aside. [Rajendra Singh Vs. State of M.P.] ...2709

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त को समन करने की शक्ति – अभिनिर्धारित – न्यायालय को द.प्र.स. की धारा 319 के अंतर्गत आदेश पारित नहीं करना चाहिए जब तक कि किसी व्यक्ति को समन करने के लिए अभिमत बनाये जाने के प्रयोजन हेतु उच्च कोटि का साक्ष्य उपलब्ध न हो – असाधारण प्रकरण में उक्त अधिकारिता का अवलंब सावधानीपूर्वक करना चाहिए – आवेदकगण के विरुद्ध प्रथम दृष्ट्या साक्ष्य नहीं – आवेदक को समन करने के लिए कोई पर्याप्त एवं प्रबल कारण नहीं दिया गया, आक्षेपित आदेश पोषणीय नहीं, उसे अपास्त किया गया। (राजेन्द्र सिंह वि. म.प्र. राज्य) ...2709

Criminal Procedure Code, 1973 (2 of 1974), Sections 397/401 – Applicants were tried for offence u/s 498-A, r/w 34 of I.P.C. – They were convicted for the same – In appeal learned Sessions Judge acquitted them from the charge punishable u/s 498-A of IPC, but convicted them for offence punishable u/s 323 & 354 of I.P.C respectively – Held – Where two offences involve two different elements and different question of facts one offence cannot be said to be the minor to the other and the conviction cannot be passed in the

absence of specific charge – Minor offence essentially be a cognate offence of the major offence – Applicants were deprived of from their right of natural justice to defend – Ingredients of Sections 354 & 498-A of IPC are entirely different to each other – There is no similarity, correlation, cognation or commonness between these two sections – Revision is allowed, applicants are acquitted. [Prakash Sahu Vs. State of M.P.] **...3293**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397/401 – भा.द.सं. की धारा 498-ए सहपठित धारा 34 के अंतर्गत अपराध के लिए आवेदकगण का विचारण किया गया – उक्त के लिए उन्हें दोषसिद्ध किया गया – अपील में विद्वान सत्र न्यायाधीश ने उन्हें भा.द.सं. की धारा 498-ए के अंतर्गत दण्डनीय आरोप से दोषमुक्त किया परंतु उन्हें क्रमशः भा.द.सं. की धारा 323 व 354 के अंतर्गत दण्डनीय अपराध के लिए दोषसिद्ध किया – अभिनिर्धारित – जहां दो अपराधों में दो भिन्न तत्व एवं भिन्न प्रश्न अंतर्विष्ट हैं, एक अपराध को अन्य से छोटा नहीं कहा जा सकता और विनिर्दिष्ट आरोप की अनुपस्थिति में दोषसिद्धि पारित नहीं की जा सकती – छोटा अपराध, बड़े अपराध का आवश्यक रूप से सजातीय अपराध होना चाहिए – भा.द.सं. की धारा 354 व 498-ए के घटकांग पूर्ण रूप से एक दूसरे से भिन्न हैं – इन दो धाराओं के मध्य कोई समानता, परस्पर संबंध, सजातीयता या समानता नहीं – पुनरीक्षण मंजूर, आवेदकगण दोषमुक्त। (प्रकाश साहू वि. म.प्र. राज्य) **...3293**

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 – Entitlement on account of age **– Age of respondent No. 3 is mentioned as 16 years in the main application therefore Family Court is directed to decide the issue of entitlement after giving fair opportunity to both the parties regarding age of respondent No. 3. [Rayees Khan Vs. Smt. Jahide Bi]** **...3049**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401 – आयु के कारण हकदारी – मुख्य आवेदन में प्रत्यर्थी क्र. 3 की आयु 16 वर्ष उल्लिखित है इसलिए कुटुम्ब न्यायालय को निदेशित किया गया कि प्रत्यर्थी क्र. 3 की आयु के संबंध में दोनों पक्षकारों को निष्पक्ष सुनवाई का अवसर देने के पश्चात हकदारी के विवाद्यक का विनिश्चय करें। (रईस खान वि. श्रीमती जाहिदा बी) **...3049**

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 – Expenses incurred towards treatment **– Civilian of Bhopal city who are affected from Gas Tragedy are getting appropriate medical facility and**

compensation so if he is expending huge amount on his own treatment is not justified – Family court has awarded a reasonable amount – Revision dismissed. [Rayees Khan Vs. Smt. Jahide Bi] ...3049

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401 – उपचार के लिए वहन किये गये खर्चे – भोपाल शहर के सिविलियन जो गैस त्रासदी से प्रभावित हुए हैं, उन्हें समुचित चिकित्सीय सुविधा और प्रतिकर मिल रहा है, अतः यदि वह स्वयं के उपचार पर विशाल रकम खर्च कर रहा है, यह न्यायोचित नहीं – कुटुम्ब न्यायालय ने युक्तियुक्त रकम अवार्ड की है – पुनरीक्षण खारिज। (रईस खान वि. श्रीमती जाहिदा बी) ...3049

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401 – Grant of Interim maintenance u/s 125, Cr.P.C. – Award from the date of application **– Order granting interim maintenance challenged on the ground that respondent No.3 being major is not entitle for the same and it should not have been awarded from the date of application – Applicant being Bhopal Gas affected person incurred huge amount on his own treatment – Held – Applicant divorced respondent No.1 and also turned out his children, neglected to maintain them and married with another woman – Reply to application was filed after lapse of more than 10 months – He adopted delaying tactics – Sufficient ground for awarding maintenance from the date of application. [Rayees Khan Vs. Smt. Jahide Bi] ...3049**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401 – द.प्र.सं. की धारा 125 के अंतर्गत अंतरिम भरण-पोषण का प्रदान – आवेदन की तिथि से अवार्ड – अंतरिम भरण-पोषण प्रदान करने के आदेश को, इस आधार पर चुनौती दी गई कि प्रत्यर्थी क्र. 3 वयस्क होने के नाते उक्त का हकदार नहीं है और आवेदन की तिथि से उसे प्रदान नहीं किया जाना चाहिए था – आवेदक भोपाल गैस प्रभावित व्यक्ति होने से उसने स्वयं के उपचार पर विशाल रकम खर्च की है – अभिनिर्धारित – आवेदक ने प्रत्यर्थी क्र. 1 को तलाक दिया और उसके बच्चों को बाहर निकाल दिया, उनके पालन-पोषण की उपेक्षा की और अन्य महिला से विवाह किया – आवेदन का जवाब 10 माह से अधिक अवधि व्यपगत होने के पश्चात प्रस्तुत किया गया – उसने विलंब की युक्ति अपनाई – आवेदन की तिथि से भरण-पोषण अवार्ड करने का पर्याप्त आधार। (रईस खान वि. श्रीमती जाहिदा बी) ...3049

Criminal Procedure Code, 1973 (2 of 1974), Sections 397/401 **– Rejection of application for returning original warehouse's receipt –**

Held – Original warehouse's receipt seized in connection of the impugned offence have been sent to authorized expert for its examination – Report is still awaited – Discretion to return the same lies only with such court which is not possible at this stage – However, the applicant shall be at liberty to file application after receiving the expert report, same shall be considered in accordance with law – Revision dismissed. [Santosh Kumar Vs. C.B.I.] (DB)...3047

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397/401 – मालगोदाम की मूल रसीद की वापिसी हेतु आवेदन को अस्वीकार किया जाना – अभिनिर्धारित – आक्षेपित अपराध से संबंधित जब्त की गई मालगोदाम की मूल रसीद को उसके परीक्षण हेतु प्राधिकृत विशेषज्ञ को भेजा गया – प्रतिवेदन अभी अप्राप्त है – उक्त को वापिस करने का विवेकाधिकार केवल उक्त न्यायालय को है जो कि इस प्रक्रम पर संभव नहीं – किन्तु, विशेषज्ञ प्रतिवेदन प्राप्त करने के पश्चात आवेदन प्रस्तुत करने के लिए आवेदक स्वतंत्र होगा और उक्त को विधि अनुसार विचार में लिया जायेगा – पुनरीक्षण खारिज। (संतोष कुमार वि. सी.बी.आई.) (DB)...3047

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401, 399 – Exercise of Revisional Jurisdiction **– On the basis of material available on record, Revisional Court is not supposed to exercise revisional jurisdiction while setting aside the order of the trial court, which is based upon well considered reasoning supported by the material available on record – Therefore, Revisional Court exceeded the jurisdiction – Impugned order is set-aside. [Gyanesh Vs. Central Bureau of Investigation] ...3274**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401, 399 – पुनरीक्षण अधिकारिता का प्रयोग – अभिलेख पर उपलब्ध सामग्री के आधार पर पुनरीक्षण न्यायालय को विचारण न्यायालय का आदेश जो अभिलेख पर उपलब्ध सामग्री द्वारा समर्थित भलिभांति विचार किये गये तर्क पर आधारित है, को अपास्त करते हुए पुनरीक्षण अधिकारिता का प्रयोग करना अपेक्षित नहीं – अतः पुनरीक्षण न्यायालय अपनी अधिकारिता की सीमा से बाहर गया – आक्षेपित आदेश अपास्त। (ज्ञानेश वि. सेन्ट्रल ब्यूरो ऑफ इन्वेस्टिगेशन) ...3274

Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401, 399, Penal Code (45 of 1860), Sections 100, 103 & Evidence Act (1 of 1872), Section 105 – Right of Private Defence **– The benefit of general exception u/s 100 and 103 of I.P.C. may be available to the accused on**

discharging the burden in the court and not before the prosecution agency – The said occasion is not available to the prosecution agency including CBI. [Gyanesh Vs. Central Bureau of Investigation]...3274

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401, 399, दण्ड संहिता (1860 का 45), धाराऐं 100, 103 व साक्ष्य अधिनियम (1872 का 1), धारा 105 – प्राईवेट प्रतिरक्षा का अधिकार – भा.द.सं. की धारा 100 एवं 103 के अंतर्गत् सामान्य अपवाद का लाभ अभियुक्त को न्यायालय में भार उन्मोचित किये जाने पर उपलब्ध हो सकता है और न कि अभियोजन एजेंसी के समक्ष – उक्त अवसर अभियोजन एजेंसी को उपलब्ध नहीं, इसमें सीबीआई भी शामिल है। (ज्ञानेश वि. सेन्ट्रल ब्यूरो ऑफ इन्वेस्टिगेशन) ...3274

***Criminal Procedure Code, 1973 (2 of 1974), Section 438 – Anticipatory Bail – Juvenile* – Application for grant of anticipatory bail preferred by juvenile cannot be entertained by the High Court or the Sessions Court by applying the provisions u/s 6(2) of Juvenile Justice *(Care and Protection of Children)* Act, 2000. [Satendra Sharma Vs. State of M.P.] ...2749**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 438 – अग्रिम जमानत – किशोर – अग्रिम जमानत प्रदान किये जाने हेतु किशोर द्वारा दिया गया आवेदन, किशोर न्याय *(बालकों की देख–रेख और संरक्षण)* अधिनियम, 2000 की धारा 6(2) के अंतर्गत उपबंधों को लागू करके उच्च न्यायालय अथवा सत्र न्यायालय द्वारा ग्रहण नहीं किया जा सकता। (सतेन्द्र शर्मा वि. म.प्र. राज्य) ...2749

***Criminal Procedure Code, 1973 (2 of 1974), Section 482, Criminal Procedure Code (Amendment) Act, 2008 (5 of 2009), Section 2 (wa) – Power of transfer of Sessions Trial u/s 407, Cr.P.C. – Hearing to Victim* – Victim is an aggrieved person not only in a crime but also in an investigation, inquiry, trial, appeal, revision, review and also the proceedings by which the inherent powers of this Court u/s 482, Cr.P.C. are invoked – The transfer certainly causes prejudice to the victim as he has a right not only to know the venue of conduction of trial, but also to oppose on cogent ground – Impugned order is recalled – M.Cr.C. No. 9261/2012 is restored to its original number. [Uday Bhan Vs. State of M.P.] (DB)...2722**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, दण्ड प्रक्रिया संहिता

(संशोधन) अधिनियम, 2008 (2009 का 5), धारा 2 (डब्लू ए) – द.प्र.सं. की धारा 407 के अंतर्गत सेशन विचारण के अंतरण की शक्ति – पीड़ित को सुना जाना – पीड़ित एक व्यथित व्यक्ति है, न केवल अपराध में बल्कि अन्वेषण, जांच, विचारण, अपील, पुनरीक्षण, पुनर्विलोकन में तथा ऐसी कार्यवाहियों में भी जिसके द्वारा द.प्र.सं. की धारा 482 के अंतर्गत इस न्यायालय की अंतर्निहित शक्तियों का अवलंब लिया गया – अंतरण निश्चित रुप से पीड़ित पर प्रतिकूल प्रभाव कारित करता है क्योंकि उसे न केवल विचारण को चलाने के स्थान की जानकारी का अधिकार है, बल्कि प्रबल आधार पर विरोध का भी है – आक्षेपित आदेश वापिस लिया गया – एम.सी.आर.सी. क्र. 9261/2012 उसके मूल क्रमांक पर पुनः स्थापित। (उदय भान वि. म.प्र. राज्य) **(DB)...2722**

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Evidence Act (1 of 1872), Section 165 **– Documents pertaining to medical report of injured were taken on record – Same were produced by the prosecution in compliance of the direction of the trial court – Held – Since the documents are necessary for just decision and also for proving the nature of injury, trial court has properly used its discretion as Court was having power to order production of necessary documents u/s 165 of the Evidence Act – Trial Court has rightly allowed the application – Petition is dismissed. [Raju Vs. State of M.P.] ...3308**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, साक्ष्य अधिनियम (1872 का 1), धारा 165 – आहत के चिकित्सा प्रतिवेदन से संबंधित दस्तावेज अभिलेख पर लिये गये – उक्त को अभियोजन द्वारा विचारण न्यायालय के निर्देश के अनुपालन में प्रस्तुत किया गया – अभिनिर्धारित – चूंकि उचित निर्णय एवं क्षति की प्रकृति को साबित करने के लिये भी दस्तावेज आवश्यक हैं, विचारण न्यायालय ने उचित रुप से अपने विवेकाधिकार का प्रयोग किया जैसा कि साक्ष्य अधिनियम की धारा 165 के अंतर्गत न्यायालय को आवश्यक दस्तावेज प्रस्तुत करने के आदेश देने की शक्ति है – विचारण न्यायालय ने उचित रुप से आवेदन मंजूर किया – याचिका खरिज। (राजू वि. म.प्र. राज्य) **...3308**

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Inherent Power **– Quashing of FIR and Criminal Proceedings – Petitioner was not named in the FIR – Implicated as an accused on the basis of statements of other u/s 27 Evidence Act – Petition allowed to the extent that proceedings initiated against the applicant are quashed. [Banwari Singh Gurjar Vs. State of M.P.] ...3064**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति –

प्रथम सूचना रिपोर्ट और दाण्डिक कार्यवाही अभिखंडित की जाना – प्रथम सूचना रिपोर्ट में याची का नाम नहीं – साक्ष्य अधिनियम की धारा 27 के अंतर्गत अन्य के कथनों के आधार पर अभियुक्त के रुप में आलिप्त किया गया – याचिका इस सीमा तक मंजूर कि आवेदक के विरुद्ध आरंभ की गयी कार्यवाही अभिखंडित। (बनवारी सिंह गुर्जर वि. म.प्र. राज्य) ...3064

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Inherent Power – Quashing of F.I.R. – **Complaint filed by Rival Trade Union that accused who are member of another Union are illegally collecting funds although its registration has already been cancelled – Held – Order cancelling registration already set aside by Labour Court which has attained finality – Criminal prosecution cannot be permitted to be used as a weapon of harassment – Complaint is lodged with ulterior motive to pressurize petitioner – The procedure for registration of Trade Union and its cancellation is prescribed in the Trade Unions Act – Correctness of the same can be examined only by the competent authority – Police authorities have no competence to give opinion on this aspect – If prosecution is permitted to be continued it will be an abuse of process of law – Petition is allowed. [R.P. Singh Vs. State of M.P.]** ...2728

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – अंतर्निहित शक्ति – प्रथम सूचना रिपोर्ट अभिखंडित की जाना – प्रतिद्वंदी ट्रेड यूनियन द्वारा शिकायत प्रस्तुत की गई कि अभियुक्त जो अन्य यूनियन के सदस्य हैं, अवैध रुप से निधि वसूल रहे हैं, जबकि उसका पंजीयन पहले ही निरस्त किया जा चुका है – अभिनिर्धारित – पंजीयन रद्दकरण का आदेश पहले ही श्रम न्यायालय द्वारा अपास्त किया जा चुका है, जिसने अंतिमता प्राप्त कर ली है – दाण्डिक अभियोजन का उपयोग, उत्पीड़न के शस्त्र के रुप में करने की अनुमति नहीं दी जा सकती – याची पर दबाव बनाने के अंतरस्थ हेतु के साथ शिकायत दर्ज की गई है – ट्रेड यूनियन के पंजीकरण एवं उसके निरस्तीकरण की प्रक्रिया व्यवसाय संघ अधिनियम में विहित है – उक्त की शुद्धता का परीक्षण केवल सक्षम प्राधिकारी द्वारा किया जा सकता है – इस पहलू पर अभिमत देने के लिए पुलिस प्राधिकारी सक्षम नहीं – यदि अभियोजन को जारी रखने की अनुमति दी गई तो यह विधि की प्रक्रिया का दुरुपयोग होगा – याचिका मंजूर। (आर.पी. सिंह वि. म.प्र. राज्य) ...2728

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Negotiable Instruments Act (26 of 1881), Section 138 – Notice – **Cheques were dishonoured but notice was given after dishonour of cheques for third time – Held – Even**

after dishonouring the first cheque for three times and second cheque for two times, if the demand notice was given first time from the last date of dishonouring such cheques in the month of July, 2003 then there is no ground to hold that the demand/statutory notice with respect of aforesaid earlier two cheques which was given by the respondent to the applicant in the month of July, 2003 was beyond the prescribed period provided under the provision of Negotiable Instruments Act. [Mohd. Aasim Vs. Anil Kumar Saraf] ...2718

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 व परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – नोटिस – चेक अनादृत हुए थे किन्तु तीसरी बार चेक अनादृत होने के पश्चात नोटिस दिया गया – अभिनिर्धारित – यदि प्रथम चेक तीन बार और द्वितीय चेक दो बार अनादृत होने के पश्चात भी यदि मांग नोटिस प्रथम बार माह–जुलाई 2003 में उक्त चेक अनादृत होने की अंतिम तिथि से दिया गया था, तब यह धारणा करने का कोई आधार नहीं कि उपरोक्त पूर्ववर्ती दो चेक जो प्रत्यर्थी द्वारा आवेदक को माह जुलाई 2003 में दिये गये थे, के संबंध में मांग/कानूनी नोटिस, परक्राम्य लिखत अधिनियम के उपबंध के अंतर्गत विहित अवधि से परे था। (मोहम्मद आसिम वि. अनिल कुमार सराफ) ...2718

Criminal Procedure Code, 1973 (2 of 1974) Section 482, Penal Code (45 of 1860) Section 498-A – Quashment **– The settlement arrived at between the parties in form of compromise petition filed before the appellate court and submission made before High Court is a sensible step that will benefit the parties will give quietus to the controversy and rehabilitate and normalize the relationship between them – The continuation of criminal proceedings would tantamount to abuse of process of law – Criminal proceeding is hereby quashed. [Naveen Vs. State of M.P.] ...3310**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 482, दण्ड संहिता (1860 का 45), धारा 498-ए– अभिखंडित किया जाना – पक्षकारों के मध्य, अपीली न्यायालय के समक्ष प्रस्तुत समझौता याचिका के रूप में समझौते पर पहुँचना और उच्च न्यायालय के समक्ष किया गया निवेदन एक समझदारी भरा कदम है जिससे पक्षकारों को लाभ होगा, जो विवाद को शांत करेगा और उनके बीच संबंधों को पुनःस्थापित और सामान्य करेगा – दाण्डिक कार्यवाहियां जारी रखना विधि की प्रक्रिया का दुरुपयोग होगा – एतद् द्वारा दाण्डिक कार्यवाही अभिखंडित। (नवीन वि. म.प्र. राज्य) ...3310

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Quashing of Charge **– Applicant and sister of respondent, who is a**

practicing lawyer are husband and wife – Applicant's wife filed an application u/s 127 of Cr.P.C. for enhancement of amount of maintenance – Applicant filed a transfer application contending that respondent and his sister publicly claiming with proud that the decision will be in their favour, because they regularly visit the house of Judicial Magistrate and therefore the applicant apprehends that he will not get justice from that court – Case was transfered to another Court – However, on the basis of above written label complaint was filed by respondent and Magistrate framed the charge u/s 500 of IPC against the applicant – Held – On the basis of available record and the fact that the publication of written 'words' are duly proved, prima-facie commission of offence punishable u/s 500 of IPC is made out – There is no material to show that the allegations are mala fide, frivolous or vexatious – No interference is warranted – Petition is dismissed. [Sadhe Prasad Vs. Santosh Kumar] ...3313

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आरोप अभिखंडित किया जाना – आवेदक और प्रत्यर्थी की बहन जो वकालत करती है, पति–पत्नी हैं – आवेदक की पत्नी ने द.प्र.सं. की धारा 127 के अंतर्गत, भरण पोषण की राशि बढ़ाये जाने हेतु आवेदन प्रस्तुत किया – आवेदक ने अंतरण हेतु आवेदन इस तर्क के साथ प्रस्तुत किया कि प्रत्यर्थी और उसकी बहन घमंड से सार्वजनिक रूप से दावा कर रहे हैं कि निर्णय उनके पक्ष में होगा क्योंकि वे नियमित रूप से न्यायिक मजिस्ट्रेट के घर आते–जाते हैं और इसलिए आवेदक को आशंका है कि उस न्यायालय से उसे न्याय नहीं मिलेगा – प्रकरण को अन्य न्यायालय को अंतरित किया गया – किन्तु, उपरोक्त के आधार पर प्रत्यर्थी द्वारा लिखित लेबल शिकायत प्रस्तुत की गई और मजिस्ट्रेट ने आवेदक के विरूद्ध भा.द.सं. की धारा 500 के अंतर्गत आरोप विरचित किया – अभिनिर्धारित – उपलब्ध अभिलेख और इस तथ्य के आधार पर कि लिखित "शब्दों" के प्रकाशन को सम्यक रूप से साबित किया गया, प्रथम दृष्ट्या भा.द.सं. की धारा 500 के अंतर्गत दण्डनीय अपराध किया जाना साबित होता है – यह दर्शाने के लिए कोई सामग्री नहीं कि अभिकथन असद्भावपूर्ण, तुच्छ या परेशान करने वाला है – हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज। (साधे प्रसाद वि. संतोष कुमार) ...3313

Criminal Procedure Code, 1973 (2 of 1974), Section 482 – Scope **– Petition for setting aside cognizance of offence taken by Magistrate on the basis of complaint – Held – Truck loaded with explosives moved to different destinations but from that it cannot be said that the acts**

and omissions which constitute the offence are the same – Same offence, would mean that acts and omissions which constitute the offence are one and the same – Except the allegation that explosives were loaded at Dholpur, the mode and manner in which the offence was committed at different places are not the same – The provision of Section 186, Cr.P.C. is not attracted in the facts of the present case – High Court erred in passing the impugned order – Order passed by the High Court is to be set aside. [State of Rajasthan Vs. Bhagwan Das Agrawal] **(SC)...3067**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति – शिकायत के आधार पर मजिस्ट्रेट द्वारा लिये गये अपराध के संज्ञान को अपास्त किये जाने हेतु याचिका – अभिनिर्धारित – विस्फोटकों से लदा हुआ ट्रक भिन्न गंतव्य स्थानों पर गया, परंतु इससे यह नहीं कहा जा सकता कि अपराध गठित करने वाले कृत्य एवं लोप समान है – समान अपराध का अर्थ होगा कि वह कृत्य एवं लोप जो अपराध गठित करते हैं वह एक और एक ही है – सिवाय इस अभिकथन के कि विस्फोटकों को धौलपुर में लादा गया था, भिन्न स्थानों पर कारित किये गये अपराध का ढंग और तरीका समान नहीं – द.प्र.सं. की धारा 186 का उपबंध, वर्तमान प्रकरण के तथ्यों में आकर्षित नहीं होता – आक्षेपित आदेश को पारित करने में उच्च न्यायालय ने भूल की – उच्च न्यायालय द्वारा पारित आदेश को अपास्त करना होगा। (राजस्थान राज्य वि. भगवान दास अग्रवाल) **(SC)...3067**

Criminal Procedure Code (Amendment) Act, 2008 (5 of 2009), Section 2 (wa) – See – Criminal Procedure Code, 1973, Section 482 **[Uday Bhan Vs. State of M.P.]** **(DB)...2722**

दण्ड प्रक्रिया संहिता (संशोधन) अधिनियम, 2008 (2009 का 5), धारा 2 (डब्लू ए) – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (उदय भान वि. म.प्र. राज्य) **(DB)...2722**

Evidence Act (1 of 1872), Section 3 – Related witnesses **– Testimony of related witnesses should be examined with the test of close and severe scrutiny – Their testimony cannot be thrown away merely on the ground that they are related witnesses. [Rajeev Lochan Singh Vs. State of M.P.]** **(DB)...3231**

साक्ष्य अधिनियम (1872 का 1), धारा 3 – संबंधी साक्षी – संबंधी साक्षी की परिसाक्ष्य का परीक्षण, बारीकी से और कठोर संविक्षा की परीक्षा के साथ किया जाना

चाहिए – उनकी परिसाक्ष्य को मात्र इस आधार पर ठुकराया नहीं जा सकता कि वे संबंधी साक्षी हैं। (राजीव लोचन सिंह वि. म.प्र. राज्य) (DB)...3231

Evidence Act (1 of 1872), Section 3 – Solitary Eye Witness – **Statement of solitary witness should be consistent, reliable and should be of very high quality and calibre. [Rohit Vs. State of M.P.] (DB)...3203**

साक्ष्य अधिनियम (1872 का 1), धारा 3 – एकमात्र चक्षुदर्शी साक्षी – एकमात्र साक्षी का कथन, संगत, विश्वसनीय होना चाहिए और बहुत उच्च गुणवत्ता और योग्यता का होना चाहिए। (रोहित वि. म.प्र. राज्य) (DB)...3203

Evidence Act (1 of 1872), Section 63 – Secondary Evidence – Photocopy – **Will is in possession of petitioner No. 1 which is not produced inspite of notice – Held – Primary evidence is not available or that anyone of the circumstances such as non-availability or custody of the document in the hands of the adversary will be sufficient grounds for producing secondary evidence. [Kalibai Vs. Ajay] ...3100**

साक्ष्य अधिनियम (1872 का 1), धारा 63 – द्वितीयक साक्ष्य – फोटोकॉपी – वसीयत, याची क्र. 1 के कब्जे में है, जिसे नोटिस के बावजूद प्रस्तुत नहीं किया गया – अभिनिर्धारित – प्राथमिक साक्ष्य उपलब्ध नहीं होना या ऐसी परिस्थितियों में से एक जैसा कि अनुपलब्धता या दस्तोवज की अभिरक्षा विरोधी के हाथ में होना, द्वितीयक साक्ष्य प्रस्तुत करने का पर्याप्त आधार होगा। (कलीबाई वि. अजय) ...3100

Evidence Act (1 of 1872), Section 105 – See – Criminal Procedure Code, 1973, Sections 397, 401, 399 **[Gyanesh Vs. Central Bureau of Investigation] ...3274**

साक्ष्य अधिनियम (1872 का 1), धारा 105 – देखें – दण्ड प्रक्रिया संहिता, 1973, धाराऐं 397, 401, 399 (ज्ञानेश वि. सेन्ट्रल ब्यूरो ऑफ इन्वेस्टिगेशन)...3274

Evidence Act (1 of 1872), Section 154 – Hostile witness – Value of his evidence – **Acceptable portion of his testimony – Can also be used in evidence. [Rajeev Lochan Singh Vs. State of M.P.] (DB)...3231**

साक्ष्य अधिनियम (1872 का 1), धारा 154 – पक्षविरोधी साक्षी – उसके साक्ष्य का मूल्य – उसकी परिसाक्ष्य का स्वीकार योग्य भाग – साक्ष्य में भी उपयोग किया जा सकता है। (राजीव लोचन सिंह वि. म.प्र. राज्य) (DB)...3231

Evidence Act (1 of 1872), Section 165 – See – Criminal Procedure Code, 1973, Section 482 [Raju Vs. State of M.P.] ...3308

साक्ष्य अधिनियम (1872 का 1), धारा 165 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (राजू वि. म.प्र. राज्य) ...3308

Excise Act, M.P. (2 of 1915), Section 34(1)(a) – Chemical Examination of Foreign Liquor – Liquor was identified by a Sub-Inspector who is a trained person and has got vast experience to examine the liquor – Held – Chemical examination is not the only manner by which the identity of the liquor can be proved – It can be proved by the person having expertise in the field. [Jagmohan Vs. State of M.P.] ...2714

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 34(1)(ए) – विदेशी मदिरा का रासायनिक परीक्षण – मदिरा की पहचान उप-निरीक्षक द्वारा की गई थी, जो एक प्रशिक्षित व्यक्ति है और मदिरा परीक्षण का उसके पास व्यापक अनुभव है – अभिनिर्धारित – रासायनिक परीक्षण एकमात्र तरीका नहीं है जिसके द्वारा मदिरा की पहचान साबित की जा सके – उसे ऐसे व्यक्ति द्वारा साबित किया जा सकता है, जिसके पास इस क्षेत्र में महारत है। (जगमोहन वि. म.प्र. राज्य) ...2714

Excise Act, M.P. (2 of 1915), Section 34(1)(a) – Conscious possession of liquor – Applicants are driver and cleaner – The Truck was in the sealed condition – They have no criminal antecedents – Held – It cannot be inferred that the applicants were aware about the fact that the liquor boxes were kept in the heap of the Cinthol products – There is no evidence against the applicants – Revision is allowed, conviction and sentence is set aside. [Jagmohan Vs. State of M.P.] ...2714

आबकारी अधिनियम, म.प्र. (1915 का 2), धारा 34(1)(ए) – मदिरा का बोधपूर्वक कब्जा – आवेदकगण वाहन चालक और क्लीनर हैं – ट्रक सीलबंद स्थिति में था – उनका आपराधिक पूर्ववृत्त नहीं – अभिनिर्धारित – यह निष्कर्ष नहीं निकाला जा सकता कि आवेदकगण इस तथ्य से अवगत थे कि सिन्थॉल उत्पादों के ढेर में मदिरा के बक्से रखे गये थे – आवेदकगण के विरुद्ध साक्ष्य नहीं – पुनरीक्षण मंजूर, दोषसिद्धि और दण्डादेश अपास्त। (जगमोहन वि. म.प्र. राज्य) ...2714

Foreign Liquor Rules, M.P. 1996, Rule 19(2) – Exemption – M.P. Foreign Liquor Rules, 1996 and the M.P. Excise Act are meant

to ensure maximum revenue to the State and therefore every clause prescribing exemption is to be strictly construed so that the same is not misused by anyone claiming exemption. [Pernod Ricard India (P) Ltd. (M/s.) Vs. State of M.P.] ...3149

विदेशी मदिरा नियम म.प्र. 1996, नियम 19(2) – *छूट* – म.प्र. विदेशी मदिरा नियम 1996 व म.प्र. आबकारी अधिनियम का उद्देश्य राज्य के लिए अधिकतम राजस्व सुनिश्चित करना है और इसलिए छूट को विहित करने वाले प्रत्येक खंड का अर्थान्वयन कठोर रुप से करना चाहिए, जिससे कि छूट का दावा करने वाला कोई उसका दुरुपयोग न कर सके। (परनॉड रिकार्ड इंडिया (प्रा.) लि. (मे.) वि. म.प्र. राज्य) ...3149

Fraud **– Any order obtained by suppression of facts or on misrepresentation would be an order obtained by fraud and would be a nullity. [Madan Lal Vohra Vs. Smt. Nirmala Dubey] ...2697**

कपट – तथ्यों का छिपाव करके या दुर्व्यपदेशन द्वारा अभिप्राप्त कोई आदेश, कपट द्वारा अभिप्राप्त आदेश होगा और अकृत होगा। (मदनलाल वोहरा वि. श्रीमती निर्मला दुबे) ...2697

Griha Nirman Mandal Adhiniyam, M.P. (3 of 1972) (Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections 47, 50(b), Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. – Addition of extra expenditure towards cost price **– Unless it is established that an extra expenditure has been incurred after the allotment of the site the final pricing of the unit by authority is always vulnerable and if found to be irrational and unreasonable is liable to be declared null and void – Board having failed to establish the expenditure added towards cost price of the land after the date of allotment is not justified in adding the same towards cost price of land. [Sudha Jain (Dr.) Vs. M.P. Housing & Infrastructure Development] ...2806**

गृह निर्माण मंडल अधिनियम, म.प्र. (1972 का 3)(04.01.2011 से प्रभावी म. प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी), गृह निर्माण मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – लागत मूल्य की ओर अतिरिक्त व्यय जोड़ा जाना – जब तक यह स्थापित नहीं होता कि स्थान के आबंटन पश्चात अतिरिक्त व्यय उपगत हुआ है, प्राधिकारी द्वारा इकाई की अंतिम कीमत सदैव भेद्य है और यदि उसे अनुचित एवं अयुक्तियुक्त पाया जाता है, वह शून्य और अकृत घोषित किये जाने योग्य है – आबंटन की तिथि के पश्चात भूमि के लागत मूल्य की

ओर जोड़ा गया व्यय स्थापित करने में मंडल विफल रहा, उसे भूमि के लागत मूल्य की ओर जोड़ा जाना न्यायोचित नहीं है। (सुधा जैन (डॉ.) वि. एम.पी. हाउसिंग एण्ड इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट) ...2806

Griha Nirman Mandal Adhiniyam, M.P. (3 of 1972)(Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections 47, 50(b), Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. – Date for determining the cost price – **It is the date when after the scrutiny of the applications received in pursuance of the tender when allotment is finalized – Price prevailing on such date is applicable. [Sudha Jain (Dr.) Vs. M.P. Housing & Infrastructure Development]** ...2806

गृह निर्माण मंडल अधिनियम, म.प्र. (1972 का 3) (04.01.2011 से प्रभावी म.प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी), गृह निर्माण मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – लागत मूल्य के निर्धारण की तिथि – यह वह तिथि है, जब निविदा के अनुसरण में प्राप्त आवेदनों की संविक्षा के पश्चात आबंटन को अंतिम रुप दिया गया – उक्त तिथि को विद्यमान कीमत लागू होती है। (सुधा जैन (डॉ.) वि. एम.पी. हाउसिंग एण्ड इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट) ...2806

Griha Nirman Mandal Adhiniyam, M.P. (3 of 1972)(Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections 47, 50(b), Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. – Linking of cost price with Collector's guideline – **Petitioners have purchased residential accommodations from M.P. Housing Infrastructure Board under self financing scheme – Issue revolves round the pricing of these residential accommodation – Petitioner have confined their challenge only to linking of cost price of land with Collector's guidelines – Held – Unless established that determination of market value is by the expert Committee constituted under 2000 Guideline, Rules by following with the procedure laid down therein the market value determined by the Collector will not be foolproof determinant for pricing of the residential accommodation under the self-financing scheme – These guidelines are for the purpose of determination of stamp duty and keeps on changing every year. [Sudha Jain (Dr.) Vs. M.P. Housing & Infrastructure Development]** ...2806

गृह निर्माण मंडल अधिनियम, म.प्र. (1972 का 3)(04.01.2011 से प्रभावी म.प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी), गृह निर्माण

मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – लागत मूल्य को कलेक्टर के दिशानिर्देशों के साथ जोड़ा जाना – याचीगण ने स्व-वित्तीय योजना के अंतर्गत म. प्र. गृह निर्माण अवसंरचना मंडल से आवासीय स्थान क्रय किये – इन आवासीय स्थानों की कीमत पर विवाद्यक केन्द्रित है – याचीगण ने अपनी चुनौती, केवल कलेक्टर के दिशा-निर्देशों से भूमि के लागत मूल्य को संलग्न किये जाने तक सीमित रखी है – अभिनिर्धारित – जब तक कि यह स्थापित नहीं किया जाता कि बाजार मूल्य का निर्धारण, 2000 दिशा-निर्देश नियम के अंतर्गत गठित विशेषज्ञ समिति द्वारा, उसमें प्रतिपादित प्रक्रिया का पालन करके किया गया है, कलेक्टर द्वारा निर्धारित बाजार मूल्य, स्व-वित्तीय योजना के अंतर्गत आवासीय स्थान की कीमत तय करने के लिए दुरुपयोग की संभावना से परे निर्धारक नहीं होगा – यह दिशा-निर्देश, स्टाम्प शुल्क के निर्धारण के प्रयोजन हेतु है और प्रत्येक वर्ष बदलते रहते हैं। (सुधा जैन (डॉ.) वि. एम.पी. हाउसिंग एण्ड इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट) ...2806

Hindu Marriage Act (25 of 1955), Sections 24 & 26, Civil Procedure Code (5 of 1908), Section 11 – Maintenance pendente-lite and expenses of proceedings – **Repeated applications u/s 24 and 26 of the Act have been filed and have been dismissed thrice – None of the applications have been heard finally and decided on merits – First application was dismissed by treating the wife as ex-parte – Subsequent applications have been dismissed as barred by principles of res-judicata – Held – Lis between the parties in the present case has never been heard finally and decided on merits at any point of time – Therefore, the principles of res-judicata are not attracted – Maintenance has to be paid every month and every month cause of action is arising – Principal Judge, Family Court erred in law and facts while rejecting the applications on technicalities – Impugned order is set aside – Principal Judge is directed to decide the application on merits. [Sona (Mrs.) Vs. Subhash]** ...2865

हिन्दू विवाह अधिनियम (1955 का 25), धाराऐं 24 व 26, सिविल प्रक्रिया संहिता (1908 का 5), धारा 11 – प्रकरण लंबित रहते भरण-पोषण और कार्यवाही के खर्चे – अधिनियम की धारा 24 व 26 के अंतर्गत बारम्बार आवेदनों को प्रस्तुत किया गया और तीन बार खारिज किया गया – किसी भी आवेदन को अंतिम रुप से न तो सुना गया और न ही गुणदोषों पर न्यायनिर्णीत किया गया – पत्नी को एकपक्षीय मानते हुए प्रथम आवेदन खारिज – पश्चातवर्ती आवेदनों को पूर्वन्याय के सिद्धांतों द्वारा वर्जित मानकर खारिज किया गया – अभिनिर्धारित – वर्तमान प्रकरण में पक्षकारों के बीच का वाद किसी प्रक्रम पर न तो अंतिम रुप से सुना गया और

न ही गुणदोषों पर न्यायनिर्णीत किया गया – इसलिए पूर्वन्याय के सिद्धांत आकर्षित नहीं होते – भरण-पोषण प्रत्येक माह अदा किया जाना है और प्रत्येक माह वाद कारण उत्पन्न हो रहा है – प्रधान न्यायाधीश, कुटुम्ब न्यायालय ने तर्कनीकियों पर आवेदन अस्वीकार करने में विधि और तथ्यों की भूल की है – आक्षेपित आदेश अपास्त – प्रधान न्यायाधीश, कुटुम्ब न्यायालय को आवेदन का निपटारा गुणदोषों पर करने के लिए निदेशित किया गया। (सोना (श्रीमती) वि. सुभाष) ...2865

Housing Board Accounts Rules, M.P. 1991, Rule 5.4 and 5.7.4. – See – Griha Nirman Mandal Adhiniyam, M.P, 1972 (Substituted by M.P. Act No. 4 of 2011 w.e.f. 04.01.2011), Sections 47, 50(b) **[Sudha Jain (Dr.) Vs. M.P. Housing & Infrastructure Development] ...2806**

गृह निर्माण मंडल लेखा नियम म.प्र. 1991, नियम 5.4 व 5.7.4 – देखें – गृह निर्माण मंडल अधिनियम, म.प्र., 1972 (04.01.2011 से प्रभावी म.प्र. अधिनियम 2011 का क्र. 4 द्वारा प्रतिस्थापित), धाराऐं 47, 50(बी) (सुधा जैन (डॉ.) वि. एम.पी. हाउसिंग एण्ड इन्फ्रास्ट्रक्चर डव्हेलपमेन्ट) ...2806

Income Tax Act (43 of 1961), Section 220(6) **– Petition against order passed by Deputy Commissioner, Income Tax, refusing to invoke powers u/s 220(6) of the Act rejecting the prayer of stay by observing that since the appeal is pending before Appellate Authority, recovery cannot be stayed – Held – Reason assigned for rejection of the prayer cannot be said to be justified – On the other hand, it runs contrary to the object and spirit of Section 220(6) of the Act – Power u/s 220(6) is required to be exercised only when assessee has presented an appeal – Assessing Officer/Dy. Commissioner has misdirected itself in rejecting the prayer – Impugned order is quashed – Dy. Commissioner is directed to reconsider the petitioner's application and pass fresh reasoned order after giving opportunity of hearing to the petitioner. [Kanchanbag A Partnership Firm Vs. Union of India] (DB)...2837**

आयकर अधिनियम (1961 का 43), धारा 220(6) – अधिनियम की धारा 220(6) के अंतर्गत शक्तियों का अवलंब लेने से इंकार करते हुए आयकर उपायुक्त द्वारा पारित किया गया आदेश जिसमें रोक की प्रार्थना को यह संविक्षा करते हुए अस्वीकार किया गया कि चूंकि अपीली प्राधिकारी के समक्ष अपील लंबित है, वसूली को रोका नहीं जा सकता, के विरुद्ध याचिका – अभिनिर्धारित – प्रार्थना की अस्वीकृति हेतु दिये गये कारण को न्यायोचित नहीं कहा जा सकता – दूसरी ओर, वह अधिनियम की धारा 220(6) के उद्देश्य और आशय के विपरीत जाता है – धारा

220(6) के अंतर्गत शक्ति का प्रयोग केवल तब अपेक्षित है जब निर्धारिती ने अपील प्रस्तुत की हो – निर्धारण अधिकारी/उपायुक्त ने प्रार्थना अस्वीकार करके स्वयं को दिग्भ्रमित किया है – आक्षेपित आदेश अभिखंडित – उपायुक्त को निदेशित किया गया कि याची के आवेदन पर पुनर्विचार करें और याची को सुनवाई का अवसर देने के पश्चात नया सकारण आदेश पारित करें। (कंचनबाग ए पार्टनरशिप फर्म वि. यूनियन ऑफ इंडिया) (DB)...2837

Industrial Disputes Act (14 of 1947), Section 25-F – Daily wager retrenched – **Petitioner was engaged only to perform temporary work in place of a suspended employee – Worked only for 270 days in the year 1994-95 – Compensation of Rs. 30,000/- in place of reinstatement would be granted. [Shrawan Kumar Chaurasia Vs. Chief Municipal Officer] ...3146**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ – दैनिक वेतन भोगी की छंटनी – याची को निलंबित कर्मचारी के स्थान पर केवल अस्थायी कार्य करने हेतु लगाया गया था – वर्ष 1994-95 में केवल 270 दिवस कार्य किया – पुनःस्थापन के स्थान पर 30,000/–रुपये प्रतिकर प्रदान किया जायेगा। (श्रवण कुमार चौरसिया वि. चीफ म्यूनिसिपल ऑफीसर) ...3146

Industrial Disputes Act (14 of 1947), Section 33-A – Interim Stay of termination of service – **Complaint before Industrial Court by medical representative – Respondent No.2, medical representative in the petitioner establishment, was transferred from Jabalpur to Mumbai by order dated 14.05.2009 – Alleging the transfer being due to malafide, respondent No.2. raised the dispute u/s 10 of 1947 Act – However, subsequently services of the petitioner were terminated – Held – Contentions that the termination on dispensation of service of the petitioner had no nexus with the dispute raised – Dispute was in respect of transfer and not the determination of service, therefore the provision of Section 33 was not violated as would have led to conferral of powers on the Labour Court in entertaining an application u/s 33-A of 1947 Act. [Themis Medicare Ltd. Vs. The Asstt. Labour Commissioner] ...3126**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33-ए – सेवा समाप्ति पर अंतरिम रोक – चिकित्सीय प्रतिनिधि द्वारा औद्योगिक न्यायालय के समक्ष शिकायत – प्रत्यर्थी क्र. 2, याची की स्थापना में चिकित्सीय प्रतिनिधि को आदेश दिनांक 14.05.2009 द्वारा जबलपुर से मुम्बई स्थानांतरित किया गया – स्थानांतरण

दुर्भावनापूर्ण होना अभिकथित करते हुए प्रत्यर्थी क्र. 2 ने अधिनियम 1947 की धारा 10 के अंतर्गत विवाद उठाया – अपितु तत्पश्चात याची की सेवा समाप्त की गई – अभिनिर्धारित – तर्क कि उठाये गये विवाद के साथ याची की सेवा समाप्ति का कोई संबंध नहीं था – विवाद स्थानातंरण के संबंध में था और न कि सेवा समाप्ति के, इसलिए धारा 33 का उल्लंघन नहीं किया गया, जिससे कि अधिनियम 1947 की ध ारा 33-ए के अंतर्गत आवेदन को ग्रहण करने में श्रम न्यायालय को शक्तियों का प्रदान होता। (थीमिस मेडिकेयर लि. वि. द असिस्टेन्ट लेबर कमिश्नर) ...3126

Industrial Disputes Act (14 of 1947), Section 33 C (2) – *See* – ***Industrial Relations Act, M.P., 1960, Sections 31(3), 108*** **[Hukum Singh Vs. Assistant Engineer, P.H.E.]** ...3135

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33 सी (2) – *देखें* – *औद्योगिक संबंध अधिनियम, म.प्र., 1960, धाराऐं 31(3), 108* (हुकुम सिंह वि. असिस्टेन्ट इंजीनियर, पी.एच.ई.) ...3135

Industrial Employment (Standing Orders) Act, M.P. (26 of 1961), Clauses 2(i)(vi) – **Petitioner was classified as permanent time keeper w.e.f. 13.10.2006 pursuant to award passed by Labour Court – Subsequently by order dated 18.07.2013, he was regularized as Mason – Petitioner seeks modification of order dated 18.07.2013 to the effect that he be regularized as Time Keeper w.e.f. 13.10.2006 from the date of the award passed by Labour Court – Held – Though the petitioner was granted the benefit of permanent classification w.e.f. 13.10.2006, but he fails to establish that there were clear vacancies of a Time Keeper on 13.10.2006 – Same would only entitle him for difference of wages of daily wage worker and the Time Keeper, however the same will not make him the member of service in the cadre of Time Keeper – Order dated 18.07.2013 cannot be found faulted – No interference is caused. [Ram Kalesh Singh Vs. State of M.P.]** ...2801

औद्योगिक नियोजन (स्थायी आदेश) अधिनियम, म.प्र. (1961 का 26), खंड 2(i)(vi) – याची को श्रम न्यायालय द्वारा पारित किये गये आदेश के अनुसरण में 13.10.2006 से प्रभावी रुप से स्थाई टाईम कीपर के रुप में वर्गीकृत किया गया – तत्पश्चात आदेश दि. 18.07.2013 द्वारा उसे राजमिस्त्री के रुप में नियमित किया गया – याची आदेश दि. 18.07.2013 में इस प्रकार का परिवर्तन चाहता है कि श्रम न्यायालय द्वारा अवार्ड पारित किये जाने की तिथि, 13.10.2006 से प्रभावी रुप से उसे टाईम कीपर के रुप में नियमित किया जाये – अभिनिर्धारित – यद्यपि याची को

13.10.2006 से प्रभावी रुप से स्थाई वर्गीकरण का लाभ प्रदान किया गया था, किन्तु वह यह स्थापित करने में असफल रहा कि 13.10.2006 को टाईम कीपर की स्पष्ट रिक्तियां थीं – उक्त से वह केवल दैनिक वेतन कर्मचारी और टाईम कीपर के वेतन के अंतर का हकदार होगा, अपितु उक्त से वह टाईम कीपर के कैडर में सेवा का सदस्य नहीं बनेगा – आदेश दि. 18.07.2013 में त्रुटि नहीं पाई जा सकती – हस्तक्षेप का कारण नहीं। (राम कलेश सिंह वि. म.प्र. राज्य) ...2801

Industrial Relations Act, M.P. (27 of 1960), Sections 31(3), 108, & Industrial Disputes Act (14 of 1947), Section 33 C (2) – **Petitioner was working in Public Health and Engineering Department and was classified as permanent employees as department was Industry – S.L.P. against classification was dismissed by Supreme Court – Subsequent concerned department was removed from schedule of Industry – Petitioner filed application u/s 33(c) before Labour Court for execution of order of Labour Court due to non-availability of Forum under 1960 Act – Held – Labour Court has jurisdiction to entertain the application – Petition allowed. [Hukum Singh Vs. Assistant Engineer, P.H.E.]** ...3135

औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धाराऐं 31(3), 108 व औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33 सी (2) – याची, लोक स्वास्थ्य एवं यांत्रिकी विभाग में कार्यरत था और जैसा कि विभाग उद्योग था, उसे स्थाई कर्मचारी के रुप में वर्गीकृत किया गया था – वर्गीकरण के विरुद्ध एस.एल.पी. को उच्चतम न्यायालय द्वारा खारिज किया गया – तत्पश्चात संबंधित विभाग को उद्योग की अनुसूची से हटाया गया – अधिनियम 1960 के अंतर्गत फोरम की अनुपलब्धता के कारण याची ने श्रम न्यायालय के आदेश के निष्पादन हेतु श्रम न्यायालय के समक्ष धारा 33(सी) के अंतर्गत आवेदन प्रस्तुत किया – अभिनिर्धारित – श्रम न्यायालय को आवेदन ग्रहण करने की अधिकारिता है – याचिका मंजूर। (हुकुम सिंह वि. असिस्टेन्ट इंजीनियर, पी.एच.ई.) ...3135

Interpretation of Statute – **Nothing is to be inserted or substituted in the words used in the statute – If the clear meaning of the provisions of Rules is available, addition or omission of words is not permissible. [S.K. Gupta Vs. State of M.P.]** ...2497

कानून का निर्वचन – कानून में प्रयुक्त शब्दों में कुछ भी निविष्ट या प्रतिस्थापित नहीं किया जाना चाहिए – यदि नियमों के उपबंधों का स्पष्ट अर्थ उपलब्ध है, तब शब्दों को जोड़ना या लोप करना अननुज्ञेय। (एस.के. गुप्ता वि. म.प्र. राज्य) ...2497

Land Acquisition Act (1 of 1894), Section 28-A – See – Civil Procedure Code, 1908, Section 96 [Kodar Singh Vs. State of M.P.] ...3190

भूमि अर्जन अधिनियम (1894 का 1), धारा 28-ए – देखें – सिविल प्रक्रिया संहिता, 1908, धारा 96 (कोदर सिंह वि. म.प्र. राज्य) ...3190

Land Revenue Code, M.P. (20 of 1959), Section 50 – Interlocutory Application – **Locus standi of respondent No. 1 to file appeal was challenged by petitioner by filing application before appellate authority – Appellate authority instead of deciding application directed that the same shall be heard at the time of final hearing – Petitioner filed revision before Board of Revenue seeking direction to appellate authority to decide application – Board of Revenue in its turn decided the revision on merits – Held – Board of Revenue did not have authority to ignore the jurisdiction of appellate Court to decide on merits – Board of Revenue ought to have decided objection regarding locus standi only – Order of Board of Revenue set aside – As petitioner does not want to prosecute his revision before Board of Revenue, appellate authority directed to decide objection of locus standi first – Petition allowed. [Chhotelal Gupta Vs. Smt. Seema Agrawal]** ...2782

भू राजस्व संहिता, म.प्र. (1959 का 20), धारा 50 – अंतर्वर्ती आवेदन – याची द्वारा अपीली प्राधिकारी के समक्ष आवेदन प्रस्तुत करके, प्रत्यर्थी क्र. 1 द्वारा अपील प्रस्तुत करने के लिए सुने जाने के अधिकार को चुनौती दी गई – अपीली प्राधिकारी ने आवेदन का विनिश्चय करने की बजाए निदेशित किया कि उसे अंतिम सुनवाई के समय सुना जायेगा – याची ने आवेदन का विनिश्चय करने के लिए अपीली प्राधिकारी को निदेश चाहते हुए राजस्व मंडल के समक्ष पुनरीक्षण प्रस्तुत किया – राजस्व मंडल ने अपनी ओर से पुनरीक्षण को गुणदोषों पर निर्णित किया – अभिनिर्धारित – राजस्व मंडल को गुणदोषों पर निर्णित करने के लिए अपीली प्राधिकारी की अधिकारिता को अनदेखा करने का प्राधिकार नहीं – राजस्व मंडल को केवल सुने जाने के अधिकार के संबंध में आक्षेप को निर्णित करना चाहिए था – राजस्व मंडल का आदेश अपास्त – चूंकि याची अपने पुनरीक्षण का अभियोजन राजस्व मंडल के समक्ष नहीं चाहता, सुने जाने के अधिकार को पहले निर्णित करने के लिए अपीली प्राधिकारी को निदेशित किया गया – याचिका मंजूर। (छोटेलाल गुप्ता वि. श्रीमती सीमा अग्रवाल) ...2782

Limitation Act (36 of 1963), Section 5 – Condonation of delay

– Factum of keeping the matter pending for more than 3 years and doing nothing to assail the judgment of first appellate court, shows utterly carelessness – No good reason to condone the delay. [State of M.P. Vs. Mannulal] ...*19

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिए माफी – 3 वर्ष से अधिक समय तक मामला लंबित रखने और प्रथम अपीली न्यायालय के निर्णय को चुनौती देने के लिए कुछ नहीं किये जाने का तथ्य, पूरी तरह से लापरवाही दर्शाता है – विलम्ब माफ करने के लिए कोई उचित कारण नहीं। (म.प्र. राज्य वि. मन्नूलाल) ...*19

***Limitation Act (36 of 1963), Section 5 – Condonation of delay – Sufficient Cause – Delay of 516 days* – Cause disclosed in application shows that except for lethargy on the part of officer of Govt at any stage no other cogent reason has been shown for seeking condonation of delay – Delay cannot be condoned – Application dismissed. [State of M.P. Vs. Late Abdul Gani Through L.Hs.] (DB)...2690**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिए माफी – पर्याप्त कारण – 516 दिनों का विलम्ब – आवेदन में प्रकट किया गया कारण दर्शाता है कि विलम्ब के लिए माफी हेतु सरकार के अधिकारी की ओर से आलस्य को छोड़कर किसी प्रक्रम पर कोई अन्य प्रबल कारण नहीं दर्शाया गया है – विलम्ब माफ नहीं किया जा सकता – आवेदन खारिज। (म.प्र. राज्य वि. मृतक अब्दुल गनी द्वारा विधिक उत्तराधिकारी) (DB)...2690

***Limitation Act (36 of 1963), Article 54 – Limitation for Specific Performance of Contract* – Defendant denied to execute the sale deed by sending reply to notice on 17.10.2000 – Period of three years would start from the date of denial i.e. 17.10.2000 – Prayer for Specific Performance made in the year 2004 – Suit for specific performance of contract barred by limitation. [Haribabu Vs. Himmat Singh] (DB)...3160**

परिसीमा अधिनियम (1963 का 36), अनुच्छेद 54 – संविदा के विनिर्दिष्ट पालन हेतु परिसीमा – प्रतिवादी ने 17.10.2000 को नोटिस का जवाब भेजकर विक्रय विलेख का निष्पादन करने से इंकार किया – तीन वर्ष की अवधि, इंकार की तिथि अर्थात 17.10.2000 से आरंभ होगी – विनिर्दिष्टि पालन हेतु प्रार्थना वर्ष 2004 में की गई – संविदा के विनिर्दिष्टि पालन हेतु वाद परिसीमा द्वारा वर्जित। (हरिबाबू वि. हिम्मत सिंह) (DB)...3160

Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 9 – Royalty – Assessment – Notional Conversion Factor – **There is no express provision regarding notional conversion factor to be applied during assessment – Assessment of Royalty amount must be commensurate with minerals removed or consumed by lessee – It is open to the Assessing Officer to reject the claim of the assessee and instead apply a just and reasonable notional conversion factor – Notional conversion factor that for manufacture of 1 tonne of cement 1.6 tonnes of limestone is consumed, has been fixed by impugned circulars – All cement companies have been directed to ensure installation of weighbridge as per specification for ascertaining correct quantity of removed limestone – If licensee has any objection for applying notional factor, can cause to weight the removed limestone for the purpose of computing Royalty – Conversion fact cannot be termed as unrealistic and arbitrary – As lease has been granted by State Government and returns are to be filed before State Govt. therefore, there is no impediment for State Government to issue administrative instructions – Instruction contained in circular that "Whichever is higher" to invoke notional conversion factor is quashed – Matter remitted back to the Assessing authority to re-examine the issue afresh from the stage of filing of returns – Petition disposed off. [Grasim Industries Ltd., Neemuch Vs. State of M.P.] (DB)...2959**

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 9 – रायल्टी – निर्धारण – काल्पनिक रुपांतरण गुणक – काल्पनिक रुपांतरण गुणक को निर्धारण के दौरान लागू किये जाने के संबंध में कोई अभिव्यक्त उपबंध नहीं – रायल्टी की रकम का निर्धारण पट्टाधारक द्वारा निकाले गये या उपभोग किये गये खनिजों के साथ समानुपाती होना चाहिए – निर्धारण अधिकारी, निर्धारिती के दावे को अस्वीकार कर सकता है और उसके बजाये न्यायोचित और युक्तियुक्त काल्पनिक रुपांतरण गुणक लागू कर सकता है – काल्पनिक रुपांतरण गुणक कि 1 टन सीमेंट के उत्पादन हेतु 1.6 टन चूना पत्थर उपयुक्त होता है, को आक्षेपित परिपत्रों द्वारा निश्चित किया गया है – हटाये गये चूना पत्थरों की सही मात्रा सुनिश्चित करने के लिए निर्दिष्टियोंनुसार तौल कांटा संस्थापित किया जाना सुनिश्चित करने के निदेश सभी सीमेंट कम्पनियों को दिये गये हैं – यदि अनज्ञप्तिधारकों को काल्पनिक गुणक लागू करने के लिये कोई आक्षेप है, वह रायल्टी की संगणना के प्रयोजन हेतु हटाये गये चूना पत्थरों का तौल करवा सकता है – रुपांतरण तत्व को अवास्तविक एवं मनमाना नहीं कहा जा सकता – जैसा कि

राज्य सरकार द्वारा पट्टा प्रदान किया गया है और रिटर्न को राज्य सरकार के समक्ष प्रस्तुत करना है इसलिए, प्रशासनिक अनुदेश जारी करने के लिए राज्य सरकार को कोई बाधा नहीं – काल्पनिक रुपांतरण गुणक का अवलंब लेने के लिये परिपत्र में अंतर्विष्ट अनुदेश कि "जो भी उच्चतर हो" अभिखंडित – निर्धारण प्राधिकारी को रिटर्न प्रस्तुत करने के प्रक्रम से नये सिरे से विवाद्यक का पुनः परीक्षण करने हेतु मामला प्रतिप्रेषित – याचिका का निपटारा किया गया। (ग्रासिम इंडस्ट्रीज लि., नीमच वि. म.प्र. राज्य) (DB)...2959

Mines and Minerals (Development and Regulation) Act (67 of 1957), Section 11(5) – Mining Lease – Natural Justice – **Petitioner was aware of changed date which was duly communicated by authority – Petitioner did not appear inspite of intimation – No violation of principles of natural justice – Further matter not argued on merits before High Court – As petitioner did not appear before authority therefore, non-supply of comments of Central Government do not affect the merits of the case – Petition dismissed. [Ideal Minerals (M/s.) Vs. State of M.P.]** ...2766

खान और खनिज (विकास और विनियमन) अधिनियम (1957 का 67), धारा 11(5) – खनन पट्टा – नैसर्गिक न्याय – याची बदली गयी तिथि से अवगत था जिसे प्राधिकारी द्वारा सम्यक रुप से संसूचित किया गया था – सूचना के बावजूद याची उपस्थित नहीं हुआ – नैसर्गिक न्याय के सिद्धांतों का उल्लंघन नहीं – इसके अतिरिक्त उच्च न्यायालय के समक्ष गुणदोषों पर मामले में तर्क नहीं किया गया – चूंकि प्राधिकारी के समक्ष याची उपस्थित नहीं हुआ, इसलिए केन्द्र सरकार द्वारा टिप्पणी प्रदाय नहीं किये जाने से प्रकरण के गुणदोषों पर प्रभाव नहीं पड़ता – याचिका खारिज। (आइडिअल मिनिरल्स (मे.) वि. म.प्र. राज्य) ...2766

Motor Vehicles Act (59 of 1988), Section 166 – Claim Petition – Entitlement – **Delay of 266 days in filing F.I.R. after alleged accident – Number of vehicle not given to the police – Named insured vehicle not proved to be involved in that accident – Insurer not liable for giving any compensation – Direction for paying back the claim amount to the insurer alongwith interest 6% from the date of this judgment. [National Insurace Co. Ltd. Vs. Santosh]** ...3023

मोटर यान अधिनियम (1988 का 59), धारा 166 – दावा याचिका – हकदारी – अभिकथित दुर्घटना के पश्चात प्रथम सूचना रिपोर्ट प्रस्तुत करने में 266 दिनों का विलम्ब – वाहन का नम्बर पुलिस को नहीं दिया गया – नामित बीमित वाहन उस दुर्घटना में

शामिल होना साबित नहीं – बीमाकर्ता कोई प्रतिकर देने के लिए दायित्वाधीन नहीं – बीमाकर्ता को इस निर्णय की तिथि से 6 प्रतिशत ब्याज के साथ दावा रकम वापस अदा करने का निदेश। (नेशनल इंश्योरेंस कं. लि. वि. संतोष) ...3023

Motor Vehicles Act (59 of 1988), Section 173 – **Accident took place while crossing the railway gate when the driver of the truck just started to cross the line suddenly passenger train came and by hitting caused damaged to the truck – Resultantly driver-cum-owner and cleaner died – Held – Since deceased driver-cum-owner of the truck was responsible for causing accident due to non-following the common traffic rules dependents of the deceased can not claim for damages for the deceased's own negligence – Insurance Company cannot be held to indemnify the liability – Risk of the owner is not covered under the policy. [Sharif Khan (Deceased) Through His L.Rs. Vs. Union of India]** ...3183

मोटर यान अधिनियम (1988 का 59), धारा 173 – रेल गेट पार करते समय दुर्घटना कारित हुई, जब ट्रक ड्राईवर रेल पटरी पार करने लगा, अचानक यात्री रेल आयी और टक्कर मारकर ट्रक को क्षति कारित की – परिणामस्वरुप ड्राईवर–सह–स्वामी तथा क्लीनर की मृत्यु हुई – अभिनिर्धारित – चूंकि मृतक ट्रक ड्राईवर–सह–स्वामी द्वारा सामान्य यातायात नियमों का पालन नहीं किये जाने से दुर्घटना कारित करने के लिए वह स्वयं जिम्मेदार था, मृतक के आश्रित स्वयं मृतक की उपेक्षा के लिये क्षतिपूर्ति हेतु दावा नहीं कर सकते – बीमा कम्पनी को दायित्व की क्षतिपूर्ति के लिए अभिनिर्धारित नहीं किया जा सकता – स्वामी का जोखिम, पॉलिसी के अंतर्गत आच्छादित नहीं। (शरीफ खान (मृतक) द्वारा विधिक प्रतिनिधि वि. यूनियन ऑफ इंडिया) ...3183

Motor Vehicles Act (59 of 1988), Section 173 – **Since risk of the cleaner travelling in truck for maintenance or operation of the truck is covered under the policy, his heirs are entitled to receive compensation to the tune of Rs. 1,46,000/- with 9% interest from the date of filing the petition. [Sharif Khan (Deceased) Through His L.Rs. Vs. Union of India]** ...3183

मोटर यान अधिनियम (1988 का 59), धारा 173 – चूंकि पॉलिसी के अंतर्गत ट्रक की देखरेख या कार्य के लिए ट्रक में यात्रा कर रहे क्लीनर का जोखिम आच्छादित है, उसके वारिस, रु. 1,46,000/– याचिका प्रस्तुत करने की तिथि से 9 प्रतिशत ब्याज के साथ प्रतिकर प्राप्त करने के हकदार हैं। (शरीफ खान (मृतक) द्वारा विधिक प्रतिनिधि वि. यूनियन ऑफ इंडिया) ...3183

Municipal Corporation (Appointment and Conditions of Service of Officers and Servants), M. P. Rules, 2000, Rule 10(3) – Promotion – **Rules are statutory in nature – Promotion granted to the Petitioners after approval of the State Govt. – Petitioners also joined on promoted posts – Approval was subsequently withdrawn without affording any opportunity of hearing to the Petitioners – Even otherwise objectors were not eligible to promotion – Petition allowed. [S.K. Gupta Vs. State of M.P.]** ...2497

नगरपालिक निगम (अधिकारियों एवं कर्मचारियों की नियुक्ति तथा सेवा शर्तें) म.प्र., नियम, 2000, नियम 10(3) – पदोन्नति – नियम, कानूनी स्वरुप के हैं – याचीगण को पदोन्नति, राज्य सरकार के अनुमोदन के पश्चात दी गयी – याचीगण ने पदोन्नति के पदों पर कार्यग्रहण भी किया – याचीगण को सुनवाई का कोई अवसर दिये बिना अनुमोदन को तत्पश्चात वापस लिया गया – अन्यथा भी आक्षेपकर्ता पदोन्नति के लिये अर्ह नहीं थे – याचिका मंजूर। (एस.के. गुप्ता वि. म. प्र. राज्य) ...2497

Municipalities Act, M.P. (37 of 1961), Section 26(2) & Municipalities (Election Petition) Rules, M.P. 1962, Rule 19(2) – Security for the Cost – **Applicant has not deposited a sum of Rs. 250/- as security for the cost of the revision with the High Court "at the time of presentation" of the petition – Due to non-compliance of the same, this petition ought to be dismissed – Held – When the decision passed by the Judge has been challenged by filing the revision before the High Court u/s 26(2) of the Act, then at the time of presentation, the security of the cost must be deposited and after pointing out of the defect, if such deposit is made in the later part of the day, it would not come within the connotation "at the time of presentation" and it would lead to consequence of dismissal as specified in the later part of sub-rule 2 of Rule 19 of Election Petition Rules. [Deepak Kumar Soni Vs. Ashok Kumar]** ...3267

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 26(2), नगरपालिका (निर्वाचन याचिका) नियम, म.प्र. 1962, नियम 19(2) – खर्चों के लिए प्रतिभूति – आवेदक ने उच्च न्यायालय में याचिका के "प्रस्तुतीकरण के समय" पनुरीक्षण के खर्चे के लिए प्रतिभूति के रूप में रू. 250/– की रकम जमा नहीं की – उक्त के अपालन के कारण, इस याचिका को खारिज किया जाना चाहिए – अभिनिर्धारित –

जब न्यायाधीश द्वारा पारित निर्णय को चुनौती देते हुए, अधिनियम की धारा 26(2) के अंतर्गत उच्च न्यायालय के समक्ष पुनरीक्षण प्रस्तुत किया जाता है तब प्रस्तुतीकरण के समय, खर्चों के लिए प्रतिभूति जमा की जाना चाहिए और त्रुटि को दर्शाने के पश्चात् यदि उक्त को उस दिन बाद में जमा किया जाता है, वह "प्रस्तुतीकरण के समय" के अर्थान्तर्गत नहीं आयेगा और उसका परिणाम खारिजी होगा जैसा कि निर्वाचन याचिका नियम के नियम 19, उप–नियम 2 के आगे के भाग में विनिर्दिष्टित है। (दीपक कुमार सोनी वि. अशोक कुमार) ...3267

Municipalities Act, M.P. (37 of 1961), Section 47 – No confidence motion – Recording of satisfaction – **It is not necessary that the Collector should conduct a enquiry with regard to identity of persons as submitted on behalf of the appellant – The affidavits filed by the 12 Councillors and their photo identity card alongwith the report of the C.E.O. are sufficient enough to record the satisfaction about their identity and if the list and other documents submitted by the C.E.O. also supports the same, the Collector can proceed in the matter by recording the satisfaction and in doing so as is done in this case Collector has not committed any error – Appeal dismissed. [Kamal Kant Bhardwaj Vs. State of M.P.]** (DB)...2491

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 47 – अविश्वास प्रस्ताव – संतुष्टि अभिलिखित की जाना – यह आवश्यक नहीं कि कलेक्टर, उन व्यक्तियों की पहचान के संबंध में जांच संचालित करे जैसा कि अपीलार्थी की ओर से प्रस्तुत किया गया – 12 पार्षदों द्वारा प्रस्तुत शपथ पत्र और सी.ई.ओ. की रिपोर्ट के साथ उनके फोटो पहचान पत्र, उनकी पहचान के बारे में संतुष्टि अभिलिखित किये जाने के लिये पर्याप्त है और यदि सी.ई.ओ. द्वारा प्रस्तुत सूची एवं अन्य दस्तावेज भी उक्त का समर्थन करते हैं, कलेक्टर संतुष्टि अभिलिखित कर मामले में कार्यवाही कर सकता है और ऐसा करने में, जैसा कि इस प्रकरण में किया गया है, कलेक्टर ने कोई भूल नहीं कारित की है – अपील खारिज। (कमल कांत भारद्वाज वि. म.प्र. राज्य) (DB)...2491

Municipalities Act, M.P. (37 of 1961), Section 172(2) – **Appeal against the demand of tax which was rejected by the trial court on the ground that the petitioner has failed to deposit the amount claimed from him – Subsequently petitioner has deposited the amount – Held – Section 172(2) does not provide the payment of disputed tax as condition precedent for entertaining an appeal – Such appeal can be admitted or entertained only but cannot be heard or disposed of without**

pre-deposit of the tax – Trial Court has not afforded any opportunity to the petitioner to deposit the amount of tax – Impugned orders are quashed – Matter is remanded to the trial court to decide the same on merits. [Ramlakhan Tripathi Vs. Chief Municipal Officer] ...3143

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 172(2) – कर की मांग के विरुद्ध अपील, जिसे विचारण न्यायालय द्वारा इस आधार पर अस्वीकार किया कि याची, उससे दावा की गई रकम जमा करने में असफल रहा – याची ने तत्पश्चात रकम जमा की है – अभिनिर्धारित – धारा 172(2) विवादित कर के भुगतान को अपील ग्रहण करने हेतु पुरोभावी शर्त के रुप में उपबंधित नहीं करती – उक्त अपील को केवल स्वीकार एवं ग्रहण किया जा सकता है, परन्तु पहले कर को जमा किये बिना सुना या निपटाया नहीं जा सकता – विचारण न्यायालय ने याची को कर जमा करने के लिए कोई अवसर प्रदान नहीं किया – आक्षेपित आदेश अभिखंडित – गुणदोषों पर निर्णित करने के लिए विचारण न्यायालय को मामला प्रतिप्रेषित किया गया। (रामलखन त्रिपाठी वि. चीफ म्यूनिसिपल ऑफीसर) ...3143

Municipalities (Election Petition) Rules, M.P. 1962, Rule 19(2) – See – Municipalities Act, M.P., 1961, Section 26(2) **[Deepak Kumar Soni Vs. Ashok Kumar] ...3267**

नगरपालिका (निर्वाचन याचिका) नियम, म.प्र. 1962, नियम 19(2) – देखें – नगरपालिका अधिनियम, म.प्र., 1961, धारा 26(2) (दीपक कुमार सोनी वि. अशोक कुमार) ...3267

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18 r/w Sections 29, 37, 42 & 67 **– Accused supplying contraband opium more than commercial quantity to the co-accused – Cannot be released on bail generally – Application for grant of bail is rejected as being without merit. [Suresh Vs. State of M.P.] ...3303**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18 सहपठित धाराएं 29, 37, 42 व 67 – अभियुक्त ने सह-अभियुक्त को वाणिज्यिक मात्रा से अधिक विनिषिद्ध अफीम प्रदाय किया – सामान्य रुप से जमानत पर नहीं छोड़ा जा सकता – बिना गुणदोष का होने के नाते, जमानत प्रदान किये जाने हेतु आवेदन नामंजूर किया गया। (सुरेश वि. म.प्र. राज्य) ...3303

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20-B II (C) – Sentence and fine **– Sentence and fine awarded**

to the appellant is the minimum stipulated under N.D.P.S. Act is not excessive calls for no reduction – However, the sentence imposed in default of payment of fine for one year is excessive same is reduced from 1 year R.I. to three months R.I. – Appeal is partly allowed. [Pradumanlal Kushwaha Vs. State of M.P.] ...3254

स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20बी II (सी) – दण्डादेश एवं अर्थदण्ड – अपीलार्थी को अवार्ड किया गया दण्डादेश एवं अर्थदण्ड, एन.डी.पी.एस. अधिनियम के अंतर्गत दिया गया न्यूनतम है, जो अत्याधिक नहीं, जिसे घटाने की आवश्यकता नहीं – किन्तु अर्थदण्ड के व्यतिक्रम में अधिरोपित एक वर्ष का दण्डादेश अत्याधिक है, उसे 1 वर्ष के सश्रम कारावास से घटाकर तीन माह सश्रम कारावास किया गया – अपील अंशतः मंजूर। (प्रदुमनलाल कुशवाहा वि. म.प्र. राज्य) ...3254

Negotiable Instruments Act (26 of 1881), Section 138 and Proviso to Clause (b) of Section 142 – Limitation – Time Barred – **Complaint u/s 138-A of the Act was filed – At a defence evidence stage it was pointed out by the defence that the same is time barred – Then application u/s 5 of Limitation Act was filed – Held – An application as per proviso to clause (b) of Section 142 of the Act must be filed alongwith complaint – Such application is not maintainable at subsequent stage i.e. after taking the cognizance, if the Magistrate took cognizance on the time barred complaint, then this defect cannot be cured by filing an application for condonation of delay at later stage – Magistrate should not have recorded the conviction as he has erroneously taken the cognizance on a time barred complaint – Application is dismissed. [Keshav Chouhan Vs. Kiran Singh] ...2744**

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 और धारा 142 के खंड (बी) का परंतुक – परिसीमा – समय वर्जित – अधिनियम की धारा 138-ए के अंतर्गत शिकायत प्रस्तुत की गई – बचाव साक्ष्य के प्रक्रम पर बचाव पक्ष द्वारा इस ओर इंगित किया गया कि वह समय वर्जित है – तब परिसीमा अधिनियम की धारा 5 के अंतर्गत आवेदन प्रस्तुत किया गया – अभिनिर्धारित – अधिनियम की धारा 142 के खंड(बी) के परंतुक के अनुसार आवेदन को शिकायत के साथ प्रस्तुत किया जाना चाहिए – उक्त आवेदन, पश्चातवर्ती प्रक्रम पर पोषणीय नहीं अर्थात संज्ञान लिये जाने के पश्चात यदि मजिस्ट्रेट ने समय वर्जित शिकायत का संज्ञान लिया है तब इस त्रुटि का सुधार, बाद के प्रक्रम पर विलम्ब के लिये माफी हेतु आवेदन प्रस्तुत

करके नहीं किया जा सकता – मजिस्ट्रेट को दाषसिद्धि अभिलिखित नहीं करना चाहिए थी, जैसा कि उसने समय वर्जित शिकायत का त्रुटिपूर्ण रुप से संज्ञान लिया है – आवेदन खारिज। (केशव चौहान वि. किरण सिंह) ...2744

Negotiable Instruments Act (26 of 1881), Section 138 – See – Criminal Procedure Code, 1973, Section 482 [Mohd. Aasim Vs. Anil Kumar Saraf] ...2718

परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (मोहम्मद आसिम वि. अनिल कुमार सराफ) ...2718

Negotiable Instruments Act (26 of 1881), Sections 138 & 141 – Complaint under Sections 138 and 141 – Petitioner, Director of Company arrayed as a party – Petitioner had neither signed the cheque in question nor there is allegation that the petitioner is the Managing Director of the Company – There is also no allegation that the petitioner was in-charge and responsible for conduct of the business of the Company at the relevant time – Trial Court has committed an error in taking cognizance of the offence u/s 138 of Negotiable Instruments Act against the petitioner – Complaint filed against the petitioner is dismissed. [Sonali Thanawala (Smt.) Vs. M/s. Rahul Ginning Industries] ...2739

परक्राम्य लिखत अधिनियम (1881 का 26), धाराऐं 138 व 141 – धारा 138 व 141 के अंतर्गत शिकायत – याची, कम्पनी का निदेशक, को पक्षकार के रुप में शामिल किया गया – याची ने न तो प्रश्नगत चेक पर हस्ताक्षर किये और न ही कोई अभिकथन है कि कम्पनी का प्रबंध निदेशक याची है – यह भी अभिकथन नहीं कि सुसंगत समय याची प्रभारी था और कम्पनी के कारोबार के संचालन हेतु उत्तरदायी था – विचारण न्यायालय ने याची के विरुद्ध परक्राम्य लिखत अधिनियम की धारा 138 के अंतर्गत अपराध का संज्ञान लेकर, भूल कारित की है – याची के विरुद्ध प्रस्तुत की गई शिकायत खारिज। (सोनाली थानावाला (श्रीमती) वि. मे. राहुल जिनिंग इंडस्ट्रीज्) ...2739

Panchayat (Powers and Functions of Chief Executive Officer), M.P. Rules, 1995 – Change of Service Condition – Transfer of petitioner to Rajiv Gandhi Watershed Mission cannot be said to be on equivalent post – Petitioner's service conditions are changed – He is deprived to perform statutory duties attached to his post. [Pratap Singh Mandeliya Vs. State of M.P.] ...2792

INDEX

पंचायत (मुख्य कार्यपालक अधिकारी की शक्तियां और कार्य), म.प्र. नियम, 1995 – सेवा शर्त में बदलाव – राजीव गांधी वॉटरशेड मिशन में याची का स्थानातंरण समकक्ष पद पर किया जाना नहीं कहा जा सकता – याची की सेवा शर्तें बदली गई हैं – उसे अपने पद से संलग्न कानूनी कर्तव्यों का पालन करने से वंचित किया गया। (प्रताप सिंह मंडेलिया वि. म.प्र. राज्य) ...2792

Panchayat (Powers and Functions of Chief Executive Officer), M.P. Rules, 1995 – Transfer – Malicious in Nature – **Entire action of transfer is based on bald complaint of Ex. M.L.A. – Cannot be said to be in administrative exigency or in public interest – Since petitioner was shunted before he could resume charge on irrelevant consideration – Transfer order is malicious in nature. [Pratap Singh Mandeliya Vs. State of M.P.]** ...2792

पंचायत (मुख्य कार्यपालक अधिकारी की शक्तियां और कार्य), म.प्र. नियम, 1995 – स्थानातंरण – विद्वेषपूर्ण स्वरुप का – स्थानांतरण की संपूर्ण कार्यवाही भूतपूर्व विधायक की साधारण शिकायत पर आधारित – प्रशासनिक सुविधा या लोकहित में नहीं कहा जा सकता – चूंकि असंगत बात पर याची को उसके द्वारा पदभार ग्रहण कर सकने से पहले ही रोका गया – स्थानांतरण आदेश विद्वेषपूर्ण स्वरुप का है। (प्रताप सिंह मंडेलिया वि. म.प्र. राज्य) ...2792

Panchayat (Powers and Functions of Chief Executive Officer), M.P. Rules, 1995 – Withdrawal of Monitoring, Drawing and Disbursing powers – **Held – Once interim order is passed staying the transfer order, it was not proper for the respondent to take away monitoring, drawing and disbursing powers from the petitioner – Attempt is made to nullify the interim order liable to be deprecated. [Pratap Singh Mandeliya Vs. State of M.P.]** ...2792

पंचायत (मुख्य कार्यपालक अधिकारी की शक्तियां और कार्य), म.प्र. नियम, 1995 – अनुश्रवण, आहरण और संवितरण की शक्तियां वापस ली जाना – अभिनिर्धारित – एक बार स्थानांतरण आदेश पर रोक का अंतरिम आदेश पारित किये जाने पर, प्रत्यर्थी को याची से अनुश्रवण, आहरण और संवितरण की शक्तियां वापस लेना उचित नहीं था – अंतरिम आदेश अकृत करने का प्रयास किया गया, निन्दनीय है। (प्रताप सिंह मंडेलिया वि. म.प्र. राज्य) ...2792

Panchayat Service (Discipline and Appeal) Rules, M.P. 1999, Rule 4(1) – Suspension of Panchayat Secretary by Collector –

Challenged on the ground that C.E.O. is the disciplinary/appointing authority and C.E.O. cannot be treated as sub-ordinate to Collector – Held – C.E.O. must be treated as sub-ordinate to Collector as he is in lower rank/position and class in comparison to the Collector – Collector is competent to place the petitioner under suspension – Impugned orders are appealable – Petitions are dismissed. [Dashrath Singh Vs. State of M.P.] ...2789

पंचायत सेवा (अनुशासन और अपील) नियम, म.प्र. 1999, नियम 4(1) – कलेक्टर द्वारा पंचायत सचिव का निलंबन – इस आधार पर चुनौती दी गई कि मुख्य कार्यपालिक अधिकारी, अनुशासनिक/नियुक्ति प्राधिकारी है तथा मुख्य कार्यपालिक अधिकारी को कलेक्टर के अधीनस्थ नहीं माना जा सकता – अभिनिर्धारित – मुख्य कार्यपालिक अधिकारी को कलेक्टर के अधीनस्थ माना जाना चाहिए क्योंकि कलेक्टर की तुलना में वह निचले पद/ओहदे और श्रेणी में आता है – याची को निलंबन में रखने के लिए कलेक्टर सक्षम है – आक्षेपित आदेश अपीलीय है – याचिकायें खारिज। (दशरथ सिंह वि. म.प्र. राज्य) ...2789

Penal Code (45 of 1860), Sections 100, 103 – See – Criminal Procedure Code, 1973, Sections 397, 401, 399 **[Gyanesh Vs. Central Bureau of Investigation] ...3274**

दण्ड संहिता (1860 का 45), धाराऐं 100, 103 – देखें – दण्ड प्रक्रिया संहिता, 1973, धाराऐं 397, 401, 399 (ज्ञानेश वि. सेन्ट्रल ब्यूरो ऑफ इन्वेस्टिगेशन)...3274

Penal Code (45 of 1860), Sections 107 & 306 – Abetment to commit suicide – Demand of due loan **– Does not amount to instigation – Demand made by petitioner from deceased did not amount to threats – Does not amount to abetment to commit suicide. [Radheshyam Vs. State of M.P.] ...3289**

दण्ड संहिता (1860 का 45), धाराऐं 107 व 306 – आत्महत्या कारित करने के लिए दुष्प्रेरण – देय ऋण की मांग – उकसाहट की कोटि में नहीं आता – याची द्वारा मृतक से की गई मांग, धमकी की कोटि में नहीं आती – आत्महत्या कारित करने के लिए दुष्प्रेरण की कोटि में नहीं आता। (राधेश्याम वि. म.प्र. राज्य) ...3289

Penal Code (45 of 1860), Sections 148, 149 – Common intention **– One of the accused is alleged to having double barrel gun but did not cause any injury to anybody – Nothing had prevented him from firing –**

Presence of the accused on spot doubtful – Liable to be acquitted. [Rajeev Lochan Singh Vs. State of M.P.] (DB)...3231

दण्ड संहिता (1860 का 45), धाराऐं 148, 149 – सामान्य आशय – अभिकथित रुप से एक अभियुक्त के पास दुनाली बंदूक थी, परंतु उसने किसी को कोई चोट कारित नहीं की – उसे गोली चलाने से किसी ने रोका नहीं था – घटनास्थल पर अभियुक्त की उपस्थिति संदेहास्पद – दोषमुक्त किये जाने योग्य। (राजीव लोचन सिंह वि. म.प्र. राज्य) **(DB)...3231**

Penal Code (45 of 1860), Sections 148, 149 & 302 – Common intention **– The accused person is alleged to have caught hold the deceased and dragged him and gunshot fired from close range by the main accused – No sign of dragging were found on the body of deceased – When main accused could fire from a very close range, then there was no necessity of catching hand of deceased taking the risk of getting injured – Allegation of holding deceased doubtful – Liable to be acquitted. [Rajeev Lochan Singh Vs. State of M.P.] (DB)...3231**

दण्ड संहिता (1860 का 45), धाराऐं 148, 149 व 302 – सामान्य आशय – अभियुक्त ने अभिकथित रुप से मृतक को पकड़ा और उसे घसीटा तथा मुख्य अभियुक्त द्वारा नजदीक से बंदूक से गोली चलायी गई – घसीटे जाने का कोई निशान मृतक के शरीर पर नहीं पाया गया – जब मुख्य अभियुक्त बहुत नजदीक से गोली चला सकता था तब आहत होने का जोखिम उठाते हुए मृतक का हाथ पकड़ने की आवश्यकता नहीं थी – मृतक को पकड़े रहने का अभिकथन संदेहास्पद – दोषमुक्त किये जाने योग्य। (राजीव लोचन सिंह वि. म.प्र. राज्य) **(DB)...3231**

Penal Code (45 of 1860), Section 302 – Murder – Ocular and Medical evidence **– In F.I.R. solitary eye witness had stated that assailants had assaulted deceased by means of lathies but in Court evidence improved his version and stated that Gupti, spear etc. were also used – No penetrating wound was found – Witnesses are related witnesses – Motive ascribed also not proved – F.I.R. also lodged within 15 minutes although police station was 8-9 kms away – In absence of corroboration, evidence of solitary eye witness cannot be relied upon – Appeal allowed, appellants acquitted. [Rohit Vs. State of M.P.] (DB)...3203**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – चक्षुदर्शी एवं चिकित्सीय साक्ष्य – प्रथम सूचना रिपोर्ट में चक्षुदर्शी साक्षी ने कथन किया कि हमलावरों ने

मृतक पर लाठियों से हमला किया किन्तु न्यायालयीन साक्ष्य में अपने वर्णन को सुधारा और कथन किया कि गुप्ती, भाला इत्यादि भी उपयोग किया गया था – कोई भेदने का घाव नहीं पाया गया – साक्षीगण संबंधी साक्षीगण हैं – बताया गया हेतुक भी साबित नहीं किया गया – प्रथम सूचना रिपोर्ट भी 15 मिनिट के भीतर दर्ज की गई, यद्यपि थाना 8–9 किमी की दूरी पर था – पुष्टिकरण की अनुपस्थिति में, एकमात्र चक्षुदर्शी के साक्ष्य पर विश्वास नहीं किया जा सकता – अपील मंजूर, अपीलार्थीगण दोषमुक्त। (रोहित वि. म.प्र. राज्य) **(DB)...3203**

Penal Code (45 of 1860), Section 302 – Murder – Presence of witness **– Complainant lodged the F.I.R. immediately after incident – P.W. 14 although declared hostile admitted that he took the deceased to hospital and complainant was with him – Presence of complainant who himself had sustained injuries cannot be doubted. [Rajeev Lochan Singh Vs. State of M.P.]** **(DB)...3231**

दण्ड संहिता (1860 का 45), धारा 302 – हत्या – साक्षी की उपस्थिति – शिकायतकर्ता ने घटना के तुरंत पश्चात प्रथम सूचना रिपोर्ट दर्ज कराई – अ.सा. 14 यद्यपि पक्ष विरोधी घोषित किया गया, उसने स्वीकार किया है कि वह मृतक को चिकित्सालय ले गया था और शिकायतकर्ता उसके साथ था – शिकायतकर्ता जिसने स्वंय चोटें सहन की हैं, की उपस्थिति पर संदेह नहीं किया जा सकता। (राजीव लोचन सिंह वि. म.प्र. राज्य) **(DB)...3231**

Penal Code (45 of 1860), Section 302 or 302/34 – Common intention **– Appellant did not make any assault on the deceased and he had no fire arm with him at the time of incident – Appellant did not himself commit any overt- acts – Main accused took out a pistol and fired at deceased – It is possible that appellant may not be having knowledge that main accused had hidden a pistol in his pocket – Once offence is committed appellant had no option except to leave the spot – Held – Common intention could not be, therefore, attributed to him, to render him guilty with the help of Section 34 I.P.C. – Hence, his appeal accepted – Appellant acquitted. [Rajendra Vs. State of M.P.]** **(DB)...3247**

दण्ड संहिता (1860 का 45), धारा 302 या 302/34 – सामान्य आशय – अपीलार्थी ने मृतक पर कोई हमला नहीं किया और उसके पास घटना के समय अग्न्यायुध नहीं था – अपीलार्थी ने स्वयं कोई प्रत्यक्ष कृत्य कारित नहीं किया – मुख्य अभियुक्त ने पिस्टल निकाली और मृतक पर गोली चलायी – यह संभव है कि अपीलार्थी को हो सकता है, यह जानकारी ना हो कि मुख्य अभियुक्त ने अपनी जेब

में पिस्टल छुपाई है – एक बार अपराध कारित हो जाने के पश्चात् अपीलार्थी के पास घटनास्थल छोड़ने के सिवाय कोई विकल्प नहीं था – अभिनिर्धारित – इसलिए भा.द.सं. की धारा 34 की सहायता से उसे दोषी ठहराने के लिए, उसका सामान्य आशय होना नहीं माना जा सकता – अतः उसकी अपील स्वीकार की गई – अपीलार्थी दोषमुक्त। (राजेन्द्र वि. म.प्र. राज्य) (DB)...3247

Penal Code (45 of 1860), Sections 304-B, 302/34 & Criminal Procedure Code, 1973 (2 of 1974), Section 228 – Framing of Charges – Murder – **No evidence which may go to show that either the applicants caused any injury upon the deceased or caused the same with an intention to cause her death or even with knowledge that the injury would result in death – Nothing on record to show that death was culpable homicide in nature – Applicants cannot be said to be responsible for causing any injury leading to death of deceased – Hence, charge u/s 302 or 302/34 are set aside. [Rani (Smt.) Vs. State of M.P.]** ...3055

दण्ड संहिता (1860 का 45), धाराऐं 304बी, 302/34 व दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 228 – आरोप विरचित किये जाना – हत्या – कोई साक्ष्य नहीं जो यह दर्शा सकता हो कि या तो आवेदकगण ने मृतक को कोई चोट कारित की या उसकी मृत्यु कारित करने के आशय से उक्त को कारित किया या यह ज्ञात होते हुए भी कि उस चोट से मृत्यु कारित होगी – यह दर्शाने के लिये अभिलेख पर कुछ नहीं कि मृत्यु, आपराधिक मानववध के स्वरुप की थी – मृतिका की मृत्यु का कारण बनने वाली किसी चोट को कारित करने के लिये आवेदकगण को उत्तरदायी नहीं कहा जा सकता – अतः धारा 302 या 302/34 के अंतर्गत आरोप अपास्त। (रानी (श्रीमती) वि. म.प्र. राज्य) ...3055

Penal Code (45 of 1860), Sections 420, 467, 468, 471, 120-B, 34 – See – Constitution – Article 226 **[Avinash Dubey Vs. State of M.P.]** (DB)...2507

दण्ड संहिता (1860 का 45), धाराऐं 420, 467, 468, 471, 120बी, 34 – देखें – संविधान – अनुच्छेद 226 (अविनाश दुबे वि. म.प्र. राज्य) (DB)...2507

Penal Code (45 of 1860), Section 498-A – See – Criminal Procedure Code, 1973, Section 482 **[Naveen Vs. State of M.P.]** ...3310

दण्ड संहिता (1860 का 45), धारा 498–ए – देखें – दण्ड प्रक्रिया संहिता, 1973, धारा 482 (नवीन वि. म.प्र. राज्य) ...3310

Prevention of Corruption Act (49 of 1988), Sections 7, 13(1)(d) R/w13(2) – Illegal gratification – **Accused in his statement under Section 313 Cr.P.C. admitted the prosecution case however, took a defence that the amount was received towards repayment of loan which was earlier given to complainant – Defence witnesses are not trustworthy as they are trying to shield his sub-ordinate – If evidence of lending loan is accepted without any documentary proof in support of alleged loan, it would be virtually impossible to convict any bribe taker – Appeal dismissed. [Dilip Sagorkar (Dead) Through L.R. Vs. State of M.P.]** **(DB)...2694**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराऐं 7, 13(1)(डी) सहपठित 13(2) – अवैध परितोषण – अभियुक्त ने द.प्र.सं. की धारा 313 के अपने कथन में अभियोजन प्रकरण को स्वीकार किया किन्तु यह बचाव लिया कि प्राप्त की गई रकम, ऋण की अदायगी के तौर पर प्राप्त की गई थी, जिसे पूर्व में शिकायतकर्ता को दिया गया था – बचाव साक्षी विश्वसनीय नहीं क्योंकि वे अपने अधीनस्थ को बचाने का प्रयास कर रहे हैं – यदि अभिकथित ऋण के समर्थन में बिना किसी दस्तावेजी सबूत के, ऋण दिया जाना स्वीकार किया गया, तो किसी रिश्वत लेने वाले को दोषसिद्ध करना वस्तुतः असंभव होगा – अपील खारिज। (दिलीप सागोरकर (मृतक) द्वारा विधिक प्रतिनिधि वि. म.प्र. राज्य) **(DB)...2694**

Prevention of Corruption Act (49 of 1988), Sections 13(1)(d) r/w Section 13(2) – See – Constitution – Article 226 **[Avinash Dubey Vs. State of M.P.]** **(DB)...2507**

भ्रष्टाचार निवारण अधिनियम (1988 का 49), धाराऐं 13(1)(d) सहपठित धारा 13(2) – देखें – संविधान – अनुच्छेद 226 (अविनाश दुबे वि. म.प्र. राज्य)**(DB)...2507**

Railway Protection Force Rules, 1987, Rules 153, 158 & 217 – See – Service Law **[S.P. Singh Vs. West Central Railway]** **....3138**

रेल सुरक्षा बल नियम, 1987, नियम 153, 158 व 217 – देखें – सेवा विधि (एस.पी. सिंह वि. वेस्ट सेन्ट्रल रेलवे) **...3138**

Service Law – Correctness of grading made in ACR – **On receiving the report of Reporting Authority petitioner was graded as 'Excellent' Officer by the Reviewing Authority which was changed by Chairman-cum-Managing Director on the noting made by the Secretary to deny promotion to the petitioner – Held – Since Secretary never**

suggested any grading of the petitioner to be made in the ACR in question – He simply said that out of 10 years ACR's of the petitioner, he was graded 'B' category Officer in 7 years – Petitioner's ACR grading was done according to the circular which cannot be said to be bad in law – Petition is dismissed. [R.K. Parashar Vs. M.P. Power Management Company] ...3088

सेवा विधि – वार्षिक गोपनीय प्रतिवेदन में किये गये श्रेणीकरण की सत्यता – रिपोर्ट प्राधिकारी का प्रतिवेदन प्राप्त होने पर पुनर्विलोकन प्राधिकारी द्वारा याची का श्रेणीकरण "उत्कृष्ट" अधिकारी के रुप में किया, जिसे अध्यक्ष-सह-प्रबंध निदेशक द्वारा याची को पदोन्नति से वंचित करने के लिए सचिव द्वारा की गई टिप्पणी पर बदला गया – अभिनिर्धारित – चूंकि सचिव ने प्रश्नगत वार्षिक गोपनीय प्रतिवेदन में याची का कोई श्रेणीकरण करने का सुझाव नहीं दिया था – उसने सामान्य ढंग से कहा था कि याची के 10 वर्षों के वार्षिक गोपनीय प्रतिवेदनों में से 7 वर्षों में उसका श्रेणीकरण 'बी' कोटि के अधिकारी के रुप में किया गया था – याची के वार्षिक गोपनीय प्रतिवेदनों में श्रेणीकरण, परिपत्र के अनुसार किया गया था, जिसे विधि अंतर्गत अनुचित नहीं कहा जा सकता – याचिका खारिज। (आर.के. पाराशर वि. एम.पी. पॉवर मेनेजमेन्ट कंपनी) ...3088

Service Law – Out of turn promotion – **Denial of out of turn promotion to petitioner, who is Vikram Awardee and has also won several Gold and Silver medals in the National and International Championship in power lifting, although respondents have considered and promoted the similarly situated persons – Held – Cause of action for consideration of promotion accrued in 2004 and 2005 – Petitioner was considered in the year 2007 – GOP came in force in the year 2007 does not apply – The case of the petitioner was not properly considered for grant of out of turn promotion – Petitioner was entitled to be considered for promotion to the post of Company Commander – Since petitioner is already promoted to the post of Company Commander, she will get only the benefit of seniority, if found fit by D.P.C. – Matter remitted back to the respondent to consider the claim of the petitioner within a period of 3 months. [Neelima Saraf (Ku.) Vs. State of M.P.]** ...2763

सेवा विधि – बिना पारी पदोन्नति – याची जो विक्रम अवार्ड से पुरस्कृत है और जिसने राष्ट्रीय एवं अंतर्राष्ट्रीय भारोत्तोलन प्रतियोगिताओं में कई स्वर्ण और रजत पदक भी जीते हैं, को बिना पारी पदोन्नति अस्वीकार की गई, यद्यपि समान

रुप से स्थित व्यक्तियों को प्रत्यर्थीगण ने विचार में लिया और पदोन्नत किया है – अभिनिर्धारित – पदोन्नति का विचार किये जाने हेतु वाद कारण 2004 व 2005 में प्रोद्भूत हुआ – याची को वर्ष 2007 में विचार में लिया गया – जी.ओ.पी. जो वर्ष 2007 से प्रभावी हुआ, लागू नहीं होता – बिना पारी पदोन्नति प्रदान किये जाने हेतु, याची के प्रकरण पर उचित रुप से विचार नहीं किया गया – याची कम्पनी कमांडर के पद पर पदोन्नति हेतु विचार किये जाने का हकदार था – चूंकि याची को पहले ही कम्पनी कमांडर के पद पर पदोन्नत किया गया है, उसे केवल वरिष्ठता का लाभ मिलेगा, यदि डी.पी.सी. द्वारा योग्य पाया जाता है – याची का दावा 3 माह की अवधि के भीतर विचार में लिये जाने हेतु प्रत्यर्थी को मामला प्रतिप्रेषित। (नीलिमा सराफ (कुमारी) वि. म.प्र. राज्य) ...2763

Service Law – Promotion – **Petitioner was working as Sister Tutor – She was having long experience of working, was possessing the Diploma in Public Health Tutor and General Nursing – Her claim of promotion on the post of Senior Sister Tutor was denied on the ground that the petitioner was not possessing the degree of Bachelor of Science (Nursing) therefore, was not eligible for such promotion – Held – Since it is the practice in the State that if for any particular department service rules are not framed, service rules framed for the similar services or post by other department are adopted – Respondent should have taken care to adopt rules of the Public Health Department rather than insisting on the norms of Indian Nursing Council in the matter of promotion of Nursing Sisters – There is no insistence in the Rules of Public Health Department that Sister Tutor must possess a Degree of Bachelor of Science with nursing subject – Thus, denial of consideration for promotion to the petitioner is grossly unjustified – Respondents are directed to consider the case of petitioner for promotion – In case the petitioner is found fit, she would be entitled to the consequential benefit of such promotion with retrospective effect. [Anjana Mathur (Smt.) Vs. State of M.P.]** ...3102

सेवा विधि – पदोन्नति – याची, सिस्टर टयूटर के रुप में कार्यरत थी – उसे कार्य का लम्बा अनुभव था और उसके पास लोक स्वास्थ्य शिक्षिका एवं सामान्य उपचर्या (नर्सिंग) में डिप्लोमा था – सीनियर सिस्टर टयूटर के पद पर पदोन्नति का उसका दावा इस आधार पर अस्वीकार किया गया कि याची के पास विज्ञान स्नातक (नर्सिंग) की उपाधि (डिग्री) नहीं थी इसलिए, उक्त पदोन्नति हेतु पात्र नहीं – अभिनिर्धारित – चूंकि राज्य में यह कार्य पद्धति है कि यदि किसी विशिष्ट विभाग

के लिए सेवा नियम विरचित नहीं है, तब समान सेवा या पद के लिए अन्य विभाग द्वारा विरचित सेवा नियमों को अपनाया जाता है – प्रत्यर्थी को नर्सिंग सिस्टंर की पदोन्नति के मामले में भारतीय उपचर्या (नर्सिंग) परिषद के मानदंडों पर जोर देने की बजाए लोक स्वास्थ्य विभाग के नियमों को अपनाने की सावधानी लेनी चाहिए थी – लोक स्वास्थ्य विभाग के नियमों में आग्रह नहीं कि सिस्टर टयूटर के पास नर्सिंग विषय में विज्ञान स्नातक की उपाधि होनी चाहिए – अतः, याची को पदोन्नति हेतु विचार में नहीं लिया जाना पूर्ण रुप से अनुचित है – पदोन्नति हेतु याची के प्रकरण पर विचार करने के लिए प्रत्यर्थीगण को निदेशित किया गया – यदि याची योग्य पायी जाती है, वह उक्त पदोन्नति के परिणामिक लाभ की भूतलक्षी प्रभाव से हकदार होगी। (अंजना माथुर (श्रीमती) वि. म.प्र. राज्य) ...3102

Service Law – Railway Protection Force Rules, 1987, Rules 153, 158 & 217 – Disciplinary Authority – **Appellate Authority while formulating an opinion that the nature of misconduct contemplates a major penalty, dropped the minor penalty charge sheet and remitted the matter to the disciplinary authority for issuance of fresh charge sheet for major penalty – Held – It is apparent from the provisions contained in Rule 217 that it is within the power of the Appellate Authority to set aside, confirm, reduce or enhance punishment or remit the case to the authority which imposed or enhanced the punishment or to any other authority with such direction, as it may deem fit in the circumstances of the case. [S.P. Singh Vs. West Central Railway]** ...3138

सेवा विधि – रेल सुरक्षा बल नियम, 1987, नियम 153, 158 व 217 – अनुशासनिक प्राधिकारी – अपीली प्राधिकारी ने यह अभिमत बनाते समय कि अवचार का स्वरूप गुरूतर शास्ति अनुध्यात करता है, लघु शास्ति का आरोप पत्र समाप्त कर दिया और अनुशासनिक प्राधिकारी को, गुरूतर शास्ति हेतु नया आरोप पत्र जारी करने के लिए मामले को प्रतिप्रेषित किया – अभिनिर्धारित – नियम 217 में अंतर्विष्ट उपबंधों से प्रकट होता है कि यह अपीली प्राधिकारी की शक्ति में है कि वह प्रकरण को अपास्त करें, अभिपुष्ट करें, शास्ति को घटाये या बढ़ाये या शास्ति अधिरोपित करने वाले या बढ़ाने वाले प्राधिकारी को या किसी अन्य प्राधिकारी को ऐसे निदेश के साथ प्रकरण प्रतिप्रेषित करें, जैसा कि प्रकरण की परिस्थितियों में वह उचित समझें। (एस.पी. सिंह वि. वेस्ट सेन्ट्रल रेलवे) ...3138

Specific Relief Act (47 of 1963), Section 41(b) – See – Civil Procedure Code, 1908, Order 39, Rule 1 & 2 [Ramnarayan Vs. Arvind] ...3201

विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 41(बी) – देखें – सिविल प्रक्रिया संहिता, 1908, आदेश 39, नियम 1 व 2 (रामनारायण वि. अरविन्द) ...3201

Transfer of Property Act (4 of 1882), Section 82 – Attempt to sell suit property – Doctrine of Lis Pendence – **Imposes a prohibition of transfer or otherwise dealing of any property during the pendency of a suit – No stay against alienation or creation of third party rights in the suit property, cannot be countenanced – Same is found to be not only against the principle u/s 52 but also an attempt to seek legal recognition of transfer of title by suppression and misrepresentation of facts. [Kulwant Singh Vs. State of M.P.]** ...3153

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 82 – वाद सम्पत्ति के विक्रय का प्रयास – विचाराधीन वाद का सिद्धांत – वाद लंबित रहने के दौरान किसी सम्पत्ति का अंतरण या अन्यथा निपटारा पर प्रतिषेध अधिरोपित करता है – वाद सम्पत्ति में तृतीय पक्षकार के अधिकारों का सृजन या हस्तांतरण के विरुद्ध कोई रोक नहीं, का समर्थन नहीं किया जा सकता – इसे न केवल धारा 52 के अंतर्गत सिद्धांत के विरुद्ध पाया जाता है, बल्कि तथ्यों के छिपाव और दुर्व्यपदेशन द्वारा हक के अंतरण को विधिक मान्यता चाहने का प्रयास भी है। (कुलवंत सिंह वि. म.प्र. राज्य) ...3153

Value Added Tax Act, M.P. (20 of 2002), Section 46 (8A), Value Added Tax Rules, M.P. 2006, Rule 61(4) – Readmission/Rehearing of appeals – **Appeal filed by Petitioner u/s 46 of Act 2002 was dismissed for want of prosecution – Application for rehearing filed under Rule 61(4) of Rules, 2006 was dismissed as limitation for deciding appeal u/s 46(8A) is 12 months and the same has expired – Held – Time limit fixed for deciding appeal will not override the provisions of Rule 61 to invoke provisions of rehearing/readmission of appeal – Order of Appellate Authority set aside – Matter remitted back for deciding application for rehearing the appeal. [Procter & Gamble Hygiene & Health Care Ltd. Vs. Additional Divisional Dupty Commissioner of Commercial Tax]** (DB)...3122

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 46 (8ए), मूल्य वर्धित कर नियम, म.प्र. 2006, नियम 61(4) – अपील को पुनःग्रहण/पुनःसुनवाई किया जाना – अधिनियम 2002 की धारा 46 के अंतर्गत प्रस्तुत की गई याची की अपील को

अभियोजन के अभाव में खारिज किया गया – पुनः सुनवाई हेतु नियम 2006 के नियम 61(4) के अंतर्गत आवेदन को खारिज किया गया क्योंकि धारा 46(8ए) के अंतर्गत अपील निर्णित करने के लिये परिसीमा 12 माह है और वह समाप्त हो चुकी है – अभिनिर्धारित – अपील के पुनः ग्रहण/पुनःसुनवाई के उपबंधों का अवलंब लेने के लिये अपील के विनिश्चय हेतु नियत समय सीमा, नियम 61 के उपबंधों पर अध्यारोही नहीं होगी – अपीली प्राधिकारी का आदेश अपास्त – अपील की पुनः सुनवाई हेतु आवेदन का विनिश्चय करने के लिये मामला प्रतिप्रेषित किया गया। (प्रॉक्टर एण्ड गेम्बल हाईजीन एण्ड हेल्थ केयर लि. वि. एडीशनल डिवीजनल डिप्टी कमिश्नर ऑफ कमर्शियल टैक्स) (DB)...3122

Value Added Tax Act, M.P. (20 of 2002), Section 54 – **Assessing authority in absence of any document held that it could not be held that goods were not for sale in M.P. and were out to out goods – Subsequently after receiving relevant documents petitioner applied for rectification of mistake –Held – As there was no mistake or error apparent on record therefore application was rightly rejected by assessing authority – However, in the interest of justice, as petitioner was not in possession of documents at the relevant time and notice was also issued by assessing authority to the third party to produce the documents, order of assessment is set aside and matter remitted back to assessing officer to decide afresh taking into consideration the documents filed by petitioner. [Adhunik Transport Organization Ltd. (M/s.) Vs. Assistant Commissioner, Commercial Tax]** (DB)...3116

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 54 – निर्धारण प्राधिकारी ने किसी दस्तावेज की अनुपस्थिति में अभिनिर्धारित किया कि यह धारणा नहीं की जा सकती कि माल म.प्र. राज्य में विक्रय हेतु नहीं था और आउट टू आउट का माल था – तत्पश्चात् सुसंगत दस्तावेज प्राप्त करने के पश्चात, याची ने भूल का सुधार करने हेतु आवेदन किया – अभिनिर्धारित – चूंकि अभिलेख पर प्रकट भूल या त्रुटि नहीं थी, इसलिए निर्धारण प्राधिकारी द्वारा उचित रूप से आवेदन अस्वीकार किया गया – अपितु, न्याय हित में, चूंकि सुसंगत समय याची के कब्जे में दस्तावेज नहीं थे और निर्धारण प्राधिकारी द्वारा दस्तावेज प्रस्तुत करने के लिए तृतीय पक्षकार को नोटिस भी जारी किया गया था, निर्धारण का आदेश अपास्त और याची द्वारा प्रस्तुत दस्तावेजों को विचार में लेकर नये सिरे से निर्णित किये जाने हेतु मामला निर्धारण प्राधिकारी को प्रतिप्रेषित। (आधुनिक ट्रांसपोर्ट ऑर्गनाइजेशन लि. (मे.) वि. असिस्टेन्ट कमिश्नर, कमर्शियल टैक्स) (DB)...3116

Value Added Tax Rules, M.P. 2006, Rule 61(4) – See – Value Added Tax Act, M.P., 2002, Section 46 (8A) **[Procter & Gamble Hygiene & Health Care Ltd. Vs. Additional Divisional Dupty Commissioner of Commercial Tax] (DB)...3122**

मूल्य वर्धित कर नियम, म.प्र. 2006, नियम 61(4) – देखें – मूल्य वर्धित कर अधिनियम, म.प्र., 2002, धारा 46 (8ए) (प्रॉक्टर एण्ड गेम्बल हाईजीन एण्ड हेल्थ केयर लि. वि. एडीशनल डिवीजनल डिप्टी कमिश्नर ऑफ कमर्शियल टैक्स) **(DB)...3122**

Vyavasayik Pariksha Mandal Adhiniyam, M.P. (21 of 2007), Section 3 – Establishment of Professional Examination Board – Notification – **State Govt. has not issued notification to establish Board in exercise of powers under Section 3(1) of Act, 2007 – Earlier Board was constituted vide notification dated 22.01.2004 – Existing Board must continue to function in terms of those Govt. orders/notifications until establishment of new Board upon issuance of notification under Section 3(1) of Act, 2007 – Upon issuance of notification, existing Board would merge in newly established Board and cease to exist. [Pratibha Singh (Minor) (Ku.) Vs. State of M.P.] (DB)...2514**

व्यावसायिक परीक्षा मंडल अधिनियम, म.प्र. (2007 का 21), धारा 3 – व्यावसायिक परीक्षा मंडल की स्थापना – अधिसूचना – अधिनियम, 2007 की धारा 3(1) के अंतर्गत शक्तियों का प्रयोग करते हुए राज्य सरकार ने अधिसूचना जारी नहीं की है – पूर्ववर्ती मंडल, का गठन अधिसूचना दिनांक 22.01.2004 द्वारा किया गया था – वर्तमान मंडल को सरकारी आदेश/अधिसूचनाओं की उन शर्तों के अधीन कार्य जारी रखना चाहिए जब तक कि अधिनियम, 2007 की धारा 3(1) के अंतर्गत अधिसूचना जारी किये जाने पर, नया मंडल स्थापित न हो – अधिसूचना जारी करने पर, वर्तमान मंडल, नव स्थापित मंडल में विलीन होगा और उसका अस्तित्व समाप्त होगा। (प्रतिमा सिंह (माइनर) (कुमारी) वि. म.प्र. राज्य) **(DB)...2514**

Vyavasayik Pariksha Mandal Adhiniyam, M.P. (21 of 2007), Section 3 – Professional Examination Board – Action against selected students – **Computer Experts Committee was constituted – After submission of its opinion further enquiry by Committee of Controllers was constituted which submitted its report – No fault can be found with the decision of Board to proceed only against identified candidates. [Pratibha Singh (Minor) (Ku.) Vs. State of M.P.] (DB)...2514**

व्यावसायिक परीक्षा मंडल अधिनियम, म.प्र. (2007 का 21), धारा 3 – व्यावसायिक परीक्षा मंडल – चयनित विद्यार्थियों के विरुद्ध कार्यवाही – कम्पयूटर विशेषज्ञ समिति गठित की गई – उसका अभिमत प्राप्त करने के पश्चात, नियंत्रको की समिति द्वारा अतिरिक्त जांच संस्थित की गयी जिसने अपना प्रतिवेदन प्रस्तुत किया – केवल दर्शित अभ्यर्थियों के विरुद्ध कार्यवाही करने के मंडल के निर्णय में कोई त्रुटि नहीं पायी जा सकती। (प्रतिभा सिंह (माइनर) (कुमारी) वि. म.प्र. राज्य) (DB)...2514

Vyavasayik Pariksha Mandal Adhiniyam, M.P. (21 of 2007), Section 3 – Professional Examination Board – Cancellation of Result – Criminal Prosecution – **Opinion of Board officials and reasons recorded in impugned decisions should not prejudice the petitioners in criminal action pending against them in any manner. [Pratibha Singh (Minor) (Ku.) Vs. State of M.P.] (DB)...2514**

व्यावसायिक परीक्षा मंडल अधिनियम, म.प्र. (2007 का 21), धारा 3 – व्यावसायिक परीक्षा मंडल – परिणाम निरस्त किया जाना – दाण्डिक अभियोजन – मंडल अधिकारियों का अभिमत और आक्षेपित निर्णयों में अभिलिखित किये गये कारण, किसी ढंग से याचीगण को उनके विरुद्ध लंबित दाण्डिक कार्यवाही में प्रतिकूल प्रभाव नहीं डाल सकते। (प्रतिभा सिंह (माइनर) (कुमारी) वि. म.प्र. राज्य) (DB)...2514

Vyavasayik Pariksha Mandal Adhiniyam, M.P. (21 of 2007), Section 3 – Professional Examination Board – Natural Justice – **Where identical pattern of commission of organized unfair means emerges, it would be nothing short of mass copying and therefore, could be dealt with together by a common order and without issuing notice to respective candidate. [Pratibha Singh (Minor) (Ku.) Vs. State of M.P.] (DB)...2514**

व्यावसायिक परीक्षा मंडल अधिनियम, म.प्र. (2007 का 21), धारा 3 – व्यावसायिक परीक्षा मंडल – नैसर्गिक न्याय – जब संगठित अनुचित साधन कारित करने का एक सा तरीका उभरकर आता है, यह सामूहिक नकल करने से कम नहीं और इसलिए क्रमशः अभ्यर्थी को नोटिस जारी किये बिना और समान आदेश द्वारा एक साथ निपटारा किया जा सकता है। (प्रतिभा सिंह (माइनर) (कुमारी) वि. म.प्र. राज्य) (DB)...2514

Vyavasayik Pariksha Mandal Adhiniyam, M.P. (21 of 2007), Section 3 – Professional Examination Board – Orders – **Orders cancelling the examination were issued under the signatures of Director – However, office notings establishes that Chairperson had approved**

the proposal and had directed the Director to take follow-up action – No illegality in issuing order under the signature of Director. [Pratibha Singh (Minor) (Ku.) Vs. State of M.P.] (DB)...2514

व्यावसायिक परीक्षा मंडल अधिनियम, म.प्र. (2007 का 21), धारा 3 – व्यावसायिक परीक्षा मंडल – आदेश – परीक्षा निरस्त करने के आदेश निदेशक के हस्ताक्षर के अंतर्गत जारी किये गये – किन्तु कार्यालयीन टिप्पणी से स्थापित होता है कि अध्यक्ष ने प्रस्ताव को अनुमोदित किया और निदेशक को आगे कार्यवाही करने के लिए निदेशित किया था – निदेशक के हस्ताक्षर के अंतर्गत आदेश जारी करने में कोई अवैधता नहीं। (प्रतिभा सिंह (माइनर) (कुमारी) वि. म.प्र. राज्य) (DB)...2514

Vyavasayik Pariksha Mandal Adhiniyam, M.P. (21 of 2007), Section 3 – Professional Examination Board **– Whether Board becomes *functus officio* by declaration of result – No executive instruction issued by State Govt. to limit the powers of Board – Argument that after declaration of result, the Board ceases to have any authority liable to be negative as obligation to conduct free and fair pre-admission professional examination is fully vested in State Govt. which has been entrusted to Board. [Pratibha Singh (Minor) (Ku.) Vs. State of M.P.] (DB)...2514**

व्यावसायिक परीक्षा मंडल अधिनियम, म.प्र. (2007 का 21), धारा 3 – व्यावसायिक परीक्षा मंडल – क्या परिणाम की घोषणा द्वारा मंडल, पदकार्य-निवृत्त होता है – मंडल की शक्तियों को सीमित करने के लिए राज्य सरकार द्वारा कार्यपालिक अनुदेश जारी नहीं – यह तर्क कि परिणाम की घोषणा के पश्चात मंडल के पास कोई प्राधिकार नहीं बचता, नकारे जाने योग्य है, जैसा कि स्वतंत्र और निष्पक्ष प्रवेश पूर्व व्यावसायिक परीक्षा के संचालन का दायित्व पूर्णतः राज्य सरकार में निहित है, जिसे मंडल को सुपुर्द किया गया है। (प्रतिभा सिंह (माइनर) (कुमारी) वि. म.प्र. राज्य) (DB)...2514

Workmen's Compensation Act (8 of 1923), Section 30 – Entitlement to file an appeal – Precondition of deposit **– Appellant has certainly not at all deposited the interest and there is no certificate on record issued by the Commissioner – Appellant has not complied with the statutory provisions as contained u/s 30 of the Act – Appeal dismissed. [Ramesh Goyal Vs. Gayatri] ...3197**

कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 30 – अपील प्रस्तुत करने की हकदारी – जमा की पूर्व शर्त – अपीलार्थी ने निश्चित रुप से ब्याज जमा नहीं

किया और कमिश्नर द्वारा जारी किया गया कोई प्रमाणपत्र अभिलेख पर नहीं – अपीलार्थी ने अधिनियम की धारा 30 के अंतर्गत समाविष्ट कानूनी उपबंधों का अनुपालन नहीं किया है – अपील खारिज। (रमेश गोयल वि. गायत्री) ...3197

Zila Sahkari Kendriya Bank Karmchari Seva Niyojan Nibandhan Tatha Unki Karya Sthiti Niyam, M.P. 1982, Rule 72(1) – Compulsory Retirement **– Petitioner compulsorily retired on the basis of certain allegations which amounts to misconduct – Overall service record of the petitioner was not adjudged – Since the order is passed without providing any opportunity principle of natural justice are violated – It is passed to avoid disciplinary proceedings which is impermissible – Same is set aside. [Shantimal Bhandari Vs. State of M.P.]** ...2841

जिला सहकारी केन्द्रीय बैंक कर्मचारी सेवा नियोजन निबंधन तथा उनकी कार्य स्थिति नियम, म.प्र. 1982, नियम 72(1) – अनिवार्य सेवानिवृत्ति – याची को अवचार की कोटि में आने वाले कतिपय आरोपों के आधार पर अनिवार्य रुप से सेवानिवृत्त किया गया – याची के सेवा अभिलेख को समग्र रुप से न्यायनिर्णित नहीं किया गया – चूंकि कोई अवसर प्रदान किये बिना आदेश पारित किया गया है, नैसर्गिक न्याय के सिद्धांत का उल्लंघन हुआ है – अनुशासनिक कार्यवाही से बचने के लिए उसे पारित किया गया, जो अननुज्ञेय है – उक्त को अपास्त किया गया। (शांतिमल भण्डारी वि. म.प्र. राज्य) ...2841

* * * * *

JOURNAL SECTION

IMPORTANT ACTS, AMENDMENTS, CIRCULARS, NOTIFICATIONS AND STANDING ORDERS.

AMENDMENTS IN THE MADHYA PRADESH STAMP RULES, 1942.

[Notification published in Madhya Pradesh Gazette (Extra-ordinary) dated 1st November, 2014, page no. 1018 (12) to 1018 (23)]

No.F. B-4-21-2014-2-V(28).– In exercise of the powers conferred by Section 74 and 75 read with Section 10, 49 and 52 of the Indian Stamp Act, 1899 (No. 11 of 1899), as applicable to the State of Madhya Pradesh, the State Government, hereby, makes the following amendments in the Madhya Pradesh Stamp Rules, 1942, namely :–

AMENDMENT

In the said rules,–

1. For rule 2, the following rule shall be substituted, namely :–

"2, Definitions – In these rules, unless the context otherwise requires–

(a) "Act" means the Indian Stamp Act, 1899 (No. II of 1899), as applicable to the State of Madhya Pradesh;

(b) "Authorised agent" means–

(i) a person holding a Power of Attorney authorising him to act on behalf of his Principal; or

(ii) an agent empowered by written authority under the hand of his Principal;

(c) "Collector" means the Collector as defined in the Act;–

(d) "Deputy Inspector General of Registration" means the Deputy Inspector General of Registration appointed by the State Government;

(e) "Electronic Registration System or ERS" means the computerised and web enabled system of registering documents electronically in the State, accessible to Licensed Service Providers, or Users authorised under these rules or by orders issued by the State Government or the Inspector General of Registration from time to time;

(f) "Electronic Signature" shall have the same meaning as assigned to it in clause (ta) of sub-section (1) of Section 2 of the Information Technology Act, 2000 (No. 21 of 2000);

(g) "Electronic Stamping System or ESS" means the computerised and web enabled system of e-stamping of documents in the State, accessible to Licensed Service Providers or Users authorised under these rules or by orders issued by the State Government or the Inspector General of Registration from time to time;

(h) "e-stamp or electronic stamp" means an electronically generated impression on paper to denote the payment of stamp duty or such other amount that would have otherwise been paid as an impressed or adhesive or Franked stamp, issued from the ESS;

(i) "e-stamp code" means the alpha numeric code issued to the user from the ESS after payment of Stamp Duty;

(j) "Form" means Forms appended to these rules;

(k) "Inspector General of Registration" means Inspector General of Registration appointed under the provisions of Section 3 of the Registration Act, 1908 (No, 16 of 1908);

(l) "Licensing Authority" means the Collector of the district as defined in the Act;

(m) "Registering Officer" means the District Registrar and Sub-Registrar appointed under the Registration Act, 1908 (No, 16 of 1908), which also includes Senior District Registrar and Senior Sub-Registrar;

(n) "Revisional Authority" means the Deputy Inspector General

of Registration;

(O) "Schedule" means the Schedules appended to the Act prescribing the rates of stamp duty;

(P) "Section" means the section of the Act;

(q) "Service Provider" means a licensee under these rules. authorised to sell e-stamps and to provide other related services in the manner laid down by the Inspector General of Registration, through the ESS and the ERS;

(r) "Service Provider credit limit" means the amount deposited by a Service Provider in advance in Government account through the ESS to the extent that he shall be entitled to sell e-stamps and get discount thereon as notified by the State Government from time to time;

(s) "Slot booking" means booking of time slots of Registering Officers on a particular date through the ERS;

(t) "Stamp" means the stamp as defined under sub-section (26) of Section 2 of the Act;

(u) "Stamp Vendor" means a licensee authorised to sell stamps under these rules;

(v) "State" means the State of Madhya Pradesh.

(w) "Government" means the Government of Madhya Pradesh;

(x) "Superintendent of Stamps" means the Superintendent of Stamps, Madhya Pradesh, appointed by the State Government:

(y) The words and expressions used but not defined in these rules, shall have the same meaning as assigned to them in the Indian Stamp Act, 1899 (II of 1899) and the Registration Act, 1908 (No. 16 of 1908) as applicable to the State and the rules framed thereunder.

2. For rule-3, the following rule shall be substituted, namely;–

"3. Description of stamps. – (1) Except as otherwise provided

by the Act or by these rules,–

(a) all duties with which any instrument is chargeable shall be paid and such payment shall be indicated on such instrument by means of stamps issued by the Government, bearing the words,"Madhya Pradesh" in Hindi vernacular for the purpose of the Act; and

(b) stamp which by any word or words on the face of it is appropriated to any particular kind of instrument shall not be used for any instrument of any other kind,

Explanation: Stamps bearing the words "Madhya Pradesh" shall be deemed to have been issued by the Government.

(2) There shall be three kinds of stamps for indicating the payment of duty with which instruments are chargeable, namely;-

(a) **Impressed Stamps.** These stamps shall be overprinted with the words "Madhya Pradesh" and bearing serial number. impressed stamp denotes labels affixed and impressed by the proper officer, stamps embossed or engraved on stamp paper, and also impression by a franking machine or any other machine as the State Government may, by notification specify;

(b) **Adhesive Stamp.**- These stamps shall be overprinted with the words Madhya Pradesh. Adhesive stamp denotes a stamp bearing the words Court Fee and intended to be used under the Court Fee Act, 1870 (No.7 of 1870) and also a stamp bearing the word or words Special Adhesive or Revenue or Foreign Bill or Share Transfer Advocate or Notarial or Agreement or Brokers Note or Insurance and intended to be used under the Act;

(c) **e-stamps-** An electronically generated impression on paper to denote the payment of stamp duty or such other amount that would have otherwise been paid as an impressed or adhesive franked stamp issued from

the ESS;

Provided that the Government may, by notification, provide for stamping to be done through any one or more type of stamps or Stamping method, for any one or more types of documents or values thereof.".

3. For rule 20, the following rule shall be substituted, namely:-

"20 **Evidence for claiming refund-or renewal.** - The Collector may require any person or his duly authorised agent claiming a refund or renewal under Chapter V of the Act, to furnish the following as evidence -

(a) an oral deposition on oath or affirmation or to file an affidavit, setting forth the circumstances under which the claim has arisen, and may also, if he thinks fit, call for the evidence of witnesses in support of the statement set forth in any such deposition or affidavit;

(b) An affidavit from the Stamp Vendor/Service Provider; and

(c) True copy of the concerned entry of the sale register of Stamp Vendor/ the "electronic records of the Service Provider."

4. For rule 22, the following rule shall be substituted, namely:-

"22. **Mode of cancelling original debenture on refund under section 55.-** (1) When the Collector makes a refund under section 55, he shall cancel the original debenture by writing on or across it the word "cancelled"and his usual signature with the date thereof.

(2) When a refund is granted, the Collector shall, then and there punch the stamps in such a way that it cannot be presented again. In case of refund of e-stamp, deactivation of the e-stamp shall be done through, the ESS.

5. For rule 25, the following rule shall be Substituted, namely:-

"25. **Authorised Licensees.-** (1) There shall be two classes of licensees to sell stamp namely:—

(a) Stamp Vendors:

(b) Service Providers.

(2) There shall be two classes of Service Providers, namely–

(a) Individual;

(b) Banks, Financial Institutions, or Post Offices.".

6. For rule 26, the following rule shall be Substituted, namely:–

"26. **Application for grant of licence.**–(1) An application for grant of licence to sell stamps as Stamp Vendor / Service Provider shall be made to the Licensing Authority in Form-A and shall be accompanied by a receipt of having paid a fee of rupees one thousand into Government account by a challan or e-payment. Application for license of Service Provider shall be made through the ESS. The fee shall not be refundable. All applications shall be disposed of within a period of one month from the date of receiving of application.

(2) **Eligibility for Stamp Vendor.**– The Licensing Authority may in its discretion on being satisfied that the applicant,–

(a) is over 21 years of age on the date of the application;

(b) is not employed in any department of the Government/ Government Undertaking/Local Body; and

(c) has passed the Higher Secondary School Certificate Examination of Madhya Pradesh Board of Secondary Education or an equivalent examination from a recognised Institution/Board may grant a licence of Stamp Vendor to the applicant in Form-B.

(3) **Eligibility for Service Provider.**– In addition to the qualifications mentioned in rule 26, the Licensing Authority may, in its discretion on being satisfied that the applicant–

(a) possesses an electronic signature as per provisions of

sub-clause n(ta) of clause (1) of section 2 of the Information Technology Act, 2000, (No, 21 of 2000) Computer, Printer, Biometric device, Electronic Writing Pen, Web Camera, UPS, Scanner and any other Computer peripherals specified in Appendix-A and broad band/high speed internet connection;

(b) is financially able to obtained credit limit for sale of e-stamps and to provide other related services;

(c) has knowledge of computer operation;

(d) is capable of providing services in both Hindi and English languages; and

(e) has working knowledge of the Indian Stamp Act, 1899 (No. II of 1899) and the Registration Act. 1908 (No. 16 of 1908) and rules made thereunder grant licence of services provided to the applicant in Form-B:

Provided that in case of the applicant applying for service provider in category mentioned in clause (b) of sub-rule (2) of rule 25, the above qualifications shall not be relevant:

Provided further that qualification (a) of Authorised Licence may be kept optional for such a period as the Inspector General of Registration may decide,

(4) **Duration of licence.**– the duration of licence of a Stamp Vendor and Service Provider shall be in the following manner, namely:–

(a) **Licence of Stamp Vendor.**– The licence of Stamp Vendor shall be granted for a period of 1 year or till 31st March of the current financial year, whichever is earlier.

(b) **Licence of Service Provider.**–The licence of service provider shall be granted for a period of 2 years, or till 31st March of the second financial year whichever is earlier.

(5) **Renewal of licence.**– On expiry of the licence, the Licensing Authority may renew the licence on payment of the fees as prescribed in sub-rule (1) of rule 26 for one year in case of a Stamp Vendor and for 2 years in case of a Service Provider. The application for renewal shall be made in Form-A at least 15 days before the expiry of the licence and shall be accompanied with a receipt of having paid the prescribed fee under these rules. The fee shall not be refundable. Applications for renewal shall be disposed of within a period of one month from the date of receipt of an application.

(6) **Issue of Duplicate Licence.**– If a licence is lost, destroyed, defaced, torn or becomes illegible, the Stamp Vendor shall apply to the Licensing Authority in the same manner for a duplicate licence as laid down in sub-rule (1) of rule 26 For the grant of a new licence. Such duplicate licence shall be issued on payment of a fee of rupees five hundred.

(7) **Terms and Conditions for Licence.**– The licence of Stamp Vendor / Service Provider shall be issued in Form-B on such terms and conditions as may be specified by the Inspector General of Registration. A person who is appointed as a Licence on his obtaining a job as mentioned in clause (b) of sub-rule (2) of rule 26 shall have to surrender his licence immediately."

7. For rule 27, the following rule shall be substituted, namely :–

"**27. Suspension or cancellation of licence.**– The Licensing Authority may at any time cancel the licence of the licensee on any of the grounds given below. The copy of such order shall be endorsed to the Regional Deputy Inspector General of Registration.

(a) for breach of any provisions of these rules or of the conditions of the licence;

(b) for incapability to store sufficient stamps or to keep sufficient credit limit for e-stamps and other related services;

(c) for failure to attend the place of work continuously for

a period exceeding one month without the prior permission of the Licensing Authority;

(d) for being guilty of participating in any illegal transaction or unfair dealings;

(e) for indulging in practice which tends to encourage corruption in the office;

(f) for charging amount in excess of what has been specified;

(g) for any other act of misconduct on the part of the licensee;

(h) in case the licensee is of unsound mind;

(i) on receipt of orders from the Inspector General of Registration to discontinue a particular category / categories of licences:

Provided that no order for cancellation of licence shall be passed unless the licensee has been given an opportunity of being heard, except in case of cancellation of licence on the ground under clause (i) above:

Provided further that from the date of issue of above notice to the licensee, the licence shall remain suspended.".

8. For rule 27-A the following rule shall be substituted namely :–

"27-A. Revision.– The Regional Deputy Inspector General of Registration may, at any time on his own motion or on the application made by any party, for the purpose of satisfying himself as to the legality or propriety of any order passed by him or as to the regularity of the proceedings of the Licensing Authority, call for and examine the record of any such case pending before him or disposed of by the Licensing Authority and may pass such order in reference thereto as he thinks fit:

Provided that no such application shall be entertained and no action shall be taken by the Deputy Inspector General of

Registration on his own motion after expiry of sixty days from the date of order of Licensing Authority and no order shall be varied or reversed unless notice has been served on the parties interested and an opportunity of hearing given to them.".

9. For rule 28, the following rule shall be substituted, namely :–

"28. **Application to the Inspector General of Registration.–** The Inspector General of Registration may, on the application of any person aggrieved by the order of the Deputy Inspector General of Registration passed under rule 27-A, may call for and examine the record of any such case and after giving an opportunity of being heard to the applicant, may pass such order as he thinks fit. The order passed by the Inspector General of Registration shall be final thereon.".

10. For rule 29, the following rule shall be substituted, namely :–

"29. **Responsibilities of Service Providers.–** Service Providers shall be responsible for the following activities, namely :–

(a) initiation of registration process through the ERS for individuals;

(b) drafting of documents for the purpose of registration as per the provisions of the Registration Act, 1908 (No. 16 of 1908) through the ERS;

(c) valuation of the subject matter property of instruments and calculation of stamp duty and Registration fees payable thereon;

(d) booking of slot for the parties for documents which require mandatory registration;

(e) payment for e-stamps from the Service Provider credit limit;

(f) performing other services like search of Registered documents, issuance of their downloaded copies etc.;

(g) generation and printing of e-stamps through the ESS

for documents for which registration is not mandatory and not opted for registration.".

11. For rule 30, the following rule shall be substituted, namely :–

"30. **Method of supply of stamps / credit limit to licensees.–** (1) Licensed vendors shall obtain stamps on cash payment (less discount as Prescribed) from the District Treasury or Sub-Treasury, as the case may be in the district for which his licence is granted.

(2) The Service Provider shall purchase credit limit to issuse e-stamps through advance payment in the manner specified in the ESS. He shall be entitled to the extent of the credit limit to sell e-stamps.".

12. For rule 34, the following rule shall be substituted, namely :–

"34. **Discount.–** The Stamp Vendor who purchases stamps (other than revenue stamps) or Service Provider who purchases credit limit for e-stamps, shall be allowed discount as notified by the Government from time to time.".

13. For rule 38, the following rule shall be substituted, namely :–

"38. **Particulars to be entered on impressed sheet.–** (1) The Stamp Vendor shall endorse on the back of each impressed sheet (other than a hundi) sold by him; its serial number, the date of sale, the value of stamps in words, name, father's name, address of actual purchaser, and if purchased on behalf of a third person, the name and address of that person, and the name and address of the transacting parties, and the purpose for which the stamp is being purchased, along with consideration or value of the transaction, if any. At the same time he shall make corresponding entries in a register to be kept by him in Form-C".

(2) **Sale of e-stamps.–** (a) Any person wishing to purchase e-stamps for documents which are not compulsorily registrable and which the applicant does not wish to get registered, shall apply for e-stamps in the format provided in the ESS. The Service Provider shall enter into the Form the requisite information and details as given in the application form for purchasing e-stamp.

Such entered details shall be verified by the applicant with his signature on the printout of the Form. After verification, the Service Provider shall affix his electronic signature, download the e-stamp, take a printout and issue the e-stamp. The e-stamps shall be printed on a paper and size shall be prescribed by the Inspector General of Registration. The ink to be used for the e-stamp printer must be non-washable permanent black or as prescribed by the Inspector General of Registration in this regard, from time to time. For documents that are compulsory registrable,the Service Provider or user shall obtain the "e-stamp code" from the ESS after paying the duty as per the mode specified.

(b) For documents that are presented for registration through the ERS, certification of stamp duty having been paid shall be done by the Registering Officer by generating the e-stamp certificate. The Registering Officer shall verify that duty has been paid into the ESS, the "e-stamp code" obtained by the applicant from the ESS and "locking" the code.

(3) **Manner of e-stamping.**– The Service Provider shall be authorised to issue e-stamps only through the ESS for documents that are not compulsorily registrable and nor brought for registration, for the access to which he shall be issued an unique login I D and password by the Department. E-stamping shall be done in the following manner :–

(a) e-stamps shall be generated only by licensed Service Providers or Authorised Officers from the ESS.

(b) Each e-stamp shall bear–

(i) a serial number/ Unique Identification Number, to ensure that it can not be re-used;

(ii) the date and time of issuance and amount of stamp duty in words and figures;

(iii) the name and address of the purchaser and of the parties to the document;

(iv) a brief description of the property and part of the

document for which the e-stamp is being purchased;

(v) the user ID and Code of the Service Provider/ Authorised Officer issuing the e-stamp;

(vi) Digital Signature/Signature and Seal of the e-stamp issuing Service Provider/Authorised Officer;

(vii) security features such as Optical Water Mark, Micro Print and Security barcode of the ESS;

(viii) any security feature or other details as specified by the Inspector General of Registration.

(4) **Identification of the particulars.**– The licensee shall work at such place as indicated in the licence and shall sell stamp and without delay deliver them, after identification of the person who has come to purchase the stamps from a copy of his Voter Identity Card, Permanent Account Number Card, Driving Licence, Bank Pass Book, Passport or any other document which the Inspector General of Registration may specify in this regard.".

14. for rule 39, the following rule shall be substituted, namely :–

"39. Register/information to be maintained by Stamp Vendor Service Provider.–

(1) Every stamp vendor shall keep a register of impressed sheets sold to the public in Form-C.

(2) The Service Provider shall keep a daily account of e-stamp issued/sold, in the ESS. The printout of the details shall be provided to the Licensing Authority or any Inspecting Officer of the department as and when required. The Service Provider shall be responsible for furnishing the following information and reports pertaining to any specified day or period to the Inspector General of Registration or/and to any other officers specified in this behalf–

(a) Total Collection Reports;

(b) Additional Stamp Duty Reports;

(c) Disabled (locked) e-stamp Reports;

(d) Cancelled e-stamp Reports;

(e) Daily/Weekly/Fortnightly/Monthly reports or desired details of the collection and remittances;

(f) Any other information or report as may be required by the Inspector General of Registration.".

15. For rule 40, the following rule shall be substituted, namely:–

"40 **Signature and seal.**– The Stamp Vendor/Service Provider shall endorse the stamp with his signature and duly filled with seal. The pattern of the seal shall be as under:–

1. Name.....

2. Licence No.....

3. Place of practice.....

4. S. No. in the Register with date.....

However, in cases where the e-stamp is issued with the digital signature of the Service Provider, the above signature and seal shall not be required.

16. For rule 42, the following rule shall be substituted, namely:–

"42. **Maintenance of register of daily transactions by stamp vendor.**– Every Stamp Vendor shall also maintain a register of his daily transaction in Form-C.".

17. For rule 47, the following rule shall be substituted, namely:–

"47. **Stamps to be delivered on demand by the Collector or on revocation of licence etc.**– Every licensed vendor, shall as any time on the demand of the Collector or on revocation or on relinquishment of his licence deliver up all stamps or any class of stamps remaining in his possession together, with the register, copies of the Act and rules which he was supplied with free of cost shall submit to the Authorised Officer.".

18. After rule 52, the following new rules shall be added, namely:–

"53. **Mode of payment for e-stamp.**– The payment for purchase of e-stamp may be made by any mode of transferring funds as

specified by the Inspector General of Registration, in this behalf.

54. **Additional e-stamps.**– If for any reason, a person who has an e-stamp of certain denomination, needs to pay an additional stamp duty on the same documents, the Sub-Registrar shall issue e-stamps for such additional value in the same way as provided in these rules.

55. **Deactivation or locking of e-stamp.**– In order to prevent re-use of an e-stamp, the Sub-Registrar or authorised officer or public officer before whom e-stamped document has been presented shall, after verification, deactivate or lock the unique identification number or the e-stamp in the ESS.

56. **Penalty for issue of below specification/duplicate e-stamp.**– No person, being a licensee under these rules shall be authorised to print stamps below the designated specification or without the security features mentioned in these rules, reprint photocopy or otherwise through any other means duplicate an e-stamp, the original of which has been printed once already from the ESS. Any person, who upon inquiry is found to be indulged in such a practice, shall be liable to face criminal proceedings under the Indian Penal Code, 1860 (No. 45 of 1860).

57. **Penalty for tampering with or causing disturbance in the ESS.**–Any person, who upon inquiry, is found to have tampered with or indulged in any activity that has resulted in the disruption of these smooth operation of the ESS, shall be liable to face criminal proceedings under the Indian Penal Code, 1860 (No. 45 of 1860)

58. **Penalties for infringement of rules.**– Any infringement of these rules or of the conditions of the licence, shall render the holder of licence thereof liable to cancellation of his licence in addition to any penalties under the Act and these rules.

59. **Resolution of disputes.**– In case of any dispute or any issue relating to the provisions in these rules, the decision of the Inspector General of Registration shall be final thereon and binding on the licensee.

60. **General superintendence and control.**– The Licensing

Authority shall exercise its powers under the general superintendence and control of the Inspector General of Registration".

19. In Appendix -III, for Form-A, Form-B and Form-C, the following new Forms shall be substituted, namely:–

"APPENDIX-III

Form– A

Form of application for new Licence/Renewal/duplicate Licence (for Stamp Vendor/Service Provider)

Passport Size Photo Attested by Licensee himself

1. Applicant's name : .....

2. Father's name : .....

3. Full residential address : .....

4. Date of birth : .....

(according to the English Calender)

5. Adhar Number, if any : .....

6. PAN Card Number, if any : .....

7. Details of Electronic Signature, if any : .....

8. Address of the place where the : .....

applicant desires to work–

Place..... City/Town .....

Tahsil ..... District .....

9. Office of Sub-Registrar nearest to place of Work

: .....

10. Educational Qualifications

(state the last examination passed) : .....

11. Extent of amount, which the applicant can

invest in purchasing stamps/limit : .....

12. Present occupation. if any : .....

13. Whether convicted of any criminal offence or

removed from Government/Private service : .....

(give particulars)

14. Other relevant information, if any : .....

Note–

1. Affix court fee label, if required.
2. Attach the receipt in support of having credited the prescribed fee
3. Attach true copies of certificates in support of date of birth and the last examination passed.
4. In case of renewal of a licence, the previous licence must be enclosed.

I declare that I have carefully read the provisions of the Madhya Pradesh Stamp Rules, 1942 as well as terms and conditions of the licence and I agree to abide by them.

Place ..... Name and Signature of the Applicant

Date .....

Form– B

Form of Licence

(To sell /issue stamps under the Madhya Pradesh Stamp Rules, 1942)

Passport Size Photo Attested by Licensee himself

1. No. of Licence : .....
2. Name, Father's. Name and
   Residential address of licensee : .....
3. Address of place of business,
   where the licensee shall : .....
   carry on the business
   Place ..... City/Town .....
   Tahsil ..... District .....
4. This licence entitles the licensee to carry on the business subject to the provisions of the Madhya Pradesh Stamp Rules, 1942 and the conditions of the licence.
5. The sale/ issuance of stamps under this licence shall be carried on only by the holder of the licence
6. The infringment of any of the Stamp Rules shall render the holder liable to penalty prescribed in the Indian Stamp Act, 1899 and the Madhya Pradesh stamp Rules, 1942.
7. The Violation of any of the rules or conditions of licence or any other

irregularity of the licence shall render the licence liable to cancellation and also imposition of a fine under the said Act, and the rules.

8. Licence is granted / renewed from (date).....to (date).....

Place: .....

Date: .....

Signature,

Name and Seal of the Licensing Authority

TERMS AND CONDITIONS

1. The Licensee shall comply With directions that may be given by Licensing Authority from time to time.
2. All dues of Government, any sum of discount paid to the licensee in excess, any fine imposed under these rules, and other sum, if any, shall be recovered from the deposit or from movable or immovable property of the licensee, as arrears of land revenue.

Place: .....

Date: .....

Signature,

Name and Seal of the Licensing Authority

Form - C

Register of daily sales of Stamps

S.No.	Date of Sale	Description of Stamps including the number	Value of Stamps (in words)	Name, father's Name and residence of the purchaser	If purchased on behalf of a third person the name, father's name and address of that person	Name of parties to the transaction and their addresses	Nature of transaction and consideration if any	Signature of the purchaser and the details of the proof of identity produced by him	Signature of the Licensee

By order and in the name of the Governor of Madhya Pradesh,

RAVINDRA KUMAR CHOUDHARY, Dy. Secy.

Short Note

**(17)*

Before Mr. Justice U.C. Maheshwari

W.P. No. 10585/2013 (Jabalpur) decided on 26 June, 2013

PRL PROJECTS & INFRASTRUCTURE LIMITED ...Petitioner

Vs.

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

Constitution – Article 227, Civil Procedure Code (5 of 1908), Order 9 Rule 9 **– Plaintiff's suit dismissed in default – He brought another suit on same prayer – Order 9 Rule 9, C.P.C. attracted – Second suit barred.**

संविधान – अनुच्छेद 227, सिविल प्रक्रिया संहिता (1908 का 5), आदेश 9 नियम 9 – व्यतिक्रम से वादी का वाद खारिज किया गया – उसी प्रार्थना पर उसने अन्य वाद पेश किया – सि.प्र.सं. का आदेश 9 नियम 9 आकृष्ट होता है – द्वितीय वाद वर्जित।

Case referred :

1979 (2) MPWN 226.

H.C. Kohli, for the petitioner.

Short Note

**(18)*

Before Mrs. Justice S.R. Waghmare

Cr. Rev. No. 1291/2012 (Indore) decided on 3 April, 2014

SABA ...Applicant

Vs.

C.B.I., BHOPAL ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 227 & 228 – Framing of charge **– If prima-facie case is made out charge has to be framed –Not necessary to appreciate evidence at the stage of framing charge – Revision dismissed.**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 227 व 228 – आरोप विरचित किया जाना – यदि प्रथम दृष्ट्या प्रकरण बनता है, तब आरोप विरचित किया जाना चाहिए – आरोप विरचित करने के प्रक्रम पर साक्ष्य का मूल्यांकन करना आवश्यक नहीं – पुनरीक्षण खारिज।

Cases referred :

2010 (9) SCC 368, (1988) 3 SCC 609, (2011) 9 SCC 234, (2012) 1 SCC 680, (2011) 2 SCC 689, AIR 1977 SC 2018, 1973 SCC (Cri.) 521, 2000(2) MPLJ 322, 2000 (1) SCC 138, 1996(4) SCC 659.

S.S. Nahar, for the applicant.

Vivek Sharan with *Ashutosh Kumar*, Inspector, C.B.I. for the non-applicant/C.B.I.

Raghuveer Singh Chouhan, G.A. for the non-applicant/State.

Short Note

****(19)***

Before Mr. Justice M.C. Garg

S.A. No. 526/2009 (Gwalior) decided on 8 December, 2014

STATE OF M.P. ...Appellant

Vs.

MANNULAL ... Respondent

Limitation Act (36 of 1963), Section 5 – Condonation of delay **– Factum of keeping the matter pending for more than 3 years and doing nothing to assail the judgment of first appellate court, shows utterly carelessness – No good reason to condone the delay.**

परिसीमा अधिनियम (1963 का 36), धारा 5 – विलम्ब के लिए माफी – 3 वर्ष से अधिक समय तक मामला लंबित रखने और प्रथम अपीली न्यायालय के निर्णय को चुनौती देने के लिए कुछ नहीं किये जाने का तथ्य, पूरी तरह से लापरवाही दर्शाता है – विलम्ब माफ करने के लिए कोई उचित कारण नहीं।

Cases referred :

2014 (1) Supreme 16.

B. Raj Pandey, G.A. for the appellant/State.

Sanjay Kumar Sharma, for the respondent.

I.L.R. [2014] M.P., 3067
SUPREME COURT OF INDIA

Before Mr. Justice Chandramauli Kr. Prasad & Mr. Justice M.Y. Eqbal

Cr. Appeal No. 2118/2013 decided on 17 December, 2013

STATE OF RAJASTHAN ...Appellant
Vs.
BHAGWAN DAS AGRAWAL & ors. ...Respondents

(Cr. A. No. 2119/2013)

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Scope **- Petition for setting aside cognizance of offence taken by Magistrate on the basis of complaint - Held - Truck loaded with explosives moved to different destinations but from that it cannot be said that the acts and omissions which constitute the offence are the same - Same offence, would mean that acts and omissions which constitute the offence are one and the same - Except the allegation that explosives were loaded at Dholpur, the mode and manner in which the offence was committed at different places are not the same - The provision of Section 186, Cr.P.C. is not attracted in the facts of the present case - High Court erred in passing the impugned order - Order passed by the High Court is to be set aside. (Paras 15 & 16)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – व्याप्ति – शिकायत के आधार पर मजिस्ट्रेट द्वारा लिये गये अपराध के संज्ञान को अपास्त किये जाने हेतु याचिका – अभिनिर्धारित – विस्फोटकों से लदा हुआ ट्रक भिन्न गंतव्य स्थानों पर गया, परंतु इससे यह नहीं कहा जा सकता कि अपराध गठित करने वाले कृत्य एवं लोप समान है – समान अपराध का अर्थ होगा कि वह कृत्य एवं लोप जो अपराध गठित करते हैं वह एक और एक ही है – सिवाय इस अभिकथन के कि विस्फोटकों को धौलपुर में लादा गया था, भिन्न स्थानों पर कारित किये गये अपराध का ढंग और तरीका समान नहीं – द.प्र.सं. की धारा 186 का उपबंध, वर्तमान प्रकरण के तथ्यों में आकर्षित नहीं होता – आक्षेपित आदेश को पारित करने में उच्च न्यायालय ने भूल की – उच्च न्यायालय द्वारा पारित आदेश को अपास्त करना होगा।

Case referred :

(1988) 4 SCC 655.

JUDGMENT

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

2. Aggrieved by the judgment and order dated 15th July, 2011 passed by the High Court of Madhya Pradesh, Principal Seat at Jabalpur, whereby the petition filed by respondent No. 1 herein (Bhagwan Das Agrawal) under Section 482 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") seeking relief to hold that the proceedings based on the subsequent and third FIR registered in Dholpur (Rajasthan) as Crime No. 427/2010 under Section 5/9B, 9C of the Explosives Act, 1884, in view of the provisions of Section 186 of Cr.P.C., be discontinued, was allowed, the appellant-State of Rajasthan has preferred the special leave petition being No. 8402 of 2011.

3. The facts and circumstances giving rise to the present appeal are that in respect of alleged unauthorized and illegal supply of explosives by M/s. Rajasthan Explosives and Chemicals Ltd., Dholpur (for short, "RECL"), in which respondent No. 1 herein Bhagwan Das Agrawal was Managing Director, to M/s. Ganesh Explosives, Sagar during the period from 17.4.2010 to 29.6.2010 in contravention of the Explosives Act, a case at Police Station Baheria, District Sagar was registered on 13.7.2010 as FIR/Crime No. 161/2010. The police after due investigation filed charge-sheet on 18.11.2010 for offences punishable under Sections 420, 467, 468, 471, 120-B, 201 and 34 of the Indian Penal Code (for short, 'IPC') and Sections 9B, 9C of the Explosives Substances Act, 1884 and Sections 4 and 6 of the Explosive Substances Act, 1908 in the Court of concerned Judicial Magistrate, First Class, Sagar against 11 persons including four persons from RECL viz. respondent No. 1 herein (Managing Director), K. Edward Kelly (Director, Operations), Vinod Kumar Garg (Chief Manager, Marketing) and Rakesh Kumar Agrawal (Manager, Marketing). The array of accused persons, *inter alia,* included Devendra Singh Thakur, Jai Kishan Ashwani, Rajendra Choubey, Gopal Shakyawar, Shiv Charan Heda, Deepa Heda and Alakh Das Gupta. After filing of the charge-sheet, the Magistrate took cognizance of the offences. Similar charge-sheet under Sections 420, 467, 468, 471, 120-B, 201/34, IPC read with Sections 9B and 9C of the Explosives Substances Act, 1884 and Sections 4, 5 and 6 of the Explosive Substances Act, 1908 was filed after investigation into another FIR lodged at Police Station Chanderi, District Ashok Nagar as FIR/ Crime No. 310/2010 on 26.8.2010 for the supply of explosives

during the period from 1.4.2010 to 30.6.2010 by RECL to another firm M/s. Sangam Explosives, Halanpur in Chanderi, District Ashok Nagar. This charge-sheet was filed in the Court of concerned Judicial Magistrate, First Class, Chanderi against 8 persons including four from RECL viz. respondent No. 1 herein (Managing Director), K. Edward Kelly (Director, Operations), Vinod Kumar Garg (Chief Manager, Marketing) and Rakesh Kumar Agrawal (Manager, Marketing). The array of accused persons, *inter alia,* included Rajendra Kumar Choubey, Anil Dhupad, Shiv Charan Heda and Jai Kishan Ashwani. In this case too, the Magistrate took cognizance of the offences on 25.11.2010. Subsequently on 5.9.2010, in respect of supplies made by RECL during the period from 1.4.2010 to 5.9.2010 to M/s. Ganesh Explosives, Sagar and to M/s. Sangam Explosives, Chanderi, third FIR on the report submitted by a Committee constituted to investigate into a news published in the newspaper regarding disappearance of trucks carrying explosives was lodged at Police Station Dholpur as FIR/Crime No. 427/2010 and the police after due investigation filed charge-sheet on 4.12.2010 against 16 persons for offences under Section 420, 465, 467, 468, 471, 120-B, IPC read with Sections 5, 9B and 9C of the Explosives Substances Act, 1884 and Sections 5 and 6 of the Explosive Substances Act, 1908 in the Court of Chief Judicial Magistrate, Dholpur, Rajasthan including the four office bearers of RECL viz. respondent No. 1 herein (Managing Director), K. Edward Kelly (Director, Operations), Vinod Kumar Garg (Chief Manager, Marketing) and Rakesh Kumar Agrawal (Manager, Marketing). The array of accused persons, inter alia included Shiv Charan Heda, Rajendra Kumar Choubey, Jai Kishan, Ashwani (also arrayed as acused in Sagar and Chanderi Courts) and Jagdish Soni, Uday Lal Kabra, Lalit Gangwani, Girdhar Bhai, Arvind, Sunil, Damji Bhai, Jitender Taank & Chimman Lal. The Magistrate took congnizance of the offences on 4.12.2010. It is thus clear that the charge-sheets were filed for the same offences against the officers (four in No.) of RECL as also the concerned persons of M/s. Ganesh Explosives and M/s. Sangam Explosives with the only difference that first FIR at Baheria was for supply made to M/s. Ganesh Explosives, second FIR at Chanderi for supply made to M/s. Sangam Explosives and the third FIR at Dholpur for supplies made both to M/s. Ganesh Explosives and M/s. Sangam Explosives. The final outcome was that for the same offences, cognizance came to be taken by the courts at Sagar, Chanderi and Dholpur.

4. As per FIR/Crime No. 161 of 2010, 60 trucks of explosive material

outbound from RECL, Dholpur to M/s. Ganesh Explosives, P.S. Baheria (M.P.) actually reached (i) M/s. Ajay Explosive, Ahmadnagar (Maharashtra) (ii) M/s. B.M. Traders, Bywara (M.P.), and (iii) M/s. B.M. Traders, Bhilwara (Rajasthan). FIR/Crime No. 310 of 2010 recorded that 103 trucks of explosive material outbound from RECL, Dholpur to M/s. Sangam Explosives at P.S. Chanderi (M.P.) actually reached (i) M/s. B.M. Traders, Bywara (M.P.) and (ii) M/s. Ajay Traders, Bhilwara (Rajasthan). As per FIR/Crime No. 427/2010, M/s. RECL, Dholpur sold explosive material illegally to (i) M/s. Ganesh Explosives, Sagar (M.P.) and (ii) M/s. Sangam Explosives, Ashok Nagar (M.P.) after the expiry of their licences. The same never reached the destinations and were diverted in their middle to Bhilwara (Raj.), Bywara (M.P.) etc. The explosives were also sold for terrorist activities which stood revealed from FIR No.130/2010 P.S. Karol Bagh, New Delhi.

5. It was alleged in the petition filed by respondent No. 1 herein before the High Court that RECL was incorporated as a private limited company in 1980; the factory of RECL at Dholpur, Rajasthan got commissioned in 1981 & since then regular production of explosives has been taking place there; and RECL was making regular supplies amongst other dealers to M/s. Ganesh Explosives as also to M/s. Sangam Explosives. It was alleged that what was investigated and charge-sheeted by the police of P.S. Baheria and P.S. Chanderi was put together and re-investigated by the P.S. Dholpur. It was further alleged that when cognizance of selfsame offence is taken by more than one court, then in such circumstances Section 186 Cr.P.C. comes into play in order to cap such situation and as the first court happened to be the Court of Judicial Magistrate, First Class, Sagar, M.P. to have initiated proceedings by taking congnizance of the offence upon submission of charge-sheet by the police of P.S. Baheria in FIR/Crime No. 161/2010, that court being the court in whose appellate criminal jurisdiction the proceedings first commenced was the court vested with the requisite jurisdiction under Section 186 Cr.P.C. to decide and make a declaration. It was alleged that the sum and substance of the allegations in the cases registered at P.S. Baheria, P.S. Chanderi and P.S. Dholpur happen to be identical, relating to the same occurrence/same transaction as also the same offence i.e. illegal supply of explosives contrary to the Explosives Rules by RECL to M/s. Ganesh Explosives and M/s. Sangam Explosives. Accordingly, prayer was made to declare the criminal proceedings in the Court of Chief Judicial Magistrate, Dholpur being violative of Section 186(b) Cr.P.C. and to discontinue the same.

6. The High Court by the impugned order dated 15.7.2011 while allowing the petition filed by respondent No. 1 herein purportedly to give effect to the provision of Section 186(b) of Cr.P.C. has observed as under:

> "On perusal of third FIR and charge sheet submitted in that respect, it is apparently clear that in contravention of the provisions of the Explosives Act, Rajasthan Explosives and Chemicals Ltd. (RECL in short) Dholpur supplied explosives to M/s. Ganesh Agency, Sagar and M/s. Sangam Agency, Chanderi. On perusal of both earlier FIRs, it is revealed that there are 11 accused persons facing trial in Sagar (M.P.) and 8 accused persons are facing trial in Ashok Nagar (M.P.) Court. In the charge sheet submitted on the basis of subsequent and third FIR, accused persons and alleged offences are the same.
>
> xxx xxx xxx
>
> Admittedly, Rajasthan Court had taken cognizance of the offence, which was already a subject matter of the case already pending in the court of Sagar and also taken congnizance of the case which has already been pending in the court of Ashok Nagar (M.P.). The proceedings has first commenced in Sagar and in Chanderi respectively within the jurisdiction of the High Court of Madhya Pradesh, hence, subsequent proceedings initiated and registered in Dholpur Court stands discontinued and is liable to be discontinued.
>
> Needless to write that this order will not be a bar to deal with the offences which are not the subject matter of the cases pending already in the courts of Madhya Pradesh."

7. In the special leave petition, the appellant-State of Rajasthan has contended that in connivance with respondent No. 1 herein 103 trucks of explosives were delivered to the Magazines of M/s. Ajay Explosives which belongs to Shiv Charan Heda and 60 trucks of explosives to M/s. B.M. Traders which belongs to Deepa Heda, both relatives of Jai Kishan Ashwani. It is alleged that the magazines of M/s. Ganesh Explosives and M/s. Sangam Explosives are not operational since many years and with the forged documentation in the name of said firms the explosives were purchased by

M/s. Ajay Explosives and M/s. B.M. Traders and the explosives were then sold to some unknown persons which are serious threat to the security of the nation and one such example is the registration of FIR in Crime No. 130/ 2010 P.S. Karol Bagh under Sections 4 and 5 of the Explosive Substances Act in which the accused Loknath Pant, a resident of Nepal was arrested and in whose custody 498 non-electronic detonator and 29.12 meter fuse wire were recovered and in the packing of the cartons it was revealed that the said explosives were from RECL, Dholpur. It is contended that the High Court has erred in law and fact by discontinuing the proceedings at Dholpur (Rajasthan) because cause of action arose within the jurisdiction of court at Dholpur and the territorial jurisdiction of a court regarding criminal offence is to be decided on the basis of place of occurrence of the incident and not on the basis of where complaint was filed. It is further alleged in the special leave petition that even the Committee comprising Sub-Divisional Magistrate, Deputy Superintendent of Police and General Manager of District Industrial Centre in its report submitted to the Superintendent of Police, Dholpur has stated that the manufacturing licence of RECL was valid till 31.3.2010 and the said company sold the explosive material to M/s. Ganesh Explosives and M/s. Sangam Explosives from the month of April 2010 till June 2010 illegally when their licences too had expired and RECL has sold the material in excess to the stipulated quantity mentioned in the licence. It was found by the Committee that there was no receipt/proof with RECL whether the trucks reached the destinations or not and further RECL had violated the Explosive Rules. It is alleged that the payments in lieu of sold explosive materials were made through the Demand Drafts of ICICI Bank, Yes Bank, Axis Bank and Indusland Bank situated at Rajkot and the payment was being made through the agents of Ganga Enterprises, Sidhnath Enterprises, Govind Kripa Enterprises, Thakkar Enterprises, Bhagwati Enterprises and Jyoti Enterprises, Rajkot. These agents used to prepare the demand drafts in the name of RECL and give to one Jagdish Soni (an accused in FIR No.427/10 at Dholpur) who used to pass on the demand drafts to Shiv Charan Heda (an accused in all the FIRs). These six agents, who had been arrested on 22.12.2010 by Dholpur Police Station upon a supplementary charge-sheet being filed and have not been arrayed as accused in the proceedings pending in the courts at Sagar and Chanderi (Madhya Pradesh), have been impleaded as respondent Nos. 3 to 8 in the present proceedings. It is lastly alleged that the respondent could not have filed the second petition because he along with other office bearers of RECL

has withdrawn the first petition seeking quashing of proceedings in Crime No. 161/2010 registered at P.S. Baheria on the ground that they were already facing trial in Crime No. 427/2010 registered by the Dholpur Police on the same set of charges and no liberty was granted by the High Court to file a fresh petition.

8. The respondents impleaded in SLP(Crl.) No. 8402 of 2011, have filed SLP (Crl.) No. 2180 of 2012 challenging the order dated 4.1.2012 passed by the High Court of Rajasthan, Bench at Jaipur whereby the habeas corpus petition filed by them was disposed of holding that the question of remand of the accused-petitioners in FIR No. 427/2010, Kotwali Dholpur by the court in the State of Rajasthan was in accordance with law or not and the detention of the accused-petitioners is illegal, are the questions which are to be adjudicated only after the issue of jurisdiction of courts in Rajasthan pending before the Apex Court in SLP(Crl.) No. 8402 of 2011 is decided. The said SLP(Crl.) No. 2180 of 2012 was directed to be put up along with SLP(Crl.) No. 8402 of 2011. Hence, both the special leave petitions are before us.

9. While issuing notice in SLP(Crl.) No.. 8402 of 2011, this Court on 25.11.2011 passed the following order:

> "Mr. U.U. Lalit, learned senior counsel appearing for respondent no.1 on caveat stated that though the High Court has quashed the proceedings at the Dholpur Court in Rajasthan, the respondents have no objection if the proceedings are continued at Dholpur, but in that case the proceedings arising from the same set of facts in the two Courts in Madhra Pradesh, i.e. at Sagar and Chanderi may have to be quashed.
>
> Issue notice to the non-appearing respondent on the limited question whether the proceedings should continue at Dholpur or at the two places (Sagar and Chanderi) in Madhya Pradesh."

10. The short question that falls for consideration in the instant case is as to whether the proceedings should continue at Dholpur or at the two places (Sagar and Chanderi) in Madhya Pradesh.

11. Section 186, Cr.P.C., which deals with the power of the High Court

to decide, in case of doubt, the district where inquiry or trial shall take place, is extracted hereinbelow:-

> **"186. High Court to decide, in case of doubt, district where inquiry or trial shall take place.-** Where two or more Courts have taken cognizance of the same offence and a question arises as to which of them ought to inquire into or try that offence, the question shall be decided --
>
> (a) if the Courts are subordinate to the same High Court, by that High Court;
>
> (b) if the Courts are not subordinate to the same High Court, by the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced,
>
> and thereupon all other proceedings in respect of that offence shall be discontinued."

12. From bare reading of the aforesaid provision it is manifest that the main object and intention of the Legislature in enacting the provision is to prevent the accused persons from being unnecessarily harassed for the same offences alleged to have been committed within the territorial jurisdiction of more than one courts. In order to avoid unnecessary harassment of the accused to appear and face trial in more than one courts, necessary direction is to be issued to discontinue the subsequent proceedings in other courts. The provision is based on the principle of convenience and expediency. However, the *sine qua non* for the application of this provision is that the cases instituted in different courts are in respect of the same offence arising out of the same occurrence and that the same transaction and that the parties are the same. In other words, the persons implicated as an accused in different cases must be the same. If these conditions are satisfied then subsequent proceeding has to be discontinued.

13. Chapter XXIV of the Code of Criminal Procedure deals with the provisions with regard to the enquiries and trials. Section 300 debars the Court from proceeding with the trial in respect of the same offence for which the accused has already been tried and convicted or acquitted. However, a person convicted for any offence may be afterwards tried if such act constituted

a different offence from that of which he was convicted. This Court elaborately dealt with the provisions contained in Section 300 Cr.P.C. in the case of *State of Bihar v. Murad Ali Khan,* (1988) 4 SCC page 655. Some of the paragraphs are worth to be quoted hereinafter.

> "26. Broadly speaking, a protection against a second or multiple punishment for the same offence, technical complexities aside, includes a protection against re-prosecution after acquittal, a protection against re-prosecution after conviction and a protection against double or multiple punishment for the same offence. These protections have since received constitutional guarantee under Article 20(2). But difficulties arise in the application of the principle in the context of what is meant by "same offence". The principle in American law is stated thus:
>
> "The proliferation of technically different offences encompassed in a single instance of crime behaviour has increased the importance of defining the scope of the offence that controls for purposes of the double jeopardy guarantee.
>
> Distinct statutory provisions will be treated as involving separate offences for double jeopardy purposes only if 'each provision requires proof of an additional fact which the other does not' *(Blockburger v. United States)*. Where the same evidence suffices to prove both crimes, they are the same for double jeopardy purposes, and the clause forbids successive trials and cumulative punishments for the two crimes. The offences must be joined in one indictment and tried together unless the defendant requests that they be tried separately.
>
> 27. The expression "the same offence", "substantially the same offence" "in effect the same offence" or "practically the same", have not done much to lessen the difficulty in applying the tests to identify the legal common denominators of "same offence". Friedland in Double Jeopardy (Oxford 1969) says at p. 108:
>
> "The trouble with this approach is that it is vague and hazy and conceals the thought processes of the court. Such an

inexact test must depend upon the individual impressions of the judges and can give little guidance for future decisions. A more serious consequence is the fact that a decision in one case that two offences are 'substantially the same' may compel the same result in another case involving the same two offences where the circumstances may be such that a second prosecution should be permissible...."

28. In order that the prohibition is attracted the same act must constitute an offence under more than one Act. If there are two distinct and separate offences with different ingredients under two different enactments, a double punishment is not barred. In *Leo Roy Frey v. Superintendent, District Jail*, the question arose whether a crime and the offence of conspiracy to commit it are different offences. This Court said: (SCR p. 827)

"The offence of conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. They are, therefore, quite separate offences."

14. In the instant case, as noticed above, the nature and manner of offences committed by the accused persons are not identical but are different, for example, in respect of FIR Crime No.130 of 2010 the accused persons in connivance with respondent No.1 delivered 103 trucks of explosives to the Magazines of M/s. Ajay Explosives which belonged to Shiv Charan Heda and 60 trucks of explosives to M/s. B.M. Traders which belonged to Deepa Heda. It was alleged that the Magazines of M/s. Ganesh Explosives and M/s. Sangam Explosives were not operational since many years and with the forged documentation in the name of the said firms the explosives were purchased by M/s. Ajay Explosives and M/s. B.M. Traders and subsequently those explosives were sold to some unknown persons. In respect of those FIRs, one accused, a resident of Nepal, was arrested and from whose custody 498 non electronic detonators were recovered. In respect of another FIR, during investigation, it has come on the record that those explosives were sold for

terrorist activities.

15. Offence means any act or omission made punishable by law. The fountain head of all the three cases may be at Dholpur from where truck loaded with explosives moved to different destinations but from that it cannot be said that the acts and omissions which constitute the offence are the same. Same offence, in our opinion, would mean that acts and omissions which constitute the offence are one and the same. Except the allegation that the explosives were loaded at Dholpur, the mode and manner in which the offence was committed at different places are not the same. As such, in our opinion, the provision of Section 186 of the Code is not attracted in the facts of the present case. Hence, the High court erred in passing the impugned order.

16. In the facts and circumstances of the case, we are of the considered opinion that the impugned order passed by the High Court is to be set aside. Consequently, the appeal preferred by the State of Rajasthan is allowed and the appeal preferred by the accused stands disposed of.

Order accordingly.

I.L.R. [2014] M.P., 3077

SUPREME COURT OF INDIA

Before Mr. Justice Dr. B.S. Chauhan, Mr. Justice K.S. Radhakrishnan & Mr. Justice S.A. Bobde

Cont. Petition (Civil) No. 390/2011 decided on 27 February, 2014

STATE OF M.P. & anr. ...Petitioners

Vs.

SURESH NARAYAN VIJAYVARGIYA & ors. ...Respondents

Contempt of Courts Act (70 of 1971), Section 12 **- Contemnors have filled up the entire 150 seats available for the year 2011-12, without sharing of MBBS seats between the respondent private Medical College and the State Government, violating the orders of court dated 27.05.2009 and 27.01.2011 - Held - Once there is an order in force binding on the parties, they cannot violate or ignore that order, taking shelter under a statutory provision - If any modification of the order is warranted parties should have approached the court and sought for clarification or modification of the order - Parties cannot get away merely by tendering an unconditional and unqualified apology after**

enjoying the fruits of their illegality - Contemnors are directed to pay Rs. 50 Lakhs. (Paras 13, 14, 15, 16)

न्यायालय अवमान अधिनियम (1971 का 70), धारा 12 – प्रत्यर्थी प्राईवेट मेडिकल कॉलेज और राज्य सरकार के बीच एमबीबीएस सीटों का हिस्सा बांटे बिना, अवमानकर्ताओं ने न्यायालय के आदेश दिनांक 27.05.2009 और 27.01.2011 का उल्लंघन करते हुए वर्ष 2011–12 के लिए उपलब्ध संपूर्ण 150 सीटों को भर दिया – अभिनिर्धारित – एक बार जब पक्षकारों पर बाध्यकारी आदेश मौजूद है, वे कानूनी उपबंध के अंतर्गत आश्रय लेकर उस आदेश का उल्लंघन या अनदेखी नहीं कर सकते – यदि आदेश का उपांतरण आवश्यक था, पक्षकारों को न्यायालय में जाना चाहिए था और आदेश का स्पष्टीकरण या उपांतरण चाहना था – पक्षकार अपनी अवैधता के फल का उपभोग करने के पश्चात, मात्र बिना शर्त क्षमा याचना करके बच नहीं सकते – अवमानकर्ताओं को 50 लाख रूपये अदा करने के लिए निदेशित किया गया।

Cases referred :

(2002) 8 SCC 481, (1995) 5 SCC 619, (1994) 6 SCC 442, (1995) 1 SCR 757, (1991) 3 SCC 600, (2005) 2 SCC 65.

JUDGMENT

The Judgment of the Court was delivered by : **K.S. RADHAKRISHNAN, J. :-** We are, in this contempt petition, concerned with the question whether the contemnors have violated the interim orders passed by this Court on 27.5.2009 and 27.1.2011 in Civil Appeal No. 4060 of 2009 in the matter of sharing of MBBS seats between the respondent private medical college and the State Government.

2. Civil Appeal No. 4060 of 2009 was preferred by the respondents/ contemnors herein, challenging the judgment of the High Court of Madhya Pradesh dated 15.5.2009, which upheld the validity of the Madhya Pradesh (Admission and Fee Regulatory Committee) Act, 2007 (for short "AFRC Act"), empowering the State Government to fill all the seats (including the NRI seats) in all the education institutions in the State of Madhya Pradesh, including private medical and dental collages. Since serious disputes were raised with regard to seat sharing and fixation of quota of seats for MBBS/ BDS, this Court felt that some interim arrangement should be made taking note of the interest of both the parties and also that of the students. This Court, therefore, as an interim measure, passed an order on 27.5.2009 in

C.A. No.4060 of 2009 and the connected appeals, which reads as follows:

> "We, therefore, direct that the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh will be done by first excluding 15% NRI seats (which can be filled up by the private institutions as per para 131 of *Inamdar case*), and allotting half of the 85% seats for admission to the undergraduate and post-graduate courses to be filled in by an open competitive examination by the State Government, and the remaining half by the Association of the Private Medical and Dental Colleges. Both the State Government as well as the Association of Private Medical and Dental Colleges will hold their own separate entrance examination for this purpose. As regards "the NRI seats", they will be filled as provided under the Act and the Rules, in the manner they were done earlier.
>
> We make it clear that the aforesaid directions will for the time being only be applicable for this Academic Year i.e. 2009- 2010. We also make it clear that if there are an odd number of seats then it will be rounded off in favour of the private institutions. For example, if there are 25 seats, 12 will be filled up by the State Government and 13 will be filled up by the Association of Private Medical/Dental Colleges. In specialities in PG courses also half the seats will be filled in by the State Government and half by the Association of Private Medical/Dental Colleges and any fraction will be rounded off in favour of the Association. In other words if in any discipline there are, say, 9 seats, then 5 will be filled in by the Association and the remaining 4 will by the State Government. Capitation fee is prohibited, both to the State Government as well as the private institutions, vide para 140 of *Inamdar case*. Both the State Government and the Association of Private Medical/ Dental Colleges will separately hold single window examinations for the whole State (vide para 136 of *Inamdar case*).
>
> We make it clear that the solution we have arrived at may not be perfect, but we have tried to do our best to find

out the best via media. Although this order is only for Academic Year 2009-2010, we recommend that it may also be considered for future sessions.

Six weeks' time is allowed for filing counter-affidavit and four weeks thereafter for filing rejoinder.

List these appeals for final hearing in September 2009. In the meantime, pleadings may be completed by the parties."

3. The interim arrangement made continued in the subsequent years as well and in the year 2011-2012, this Court vide its order dated 27.1.2011 in I.A. No. 50 of 2011 passed the following order:

"The order dated 27th May, 2009 made in Civil Appeal No. 4060 of 2009 etc. shall be applicable for the academic year 2011-2012.

There shall be an order accordingly."

4. This contempt petition has been preferred by the State Government and the Director of Medical Education Department alleging that the contemnors have filled up the entire 150 seats available for the year 2011-2012, without sharing it with the State Government, violating the orders of this Court dated 27.5.2009 and 27.1.2011. Petitioners pointed out that the contemnors had sent a letter dated 23.5.2011 stating that they would fill up the entire seats during the academic year 2011-2012 since their colleges would be functioning under the Madhya Pradesh Niji Vishwavidyalaya (Sthapana Avam Sanchalan) Adhiniyam, 2007 [for short "Adhiniyam 2007"], consequent to the establishment of the Peoples' University under M.P. Act No.18 of 2011 and the admission process of those constituent institutions would be governed by the statutes and ordinances framed under the above-mentioned Act. The State Government noticing the stand taken by the contemnors, wrote a letter dated 14.7.2011 to the Managing Director of the Medical College stating that the admissions have to be made only following the arrangement made by this Court vide order dated 27.1.2011 and, if any change has to be made, the same could be done only with the permission of this Court.

5. The Directorate of Medical Education of the State Government also wrote a letter dated 14.7.2011 to the Medical Council of India, informing the Council of the defiant attitude taken by the contemnors by not giving admission

to any of the students included in the State quota for the academic year 2010-11.

6. The Directorate of Medical Education then wrote a detailed letter dated 8.8.2011 to the Secretary, Association of Private Dental & Medical Colleges, in the State, specifically referring to the interim order passed by this Court on 27.1.2011 reminding them of the necessity of the compliance of the Court's directions in the matter of seat sharing. The contemnors, ignoring those letters, published an advertisement in a local newspaper "People Samachar" on 9.8.2011 informing the public that 150 seats would be available with them for admission to MBBS course under the management quota for the year 2011-12.

7. The Directorate of Medical Education, in the meanwhile, sent a list of 66 students under the State quota to the Medical College for admission to MBBS course. The contemnors refused to admit those students under the State quota and the State Government received several complaints from the students who were included in the State quota, but not admitted by the contemnors. The State Government then sent a notice dated 17.8.2011, to the Dean of the Medical College to show cause why the following action be not initiated against the college:-

(a) withdraw the Desirability and Feasibility Certificates issued in favour of the college;

(b) report the matter to the Medical Council of India to take suitable action against the college.

(c) report the matter to the concerned authorities for action against Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007.

8. The contemnors, in total defiance of the Court's order as well as the various directions issued by the Directorate of Medical Education, filled up the entire 150 seats in the management quota for the academic year 2011-12.

9. The students, who figured in the State quota, then approached the High Court of Madhya Pradesh. The High Court directed the contemnors to admit students who were included in the State quota. Consequently, they admitted those students and the number of students admitted in the College

went up to 245 as against the sanctioned strength of 150 seats. The Medical College does not have the infrastructural facilities to admit 245 students, which has adversely affected the academic standards of the students admitted. The State Government, as also the Directorate of Medical Education, in the above-mentioned circumstances, approached this Court and filed the present Contempt Petition for taking appropriate action against the contemnors for violating the orders passed by this Court on 27.5.2009 and 27.1.2011 and also by not complying with the various directions issued by the State Government as well as the Directorate of Medical Education.

10. When the matter came up for hearing, this Court issued notice to the contemnors. Learned senior counsel appearing for the contemnors, submitted before this Court on 3.2.2014 that they would be tendering their unconditional and unqualified apology for their actions and made a proposal to set right the illegalities committed, which reads as under :-

(a) None of the 245 students admitted in the Institution – Peoples College of Medical Sciences (PCMS) during the academic year 2011-12 shall be disturbed and they all will continue to pursue their course without any interruption. This would include the students allotted by the State who had been given provisional admissions pursuant to the orders of the Hon'ble High Court.

(b) In the academic session 2011-12 on the basis of the 50-50 admissions between the College and State after 15% NRI quota is deducted as per the orders of this Hon'ble Court, the State entitlement filled in by the institution was 63 seats. The institution shall accordingly surrender 21 seats in each of the following three academic years i.e. 2014-15, 2015-16 and 2016-17 to the State government to be filled in through the procedure laid down in the order dated 27.5.2009.

11. The contemnors on 13.2.2014, filed a written note wherein, after reiterating the proposals submitted on 3.2.2014, they stated as follows :

> "13. Though admissions have already been made by the State against the said 63 seats for the year 2011-12 in the said year itself still in deference to the orders of this Hon'ble Court the

Respondent is willing to give up the said 63 seats. It is however requested that if these 63 seats are adjusted only in one year, the college would suffer adversely. Therefore, the Respondent again humbly submits that it be permitted to surrender 21 seats in each of the following three academic years i.e. 2014-15, 2015-16 and 2016-17 as submitted before this Hon'ble Court on 3.2.2014 to the State Government to be filled in through the procedure laid down in the order dated 27.5.2009.

14. It is respectfully submitted that in the captioned contempt petition of the Petitioner State only relates to its 50% quota of admissions i.e. 63 seats in the academic year 2011-12.

15. The respondents reiterate the proposal submitted on 3.2.2014 and again tender an unconditional and unqualified apology for their actions."

12. In the written note filed by the State of Madhya Pradesh on 13.2.2014, in response to the submissions made by the contemnors on 3.2.2014, the State of Madhya Pradesh stated as follows :-

"20. For the academic session 2011-12, the State Government had a quota of 107 students :-

- 63 seats as per the 50:50 order of this Hon'ble Court.
- 42 seats as per letter dated 19.9.2011 of MCI since Peoples College made excess admissions in 2010-11.
- 2 seats which were not filled in the NRI quota.

21. The aforesaid position of State quota seats for 2011-12 is explained in detail in the letter of MCI dated 5.3.2012 (annexed herewith as Annexure A-1).

22. For the academic session 2011-12

Total sanctioned strength	150
Total seats filled by College	245

College authorized to fill	43
State quota seats filled by College	95
Excess seats filled by College	107

23. The issue of excess admissions made by the College is to be considered as per the Regulations framed by the MCI under the Indian Medical Council Act, 1956 and the submissions made by the MCI in that regard.

24. However, if the scheme formulated by the Peoples College is considered by this Hon'ble Court, then the excess 107 admissions made by the College in 2011-12 be adjusted in the session of 2014-15 in full and remaining seats be adjusted in 2015-16.

25. On account of illegal and unlawful acts of Respondents/ Contemnors, not only the State Government, but the students of the State quota, who were illegally denied admissions were severely harassed and were drawn on a long drawn legal battle with uncertainty of their respective careers."

13. We have no hesitation in saying that the above situation has been created by the contemnors themselves by filling up of the entire 150 seats in total defiance of the interim orders passed by this Court on 27.5.2009 and 27.1.2011 making an interim arrangement for seat sharing between the State Government and the private educational institutions from the year 2009-10 onwards in the State of Madhya Pradesh, which are binding on the contemnors. The contemnors attempted to justify their action on the ground that they are regulated by the Private Universities Act and that AFRC Act has ceased to apply and, after the notification dated 4.5.2011, the State Government has no right even to share seats in their institution, *de hors* the interim orders passed by this Court. This stand taken by the contemnors is also not correct, since Section 7(m) of the Private University Act, 2007 provides that admission shall not be started till the concerned statutes and ordinances are approved as per Section 35 of the Act, which states that the statutes and ordinances shall come into force only upon publication in the official Gazette. Even otherwise, once there is an order in force binding on the parties, they cannot violate or ignore that order, taking shelter under a statutory provision and if any

modification of the orders is warranted, parties should have approached this Court and sought for clarification or modification of those orders. However, without doing so, in total defiance of the orders passed by this Court, they filled up the entire seats, leaving the students who figured in the State list in the lurch. Later, though they were admitted in the College having the infrastructure for accommodating only 150 students, it has affected the quality and standard of medical education. After having convinced that they had violated the orders of this Court, they have come up with an unconditional and unqualified apology and making some suggestions to undo the illegality committed by them after eating away the seats from the State quota.

14. We have, on facts, found that there has been a willful disobedience by the contemnors of the orders passed by this Court, which is nothing but interference with the administration of justice. Disobedience of an order of a Court, which is willful, shakes the very foundation of the judicial system and can erode the faith and confidence reposed by the people in the Judiciary and undermines rule of law. The Contemnors have shown scant respect to the orders passed by the highest Court of the land and depicted undue haste to fill up the entire seats evidently not to attract better students or recognize merit, but possibly to make unlawful gain, adopting unhealthy practices, as noticed by this Court in *TMA Pai Foundation & Ors. v. State of Karnataka & Ors.* (2002) 8 SCC 481 and various other cases. Once the Court passes an order, the parties to the proceedings before the Court cannot avoid implementation of that order by seeking refuge under any statutory rule and it is not open to the parties to go behind the orders and truncate the effect of those orders. This Court in *T.R. Dhananjaya v. J. Vasudevan* (1995) 5 SCC 619, held that once the Court directed that appeal be disposed of after giving him opportunity of hearing and such direction was not appealed from, it is not open to the concerned authority to deny the hearing on the ground that the Police Manual does not provide for the same. This Court in *Mohd. Aslam alias Bhure, Acchan Rizvi v. Union of India* (1994) 6 SCC 442 held that circumvention of an order can be by 'positive acts of violation' or 'surreptitious and indirect aids to circumvention and violation of orders. In the instant case, the violation is a positive act of violation, which is apparent on the face of the record.

15. We have already pointed out that the contemnors earlier took up the stand that, after notifying their institution as a University on 4.5.2011 under the Private University Act, 2007, the AFRC Act ceased to apply, hence, they

are not bound by the orders passed by this Court. Contemnors cannot take refuse under a notification issued under a Statute to defeat the interim orders passed by this Court which are binding on the parties, unless varied or modified by this Court. In the instant case, all the appeals in which interim orders have been passed, are pending before this Court and if the contemnors had any doubt on the applicability of those orders, they could have sought clarification or modification of the order. Now, by tendering unconditional and unqualified apology, the contemnors are trying to wriggle out of the possible action for Contempt of Court, after violating the orders causing considerable inconvenience to the students and after enjoying the fruits for the illegality committed by them. It is trite law that apology is neither a weapon of defence to purge the guilty of their offence; nor is it intended to operate as universal panacea, it is intended to be evidence of real contriteness. (See *M.Y. Shareef & Anr. v. Hon'ble Judges of the High Court of Nagpur & Ors.* (1955) 1 SCR 757 and *M.B. Sanghi, Advocate v. High Court of Punjab & Haryana & Ors.* (1991) 3 SCC 600.

16. Contemnors have now tendered unconditional and unqualified apology and volunteered to set right the illegality committed by them, but the purpose for flouting the orders has been achieved, that is the contemnors wanted to fill up the entire seats by themselves. Therefore, to maintain the sanctity of the orders of this Court and to give a message that the parties cannot get away by merely tendering an unconditional and unqualified apology after enjoying the fruits of their illegality, we are inclined to impose a fine, which we quantify at Rs.50 lakhs.

17. We may now examine how the illegality committed by the contemnors can be rectified. For the academic year 2011-12, the State Government's quota was 107 seats, details of which is given below :-

- 63 seats as per the 50:50 order of this Hon'ble Court.
- 42 seats as per letter dated 19.9.2011 of MCI since Peoples College made excess admissions in 2010-11.
- 2 seats which were not filled in the NRI quota.

18. The total sanctioned strength for the academic year 2011-12 was 150 students, but the contemnors had filled up 245 seats, though the college was authorized to fill up only 43 seats. The contemnors filled up 95 seats, which would have gone to the State quota. Consequently, 107 excess seats were

filled up by the college. The contemnors; however, took up the stand that if 63 seats are to be adjusted for the academic year 2014-15 that may seriously affect the functioning of the College, hence their suggestion is that they will compensate the lost seats in a phased manner, that is 21 seats in the year 2014-15 and the rest in equal proportion in the years 2015-16 and 2016-17, which we find difficult to accept. We are of the view that the excess of 107 admissions made in the year 2011-12 have to be adjusted by adjusting the same for the academic session 2014-15 in full and remaining seats be adjusted in the year 2015-16, because the illegality committed must be set right at the earliest. This Court in *Mridul Dhar (Minor) & Anr. v. Union of India & Ors.* (2005) 2 SCC 65, held (Direction No.11) as follows :

> "11. If any private medical college in a given academic year for any reason grants admission in its management quota in excess of its prescribed quota, the management quota for the next academic year shall stand reduced so as to set off the effect of excess admission in the management quota in the previous academic year."

19. We may reiterate that the above-mentioned situation has been created by the contemnors themselves and due to their illegal and unlawful acts, by admitting students over and above the sanctioned strength, the students who were later admitted from the list of State quota, could not get the quality medical education, which otherwise they would have got. Further, they were also driven to unnecessary litigation before the High Court creating uncertainty to their future.

20. We, therefore, order that the admission of students under the State quota for the academic year 2011-12 in Medical College is valid and legal and appropriate steps should be taken by the State Government and the Medical Council of India to regularize the admission. The excess 107 admissions made by the Medical College for the MBBS during the year 2011-12 and the previous year, be adjusted in the session 2014-15 in full taking note of the full sanctioned strength and the balance seats be adjusted in the year 2015-16. The unconditional and unqualified apology tendered by the contemnors is accepted, but the contemnors are directed to pay a fine of Rs.50 lakhs in two months from today, to the State Government. Ordered accordingly.

21. The Contempt Petition is disposed of accordingly.

Petition disposed of.

I.L.R. [2014] M.P., 3088
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 3637/2012 (Jabalpur) decided on 8 May, 2013

R.K. PARASHAR ...Petitioner
Vs.
M.P. POWER MANAGEMENT COMPANY & ors. ...Respondents

Service Law - Correctness of grading made in ACR **- On receiving the report of Reporting Authority petitioner was graded as 'Excellent' Officer by the Reviewing Authority which was changed by Chairman-cum-Managing Director on the noting made by the Secretary to deny promotion to the petitioner - Held - Since Secretary never suggested any grading of the petitioner to be made in the ACR in question - He simply said that out of 10 years ACR's of the petitioner, he was graded 'B' category Officer in 7 years - Petitioner's ACR grading was done according to the circular which cannot be said to be bad in law - Petition is dismissed. (Paras 7 & 8)**

सेवा विधि – वार्षिक गोपनीय प्रतिवेदन में किये गये श्रेणीकरण की सत्यता – रिपोर्ट प्राधिकारी का प्रतिवेदन प्राप्त होने पर पुनर्विलोकन प्राधिकारी द्वारा याची का श्रेणीकरण "उत्कृष्ट" अधिकारी के रुप में किया, जिसे अध्यक्ष-सह-प्रबंध निदेशक द्वारा याची को पदोन्नति से वंचित करने के लिए सचिव द्वारा की गई टिप्पणी पर बदला गया – अभिनिर्धारित – चूंकि सचिव ने प्रश्नगत वार्षिक गोपनीय प्रतिवेदन में याची का कोई श्रेणीकरण करने का सुझाव नहीं दिया था – उसने सामान्य ढंग से कहा था कि याची के 10 वर्षों के वार्षिक गोपनीय प्रतिवेदनों में से 7 वर्षों में उसका श्रेणीकरण 'बी' कोटि के अधिकारी के रुप में किया गया था – याची के वार्षिक गोपनीय प्रतिवेदनों में श्रेणीकरण, परिपत्र के अनुसार किया गया था, जिसे विधि अंतर्गत अनुचित नहीं कहा जा सकता – याचिका खारिज।

Cases referred :

(2012) 4 SCC 407, 1994 Suppp.(3) SCC 424, (1996) 10 SCC 369, (2012) 3 SCC 580.

V.S. Shroti with *Vikram Johri,* for the petitioner.
Sanjay Agrawal, for the respondents.

ORDER

K.K. TRIVEDI, J. :- This petition under Article 226 of the Constitution

of India is filed seeking to challenge the correctness of the grading made in the annual confidential report ('ACR' for short) of the petitioner in the year 2010-2011. It is contended that after receiving the report of the Reporting Authority, the Reviewing Authority graded the petitioner as 'Excellent' officer but such a grading of the petitioner was disturbed on the noting made by the Secretary of the respondent Company by the Chairman-cum-Managing Director and since such an action was based on malafides of the respondents-authorities, the change of grading in the ACR of the petitioner by the Chairman-cum-Managing Director was unjustified and is, thus, liable to be quashed. It is contended that the petitioner was superseded in the matter of promotion, though he was eligible to be promoted on the next higher post, with ulterior motive, which action was called in question in a writ petition before this Court being W.P. No.19207/2011 (S) and as a result of this malafide born in the mind of the respondents, the grading of the ACR of the petitioner was changed, which action of the respondents is per se illegal, therefore, the petitioner was constrained to approach this Court by way of filing this writ petition. On the basis of these pleadings, the petitioner has claimed the following relief:

> "The petitioner humbly and respectfully prays that this Hon. Court may be pleased to issue a writ in the nature of
>
> (a) Certiorari quashing the grading given by the respondent Chairman in the note sheet, dated 23.12.2011 (Annexure P-6);
>
> (b) Mandamus directing the respondents to maintain the grading of 'A+' given by the Reviewing Officer in the ACR of the year 2010-11;
>
> Any other order or orders that this Hon. Court deems fit and proper in the facts and circumstances of the case may also kindly be passed."

2. The writ petition was entertained, notices were issued to the respondents and they have filed a return contending inter alia that under the procedure prescribed for writing the ACR, the same is required to be initiated by the Reporting Officer, who has seen the working of the concerned incumbent. The ACR thereafter is placed before the Reviewing Officer, who gives his opinion. Thereafter, the matter refers to the Endorsing Officer and ultimately it is sent to the Accepting Authority, which makes the comments

after examining the overall performance of the person concerned. Such is the scheme made by the respondents by issuance of a circular placed on record as Annexure R-2. It is contended that since the Reporting Officer specifically made the grading of the petitioner after recording the reasons thereof and categorized the petitioner as 'B' category officer, the same was required to be seen by the Reviewing Officer and Endorsing Officer. However, without there being any justified reason, the petitioner was graded as 'Excellent' officer by the Reviewing Officer. When ultimately the same was placed before the Chairman, being the Accepting Authority, the grading made by the Reporting Officer was accepted and petitioner was graded as 'B' category officer. Therefore, there is no illegality committed by the respondents in considering the ACR of the petitioner or making grading in the said ACR. The allegations of malafides are denied and it is pointed out that the decision rendered by this Court in W.P. No.19207/2011 (S) is subject matter of a writ appeal in which an interim stay has been granted, therefore, such allegations of the petitioner are baseless. It is, thus, contended that the petition is liable to be dismissed.

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

4. Learned senior Counsel for the petitioner has contended that there was every reason to believe that the ACR grading of the petitioner was changed to his detriment because of the fact that respondents were prejudiced against the petitioner. It is vehemently contended by learned senior Counsel that since an order was passed in his favour in the writ petition wherein it has been held by the single Bench of this Court that the petitioner was denied the promotion illegally, it would be writ large that the grading of the ACR was changed to deny promotion to the petitioner. This being so, it is contended that the malafides are proved in view of the law laid-down by the Apex Court in the case of *Ravi Yashwant Bhoir vs. District Collector, Raigad & others,* (2012) 4 SCC 407. It is further contended by learned senior Counsel that in view of the law laid-down by the Apex Court in several cases, if the ACRs are written in such manner without keeping in mind the performance of duties of the petitioner and his previous service record, they are to be treated as improperly written ACRs with a malafide intention. Relying in the case of *S. Ramachandra Raju vs. State of Orissa,* 1994 Supp (3) SCC 424, and in the case of *M.A. Rajashekhar vs. State of Karnataka and another,* (1996) 10 SCC 369, it is contended by learned Counsel for the petitioner that the ACR grading of the petitioner made by the Accepting Authority was liable to

be quashed and the grading made by the Reviewing Authority was to be accepted. Further relying in the case of *Nand Kumar Verma vs. State of Jharkhand and others,* (2012) 3 SCC 580, it is contended by learned senior Counsel for the petitioner that the ACRs are to be written on the basis of relevant material and cursory remark is not required to be made. Reading as a whole the comments made by the Reporting Officer, learned senior Counsel for the petitioner has contended that there was no justified reason in grading the petitioner as 'B' category officer by the Reporting Officer. This aspect was considered by the Reviewing Authority and an endorsement was rightly made grading the petitioner as 'Excellent' officer. The Secretary of the Chairman-cum-Managing Director had no role to play in the matter of writing of ACRs of the officers like petitioner but only because he made a noting on the basis of appraisal report of the petitioner and placed before the Accepting Authority, mechanically the grading of the petitioner as was made by the Reviewing Officer, was changed and the petitioner was graded as 'B' category officer in the said ACR. This was done with an object to restrict the petitioner below the benchmark, which is fixed for the purposes of grant of next higher promotion and in view of this, there was malice in law and applying the law laid-down by the Apex Court, it is to be held that the gradings of the petitioner were illegally changed by the Accepting Officer. It is, thus, contended that the petitioner is entitled to the relief claimed in the writ petition.

5. Per contra it is contended by learned Counsel appearing for the respondents that if the petitioner was aggrieved by the grading made in the ACR, treating the same as adverse or prejudicial, the petitioner was required to make a representation before the committee constituted for the said purpose in the Company. It is contended that a committee of five members is already constituted in the Company for the purposes of considering all such representations made by the employees and officers against the ACRs. The said committee is competent to take suitable decision and to recommend the authorities to pass orders on such representations. However, the petitioner has not made any such representation and, therefore, the writ petition is not maintainable. Further, it is contended that the order passed in W.P. No.19207/ 2011 (S) is the subject matter of writ appeal filed before the Division Bench of this Court where an interim stay has been granted. The note-sheet was written much before the final decision in the said writ petition, which was said to be decided on 18.09.2012 whereas the final orders were passed in respect of ACR grading by the competent authority on 23.12.2011. Therefore, it is

contended that there was no prejudice on account of passing of any order in a writ petition in favour of the petitioner, in the matter of making any grading of the petitioner in the ACR. Further it is submitted that since the matter is *sub judice* before appropriate forum in this Court itself, it would not be justified to look into such allegations made in this writ petition and, therefore, there cannot be any finding in respect of such malafide as alleged. Further it is submitted by learned Counsel for the respondents that in fact after finalization of proceedings of writing the ACR of the petitioner in question, the same was placed before the Endorsing Officer, who was the Chairman-cum-Managing Director of Generation Company. It is submitted that the Reviewing Officer and Reporting Officer being the same, it was not possible for the Additional Director (Finance) to give a comment as a Reviewing Officer and, therefore, the matter was placed before the Chairman-cum-Managing Director of Generation Company. There were certain comments made by the Reporting Officer himself with respect to the working of the petitioner wherein it was specifically recorded that the petitioner's temperament was not always moderate as he has habit of shouting at many times, not only on the subordinates but sometimes at senior officers also. After examining the overall performance of the petitioner, the Reporting Officer has graded the petitioner as 'Good', i.e. 'B' category officer. When the matter was placed before the Endorsing Officer, for some reasons he recorded that due to frustration of not getting promoted timely despite being much senior then others, the petitioner has behaved badly. Even then he graded the petitioner as 'Excellent' A+ officer. This was solely examined by the Accepting Officer and he agreed with the grading of the petitioner made in the ACR by the Reporting Officer, who has watched the work of the petitioner and endorsed the grading of the petitioner made by the Reporting Officer. There was nothing to show that this grading was done by the Reporting Officer out of any prejudice nor there is anything available on record or reflected from the note-sheet written by the Secretary of the Company that any change in the grading was suggested by the said officer. The only thing which was done by the Secretary was that he noted on the note-sheet that in the last 10 years the gradings of the petitioner for the maximum period was 'B' in the ACRs. It is contended that merely because such a noting was made, no prejudice was caused against the petitioner and, therefore, the allegation that only because of the noting of the Secretary of the Company, the petitioner has been graded as 'B' category officer by the Accepting Authority is not justified. Thus, it is contended that no specific

case is made out to interfere in the grading made by the authorities of the respondents in the ACR of the petitioner and the petition is, thus, liable to be dismissed.

6. True it is that the ACR of the petitioner was written much before the date of decision in the earlier writ petition of the petitioner. It is also true that the order passed by the single Bench of this Court in the aforesaid writ petition is the subject matter of the writ appeal pending before the Division Bench of this Court where an interim stay has been granted. The proprietary and the judicial discipline demands that when such a matter is pending judicial review before the higher forum, no comments should be made with respect to the findings recorded in the order passed in the writ petition by this Court dealing with the present writ petition. That apart, it is seen from the record that the ACR of the petitioner in question was written before the date of order finally passed in the aforesaid writ petition and, therefore, it cannot be presumed that the grading was made in the ACR of the petitioner because of any favourable order passed in the writ petition in respect of the petitioner. The Apex Court has clearly laid-down in several cases that this Court would not look into the correctness of the gradings made in the ACRs as if it is a reviewing authority of the said ACRs. The judicial review of such an action of writing the ACRs is very limited. It was always better if the gradings made in the ACRs are subjected to a scrutiny before the committee constituted for the purposes of considering the representation made against the ACRs because the said committee has a larger scope of examining the records and to reach to the particular conclusion. However, this cannot be done by this Court. Secondly, it is seen that ACR grading of the petitioner was made by the Reporting Officer himself after closely watching the work of the petitioner and in none then clear words it was said that the petitioner is graded as 'Good', 'B' category officer. Normally the gradings made by the Reporting Officer are accepted and it is just and proper also in view of the fact that the Reporting Officer is the immediate superior officer, who closely watches the work of a subordinate. There is no allegation made in the petition to this effect that the Reporting Officer was not properly working or was having any malafide or prejudice against the petitioner and deliberately made such grading, which was not in consonance to the work performance of the petitioner. From the record it is clear that the Endorsing Officer, who has virtually not examined the working of the petitioner continuously for a sufficient period, has graded him 'Excellent' A+ officer though he endorsed in the said note that the petitioner

has behaved badly on account of some frustration because of his delayed promotion. It is also noted that there was no reference made by the Endorsing Officer in his grading that the past remarks in the ACRs of the petitioner were looked into and then the grading was done. How and in what manner the petitioner was treated to be an excellent officer by the Endorsing Officer and how such a remark was made when the petitioner was graded as 'B' category officer by the Reporting Officer, is not indicated in the note made by the Endorsing Officer.

7. From the note-sheet placed on record, written by the Secretary of the Company, it is seen that the said note contains nothing but the remarks of the Reporting Officer, remarks of the Endorsing Officer and said Secretary has summarized in the note-sheet that in the last 10 years ACRs of the petitioner, he was graded 'B' category officer in 7 years ACRs. He never suggested any grading of the petitioner to be made in the ACR in question. The note-sheet was sent to the Chairman-cum-Managing Director of Company, who has made a comment that **'based upon the Reporting and Reviewing Officer's the grading of the petitioner is maintained as B'.** It is thus clear that there was no role played by the Secretary of the respondent Company in writing the ACR of the petitioner or making any grading in the ACR of the petitioner. In view of this, the law laid-down by the Apex Court in the cases of *Ravi Yashwant Bhoir* (supra), *S. Ramachandra Raju* (supra), *M.A. Rajasekhar* (supra) and *Nand Kumar Verma* (supra) would not be applicable as there was nothing to suggest that the gradings made by the Reporting Officer were tempered or changed unauthorizedly by the Accepting Officer. In fact from the record it is clear that the grading made by the Reporting Authority was fully accepted by the Accepting Authority, discarding the grading made by the Reviewing Authority.

8. For the aforesaid reasons, it is clear that the grading of the ACR of the petitioner was done in the manner indicated in the circular without there being any tempering on the same on account of noting of the Secretary of the Company and as such the act of the respondents cannot be said to be bad in law.

9. There is no substance in the writ petition. The same deserves to be and is hereby dismissed. However, there shall be no order as to costs.

Petition dismissed.

I.L.R. [2014] M.P., 3095
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 4150/2012 (Indore) decided on 8 July, 2013

RAM KRISHNA KOTHARI ...Petitioner
Vs.
STATE BAR COUNCIL OF M.P. ...Respondent

Constitution - Article 226, Advocate Act, (25 of 1961), Section 35 - Professional misconduct **- Petitioner was suspended from practicing as an advocate for a period of five year - Bar council of India reduced the period of suspension from 5 years to one year - Petitioner preferred an appeal before the Apex Court, and finally the appeal was allowed by the Apex Court and the period of suspension was reduced from one year to 6 months - It is alleged that since the order passed by the Apex Court was not communicated to the petitioner, the petitioner continued to practice - Held - Petitioner has stated on affidavit that petitioner is not practicing since 15.10.2011 - It is further stated that petitioner did not practice till the date of filing of petition which was filed on 24.04.2012 - Thus, the petitioner did not practice for six months - There is no evidence in rebuttal - No counter affidavit has been filed by the respondent - There is no reason to disbelieve the statement of petitioner which is on affidavit - In view of this subsequent notification dated 21.01.2012 and also show cause notice dated 03.10.2011 issued by respondent stands quashed - It is clarified that now the petitioner is entitled to practice as suspension period of six months was over long back - Petition disposed of. (Paras 2, 7, 8)**

संविधान – अनुच्छेद 226, अधिवक्ता अधिनियम (1961 का 25), धारा 35 – वृत्तिक अवचार – याची को पाँच वर्ष की अवधि के लिए अधिवक्ता के रुप में व्यवसाय करने से निलंबित किया गया – भारत की अधिवक्ता परिषद ने निलंबन की अवधि 5 वर्ष से घटाकर एक वर्ष की – याची ने सर्वोच्च न्यायालय को अपील की और अंतिमतः सर्वोच्च न्यायालय द्वारा अपील मंजूर की गई और निलंबन की अवधि एक वर्ष से घटाकर छः माह की गई – यह अभिकथित किया गया है कि चूंकि सर्वोच्च न्यायालय द्वारा पारित आदेश, याची को संसूचित नहीं किया गया, याची ने व्यवसाय जारी रखा – अभिनिर्धारित – याची ने शपथ पत्र पर कथन किया है कि याची 15.10.2011 से व्यवसाय नहीं कर रहा है – आगे यह कथन है कि याची ने याचिका प्रस्तुत करने की तिथि तक जिसे 24.04.2012 को प्रस्तुत किया गया था,

व्यवसाय नहीं किया – अतः याची ने छः माह तक व्यवसाय नहीं किया – खंडन में कोई साक्ष्य नहीं – प्रत्यर्थी द्वारा प्रति शपथ पत्र प्रस्तुत नहीं किया गया – याची का कथन जो शपथ पत्र पर है, उस पर अविश्वास करने का कोई कारण नहीं – इसे दृष्टिगत रखते हुए पश्चातवर्ती अधिसूचना दिनांक 21.01.2012 और प्रत्यर्थी द्वारा जारी किया गया कारण बताओ नोटिस दिनांक 03.10.2011 अभिखंडित – यह स्पष्ट किया जाता है कि अब याची व्यवसाय करने का हकदार है, क्योंकि छः माह की निलंबन अवधि बहुत पहले पूरी हो गई है – याचिका का निपटारा किया गया।

Prateek Maheshwari, for the petitioner.
Ritu Bhargav, for the respondent.

ORDER

N.K. Mody, J. :- The prayer in the petition is to quash the notification dated 21/02/2012 to the extent that period of petitioner's suspension be calculated from 15/10/2011 instead of date of notification.

2. Short facts of the case, as alleged in the petition are that petitioner is a practicing advocate and was enrolled as an advocate in the year 1962. The petitioner was found guilty by the respondent vide order dated 08/12/2005 on account of professional mis-conduct. The petitioner was suspended from practicing as an advocate for a period of five year w.e.f. 10/01/2006. The notification was published in that regard on 28/12/2005. The petitioner preferred an appeal before the Bar Council of India which was numbered as 1/2006. Vide order dated 14/01/2006, the Bar Council of India stayed the operation of order dated 08/12/2005, passed by the respondent. Vide order dated 09/03/2007, Bar Council of India partly allowed the appeal and period was reduced from 5 years to one year and penalty of Rs. 10,000/- was imposed, which was to be paid to the Advocate Welfare Fund. In Appeal No. 1924/ 2007, filed by the petitioner Hon'ble the Apex Court, vide order dated 27/04/2007 stayed the order passed by the Bar Council of India and finally the appeal was allowed vide order dated 04/02/2008 by the Apex Court and the period of suspension was reduced from one year to 6 months. It is alleged that since the order passed by the Apex Court was not communicated to the petitioner, the petitioner continued to practice. Petitioner came to know about the order dated 04/02/2008. Thereafter the review application was filed by the petitioner before the Hon'ble Apex Court which was dismissed vide order dated 26/09/2011. Thereafter upon a complaint show cause notice was issued to the petitioner by the respondent on 03/10/2011, whereby the petitioner

was asked to show cause as to why the result of the order passed by the Hon'ble Apex Court was not intimated. In the petition it is alleged that after the knowledge of the order passed by the Hon'ble Apex Court, petitioner suspended his practice w.e.f. 15/10/2011 and intimated the fact to the Bar Association, Alirajpur when the petitioner is practicing and also to the respondent.

3. It is submitted that the petitioner did not practice w.e.f. 15/10/2011. It is alleged that thereafter the notification has been issued by the respondent whereby petitioner has been directed not to practice w.e.f. 21/02/2012, while the petitioner was not practicing w.e.f. 15/10/2011. It is submitted that since period should be counted w.e.f. 15/10/2011 which ended on 14/04/2012. It is submitted that the petitioner did not practice till petition was filed before this Court on 02/04/2012. It is prayed that the period suspension of practice of the petitioner be counted from 15/10/2011 instead of 21/02/2012.

4. Learned counsel for the respondent, supports the notification and submits that petition has no merits and deserves to be dismissed. It is submitted that petition be dismissed.

5. Vide interim order dated 15/05/2012 operation of notification dated 21/02/2012 was stayed.

6. Relevant dates and events for just disposal of the case are as under:-

Date	Events
1962	Petitioner is in practice.
08.12.2005	State Bar Council suspended the licence of petitioner for 5 years.
28.12.2005	State Bar Council published Notification in this regard.
10.01.2006	Notification came in force.
09/03/2007	Bar Council of India reduced the period of suspension from 5 years to one year.

27.04.2007	The Supreme Court stayed the operation of order of suspension.
04.02.2008	The Supreme Court reduced the period of suspension from 1 year to six months.
26.09.2011	The Supreme Court dismissed the review application.
03/10/2011	Show cause notice by the State Bar Council.
17.10.2011	Reply submitted by the petitioner of show cause notice.
21.02.2012	Notification for suspensio (sic:suspension) licence to practice, issued by State Bar Council. licence to practice, issued by State Bar Council.

7. From perusal of record, it is evident that petitioner is an advocate aged 82 years and having a lod of practice on his shoulder of 45 years. Petitioner was suspended from practice vide order dated 10/01/2006 for a period of 5 years in compliance of order dated 28.12.2005. Order of respondent was modified by Bar Council of India vide Order dated 09/03/2007 and the same was reduced to one year. Vide order dated 04/02/2008 the same was reduced to six months by the Apex Court. Petitioner has stated on affidavit that petitioner is not practicing since 15/10/2011. It is further stated that petitioner did not practice till the date of filing of petition which was filed on 24/04/2012. Thus the petitioner did not practice for six months. There is no evidence in rebuttal. No counter affidavit has been filed by the respondent. There is no reason to disbelieve the statement of petitioner which is on affidavit. If an advocate who is serious in practice, is debarred by the State Bar Council, then it affects his reputation in the society adversely. Virtually this period starts from the day when he receives the show cause notice from the State Bar Council. In the present case order of suspension was passed by the State Bar Council on 28/12/2005. The Suspension period was of 5 years by the State Bar Council, which was reduced to one year by Bar Council of India and

was further reduced to six months by the Supreme Court. Keeping in view the gravity of the matter and also pendency of the case right from the date when show cause notice was issued to the petitioner by the State Bar Council which must be same wherein the year 2005 and the fact that the petitioner is not only a senior citizen but also senior in practice, has completed 15 years in practice in remote backward District of the State, this Court finds that the period of suspension of six months ought to have been counted with effect from 10.01.2006 when the first notification was published whereby petitioner was debarred from practice for period of 5 years, out of which the period when the notification remained stayed, ought to have excluded. From perusal of show cause notice it is evident that petitioner was asked to show cause why the petitioner did not inform the State Bar Council about the judgment of Supreme Court. This notice was duly replied by the petitioner but without giving any opportunity of hearing and also no order of respondent is placed on record in-spite of opportunities to show that return was taken into consideration upon issuance of subsequent Notification dated 21.02.2012. Since the Notification of suspension was published by the respondent on 28.12.2005 which came in force w.e.f. 10.01.2006 and period of six months ought to have been counted from that day excluding the period when the Notification remained stayed by the Bar Council of India and the Supreme Court of India. Since sufficient document is on record that petitioner stopped to appear before the Court for a period of more than six months, therefore, this Court finds that period of six months was over on 14/04/2012 as calculated by the petitioner. It is made clear that the show cause notice dated 03/10/2011 issued by the State Bar Council is without any substance. By this petitioner is directed to show cause why the petitioner did not inform the respondent about the order dated 04/02/2008 passed by Hon'ble Supreme Court whereby the period of suspension of petitioner from practice was reduced. It is not shown by the respondent that under the statute it was obligatory on the part of petitioner to inform the respondent about the order of Supreme Court.

8. In view of this subsequent Notification dated 21.01.2012 and also show cause notice dated 03.10.2011 issued by respondent stands quashed. It is clarified that now the petitioner is entitled to practice as suspension period of six months was over long back. No order as to costs.

9. With the aforesaid, petition stands disposed of.

Petition disposed of.

I.L.R. [2014] M.P., 3100
WRIT PETITION
Before Mr. Justice N.K. Mody
W.P. No. 11510/2012 (Indore) decided on 10 July, 2013

KALIBAI & ors. ...Petitioners
Vs.
AJAY & anr. ...Respondents

Evidence Act (1 of 1872), Section 63 - Secondary Evidence - Photocopy **- Will is in possession of petitioner No. 1 which is not produced inspite of notice - Held - Primary evidence is not available or that anyone of the circumstances such as non-availability or custody of the document in the hands of the adversary will be sufficient grounds for producing secondary evidence. (Paras 4 & 5)**

साक्ष्य अधिनियम (1872 का 1), धारा 63 – द्वितीयक साक्ष्य – फोटोकॉपी – वसीयत, याची क्र. 1 के कब्जे में है, जिसे नोटिस के बावजूद प्रस्तुत नहीं किया गया – अभिनिर्धारित – प्राथमिक साक्ष्य उपलब्ध नहीं होना या ऐसी परिस्थितियों में से एक जैसा कि अनुपलब्धता या दस्तोवज की अभिरक्षा विरोधी के हाथ में होना, द्वितीयक साक्ष्य प्रस्तुत करने का पर्याप्त आधार होगा।

Cases referred :

2012(1) MPLJ 120, 2010 AIR SCW 6362.

Yashpal Rathore, for the petitioner.
Yogesh Mittal with *A. Choudhary,* for the respondent No.1.
C.S. Ujjainiya, G.A. for the respondent No. 2/State.

ORDER

N.K. Mody, J. :- Being aggrieved by the order dated 03/11/2012 passed by I Civil Judge, Class-II, Jhabua in civil suit No. 43-A/2012 whereby application filed by the respondent No. 1 under Section 65 of the Evidence Act with a prayer to permit the respondent No. 1 to prove the Will by adducing the secondary evidence was allowed, present petition has been filed.

2. Short facts of the case are that respondent No. 1 filed a suit for declaration, possession and for cancellation of sale-deed which was executed by petitioner No. 1 in favour of petitioners No. 2 and 3 alleging that suit property was belonging to one Limba who was husband of petitioner No. 1

and respondent No. 1 is the adopted son. It was alleged that Limba died on 22/01/2011 and in his life time he executed a Will on 23/07/2005 in favour of respondent No. 1. It was prayed that suit be decreed. The suit was contested by the petitioners wherein all the plaint allegations were denied. It was denied that Limba ever executed any Will in favour of the respondent No. 1. After framing of issues at the stage of evidence respondent No. 1 filed an application under Section 65 of Evidence Act alleging that respondent No. 1 be permitted to prove the Will by adducing secondary evidence. It was alleged that Will is in possession of petitioner No. 1 which is not produced inspite of notice. It was prayed that application be allowed. The application was contested by the petitioner No. 1 on various grounds including on the ground that neither any Will was executed by the deceased/Limba nor petitioner No. 1 is in possession of such Will. It was prayed that application be dismissed. After hearing the parties learned Court below allowed the application against which present petition has been filed.

3. Learned counsel for the petitioners argued at length and submit the impugned order is illegal, incorrect and deserves to be set-aside. It is submitted that since the document which respondent No. 1 wants to prove is photostat copy, therefore, the same cannot be allowed to prove by secondary evidence. Learned counsel placed reliance on a decision in the matter of *Ratanlal Vs. Kishanlal* 2012 (1) MPLJ 120 wherein this Court held that photocopy is neither a primary nor secondary evidence. It is submitted that petition be allowed and impugned order be set-aside.

4. Learned counsel for the respondent No. 1 supports the order and submits that since orignal Will is in possession of petitioner No. 1 who is wife of deceased, therefore, respondent No. 1 is left with no option except to prove the Will by adducing secondary evidence. Learned counsel placed reliance on a decision in the matter of *M. Chandra Vs. M. Thangmuthu* 2010 AIR SCW 6362 wherein Hon'ble Apex Court while dealing with Section 63 of the Evidence Act observed that Section 63 of Evidence Act intended to provide relief to party genuinely unable to produce original through no fault of that party, non acceptance of duplicate copy of conversion certificate is improper. It is submitted that petition has no merits and the same be dismissed.

5. In the matter of *Ratanlal* (Supra) the facts of the case were altogether different, therefore, the law (sic:laid ?) down in that case is not applicable in

the present case. The photocopies are the secondary evidence. The Indian Evidence Act sets out the procedure for receiving the secondary evidence. It has to be shown that primary evidence is not available or that anyone of the circumstances such as non-availability or custody of the document in the hands of the adversary will be sufficient grounds for producing secondary evidence. The secondary evidence includes among other documents a document produced by exercise of the mechanical device that ensures the correctness of the original. The photocopies of the document is one such procedure and if a valid ground is given for acceptance of secondary evidence, then there cannot be any objection to the reception of photocopies of documents. The rejection of the documents had arisen only by the fact that the photocopies and therefore they cannot be received in evidence. There is no merit in such a contention for, if the objection is that there is no basis for not producing the original or that the so called original is not in the custody of the plaintiff himself as contended by the defendants, then it is a matter that has to be brought out in the cross-examination of the witness and the reception of the documents themselves cannot be prohibited. In the facts and circumstances of the case, petition filed by the petitioner has no substance, hence the same stands dismissed.

Petition dismissed.

I.L.R. [2014] M.P., 3102
WRIT PETITION
Before Mr. Justice K.K. Trivedi
W.P. No. 10355/2005 (S) (Jabalpur) decided on 31 July, 2013

ANJANA MATHUR (SMT.) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Service Law – Promotion **– Petitioner was working as Sister Tutor – She was having long experience of working, was possessing the Diploma in Public Health Tutor and General Nursing – Her claim of promotion on the post of Senior Sister Tutor was denied on the ground that the petitioner was not possessing the degree of Bachelor of Science (Nursing) therefore, was not eligible for such promotion – Held – Since it is the practice in the State that if for any particular department service rules are not framed, service rules framed for the similar services or post by other department are adopted – Respondent should**

have taken care to adopt rules of the Public Health Department rather than insisting on the norms of Indian Nursing Council in the matter of promotion of Nursing Sisters – There is no insistence in the Rules of Public Health Department that Sister Tutor must possess a Degree of Bachelor of Science with nursing subject – Thus, denial of consideration for promotion to the petitioner is grossly unjustified – Respondents are directed to consider the case of petitioner for promotion – In case the petitioner is found fit, she would be entitled to the consequential benefit of such promotion with retrospective effect. (Paras 5, 6, 7)

सेवा विधि – पदोन्नति – याची, सिस्टर टयूटर के रुप में कार्यरत थी – उसे कार्य का लम्बा अनुभव था और उसके पास लोक स्वास्थ्य शिक्षिका एवं सामान्य उपचर्या (नर्सिंग) में डिप्लोमा था – सीनियर सिस्टर टयूटर के पद पर पदोन्नति का उसका दावा इस आधार पर अस्वीकार किया गया कि याची के पास विज्ञान स्नातक (नर्सिंग) की उपाधि (डिग्री) नहीं थी इसलिए, उक्त पदोन्नति हेतु पात्र नहीं – अभिनिर्धारित – चूंकि राज्य में यह कार्य पद्धति है कि यदि किसी विशिष्ट विभाग के लिए सेवा नियम विरचित नहीं है, तब समान सेवा या पद के लिए अन्य विभाग द्वारा विरचित सेवा नियमों को अपनाया जाता है – प्रत्यर्थी को नर्सिंग सिस्टर की पदोन्नति के मामले में भारतीय उपचर्या (नर्सिंग) परिषद के मानदंडों पर जोर देने की बजाए लोक स्वास्थ्य विभाग के नियमों को अपनाने की सावधानी लेनी चाहिए थी – लोक स्वास्थ्य विभाग के नियमों में आग्रह नहीं कि सिस्टर टयूटर के पास नर्सिंग विषय में विज्ञान स्नातक की उपाधि होनी चाहिए – अतः, याची को पदोन्नति हेतु विचार में नहीं लिया जाना पूर्ण रुप से अनुचित है – पदोन्नति हेतु याची के प्रकरण पर विचार करने के लिए प्रत्यर्थीगण को निदेशित किया गया – यदि याची योग्य पायी जाती है, वह उक्त पदोन्नति के परिणामिक लाभ की भूतलक्षी प्रभाव से हकदार होगी।

Sharad Verma, for the petitioner.
Puneet Shroti, P.L. for the respondents/State.

ORDER

K.K. Trivedi, J. :- The petitioner, who was working as Sister Tutor in the Health Services of the Government of Madhya Pradesh, has approached this Court by way of filing this writ petition under Article 226 of the Constitution of India seeking direction to consider and promote the petitioner on the post of Senior Sister Tutor. It is contended that the petitioner was working on the post of Sister Tutor on which post she was promoted on 29.06.2000. After assuming the duties, she has sincerely, honestly and with devotion discharged the duties but was not being considered for promotion on the post of Senior

Sister Tutor according to her seniority. The petitioner made a request before the respondents on 16.12.2003 for such promotion but by order dated 21.12.2004, her request has been turned down saying that the petitioner was not possessing the degree of Bachelor of Science (Nursing) and, therefore, was not eligible for such promotion. The petitioner in fact has passed the General Nursing Examination way back in the year 1969, has obtained a Diploma in Public Health Tutor in 1978 and was having continuous working experience on the said post, which according to the petitioner qualified her for promotion on the post of Senior Sister Tutor. In the norms prescribed by the respondents it is contended that if a B.Sc. (Nursing) qualified candidate is not available, a diploma in Nursing and Administration or teaching and administrative experience would be sufficient for consideration for promotion. That being so, since the petitioner was having long experience of working, was possessing the Diploma in Public Health Tutor and General Nursing Examination Certificate, she should have been considered for promotion. Such rejection of the claim of the petitioner is, thus, bad in law, therefore, petitioner would be entitled to grant of benefit of promotion on the post of Senior Sister Tutor. It is further contended that the petitioner has officiated on the said post as nobody was working as Senior Sister Tutor and, therefore, before her superannuation, she should be granted a regular promotion on the said post.

2. Upon service of the notice of the writ petition, the respondents have filed the return contending inter alia that though there are no specific rules framed in the Medical Education Department relating to promotion of the employees but the norms prescribed by the Indian Nursing Council are made applicable and unless a candidate is fulfilling the norms prescribed by the Indian Nursing Council, he/she is not to be granted such promotion. It is contended that the petitioner has not performed the duty as Senior Sister Tutor as she was only given the charge of the said post for the purposes of relieving somebody. That itself does not mean that the petitioner was made to work against the post of Senior Sister Tutor. It is further contended that merely because the petitioner has obtained a Diploma in Nursing and Administration, that itself would not be enough to grant promotion on the post of Senior Sister Tutor in view of the fact that the petitioner is not fulfilling the norms prescribed by the Indian Nursing Council. However, nothing is said by the respondents as to why Rules were not framed and in absence of Rules, how the claims for promotion were being considered in the Department. It is, however, contended that the consideration of representation of the petitioner was done on the anvil

of the norms prescribed by the Indian Nursing Council and since the petitioner was not having the qualification of B.Sc. in Nursing, her claim was rightly rejected. Thus, it is contended that the petition being wholly misconceived, is liable to be dismissed.

3. By filing a rejoinder, the petitioner has brought on record the fact that the respondents have made the Rules governing the services in the Public Health Department. The said Rules have been enforced on 30th April, 1988 on their publication in the Gazette of Madhya Pradesh. Specific conditions for appointment on nursing post have been prescribed in the said Rules. The Medical Education Department was also part and parcel of the Public Health Department before its bifurcation and in case the Rules are not made in the Medical Education Department, the norms prescribed by the State Government in the Rules of Public Health Department would be applicable in case of consideration of claim for promotion. It is emphatically contended that in Schedule-IV a channel of promotion is prescribed from Sister Tutor Class-III to the post of Senior Sister Tutor and for the said purposes, no educational qualifications are prescribed. Only five years of service is prescribed for promotion on the said post. Of course for the Sister Tutor Class-III another channel of promotion is prescribed on the post of Senior Training Officer (MPW)/Principal, Promotee School, Jabalpur/Principal, Family Health Worker Training School. For such promotion it is prescribed that five years service experience of only those Sister Tutors, who have B.Sc. Nursing or Diploma in Public Health or Nursing Education or Nursing Administration is necessary. It is again contended that even for such post the educational qualifications insisting on are not specifically B.Sc. Nursing but Diploma in Public Health or Nursing Education or Nursing Administration would be sufficient for consideration of such candidate for promotion on aforesaid senior post. Thus, it is contended that if these are the norms prescribed in the Rules, it cannot be said that petitioner was ineligible to be given promotion. If there are statutory Rules framed in exercise of power under proviso to Article 309 of the Constitution of India, the same will prevail. The insistence of the department for consideration of the cases of only those, who were fulfilling the norms of the Indian Nursing Council alone would not be justified. No additional return has been filed to explain these facts by the respondents.

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

5. It is nowhere stated by the respondents in their return that they have

formulated any statutory service rules governing the services of the employees and officers working in the Medical Education Department. However, it is also not their case that the regulations framed by the Indian Nursing Council alone will hold the field and the rules made by them for governing the services of counterpart of the petitioner in other department would not be applicable. It is also not the case of the respondents that the Rules in the Public Health Department were framed before the making of regulations by the Indian Nursing Council. Even the adoption of the norms prescribed by the Indian Nursing Council has not been placed on record by the respondents. It is to be seen whether a similarly situated person working in Public Health Department would be entitled to grant of promotion even if he or she is not fulfilling certain norms prescribed by the Indian Nursing Council. The power under Article 309 of the Constitution of India is to be exercised for making the Act and the laws by the State for governing the services of the employees of the State. The proviso added to Article 309 of the Constitution of India is only enabling clause where the State can exercise the legislative powers to make the rules for the purposes of governing the services of its employees till the laws are made by the Legislative Assembly by passing the Act. That being so, the Rules which ultimately culminated in an Act of the Legislature would have much more force in law than the norms prescribed in any regulations made by the Indian Nursing Council for the purposes of giving guidance as to how recruitment in the Nursing services are to be made. Therefore, it is clear that insistence of the respondents on adoption of the norms of the Indian Nursing Council cannot be said to be right action on the part of the respondents. In fact it is the practice in the State that if for any particular department service rules are not framed, the service rules framed for the similar services or post by the other department are adopted for the purposes of governing the services of the department where the rules are not framed. Moreover, it is not made clear as to what was the purpose of making or prescribing the norms by the Indian Nursing Council. Whether the same was with an object to only grant registration to the Nursing persons in the Council or the same was made mandatory to be followed by all States for the purposes of constituting Nursing services within the State. That being so, the respondents should have taken care to adopt the rules of the Public Health Department rather than insisting on the norms of the Indian Nursing Council, in the matter of promotion of Nursing Sisters.

6. The Rules of 1988, placed on record, leave no doubt where the classification of the post has been done. There are three groups in the Public Health Department services. Group-A deals with the services concerning medical,

Group- B deals with the services concerning non-medical and Group-C deals with the nursing services. In the nursing services, there are specific posts of Sister Tutor and Senior Sister Tutor. For the post of Sister Tutor, which is to be filled in by direct recruitment, specific provisions are made relating to educational qualification. The graduate in Science subject preferably in Nursing or those having passed certificate course of General Tutor along with 5 years experience, duly registered as Nursing Midwife with the Nursing Council, are said to be eligible to be appointed on the post. If such persons have put in 5 years of service, they become eligible to be considered for Senior Sister Tutor, General Nursing Center of the Public Health Department. There is no insistence that they must be having a degree of Bachelor of Science with Nursing subject. Similarly, a Sister Tutor Class-III can be promoted as Senior Nursing Officer/Principal, Promotee School/ Principal, Family Health Worker Training School with 5 years experience and having Diploma in Public Health or Nursing Education or Nursing Administration. Again there is no insistence that even for such higher post, the Bachelor Degree in Science with Nursing or a Post Graduate Degree of Science with Nursing subject would be essential qualification for such promotion. Since it is not contended by the respondents that the rules were made before coming into force of any such norms of the Indian Nursing Council and the rules needs to be amended, in terms of the prescription of norms prescribed by the Indian Nursing Council, it has to be held that same provision still holds field in the matter of promotion of counterparts of the petitioner serving in the Public Health Department. Thus, it will grossly unjustified if the petitioner is denied consideration for promotion on the post of Senior Sister Tutor, on the lame excuse that she is not possessing the qualification as prescribed by the Indian Nursing Council. Such a stand of the respondents, thus, cannot be accepted.

7. Having considered so, it has to be held that the petitioner was entitled to be considered for promotion as Senior Sister Tutor. Since now the petitioner would have attained the age of superannuation as she was 59 years of age in the year when the writ petition was filed and would have retired from service by now, it would be proper to command the respondents to hold a review D.P.C., consider the case of the petitioner for promotion on the post of Senior Sister Tutor on the date she has completed 5 years of service on the post of Sister Tutor, i.e. with effect from the year 2005 itself. In case the petitioner is found fit for such promotion, let necessary orders be issued promoting her on the post of Senior Sister Tutor with retrospective effect. Needless to say, in case the petitioner is found fit for grant of such promotion as her fundamental right of consideration for promotion

was denied illegally by the respondents, the petitioner would be entitled to all the consequential benefits of such promotion, such as pay, allowances and seniority. Let the aforesaid exercise be completed within a period of four months from the date of receipt of copy of the order passed today.

8. 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., 3108
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 14952/2013 (Jabalpur) decided on 10 September, 2013

LALLA KUMHAR ...Petitioner
Vs.
DHANIRAM KUMHAR & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 8 Rule 6-C - Maintainability of counter claim - **Mere on account of withdrawal of the counter claim by one of the defendant and on filing the application by plaintiff for withdrawal of the suit, counter claim of the other defendant could not be excluded from consideration, the same could be proceeded and adjudicated on merits against the plaintiff even after withdrawal of the suit - No perversity in the order passed by the trial court - Petition dismissed. (Paras 5 & 8)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 8 नियम 6-सी – प्रतिदावे की पोषणीयता – मात्र इसलिए कि एक प्रतिवादी द्वारा प्रतिदावा वापस लिये जाने से और वादी द्वारा वाद वापस लिये जाने हेतु आवेदन प्रस्तुत किये जाने पर, अन्य प्रतिवादियों का प्रतिदावा विचारण से वंचित नहीं किया जा सकता, वाद वापस लिये जाने के पश्चात भी, उक्त को वादी के विरुद्ध गुणदोषों पर कार्यवाही कर न्यायनिर्णित किया जा सकता है – विचारण न्यायालय द्वारा पारित आदेश में कोई विपर्यस्तता नहीं – याचिका खारिज।

Cases referred :

2002 (1) MPWN 31, 2005 (2) MPHT 276.

Atul Upadhyay, for the petitioner.

ORDER

U.C. MAHESHWARI, J. :- Heard on the question of admission.

The petitioner/defendant No. 1 has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 18.5.2013, passed by Additional Judge to the Court of First Additional District Judge, Shahdol in Civil Suit No. 21-A/2012 whereby his application filed under Order 8 Rule 6-C of CPC for appropriate direction to exclude the counter claim of defendant No. 26 from consideration has been dismissed.

2. The petitioner's counsel after taking me through the papers placed on record along with the impugned order argued that respondent No. 1 plaintiff herein filed the suit against the petitioner and other respondents by impleading as defendants for declaration and perpetual injunction. In response of such suit the respondent No. 26 and 27 have filed their separate written statements. In addition to it the counter claim for partition and their share was also filed against the respondent No. 1/plaintiff as well as against the petitioner and other respondents/defendants. In pendency of the same respondent No. 27 has filed an application under Order 23 Rule 1 of CPC to withdraw her counter claim and on consideration by allowing her application the same has been dismissed as withdrawn. Simultaneously respondent No. 1/plaintiff has also filed an application for withdrawal of suit, the same is pending for adjudication before the trial Court. Meanwhile on behalf of the petitioner/defendant No. 1 an application under Order 8 Rule 6-C of CPC was filed for appropriate direction to exclude the counter claim of defendant No. 26 from consideration, such application was dismissed by the impugned order. He further said that in view of the procedure of Order 8 Rule 6-A and other related provisions of the CPC the inter-se defendant has no right to file the written statement in response of counter claim filed by inter-se defendant against the defendants only the plaintiff may file the rejoinder in the matter. Thus, taking into consideration that plaintiff has filed an application for withdrawal of his suit the counter claim of the respondent No. 26 filed against the petitioner also by allowing his application ought to have been excluded by the trial Court from consideration. However, counsel has fairly conceded that if such counter claim is filed against the respondent No. 1/plaintiff also then same could be proceeded further even after dismissal of the suit because the counter claim is treated to be a suit in the eye of law at the instance of the concerning defendant. He also placed his reliance on reported decisions of this Court in the matter

of *Udhavdas Tyagi Vs. Srimurti Radhakrishna Mandir* reported in 2002 (1) MPWN 31 and in the matter of *Narendra Kumar Vs. Smt. Manju Agrawal* reported in 2005 (2) MPHT 276.

3. Having heard the counsel at length, I have carefully gone through the papers placed on record along with the impugned order so also the cited cases.

4. It is apparent from the impugned order that respondent No. 26 herein, who is defendant No. 26 before the trial Court has filed her counter claim not only against the inter-se defendants but also against the respondent No. 1/ sole plaintiff of the matter so firstly on this count alone the argument of the petitioner's counsel that in response of counter claim inter-se defendant has no right to file the written statement against inter-se defendant and only the plaintiff may file the rejoinder has not appealed me. In any case even after withdrawal of the suit counter claim may proceed against the plaintiff and in the suit of partition the capacity of all parties some time remained within the scope of plaintiff if the matter is related with the property of undivided Hindu Family. Such citation gives equal status to the parties to contest the matter for their respective shares. So, in such premises also the impugned order does no appear to be perverse or contrary to any procedure or law.

5. So far applicability of provisions of Order 8 Rule 6-C of CPC to the case at hand is concerned, in the available scenario of the matter mere on account of withdrawal of the counter claim by respondent No. 27/defendant No. 27 and on filing the application by the plaintiff for withdrawal of the suit, the counter claim of respondent No. 26 could not be excluded from consideration, the same could be proceeded and adjudicated on merits against the respondent No. 1/plaintiff even after withdrawal of the suit.

6. So far the case law in the matter of *Narendra Kumar* (Supra) is concerned, such case is not related with the question involved in the case at hand but the same is related to the period of limitation to file the counter claim in the matter. In the cited case it is held that counter claim may be filed within thirty days from the date of receiving the notice of the suit. Such question is not under dispute before me. So, this citation is not helping to the petitioner.

7. So far the case law in the matter of *Udhavdas Tyagi* (Supra) is concerned, in such case besides the other findings it was held that the defendant has a right to file the counter claim only against the plaintiff, the counter claim

seeking any reliefs against co-defendant can not be entertained. It is apparent from the aforesaid discussion that the respondent No. 26 has filed the counter claim against the respondent No. 1/plaintiff also. So, this citation is also not helping to the present petitioner.

8. In view of aforesaid discussion, I have not found any perversity, illegality, irregularity or anythings against the propriety of law in the order passed by the trial Court. Thus, this petition being devoid of any merit deserves to be and is hereby dismissed. There shall be no order as to costs.

Petition dismissed.

I.L.R. [2014] M.P., 3111
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 5814/2013 (Jabalpur) decided on 11 September, 2013

LAXMI CYCLE ...Petitioner
Vs.
SUBHU KUMAR JAIN ...Respondent

Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment in the written statement **- Suit for eviction on the ground of bonafide need - Petitioner wants to plead information regarding acquisition of alternate accommodation during pendency of the case - Held - Rent Controlling Authority ought to have allowed the aforesaid application and after incorporating such amendment, opportunity to make consequential amendment should have been extended to the respondent - Such question should have been decided after recording evidence - Such procedure has not been adopted by the R.C.A. - Impugned order is perverse, same is hereby set aside. (Paras 6 & 7)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – लिखित कथन में संशोधन – वास्तविक आवश्यकता के आधार पर बेदखली हेतु वाद – याची प्रकरण लंबित रहने के दौरान वैकल्पिक स्थान के अर्जन से संबंधित जानकारी का अभिवाक् करना चाहता है – अभिनिर्धारित – भाड़ा नियंत्रण प्राधिकारी को उपरोक्त आवेदन मंजूर करना चाहिए था और उक्त संशोधन समाविष्ट करने के पश्चात, प्रत्यर्थी को परिणामिक संशोधन करने का अवसर देना चाहिए था – उक्त प्रश्न का विनिश्चय, साक्ष्य अभिलिखित किये जाने के पश्चात करना चाहिए था – भाड़ा नियंत्रण प्राधिकारी द्वारा उक्त प्रक्रिया का अवलंब नहीं लिया गया – आक्षेपित आदेश

विपर्यस्त है और उसे एतद् द्वारा अपास्त किया गया।

Case referred :

AIR 1981 SC 1711.

A.K. Jain, for the petitioner.
Mukhtar Ahmad, for the respondent.

ORDER

U.C. MAHESHWARI, J. :- Heard.

The petitioner/tenant/non-applicant has filed this petition under Article 227 of the Constitution of India being aggrieved by the order dated 11/3/2013 passed by the Rent Controlling Authority, Katni in Rent Case No. 1/A-90(7)/06-07 whereby the application of the petitioner filed under Order 6 Rule 17 of CPC to incorporate some amendment in the original written statement to plead information regarding requisition of alternate accommodation for the alleged need by the daughter-in-law of the respondent has been dismissed.

2. Petitioner's counsel after taking me throw (sic:through) the averments of the petition along with papers placed on record and the impugned order argued that the impugned case has been filed by the respondent under Section 23-A of the M.P. Accommodation Control Act for the bona fide genuine requirement of the disputed accommodation for his daughter-in- law to open Clinic for her profession and on written statement of the petitioner such need has been denied; In additional pleading it is also stated that some alternate accommodation of his own for the alleged need is available in the same town with the respondent and in such premises prayer for dismissal of the rent case was made. In continuation, he said that in pendency of this petition, daughter-in-law of the respondent namely Swati Jain has acquired her own accommodation for the alleged need through registered sale deed dated 16th June, 2011 (Annexure-P/2) and in such premises if there was any need of the respondent, the same has come to an end. Such pleading being related to the alternative accommodation of the respondent was necessary in the written statement. Because of no accountant explanation in this regard has been put forth by the respondent in his application filed under Section 23-A of the aforesaid Act. It is settled principle of law that during pendency of the suit if any accommodation which may be considered as an alternative available accommodation for the landlord with respect of the alleged need and the

particulars of the same are not supplied on the record by the landlord, then tenant should be permitted to amend his pleadings accordingly in the written statement. In such premises, he said that the impugned order being contrary to the existing legal preposition deserves to be set aside by allowing this petition.

4. Aforesaid prayer is opposed by the respondent's counsel saying that impugned application has been filed only to prolong the case as such alleged accommodation could not be treated to be alternate available accommodation for running the Clinic because the same is situated in a residential area where medical profession could not be carried out and in such premises Rent Controlling Authority has not committed any error in dismissing the petitioner's application and prayed for dismissal of the writ petition.

5. Having heard the learned counsel, keeping in view their arguments, I have carefully gone through the averments of the petition and the papers placed on record along with the impugned order.

6. In the available circumstances, there is a dispute between the parties on the question whether the aforesaid alleged accommodation acquisitioned by the daughter-in-law of the respondent namely Swati Jain in pendency of the impugned case, is a residential accommodation or the same is non-residential also but it is apparent on record that in this regard on behalf of the respondent, in his pleadings through amendment, no explanation has been put forth. Only the petitioner, herein, has filed the impugned application to propose the amendment to stat (sic:state) that such accommodation is an alternate accommodation with the respondent for the alleged need of said Swati Jain and pursuant to the alleged requirement has come to an end.

7. Long back in the matter of *Hasmat Rai and another vs. Raghunath Prasad* reported in AIR 1981 SC 1711, it was held that in pendency of the suit filed for eviction on the ground of bona fide genuine requirement if any accommodation is requisitioned by the landlord, which may be considered as alternate available accommodation and its account and explanation is not put forth by the landlord in his pleadings and the same is pleaded by the tenant in his written statement, then Court may consider such subsequent aspect also on its own merit. So, in view of such principles, the impugned amendment deserves to be allowed. Apart the aforesaid, at the stage of amendment application which is supported by the registered document of sale deed, the merit or demerit of the proposed amendment, should not be considered, the same should be considered after allowing such amendment, in accordance

with the procedure prescribed. So in such premises, also I am of the view that the Rent Controlling Authority ought to have allowed the aforesaid application and after incorporating such amendment, opportunity to make consequential amendment should have been extended to the respondent in his original application and such question should have been decided after recording evidence of the parties, but such procedure has not been adopted by the RCA.

8. In the aforesaid premises, the impugned order being perverse is hereby set aside. Pursuant to it, by allowing the amendment application of the petitioner, he is permitted to incorporate the same in the written statement within ten days before the RCA and respondent is also extended an opportunity to file appropriate application for consequential amendment in this regard, if so desire, within further ten days and thereafter such question shall be decided by the RCA after framing issues on the question, if the same is not covered in the existing issues. However, considering the oral prayer of the respondent's counsel, RCA is directed to take endeavour to expedite the trial of the impugned case and conclude the same at an early date probably within six months from today in accordance with the spirit of provisions of Chapter III-A of the M.P. Accommodation Control Act, 1961.

7. Accordingly, this petition is allowed to the extend (sic:extent) indicated herein above.

C.C. as per rules.

Petition allowed.

I.L.R. [2014] M.P., 3114
WRIT PETITION
Before Mr. Justice U.C. Maheshwari
W.P. No. 15288/2013 (Jabalpur) decided on 13 September, 2013

GHASIRAM DEHARIYA ...Petitioner
Vs.
ANAKHLAL DEHARIYA & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 26 Rule 9 - Appointment of Commissioner to ascertain who is in possession **- Held - Suit is at the initial stage - Evidence is yet to be recorded - No party can be permitted to use the procedure of the court to collect the evidence in support of his**

case - No interference is required - Petition dismissed. (Para 2)

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 26 नियम 9 – किसका कब्जा है यह सुनिश्चित करने के लिए कमिश्नर की नियुक्ति – अभिनिर्धारित – वाद आरंभिक प्रक्रम पर है – साक्ष्य अभिलिखित किया जाना बाकी है – किसी पक्षकार को अपने प्रकरण के समर्थन में साक्ष्य एकत्रित करने हेतु न्यायालय की प्रक्रिया का उपयोग करने की अनुमति नहीं दी जा सकती – किसी हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Cases referred :

1982 MPWN 255, 2007(3) MPWN 123.

Mohd. Shafiqullah, for the petitioner.

ORDER

U.C. MAHESHWARI, J. :- Heard on the question of admission.

1. The petitioners/plaintiffs have filed this petition under Article 227 of the Constitution of India being aggrieved by order dated 23.7.2013 (Annexure P-4) passed by Civil Judge Class II, Parasiya in Civil Original Case No. 12-A/2012 whereby their application filed under Order 26 Rule 9 of the CPC for appointment of Commissioner and for calling the report that which party is in actual possession of the disputed land, whether the plaintiffs are the defendants, has been dismissed.

2. I have heard the learned counsel for the petitioners and perused the record. The impugned suit is at the initial stage. Even the process to record the evidence of parties has not been started. It is settled preposition of law that no party can be permitted to use the procedure of the Court to collect the evidence in support of his case as laid down by this Court long back in the matter of *Laxman Vs. Ram Singh* reported in 1982 MPWN 255 and in the matter of *Ashok Kumar Patel and another Vs. Ram Niranjan and others* reported in 2007 (3) MPWN 123, as mentioned by the trial Court in the impugned order. In such premises, the impugned order does not require any interference at this stage.

3. Resultantly, this petition is hereby dismissed. However, it is observed that after recording the evidence of both the parties, in order to clarify the ambiguity, if any, in the evidence, then either of the party, shall be at liberty to file appropriate application to call the report in that regard through

Commissioner by inspection of the property. On filing such application at that stage, the trial Court shall be at liberty consider the same in accordance with the procedure prescribed under the law to clarify the ambiguity without influencing from any observations, findings made by such Court in the order impugned or this Court in the present order.

Petition dismissed.

I.L.R. [2014] M.P., 3116
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg
W.P. No.10969/2013 (Indore) decided on 4 October, 2013

ADHUNIK TRANSPORT ORGANIZATION LTD.(M/S) ...Petitioner

Vs.

ASSISTANT COMMISSIONER,
COMMERCIAL TAX & ors. ...Respondents

Value Added Tax Act, M.P. (20 of 2002), Section 54 **- Assessing authority in absence of any document held that it could not be held that goods were not for sale in M.P. and were out to out goods - Subsequently after receiving relevant documents petitioner applied for rectification of mistake -Held - As there was no mistake or error apparent on record therefore application was rightly rejected by assessing authority - However, in the interest of justice, as petitioner was not in possession of documents at the relevant time and notice was also issued by assessing authority to the third party to produce the documents, order of assessment is set aside and matter remitted back to assessing officer to decide afresh taking into consideration the documents filed by petitioner. (Paras 11 & 12)**

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 54 – निर्धारण पाधिकारी ने किसी दस्तावेज की अनुपस्थिति में अभिनिर्धारित किया कि यह धारणा नहीं की जा सकती कि माल म.प्र. राज्य में विक्रय हेतु नहीं था और आउट टू आउट का माल था – तत्पश्चात् सुसंगत दस्तावेज प्राप्त करने के पश्चात, याची ने भूल का सुधार करने हेतु आवेदन किया – अभिनिर्धारित – चूंकि अभिलेख पर प्रकट भूल या त्रुटि नहीं थी, इसलिए निर्धारण प्राधिकारी द्वारा उचित रूप से आवेदन अस्वीकार किया गया – अपितु, न्याय हित में, चूंकि सुसंगत समय याची के कब्जे में दस्तावेज नहीं थे और निर्धारण प्राधिकारी द्वारा दस्तावेज प्रस्तुत करने के लिए तृतीय पक्षकार

को नोटिस भी जारी किया गया था, निर्धारण का आदेश अपास्त और याची द्वारा प्रस्तुत दस्तावेजों को विचार में लेकर नये सिरे से निर्णित किये जाने हेतु मामला निर्धारण प्राधिकारी को प्रतिप्रेषित।

Cases referred :

(2007) 165 Taxman 307 (SC) = (2007) 295 ITR 466 (SC) = 2007 213 CTR 425 (SC).

Sumit Nema, for the petitioner,
Sudhanshu Vyas, P.L. for the respondents.

ORDER

The Order of the Court was delivered by : SHANTANU KEMKAR, J. :- The petitioner-transporter was transporting in its vehicle bearing registration No.RJ06GA-1534 a road roller of M/s. Atlas Copco India Limited from Nasik (Maharashtra) to Yamuna Nagar (Haryana). The Anti Evasion Bureau of the Commercial Tax Department stopped the truck for inspection and found that the relevant Transit Form No.59 was not being obtained from the entry check post of the State of Madhya Pradesh, and that, there was no seal of the nearest Commercial Tax Office on the challan/document. In the circumstances, an opinion was formed by the Anti Evasion Bureau that an attempt was being made by the petitioner to transport road roller by evasion of tax. Thereafter, the Assessing Officer imposed a penalty of Rs.21,20,265/- on the petitioner vide order dated 15.02.2010. The said order was challenged by the petitioner before the Deputy Commissioner, Commercial Tax, Indore. The appeal suffered dismissal vide order dated 29.01.2011.

2. Aggrieved by the said order dated 29.01.2011, the petitioner filed second appeal before the M.P. Commercial Tax Appellate Board, Bhopal, (For short 'the Appellate Board'). The Appellate Board vide its order dated 02.11.2012 allowed the appeal in part and remanded the matter to the Assessing Officer with following observations and directions:-

> " (9) यद्यपि वाहन चालक द्वारा माल से संबंधित दस्तावेज जांच चौकी पर प्रस्तुत करना प्रगट नहीं हो रहा है परंतु जांच अधिकारी को शास्ति आरोपित करने के पूर्व इस बात की जांच कर संतुष्टि कर लेनी चाहिए थी कि वह माल आउट टू आउट का न होकर मध्यप्रदेश राज्य में विक्रय करने के लिए लाया जा रहा था एवं कर अपवंचन सुकर बनाने का प्रयास किया जा रहा था।

अपीलार्थी के पास से प्राप्त दस्तावेजों के आधार पर इस तथ्य का सत्यापन किया जा सकता था परंतु जांच अधिकारी द्वारा ऐसा कोई सत्यापन किया जाना प्रगट नहीं होता है। इसके विपरीत अपीलार्थी की ओर से प्रस्तुत दस्तावेजों के अवलोकन से तो यही प्रगट होता है कि वास्तव में माल आउट टू आउट परिवहन किया जा रहा था। इन दस्तावेजों का सत्यापन किया जाना आवश्यक प्रतीत होता है। दस्तावेजों का सत्यापन कर यथोचित आदेश पारित करने हेतु प्रकरण जांच अधिकारी की ओर प्रत्यावर्तित किया जा सकता है।

(10) उपरोक्त आधारों पर अपीलार्थी की अपील आंशिक रूप से स्वीकार करते हुए प्रकरण, जांच अधिकारी, एंटी इवेजन ब्यूरो, इंदौर–ए की ओर उक्त निर्देशों के अनुसार सुनवाई का अवसर देकर सत्यापन पश्चात् यथोचित आदेश पारित करने हेतु, प्रत्यावर्तित किया जाता है।

तदनुसार अपीलार्थी की अपील आंशिक रूप से स्वीकार।"

3. In compliance of the order passed by the Appellate Board, the Assessing Officer issued notice to the petitioner as also to the purchaser of the road roller, to whom it was to be delivered by the petitioner asking them for producing the relevant information and documents to establish the plea of the petitioner that the goods were not for sale in M.P. and were out to out goods.

4. The petitioner submitted reply/explanation dated 24.04.2013 (Annexure P/8) to the notice issued by the first respondent and also prayed for short time to be granted for getting the requisite documents and information from the third party i.e. M/s. S.P. Singla Contractors, who had purchased the road roller from M/s. Atlas Copco India Limited, Nasik. However, the prayer was denied and vide its order dated 27.04.2013 (Annexure P/10) the Assessing Officer maintained its earlier order of penalty by observing thus:-

प्रस्तुत स्पष्टीकरण एवं स्त्यापन व सत्यापन के लिए आवश्यक दस्तावेजों के अभाव में यह निष्कर्ष नहीं निकाला जा सकता कि माल का विकय म0 प्र0 के बाहर ही होता। इस प्रकार साक्ष्यों के आधार पर इस संभावना को निर्मूल नहीं कहा जा सकता कि प्रश्नाधीन रोड रोलर मध्य प्रदेश भी बिक सकता था। इन समग्र परिस्थतियों में प्रकरण में धारा 58 एवं धारा 57 (8) की शास्ति आकृष्ट होती है एवं पूर्व में लिए गए निर्णय से कोई भिन्न निष्कर्ष नहीं निकाला जा सकता है। अतएव मूल प्रकरण में वैट कर अधिनियम के तहत धारा 57 (8) के अन्तर्गत शास्ति रू0 19,76,520/– एवं प्रवेशकर अधिनियम की धारा 13 सहपठित वेट कर अधिनियम की धारा 57 (8) के अधीन 1,43,745/– कुल रूपये 21,20,265/– की शास्ति पुनः आरोपित की जाती है। अर्थात यथावत

रखी जाती है। तदनुसार आदेश पारित।"

5. After passing of the aforesaid order dated 27.04.2013 (Annexure P/10), on 03.05.2013 the petitioner received the relevant documents from the third party M/s. S.P. Singla Contractors by Registered A/D. The said documents along with a covering letter dated 20.05.2013 (Annexure P/11) in the form of request for rectification under Section 54 of the Madhya Pradesh Valued Added Tax Act, 2002, (For short 'VAT Act') was submitted by the petitioner. The petitioner also filed a copy of letter dated 29.04.2013 (Annexure P/9) sent by the said M/s. S.P. Singla to the Assessing Officer. The petitioner vide its letter dated 20.05.2013 (Annexure P- 11) made a prayer that in the interest of justice the mistake be rectified and a fresh order be passed after considering the documents which have been received by it from the third party. The said prayer for rectification was rejected by the Assessing Officer vide order dated 25.07.2013 (Annexure P/13) by observing that no ground is made out to hold that there is any mistake in the order dated 27.04.2013. Feeling aggrieved, the petitioner has filed this petition.

6. Shri Sumit Nema, learned counsel for the petitioner has argued that the learned first respondent has committed error in not exercising the powers of rectification provided under Section 54 of the VAT Act. He argued that after passing the order by the first respondent, the relevant documents were received by the petitioner, and as such when they were submitted along with the prayer for rectification of mistake, the same should have been taken on record instead of holding that such a prayer is not tenable. In support of his submission, he placed reliance on the judgment of the Supreme Court in the case of *Honda Siel Power Products Limited Vs. Commissioner of Income Tax* reported in [2007] 165 Taxman 307 (SC) = [2007] 295 ITR 466 (SC)=2007 213 CTR 425 (SC). Alternatively he prayed that since the documents are very relevant for the just decision of the controversy, the same may be directed to be taken on record and to be considered by the Assessing Officer and for that purpose the matter may be remanded back to the Assessing Officer for deciding the matter afresh.

7. On the other hand, Shri Sudhanshu Vyas learned panel lawyer for the State argued that the Assessing Officer has rightly declined to interfere into the matter under Section 54 of the VAT Act as there was no clerical or

arithmetic mistake nor there was any error arising from any omission. He argued that the judgment of the Supreme Court in the case of *Honda Siel Power Products Limited* (Supra) is based upon entirely different facts and has no application to the facts of the present case. He also submitted that the petitioner did not file the documents inspite of giving sufficient opportunity for the same. In the circumstances, the Assessing Officer had no other option but to pass the order.

8. We have considered the submissions made by the learned counsel for the parties and perused the orders and annexures.

9. The first question which is requires to be considered in this matter is as to whether Section 54 of the VAT Act which deals with powers of rectification of mistakes by the Commissioner and the Appellate Board is attracted in the present case or not. For ready reference the relevant provisions of Section 54 of the VAT Act, are extracted below:-

"54: Rectification of mistakes

(1) The Commissioner may –

(i) on his own motion at any time within one calendar year from the date of any order passed by him; or

(ii) on an application made by a dealer within one calendar year from the date of receipt of such application, rectify, in such manner as may be prescribed, such order for correcting any clerical or arithmetical mistake or any error arising therein from any omission :

Provided that, -

(i) the Commissioner shall not entertain any application by the dealer unless it is made within one year from the date of the order sought to be rectified :

(ii) no such rectification shall be made if it has the effect of enhancing the tax or reducing the amount of refund unless the Commissioner has given notice in the prescribed form to the dealer of his intention so to do and has allowed the dealer a reasonable opportunity of being heard.

(2).....

(3).....

(4).....

(5).....

Not relevant in the present case".

10. From the aforesaid provision, it is clear that the Commissioner may rectify its order for correcting any clerical or arithmetic mistake or any error arising therein from any omission. In the present case, we find there is neither any clerical nor any arithmetical mistake, there appears to be even no error arising from any omission. On the other hand in this matter till the passing of the impugned order, the relevant documents were not filed by the petitioner. Therefore the Assessing Officer has rightly observed that the provision of rectification is not attracted in the matter. In the case of *Honda Siel Power Products Limited* (Supra), the Supreme Court while dealing with the matter in which the Income Tax Appellate Tribunal had inadvertently not referred to its earlier decision holding that enhanced depreciation was allowable even on notional increase in cost of Estate on the ground of fluctuation in exchange rates and despite fact that additional liability resulting from said fluctuation had not been paid by assesse and wrongly held that since there was no actual payment after fluctuation, assesse was not entitled to claim benefit under Section 43-A and the tribunal having held that an error apparent from the record had crept in and the same should be rectified by acknowledging the mistake of not considering the judgment of coordinate bench of the Tribunal even when the same was cited and accordingly rectified its order by allowing assesse's claim, the Supreme Court upheld the order of the tribunal and set aside the order of the High Court in which the High Court held that it would not amount to rectification. However as observed above, facts of the present case are entirely different and therefore the law laid down by the Supreme Court has no application to the present case. In the circumstances, we are of the view that the Assessing Officer has committed no error in not exercising the jurisdiction of rectification in the facts of the present case.

11. As regards petitioner's contention that in the interest of justice and for just decision of the matter, the petitioner be accorded an opportunity to file

documents which have been received by subsequently in order to prove its case that the road roller was being transported by it out to out and not for sale in M.P., we are of view that this prayer needs to be allowed to do complete justice in the matter. As noticed by us the relevant documents were not in the possession of the petitioner and after repeated efforts being made by the petitioner the same were made available to the petitioner by the third party only after passing of the impugned order by the Assessing Officer. It is also relevant to state that the Assessing Officer itself had issued notice on dated 16.04.2013 to the said third party to produce the documents and the same were sent by the third party to the Assessing Officer and also to the petitioner but only after the order was passed. In this background of the matter, in the interest of justice this prayer of the petitioner deserves to be allowed.

12. In the circumstances, we set aside the order dated 27.04.2013(Annexure P/10) as also the order dated 25.07.2013 (Annexure P/13) passed by the Assessing Officer and remit the matter to the Assessing Officer for deciding the matter afresh taking into consideration the aforesaid documents. The petitioner to appear before the authority on 30.10.2013, with all the relevant documents.

CC within 3 days.

Order accordingly.

I.L.R. [2014] M.P., 3122
WRIT PETITION

Before Mr. Justice Shantanu Kemkar & Mr. Justice Mool Chand Garg

W.P. No. 11112/2013 (Indore) decided on 4 October, 2013

PROCTER & GAMBLE HYGIENE & HEALTH CARE LTD. ...Petitioner

Vs.

ADDITIONAL DIVISIONAL DEPUTY COMMISSIONER OF COMMERCIAL TAX & ors. ....Respondents

Value Added Tax Act, M.P. (20 of 2002), Section 46 (8A), Value Added Tax Rules, M.P. 2006, Rule 61(4) - Readmission/Rehearing of appeals **- Appeal filed by Petitioner u/s 46 of Act 2002 was dismissed for want of prosecution - Application for rehearing filed under Rule 61(4) of Rules, 2006 was dismissed as limitation for deciding appeal u/s 46(8A) is 12 months and the same has expired - Held - Time limit**

fixed for deciding appeal will not override the provisions of Rule 61 to invoke provisions of rehearing/readmission of appeal - Order of Appellate Authority set aside - Matter remitted back for deciding application for rehearing the appeal. (Paras 7 & 8)

मूल्य वर्धित कर अधिनियम, म.प्र. (2002 का 20), धारा 46 (8ए), मूल्य वर्धित कर नियम, म.प्र. 2006,नियम 61(4) – अपील को पुनःग्रहण/पुनःसुनवाई किया जाना – अधिनियम 2002 की धारा 46 के अंतर्गत प्रस्तुत की गई याची की अपील को अभियोजन के अभाव में खारिज किया गया – पुनः सुनवाई हेतु नियम 2006 के नियम 61(4) के अंतर्गत आवेदन को खारिज किया गया क्योंकि धारा 46(8ए) के अंतर्गत अपील निर्णित करने के लिये परिसीमा 12 माह है और वह समाप्त हो चुकी है – अभिनिर्धारित – अपील के पुनः ग्रहण/पुनःसुनवाई के उपबंधों का अवलंब लेने के लिये अपील के विनिश्चय हेतु नियत समय सीमा, नियम 61 के उपबंधों पर अध्यारोही नहीं होगी – अपीली प्राधिकारी का आदेश अपास्त – अपील की पुनः सुनवाई हेतु आवेदन का विनिश्चय करने के लिये मामला प्रतिप्रेषित किया गया।

Sumit Nema, for the petitioner.
Sudhanshu Vyas, P.L. for the Respondents.

ORDER

The Order of the Court was delivered by : SHANTANU KEMKAR, J. :- The petitioner, a Public Limited Company, was assessed vide order dated 22.06.2011 (Annexure P-1) by the first respondent for the period 01.04.2008 to 31.03.2009 under the Central Sales Tax Act and was assessed under the Madhya Pradesh Valued Added Tax Act, 2002, (For short 'VAT Act') for the same period vide order dated 22.06.2011 (Annexure P/2). In both the assessments, the petitioner was denied time to file F- Forms.

2. Aggrieved by the said assessment orders, the petitioner filed appeals under Section 46 of the VAT Act. The appeals were listed for hearing on 07.08.2012 before an Officer holding office at Bhopal and was given additional charge of Indore. On that day, petitioner's Counsel could not attend hearing of the appeals because of his ailment. The appeals were, therefore, dismissed by the appellate authority for want of prosecution vide orders dated 07.08.2012 (Annexure P-5 and Annexure P-6). According to the petitioner, the said orders of dismissal of its appeals were not known to it, and therefore, its Counsel attended the office of the appellate authority at Indore on 17.08.2012 with written submissions, but he was informed that the files were

taken by the Appellate Authority to Bhopal. On 20.08.2012, petitioner's Counsel requested the second respondent to inform the petitioner about the status of appeals, but no information was supplied to him. The petitioner's Counsel went thrice to Bhopal to find out the status of appeals, but on that, he was informed that the files are not traceable. Lastly, the petitioner was served with orders dated 07.08.2012 for the first time on 18.03.2013.

3. On receipt of these ex-parte dismissal orders, the petitioner submitted applications on 16.04.2013 under Rule 61 (4) of the M.P. Value Added Rules, 2006 (For short 'VAT' Rules 2006) for readmission/rehearing of appeals on the ground that his Counsel could not appear before the appellate authority on the date of hearing because of his ill health. The applications were supported by the affidavits and the medical certificate of the Counsel.

4. The appellate authority, without adverting to the contents of the applications filed by the petitioner under Rule 61 (4) of the VAT Rules, 2006 and without granting any opportunity of hearing to the petitioner, rejected the applications vide order dated 06.06.2013 (Annexure P-14) on the ground that under Section 46 (8A) of the VAT Act, the appeal is required to be disposed of by the appellate authority within a period of one year and that since the period was already over, the prayer for readmission of the appeal cannot be allowed. Feeling aggrieved by the order dated 06.06.2013 (Annexure P-14) the petitioner has filed this petition.

5. Shri Sumit Nema, learned counsel for the petitioner has argued that the learned appellate authority has committed error in not considering the provisions of Rule 61 (4) of the VAT Rules in its correct perspective. He argued that the time limit prescribed under Section 46 (8A) of the VAT Act is for deciding an appeal, whereas Rule 61 (4) of the VAT Rules, 2006, is a provision for readmission/rehearing of the appeal, which is dismissed or decided ex-parte under sub-rule (3) of Rule 61. In the circumstances while dealing with the application for readmission/rehearing the petitioner's application could not have been dismissed on the ground of lapse of period fixed under Section 46 (8A) of the VAT Act, but was required to have been decided on its merits.

6. Shri Sudhanshu Vyas learned panel lawyer for the respondents, on the other hand, supported the impugned order of rejection of the petitioner's applications for readmission/rehearing of the appeals.

7. Having considered the submissions made by the learned counsel

for the parties, we are of the view that the impugned order dated 06.06.2013 (Annexure P-14) passed by the appellate authority cannot be sustained. Admittedly, the petitioner's appeals were dismissed vide orders dated 07.08.2012 (Annexure P/5 and Annexure P/6) for want of prosecution. The petitioner, invoking the provisions of Rule 61 of the VAT Rules, 2006, had submitted applications for readmission/rehearing of the appeals. In the circumstance, it was necessary for the appellate authority to have decided the said applications filed under Rule 61 (4) of the VAT Rules 2006, on merits. However the appellate authority has wrongly applied the time limit fixed under Section 46 (8A) of the VAT Act for deciding the appeals. In our considered view, the time limit fixed under Section 46 (8A) of the VAT Act, will not override or curtail the right of the appellant to invoke provisions of readmission/rehearing of the appeal which suffered dismissal for want of prosecution under Rule 61 (4) of the VAT Rules, 2006. On invocation of the provision of Rule 61 (4) the appellate authority is duty bound to consider the prayer made in it irrespective of the expiry of time fixed under Section 46 (8A) for deciding the appeal as the both the provisions operate in different spheres. The view taken by the appellate authority if allowed to stand, would render provisions of Rule 61 (4) of the VAT Rules, 2006, to be redundant, as in the cases when the appeal is dismissed for want of prosecution just before expiry of 12 months, the restoration application which will naturally be filed after 12 months would not become maintainable, which in our considered view cannot be the intention of the legislature.

8. In the circumstances, we set-aside the impugned order dated 06.06.2013 (Annexure P-14) passed by the appellate authority and remand the matter to the appellate authority for deciding the petitioner's prayer for readmission/rehearing of the appeal on merits, without being influenced by the fact that the period fixed under Section 46 (8A) of the VAT Act for deciding the appeal has expired.

9. With the aforesaid, writ petition stands allowed to the extent indicated above.

C.C. within 3 days.

Petition allowed.

I.L.R. [2014] M.P., 3126
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 21624/2011 (Jabalpur) decided on 22 October, 2013

THEMIS MEDICARE LTD. ...Petitioner
Vs.
THE ASSTT. LABOUR COMMISSIONER & ors. ...Respondents

Industrial Disputes Act (14 of 1947), Section 33-A – Interim Stay of termination of service **– Complaint before Industrial Court by medical representative – Respondent No.2, medical representative in the petitioner establishment, was transferred from Jabalpur to Mumbai by order dated 14.05.2009 – Alleging the transfer being due to malafide, respondent No.2. raised the dispute u/s 10 of 1947 Act – However, subsequently services of the petitioner were terminated – Held – Contentions that the termination on dispensation of service of the petitioner had no nexus with the dispute raised – Dispute was in respect of transfer and not the determination of service, therefore the provision of Section 33 was not violated as would have led to conferral of powers on the Labour Court in entertaining an application u/s 33-A of 1947 Act.** **(Paras 3, 4, 22)**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33-ए – सेवा समाप्ति पर अंतरिम रोक – चिकित्सीय प्रतिनिधि द्वारा औद्योगिक न्यायालय के समक्ष शिकायत – प्रत्यर्थी क्र. 2, याची की स्थापना में चिकित्सीय प्रतिनिधि को आदेश दिनांक 14.05.2009 द्वारा जबलपुर से मुम्बई स्थानांतरित किया गया – स्थानांतरण दुर्भावनापूर्ण होना अभिकथित करते हुए प्रत्यर्थी क्र. 2 ने अधिनियम 1947 की धारा 10 के अंतर्गत विवाद उठाया – अपितु तत्पश्चात याची की सेवा समाप्त की गई – अभिनिर्धारित – तर्क कि उठाये गये विवाद के साथ याची की सेवा समाप्ति का कोई संबंध नहीं था – विवाद स्थानातंरण के संबंध में था और न कि सेवा समाप्ति के, इसलिए धारा 33 का उल्लंघन नहीं किया गया, जिससे कि अधिनियम 1947 की धारा 33-ए के अंतर्गत आवेदन को ग्रहण करने में श्रम न्यायालय को शक्तियों का प्रदान होता।

Cases referred :
AIR 1994 SC 2608, 1991 MPLJ 114.

K.N. Pethia, for the petitioner.
Shradha Tiwari, for the respondent No.2.

ORDER

SANJAY YADAV, J. :- The petition though is posted for consideration of I.A.No.3892/2013 and application for vacating the stay order dated 3.5.2010. However, with the consent of learned counsel for the parties the petition is heard finally.

2. Petition is directed against the order dated 28.3.2011 whereby, the Labour Court while entertaining an application under section 33 A Industrial Dispute Act, 1947(hereinafter to be referred to as Act of 1947), by respondent no.2 stayed his termination which was by order dated 14.4.2010 and thereby affirmed its earlier exparte interim order dated 3.5.2010.

3. Respondent no.2 , Medical Representative in the petitioner establishment, appointed since 4.1.1989, was transferred from Jabalpur to Mumbai by order dated 14.5.2009.

4. Alleging the transfer being due to malafide, respondent no.2 raised the dispute under section 10 of 1947 Act.

5. In the course of conciliation before Assistant Labour Commissioner an order came to be passed by the Assistant Labour Commissioner that the condition of service of respondent no.2 shall not be changed during the conciliation proceedings. The order is in the following terms (the order still persist as the conciliation proceedings are reportedly pending):

> 15.6.2009 अनावेदक पक्ष से अधिकृत प्रतिनिधि श्री रंजीत रैकवार उपस्थित आवेदक पक्ष से आवेदक स्वयं एवं यूनियन के अध्यक्ष श्री डेविड रहीम एवं सचिव श्री संतोष मुदलियार उपस्थित। अनावेदक पक्ष को निर्देशित किया गया कि प्रकरण के संराधन कार्यवाही में विचाराधीन रहते आवेदक कि सेवा शर्तो में आदि में किसी प्रकार का परिवर्तन नहीं किया जा सकता । यदि सेवा शर्तो में कोई परिवर्तन किया जाता है तो औ.वि अधिनियम, 1947 की धारा 33 का उल्लघन होगा।
>
> पक्षों की सहमति से प्रकरण में आगामी बैठक दिनांक 23.6.2009 को नियत/पक्षों को नोट कराया गया

6. The order date 15.6.2009 having not being questioned has attained finality.

7. That by order dated 14.4.2010 the services of the petitioner was

dispensed with in the following terms:

> "Further to your appointmnt letter No.HDM/ PERS:011:89/305 dated 4th January 1989 we write to inform you that your services are no longer required by the company and accordingly your services hereby stands terminated with immediate effect".

8. Being aggrieved, respondent no.2 filed an application under Section 33 A of 1947 Act whereon the Labour Court granted an interim stay of termination by order dated 3.5.2010 which was made absolute vide impugned order.

9. Petitioner questions the order on the ground that respondent employee was not a workman but was a Hospital Manager, the post on which he was promoted and transferred whereagainst he raised the dispute which itself is not maintainable because being not a workman the provisions of Sales Promotion Employees Act (Condition of Service) Act 1976 (hereinafter to be referred to as Act of 1976)and of the Industrial Dispute Act 1947 are not applicable.

10. Secondly, it is contended that, the dispute which was raised was against the transfer whereas the services of the petitioner were dispensed with as no more required. Thus there was no nexus with the dispute raised and termination as would attract the provision of section 33 of the Act of 1947.The application under Section 33 A it is urged was not tenable.

11. Thirdly it is contended that the assumption of jurisdiction by Labour Court under Section 33 A, was erroneous.

12. On these grounds petitioner seeks quashment of the impugned order.

13. Th (sic:The) respondent no.2 on its turn supports the order passed by the Labour Court. It is urged that since the respondent being a medical representation (sic:representative) raised a dispute against his transfer from Jabalpur to Mumbai and in order to frustrate the same his services were dispensed by order dated 14.4.2009 which has rightly been interfered by the Court as being violation of protection under Section 33 of the Act of 1947.

14. Considered the rival submission.

15. The Sales Promotion Employees (Condition of Service) Act of 1976 was enacted to regulate certain conditions of services of sales promotion employees in certain establishments.

16. Section 2(d) of 1976 Act defines 'Sales Promotion Employees to mean "any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business, or both, but does not include any such person-

(i) who, being employed or engaged in a supervisory capacity, daily wages exceeding sixteen hundred rupees menses (sic:per mensem); or

(ii) who is employed or engaged mainly in a managerial or administrative capacity.

Explanation:For the purposes of this clause, the wages per mensem of a person shall be deemed to be the amount equal to thirty times his total wages (whether or not including, or comprising only of, commission) in respect of the continuous period of his service falling within the period of twelve months immediately preceding the date with reference to which the calculation is to be made, divided by the number of days comprising that period of service;]

(e) all words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947 (14 of 1947), shall have the meanings respectively assigned to them in that Act.

17. Respondent no.2 when he raised the dispute before Assistant Labour Commissioner was holding the post of Medical Representative and by order dated 15.6.2009 passed by Assistant Labour Commissioner, the service condition of the petitioner was not to be changed. Yet the petitioner by order dated 14.8.2009 promoted the petitioner w.e.f 4.8.2009 as Hospital Manager without seeking leave of the Assistant Labour Commissioner. As Section 33 of 1947 Act requires that:

> "33. 1 Conditions of service, etc., to remain unchanged under certain circumstances during pendency of proceedings.-
>
> (1) During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before 2[an arbitrator or] a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, no employer shall--

(a) in regard to any matter connected with the dispute, alter, to the prejudice of the workmen concerned in such dispute, the conditions of service applicable to them immediately before the commencement of such proceeding; or

(b) for any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute, save with the express permission in writing of the authority before which the proceeding is pending.

(2) During the pendency of any such proceeding in respect of an industrial dispute, the employer may, in accordance with the standing orders applicable to a workman concerned in such dispute 2[or, where there are no such standing orders, in accordance with the terms of the contract, whether express or implied, between him and the workman],--

(a) alter, in regard to any matter not connected with the dispute, the conditions of service applicable to that workman immediately before the commencement of such proceeding; or

(b) for any misconduct not connected with the dispute, or discharge or punish, whether by dismissal or otherwise, that workman: Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer.

(3) Notwithstanding anything contained in sub- section (2), no employer shall, during the pendency of any such proceeding in respect of an industrial dispute, take any action against any protected workman concerned in such dispute--

(a) by altering, to the prejudice of such protected workman, the conditions of service applicable to him immediately before the commencement of such proceedings; or

(b) by discharging or punishing, whether by dismissal or

otherwise, such protected workman, save with the express permission in writing of the authority before which the proceeding is pending. Explanation.-- For the purposes of this sub- section, a" protected workman", in relation to an establishment, means a workman who, being 1[a member of the executive or other office bearer] of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

(4) In every establishment, the number of workmen to be recognized as protected workmen for the purposes of sub-section (3) shall be one per cent. of the total number of workmen employed therein subject to a minimum number of five protected workmen and a maximum number of one hundred protected workmen and for the aforesaid purpose, the appropriate Government may make rules providing for the distribution of such protected workmen among various trade unions, if any, connected with the establishment and the manner in which the workmen may be chosen and recognised as protected workmen.

(5) Where an employer makes an application to a conciliation officer, Board, 2[an arbitrator, a] labour Court, Tribunal or National Tribunal under the proviso to sub- section (2) for approval of the action taken by him, the authority concerned shall, without delay, hear such application and pass, 3[within a period of three months from the date of receipt of such application], such order in relation thereto as it deems fit:] 4[Provided that where any such authority considers it necessary or expedient so to do, it may, for reasons to be recorded in writing, extend such period by such further period as it may think fit: Provided further that no proceedings before any such authority shall lapse merely on the ground that any period specified in this sub- section had expired without such proceedings being completed.]

18. Thus the respondent no.2 being a Sales Promotion employee having raised the dispute , subsequent promotion order contrary to the stay granted on 15.6.2009 will not in the considered opinion of this Court, adversely affect

the status of respondent no.2 as Sales Promotion Employee in prosecuting the dispute. This answers the first contention raised by learned counsel for the petitioner. The contention that with promotion respondent no.2 lost the status of workman/Sales Promotion Employee is negatived.

19. Furthermore by virtue of section 6 of 1976 Act the provisions of the Act of 1947 has been made applicable. Section 6 of Act of 1976 stipulates:

> ".6. Application of certain Acts to sales promotion employees.- (1) The provisions of the Workmen's Compensation Act, 1923 (8 of 1923), as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, workmen within the meaning of that Act.
>
> (2) The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, workmen within the meaning of that Act and for the purposes of any proceeding under that Act in relation to an industrial dispute, a sales promotion employee shall be deemed to include a sales promotion employee who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute or whose dismissal, discharge or retrenchment had led to that dispute.
>
> (3) The provisions of the Minimum Wages Act, 1948 (11 of 1948), as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, employees within the meaning of that Act.
>
> (4) The provisions of the Maternity Benefit Act, 1961 (53 of 1961), as in force for the time being, shall apply to, or in relation to, sales promotion employees, being women, as they apply to, or in relation to, women employed, whether directly or through any agency, for wages in any establishment within the meaning of that Act.
>
> (5) The provisions of the Payment of Bonus Act, 1965 (21 of 1965), as in force for the time being, shall apply to, or

in relation to, sales promotion employees as they apply to, or in relation to, employees within the meaning of that Act.

(6) The provisions of the Payment of Gratuity Act, 1972 (39 of 1972), as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, employees within the meaning of that Act.

20. That there being violation of the interim order dated 15.6.2009 and the provision of Section 33 it was within the jurisdiction of Labour Court to entertain application under Section 33 A of 1947 Act the objection of the petitioner regarding jurisdiction of Labour Court is also negatived.

21. It was also contended during the course of hearing that the provision of Act of 1947 is not applicable to the Sales Promotion Employee. The contention deserves rejection at the outset. in view of provisions of Section 6 of 1976 Act and the decision by Supreme Court in *H.R. ADYANTHAYA Vs. SANDOZ (INDIA) LTD*: AIR 1994 SC 2608 wherein it is held:

"4.....In other words, on and from 6-3-1976 the provisions of the ID Act became applicable to the medical representatives depending upon their wages up to 6-5-1987 and without the limitation on their wages thereafter and upon the capacity in which they were employed or engaged.

5. It appears that the SPE Act was brought on the statute book, as the Statement of Objects and Reasons accompanying the Bill shows, as a result of this Court's judgment in *May & Baker* case 1. The Committee of Petitions (Rajya Sabha) in its 13th Report submitted on 14-3-1972 had come to the conclusion that the ends of social justice would be met only by suitably amending the definition of the term 'workman' in the ID Act in the manner that the medical representatives were also covered by the definition of workman under the ID Act. The Committee also felt that other workers engaged in sales promotion should similarly be considered as workmen. The legislature, however, considered it more appropriate to have a separate legislation for governing the conditions of services of the sales promotion employees instead of amending the ID Act, and hence the SPE Act.

> It also appears that Parliament has amended the definition of 'industry' by the Amending Act 46 of 1982 to include, in the definition of industry in Section 2(i) of the ID Act, among others, any activity relating to the promotion of sales or business, or both carried on by any establishment. However, that amendment has not yetcome into force. But the amendment made by the very same Amending Act of 1982 to the definition of 'workman' in Section 2(s) to include those employed to do 'operational work', and to the definition of 'wages' in Section 2(rr) to include "any commission payable on the promotion of sales or business or both" has come into force w.e.f. 21-8-1984."

22. In furtherance to the contentions that the termination on dispensation of service of the petitioner had no nexus with the dispute raised. It is urged by learned counsel for the petitioner that the dispute was in respect of transfer and not the determination of service, therefore the provision of section 33 was not violated as would have led to conferral of powers on the Labour Court in entertaining an application under Section 33 A of 1947 Act. decision in *Management Dainik Naveen Duniya V. Presiding Officer Labour Court and others* : 1991 MPLJ 114 has been placed reliance on support of these contention.

23. The contention though attractive when tested on the anvil of the facts of the case does not carry any substance.

24. Evidently the dispute has been raised against transfer and if services are dispensed with as is done in this case, the dispute raised would render infructuous, as the master servant relationship comes to end with the termination. It is therefore clear that the petitioner intended to change the service condition by terminating the service of the respondent workman which would adversely effect the dispute raised . In these facts the decision in *Management Dainik Naveen Duniya*(Supra) is of no assistance. The Labour Court was thus within its jurisdiction by interfering with the termination order dated 14.4.2009 as would warrant any interference.

25. In the result petition fails and dismissed. No costs.

Petition dismissed.

I.L.R. [2014] M.P., 3135
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 16945/2012 (Jabalpur) decided on 29 October, 2013

HUKUM SINGH ...Petitioner
Vs.
ASSISTANT ENGINEER, P.H.E. & ors. ...Respondents

Industrial Relations Act, M.P. (27 of 1960), Sections 31(3), 108, & Industrial Disputes Act (14 of 1947), Section 33 C (2) **- Petitioner was working in Public Health and Engineering Department and was classified as permanent employees as department was Industry - S.L.P. against classification was dismissed by Supreme Court - Subsequent concerned department was removed from schedule of Industry - Petitioner filed application u/s 33(c) before Labour Court for execution of order of Labour Court due to non-availability of Forum under 1960 Act - Held - Labour Court has jurisdiction to entertain the application - Petition allowed. (Paras 2, 5 & 7)**

औद्योगिक संबंध अधिनियम, म.प्र. (1960 का 27), धाराऐं 31(3), 108 व औद्योगिक विवाद अधिनियम (1947 का 14), धारा 33 सी (2) – याची, लोक स्वास्थ्य एवं यांत्रिकी विभाग में कार्यरत था और जैसा कि विभाग उद्योग था, उसे स्थाई कर्मचारी के रुप में वर्गीकृत किया गया था – वर्गीकरण के विरुद्ध एस.एल.पी. को उच्चतम न्यायालय द्वारा खारिज किया गया – तत्पश्चात संबंधित विभाग को उद्योग की अनुसूची से हटाया गया – अधिनियम 1960 के अंतर्गत फोरम की अनुपलब्धता के कारण याची ने श्रम न्यायालय के आदेश के निष्पादन हेतु श्रम न्यायालय के समक्ष धारा 33(सी) के अंतर्गत आवेदन प्रस्तुत किया – अभिनिर्धारित – श्रम न्यायालय को आवेदन ग्रहण करने की अधिकारिता है – याचिका मंजूर।

Case referred :

1997 SCC (L&S) 1710.

K.N. Pethia, for the petitioner.
Vivek Agrawal, Dy. A.G. for the respondents/State.

ORDER

SANJAY YADAV, J. :- With consent, matter heard finally.

Order dated 14.9.2012 passed by labour Court, Jabalpur has been assailed, whereby an application under Section 33 C (2) Industrial Dispute preferred by the petitioner has been rejected as not tenable.

2. Petitioner engaged as helper on daily wages in the Department of Public Health Engineering, Government of M.P. earlier had approached the labour Court vide application under Section 31 (3), Madhya Pradesh Industrial Relations Act, 1960 (referred to as '1960' Act) seeking permanent classification. The remedy under MPIR Act was sought because at relevant time the Department of Public Health and Engineering was scheduled as Industry under, 1960 Act.

3. The application under Section 31 (3) was allowed on 17.12.1999 classifying the petitioner as permanent with consequential benefits. An appeal thereagainst was dismissed on 9.2.2001. The orders were affirmed in Writ Petition No. 5996/2001 (dismissed on 6.5.2002) and Civil Appeal No. 7380/ 2003 (dismissed on 23.7.2009).

4. That, in the meanwhile vide notification No. F 6-15-04-A-XVI dated 10th October 2005 issued by the State Government in exercise of powers conferred by Sub-Section (3) of Section 1 of 1960 Act deleted the Public Health Engineering from the schedule of Industry. Consequent whereof, the provisions contained in the 1960 Act became inapplicable to the Public Health Engineering with effect from 10.10.2005.

5. The petitioner workman after the dismissal of Civil Appeal No. 7380/ 2003 by the Supreme Court sought the execution of the order passed by labour Court on 17.12.1999 for difference of wages and since the forum under 1960 Act was not available, he filed an application under Section 33 C (2) of Industrial Disputes Act, 1947, which stipulates :-

> "(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to

any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government; within a period not exceeding three months:

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit."

6. Thus, it was pre-adjudicated right which the petitioner was getting executed under the provisions of Section 33 C (2) of 1947 because of non-availability of forum under 1960 Act.

7. The labour Court ignoring these developments and the fact that an application under Section 108 of 1960 Act could not have been entertained because of non-applicability of the provision of 1960 Act to the respondent-industry, rejected the application holding that the same is not tenable.

8. The labour Court in the given facts, as rightly urged by learned counsel for petitioner, grossly erred in rejecting the application.

9. It has been held in *Arka Bikas Chakravorty V. State Bank of India and others* : 1997 SCC (L & S) 1710 that :-

"3. It is well settled in law, as under :

"Where, however, the remedy is repealed, the Court looses its jurisdiction to enforce that remedy and the pending cases must terminate at the stage they have reached when the repeal occurs, since statute affecting remedies are retrospective." (Sutherland : statutory construction (5th Edition)."

10. In view of the proposition of law laid down by the Supreme Court and the given facts of the case, the conclusion arrived at by the labour Court rejecting the application under Section 33 C (2) of 1947 Act cannot be given the stamp of approval.

11. Consequently, the order dated 14.9.2012 is quashed. Matter is remitted to the labour Court for adjudication of application under Section 33 C (2), 1947 Act on merit. Let the same be decided within two months from

the date of communication of this order.

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

Petition allowed.

I.L.R. [2014] M.P., 3138
WRIT PETITION
Before Mr. Justice Sanjay Yadav
W.P. No. 540/2013 (Jabalpur) decided on 27 November, 2013

S.P. SINGH ...Petitioner
Vs.
WEST CENTRAL RAILWAY & ors. ...Respondents

Service Law - Railway Protection Force Rules, 1987, Rules 153, 158 & 217 - Disciplinary Authority **- Appellate Authority while formulating an opinion that the nature of misconduct contemplates a major penalty, dropped the minor penalty charge sheet and remitted the matter to the disciplinary authority for issuance of fresh charge sheet for major penalty - Held - It is apparent from the provisions contained in Rule 217 that it is within the power of the Appellate Authority to set aside, confirm, reduce or enhance punishment or remit the case to the authority which imposed or enhanced the punishment or to any other authority with such direction, as it may deem fit in the circumstances of the case. (Paras 7 & 14)**

सेवा विधि – रेल सुरक्षा बल नियम, 1987, नियम 153, 158 व 217 – अनुशासनिक प्राधिकारी – अपीली प्राधिकारी ने यह अभिमत बनाते समय कि अवचार का स्वरूप गुरूतर शास्ति अनुध्यात करता है, लघु शास्ति का आरोप पत्र समाप्त कर दिया और अनुशासनिक प्राधिकारी को, गुरूतर शास्ति हेतु नया आरोप पत्र जारी करने के लिए मामले को प्रतिप्रेषित किया – अभिनिर्धारित – नियम 217 में अंतर्विष्ट उपबंधों से प्रकट होता है कि यह अपीली प्राधिकारी की शक्ति में है कि वह प्रकरण को अपास्त करें, अभिपुष्ट करें, शास्ति को घटाये या बढ़ाये या शास्ति अधिरोपित करने वाले या बढ़ाने वाले प्राधिकारी को या किसी अन्य प्राधिकारी को ऐसे निदेश के साथ प्रकरण प्रतिप्रेषित करें, जैसा कि प्रकरण की परिस्थितियों में वह उचित समझे।

Anoop Nair, for the petitioner.
N.S. Ruprah, for the respondents.

ORDER

SANJAY YADAV, J. :- Though the matter is posted for consideration of I.A. No. 10476/2013 an application for vacating the stay; however, since pleadings are complete, with consent of learned counsel for the parties, the matter is heard finally.

2. Quashment of orders dated 29.8.2011, 10.5.2012 and 19.12.2012 are being sought vide this petition.

3. Whereas, by order dated 29.8.2011 the petitioner, Inspector, Railway Protection Force, has been visited with a penalty of stoppage of annual increments for three years with non-cumulative effect, in an enquiry on the charge-sheet for minor penalty issued under Rule 158 of The Railway Protection Force Rules, 1987 (referred to as 1987 Rules).

4. That, by order dated 10.5.2012, the Appellate Authority, on an appeal preferred by the petitioner, while dropping the minor penalty charge-sheet has remitted the matter to the Disciplinary Authority with a direction to issue major penalty charge-sheet under Rule 153 of 1987 Rules, A Revision filed there-against has been dismissed by order dated 19.12.2012.

5. Thus, since orders dated 29.8.2011 and 19.12.2012 merged with the Appellate order dated 10.5.2012, it is this order which is being principally challenged.

6. An incident of personal search of 54 persons on 1.10.2010 and 2.10.2010 by the sub-ordinates of petitioner who at relevant time was posted as Incharge, Special Intelligence Wing, Bhopal, resulting in the recovering paltry sum of Rs.500/-, led the Authorities to issue charge sheet for minor penalty under Rule 158 of 1987 Rules on 15.7.2011 by charging the petitioner of lack of control over his sub-ordinate staff. Though the petitioner denied the allegations stating that during the period in question he was on leave, the petitioner was, however, found guilty of the charges of ineffective control over sub-ordinates and was visited with the penalty of stoppage of annual increments for three years, i.e., minor penalty.

7. Being aggrieved, petitioner filed an appeal. The Appellate Authority while formulating an opinion that the nature of misconduct contemplates a major penalty, dropped the minor penalty charge-sheet and remitted the matter to the disciplinary authority for issuance of fresh charge-sheet for major penalty

under Rule 153 of Rules of 1987 by order dated 10.5.2012. Revision filed thereagainst was dismissed on 19.12.2012.

8. The order directing issuance of major penalty charge sheet is on the ground that having proceeded against in respect of an incident with the enquiry for minor penalty culminating into an order of imposition of minor penalty, it is beyond powers of Appellate Authority without recording a descent note and without affording an opportunity of hearing, to remit the matter with a direction to initiate fresh enquiry on same set of charges. It is urged that Appellate Authority has overlooked the fact that the petitioner was on leave during the period when the incident had occurred.

9. On these grounds petitioner seeks quashment of order dated 10.5.2012.

10. The respondents on their turn defend the order. It is stated that it being within the powers of the Appellate Authority under Rule 217 of the Rules, 1987 to drop the charge-sheet and remit the matter for issuing fresh charge sheet for major penalty. It is urged that such decision since does not ipso facto tantamount to imposition of punishment much-less the enhanced punishment, the challenge is premature, as the petitioner on the issuance of charge sheet will get an opportunity to defend himself. It is further contended that since there is no enhancement of punishment, an opportunity of hearing contemplated under the Rules is not attracted and non affording of opportunity, therefore, does not vitiate the order of issuing fresh charge-sheet, as would call for any indulgence.

11. On hearing the rival contentions, the question which crops up for consideration is whether it is within the power of the Appellate Authority when entertaining an appeal against infliction of minor penalty on a minor penalty charge sheet to drop the charge sheet and direct the disciplinary authority to issue fresh charge sheet for major penalty.

12. Whereas, under 1987 Rules, Rule 158 lays down procedure for imposition of minor penalty. It impliedly prohibits imposition of major penalty. On the other hand Rule 153 contemplates procedure for imposition of major penalty. However, even in case where the major penalty charge sheet is issued Rule 154.6 empowers the disciplinary authority having regard to its findings on all or any of the article of charge if is of the opinion that any of the minor punishments should be imposed on the party charged, it shall, notwithstanding anything contained in Rule 158, make an order imposing such punishment.

13. That, Rule 217 of the Rules 1987 lays down the scope of interference in appeal, it stipulates:

"217. Consideration of appeals:

217.1 While considering the appeal, the appellate authority may, on request, grant personal hearing to the aggrieved enrolled member of the Force in case it considers it in the interest of administration and justice.

217.2 In the case of an appeal against an order of suspension, the appellate authority shall consider whether, in the light of the provisions of rules 134 and 135 and having regard to the circumstances of the case, the order of suspension is justified or not and confirm or revoke the order accordingly.

217.3 In the case of an appeal against an order imposing any of the punishments specified in rules 148 and 149 or enhancing any penalty imposed under the said rules the appellate authority shall consider:

(a) whether the procedure prescribed in these rules has been complied with, and if not whether such non-compliance has resulted in violation of any constitutional provisions or in miscarriage of Justice;

(b) whether the findings are warranted and based on evidence on record; and

(c) whether the punishment or the enhanced punishment imposed is adequate or inadequate or severe and pass speaking orders for-

(i) setting aside, confirming, reducing or enhancing the punishment, or

(ii) remitting the case to the authority which imposed or enhanced the punishment or to any other authority with such directions as it may deem fit in the circumstances of the case:

Provided that –

(i) no order imposing an enhanced punishment shall be passed unless the appellant is given an opportunity of

making any representation which he may wish to make against such enhanced punishment; and

(ii) if the enhanced punishment, which the appellate authority purposes, is one of the punishments specified in clauses (a) to (d) of rule 148.2 and an inquiry under rule 153 has not already been held in the case, the appellate authority shall, subject to the provisions of rule 153 itself hold such inquiry or direct that such inquiry be held and thereafter on a consideration of the proceedings of such inquiry pass such orders as it may deem fit."

14. Apparent, it is from the provisions contained in Rule 217 that it is within the powers of the Appellate Authority to set aside, confirm, reduce or enhance punishment or remit the case to the authority which imposed or enhanced the punishment or to any other authority which such direction, as it may deem fit in the circumstances of the case.

15. First proviso to Rule 217.3 stipulates that in case where the punishment is proposed to be enhanced incumbent it would on the Appellate Authority to afford an opportunity of hearing. Thus, hearing is contemplated where there is proposal for enhancement.

16. In the case at hand the appellate authority since has remanded the matter with direction to issue major penalty charge sheet which does not mean that the punishment has been enhanced in such a case, proviso to Rule 217.3 is not attracted. Therefore, non-granting an opportunity of hearing before taking the decision to drop the minor penalty charge sheet and to issue major penalty charge sheet by the appellate authority, in the considered opinion of this Court, will not vitiate the order.

17. The Appellate Authority was well within its power conferred vide Rule 217.3 (c) (ii) of 1987 Rules to have dropped the minor penalty charge sheet and remit the matter with a direction to the disciplinary authority to issue fresh charge sheet under Rule 153 of 1987 Rules for major penalty. The order, therefore, cannot be faulted with.

18. It is further contended by learned counsel for the petitioner that it was the same Appellate Authority who had earlier examined the entire facts and had concluded that petitioner be charge-sheeted for minor penalty and when the said decision has culminated into issuance of minor penalty charge sheet and infliction of minor penalty thereon, the authority acting as an Appellate Authority was not

justified in reviewing the earlier order by directing fresh enquiry with the issuance of major penalty charge-sheet. The scheme of Rule 217 reflects that the Appellate Authority has been conferred with absolute power while considering the appeal either to set aside the punishment order or to confirm, reduce or enhance the punishment. The appellate authority is also empowered to remit the case to the authority which imposed or enhanced the punishment or to any other authority with such directions as it may deem fit in the circumstances of the case. While sitting in appeal the entire record of disciplinary proceeding is there before the Appellate Authority and if he exercises his discretion to review its own order passed on the basis of some prima facie facts, in the considered opinion of this Court, it is within the power of Appellate Authority to do so as there may be mitigating facts which have come on record during course of a disciplinary enquiry as would warrant a severe action against the delinquent officer. The power of the Appellate Authority cannot be conscribed on the anvil of some decision taken on a fact finding enquiry which is generally conducted to ascertain as to whether an employee can be charge sheeted for alleged misconduct.

19. Having thus considered, this Court does not find any error in the decision taken by the Appellate Authority in dropping the minor penalty charge-sheet and remitting the matter to the disciplinary authority for issuance of fresh charge-sheet under Rule 153 of 1987 Rules.

20. Consequently, petition fails and is dismissed.

Petition dismissed.

I.L.R. [2014] M.P., 3143
WRIT PETITION
Before Mr. Justice Alok Aradhe
W.P. No. 18932/2012 (Jabalpur) decided on 11 February, 2014

RAMLAKHAN TRIPATHI ...Petitioner
Vs.
CHIEF MUNICIPAL OFFICER ...Respondent

Municipalities Act, M.P. (37 of 1961), Section 172(2) **- Appeal against the demand of tax which was rejected by the trial court on the ground that the petitioner has failed to deposit the amount claimed from him - Subsequently petitioner has deposited the amount - Held - Section 172(2) does not provide the payment of disputed tax as condition precedent for entertaining an appeal - Such appeal can be**

admitted or entertained only but cannot be heard or disposed of without pre-deposit of the tax - Trial Court has not afforded any opportunity to the petitioner to deposit the amount of tax - Impugned orders are quashed - Matter is remanded to the trial court to deal the same on merits. (Paras 3 & 5)

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 172(2) – कर की मांग के विरुद्ध अपील, जिसे विचारण न्यायालय द्वारा इस आधार पर अस्वीकार किया कि याची, उससे दावा की गई रकम जमा करने में असफल रहा – याची ने तत्पश्चात रकम जमा की है – अभिनिर्धारित – धारा 172(2) विवादित कर के भुगतान को अपील ग्रहण करने हेतु पुरोभावी शर्त के रुप में उपबंधित नहीं करती – उक्त अपील को केवल स्वीकार एवं ग्रहण किया जा सकता है, परन्तु पहले कर को जमा किये बिना सुना या निपटाया नहीं जा सकता – विचारण न्यायालय ने याची को कर जमा करने के लिए कोई अवसर प्रदान नहीं किया – आक्षेपित आदेश अभिखंडित – गुणदोषों पर निर्णित करने के लिए विचारण न्यायालय को मामला प्रतिप्रेषित किया गया।

Cases referred :

(2008) 4 SCC 720, (1993) 1 SCC 22.

Abhishek Arjaria, for the petitioner.
Rajneesh Gupta, for the respondent.

ORDER

ALOK ARADHE, J. :- With the consent of learned counsel for the parties, the matter is heard finally.

2. In this writ petition, the petitioner has challenged the validity of order dated 12.09.2012 and 19.05.2012 passed by the trial Court, by which the revision and the appeal respectively preferred by the petitioner under Section 172 of the Madhya Pradesh Municipalties Act, 1961 (hereinafter in short referred to as 'the Act') have been rejected.

3. Learned counsel for the petitioner submits that the petitioner had preferred an appeal under Section 172 (2) of the Act against the demand notice dated 2.3.2006. The petitioner after dismissal of appeal had deposited entire amount mentioned in demand notice dated 2.3.2006 in the office of Municipal Council. However, the trial Court has rejected the appeal preferred by the petitioner on the ground that the petitioner has failed to deposit the amount claimed from him. Learned counsel for the petitioner submits that the

order passed by the trial Court is patently erroneous and illegal. On the other hand, learned counsel for the respondent has supported the order passed by the trial Court.

4. I have considered the submissions made by learned counsel for the parties. It is well settled in law that right to appeal is a statutory right and it can be circumscribed by the conditions of the statute granting it. When statute confers right of appeal, the legislature can impose conditions for the exercise of such right. (See : *Government of Andhra Pradesh and Others Vs. P. Laxmi Devi* (2008) 4 SCC 720). In the case of *Shyam Kishore and Others Vs. Municipal Corporation of Delhi and Another*, (1993) 1 SCC 22 vide interpreting a *pari-materia* provision contained in Section 170 of the Delhi Municipal Corporation Act, 1957 (hereinafter in short referred to as "the Act, 1957) held that the expression "no appeal shall be heard or determined" used by the legislature mentioned in Section 170 of the Act, 1957 indicate that the payment of tax is not condition precedent to the entertainment or admission of the appeal. Such appeal can be admitted or entertained but only can be heard or disposed of without pre-deposit of the disputed tax. In the backdrop of the aforesaid well settled legal provision Section 172 of the Act may be seen which reads as under :

> **172. Appeal to Civil Judge.** - (1) ------
>
> (2) No such appeal shall be heard and determined unless-
>
> (a) the appeal is brought within 15 days next after presentation of the bill complained of;
>
> (b) an application, in writing, stating the ground on which the claim of Council is disputed, has been made to the Council in the case of a rate on building or land within the time fixed in the notice given in accordance with the provisions of the Act or the rules made thereunder or of the assessment or alteration thereof, according to which the bill is prepared ;
>
> (c) the amount claimed from the appellant has been deposited by him in the Municipal office.

5. From perusal of Section 172 (2) of the Act, it is evident that the expression "heard and determined" has been used in Section 172 (2) of the Act. The payment of disputed tax is not condition precedent for entertaining

an appeal. Such an appeal can be admitted or entertained but only cannot be heard or disposed of without pre-deposit of the tax. In the instant case, the trial Court has not afforded any opportunity to the petitioner to deposit the amount of tax and has held the appeal to be not maintainable.

6. In view of preceding analysis, the order passed by the trial Court cannot be sustained in the eye of law. The petitioner has already deposited the amount in question. The impugned orders dated 19.05.2012 and 12.09.2012 are hereby quashed. The matter is remanded to the trial Court to decide the appeal preferred by the petitioner on merits in accordance with law.

7. Accordingly, the writ petition stands disposed of.

Certified copy as per rules.

Petition disposed of.

I.L.R. [2014] M.P., 3146
WRIT PETITION
Before Mr. Justice R.S. Jha
W.P. No. 3904/2008 (Jabalpur) decided on 15 October, 2014

SHRAWAN KUMAR CHAURASIA ...Petitioner
Vs.
CHIEF MUNICIPAL OFFICER ...Respondent

Industrial Disputes Act (14 of 1947), Section 25-F - Daily wager retrenched **- Petitioner was engaged only to perform temporary work in place of a suspended employee - Worked only for 270 days in the year 1994-95 - Compensation of Rs. 30,000/- in place of reinstatement would be granted. (Paras 10 & 11)**

औद्योगिक विवाद अधिनियम (1947 का 14), धारा 25-एफ – दैनिक वेतन भोगी की छंटनी – याची को निलंबित कर्मचारी के स्थान पर केवल अस्थायी कार्य करने हेतु लगाया गया था – वर्ष 1994-95 में केवल 270 दिवस कार्य किया – पुनःस्थापन के स्थान पर 30,000/–रुपये प्रतिकर प्रदान किया जायेगा।

Cases referred :

(2012) 1 SCC 558, (2013) 5 SCC 136, 2014 AIR SCW 1383.

Rajneesh Gupta, for the petitioner.
Varun Singh, for the respondent.

ORDER

R.S. JHA, J. :- The petitioner has filed this petition being aggrieved by award dated 15.01.2008 passed by the Presiding Officer, Labour Court, Satna whereby the dispute referred to it regarding illegal retrenchment of the petitioner has been dismissed and rejected.

2. It is submitted by the learned counsel appearing for the petitioner that the claim of the petitioner has been rejected by recording a finding to the effect that the petitioner had worked with the respondent on daily wages for a limited period of 89 days only and therefore as he has not worked for continuous period of 240 days, he is not entitled to any benefit or relief under Section 25-F of the Industrial Disputes Act, 1947.

3. Learned counsel for the petitioner submits that the Labour Court while dismissing the claim of the petitioner has totally ignored the document (EX.P/2) filed by him which was a certificate issued by the Chief Municipal Officer, Municipal Council, Maihar dated 15.05.1995 to the effect that the petitioner has worked in the establishment of respondent from 02.05.1994 to 15.05.1995.

4 The counsel for the petitioner further states that the Labour Court has also not taken into consideration the note-sheets of the respondent-Municipality which have been brought on record and which clearly indicate that the petitioner had been engaged as a daily wager w.e.f. 28.09.1994 till June, 1995.

5. Learned counsel for the petitioner further submits that the Labour Court has also not taken into consideration the admission made by the Chief Municipal Officer i.e. witness No.1 for the respondent wherein he has clearly admitted that the petitioner had rendered services in the establishment of Municipality from 28.09.1994 to June 1995 which comes to 273 days.

6. It is submitted that in view of the aforesaid admitted and undisputed facts, the finding recorded by the Labour Court is perverse, contrary to law and deserves to be set aside.

7. Learned counsel appearing for respondent-Municipality per contra submits that the petitioner was engaged on temporary basis for a period of 89 days on account of suspension of one Shri Shashi Kumar, who was working as a Typist in the establishment. It is submitted that the petitioner was permitted to work only for 89 days and thereafter he was disengaged and therefore no

fault can be found with in the impugned order passed by the Labour Court.

8. However, when the learned counsel for the respondent is strictly put to question in respect to admission made by the Chief Municipal Officer witness no.1 for the Municipality and the document Ex.P/2 and the note-sheets of the municipality, he is unable to explain the admission made therein to the effect that the petitioner had been continuously engaged by them to do typist work in place of suspended employee from 28.09.1994 to June 1995.

9. In view of the aforesaid facts and circumstances and the admission made by the respondent and their statement as well as document regarding engagement of the petitioner for more than 270 days, I find that order passed by the Labour Court dismissing the reference is unsustainable as it suffers from perversity and therefore the same is accordingly set aside.

10. At this stage, the learned counsel for the parties are heard on the question of the relief of reinstatement. The Supreme Court in the case of *Bharat Sanchar Nigam Limited vs. Man Singh* (2012) 1 SCC 558, *Assistant Engineer, Rajasthan Development Corporation and another vs. Gitam Singh* (2013) 5 SCC 136 and *Hari Nandan Prasad and Anr. v. Employer I/R to Management of PCI and Anr.* 2014 AIR SCW 1383 has held that a daily wager who is engaged for a short period of time without following any procedure provided by law and is thereafter disengaged, is not entitled to reinstatement even if he has worked for more than 240 days and the appropriate relief in such cases is to award compensation.

11. In the facts of the present case as it is apparent that the petitioner was engaged only to perform temporary work in place of a suspended employee and has worked only for 270 days in the year 1994-95 and in view of the law laid down by the Supreme Court, the present petition is partly allowed and it is ordered that the respondent-Municipality in place of reinstatement would grant compensation to the petitioner to the tune of Rs. 30,000/- (Rupees Thirty Thousand). The said amount shall be disbursed to the petitioner by the respondent-Municipality at the earliest preferably within a period of three months, failing which the petitioner would be entitled to interest on banking rates on the amount of compensation till the date of its realization.

12. The petition is accordingly allowed in part to the extent indicated hereinabove.

Petition partly allowed.

I.L.R. [2014] M.P., 3149
WRIT PETITION
Before Mr. Justice Sheel Nagu
W.P. No. 274/2014 (Gwalior) decided on 27 October, 2014

PERNOD RICARD INDIA (P) LTD. (M/S) ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Foreign Liquor Rules, M.P. 1996, Rule 19(2) - Exemption **- M.P. Foreign Liquor Rules, 1996 and the M.P. Excise Act are meant to ensure maximum revenue to the State and therefore every clause prescribing exemption is to be strictly construed so that the same is not misused by anyone claiming exemption. (Para 10)**

विदेशी मदिरा नियम म.प्र. 1996, नियम 19(2) – छूट – म.प्र. विदेशी मदिरा नियम 1996 व म.प्र. आबकारी अधिनियम का उद्देश्य राज्य के लिए अधिकतम राजस्व सुनिश्चित करना है और इसलिए छूट को विहित करने वाले प्रत्येक खंड का अर्थान्वयन कठोर रुप से करना चाहिए, जिससे कि छूट का दावा करने वाला कोई उसका दुरुपयोग न कर सके।

Cases referred :

2001(4) MPLJ 482, (2005) 1 SCC 368, (2012) 3 SCC 593.

S.K. Shrivastava, for the petitioner.
Praveen Newaskar, Dy. G.A. for the respondents/State.

ORDER

Sheel Nagu, J. :- This order disposes of a bunch of petitions registered as Writ Petitions No.274/2014, 277/2014, 278/2014, 280/2014, 275/2014, 276/2014 and 279/2014. The issue involved in these petitions is the same.

2. This bunch of petitions involves three different kinds of cases. The first being WP No.274/2014, in which FIR was not only lodged but also filed alongwith the pleadings before the Excise Commissioner for claiming the benefit of proviso to Rule 19 (2) of the M.P. Foreign Liquor Rules, 1996 (for brevity "Rules of 1996"); second category of the cases is WPs No. 277/2014, 278/2014 and 280/2014 where no FIR was produced as the same was not available and instead a certificate issued by the Police Station concerned was brought on record to claim the abovesaid benefit; and the third and last category of

the cases is WPs no.275/2014, 276/2014 and 279/2014 where no offence was registered, but the factum of accident of the truck carrying the liquor having taken place was reported to the Police Station concerned and the intimation in that regard has been brought on record not only herein but even alongwith the pleadings before the Excise Commissioner.

3. Learned counsel for petitioner assailing the orders passed by the Board of Revenue, Excise Commissioner and the Deputy Excise Commissioner contends that there has been no application of mind by way of a fact finding enquiry as to whether the deficiency in excess of limits prescribed under Rule 16 of the Rules of 1996 was due to unavoidable circumstances beyond the control of the petitioner. It is submitted that despite the requisite material having been filed in shape of FIR/certificate issued by the Police Station concerned/ intimation in regard to the accident to the Police Station, and the same having been brought on record, the Commissioner Excise has failed to exercise the jurisdiction vested in him under the proviso to Rule 19 (2) of the Rules of 1996. It is, thus, contended that in view of the above, the orders passed by all the three forums below are vitiated in law.

4. Learned counsel for State, on the other hand, relying upon the decision of the Single Bench of this Court rendered in the case of *Pooja Marketing Agencies v. Excise Commissioner* : 2001 (4) MPLJ 482 submits that the burden of establishing that the deficiency, in excess of limits prescribed under Rule 16 of the Rules of 1996, was occasioned by circumstances beyond the control of the petitioner, lies heavily upon the petitioner. It is the duty of the petitioner to prove to the satisfaction of the Excise Commissioner by producing material and cogent evidence that unavoidable circumstances or causes beyond the control of the petitioner occasioned the loss in excess of the prescribed limits under Rule 16 of the Rules of 1996. But, it is contended that the petitioner has failed to discharge this burden and, therefore the petition is liable to be dismissed.

5. For convenience and ready reference, the relevant provision,i.e.,Rule 19 is reproduced below :-

> **"19. Penalties.**- (1) Without prejudice to the provisions of the Act, or conditions No.4 of licence in Form F.L. 1, conditions No.7 of licence in Form F.L.2, condition No.4 of licence in Form F.L.3, the Excise Commissioner or the

Collector may impose a penalty not exceeding Rs. 50,000 for contravention of any of these rules or the provisions of the Act or any other rules made under the Act or the order issued by the Excise Commissioner.

2. on all deficiencies in excess of the limits allowed under Rule 16 and Rule 17, the F.L. 9 or F.L. 9A, F.L. 10-A or F.L.10-B licensee shall be liable to pay penalty at a rate exceeding three times but not exceeding four times the maximum duty payable on foreign liquor at that time, as may be imposed by the Excise Commissioner or any officer authorised by him:

Provided that if it be proved to the satisfaction of the Excise Commissioner or the authorised officer that such excess deficiency or loss was due to some unavoidable cause like fire or accident and its first information report was lodged in Police Station, he may waive the penalty impossible under this sub-rule.

3. The Excise Commissioner or the Collector may suspend or cancel the licence under Section 31 of the Act upon a contravention of nay of these rules or provisions of the Act, or any other rules made under the Act, or the orders issued by the Excise Commissioner."

6. Considering the rival contentions of the parties and perusal of the original records of the Board of Revenue and as well as of the Excise Commissioner,it is crystal clear that in only one case, i.e. WP No.274/2014, an FIR was brought on record before the Excise Commissioner; whereas in the other three cases, i.e., WPs No. 277/2014, 278/2014 and 280/2014, the certificate issued by the Police Station concerned certifying the accident having taken place, resulting into certain loss was produced by the petitioner; while in all other cases, a mere intimation by the petitioner having been made to the concerned Police Station about the accident, was brought on record before the Commissioner Excise.

7. True, it is that the provision contained in proviso to Rule 19 (2) of the Rules of 1996 mentions production of an FIR as a proof of the unavoidable circumstances of an accident leading to loss in excess of the prescribed limit

as a condition precedent to exercise of discretion by the Excise Commissioner in favour of the person claiming benefit of the proviso, but the fact remains that the said proviso employs the term "accident" or "fire" as an illustration and not exhaustively. Thus, the term "First Information Report" mentioned in the said proviso also relates to one of the illustrative example of proof of "accident" or "fire". Thus, mere non-production of an FIR as proof of an accident cannot by itself be sufficient to render the person ineligible to seek benefit of the proviso to Rule 19 (2), provided some other cogent material or evidence is shown. Whether the material produced is cogent or not is for the competent authority to decide after holding a summary enquiry in which the least that is required is to comply with the principles of natural justice. It is only then that the discretion vested by the said proviso shall be treated to have been exercised in a fair and judicious manner eliminating the vice of arbitrariness from coming into play.

8. Thus, the respondents have adopted a pedantic approach that in absence of FIR, the discretion cannot be exercised in favour of the petitioner under the proviso to Rule 19 (2) of the Rules of 1996.

9. In the instant case, the nature of accident is not known. It was, thus, incumbent upon the Excise Commissioner to have embarked upon a fact finding enquiry on the material produced by the petitioner and, thereafter coming to a reasonable finding as to whether the deficiency in excess of the limits prescribed under Rule 16 of the Rules of 1996 is occasioned by an unavoidable circumstances or not. The impugned orders of the Board of Revenue as well as the Commissioner Excise are silent in this respect.

10. This Court at this juncture reminds itself of the fact that the M.P. Foreign Liquor Rules, 1996 and the M.P. Excise Act are meant to ensure maximum revenue to the State and therefore every clause prescribing exemption is to be strictly construed so that the same is not misused by anyone claiming exemption. Reference may be had to the decisions of the Apex Court rendered in *State of Jharkhand & Others v. Ambay Cements & Another* : (2005) 1 SCC 368 (Para 24) and *Topman Exports v. Commissioner of Income Tax, Mumbai* : (2012) 3 SCC 593 (Para 39).

11. Reliance placed by the State counsel on the decision *Pooja Marketing Agencies* (supra) is of no assistance since the said decision does not relate at all to the penalty clause contained in Rule 19 (2) of the Rules of 1996.

12. In view of the above discussion, this Court is of the considered view that the Excise Commissioner has not exercised the discretion vested in him in the proviso to Rule 19 (2) of the Rules of 1996, in a lawful and judicious manner as recognized by the law.

13. Accordingly, all the petitions are allowed. The impugned orders passed by the Board of Revenue as well as the Excise Commissioner on 10.12.2013 (Annexure P/1) and 02.05.2013 (Annexure P/3) respectively are set aside. The Excise Commissioner is directed to conduct an enquiry into the fact as to whether the deficiencies in excess of the limits prescribed under Rule 16 of the M.P. Foreign Liquor Rules, 1996 as claimed by the petitioner occurred on account of circumstances beyond the control of the petitioner or not after giving due and sufficient opportunity to the petitioner and all concerned.

14. The parties are directed to appear before the Excise Commissioner, Gwalior on 18th. November, 2014.

15. Petitions are allowed to the extent indicated above.

16. No order as to cost.

Petition allowed.

I.L.R. [2014] M.P., 3153
WRIT PETITION
Before Mr. Justice Rohit Arya
W.P. No. 1388/2012 (Gwalior) decided on 10 December, 2014

KULWANT SINGH ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

Transfer of Property Act (4 of 1882), Section 82 - Attempt to sell suit property **- Doctrine of Lis Pendence - Imposes a prohibition of transfer or otherwise dealing of any property during the pendency of a suit - No stay against alienation or creation of third party rights in the suit property, cannot be countenanced - Same is found to be not only against the principle u/s 52 but also an attempt to seek legal recognition of transfer of title by suppression and misrepresentation of facts. (Paras 7, 14)**

सम्पत्ति अन्तरण अधिनियम (1882 का 4), धारा 82 — वाद सम्पत्ति के विक्रय

का प्रयास – विचाराधीन वाद का सिद्धांत – वाद लंबित रहने के दौरान किसी सम्पत्ति का अंतरण या अन्यथा निपटारा पर प्रतिषेध अधिरोपित करता है – वाद सम्पत्ति में तृतीय पक्षकार के अधिकारों का सृजन या हस्तांतरण के विरुद्ध कोई रोक नहीं, का समर्थन नहीं किया जा सकता – इसे न केवल धारा 52 के अंतर्गत सिद्धांत के विरुद्ध पाया जाता है, बल्कि तथ्यों के छिपाव और दुर्व्यपदेशन द्वारा हक के अंतरण को विधिक मान्यता चाहने का प्रयास भी है।

Cases referred :

(1857) 1 De G & J 566, (2005) 11 SCC 403.

J.P. Mishra, for the petitioner.

N.S. Kirar, P.L. for the respondent/State.

D.D. Bansal, for the applicants/intervenors, Ramnarayan & ors. in I.A. No. 830/2013

ORDER

Rohit Arya, J. :- By this petition under Article 226 of the Constitution of India, petitioner, Kulwant Singh s/o Inder Singh has sought for a direction to the respondent No.3, Sub-Registrar to register the sale deed dated 20/04/2011.

2. Relevant facts for disposal of this petition are in narrow compass:

3. There is a title dispute pending in the form of S.A.No.609/2008 (Ramnarayan and others Vs. Savitri Bai and others). The applicants/intervenors are the appellants and vendors shown in the aforesaid sale deed are respondents in the second appeal.

4. This Court while admitting S.A.No.609/2008 on 17/02/2010 has framed the following substantial questions of law and as a measure of interim protection under Order XLI Rule 5 CPC (I.A.No.1031/2006) had directed that the status quo as regards possession of the suit property shall be maintained by the parties.

> "(i) Whether the Courts below were justified in decreeing the suit for declaration and exclusive possession of ½ share without there being any relief of partition claimed by the plaintiffs in the plaint?
>
> (ii) Whether in absence of a specific challenge being made by

the plaintiffs against the execution of the Will, the finding regarding execution of Will would sustain, in view of the specific Evidence adduced by the Defendants?

(iii) Whether the Suit as filed by the Plaintiffs was barred by Limitation and was not maintainable?

(iv) Whether the Suit was liable to be dismissed for want of non payment of requisite court fee and for mis joinder of parties?

(v) Whether the judgment, decree and findings are perverse and contrary to law and passed ignoring the admissions and based on wrong assumptions of facts and law?

The aforesaid order was made absolute on 20/03/2010.

5. It appears that after admission of the appeal, the draft sale deed was prepared on 20/04/2011 in respect of the suit property wherein the petitioner is shown to be purchaser and the respondents in second appeal as sellers. Intervenors having come to know about the aforesaid sale deed have submitted objections before the Sub-Registrar objecting to the registration of the sale deed in the light of pendency of the second appeal wherein substantial questions of law have been framed in the context of the aforesaid dispute between the parties and the interim order passed by this Court therein for maintenance of *status quo* as regards possession of the suit property.

6. The intervenors have also filed a contempt petition vide Cont. Case No.134/2013 on 11/02/2013 alleging contempt of Court's order as respondents in the second appeal have in order to transfer the suit property had prepared the sale deed to be executed in favour of the petitioner despite interim orders passed by this Court on 17/02/2010 and 20/03/2010 (supra). It is also stated in the contempt petition that a writ petition has also been filed by the prospective buyer seeking a direction for registration of sale deed without impleading the appellants in the second appeal as party to the writ petition. Since then, the contempt petition is pending for consideration.

7. Applicants in the contempt petition have filed an application for intervention (I.A.No.830/2013) in this writ petition opposing the relief claimed in the writ petition by the petitioner. It is pleaded that perusal of the sale deed reflects that there is material suppression of facts misleading

in nature and highly prejudicial to the appellants in S.A.No.609/2008 (supra). In fact, the sale deed is sought to be executed behind back of the applicants/intervenors on the strength of misrepresentation of facts. It is further pleaded in the application that the aforesaid sale deed dated 20/04/2011 bears a stipulation that the vendors/respondents in S.A.No.609/2008 (supra) have title and are in possession over the suit property. They have exclusive right to transfer the same and vendee/ purchaser has been delivered the possession of the suit property. There is no mention of the fact that S.A.No.609/2008 (supra) in respect of the suit property is pending consideration before the High Court and interim orders have been passed therein. It is further pleaded that in the judgment and decree passed, the trial Court has found that the applicants/appellants in S.A.No.609/2008 (supra) are in possession over the suit property and the respondents/vendors in the said second appeal held entitled to take possession from the appellants after partition of the suit property. As such, a false statement has been made in the sale deed that possession has been delivered to the vendee/purchaser; it reflects ulterior motive of parties to the sale deed dated 20/04/2011 to deceive the appellants in S.A.No.609/2008 (supra). With the aforesaid pleadings, it is submitted that in fact, in the light of substantial questions of law framed and interim orders passed by this Court in S.A.No.609/2008 (supra), the Sub-Registrar, Registration Office, District Ashok Nagar (respondent No.3) was fully justified having refused to register the sale deed dated 20/04/ 2011. Moreover, counsel for the intervenor submits that principles underlying section 52 of the Transfer of Property Act prohibits transfer of the property during pendency of the lis of the nature in hand. It is submitted that dispute between parties to the suit relates to the title of the suit property. Substantial questions of law framed by this Court while admitting S.A.No.609/2008 (supra) relates to determination of entitlement of share of parties to the suit in the suit property as the right to the suit property is being claimed by parties with divergent assertion namely; partition claimed by one party and existence of "will" claimed by the other party. With the aforesaid submissions, it is prayed that the writ petition deserves to be dismissed.

8. The respondents/State filed the counter-affidavit and denied the relief claimed by the petitioner on the reasoning as has been shown by intervenors.

9. Counsel for the petitioner contends that the Sub-Registrar (respondent

No.3) has fallen in error having refused to register the sale deed dated 20/04/2011 for the reason of interim order passed by this Court in S.A.No.609/2008 (supra). It is submitted that the aforesaid interim order was only in relation to the maintenance of *status quo* by parties as regards possession of the suit property. There is no stay against alienation or creation of third party rights in the suit property. It is further submitted that in any case, the sale deed so executed is always subject to the decision in S.A.No.609/2008 (supra). With the aforesaid submissions, it is prayed that the Sub Registrar (respondent No.3) be commanded to register the sale deed dated 20/04/2011.

10. Heard.

11. Section 52 of the Transfer of Property Act in fact is a doctrine of *lis pendens* which is expressed in maxim *'ut lite pendentet nihil innovetur'*. It imposes a prohibition of transfer or otherwise dealing of any property during the pendency of a suit, provided the conditions laid down in the section are satisfied. The principle on which the doctrine rests is explained in the leading case of *Bellamy Vs. Sabine,* (1857) 1 De G & J 566 pp 578, 584 where LJ Turner said:

> "It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings *de novo,* subject again to be defeated by the same course of proceeding."

12. In the case of *Amit Kumar Shaw and another Vs. Farida Khatoon and another,* (2005) 11 SCC 403, the Hon'ble Supreme Court has dealt with the scope and object of section 52 of the Transfer of Property Act and held as under:

> "15. Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that *pendente lite*, neither

party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a *lis pendens*, the following elements must be present:

1. There must be a suit or proceeding pending in a court of competent jurisdiction.
2. The suit or proceeding must not be collusive.
3. The litigation must be one in which right to immovable property is directly and specifically in question.
4. There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.
5. Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order."

13. Undisputedly, title dispute between the appellants and the respondents in S.A.No.609/2008 (supra) is pending for consideration in this Court. The aforesaid second appeal was admitted on five substantial questions of law; the first two relates to the title asserted by either of the parties based on claim of share in partition and existence of 'will'. The trial Court has found possession of the suit property with the appellants in S.A.No.609/2008 (supra). This Court while admitting the appeal has directed maintenance of *status quo* by the parties as regards possession. Under such circumstances, as a matter of fact, in all fairness, no third party rights should be allowed to be created which shall lead to multiplicity of the litigation against the judicial discipline and shall certainly have substantial bearing of *inter se* rights of the parties with prejudicial consequences. Further, the stipulation in the draft sale deed is to the effect that the vendors have exclusive rights and they are in possession and they have handed over the possession to the purchaser (petitioner in the present writ petition) appear to be *de hors* reasoning as there is no mention of the following therein:

(i) as regards title dispute, pendency of S.A.No.609/2008

(supra);

(ii) seeking relief of writ of Mandamus in the instant writ petition; the direction to the Sub-Registrar (respondent No.3) to register the sale deed dated 20/04/2011 without making either appellants or respondents in S.A.No.609/2008 (supra) as parties;

(iii) pendency of Contempt Case No.134/2013 with effect from 11/02/2013; and

(iv) interim order dated 17/02/2010 passed for maintaining *status quo* as regards possession of the suit property and the said order made absolute vide order dated 20/03/2010; are the circumstances which reflect on the conduct of the petitioner in collusion with the respondents' in S.A.No.609/2008 (supra).

Therefore, the counsel for the intervenor/applicants is right when he contends that the aforesaid sale deed dated 20/04/2011 is in fact an evil design to deceive the appellants and their valuable right to the suit property and to render S.A.No.609/2008 (supra) of no consequence. Besides, the same is the outcome of the collusion between the petitioner and the respondents in S.A.No.609/2008 (supra) with ulterior motive.

14. The submission of counsel for the petitioner that there is no stay against alienation or creation of third party rights in the suit property, therefore, there is no prohibition in execution of the sale deed in issue cannot be countenanced and in fact, the same is found to be not only against the principles underlying section 52 of the Transfer of Property Act but also an attempt to seek legal recognition of transfer of title by suppression and misrepresentation of facts. This cannot be permitted as our legal system does not approve of the same founded on principles of rule of law, justice, equity and good conscience.

15. In view of the aforesaid, in the opinion of this Court, no equitable discretionary relief can be granted to the petitioner in exercise of the extraordinary Constitutional jurisdiction under Article 226 of the Constitution of India. The petition is devoid of merit is hereby dismissed. No order as to costs.

Petition dismissed.

I.L.R. [2014] M.P., 3160
APPELLATE CIVIL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
F.A. No. 28/2006 (Indore) decided on 4 February, 2013

HARIBABU & anr. ...Appellants
Vs.
HIMMAT SINGH & ors. ....Respondents

A. Limitation Act (36 of 1963), Article 54 - Limitation for Specific Performance of Contract - **Defendant denied to execute the sale deed by sending reply to notice on 17.10.2000 - Period of three years would start from the date of denial i.e. 17.10.2000 - Prayer for Specific Performance made in the year 2004 - Suit for specific performance of contract barred by limitation. (Paras 9, 19)**

क. परिसीमा अधिनियम (1963 का 36), अनुच्छेद 54 – संविदा के विनिर्दिष्ट पालन हेतु परिसीमा – प्रतिवादी ने 17.10.2000 को नोटिस का जवाब भेजकर विक्रय विलेख का निष्पादन करने से इंकार किया – तीन वर्ष की अवधि, इंकार की तिथि अर्थात 17.10.2000 से आरंभ होगी – विनिर्दिष्टि पालन हेतु प्रार्थना वर्ष 2004 में की गई – संविदा के विनिर्दिष्टि पालन हेतु वाद परिसीमा द्वारा वर्जित।

B. Civil Procedure Code (5 of 1908), Order 2 Rule 2 - **Civil Suit for injunction simplicitor was filed and injunction was granted - Plaintiffs could have sought relief of specific performance of contract in the first Suit - Subsequent suit is barred under Order 2 Rule 2 C.P.C. (Para 18)**

ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 2 नियम 2 – सादा व्यादेश हेतु सिविल वाद प्रस्तुत किया गया और व्यादेश प्रदान किया गया – वादीगण, प्रथम वाद में संविदा के विनिर्दिष्ट पालन का अनुतोष मांग सकते थे – पश्चातवर्ती वाद, सि.प्र.सं. के आदेश 2 नियम 2 के अंतर्गत वर्जित।

Cases referred :

2008(1)MPLJ 119, 2001(1) JLJ 278.

B.L. Pavecha with *Nitin Phadke*, for the appellants.
Vinay Zelawat, for the respondents No. 1 & 3.
Vivek Dalal, for the respondents No. 4 to 7.

JUDGMENT

The Judgment of the Court was delivered by : **M.C. GARG, J. :-** Present first appeal has been filed by the appellants being aggrieved of the judgment and decree passed by the 2nd Additional District Judge, Mandsaur dated 30th of September, 2003. By the impugned judgment, learned Additional District Judge has dismissed the suit filed by the appellants for specific performance of the suit property on the basis of agreement executed between them on 04th of September, 1998 as barred by limitation as also barred under the provisions of Order II Rule 2 of CPC

2. Briefly stating the facts giving arise to filing of this appeal are

(i) that on 04th of September, 1998, an agreement was executed between the appellants and respondent nos. 1 to 3 for purchase of immovable property located in Survey nos. 55, 42, 44/2 and 53 measuring total area 2.957 hectares (approx, 14.62 bighas) situated at village Tigriya, Distriect-Mandsaur at the rate of Rs.1,11,111/- per bigha. On the date of agreement, the vendors i.e. respondent nos. 1 to 3 were paid an amount of Rs.2,01,001/- in cash by way of advance and the balance sale price was to be paid by or before 04th of March, 1999. On that date, on receiving the payment, respondents were to hand over the possession of the suit property and were to execute the registered sale deed in favour of the appellants.

(ii) On 19th of January, 1999, the appellants paid further sum of Rs.50,000/- towards sale consideration to the respondents and acknowledge thereof was executed by the respondents on the overleaf of agreement (Ex.-P/1).

(iii) Further development took place when, sale deed of suit portion of the property was registered by the respondents in favour of the appellants with respect to land located in survey no. 44/2 measuring area 0.689 hectares and survey no. 53 measuring area 0.523 hectares for a sum of Rs. 2,76,000/-, which was paid by way of cheques as stated in the sale deed (Ex.-P/3 and Ex.-P/4). According to the appellants, balance amount was paid in cash which is denied

by the respondents no. 1 to 3.

(iv) Accordingly, after execution of the sale deed (Ex.-P/3 and Ex.-P/4), dispute arose between the parties that the amount which was shown to have been paid by way of cheques was not the full amount and balance amount was still payable at the rate of Rs.1,11,111/- per bigha and that balance amount was not paid by the appellants to respondent nos. 1 to 3.

(v) A civil suit was filed by the appellants seeking temporary injunction for restraining the vendors from transferring the balance suit property in favour of any third party. The said injunction was granted in civil suit no. 312-A/1998 on 12th of May, 2000. It is matter of record that despite provisions contained in Order II Rule 2 of CPC, no relief for specific performance to the agreement was sought in this case.

3. It is a matter of record that when the aforesaid suit was filed, the appellants did not ask the respondents to execute the sale deed of the balance land in terms of the agreement dated 04th of September, 1998 without giving any permission to differ such relief in accordance with the provision of Order II Rule 2 of CPC.

The appellants then served the respondents with a legal notice calling upon them to hand over the possession of the balance property and also to execute the sale deed of the remaining property. For the sake of reference, the said notice (Ex.-P/18) is reproduced hereunder :

कार्यालय – ए.के. पोरवाल, एडव्होकेट, 17, गुरूनानक मार्क,
नई आबादी,
मन्दसौर

दिनांक 20/09/2000

प्रति,

1. हिम्मतसिंह पिता सज्जनसिंहजी राजपूत,
निवासी भीलवाड़ा (राज.)

2. रणजीतसिंह पिता सज्जनसिंहजी राजपूत,
निवासी भीलवाड़ा (राज.)

3. श्रीमती लीलादेवी बेवा सज्जनसिंहजी राजपूत,
निवासी भीलवाड़ा (राज.)

महोदय,

आपको यह सूचना–पत्र मेरे पक्षकार हरिबाबू पिता अम्बालालजी जायसवाल निवासी मंदसौर व श्रीमती शकुंतला देवी पति हरिबाबू जायसवाल निवासी मंदसौर द्वारा प्राप्त सूचनाओं के आधार पर एवं की ओर से निम्नानुसार दिया जाता है :–

1. यह कि आपने अनुबंध दिनांकित 4/9/98 जो कि दिनांक 5/9/98 को नोटरी द्वारा तस्दीक किया गया है, से ग्राम–टिगरिया तहसील व जिला मंदसौर की कृषि भूमि खाता नंबर 179 सन् 96–97 के सर्वे नंबर 44/2 रकबा 0.689 आरी तथा सर्वे नंबर 46 रकबा 1.358 आरी, सर्वे नंबर 52 रकबा 0.387 आरी तथा सर्वे नंबर 53 रकबा 0.523 आरी, कुल सर्वे नंबर 4, जिनका कुल रकबा 2.957 आरी को अपने स्वामित्व, स्वत्व एवं आधिपत्य तथा हर प्रकार के आड़, भार, कर्ज, बोझ तथा मुख्य रूप से हर किस्मी वाद, विवाद से मुक्त होना बताकर विकय करने का सौदा रूपया 1,11,111=00 एक लाख, ग्यारह हजार एक सौ ग्यारह प्रतिबीघा यानी 0.209 आरी के मान से किया था तथा सौदे की साई पेटे एडवांस में रूपया 2,01,001=00 दो लाख, एक हजार एक नकद प्राप्त कर अनुबंध–पत्र पर अपने हस्ताक्षर कर दिये तथा गवाही गवाहान करवा कर व अनुबंध–पत्र को नोटरी से तस्दीक करवा कर मेरे पक्षकार को दे दिया।

2. यह कि जमीन का मौके पर कब्जा देकर रजिस्ट्री करवाने की शर्त ठहरी थी।

3. यह कि आपने दस्तावेज विकय–पत्र पंजीयन कमांक–3746 दिनांक 31/3/99 तथा दस्तावेज विकय–पत्र पंजीयन कमांक 3745 दिनांक 31/3/99 उप पंजीयक कार्यालय, मंदसौर से मेरे पक्षकार का बिना मौके पर जमीन का कब्जा दिये तथा विवाह के लिये रूपयों की नितान्त आवश्यकता बताकर भूमि सर्वे नंबर 53 रकबा 0.523 आरी तथा सर्वे नंबर 44/2 रकबा 0.689 आरी की बेचान रजिस्ट्री कमशः रूपया 1,20,000=00 तथा 156000/–की करवा दी तथा उक्त विकय–पत्रों में यह कहकर मुजरा नहीं की कि अभी–अभी नंबरों की ओर बेचान रजिस्ट्री करवाना बाकी है, उसमें मुजरा कर लेंगे।

4. यह कि दस्तावेज विकय–पत्र का पंजीयन करवाने के बाद मेरे पक्षकार को ज्ञात हुआ है कि विकय की गई व सौदे की जमीन विवादित है। आपका कब्जा मौके पर नहीं था और न है तथा न्यायालय में विवाद भी चल रहे हैं तथा आज दिन तक विकय की गई जमीन का मेरे पक्षकार को मौके

पर कब्जा न तो दिया गया है और न ही करवाया गया है। आज भी मेरा पक्षकार मुकदमेबाजी में उलझा हुआ है। आपने मेरे पक्षकार के साथ धोखा किया है।

5. यह कि मेरे पक्षकार का एडवांस रूपया 2,01,001=00 अनुबंध पर प्राप्त किया गया व दिनांक 19/1/99 को रूपया 50,000=00 पचास हजार आप हिम्मतसिंहजी द्वारा प्राप्त किया गया व इस बावत इकरार नामें की पुश्त पर आप हिम्मतसिंहजी द्वारा हस्ताक्षर किये गये हैं तथा आप लीलादेवी ने भी इसके समर्थन में हस्ताक्षर किये हैं। इस प्रकार रूपया 251000=00 आपके पास मेरे पक्षकार का एडवांस पड़ा हुआ है।

अतः आपको सूचित किया जाता है कि इस सूचना–पत्र की प्राप्ति से 15 दिवस के भीतर–भीतर पूर्व में विकय की गई भूमि का कब्जा देकर शेष विकयमूल्य प्राप्त करे और यादि आप इन दोनों शर्तों का पालन नहीं करते हैं तो हमारे पक्षकार द्वारा एडवांस लिया गया रूपया मय 2/– रूपया सैंकड़ा प्रतिमाह के मेरे पक्षकार को बापस कर रसीद प्राप्त करे अन्यथा आपके खिलाफ विधिवत दिवानी व फौजदारी कार्यवाही की जावेगी। अतः सूचित हो।

भवदीय
ए.के. पोरवाल
एडव्होकेट, मंदसौर

4. The appellants also published a notice in newspapers bringing the agreement in question to public notice and cautioning others from purchasing the suit property vide notice Ex.-D/1.

5. On receipt of notice dated 20th of September, 2000, a reply (Ex.-P/19) was sent on behalf of the respondents through his counsel Mr. Vimal Kumar Tarvecha, Advocate on 17th of October, 2000. Vide said reply, the respondents refused to hand over the possession of the land to the appellants of the remaining property in terms of the agreement dated 04th of September, 1998, rather claimed cancellation of the agreement after adjusting the money paid by the appellants to them in advance towards the balance price of sale deed executed on 24th of March, 1999. For the sake of reference, reply to the legal notice sent by the respondent to the appellants is reproduced hereunder :

जबाब–सूचनापत्र

प्रति,
श्री अमृतकुमार जी पोरवाल,
एडव्होकेट, मंदसौर, म.प्र

महोदय,

आपने अपने पक्षकार हरिबाबू जायसवाल एवं श्रीमती शकुन्तला देवी जायसवाल नि.–मंदसौर की ओर से जो सूचनापत्र दिनांकित 20/09/2000 का मेरे पक्षकारगण हिम्मतसिंह, रणजीतसिंह एवं श्रीमती लीलादेवी नि. भीलवाड़ा को पहुंचाया है, का जबाव मेरे पक्षकार की ओर से उनके द्वारा दी गई हिदायत एवं निर्देशों अनुसार, निम्नवत भेजा जा रहा है :–

1. यह कि आपका सूचनापत्र, आपसे सम्पूर्ण असत्य माहिती देकर भिजवाया गया है जो मेरे पक्षकारगण को स्वीकार नहीं।

2. यह कि यह सही है कि मेरे पक्षकारगण ने अपने स्वामित्व एवं आधिपत्य की भूमि स्थित ग्राम टिगरियां को विकय करने का करार रूपये 1;11,111=00 रूपये प्रतिबीघा के मान से किया था। किंतु आपके पक्षकार ने अनुबंध का पालन नहीं किया है। जो निम्न है :–

(अ) आपके पक्षकार को अनुबंध अनुसार सम्पूर्ण खाते कि भूमि का विकयपत्र अपने हित में कराना थी जो नहीं कराई है। अवधि अधिकतम 6 माह थी।

(ब) आपके पक्षकार द्वारा 5½ बीघा जमीन के विकयपत्र पंजीयन करवाया गया है किंतु आपके पक्षकार गण ने 1,11,111=00 रूपये प्रतिबीघा के मान से रकम की अदायगी न करते हुए विकयपत्र में अंकित राशि ही अदा की है, शेष राशि अदा नहीं की गयी है।

(स) आपके पक्षकार गण द्वारा अनुबंध के वक्त दी गई अग्रिम राशि का समायोजन 5½ बीघा भूमि के विकयपत्र के पंजीयन के वक्त कर लिया है, अब कोई अग्रिम राशि नहीं बची है। आपके पक्षकारगण ने 2,51,000/– रूपये की राशि मेरे पक्षकार के पास रहने का गलत वर्णन किया है।

(द) आपके पक्षकार यह कहना नितांत असत्य है कि मेरे पक्षकारगण ने मौके पर जाकर विकय की गयी भूमि का कब्जा नहीं दिया। मेरे पक्षकारगण ने मौके पर जाकर विकय की गई भूमि का कब्जा दिया था, यह स्वीकृति भी आपके पक्षकारों ने कई जगह की है।

(क) आपके पक्षकारगण ने वक्त रजिस्ट्री असल अनुबंधपत्र लौटा देने कि कहा था जो लौटाया नहीं है एवं अब दुर्भावना वश उसका गलत उपयोग किया जा रहा है, इसी प्रकार भू अधिकार एवं ऋण पुस्तिका भाग–एक को भी नहीं लौटाया है, जो इन्द्राज कराने के बाद लौटाने की आपके पक्षकारगण ने कहा था।

(ख) यह कि इस प्रकार अनुबंधपत्र की शर्तों का आपके पक्षकारगण

ने पालना नहीं की है स्वयं आगे रहकर संविदा का विखण्डन किया है। उपरोक्त कारणों के आधार पर, अनुबंधपत्र का स्वतः विखण्डन हो गया है। आप अपने पक्षकार को हिदायत देवे कि वह, मेरे पक्षकार की अंतर की राशि अदा करे एवं आपके द्वारा दिये गये सूचनापत्र के आधार कोई कार्यवाही नहीं करे। अन्यथा मेरे पक्षकार को विवश होकर बचाव व न्यायालयीन कार्यवाही करना पड़ेगी जिसमें होनेवाले खर्चे एवं परिणाम के जबाबदार आपके पक्षकारगण होगे।

सूचित हो।

भवदीय
(विमल कुमार तरवेचा, एडव्होकेट)
मंदसौर, म.प्र.

6. It is thus clear that on that date, respondents on account of non-payment of balance amount at the time of execution of sale deed Ex.-P/3 & Ex.-P/4 took a stand that the advance amount paid to the respondents at the time of execution of agreement dated 04th of September, 1998 was adjusted towards the sale deed (Ex.-P/ 3 & Ex-P/4) and that now there was no obligations left with the respondents to either hand over the possession of any property to them or execute the sale deed in favour of the appellants. According to them, agreement itself had become infructuous.

7. According to the appellants, no amount was payable by way of balance to the respondents towards execution of the sale deed Ex.-P/3 & Ex.-P/4 by the appellants. In view of the controversy, the appellants filed a civil suit for declaration and permanent injunction against the respondents by praying that the decree of injunction be granted in favour of the appellants and against the respondents no. 1 to 3 to the effect that they were not entitled to execute any sale deed of the remaining portion of the property forming part of agreement Ex.-P/1 in favour of any third party. Such injunction was granted in favour of the appellants.

8. During the pendency of the aforesaid suit, it came to the notice of the appellants that portion of the suit property subject matter of agreement (Ex.-P/1) had been sold by the respondents no. 1 to 3 in favour of the respondents no. 4 and 5. Since the respondent no. 5 died by that time, the appellants by way of amendment brought on record the respondents no. 4 to 7 as defendants in the suit filed for injunction by moving an application under Order 22 Rule 10 read with Order VI Rule 17 of CPC moved on 23rd June, 2003.

Respondents no. 5 to 7 filed their written statements.

9. It may be observed here that refusal to execute specific performance to the agreement was made by the respondents when they sent reply to the notice Ex.-P/18 vide reply dated 17th of October, 2000. In terms of Article – 54 of the Limitation Act, the limitation to file the suit for specific performance, therefore was over on 16th of October, 2003. According the respondents, the suit was filed beyond limitation.

10. In fact there was written statement filed to the amended suit. The respondents no. 1 to 3 took a stand that the relief claimed by the appellants for specific performance was not available to them in view of the circumstances as narrated in the written statements and that the suit for specific performance was not only barred by limitation, but even otherwise, such relief could not be granted to the appellants.

11. A written statement was also filed by respondent nos. 1 to 3. Following objections were taken in the aforesaid suit.

> 3. वादपत्र की चरण संख्या 3 का जबाब इस प्रकार है कि वादीगण ने प्रतिवादी कं. 1 लगायत 3 से, प्रतिवादी कं. 1 लगायत 3 के स्वामित्व एवं आधिपत्य की कृषि भूमियां स्थित ग्राम टिगरिया पटवारी हल्का नं. 12 तहसील व जिला–मंदसौर जिसमें सर्वे कं. 44/2 रकबा 0.689 आरी, सर्वे कं. 46 रकबा 1.358 आरी, सर्वे कं. 52 रकबा 0.387 आरी तथा सर्वे कं. 53 रकबा 0.523 आरी, कुल नम्बर 4 कुल रकबा 2.957 आरी को कय करने का करार दि. 04/09/1998 को स्थान भीलवाड़ा में किया गया था जिसका अनुबंध–पत्र लिखा जाकर, जो अनुबंध पत्र दिनांक 05/09/1998 को नोटरी पब्लिक भीलवाड़ा के समक्ष अटेसटेड किया गया था। उक्त अनुबंध अनुसार वादीगण ने प्रतिवादी कं. 1 लगायत 3 की उपरोक्त भूमियां रूपये 1,11,111=00 प्रतिबीघा के मान से कय करने का करार किया था एवं विकय करार पेटे अग्रिम राशि के रूप में 2,01,001/– दो लाख एक हजार एक रूपये मात्र वादीगण ने प्रतिवादी कं. 1 लगायत 3 को दिया था। अनुबंध अनुसार अनुबंध की अवधि, अनुबंध दिनांक से 6 माह अर्थात् 04/03/1999 तक की थी, इसके पूर्व वादीगण ने समस्त राशि अदा कर विकयपत्र का पंजीयन अपने पक्ष में करवाना था, पंजीयन में लगने वाले व्यय की समस्त जबावदारी वादीगण की थी। इस अनुबंध के बाद वादीगण ने प्रतिवादी कं. 1 लगायत 3 को 50,000/– रूपये और दिये हैं। यह सही है कि वादीगण एवं प्रतिवादी कं. 1 लगायत 3 के मध्य दिनांक 05/09/1998 को पुनः एक लेख और लिखा गया कि कुल जमीन के रकबे की जितनी राशि बनेगी, उसमें से रूपये 50,000/– रास्ते हेतु छूट

प्रतिवादी कं. 1 लगायत 3 वादीगण को देगे, किंतु यह छूट वादीगण तभी प्राप्त करने के अधिकारी होगे, जब वादीगण विकय अनुबंध के तहत कय की गयी समस्त भूमियों के विकयपत्र का पंजीयन अपने पक्ष में करावें। चूँकि वादीगण से सम्पूर्ण भूमियों के विकयपत्र का पंजीयन नहीं कराया है इस कारण वादीगण यह छूट पाने के अधिकारी नहीं है। वादीगण ने प्रतिवादीगण से सम्पूर्ण भूमियों का पंजीयन नही कराते हुए, प्रतिवादीगण को भुलावे में रखा एवं प्रतिवादीगण को यह कहकर वादीगण प्रतिवादीगण से सुविधानुसार सम्पूर्ण भूमियों का पंजीयन प्रतिफल देकर करालेंगे एवं वादीगण ने प्रतिवादी कं. 1 लगायत 3 से दिनांक 31/03/99 को सर्वे कं. 44/2 रकबा 0.689 आरी भूमि का विकयपत्र रूपये 1,56,000/– में पंजीकृत करवा लिया एवं दिनांक 31/03/99 को ही एक अन्य विकयपत्र के द्वारा सर्वे कं 53 रकबा 0.523 आरी भूमि का विकयपत्र रूपये 1,20,000/– रूपये में पंजीकृत करवा लिया। इस प्रकार वादीगण ने प्रतिवादी से कुल 1,212 आरी भूमि के विकयपत्र का पंजीयन अपने पक्ष में करवा लिया है एवं वादीगण ने अपनी सुविधा के लिये विकयमुल्य कम का अंकित किया है किंतु वास्तव में अनुबंध अनुसार इस भूमि की कीमत 6,44,337=00 रूपये होती है। इस 6,44,337=00 रू. पेटे वादीगण ने प्रतिवादी कं. 1 लगायत 3 को विकयपत्र पंजीकरण के वक्त 1,56,000=00 रूपये, 1,20,000=00 रूपये कुल 2,76,000=00 रूपये दिये है। तथा एडवान्स दी गयी राशि का भी इन्ही विकयपत्र में समायोजित किया गया है जो 2,51,001=00 रूपये है इस प्रकार रूपये 5,27,001=00 रूपया वादीगण ने प्रतिवादी कं. 1 लगायत 3 को दिये है। इस प्रकार प्रतिवादी कं. 1 लगायत 3 ने वादीगण में रूपये 1,17,336=00 रूपये शेष है जिसे वादीगण को आज भी प्रतिवादी कं. 1 लगायत 3 को अदा करना है। उक्त विकयपत्र पंजीयन के बाद विहित अवधि में वादीगण को शेष भूमि का पंजीयन अपने पक्ष में करवाना था जो नहीं कराया है एवं उक्त दोनों विकयपत्र पंजीयन के बाद ही शेष पंजीयन कराने से मना कर दिया एवं शेष राशि अदा नहीं की। प्रतिवादी कं. 1 लगायत 3 ने उक्त दोनों विकयपत्र पंजीयन के वक्त ही विकय की जानेवाली भूमियों का वास्तविक आधिपत्य वादीगण को सौंप दिया था।

4. वादपत्र की चरण संख्या 4 का जबाब यह है कि उपरोक्त दोनों विकयपत्र के द्वारा विकय की गयी भूमियों की कीमत पेटे प्रतिवादी कं. 1 लगायत 3 को रूपये 1,17,336=00 लेना अवशेष है। शेष कथन अस्वीकार है।

5. वादपत्र की चरण संख्या 5 स्वीकार नहीं। विकय अनुबंध के समय दी गयी अग्रिम राशि रूपये 2,01,001=00 एवं रूपये 50,000/– कुल रूपये 2,51,001/– का समायोजन वादीगण ने पूर्व विकयपत्र पंजीयन के वक्त ही कर लिया है इसके अलावा कोई नगद राशि नहीं दी गयी है तथा उपर बताये हिसाब अनुसार पूर्व में विकय की गयी भूमि के पेटे भी प्रतिवादी कं. 1 लगायत 3 का वादीगण में राशि रूपये 1,17,336=00 अवशेष है।

6. वादपत्र की चरण संख्या 6 स्वीकार नहीं। प्रतिवादी कं. 1 लगायत 3 द्वारा विक्रय की गयी भूमियों के पेटे कोई विवाद नहीं है यह समस्त विवाद असत्य होकर, स्वयं वादीगण ने कोलुजन कर उठाये है एवं स्वयं वादीगण ही इस बात की स्वीकृति कई जगह कर चुके हैं कि विवाद असत्य है। विक्रय अनुबंध के तहत विक्रय की जानेवाली भूमियों में प्रतिवादी कं. 1 लगायत 3 का स्वत्व स्वच्छ है। तथा वादीगण ने स्वयं इन तथ्यों की जॉच करने के बाद प्रतिवादी कं. 1 लगायत 3 से भूमियॉ खरीदी है। जो वाद चल रहे है उनमें वादीगण स्वयं पक्षकार है तथा वादीगण को यह जानकारी है कि विवाद असत्य है। जिनमें वादीगण द्वारा प्रस्तुत जबाबदावे में भी इन तथ्यों की स्वीकृतियां हैं। एवं इसी कारण उक्त समस्त बातों में हंसकुंवरबाई आदि को कही भी सफलता नहीं मिली है। तथा दिवानी न्यायालय एवं राजस्व न्यायालय में प्रतिवादी कं. 1 लगायत 3 सफल रहा है। समस्त भूमियों पर प्रतिवादी कं. 1 लगायत 3 अविधिवत नामान्तरण हुआ है तथा जिन भूमियों को वादीगण ने क्रय किया है उन पर भी वादीगण का विधिवत नामान्तरण हो चुका है जो बन्दोबस्त न्यायालय एवं कलेक्टर न्यायालय से भी स्थिर रहा है। वर्तमान में कोई अन्य विवाद विचाराधीन नहीं है।

7. वादपत्र की चरण संख्या 7 स्वीकार नहीं। वादीगण संविदा के अपने अंश का पालन करने में एवं शेष विक्रयमूल्य व पूर्व का शेष प्रतिफल देने को कभी भी इच्छुक व तत्पर नहीं रहे हैं एवं नहीं है। प्रतिवादी कं. 1 लगायत 3 ने अनुबंध का उल्लंघन नहीं किया है स्वयं वादीगण ने अनुबंध का उल्लंघन किया है इस कारण वादीगण कोई सहायता किसी भी प्रकार की पाने के अधिकारी नहीं है तथा अनुबंध पत्र समाप्त हो गया है। वैसे भी वादीगण की अवधि समाप्त हो चुकी है।

8. वादपत्र की चरण संख्या 8 स्वीकार नहीं। प्रतिवादी कं. 1 लगायत 3 के मध्य कोई बदयान्ती नहीं आई है। बल्कि स्वयं वादीगण के मन में बदयान्ती आ गयी है एवं वादीगण बिना प्रतिफल दिये प्रतिवादी कं. 1 लगायत 3 से न तो शेष भूमि को क्रय करने के इच्छुक है एवं नहीं किसी अन्य को विक्रय करने देना चाहते हैं यह तथ्य वादीगण की दुर्भावना को दर्शाता है एवं इस कारण भी वादीगण इस वाद में कोई सहायता पाने के अधिकारी नहीं है तथा प्रतिवादी कं. 1 लगायत 3 को यह अधिकार है कि वे अपनी शेष बची कृषि भूमि को किसी अन्य को विक्रय कर देवे। तथा इसी कारण प्रतिवादी कं. 1 लगायत 3 ने अपनी शेष बची भूमियों का अनुबंध प्रतिवादी कं. 4 से किया है। तथा जिसका शीघ्र ही विक्रयपत्र का पंजीयन प्रतिवादी कं. 1 लगायत 3 करवाने जा रहे हैं।

12. It may be observed here that despite the clear stand taken by the respondents in their reply dated 17th of October, 2000 refusing to perform

the agreement to sale and rather cancelling the agreement and adjusting the advance given by the appellants to the respondents at the time of execution of the agreement Ex.- P/1, the appellants still did not thought it appropriate to file a suit for specific performance rather they filed a suit for declaration that respondent nos. 1 to 3 were not entitled to sale the property to any other persons except them and also for injunction to same effect, suit was filed on 07th of October, 2002.

13. On 27th of February, 2004, for the first time, the appellants moved an application for amending the suit for bringing on record their plea for specific performance of the agreement by filing an application under Order VI Rule 17 of CPC.

14. The application was allowed and the amended written statement was filed by respondent nos. 1 to 3 by amending their original written statements wherein they have taken specific plea that the suit for specific performance was not maintainable. Relevant objections taken in the amended written statements are reproduced hereunder :

> वादी ने संशोधन कर जो अभिवचन बढ़ाये हैं वह स्वीकार नहीं। वादी ने असत्य कथन किये हैं। वादी विवादित भूमि को कभी भी कय करने का इच्छुक नहीं था, नहीं तैयार एवं तत्पर था, एवं नहीं तैयार एवं तत्पर है। सम्पूर्ण वादपत्र को पढ़ने से ही स्पष्ट है कि वादी ने विरोधाभासी अभिवचन कर रखे हैं जो वादी की दुर्भावना को दर्शाते हैं। इस कारण वाद निरस्त होने योग्य है। वादी ने संशोधन अनुसार न तो क्षेत्राधिकार बावत संशोधन किया है नही न्यायशुल्क बाबत संशोधन किया है, साथ ही न्यायशुल्क भी अदा नहीं किया है तथा किया गया संशोधन से जो सहायता मॉगी जा रही है वह अवधि बाधित है। इस कारण भी वाद निरस्त होने योग्य है। (माननीय न्यायालय के आदेश दिनांक 29/01/2001 के पालन में संशोधन किया।)
>
> चरण 12 के अंत में
>
> वादी को संविदा के विधिवत पालन हेतु कोई वाद कारण उत्पन्न नहीं होता है, काल्पनिक वाद कारण के आधार पर वाद प्रस्तुत किया है जो निरस्त होने योग्य है। साथ ही वादी ने संविदा के विधिवत पालन हेतु सहायता चाही है वह अवधि बाधित होने से वादी प्राप्त करने का अधिकारी नहीं है। अतः वाद वादी निरस्त होने योग्य है। इस चरण का शेष कथन भी उपरोक्त जवाब के विपरीत हो वह स्वीकार नहीं। (Amendment as per order dt. 13/05/2004)
>
> चरण 14 के बाद

वादी ने वाद मूल्य मनमाना निर्धारित किया जाकर फिलूल में न्यायशुल्क अदा किया है। (Amendment as per order dt. 13/05/2004)

चरण 15 के बाद

15 (अ)(अ) जो बढ़ाया है वह स्वीकार नहीं, वादी इस चरण में चाही गयी कोई सहायता पाने का अधिकारी नहीं है। वाद निरस्त होने योग्य है जो निरस्त किया जावे। (Amendment as per order dt. 13/05/2004)

15. According the respondents, the relief claimed by the appellants for specific performance was not only barred by limitation, but also was not available to them in the light of the provisions of Order II Rule 2 of C.P.C

16. On the pleadings of the parties, following issues were framed by the learned trial Court.

वाद विषय

1. क्या संविदा के विशिष्ट अनुपालन की सहायता मांगे बगैर यह वाद प्रचलन योग्य नहीं है?

2. क्या वादीगण का वाद अवधि के अंदर है?

3. क्या वादीगण द्वारा वाद का सही मूल्यांकन किया जाकर सही न्याय शुल्क अदा किया गया है?

4. क्या भूमि के विकय के अनुबंध के समय विवादित भूमि सभी विवादों से मुक्त बताई जाकर यह शर्त रखी गई थी कि विकय पत्र के पंजीयन के पूर्व ऐसे विवाद के निपटाने का दायित्व एवं व्यय प्रतिवादीगण पर होगा? यदि हॉ तो प्रभाव?

5. क्या अनुबंध अनुसार विवाद निपटाने के बाद ही विकय पत्र पंजीयन कराया जाना तय किया गया है? यदि हॉ तो प्रभाव?

6. क्या वादी चाही गई सहायता पाने का अधिकारी है?

7. सहायता एवं व्यय?

17. The learned trial Court after taking into consideration the evidence available on record, decided the issue nos. 1, 2, 3 & 6 and gave its findings which reads as under :

39. प्रतिवादी क. 1, 2, 3 के अभिभाषक का यह भी तर्क है कि वाद समयावधि में नहीं है इसलिये निरस्त किया जाना चाहिए। उसके लिये विवाद का कारण दर्शाते हुए वादी समयावधि नहीं बढ़ा सकता है। और जिस दिन

अनुबंध की तिथि निकल जाने एवं प्रतिवादी द्वारा इंकार किये जाने पर अनुबंध विखण्डित हो जाता है और वादी द्वारा प्रदर्श पी. 18 का नोटिस देकर अनुबंध का विखण्डन समय गुजर जाने के बाद दिया है इस कारण वाद अवधि में नहीं है। इस संबंध में मान. सु.को. का न्याय. दृष्टांत *श्रीमती शकुन्तला वि. नारायण गुण्ड़ोजी चवान* 2000(1) एम.पी.व्हीनोट नं. 113 सुको. एवं वादी विक्रय पत्र निष्पादित करने के लिये तैयार व तत्पर नहीं था इस संबंध में मान. उच्च न्यायालय का न्याय दृष्टांत *श्रीमती कमलरानी एवं अन्य वि. कुमारी पिंकी एवं अन्य* 2001 (1) एम.पी.जे.आर. 137 प्रस्तुत किये हैं।

40. माननीय सर्वोच्च न्यायालय एवं उच्च न्यायालय के उपवर्णित न्याय दृष्टांतों में प्रतिपादित सिद्धान्तों के प्रकाश में एवं उपरोक्त विवेचना के प्रकाश में वादीगण का वाद अवधि में प्रस्तुत किया जाना नहीं पाया जाता है। एवं वादी द्वारा विक्रय अनुबंध के समय वादग्रस्त तिथि तक जो दिनांक 4/3/99 तक वादग्रस्त भूमि के संबंध में कोई विवाद नहीं था इसलिये पश्चातवर्ती विवाद महत्वहीन हो जाते हैं क्योंकि अनुबंध के दिनांक तक वादीगण द्वारा विक्रय पत्र उपवर्णित विवेचना के प्रकाश में नहीं करवाये जाना प्रमाणित होता है। इसलिये वह शर्त महत्वहीन हो जाती है जो विवाद निपटाने के बाद पंजीयन कराया जाना तय किया था लेकिन अनुबंध की अंतिम तिथि तक विक्रयपत्र नहीं निष्पादित करवाया जिसके कारण यह वाद अवधि में पेश नहीं किया।

41. वादप्रश्न क्रमांक 6 :–

उपरोक्त विवेचना के प्रकाश में वादी चाही गई सहायता पाने का अधिकारी नहीं है यह प्रमाणित होता है।

18. It is thus clear that the findings returned above by the learned Trial Court were based upon the evidence which came on record and taking into consideration that, in this case, the suit filed by the appellants for seeking specific performance was not within time. It is seen that despite refusal to execute the sale deed, the appellants did not file a suit for specific performance. This fact is clear from the fact that they filed the first suit for declaration and injunction on 07/10/2002 which was not a suit for specific performance. The application for amendment of the said suit for seeking relief of specific performance was made on 27/02/2004 which was beyond three years from the date of refusal of the respondents to execute the sale deed of the remaining property. Moreover, the appellants had not filed the original suit for seeking relief of specific performance, even though they were entitled to ask for such relief, no permission was obtained from the Court to file separate suit for

separate relief. However, this has not been done. It may be observed here that the suit filed for injunction was not file by the petitioner after seeking permission from the Court concerned for not filing the suit for specific relief on that time by making an application under Order II Rule 2 of CPC. For the sake of reference, Order II Rule 2 of CPC is reproduced hereunder .

> ***2 Suit to include the whole claim–***
>
> (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of this claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim – Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs – A person entitled to more than one relief in respect of the same cause of action may use for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> *Explanation – for the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.*

19. In view of the aforesaid provisions and the limitation prescribed for filing a suit for specific performance i.e. under Article 54 of the Limitation Act, the relief of specific performance which was available to the appellants at the time of receiving reply to the notice Ex.-P/18 stood relinquished / abandoned as they did not claim that relief when they filed suit for injunction.

In view of the aforesaid, the suit for specific performance was not only barred by limitation, but also barred under Order II Rule 2 of C.P.C.

20. Learned counsel appearing for the appellants submitted that the judgment delivered by the trial Court was not sustainable, in as much as limitation for claiming specific performance, first co-relates to the date of filing

of injunction. It was also submitted that the appellants were always ready and willing to perform their part of contract, but it was the respondents who violated the agreement and thus when the relief for specific performance was claimed by way of amendment which amendment must apply on the date of filing of injunction, they were entitled to the relief for specific performance and that judgment delivered by the trial Court was contrary to law. It is also submitted that in vie (sic:view) of the injunction granted against the respondents restraining them from selling the property to any one else, the respondents could not have executed the sale deed till such time and the claim was made on behalf of the appellants and therefore, it cannot be said that the suit was not within time.

21. We have considered the judgment delivered by this Court in the case of *Van Vibhag Karmachari Griha Nirman Sahakari Sanstha Maryadit, Indore Vs. Ramechchandra S/o Hiralal Hardiya and others* reported in 2008 (1) MPLJ 119.

22. In that suit, appeal filed before the Devision (sic:Division) Bench of this Court was dismissed, which was directed against the order dated 23rd August, 2004 passed by XIX Additional District Judge, Indore in Civil Sit (sic:suit) no. 6-A/2003. The suit was dismissed under section 14 of the Limitation Act.

23. Relevant facts giving rise to filing of that suit are as under :

> 2. The case has a chequered history. On 20.03.1974, an agreement was entered into by the appellant and the respondent No.1 for sale of land admeasuring 2.039 hectares(5 acres) in village Chitwad for consideration at the rate of Rs.2,00,000/-, per hectare. In pursuance of the said agreement, payment was made by the appellant-society in installments commencing from 22.3.1982 to 28.8.1984 and, thus a total amount of Rs.3,20,000/- was paid. However, on 3.2.1991, a publication in the Newspaper appeared to the effect that the said land was being sold to a third party. It was in this context that a suit was filed on 11.2.1991 for declaration of title and injunction before the Civil Judge, Class-II, Indore. The case was pursued upto 16.12.2002, but on realisation that suit for declaration of title and injunction simpliciter was not maintainable in respect of the breach of the contract requiring specific performance, an application under Order 6

Rule 17 of the Code of Civil Procedure, was filed on 16.12.2002. This application was allowed by the learned Civil Judge, by order dated 10.3.2003 and since the learned Civil Judge ceased to have jurisdiction on account of the amendment of the plaint, he directed return of the plaint for being presented to the Court having jurisdiction.

3. The respondents resisted the proposed amendment and after the amendment was accepted, a review application was filed against the same, but was dismissed by order dated 23.6.2003. Accordingly, the plaint was returned and it was presented to the Court having jurisdiction on 25.06.2003 alongwith an application under Section 14 of the Limitation Act, seeking exclusion of the period from 11.02.1991 to 23.06.2003. Since the said claim was based on account of the proceedings of the Court of Civil Judge, Class-II, and no evidence was required to be adduced, the Court tried the said issue as a preliminary issue and dismissed the suit on the ground of limitation. It is against this order that the present appeal has been filed.

4. Learned counsel for the appellant submits that once the order was passed on 10.03.2003 allowing the amendment, it was incumbent upon the respondents (defendants) to challenge that order and the defendants having not done so, it was not permissible to them to object to the time being excluded from 11.2.1991 to the date of the return of the plaint for presentation to the proper Court. Learned counsel for the respondents, however, submits that the only remedy that was available against the order dated 10.03.2003 was to seek review and since application for review was also rejected by the learned Civil Judge, no further remedy was available and they were not precluded from raising this objection before the learned Addl. District Judge.

5. Learned counsel for the respondent has invited attention to the decision of the Supreme Court in *K. Ratheja Constructions Ltd. Vs. Alliance Ministries and others,* AIR 1995 SC 1768 to the effect that where a suit is filed for relief

of permanent injunction restraining the respondents from alienating, encumbering, selling, disposing of, or in any way dealing with the property, subsequent amendment of plaint for seeking relief of specific performance of contract could not be allowed as the plaintiffs had divesting themselves of the relief for specific performance which could not have been added after a lapse of seven years, being barred by limitation. Attention has been drawn to the following passage from the said report:-

> *"The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the ground set out, would defeat the valuable right of limitation accrued to the respondent."*

24. Similar argument has been addressed before us also by the learned counsel for the appellants who also submitted that in this case at the time of execution of the registered sale deed (Ex.- P/3 & Ex.-P/4) with respect to part of the property in the year 1999, dispute had arisen between the parties about the payment of balance sale price and on that account, a civil suit was also filed by the appellants on 12th of May, 2000 for injunction.

25. It is also submitted that since the injunction was continuing, respondent could not have executed a sale deed in their favour, therefore, the suit was within limitation. It has been submitted that the appellants were entitled to exclusion of time with respect to proceedings which were going on at the time when the suit for injunction was pending.

26. However, on other hand, learned counsel for the respondents submitted that in this case, the respondents denied the claim of the appellants while replying to the legal notice, limitation to file the suit for specific performance started. Denial was made on 17th of October,2000. As such at the most, the limitation to file the suit was available till 16th of October, 2003, but in this case, relief for specific performance was claimed on only 23rd January, 2004.

27. Both the points i.e. the point of limitation and exclusive of time have also been considered by the Division Bench of this Court in the aforesaid mentioned case. Relevant paragraphs are reproduced hereunder

> 6. It is trite that against the breach of the contract it was necessary for the person aggrieved to seek specific performance and since the present appellant had instituted a suit only for declaration of title and perpetual injunction, the appellant ought not to have been allowed to make an amendment under Order 6 Rule 17, to incorporate the relief of specific performance. In a similar case, in *Tarlok Singh Vs. Vijay Kumar Sabharwal,* JT 1996 (4) SC 245, it was held that even in the case of such amendment, the limitation will commence from the date of the suit and not from the date the amendment was permitted. Since the suit was filed after three years, it was clearly barred by limitation. We may refer to the following passage containing the law laid down by the Apex Court:-
>
> > *" We think that parties had, by agreement, determined the date for performance of the contract. Thereby limitation began to run from April 6,1986. Suit merely for injunction laid on December 23, 1987 would not be of any avail nor the limitation began to run from that date. Suit for perpetual injunction is different from suit for specific performance. The suit for specific performance in fact was claimed by way of amendment application filed under Order 6 Rule 17, Civil Procedure Code on September 12, 1979. It will operate only on the application being ordered. Since the amendment was ordered on August 25, 1989 the crucial date would be the date on which the amendment was ordered by which date, admittedly, the suit is barred by limitation."*
>
> 7. From the above narration of facts, based on record, it is manifest that the suit was filed by the present appellant on 11.02.1991and it was only after several years

that the amendment was sought by application dated 16.12.2002, to incorporate the relief of specific performance, which was allowed on 10.03.2003. Since relief of specific performance can be claimed only within a period of three years from the date of the cause of action, in any case, the amendment to seek the relief of specific performance was not within limitation. Under these circumstances, we are of the considered view that the trial Court did not commit any illegality in not allowing the application of the appellant, under Section 14 of the Limitation Act, and treating the suit as barred by limitation.

28. There is another judgment delivered by Hon'ble Supreme Court which directly deals with the issues involved in this matter and supports the case of the respondents. In the present case, appeal filed by the appellants was not maintainable since the suit filed by them was barred by limitation and as such, the judgment of the Additional District Judge was not suffering from any error which call for any interference by this Court. The said judgment has been delivered in this very case by Hon'ble Supreme Court as reported in 2001(1) JLJ 278. In that case, Hon'ble Supreme Court has considered even the provision of Article 54 of Limitation Act, as also the provision of Order II Rule 2 of CPC. In that case, it has been held that :

27. In this context, the provision of Article 54 of the Limitation Act is very relevant. The period of limitation prescribed in Article 54 for filing a suit for specific performance is three years from the date fixed for the performance, or if no such date is fixed, when the plaintiff has noticed that performance is refused.

28. Here admittedly, no date has been fixed for performance in the agreement for sale entered between the parties in 1976. But definitely by its notice dated 3.2.1991, the first respondent has clearly made its intentions clear about refusing the performance of the agreement and cancelled the agreement.

33. This Court is, therefore, of the opinion that the appellant had the cause of action to sue for Specific Performance in 1991 but he omitted to do so. Having done that, he should not be allowed to sue on that cause of action which he omitted to include

when he filed his suit. This Court may consider its omission to include the relief of Specific Performance in the suit which it filed when it had cause of action to sue for Specific Performance as relinquishment of that part of its claim. The suit filed by appellant, therefore, is hit by the provisions of Order 2 Rule 2 of the Civil Procedure Code.

29. The respondents denied specific performance to the agreement on 17th of October, 2000, as such even if limitation is taken from that date, then also for specific performance was barred by limitation, in as much as original suit for injunction was not filed for specific performance and was filed only for injunction which in any case could not have extended the limitation.

30. In the case in hand, limitation to file suit for specific performance was over after completion of three years taken from 4th September,1998, even if the said date is taken from the date when the respondents denied execution i.e. when they sent reply to legal notice on 17th of October, 2000 then also three years also taken on that date, then also the time had expired.

31. This also take care of bar attracted in filing a suit for specific performance by way of amendment of the suit for injunction.

32. In view of the aforesaid, we find no infirmity in the judgment passed by the 2nd Additional District Judge. Consequently, the first appeal filed by the appellants is dismissed with costs.

Appeal dismissed.

I.L.R. [2014] M.P., 3179
APPELLATE CIVIL
Before Mr. Justice R.S. Jha
S.A. No. 888/2004 (Jabalpur) decided on 16 April, 2013

MAHESH KUMAR & anr. ...Appellants
Vs.
HIMMAT SINGH & ors. ...Respondents

Civil Procedure Code (5 of 1908), Section 100 - Second Appeal - **Land in question initially belonged to grand father of plaintiff - It was not included in the partition proceedings and, therefore, the right of the respondents/plaintiffs in land in dispute to the extent of half share therein is undisputed - In view of provisions of Order VIII Rule 7 and Order XVI**

Rule 33 of the C.P.C., the Courts below have rightly decreed the suit filed by the respondents/plaintiffs to the extent of half share in land in dispute - No substantial question of law arises for adjudication. (Paras 6, 9, 11)

सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील – प्रश्नगत भूमि पहले वादी के दादा की थी – उसे विभाजन कार्यवाही में शामिल नहीं किया गया और इसलिए प्रत्यर्थीगण/वादीगण का वाद भूमि में आधे हिस्से की सीमा तक का अधिकार अविवादित है – सिविल प्रक्रिया संहिता के आदेश VIII नियम 7 व आदेश XVI नियम 33 के उपबंधो को दृष्टिगत रखते हुए, निचले न्यायालयों ने प्रतिवादीगण/वादीगण द्वारा प्रस्तुत वाद को प्रश्नगत भूमि में आधे हिस्से की सीमा तक उचित रूप से डिक्रीत किया – न्यायनिर्णित करने के लिए विधि का सारवान प्रश्न उत्पन्न नहीं होता।

Cases referred :

AIR 1971 SC 2548, AIR 1997 SC 2181, AIR 2008 SC 901, AIR 2009 SC 1103, 2011(2) MPLJ 507, 2012 (4) MPLJ 265.

Shobha Menon with *Surbhi Ahirkar,* for the appellants.
Imtiaz Hussain, for the respondents.

ORDER

R.S. JHA, J. :- The appellants/defendants have filed this appeal being aggrieved by the judgment and decree dated 3-7-2004 passed by the 5th Additional District Judge, Bhopal, in R.C.A. No. 11-A/2004, confirming and affirming the judgment and decree dated 3-7-2003 passed by the First Additional Civil Judge, Bhopal, in C.S.No. 94-A/2002.

2. The brief facts leading to the filing of this appeal are that the respondents/plaintiffs had filed a suit for declaration of title and permanent injunction in respect of Khasra No. 184, area 1.16 acres of village Pipalner, Tahsil Huzur, District Bhopal against the appellants/defendants alleging that the property belong to them but had wrongly been taken in possession by the appellants/defendants. The suit was opposed by the appellants/defendants on the ground that they had purchased the property in question by a sale deed executed in the year 1982 by Khemchand in favour of the defendants and, therefore, they were in legal possession of the property .

3. Both the Courts below have decreed the suit filed by the respondents/ plaintiffs to the extent of half portion of Khasra No. 184 by recording a finding to the effect that the property was held jointly by Khemchand and Ramlal i.e. the uncle and father of the respondents, respectively, and, therefore, the

respondents/plaintiffs were entitled to a declaration only in respect of half of the property.

4. The learned senior counsel appearing for the appellant/defendants submits that the Courts below have totally misconstrued the relief sought for by the respondents/plaintiffs inasmuch as the plaintiffs have nowhere sought a declaration that the sale deed in favour of the appellants/defendants is null and void. She further submits that the Courts below have in fact set up a new case of the property being joint in favour of the respondents/plaintiffs in spite of the fact that there was no pleading or proof in this regard by them. It is submitted that in view of the aforesaid the findings recorded by the Courts below are perverse and beyond the powers and authority of the Courts below, by relying upon the decisions rendered in the cases of *Dattatraya v. Rangnath Gopalrao Kawathekar (by LRs.) and others,* AIR 1971 SC 2548, *State of Himachal Pradesh v. Keshav Ram and others,* AIR 1997 SC 2181, *Gurunath Manohar Pavaskar & others v. Nagesh Siddappa Navalgund & others,* AIR 2008 SC 901, *Bachhaj Nahar v. Nilima Mandal & others,* AIR 2009 SC 1103, *D.R.Rathna Murthy v. Ramappa,* 2011 (2) MPLJ 507 and *Vishwanath v. Sarla Vishwanath Agrawal,* 2012 (4) MPLJ 265.

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

6. From a perusal of the record as well as the judgment and decree of the trial Court and appellate Court it is clear that the property in question initially belonged to Rewaram, the grand father of the respondent/plaintiffs. It is stated that Rewaram had three sons, Ramlal, Harlal and Khemchand among whom 24 acres of the land belonging to Rewaram was divided by a partition. The suit was filed by the respondent/plaintiffs by asserting that Khasra No. 184 area 1.16 acres fell in their share and, therefore, they be declared owners of the said land.

7. It is also apparent that the suit was opposed by the appellants/ defendants by alleging that the land in question fell in the share of Khemchand and was purchased by them from Khemchand in the year 1982. From a perusal of the record it is clear that the aforesaid assertion was made by the appellants by filing a copy of the document Ex.D-9 relating to partition. It is further clear that both the Courts below, on going through the aforesaid document, Ex.D-9, filed by the appellants have found that Khasra No. 184 was not included in the partition proceedings. This finding has been recorded by the trial Courts

in paragraph 14 of the judgment and has been affirmed by the appellate Court. The fact that Khasra No. 184 was not included in the partition proceedings is also undisputed before this Court.

8. On the basis of the aforesaid facts the Courts below have recorded a finding to the effect that the land in dispute, namely, Khasra No. 184, area 1.16 acres continued to remain in the joint ownership of the respondents/ plaintiffs and Khemchand and therefore the respondent/plaintiffs had right and title to the extent of half share in Khasra No. 184 area 1.16 acres. On the basis of the aforesaid finding both the Courts below have decreed the suit in favour of the respondent/plaintiffs to the extent of half share in Khasra No. 184, area 1.16 acres, situated in village Pipalner, Tahsil Huzur, District Bhopal.

9. Even after hearing the learned senior counsel appearing for the appellant/defendants and perusal of the record it is clear that the land in question I.e. Khasra No. 184, area 1.16 acres situated in village Pipalner, Tahsil Huzur, District Bhopal initially belonged to Rewaram, that it was not included in the partition proceedings Ex.D-9 and, therefore, the right of the respondents/ plaintiffs in Khasra No. 184, area 1.16 acres to the extent of half share therein is undisputed and, therefore, in my considered opinion in view of the provisions of Order VIII Rule 7 and Order XVI Rule 33 of the Code of Civil Procedure the Courts below have rightly decreed the suit filed by the respondents/plaintiffs to the extent of half share in Khasra No. 184, area 1.16 acres.

10. In view of the facts and circumstances of the present case, I am also of the considered opinion that the aforesaid judgments cited by the learned senior counsel appearing for the appellants/defendants are of no help to the appellants/defendants on account of the factual aspects of the present case which are totally different.

11. From a perusal of the impugned judgment and decrees it is further clear that they are based on proper appreciation of the oral and documentary evidence on record and do not suffer from any perversity or manifest illegality warranting interference by this Court as no substantial question of law arises for adjudication.

12. In view of the aforesaid, the appeal filed by the appellants/defendants, being meritless, is accordingly dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 3183
APPELLATE CIVIL
Before Mr. Justice G.D. Saxena
M. A. No. 345/2005 (Gwalior) decided on 11 October, 2013

SHARIF KHAN (DECEASED) THROUGH HIS L.Rs. ... Appellants
Vs.
UNION OF INDIA & anr. ...Respondents

(Alongwith M.A. No. 365/2005)

A. ***Motor Vehicles Act (59 of 1988), Section 173*** **- Accident took place while crossing the railway gate when the driver of the truck just started to cross the line suddenly passenger train came and by hitting caused damaged to the truck - Resultantly driver-cum-owner and cleaner died - Held - Since deceased driver-cum-owner of the truck was responsible for causing accident due to non-following the common traffic rules dependents of the deceased can not claim for damages for the deceased's own negligence - Insurance Company cannot be held to indemnify the liability - Risk of the owner is not covered under the policy. (Paras 10 & 11)**

क. *मोटर यान अधिनियम (1988 का 59), धारा 173* – रेल गेट पार करते समय दुर्घटना कारित हुई, जब ट्रक ड्राईवर रेल पटरी पार करने लगा, अचानक यात्री रेल आयी और टक्कर मारकर ट्रक को क्षति कारित की – परिणामस्वरुप ड्राईवर–सह–स्वामी तथा क्लीनर की मृत्यु हुई – अभिनिर्धारित – चूंकि मृतक ट्रक ड्राईवर–सह–स्वामी द्वारा सामान्य यातायात नियमों का पालन नहीं किये जाने से दुर्घटना कारित करने के लिए वह स्वयं जिम्मेदार था, मृतक के आश्रित स्वयं मृतक की उपेक्षा के लिये क्षतिपूर्ति हेतु दावा नहीं कर सकते – बीमा कम्पनी को दायित्व की क्षतिपूर्ति के लिए अभिनिर्धारित नहीं किया जा सकता – स्वामी का जोखिम, पॉलिसी के अंतर्गत आच्छादित नहीं।

B. ***Motor Vehicles Act (59 of 1988), Section 173*** **- Since risk of the cleaner travelling in truck for maintenance or operation of the truck is covered under the policy, his heirs are entitled to receive compensation to the tune of Rs. 1,46,000/- with 9% interest from the date of filing the petition. (Para 14)**

ख. *मोटर यान अधिनियम (1988 का 59), धारा 173* – चूंकि पॉलिसी के अंतर्गत ट्रक की देखरेख या कार्य के लिए ट्रक में यात्रा कर रहे क्लीनर का जोखिम आच्छादित है, उसके वारिस, रु. 1,46,000/– याचिका प्रस्तुत करने की

तिथि से 9 प्रतिशत ब्याज के साथ प्रतिकर प्राप्त करने के हकदार हैं।

Cases referred :

(2004) 8 SCC 553, (2005) 10 SCC 720.

R.P. Gupta, for the appellants.
H.D. Gupta with *Sunil Gupta & Santosh Agrawal,* for the respondent No.1.
Vandana Kekre, for the respondent No.2.

ORDER

G.D. SAXENA, J. :- Since both the appeals filed by the claimants of deceased driver-cum-owner and cleaner of ill-fated truck involved in train-truck accident have arisen out of the common Award dated 13th January, 2005 in Claim Case Nos. 58/04 and 59/04 passed by the Motor Accident Claims Tribunal, Chachoda, Camp Guna, they are taken up together for final disposal by this one order.

2. At the outset, it may be mentioned here that Misc. Appeal No. 345/05 has been preferred by the claimants/legal heirs of the deceased Yusuf Khan who was a cleaner of the truck having registration No. MKM/ 1806 driven by deceased-driver Sadiq Khan, under Section 173 of the Motor Vehicles Act 1988 against the impugned Award rejecting thereby the claim petition filed by the appellants/claimants of the said Yusuf Khan who died in train-truck accident claiming compensation of Rs. 2,80,000/-against the Union of India as well as insurer, the Oriental Insurance Company (respondents No. 1 and 2 herein).

3. Another appeal (Misc. Appeal No. 365/2005) has been preferred by the claimants/legal heirs of the deceased driver Sadiq Khan of the truck having registration No. MKM/1806 against the impugned Award rejecting thereby the claim petition filed by the appellants/claimants of the said Saidq (sic:Sadiq) Khan who died in train-truck accident claiming compensation of Rs. 13,50,000/ - against the Union of India as well as insurer, the Oriental Insurance Company (respondents No. 1 and 2 herein).

4. Briefly narrated the facts of the cases are that on 15th August 1992 at about 6-7 p.m. just before night break, when the truck reached Gate No. 79/C at railway line of Maksi in between Kumbharaj-Vijaypur crossing, the railway gate was not closed and the vehicles were passing through the line, at that juncture, when the driver of the truck just started to cross the line, suddenly the passenger (sic:train) coming from Guna to Maksi came and by hitting caused

damage to the truck. Resultantly, both the driver and cleaner of the truck died on the spot or during (sic:journey from) spot to the Hospital for treatment. After the incident, a Marg Intimation Report (Ex.P/10-C) was lodged on written report from Medical Officer posted in the Hospital Raghogarh. During inquiry, the spot map (Ex.P/ 9-C) was prepared. It is not disputed that the ill-fated truck which was driven by deceased Sadiq Khan and who was also the owner was insured with the respondent No.2-Oriental Insurance Company. The claim petition under Section 166 of the Act seeking compensation of Rs. 2,80,000/- with interest @ Rs. 12% till full and final payment of the award amount is made from the non-petitioners Union of India and Insurance Company was submitted. Another claim petition was filed by the claimants of Sadiq Khan for compensation of Rs. 13,50,000/- against the defendants/respondents as mentioned above. Since the tribunal has dismissed the aforesaid claim petitions of the petitioners, they have come to this court.

5. It is contended on behalf of the learned counsel for the appellants in both the appeals that the accident was direct result of the railways employees, i.e., the railway gate man for not closing the railway gate and thereby allowing the road traffics just before passing the railway train at railway track. It is further submitted that equally the driver of the train was responsible for causing such accident because he did not blow the horn for alarming the vehicles passing through railway crossing. It is therefore contended that since the lapse was on the part of the railway employees, the railway authority is liable to pay the compensation to the heirs of the deceased. It is thus submitted that the tribunal was not justified in rejecting the claim of the claimants for compensation and directing to recover the amount of interim award under Section 140 of the Act on the very moment of rejection of the claim of the appellants. On the basis of aforesaid submissions, it is prayed that the appellants' appeals deserve to be allowed and the amount as prayed for deserves to be granted.

6. On the other hand, the submission put forth by the learned counsel for the Union of India (Railway Administration) is that by adducing the cogent evidence the defendant/respondent UOI had proved that the truck by violating traffic rules and avoiding all signals, after breaking the chain of the gate and the pillar of the entrance travelled the railway track and resultantly collided with the Bina passenger train, which by that time was passing after getting the green signal and adopting all safety measurements. Hence, as per the learned Sr. Advocate the Railway Administration is not responsible for the casualties

caused in accident. In view of the aforesaid, it is submitted that the learned tribunal has rightly rejected the claim petitions praying for awarding compensation by the railway authorities.

7. The contention of the Insurance Company is that the alleged accident was direct result of the sole negligence on the part of the driver of the truck, therefore, on that ground the heirs of the deceased of the driver-cum-owner of the vehicle is not entitled for own defaults of the driver-cum-owner of the vehicle. Even other wise, the claimants are also not entitled to claim on account of the death of the driver-owner. It is also submitted that the claim of claimants of the deceased-cleaner does not cover under the law nor the terms of the policy, hence, the Insurance company is not liable for indemnifying the liabilities of payment of compensation for the death of deceased-cleaner to his heirs on behalf of deceased-owner-cum-driver, who was negligent for causing the accident. Hence, it is submitted that the learned tribunal rightly dismissed the claim petition filed by the heirs of the deceased-cleaner. Accordingly, the respondent No.2/Insurance company prayed that by dismissing the appeals filed by appellants/claimants, the impugned Award passed by the learned tribunal may be affirmed.

8. Heard the learned counsel for the parties. Also perused the record (sic:of) the tribunal and the law applicable to the case.

9. The questions for consideration of these appeals are:-

(i) Whether the respondent No.1/Union of India through Railway Administration on the basis of vicarious liability for negligence of the gate-man of railway where the accident in between truck and the running train took place, was liable to pay the compensation to the claimants of the deceased driver/ owner and cleaner who died in accident or they are liable to pay the compensation on the basis of contributory/composite negligence on account of head on collision between the truck and the running train at Railway crossing ?

(ii) Whether, the Insurance company is liable to satisfy the compensation on behalf of insured truck to the claimants of the deceased-cum-driver-owner as well as the deceased-cleaner who was travelling in the truck at the time of accident ?

(iii) Whether, the interim award paid by the Insurance company

can be directed to be recovered from the claimants under the facts and circumstances of the case ?

10. On perusal of the record, it appears that Smt. Raj Kumari Gurjar (AW-3) deposed that prior to the time of accident she with her mother were on evening walk towards the side of railway crossing. As she was returning and at a distance of 2025 (sic:20-25) ft. away from railway crossing gate, she heard the loud noise of dashing so she returned back to the railway crossing. She deposed that by that time, the railway gate-man was not available on the spot where the truck was thrown after dashing with train and one man and one boy were alive and were crying. She states that with help of one contractor she made an arrangement for sending the injured to the hospital. She also stated that on railway crossing gate, the chain was not put on other end. She also admitted that speed breakers from both sides of the railway crossing have recently been constructed. She also stated that at another side of crossing, near about 10-15 trucks were waiting for opening the railway gate. She categorically denied that the ill-fated truck entered into the railway track by breaking the chain pulled from one end to another end of the gate. On the other hand, Parsuram (NAW-1) gate-man of the railway crossing gate deposed that before passing the train he closed the gate for road traffics. The train was running by blowing horn and head lights of the engine were on and were visible from long distance. He was also showing the green lamp for safely passing the train through railway crossing. By that time, one truck entered suddenly and got dash with the engine of the train due to which the gate was broken and pillar of other end was also damaged. In cross-examination, he admitted that after inquiry, the Railway Authorities punished him for negligence. Kaluram Rai (NAW-3) is the train driver of the ill-fated train. He deposed that at the time of accident, the lights of engine were on from last station Kumbharaj near about 800 meters before crossing and as per direction the continuous horn was blowing for caution to the road crossers through gate. He stated that at the time of accident, the gates were closed and the gate-man was showing the green light signal for passing the train safely. As the engine of train reached on level crossing from gate No. 79-C, one truck with a high speed by breaking the chain locked on other end and level crossing gate, dashed the coming engine of train and was trapped with railway engine and thereafter was thrown into pit near railway line. The train by applying the emergency breaks was not possible to stop in order to avoid turning the passenger train and loss of great casualties. Thus, on the basis of the evidence

on record, the negligence of railway employees, i.e., gate man and driver of the engine of passenger train is completely ruled out and the sole negligence on the part of deceased driver of the ill-fated truck is made out.

11. So far as the claim of heirs of deceased Sadiq Khan, the driver-cum-owner of the vehicle (Misc. Appeal No.365/2002) filed by Mumtajbai and others is concerned, as stated earlier, the deceased Sadiq Khan was driver/ owner of the truck involved in accident. He himself insured the truck under compressive (sic:comprehensive) package. It is also born out that driver Sadiq Khan was responsible for causing accident due to non-following the common traffic rules. While crossing the railway line, the speed of the vehicle should be under control. In this view of the matter, the claimants claiming themselves to be dependents on the deceased-driver-cum-owner cannot claim for damages for the deceased's own negligence nor the Insurance company can be held to indemnify the liability of the insured for his own negligent acts contributing to accident.

12. In *Dhanraj Vs. New India Assurance Co. Ltd.,* (2004) 8 SCC 553, at page 555 : the Hon. Apex court has considered and observed as follows :-

> "8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.
>
> 9. In the case of *Oriental Insurance Co. Ltd. Vs. Sunita Rathi* (1998) 1 SCC 365 : it has been held that the liability of an insurance company is only for the purpose of indemnifying the insured against liabilities incurred towards a third person or in respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the insurance company has no liability also."

13. On perusal of the insurance policy (Ex.D/1) of the truck issued by the Oriental Insurance company, it appears that the insurance of the ill-fated truck was for own damage of the vehicle covering liability to public risk for carriage of own goods, liability to the non-paying passenger, liability to persons

employed in connection with operation and or maintenance and/or loading or unloading of motor vehicle and in any other heads no premium was charged. It clearly indicates that no premium for owner's personal risk or injury or death was recovered. Thus, risk of the cleaner travelling in truck for maintenance or operation of the truck is covered under policy but the risk of the owner/driver of the truck was not covered under the policy. As per statutory provisions, the risk of the owner is not covered. As a consequence, the heirs of deceased Sadiq Khan driver of the ill-fated truck would not be entitled for compensation.

14. Now, coming to the evidence as adduced in claim petition (Claim Case No.59/ 2002) in order to decide the question as to what would be appropriate amount of compensation which would be payable to the claimants of the deceased, it is noted that Sharif Khan (AW-1) father of deceased Yusuf Khan deposed that Yusuf Khan aged 20 years, the cleaner of the truck, who died in accident was getting Rs. 750/- monthly salary with allowance of Rs. 25/- to meet out the daily expenses during employment while travelling on the truck. In future, he may drive the truck and in that situation he may get Rs. 5000/- monthly. Parents of the deceased are old and ailing besides younger brothers and sisters who are also dependents on the income of the deceased. So for calculation of the dependency of the heirs on the income of the deceased, the basis of monthly income of Rs. 750/- of the deceased shall be taken which was paid to the cleaner at the relevant time by the owner of the vehicle, which annually comes to Rs. 9,000/-. Since the deceased was unmarried at the time of death in that case dependency of the heirs would be 3/4th part of the income of the deceased. As regards multiplier applied in determination of compensation, taking into consideration the law laid down in the case of *New India Assurance Co. Ltd. Vs. Charlie* (2005) 10 SCC 720 wherein it held that choice of multiplier is determined by the age of the deceased or the claimant whichever age is higher, it would be appropriate to apply multiplier of 11, looking to the age in between 50 to 55 years of the parents, who are heirs of the deceased. Thus, the total dependency will be Rs. 66,000/-. In addition to it, claimants are also entitled to Rs. 50,000/- for love and affection, Rs. 10,000/- towards funeral expenses, Rs. 10,000/- as cost of transportation of the dead-body and Rs. 10,000/- for loss of estate. Thus, in this way, the claimants are entitled to receive total compensation of **Rs. 1,46,000/- (Rs. One lac forty six thousand only)** with 9% interest on the awarded amount from the date of filing of the petition dated 3rd December 1992 till

date of payment of the award amount. The award mount (sic:amount) shall be paid by the Insurance company by deducting the amount deposited before tribunal for payment to the claimants, within three months from the date of passing of this order.

15. As a result, Misc. Appeal No. 345/2005 filed by heirs of deceased Yusuf khan who was cleaner of the truck and died in accident stands hereby allowed in the manner indicated above whereas other Misc. Appeal No.365/2005 filed by heirs of Sadiq Khan who was driver-cum-owner of the truck and died in accident is hereby dismissed.

16. The parties shall bear their own expenses.

17. Counsel fee Rs. 1,000/-, if certified, be added in the costs.

Order accordingly.

I.L.R. [2014] M.P., 3190
APPELLATE CIVIL
Before Mr. Justice P.K. Jaiswal
F.A.No. 15/2011 (Indore) decided on 25 March, 2014

KODAR SINGH ...Appellant
Vs.
STATE OF M.P. & anr. ...Respondents

(Alongwith F.A. Nos. 972/2010, 973/2010, 974/2010, 975/2010, 976/2010, 977/2010, 978/2010)

Civil Procedure Code (5 of 1908), Section 96, Land Acquisition Act (1 of 1894), Section 28-A - Redetermination of compensation - Second Application **- Appellants filed application before Land Acquisition Officer for re-determination of compensation amount which was allowed and compensation was enhanced to Rs. 80,000/- per acre on the basis of judgment passed by reference Court in another case - In separate case arising out of same acquisition proceedings High Court in appeal awarded compensation @ Rs. 1 lacs per acre - Appellants filed second application for re-determination of compensation in the light of judgment of High Court - Second Application u/s 28-A not maintainable - Appeal dismissed. (Paras 9 & 11)**

सिविल प्रक्रिया संहिता (1908 का 5), धारा 96, भूमि अर्जन अधिनियम (1894

का 1), धारा 28-ए – प्रतिकर का पुनर्निर्धारण – द्वितीय आवेदन – अपीलार्थीगण ने प्रतिकर की रकम के पुनर्निर्धारण हेतु मू. अर्जन अधिकारी के समक्ष आवेदन प्रस्तुत किया, जिसे मंजूर किया गया और अन्य प्रकरण में निर्देश न्यायालय द्वारा पारित किये गये निर्णय के आधार पर प्रतिकर रु. 80,000/– प्रति एकड़ बढ़ाया गया – समान अर्जन कार्यवाही से उत्पन्न पृथक प्रकरण में उच्च न्यायालय ने अपील में रु. 1 लाख प्रति एकड़ की दर से प्रतिकर अवार्ड किया – उच्च न्यायालय के निर्णय के आलोक में अपीलार्थीगण ने प्रतिकर के पुनर्निर्धारण हेतु द्वितीय आवेदन प्रस्तुत किया – धारा 28-ए के अंतर्गत द्वितीय आवेदन पोषणीय नहीं – अपील खारिज।

Cases referred :

AIR 2008 (NOC) 497 (H.P.), (2002) 7 SCC 273, 1995(2) SCC 689, (1995) 2 SCC 736.

K.L. Hardia, for the appellant.
Devendra Singh, P.L. for the respondent/State.

JUDGMENT

P.K. JAISWAL, J. :- They are heard.

1. This order shall also govern the disposal of F.A. No.15/2011, F.A.No.972/2010, F.A. No.973/2010, F.A. No.974/2010, F.A. No.975/2010, F.A. No.976/2010, F.A. No.977/2010 and F.A. No.978/2010 as the common questions are involved and all the matters were heard together and are being decided by this common order. For the purpose of this order, the facts are taken from F.A. No.15/2011.

2. The first appeal bearing F.A. No.15/2011 has been filed against the judgment and decree dated 20/08/2010, passed by IX Additional District Judge, Indore in Reference Case No.40/2010, whereunder, the learned trial Court dismissed the application filed by the appellants/claimants for redetermination of compensation under Section 28-A of the Land Acquisition Act, 1894(hereinafter referred to as "the Act").

3. By notification under Section 4 of the Act on 26/08/1983, the State Government acquired total land admeasuring 1638.96acres situated in five villages namely, 1. Sukh Niwas 2. Signora 3. Navada Path 4. Hukma Khedi and 5. Ahir Khedi in Tehsil and District Indore.

4. In this case, admittedly, the land of the appellant/claimant was acquired

for establishment of an institution which is now known as CAT (Centre for Advance Technology). A notification under Section 4 of the Act was issued on 26/08/1983. The award under Section 11 of the Act was passed on 2/01/1986. Against awarded (sic:award) dated 2/01/1986 a request for reference under Section 18 of the Act was made before the District Court by another land owner. The trial Court decided the reference application No.1/93 (Motilal v. State of M.P.) on 30.01.2000 and modified the award dated 2/01/1986 by directing the respondent No.1 to pay compensation @ Rs.80,000/per acre.

5. By notification dated 26/08/1983, land of number of land owners were acquired. On the basis of order dated 30.01.2000, passed in the matter of Motilal vs. State (Reference No.1/93) on 30.01.2000, application under Section 28-A of the Act was filed by appellant for redetermination of compensation vide Case No.21-A/ 82/90-91 which was allowed on 30/10/2000 and compensation of Rs.80,000/per acre was awarded to him.

6. In F.A. No. 360/200(Laxminarayan deceased through LRs Bondar @ Balram & Ors.) by judgment dated 9/11/2001, the Division Bench of this Court modified the award rendered by Reference Court in all connected appeals and held that the claimants/land owners are entitled to claim compensation for their lands which were acquired under notification dated 26/08/1983 issued under Section 4 of the Act @ Rs.1 Lakh per acre along with interest on solatium under Section 28 of the Act.

7. The other land owner Smt. Manorama Devi made a request for reference to the District Court under Section 18 of the Act. The District Court by Reference no.7/94 dated 22/12/2004 allowed the application and awarded compensation @ Rs.1,00,000/(One Lakh) per acre.

8. The State Government as well as the land owners challenged the aforesaid judgment by filing petition(s) for Special Leave to Appeal (Civil) No (s).10184-10293/ 2002. On 13/02/2006, the Hon'ble Apex Court dismissed the S.L.P. filed by the Statte Government as well as by the land owners.

9. On 11/07/2005, the land owners in the present bunch of appeals filed an application under Section 28-A of the Act for redetermination of the compensation before the Land Acquisition Officer, within three months from the date of order dated 22/12/2004 passed in Reference Case No.7/94 (Smt.

Manorama Devi vs. State of M.P.). The Land Acquisition Officer rejected the application on the ground that second application under Section 28-A of the Act is not maintainable. A request for reference was made. The Land Acquisition Officer referred the matter to the Civil Court. The learned trial Court by impugned order dated 20/08/2010 rejected the reference for redetermination of compensation under Section 28-A of the Act on the ground that their claim for enhanced compensation has been decided by the Reference Court on merits and an award was passed and, thus, they cannot thereafter seek redetermination of compensation under Section 28-A, taking advantage of enhanced compensation awarded by Reference Court in respect of reference made by other owners whose lands were also acquired under the same notification.

10. Learned counsel for the land owners has submitted that the question involved in these bunch of appeals has been considered by Himachal Pradesh High Court in the case of *Nasib Chand & Anr. v. State of H.P. & Ors.*, reported in AIR 2008 (NOC) 497 (H.P.). In the matter of *Nasib Chand & Anr.* (supra), reference petition under Section 18 of the Act claiming higher compensation on various grounds was filed by several land owners other than the petitioners therein and award was passed and the petitioners therein filed applications under Section 28-A claiming enhanced compensation on the basis of that award, however, against that award appeals were filed before the High Court whereby the award was set aside and matter was remanded back to the District Judge for reconsideration and thereafter fresh award was passed. The Himachal Pradesh High Court in the case of *Nasib Chand & Anr.* (supra) has held that the second application of petitioners therein for redetermination of compensation on basis of fresh award would be maintainable.

11. In the present case, the appellant availed the benefit of Section 28-A of the Act and compensation amount was enhanced to Rs.80,000/per acre by order dated 3/10/2000. The aforesaid order was never challenged by the appellant and when Reference Case no.7/94 of Smt. Manorama Devi was allowed on 22/12/2004 and she was awarded compensation @ Rs. 1 Lakh per acre, another application was filed by the appellant and other land owners on 11/07/2005. The same was rejected by holding that subsequent application is not maintainable.

12. Learned counsel vehemently tried to argue the fact that his reference

under Section 18 of the Act was earlier not considered on merits by the Reference Court and an award has been passed, enhancing compensation, the right to avail the benefit of redetermination of the compensation under Section 28-A of the Act taking advantage of the other award dated 22/12/2004 made by Reference Court on a reference made of the claim of the other owners, whose lands were also acquired under the same notification, as of the lands of the appellant, cannot be whittled down or denied and, therefore, his claim has to be allowed to be considered under Section 28-A of the Act.

13. In the present bunch of first appeals, provisions of Section 28-A of the Act had already been invoked by the claimants and their compensation were redetermined on par with the compensation awarded and they have been granted compensation @ Rs.80,000/per acre. No subsequent application for redetermination under Section 28-A of the Act is maintainable.

14. The Apex Court in the case of *Union of India & anr. v. Hansoli Devi & Ors.*, reported in (2002) 7 SCC 273 enumerated the conditions to be satisfied, whereafter an application under Section 28-A can be moved. The said conditions being, reads as under:

> (i) An award has been made by the court under Part III after the coming into force of Section 28-A;
>
> (ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;
>
> (iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4 (1) to which the said award relates;
>
> (iv) The person moving the application did not make an application to the Collector under Section 18;
>
> (v) The application is moved within three months from the date of the award on the basis of which the redetermination of amount of compensation is sought; and
>
> (vi) Only one application can be moved under Section 28-A for redetermination of compensation by an applicant."

15. The three judges Bench of the Apex Court in the case of *Babua Ram*

& Ors. v. State of U.P. & anr., reported in 1995 (2) SCC 689 has held that benefit of redetermination of the amount of compensation under Section 28-A, can be availed of, on the basis of any one of the awards that has been passed by the Court after coming into force of Section 28-A and the period of limitation of three months would start from making of the award on the basis of redetermination is sought.

16. The constitution Bench of the Apex Court which render the decision in the case of *Union of India & Anr. v. Hansoli Devi & Ors.*(supra) and in (2002) 7 SCC 273 adverted to the relevant principles of interpretation with particular reference to Section 28-A, and held that the object was to accord a benefit of those who might not have themselves got a reference earlier under Section 18 of the Act. Referring to the words, "had not made an application to the Collector under Section 18" in Section 28-A, it has been held as follows:

> The aforesaid expression would mean that if the landowner has made an application for reference under Section 18 and that reference is entertained and answered. In other words, it may not be permissible for a landowner to make a reference and get it answered and then subsequently make another application when some other person gets the reference answered and obtains a higher amount. In fact in the case of *Union of India v. Pradeep Kumari,* (1995) 2 SCC 736, the three learned Judges, while enumerating the conditions to be satisfied, whereafter an application under Section 28-A can be moved, had categorically stated (SCC p. 743, para 10) 'the person moving the application did not make an application to the Collector under Section 18'. The expression 'did not make an application', as observed by this Court, would mean, did not make an effective application which had been entertained by making the reference and the reference was answered."

17. As per decision of larger Bench of the Apex Court in the case of *Union of India & another vs/ Pradeep Kumari,* reported in (1995) 2 SCC 736, a person would be able to seek redetermination of the amount of compensation payable to him provided that only one application can be moved under Section 28-A for redetermination of compensation by an appellant. The appellant earlier having pursued the remedy under Section 28-A before a Competent Authority

which become final on, it binds the parties and the State and he or they cannot fall back upon the right and remedy under Section 28-A(1) as the public policy envisaged is that such a party cannot agitate its right twice over.

18. In view of the law laid down by the Apex Court in the case of *Union of India & Anr. v. Hansoli Devi & Ors.*(supra) and considering the fact that in the earlier round of litigation the appellant filed an application for redetermination of compensation under Section 28-A of the Act which has been decided by the Reference Court on merits on 30/10/2000, he cannot thereafter take advantage of enhanced compensation awarded by the Reference Court in respect of Reference Case No.7/94 (Smt. Manorama Devi v. State of M.P., decided on 22/12/2004) made by other owners whose lands were also acquired under the same notification and filed another application (second application) for redetermination of compensation under Section 28-A of the Land Acquisition Act, 1894, the Court below has rightly rejected the application.

19. In view of the aforesaid, there is absolutely no merit in the contention raised on behalf of the appellant/appellants. F.A. No.15/2011 filed by the appellant has no merit and is liable to be dismissed.

20. The Taxing Officer is directed to verify the record and if it is found that no *advalorem* Court fee has been paid then amount of Court Fee be recovered from the appellant/appellants by directing the appellant/appellants to pay the Court Fee, within a period of two weeks from the date of order, failing which recover the amount of Court Fee by initiating execution proceedings against the land owners and after recovering the amount, the same may be deposited in the shape of stamp to the Registry of the Court. The matter be also investigated by the Registrar at his end and report be submitted to the Court from administrative side, within six weeks from today.

21. The appeal fails and shall stand dismissed with cost of Rs.1,500/-. Counsel fee as per schedule.

22. With the aforesaid, F.A. No.972/2010, F.A. No.973/2010, F.A. No.974/2010, F.A. No.975/2010, F.A. No.976/2010, F.A. No.977/2010 and F.A. No.978/2010 are dismissed.

23. A copy of the order passed in this first appeal be retained in the record of F.A. No.972/2010, F.A. No.973/2010, F.A. No.974/2010, F.A. No.975/2010, F.A. No.976/2010, F.A. No.977/2010 and F.A. No.978/2010.

Appeal dismissed.

I.L.R. [2014] M.P., 3197
APPELLATE CIVIL
Before Mr. Justice S.C. Sharma
M.A. No.1258/2013 (Indore) decided on 2 April, 2014

RAMESH GOYAL ...Appellant
Vs.
GAYATRI & anr. ...Respondents

Workmen's Compensation Act (8 of 1923), Section 30 - Entitlement to file an appeal - Precondition of deposit - **Appellant has certainly not at all deposited the interest and there is no certificate on record issued by the Commissioner - Appellant has not complied with the statutory provisions as contained u/s 30 of the Act - Appeal dismissed. (Paras 7 & 8)**

कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 30 – अपील प्रस्तुत करने की हकदारी – जमा की पूर्व शर्त – अपीलार्थी ने निश्चित रुप से ब्याज जमा नहीं किया और कमिश्नर द्वारा जारी किया गया कोई प्रमाणपत्र अभिलेख पर नहीं – अपीलार्थी ने अधिनियम की धारा 30 के अंतर्गत समाविष्ट कानूनी उपबंधों का अनुपालन नहीं किया है – अपील खारिज।

Case referred :

(1998) 1 MPLJ 188.

V.K. Jain, for the appellant.
D.C. Patel, for the respondent.

ORDER

S.C. SHARMA, J. :- The appellant before this court has filed an appeal u/s 30 of the Workman Compensation Act, 1923 against the order dated 10-04-2013 passed by the Labour Court, Ujjain in W.C.A No. 169/2006.

2. Facts of the case reveal that the appellant was engaged in the business of mining and an accident took place on 26-05-2002 resulting in death of the workman. A claim petition was preferred by the widow of the deceased workman alongwith a minor daughter and witnesses were examined before the Labour Court. Witnesses have categorically stated that an accident took place on 26-05-2002 and the workman died on account of injuries caused by the crasher machine and a tractor. The Commissioner Workmen's Compensation has awarded a sum of Rs. 2,57,108/- alongwith interest with

effect from 11-09-2006 @ 12% per annum to the workman. The present appeal has been filed against the award dated 10-04-2013.

3. Learned counsel appearing for the claimants/respondents at the outset has drawn the attention of this court towards section 30 of the Workmen's Compensation Act, 1923 and his contention is that the appellant has not deposited the entire amount with the Commissioner and therefore in light of the judgment delivered by this court in the case of *Tulsiram Vs. Daryaobai* reported in (1998) 1 MPLJ 188, the appeal itself is not maintainable.

4. Heard learned counsel for the parties on the question of admission and perused the record.

5. In the present case, it is not in dispute that the Commissioner for Workmen's Compensation has awarded a sum of Rs. 2,57,108/- alongwith interest @ 12% per annum with effect from 11-09-2006. Section 30 of the Workman Compensation Act, 1923, which provides for a remedy of appeal and the same reads as under :-

> **"30. Appeals.-**
>
> (1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely:--
>
> (a) an order awarding as compensation a lump sum whether by way of redemption of a half- monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;
>
> (aa) 1[an order awarding interest or penalty under section 4A;]
>
> (b) an order refusing to allow redemption of a half- monthly payment;
>
> (c) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant;
>
> (d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub- section (2) of section 12; or
>
> (e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same

subject to conditions: Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and, in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees: Provided, further, that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties: 2[Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.]

1. Ins. by Act 8 of 1959, s. 15 (w. e. f. 1- 6- 1959). 2. Ins. by Act 15 of 1933, s. 17.

(2) The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of section 5 of the Indian Limitation Act, 1908 (9 of 1908), shall be applicable to appeals under this section. "

6. The aforesaid statutory provision of law was considered by this court in the case of *Tulsiram Vs. Daryaobai* (supra). Paragraph 6 and 7 of the aforesaid judgment reads as under :-

"6. Section 30(1)(a) deals with the compensation to be awarded to the claimant and Section 30 provides for an appeal challenging such order. Section 30(aa) deals with the awarding of interest or penalty under Section 4A. By the virtue of provisions of Section 30 such persons can prefer an appeal. A proviso has been provided to Section 30 which reads that :

"No appeal by an employer under Clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against."

7. Mr. Gangwal has argued that this proviso has no application to

the cases which are connected to provisions of Section 30(aa). He further argued that the necessary amount has been deposited by the appellant and xerox copy of the receipt in that context has been annexed to the appeal memo. I do not uphold his submissions. If the appellant wants to make him entitled to prefer an appeal, he is obliged to deposit the entire amount of compensation which has been awarded to the claimant and that has to be deposited with the Commissioner who is awarding such compensation. The plain meaning of proviso to Section 30, as mentioned above provides that the 'the amount which has to be deposited by the appellant with the Commissioner, should be also coupled with appropriate amount of interest awarded by the Commissioner on the amount of compensation awarded to the claimant'. Therefore, it becomes the duty of such an appellant to calculate the said amount of interest if the amount of compensation is separately indicated by the appellant in the appeal. If such an amount is not separately calculated, then the appellant will have to seek necessary directions from the Commissioner, Workmen's Compensation, who has passed the order and that too immediately after the award has been passed. If he fails to do so, he can seek such appropriate order from the High Court at the time of presentation of the appeal memo, if such application is annexed, the High Court would be in position to decide whether the appeal should be accepted for hearing on admission. If such appellant fails to lake such steps, he is inviting the effect of a bar which has been indicated by proviso to Section 30 as mentioned above."

7. In the present case, the appellant has certainly not at all deposited the interest and there is no certificate on record issued by the Commissioner Workmen's Compensation as required under section 30 of the Workmen' Compensation Act, 1923.

8. In light of the aforesaid as the appellant has not complied with the statutory provisions as contained u/s 30 of the Workmen' Compensation Act, 1923, admission is declined and the appeal is dismissed.

No order as to costs.

C.C. as per rules.

Appeal dismissed.

I.L.R. [2014] M.P., 3201
APPELLATE CIVIL
Before Mr. Justice Prakash Shrivastava
M.A. No. 693/2012 (Indore) decided on 2 July, 2014

RAMNARAYAN & ors. ...Appellants
Vs.
ARVIND & ors. ...Respondents

Civil Procedure Code (5 of 1908), Order 39, Rule 1 & 2 and Specific Relief Act (47 of 1963), Section 41(b) - **Injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought.** **(Para 8)**

सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39, नियम 1 व 2 एवं विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 41(बी) – किसी व्यक्ति को किसी ऐसे न्यायालय में कोई कार्यवाही संस्थित करने या अभियोजित करने से अवरूद्ध करने हेतु व्यादेश प्रदान नहीं किया जा सकता जो उस न्यायालय के अधीनस्थ नहीं जिससे व्यादेश चाहा गया है।

Cases referred :

AIR 1983 SC 1272.

S.C. Bagadiya with *D.K. Chhabra,* for the appellants.
Dilip Kshirsagar, for the respondents No. 1 to 3.

ORDER

Prakash Srivastava, J. :- This appeal under (sic:Order) 43 Rule 1 of the CPC is at the instance of the plaintiff in the suit challenging the order of the trial Court dated 14/2/2012 passed in CS No.8-A/2011 rejecting the appellants application under Order 39 Rule 1 and 2 CPC.

2. The appellants as well as the respondent No.1 are sons of Shiv Prasad Chaurasia and the respondent No.4 is the daughter of Shv (sic:Shiv) Prasad Chaurasiya whereas the respondent No.2 and 3 are sons of respondent No.1.

3. The appellants had filed the suit for declaration and permanent injunction pleading that their father Shiv Prasad Chaurasiya had executed the will dated 30/4/2005 bequeathing ground floor of the house bearing No.441 to the

appellant No.1 and making a provision for other properties in respect of the other legal heirs. Their further case is that the ground floor shop in question is a tenanted premise for which the appellant No.1 is receiving rent and that the respondents are claiming the property on the basis of the will dated 21/7/2006 which is a fabricated will. Shiv Prasad Chaurasiya had died on 29/7/2006. The appellants had claimed declaration on the basis of the will dated 30/4/2005 in their favour and also for the declaration of will dated 21/9/2006 as forged and fabricated. Along with the suit the appellants had filed an application under Order 39 Rule 1 and 2 CPC seeking temporary injunction restraining the respondents from interfering in their use and possession as also anti suit injunction seeking stay of the further proceedings in the eviction suit No. CS 22-A/2010 pending before the VII Addl. District Judge, Indore filed by the respondents for eviction of the tenant from ground floor of House No.441. The trial Court, by the impugned order dated 14/2/2012 has rejected the application for temporary injunction.

4. Learned counsel for appellants submits that the appellants are claiming to be the owner of the ground floor, therefore, if the respondents are allowed to continue with the eviction suit against the tenant in the ground floor then that would affect the appellants right, hence anti suit injunction is required to be granted in the case.

5. As against, the learned counsel for respondents has submitted that both the suits are pending before the Courts of Coordinate jurisdiction, therefore, anti suit injunction cannot be granted.

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

7. The trial Court by order dated 14/2/2012 while rejecting the appellants application under (sic:Order) 39 Rule 1, 2 CPC has given proper reasons. The trial Court has noted that there are two wills produced in the case and the eviction suit has been filed by the respondents on the basis of one of the will. It has further been noted that the nature of both the suits is different and in the eviction suit the concerned respondents has to prove the necessary requirement for succeeding in such a suit. It has been found that the appellants have failed to prove *prima-facie* case for grant of temporary injunction.

8. The appellants are not entitled for any such anti suit injunction also for the reason that u/S.41(b) of the Specific Relief Act, injunction cannot be granted to restrain any person from instituting or prosecuting any proceedings

in a Court not subordinate to that from which the injunction is sought. Meaning thereby a Court cannot grant injunction restraining any person from instituting or prosecuting any proceedings in a court of coordinate or superior jurisdiction. In an appropriate case a court can grant the injunction in instituting or prosecuting any proceedings in a court subordinate to it. Section 41 (b) is attracted even at the stage of grant of temporary injunction since even at that stage the order cannot be passed to nullify or stultify the statutory provision. [See *Cotton Corporation of India Limited Vs. United Industrial Bank Limited and others* AIR 1983 SC 1272.] .

9. In the present case, the suit for declaration filed by the appellants is pending before the VII Addl. District Judge, Indore whereas suit for eviction filed by the respondents is also pending before another VII Addl. District Judge, Indore having the coordinate jurisdiction. Thus, the trial Court while passing the impugned order has rightly not granted temporary injunction and has refused the prayer for stay of further proceedings in the eviction suit since such an anti suit injunction in the present case could not be granted by the trial Court in view of the bar contained in Section 41(b) of the Act.

10. In these circumstances, no ground for interference in the impugned order of the trial Court is made out. The appeal is accordingly dismissed.

Appeal dismissed.

I.L.R. [2014] M.P., 3203
APPELLATE CRIMINAL
Before Mr. Justice Shantanu Kemkar & Mr. Justice M.C. Garg
Cr. A. No. 1380/2008 (Indore) decided on 26 July, 2013

ROHIT & ors. ...Appellants
Vs.
STATE OF MADHYA PRADESH ...Respondent

(And Cr.A. No. 14/2009)

A. Evidence Act (1 of 1872), Section 3 - Solitary Eye Witness **- Statement of solitary witness should be consistent, reliable and should be of very high quality and calibre. (Para 18)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – एकमात्र चक्षुदर्शी साक्षी – एकमात्र साक्षी का कथन, संगत, विश्वसनीय होना चाहिए और बहुत उच्च गुणवत्ता और योग्यता का होना चाहिए।

B. Penal Code (45 of 1860), Section 302 - Murder - Ocular and Medical evidence - **In F.I.R. solitary eye witness had stated that assailants had assaulted deceased by means of lathies but in Court evidence improved his version and stated that Gupti, spear etc. were also used - No penetrating wound was found - Witnesses are related witnesses - Motive ascribed also not proved - F.I.R. also lodged within 15 minutes although police station was 8-9 kms away - In absence of corroboration, evidence of solitary eye witness cannot be relied upon - Appeal allowed, appellants acquitted. (Paras 37 & 43)**

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – चक्षुदर्शी एवं चिकित्सीय साक्ष्य – प्रथम सूचना रिपोर्ट में चक्षुदर्शी साक्षी ने कथन किया कि हमलावरों ने मृतक पर लाठियों से हमला किया किन्तु न्यायालयीन साक्ष्य में अपने वर्णन को सुधारा और कथन किया कि गुप्ती, माला इत्यादि भी उपयोग किया गया था – कोई भेदने का घाव नहीं पाया गया – साक्षीगण संबंधी साक्षीगण हैं – बताया गया हेतुक भी साबित नहीं किया गया – प्रथम सूचना रिपोर्ट भी 15 मिनिट के भीतर दर्ज की गई, यद्यपि थाना 8–9 किमी की दूरी पर था – पुष्टिकरण की अनुपस्थिति में, एकमात्र चक्षुदर्शी के साक्ष्य पर विश्वास नहीं किया जा सकता – अपील मंजूर, अपीलार्थीगण दोषमुक्त।

Cases referred :

AIR 1989 SC 982, 1995 SCC (Cri.) 1106, 1976 SCC (Cri.) 60, 2012 CR.L.J. 4119,

Jai Singh with *Vivek Singh,* for the appellants No.1, 3, 5, 6 & 8.
S.K. Vyas with *K.K. Tiwari,* for the appellants No. 2, 4 & 7.
Mamta Shandilya, P.L. for the respondent/State.

JUDGMENT

The Judgment of the Court was delivered by : **M.C. GARG, J. :-** This judgment shall dispose of the aforesaid Criminal Appeals filed by 14 accused persons who all were sent for trial in Criminal Case no. 316/2003 to face charges under section 147, 148, 302/149 of IPC on account of death of Shakir Mohd and Shafi Mohd in an incident which allegedly occurred on 20th February, 2003 at about 4.00 pm near Titodiya Khal Rapat, Rajgarh, situated at Chhadawad Marg. Out of all the accused / appellants, appellants Rohit, Shambhulal, Lalu, Hate Singh, Hare Singh, Amraji, Jadu Singh, Lalchand, Amarlal have filed Criminal Appeal no. 1380/2008. One of them, appellant no. 9 Amarlal S/o Gomaji is no more; whereas accused

/ appellants Ishwar Singh, Prakash, Jalam Singh, Kalu and Gopal have filed Criminal Appeal no. 14/2009.

2. Appellants Shambhulal, Hate Singh and Jadu Singh are represented by Mr. S.K. Vyas, learned Sr. Counsel whereas the other appellants are represented by Mr. Jai Singh, learned Sr. Counsel.

3. As per the case of the prosecution, on 20th of February, 2003 at about 16.45 hours, complainant Shahjad S/o Ismil who is the only eye witness, on whose statement, conviction has been fastened upon the appellants by the learned Sessions Judge, made a complaint at Police Chowki Rajgarh of Police Station – Sardarpur. The report made by him reads as under :

> आज मैं तथा मेरे साथ शाकिर भाई, फखरू राजगढ़ आए थे तभी राजगढ़ में कर्फ्यू लगने से हम लोग ईशाक भाई राजगढ़ वाले के यहां रूक गये थे। करीब तीन साढ़े तीन बजे मैं तथा शफी एवं शाकिर छड़ावद जाने के लिए रवाना हुये। शफी एवं शाकिर अब्दुल रहमान अण्डे वाले की मोटरसाइकिल क. एम.पी.–11 सी / 1534 से तथा मैं अपनी गाड़ी बजाज एम.पी. 09–271 से छड़ावद के लिये रवाना हुए, आगे–आगे शफी एवं शाकिर चल रहे थे। शाकिर गाड़ी चला रहा था। मैं 25–30 फिट पीछे चल रहा था। हम लोग जैसे ही टिटोडिया खाल रपटे पर पहुंचे कि पास की झाड़ी में से तीन–चार आदमी जिसमें (1) ईश्वरसिंह (2) अमर (3) गोपाल (4) अमरा छड़ावद वाले सड़क पर आ गये, इनके हाथों में लाठियां थीं। शाकिर जो मोटरसाइकिल चला रहा था, को सीने में अमर ले लाठी मारी एवं ईश्वरसिंह ने इनको गिराने के लिये धक्का दिया, जिससे ये दोनों वहीं गिर पड़े। वैसे ही साइड की झाड़ियों में छिपे हुये लालू, पूनमसिंह, हरीसिंह, कालू, लालचंद, प्रकाश, हटेसिंह, जादसिंह, जालमसिंह, रोहित, शंभू छड़ावद वाले एकदम झाड़ियों से निकल कर सड़क पर आ गये। इनके हाथों में लाठियां थीं जो इन्होंने लाठियों से एवं दो–तीन लोगों ने पत्थरों से जान से मारने की नियत से मारपीट कर चोटें पहुंचाई। झगड़े का कारण यह है कि ये लोग हमारी जमीनों पर कब्जा करना चाहते हैं एवं गांव में हमें नहीं रहने देना चाहते हैं। यह घटना गोविंद पिता पुरूषोत्तम छड़ावद वाले एवं इनके साथ दो व्यक्ति और थे, उन्होंने देखी है। मौके से मैं डर के कारण अपनी मोटरसाइकिल मौके से मोड़कर चौकी रिपोर्ट करने आया हूं।

4. The important facts in this complaint are as follows (i) the injuries have been caused by the assailants using lathies. There is no mention of using any gupti, spear and gun. (ii) cause of the dispute is intention of the assailants to take forcibly possession of the land belonging to the complainant party (iii) statement of the complainant has been signed by him after two days.

5. On the basis of this statement made by complainant Shahjad, FIR Ex.-P/1 was registered at Police Chowki – Rajgarh, District – Dhar on 20th of February, 2003 at about 16.45 hours. On that basis, crime no. 025/2003 was registered under sections 147, 148, 149, 307 of IPC and Asal Tehrir was sent to Police Station – Sardarpur who then recorded crime no. 74/2003 under section 147, 148, 149 and 307 of IPC. In this case, after registration of FIR Ex.- P/1, In-charge of police station – Sardarpur Mr. R.R. Patidar PW- 14 started investigation by going to the spot. He prepared site plan and took into possession the blood sample and blood earth in presence of witness Aziz Khan and Makhan Singh. Mr. R.R. Patidar PW- 14 is stated to have also took into possession, one motorcycle bearing registration no. M.P.-11 – 1534. On the same day, Doctor of District Hospital, Jhabua through his peon Bhartsingh S/o Brajlal sent one Tehrir to Police Station – Jhabua informing that dead body of one Shakir Mohd was sent to the hospital by Police Chowki – Rajgarh of Police Station – Sardarpur. On that basis, Police Station – Jhabua recorded merg no. 93/2003 under section 174 of Cr.P.C. Similarly, another Tehrir was received from the Doctor of District Hospital – Jhabua regarding the information of death of Shafi Mohd who was taken to the hospital for treatment. On that basis, another merg no. 10/2003 was recorded at Police Station – Jhabua under section 174 of Cr.P.C. ASI Mr. O.P. Thakur on 20th of February, 2003 also prepared Naksha Panchanama of deceased Shafi Mohd in presence of witness Mohd, Mansuri, Ishaq, Noon Mohd and Abdul Aziz. On the same day, Naksha Panchanama of another deceased Shakir Mohd was also prepared.

6. On the same day, Incharge of Police Station – Jhabua referred the dead body of Shakir Mohd and Shafi Mohd for postmortem after obtaining permission from SDM, Jhabua. Postmortem of aforesaid two dead bodies was permitted to be held by SDM, Jhabua on the same day. In this connection, dead body of Shakir Mohd and Shafi Mohd was sent to the hospital for conducting postmortem at 8.10 pm and at 11.30 pm respectively. Dr. A.K. Dubey of District Hospital, Jhabua conducted the postmortem of deceased Shakir Mohd at 8.45 pm and Shafi Mohd at 11.45 pm. Thereafter, dead body of both the deceased were sent for Antim Sanskar. On 21st February, 2003 from Jhabua Hospital, Sub-inspector O.S. Thakur took into possession blood sample, Jangiya, Paijama and Baniyan of deceased Shakir Mohd in presence of witness Amrutlal and Santosh while on the same day, blood sample, Jangiya, Pant and Baniyan of deceased Shafi Mohd was also taken into

possession. On 20th , 23rd and 28th of February, 2003 and 25th of April, 2003, Mr. R.R. Patidar after arresting the accused persons recorded their statements under section 27 of the Evidence Act recorded. From disclosure statement, one iron gupti and one wooden rod was recovered at the instance of accused Ishwar; one iron spear at the instance of accused Amarsingh; one double barrel gun at the instance of accused Virendrasingh and wooden rods from the other accused persons. Statements of the witnesses were also recorded. Seized Articles were sent for examination to FSL, Rau and after completing investigation, initially the challan was filed on 26th of May, 2003 before the CJM, Dhar under section 148, 307, 302/149 of IPC who then transferred the case, on 27th of May, 2003 to JMFC, Sardarpur who then committed the case to Sessions on 23rd of June, 2003.

7. Charges framed against the accused / appellants under sections 147, 148, 302/149 of IPC were denied by all of them. In their statement recorded under section 313 of Cr.P.C., all the appellants claimed innocence. They also took defence of alibi in so far as appellants Shambhu, Jalamsingh, Hatesingh, Lalu, Rohit are concerned. Appellant Virendra claimed to be RSS worker and alleged false implication. Other accused persons claimed false involvement in this case on the basis of political rivalry. However, no defence evidence has been led by any of the accused / appellants.

8. The trial Court proceeded with examination of the evidence which came on record by presuming that all the witnesses cited by the prosecution knew all the accused persons / appellants as all the witnesses as well as the accused persons were resident of Gram -Chhadawat. The trial Judge also proceeded with further presumption that on 20th of February, 2003 on account of dispute of Bhojshala, there was curfew in Rajgarh and that there was communal tension in that area.

9. Examination of Shahjad PW-1 is very relevant as the entire case of the prosecution is based upon the assumption that he is the only eye witness and on the basis of sole testimony, the learned Sessions Judge convicted all the appellants of the charges framed against them.

10. It has been submitted by the appellants that the evidence of Shahjad PW-1, the sole eye witness of the incident relied upon by the prosecution was completely unreliable and unacceptable, in as much as, the version in the FIR by that witness regarding injuries found on the body of the deceased were not as disclosed by him in his testimony which was recorded in the Court. It was

also submitted that even the medical evidence was contrary to what has been stated by PW-1 Shahjad in his statement made to police which is the basis of the FIR Ex.-P/1. It has also been contended that this witness has very categorically admitted that all the witnesses cited by the prosecution including this witnesses were near relatives of the deceased persons.

11. The appellants have further submitted that the prosecution has not been able to prove their case beyond reasonable doubts inter-alia for the following amongst other reasons.

i) The FIR in this case is suspicious and ante time as the date and time of the incident is 20th of February, 2003 at 16.00 hours and the FIR was made on the same day at 16.15 hours. Place of the incident is at the distance of about 8 km from the police station. Thus, it is clearly impossible for anyone in ordinary course to reach and travel the distance of 8 km within 15 minutes. Thus, it clearly shows that the FIR is ante time.

ii) Statement under section 161 of Cr.P.C of alleged eye witness Shahjad PW-1 was recorded after one day of the incident, whereas the witness was available to the prosecution at the time of lodging of the FIR and carrying out other investigation. This also fortify that the FIR was ante time and the eye witness was brought must later to support the prosecution story, even though he was not present at the time of incident.

iii) Statement of PW-2 Fakru and recording of dying declaration of Shafi Mohd have been discarded and not believed by the trial Court. Similarly, the story of the prosecution that the accused persons were last seen on the place of the occurrence armed with weapons is also disbelieved by the trial Court in the light of the observations made by learned Trial Court in para – 30, 31 and 37 of the impugned judgment. In having disbelieved the statement of Fakru PW-2 and oral dying declaration of deceased Shafi Mohd, case of the prosecution rests only on the evidence of PW-1 Shahjad, whose statement is not admissible in evidence for the following reason:

" That the initial version given in the FIR that the accused persons are armed with lathi and stones but later on his version changes and now the witness improves and states that the accused persons were armed with hard and sharp objects. It is a material omission amounting to contradiction and the witness improves his story just to suit the medical evidence. Hence the evidence of the eye witness suffers from material contradiction and deserves to be discarded ".

Para – 30, 31, 32 and 37 of the impugned judgment are relevant which are reproduced hereunder for the sake of reference :

30 जहॉ तक शेष अभियुक्तगण का प्रश्न है, इस बिन्दु पर स्वयं (असा. 2) फखरू द्वारा प्रस्तुत हुई साक्ष्य के अनुसार घटना दिनांक 20–02–2003 के तीन–साढ़े तीन बजे करीबन राजगढ़ से वह स्वयं (असा. 1) शहजाद तथा मृतक शफी एवं शाकिर ग्राम छड़ावद क लिए अलग–अलग मोटरसाइकिल से रवाना हुए। सबसे आगे मृतक शफी तथा शाकिर एक मोटरसाइकिल से थे, उनके पीछे (असा. 2) फखरू मोटरसाइकिल पर था तथा स्वयं (असा. 2) फखरू राजगढ़ निवासी अपने जीजा अब्दुल रहमान अण्डेवाले की मोटरसाइकिल से राजगढ़ से ग्राम छड़ावद के लिए रवाना हुआ था, जबकि प्रस्तुत मामले में (असा. 1) शहजाद ने अपनी प्रथम सुचना रिपोर्ट प्र.पी. 1 में यह वर्णित करवाया है कि – "" करीब साढे तीन बजे मैं तथा शफी एवं शाकिर छड़ावद जाने के लिए रवाना हुए, शफी और शाकिर अब्दुल रहमान अण्डेवाले की मोटरसाइकिल कंएमपी. 11–सी/1534 से तथा मैं अपनी गाडी बजाज कं. एम.पी. 09/217 से छड़ावद के लिए रवाना हुए। "" अतः प्रस्तुत हुई प्रथम सुचना रिपोर्ट के अनुसार स्वयं (असा. 1) शहजाद अपनी स्वयं की बजाज मोटरसाइकिल कं. एम.पी. 09/217 से छड़ावद के लिए रवाना हुआ तथा मृतक शफी तथा शाकिर अब्दुल रहमान अण्डेवाले की मोटरसाइकिल से रवाना हुए थे, तथा यहॉ यह प्रमाणित हुआ है कि (असा. 14) श्री आरआर. पाटीदार थाना प्रभरी ने दि. 20–02–2003 को ही ग्राम छड़ावद पहुंच कर शहजाद खॉ के घर रखी हुई मोटरसाइकिल कं. एम.पी. 11/1574 जप्त कर जप्ती पत्र प्र.पी. 44 बनाया था। यह स्वयं मृतक शाकिर मोहम्मद के पुत्र (असा. 4) शिकंदर द्वारा प्रस्तुत हुई साक्ष्य से यहॉ यह भी स्पष्ट हैकि घटना के उपरांत घटना की जानकारी प्राप्त होने जब वह स्वयं, सुलेमान, कलमसिंह, अजीज़, इशाक, इमरान के साथ – (असा. 9) माखनसिंह के ट्रेक्टर से घटनास्थल पर गया था, तभी पुलिस आा गई थी और शफी तथा शाकिर की लाश उठाकर थाने में ले आई थी, तब वह घटनास्थल से मोटरसाइकिल उठाकर अपने घर छड़ावद चला गया था। अतः स्पष्ट हैकि शाकिर तथा शफी अब्दुल रहमान अण्डेवाले की जिस मोटरसाइकिल से राजगढ़ से छड़ावद जा रहे थे, उस मोटरसाइकिल की मृतक शाकिर का

पुत्र (असा. 4) शिकंदर अपने घर छड़ावद ले गया था, जिससे घटना दिनांक को ही (असा. 14) थाना प्रभारी श्री आरआर. पाटीदार ने जप्त कर जप्ती पत्र प्र.पी. 44 बनाया था, तब (असा. 2) फखरू द्वारा प्रस्तुत हुआ यह साक्ष्य कि घटना दि. 20–02–2003 को वह स्वयं राजगढ़ से अपने जीजा अब्दुल रहमान अंडेवाले की मोटरसाइकिल से छड़ावद जा रहा था और घटना देखने के उपरांत मोटरसाइकिल को पलटा कर वापिस राजगढ़ आ गया था। प्रस्तुत हुआ यह साक्ष्य असत्य हो जाता है, तब घटना के समय (असा. 2) फखरू द्वारा घटना देखे जाने का दावा भी असत्य हो जाता है।

अतः प्रस्तुत हुई साक्ष्य से यहॉ यह प्रमाणित नीं होता हैकि घटना दिनांक 20–02–2003 के करीब चार बजे (असा. 2) फखरू ने छड़ावद अपने जीजा की मोटरसाइकिल से जाते समय टिटोडिया खाल (नाले) पर अभियुक्तगण द्वारा शफी तथा शाकिर के साथ मारपीट करते हुए देखा था।

31 यहॉ परीक्षित साक्षी (असा. 7) शांतिलाल ने अपने मुख्य कथन में इस आशय का साक्ष्य प्रस्तुत किया है कि घटना के दिन क 12 बजे करीबन वह स्वयं राजगढ़ जा रहा था, जहां उसने टिटोडिय खाल (नाले) के वहां पर बहुत से आदमियों को देखा था, किंतु व्ह उन आदमियों को पहचानता नहीं था। उन आदमियों को देखकर वह वापिस अपने गांव छड़ावद चला गया था, तब अभियोजन पक्ष ने इस साक्षी को पक्षविरोधी घोषित कर उससे सुचक प्रश्न पूछे, तब उसने यह तो स्वीकार किया हैकि घटना के समय वह स्वयं अपने लड़के मुकेश के साथ मोटरसाइकिल से राजगढ़ की ओर आ रहा था, राजगढ़ स्थित मानव सेवा अस्पताल में उसकी पत्नी विद्या बाई भर्ती थी, उस समय उसने कुद लोगों को मारपीट करते हुए देखने के उपरांत वह अपने पुत्र के साथ वापिस छड़ावद चले गया था, किंतु उसने यह जानकारी वापिस छड़ावद जाकर मोहम्मद शिकंदर को बताए जाने से इंकार कर दिया है। उसने अपने पुलिस बयान प्रपी. 8 में ए का अंश भी दिये जाने से इंकार कर दिया है तथा बचाव पक्ष की ओर से किए गए प्रतिपरीक्षण में यह स्वीकार किया है कि घटना के समय उसने अभियुक्तगण द्वारा किसी के साथ मारपीट करते हुए नहीं देखा था। अतः ऐसी दशा में स्वयं (असा. 7) शांतिलाल द्वारा प्रस्तुत हुआ साक्ष्य मामले की पृष्ठ भूमि में अनावश्यक एवं असंगत होने के कारण साक्ष्य में ग्राह्य किए जाने योग्य नहीं रह जाता है।

32 यहॉ परीक्षित साक्षी (असा. 1) शहजाद, (असा. 2) फखरू द्वारा प्रस्तुत हुई साक्ष्य से यहां यह तो स्पष्ट है कि राजगढ़ तथा छड़ावद के मध्य घटानास्थल टिटोडिया खाल (नाला) स्थित है। ग्राम छड़ावद से राजगढ़ की दूरी नौ कि.मी. है तथा राजगढ़ से टिटोडिया खाल (नाले) की दूरी सात–आठ किमी. की है। स्वयं (असा. 1) शहजाद ने अपने प्रतिपरीक्षण की कंडिका – 11 में यह स्वीकार किया है कि घटना के समय जब वह स्वयं राजगढ़ से करीब

तीन बजे ग्राम छड़ावद के लिए निकले, तब घटनास्थल टिटोडिया खाल (नाला) पहुँचने में करीब एक घंटे का समय लगा था। अतः स्पष्ट है कि घटनास्थल से वापिस राजगढ़ आने के लिए उतना ही करीबन समय लगने की उपधारणा की जा सकती है। यहाँ परीक्षित साक्षी (असा. 3) मोहम्मद मंसुरी, (असा. 4) शिकंदर, (असा. 5) इमरान, (असा. 6) अब्दुल सलाम तथा (असा. 9) माखनसिंह ने अपनी न्यायिक परीक्षा काल में एक स्वर में इस आशय का साक्ष्य प्रस्तुत किया हैकि घटना दिनांक 20–02–2003 को जब वे स्वयं अपने घर पर थे, उस समय उन्हें (असा. 7) शांतिलाल एवं उसके पुत्र मुकेश से यह जानकारी प्राप्त हुई के गांव के लोग शाकिर मोहम्मद तथा शफी मोहम्मद के साथ मारपीट कर रहे है, तब वे (असा. 9) माखनसिंह के घर गए और अपने ट्रेक्टर से घटनास्थल पर चलने के लिए कहा था, तब ट्रेक्टर में तेल न होने कारण (असा. 3) मोहम्मद मंसुरी पांच लीटर तेल लेकर ट्रेक्टर में डाला और वे सभी घटनास्थल पर गए, जहाँ (असा. 9) माखनसिंह का यह कहना रहा है कि जब वे घटनास्थल पर पहुंचे, तशाकिर और शफी मोहम्मद मृत अवस्था में पड़े हुए थे। जब वे पहुंचे तभी पुलिस की गाडी भी आ गई, इसके अलावा घटनास्थल पर ओर कोई मौजुद नहीं थे, (असा. 3) मोहम्मद मंसुरी, (असा. 4) शिकंदर तथा (असा. 5) इमरान द्वारा प्रस्तुत हुआ यह साक्ष्य विश्वसनीय नहीं रह जाता हैकि जब वे घटनास्थल पर पहुंचे, तब उन्होंने अभियुक्त ईश्वर को अपने हाथ में गुप्ती, अभियुक्त अमरसिंह को अपने हाथ में भाला, अभियुक्त कालू, लालू, लालचंद, प्रकाश, जालतसिंह, शंभुसिंह, अमरा, अमर, हटेसिंह, जादूसिंह, हरेसिंह, रोहित तथा गोपाल को अपने हाथ में लाठियाँ लेकर भागते हुए एवं अभियुक्त वीरेन्द्रसिंह अपने हाथ में बन्दूक लिए हुए गावं की ओर जाते हुए देखा था, जहाँ घटनास्थल से पुलिस चौकी आने में करीब एक घंटे का समय लगता है और राजगढ़ से पुनः वापिस ट्रेक्टर से जाने में भी लगभग उतना ही समय लगने की उपधारणा की जा सकती है, तब तक अभियुक्तगण की घटनास्थल पर उपस्थिति की अपेक्षा नहीं की जा सकती हैं। अतः परीक्षित हुए इस साक्षियों द्वारा घटनास्थल पर जाकर अभियुक्तगण को घटनास्थल से हथियार लेकर जाते हुए देखे जाना प्रमाणित नहीं होता है।

37 यहाँ प्रस्तुत हुई साक्ष्य के अध्ययन से यहाँ यह स्पष्ट नहीं होता हैकि जब पुलिस घटनास्थल टिटोडिया खाल (नाले) से मृतक शाकिर मोहम्मद एवं शफी मोहम्मद को अपनी गाडी में रखकर पुलिस चौकी राजगढ़ लाई और आधे घंटे के उपरांत झाबुआ के लिए रवाना हुई थी, उस समय शफी मोहम्मद जीवित था, क्योंकि यदि वास्तव में शफी मोहम्मद जीवित था, तो निश्चित् ही कर्फ्यू के उपरांत भी पुलिस उसके जीवन को बचाने के लिए राजगढ़ स्थित अस्पतालों में अथवा सरदारपुर अस्पताल में लेकर आती, अथवा शफी मोहम्मद के मरणासन्न कथन लेखबद्ध करते, क्योंकि मानव जीवन की रक्षाकरना सर्वोपरि कर्तव्य है। संविधान की अनुच्छेद 21 के अनुसार राज्य

जीवन रक्षा करने के लिए बाध्य है। घटनास्थल से पुलिस चौकी राजगढ़ में आधे घंटे तक पुलिस वाहन में ही शाकिर मोहम्मद तथा शफी मोहम्मद को रखे जाना इस बात का संकेत मिलता हैकि वास्तव में घटनास्थल पर ही शाकिर मोहम्मद के साथ ही शफी मोहम्मद की भी मृत्यु हो चुकी थी। यदि यह भी मान लिया जावे कि पुलिस शफी मोहम्मद को बेहोशी हालत में उठाकर पुलिस चौकी लाई थी, जहॉ (असा. 3) मोहम्मद मंसुरी ने शफी मोहम्मद को पानी पिलाया था, तब भी शफी मोहम्मद द्वारा मौखिक मृत्युकालीन कथन दिया जाना विश्वसनीय नहीं है, क्योंकि स्वयं (असा. 3) मोहम्मद मंसुरी ने अपने प्रतिपरीक्षण में यह स्वीकार किया हैकि शफी मोहम्मद बोल ही नहीं पाया। (अशोक विरूद्ध स्अेटऑफ गुजरात 2007 कि0ला0ज0 3579 गुजरात) के मामले में मृतक को आहत दशा में पुलिस स्अेशन पर लाया गया था, जब उसे पुलिस स्अेशन पर लाया गया था, वह चैतन्य था, तब यह मार्गदर्शन दिया गया है कि ऐसी स्थिति में उसके कथन को अभिलिखित किए जाने अथवा मृत्युकालीन कथन को अभिलिखित किए जाने का कोई प्रयास न किया जाना उचित नहीं माना गया और तब अभियोजन मामले को संदिग्ध मानते हुए दोषमुक्ति उचित ठहराई गई थी। प्रस्तुत मामले में भी यही स्थिति रही है। यदि वास्तव में शफी मोहम्मद जीवित होता, तो निश्चित् ही राजगढ़ पुलिस चौकी शफी मोहम्मद के जीवन को बचाने का प्रयास करती अथवा उसके मृत्यूकालीन कथन अवश्य ही लेखबद्ध करती। (हेकजम छोबा सिंह विरूद्ध स्टेट ऑफ मणिपुर 2000 कि0ला0रि0 34 एस.सी.) के मामले में मृतिका ने उसके भाई (असा. 5) को अस्पताल में मृत्युकालीन कथन दिये थे, इसका उल्लेख प्रथम सुचना रिपोर्ट में नहीं था। पुलिस ने घटना के कई दिवस पश्चात् (असा. 5) के कथन लेखबद्ध किए थे। माननीय उच्चतम न्यायालय ने ये अभिमत दिया कि जिस समय मृतिका ने अपने भाई (असा. 5) को मृत्युकालीन कथन दिया था, उस समय उपस्थित साक्षियों के कथन नहीं लिए थे, जो उस समय उपस्थित थे। मात्र हितबद्ध साक्षियों के कथन लिए गए थे, इस कारण (असा. 5) के कथन को महत्व नहीं दिया था तथा मृत्युकालीन कथन को विश्वसनीय नहीं माना गया था। प्रस्तुत मामले में यही स्थिति रही है। स्वयं (असा. 11) डॉ0 ए.के. दुबे ने भी शव परीक्षण रिपोर्ट प्र.पी. 38 एवं प्र.पी. 39 प्रस्तुत कर अपने कुट परीक्षण की कंडिका –11 में यह स्वीकार किया है कि मृतक शफी मोहम्मद की खोपड़ी के अंदर टैम्पोरल बोन का फ्रैक्चर बेस ऑफ स्कल तक हो गया था, उसके नीचे बड़ी मात्रा में हेमोटोमा था, जिसके कारण अत्यधिक रक्त स्त्राव हुआ और शॉक उत्पन्न हुआ था। खोपड़ी में हुई यह उपहति के कारण शफी मोहम्मद कुछ ही क्षणों में बेहोश हो जाने की संभावना थी। अतः ऐसी दशा में (असा. 3) मोहम्मद मंसुरी, (असा. 5) इमरान द्वारा प्रस्तुत हुआ यह साक्ष्य विश्वसनीय नहीं रह जाता है कि मृतक शफी मोहम्मद ने मौखिक मरणासन्न कथन दिये थे। अतः यहॉ यह भी प्रमाणित नहीं हो पाया है कि मृतक शफी मोहम्मद ने किसी प्रकार के मौखिक मरणासन्न कथन दिये थे।

12. Appellants have also relied upon the Judgment delivered by Hon'ble the Supreme Court in the case of *Mahendra Singh Vs. State of Rajasthan* reported in AIR 1989 SC 982 and they have argued that when there is change in the version of the eye witness as per his statement made in the FIR before the Committal Court and then before the trial Court so as to fit in story of the prosecution viz-viz medical evidence, such statement cannot be believed. Paragraphs no. 7 to 9 are relevant which are reproduced hereunder for the sake of reference :

> 7. The learned counsel for the appellant submitted that the prosecution story in regard to the involvement of the appellant is incredible, in that, it is not possible to believe that the appellant who had invited PW-1 and the deceased Harbans Singh to attend the betrothal ceremony would involve himself in the murder of Harbans Singh. He further submitted that in any case it was hazardous to place implicit faith on the testimony of PW-1 because it is found that his entire version regarding the second part of the prosecution case is thoroughly unacceptable, and insofar as the first part of the incident is concerned, it is found that he has been shifting his version in that behalf. We see considerable force in the submissions of the learned counsel for the appellant.
>
> 8. As pointed out earlier, the conviction of the appellant is based solely on the testimony of PW-1. There is no doubt that Harbans Singh was done to death at the residence of Banta Singh where he had gone with PW-1 to attend the betrothal ceremony. However, PW-4 and PW-8 who were examined as eye-witnesses to the occurrence did not support the version of PW-1 at the trial. PW-1, in the course of his evidence before the Court stated that after Bua Singh had inflicted two blows with the Dantar on the head of Harbans Singh and the latter had fallen on the ground, the appellant took the Dantar from Bua Singh and inflicted many blows on the back of the deceased. He has further deposed that thereafter the appellant fired four shots from his revolver whereupon PW-4 and PW-8 took to their heels. When the Panchnama of the scene of occurrence was drawn up on the next day in the morning nothing was found to indicate that the

appellant had fired four shots from his revolver. If the appellant was armed with a revolver and had intended to kill Harbans Singh, we fail to understand why instead of using the revolver he chose to use the Dantar. PW-1 wants us to believe that the appellant inflicted blows with the Dantar on the back of the deceased even though the head of the deceased was virtually chopped off by Bua Singh. However, it is found that in the F.I.R. lodged at about 1.30 p.m. on 21st June, 1973 PW-1 had stated that the appellant had inflicted three or four blows on the head of the deceased. In his evidence before the committal court also PW-1 stated that the appellant had dealt blows with the Dantar on the head of the deceased. It was, therefore, rightly pointed out by the learned counsel for the appellant that the version given out by PW-1 in his F.I R. as well as evidence recorded in committal court was that the appellant had inflicted blows on the 'head' of the deceased while during the trial he testified that the blows were inflicted on his 'back'. He changed his version in his evidence at the trial on realising that otherwise it would conflict with medical opinion. Finding that there were incised wounds on the back and leg of the deceased which would go unexplained and only a limited number of wounds on the head which would falsify his statement of having dealt three or four blows on the head he stated that the appellant had inflicted blows with the Dantar on the back of the deceased after the latter had fallen down. The learned counsel for the appellant rightly pointed out that he had raised this contention before the learned Additional Sessions Judge as well as the High Court but the same was not effectively dealt with. We think that having regard to the deliberate improvement made by PW-1 as regards the seat of injuries caused by the appellant to make his version consistent with medical opinion, both the courts below erred in concluding that it was safe to place implicit trust on his testimony. Since the evidence of PW-1 in regard to the presence of PW-4 and PW-8 as well as the second part of the incident is found to be thoroughly unacceptable, his evidence regarding the murder also has to be accepted with a pinch of salt and cannot be acted upon in absence of independent corroboration.

9. In the above circumstances we are of the opinion that the testimony of PW-1, insofar as the role assigned to the appellant is concerned is suspect and cannot be accepted in the absence of dependable corroboration. We, therefore, think that a serious doubt arises as regards the involvement of the appellant and the benefit of that doubt must go to him. We, therefore. allow this appeal, give the benefit of doubt to the appellant and set aside his conviction and sentence under S.302/34 IPC, and direct that he be released at once unless required in any other case. The fine, if paid, to be refunded.

Appeal allowed.

13. In this case also, it has been submitted that PW-1 Shahjad has given different story in the FIR. In that statement, he did not make any mention about using of gupti, spear or gun whereas in his statement made in the Court, he has stated that gupti, spear and gun was used. Such improvement made by him is even otherwise not consistent with the medical evidence and therefore, such improvement in his statement only goes to prove that the witness was not available at the place of the incident and is not the eye witness . Moreover, statement made by PW-1 Shahjad has not been corroborated by any other witness.

14. Other judgment delivered by Hon'ble the Supreme Court in the case of *Namwar Dubey and others Vs. State of U.P.* Reported in 1995 SCC (Cri) 1106 also relied upon by the appellants is also on the same line and on the same point cited before us by learned Sr. Counsel appearing for the appellants.

15. In this case also by referring to evidence of the sole eye witness on which reliance was placed by the prosecution and finding it to be contradictory and inconsistent with his earlier statement recorded as dying declaration and finding material discrepancies as regards nature of weapon carried by the assailants and used for assault on the victims, in the light of the statement of doctor in whose presence the said dying declaration was recorded by the Magistrate wherein the witness claimed that he was unconscious or that he did not make the statement attributed to him was held to be not acceptable. Reference can be made to para no. 7 to 9 of this judgment which read as under :

"7. The most glaring discrepancy which goes to the root of the matter and shatters the cases version of PW2 is as regards the site where the murderous attack on Lognar took place. According to his sworn testimony the entire assault on the deceased took place in the shop of Lalta which as the evidence on record shows. was at a distance of about 40/50 feet to the east of Varanasi-Bhaoohi Road. In his earlier statement he however stated that his uncle was shot at and died on the road. Indeed, in his earlier statement he did not even mention about the shod of Lalta. The reason for such shifting of the place of occurrence is not far to seek. The investigation Officer stated in his evidence that he found blood only in the shop of lalta and nowhere else. Obviously to fit in with the presence of blood only in the shop of Lalta, PW 2 mace the above concocted statement in Court. As regards the sequence of events also there is a marked discrepancy in the evidence of PW 2. At the trial he stated that as soon as they reached the road the miscreants bounced upon them. But his earlier statement was that after coming out of their house they went to a petal shop and there while they were waiting for the betels ordered by them to be served the miscreants came there and attacked them. PW 2 next stated in his deposition that after being assaulted he rushed to the courtyard of Ramdular which was on the western side of the Varanasi, Bhadohi Road and from there he saw the assault on his uncle in the shop of Lalta. But earlier he had stated that after being assaulted when he went running to the house of Ramdular he did not allow him to enter apprehending that he (Ramdular) might be fired at also and that he fell down in front of his gate. There is also material discrepancy as regards the nature of weapons carried by the appellants and used for assault or him and his uncle.

8. In appears that when PW 2 was confronted with different portions of his earlier statement in accordance with Section 145 of the Evidence Act. he claimed that he was unconscious and denied to have made the statements attributed to him. That such claim of PW2 was false - and was obviously made to ripple out of the earlier statement - would be patently

clear from the unimpeachable evidence of Dr. B.P. Singh (D.W.I who was the Medical Officer of Varanasi Hospital at the material time. He testified that in his presence Shri S.M. Maurya. Deputy Collector, Varanasi recorded the dying declaration of Ram Surat in his presence and that Ram Surat was in his senses. In support of his testimony he not only proved the dying declaration but also his endorsement and that of the Magistrate thereon. In cross examination he denied the suggestion that Ram Surat was senseless and was not able to give the statement.

9. For the foregoing discussion we are unable to conclusively infer solely relying upon the evidence of PW 2 that the four appellants committed the murder of his uncle or attempted to commit his murder. The appeal is therefore, allowed. The impugned order of conviction and sentence is hereby set aside and the appellants are acquitted of all the charges. The appellants who are in jail be released forthwith.

16. One more judgment as cited by the learned counsel appearing for the appellants is the judgment delivered by Hon'ble the Supreme Court in the case of *Badri Vs. State of Rajasthan* reported in 1976 SCC (Cri) 60. In this case also, in absence of corroboration to the sole witness relied upon by the prosecution against the accused persons to prove a serious charge of murder, who modulate his evidence to secure conviction, the Court observed that the evidence of the solitary witness in these circumstances was not such that it could be relied upon by the Court for the purpose of upholding the conviction. In that case also, it was held that while no particular number of witnesses are required for the proof of any fact, it is a sound and well established rule of law that quality and not quantity of evidence matters. In each case, the Court has to consider whether it can be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting a person. Para – 11 and 12 are relevant which read as under :

11. This Court had to deal with the case of a solitary witness in *Vadivelu Thevar v. The State of Madras.* (1) oral testimony was classified in that case into three categories, namely (1) wholly reliable, (2) wholly unreliable and (3) neither wholly reliable nor wholly unreliable. While there is no difficulty

about the first two, with regard to the third category this Court observed:

> "It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial".

12. Since under the Evidence Act no particular number of witnesses are required for the proof of any fact, it is a sound and well-established rule of law that quality and not quantity of evidence matters. In each case the court has considered whether it can be reasonably satisfied to act even upon the testimony of a single witness for the purpose of convicting a person.

17. It has been discussed by the Apex Court in its later judgment delivered in the case of *Rai Sandeep alias Deepu Vs. State of NCT of Delhi Vs. Hari Singh Vs. State of (NCT)* of Delhi reported in 2012 CRI.L.J. 4119 where the Hon'ble Supreme Court in para – 15 has laid down the test for admissibility of such solitary witness. Para 15 reads as under :

> 15. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-

relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

18. Thus, from the aforesaid judgments, principle can be deduced for the purpose of analyzing and placing reliance upon the testimony of solitary witness i.e., the statement made by that witness should be consistent, reliable and even if it is not supported or corroborated by any other witness, then also, the quality of such evidence be such, should be of very high quality and calibre.

19. Thus, in the light of the aforesaid principle, we will have to test the version of PW-1 Shahjad , the sole eye witness relied upon by the learned Sessions Judge in this case to convict all the appellants for the offence punishable under section 147, 148, 302/149 of IPC.

20. It would also be relevant to take note of the statement made by doctor who conducted postmortem on the dead bodies of the deceased persons. Postmortem report of Shakir Mohd and Shafi Mohd as available on record are Ex.-P/38 and Ex.-P/39 respectively. Both the postmortem reports have been proved by Dr. A.K. Dubey PW-11. His entire evidence is relevant and is reproduced hereunder for the sake of reference. :

1. मैं झाबुआ में चिकित्सक के पद पर पदस्थ हूं। दिनांक

20.02.03 को मै जिला चिकित्सालस झाबुआ में चिकित्सा अधिकारी के पद पर पदस्थ था उक्त दिनांक को थाना झाबुआ द्वारा शव परीक्षण हेतु शकील मोहम्मद पिता अब्दुल रहमान उम्र 45 वर्ष, निवासी ग्राम छड़ावद को लाया गया था। शव के बाहरी परीक्षण में हमने पाया कि शरीर पर निम्न चोटें पाई :–

1. एक कटे हुए घाव सी के सामने एवं दोनों तरफ पाये गये। साथ ही पेट के उपरी हिस्से में भी घाव पाये गये जिनका आकार 2 x ½ सेमी. एवं वक्ष की गहराई एवं पेट की गहराई सख्त होकर 2.5 x ½सेमी. मसल्स की गहराई तक थे।

2. एक फटा हुआ घाव सिर के पिछले हिस्से में पाया गया जिसका आकार 3 x ½ x ½ सेमी. था।

3. एक फटा हुआ घाव बांये हाथ की अग्र भुजा पर आकार डेढ़ x ½ सेमी. एवं मसल्स की गहराई तक था।

4. एक फटा हुआ घाव सिर के सिर के सामने हिस्से में बांये तरफ जिसका आकार 2 x ½ x ½ सेमी. था।

5. एक फटा हुआ घाव बांये कंधे पर जिसका आकार 1.5 x ½ सेमी. एवं मसल्स की गहराई था।

6. सी के बांये हिस्से में अनेक ब्रूजेज पाये गये जिनका आकार 2.5 सेमी. x 3 x 2.4 सेमी. था।

शव के आंतरिक परीक्षण में निम्न स्थिति पाई गई :– सिर के पिछले हिस्से में एक लिनियर फ्रेक्चर पाया। मस्तिष्क की इंद्री सिर के पिछले हिस्से में फटी हुई पाई गई। रक्त का थक्का मस्तिष्क की सतह पर सामने व पिछले हिस्से में पाया गया। सी के बांये ओर की अनके पसलियों का फ्रेक्चर पाया था। साथ ही वक्ष गुहा में रक्त पाया गया। दोनों फेफड़ों की झिल्ली फटी हुई थी, दाहिना फेफड़ा में फटा हुआ घाव था जिसकी लंबाई 3 सेमी. थी। बांये फेफड़े में निचले हिस्से में एक फटा हुआ घाव 2.5 सेमी. का पाया था। हृदय के दोनों चेम्बर रिक्त पाये गये। एबडामिनल केविटी रक्त से भरी हुई थी। लीवर के दाहिने हिस्से में कटा हुआ घाव पाया गया जिसका आकार 1.5 सेमी. x ½ सेमी. x ½ सेमी. था। स्पनिल का रक्तचर होना पाया गया। सामने की सतह पर जिसके केपसूल में ब्लड पाया गया। समस्त बाडी आर्गन फेल पाये गये। उक्त सभी चोटें मृत्यु पूर्व की थीं एवं कटा हुआ घाव एवं फटा हुआ घाव दोनों की वजह से आई थी। जो मृत्यु के कारण के लिए पर्याप्त थी।

21. Opinion given by this doctor is relevant which reads as under :

2. अभिमत :– हमारे अभिमत अनुसार मृतक की मृत्यु शाक व कोमा

के कारण होना थी जो कि शरीर के महत्वपूर्ण अंगों में चोट की वजह से है। मृत्यु का समय 12 घंटे की अवधि के भीतर पोस्टमार्टम परीक्षण के समय पाया गया। उक्त पोस्टमार्टम 3 डाक्टरों के द्वारा किया गया था। शव परीक्षण प्रतिवेदन प्रदर्श पी–3 है जिसके ए से ए भाग पर मेरे हस्ताक्षर हैं तथा पी–3 में मेरे सहयोगी डाक्टरों के भी हस्ताक्षर हैं।

22. In his cross-examination, he has very clearly stated that on the dead body of deceased Shakir Mohd, **there was no penetrating wound** and thus, he ruled out user of weapon like gupti, knife, arrow, ballam etc. The same witness Dr. Dubey also proved the postmortem of deceased Shafi Mohd. In his very statement, he stated that

3. उक्त दिनांक को ही शव परीक्षण हेतु सफी मोहम्मद पिता मोहम्मद वजीर निवासी ग्राम छड़ावद जिला धार को थाना झाबुआ द्वारा लाया गया था शव के बाह्य परीक्षण में निम्न स्थिति पाई :–

1. सिर पर अनेक सिले हुए घाव पाये गये जो कि चेहरे पर भी थे एवं जिनकी लंबाई 3 सेमी. से 10 सेमी. थी। सीने के बांये भाग में एक ब्रूज पाया गया जिसका आकार 20 x 2 सेमी. था।

3. एक कटयूज हड्डी की विकृति के साथ चेहरे के बांये भाग में पाया गया मेन्डेबल हड्डी का फ्रेक्चर पाया गया।

4. एक कंट्यूजन बांये कलाई में हड्डी की विकृति के साथ पाया गया।

5. दाहिने कलाई में भी विकृति के साथ एक कंट्यूजन पाया गया।

आंतरिक परीक्षण में निम्न स्थिति पाई :–

1 .सिर के टेम्पोरल भाग में बांई ओर एक फ्रेक्चर पाया गया जो कि सिर के बेस तक गया था। सिर के स्केल के नीचे एक बड़ा खून का भाग पाया गया। जो कि पेराइटल व टेम्पोरल भाग में था। सिर में सिरम्यूरल पेराइटल पाया गया जो सिर में टेम्पोरल भाग में था। हृदय के दोनों चेम्बर रिक्त पाये गये। समस्त बाडी आर्गन पेल पाये गये थे।

उक्त सभी चोटें मृत्यु पूर्व की होकर पूर्व की होकर मृत्यु के कारण के लिये पर्याप्त थी।

4. हमारे अभिमत में मृतक की मृत्य शाक व कोमा की वजह से हुई थी जो कि शरीर के महत्वपूर्ण अंगों में चोटें एवं अत्यधिक रक्तस्त्राव के कारण हुई। शव परीक्षण की 3 डाक्टरों की पेनल द्वारा किया गया है। शव परीक्षण

प्रतिवेदन प्रदर्श पी–39 है जिस पर ए से ए भाग पर मेरे हस्ताक्षर हैं। तथा मेरे सहयोगी डाक्टरों के भी हस्ताक्षर हैं।

5. मेरे सहयोगी डा. बघेल ने जो मेरे साथ उस समय कार्यरत थे मैं उनकी लिखावट व हस्ताक्षर जानता हूं प्रदर्श पी–40 का डिस्चार्ज टिकिट डा. बघेल के हाथ का लिखा होकर उस पर ए से ए भाग पर उनके हस्ताक्षर हैं।

23. Even about this person, Dr. A.K.Dubey has made the similar statement that **on the dead body of deceased Shafi Mohd, there was no penetrating wound.** Thus, from the statement of Dr. A.K. Dubey, user of gupti, spear or ballam in this incident is ruled out. Similarly, there is no gun injury on the bodies of the deceased persons.

24. It will now be appropriate to take note of the statement of PW-1 Shahjad which reads as under :

1. घटना 20 फरवरी 2003 की है, करीब साढे 4 बजे की बात है। मैं,शाकिर, सुफी, और फकरू मोटरसाइकिल से राजगढ से छउावद` लिये 4 – साढे 4 बजे शाम को जा रहे थे। जैसे ही हम लोग टिटोडिया खाली पर पहुंचे आरोपीगण ईश्वरसिंह, अमर, अमरा, और गोपाल 4 पहले आए, इन्होने आकर वार किया, वार शफी और साकिर पर किया । साक्षी झाडी मे छूपे हुए व्यक्तियो के नाम पुछे जाने पर बताया कि जालमसिंह, शंभूसिंह, और विरेन्द्रसिंह, पुनमसिंह आए तथा लालु, प्रकाश, हरेसिंह, हटेसिंह, जादूसिंह, मालु, कालु, रोहित, येह सभी झाडियो मे से निकलकर आए और सबने मिलकर एकसाथ वार किया।

2. ईश्वरसिंह, गोपाल, संभी ने मिलकर पहले लाठियो से शाकिर और सफी को मारा, उसके बाद ईश्वरसिंह ने गुप्ती से मारा, अमरसिंह ने भाले से मारा। शाकिर को पुरे पेट पर 11 घाव थे सफी का सिर फट गया था, और दोनो हाथ की कलाई को तोड दिया था। फिर मै वहां से राजगढ के लिये मोटरसाइकिल से भागा। चौकी पर आया, पुलिस चौकी पर आकर मैने घटना के बारे में बताया। पुलिसने कहा कि हम जा रहे है तुम जहां ठहरे हो वही चले जाओ, तो मै अपने जीजा ईशाक मोहम्मद के यहां राजगढ मे चला गया।

नोट :– अभियोजन के अधिवक्ता द्वारा साक्षी से सीधे सीधे प्रश्न किया गया कि क्या तुमने रिपोर्ट की क्या 9. इस पर अभियुक्तगणो की ओर से अधिवक्ता श्री जयसिंह द्वारा आपत्ती की गयी कि इस प्रकार का सुचक प्रश्न नही पूछा जा सकता। आपत्ती स्वीकार की गयी।

3. झगड़े का कारण भोजशाला का था। पुलिस बाद में मौके पर पहूंची, मौके पर सफी जीवित था दोनो को लेकर पुलिस आयी। दोनो आहतो को पुलिस ने

झाबुआ के लिये रैफर किया। पुलिस स्वयं झाबुआ ले गयी। पुलिस के साथा मोहम्मद भी गया था। शाकिर की मौके पर ही मृत्या हो गयी थी, सफी की बाद में ईलाज के दौरान झाबुआ अस्पताल मे मृत्य हो गयी। प्रथम सुचना रिपोर्ट दिखाकर साक्षी से पुछा गया कि इसमे हस्ताक्षर किसके है इस पर साक्षी ने कहा कि मेरे हस्ताक्षर है जिससे रिपोर्ट को प्र.पी. 1 अंकित किया गया जिसके ए से ए (पी–1) भाग पर साक्षी के हस्ताक्षर है।

4. झाबुआ मे हमारे और रिश्तेदार लोग रहते है जिनहोने दोनो की लाश का अंतिम संस्कार कर दिया। पुलिस के द्वारा एफ.आई.आर. लिखी गयी उसके बाद और कोई कार्यवाही नही की गयी।

25. It is also relevant to take note of the cross-examination of Shahjad PW-1 wherein he admits that the witnesses as well as the deceased are his near relatives. Relevant paragraph reads as under :

5. फकरू मेरा चचेरा भाई है। शाकिर और शपी मेरे बड़े पिता के लड़के होकर मेरे भाई थे। ईशाक मेरा सगा जीजा लगता है। सिकंदर मेरा भतीजा लगता हैं मोहम्मद मंसूरी मेरा भाई है। सलाम मेरा भान्जा है। अजीज पिता इस्माईल मेरा सगा भाई है। ईमरान और रईस उर्फ गज्जू शाकिर के लड़के होकर मेरे भतीजे लगते हैं। सुलेमान शफी का सगा भाई है। वाहब फकरू का लड़का है। मैंने जितने नाम अभी बताये हैं ये सभी लोग या तो मेरे भाई हैं या मेरे भतीजे हैं।

26. From the deposition of Shahjad PW-1 as recorded by the trial Court, it is apparent that this witness has made definite improvement in his version contrary to the FIR lodged by him. The deposition of PW-1 Shahjad is also contrary to the medical opinion, in as much as using of gupti, wooden rod and gun as deposed by him in his statement before the Court was neither stated by him while he got recorded the FIR nor he supported with the medical evidence as discussed above.

27. In addition, we also find that the manner, in which the learned Judge has analyzed the evidence and has appreciated the same also calls for certain observations by us, in as much as while Mr. R.R. Patidar, the Investigating Officer admits that he did not have any discussion with the complainant regarding preparation of the site plan, it is not clear as to how he prepared the site plan. No witness who would have witnessed the preparation of the site plan in the absence of there being eye witness to the incident would support the preparation of the site plan by Mr. R.R. Patidar.

28. There is deficiency in the case of prosecution as also noticed by the

observations made by the Trial Judge in various paragraphs, yet the trial Court has accepted the case of the prosecution. Relevant portion of the impugned judgment reads as under :

> दिनांक 20–02–2003 की शाम 6 बजे हम लोग झाबुआ शफी और शाकिर को लेकर पहूंच गए थे। शाकिर और शफी दोनों की लाश का पचंनामा रात में ही बन गया था। शाकिर और शफी के नक्शा पचायतनामा बनाया गया था, जिसमें मैने हस्ताक्षर रात के 11 बजे किए थे। शफी और शाकिर की लाश की रसीद रात 12 बजे बनाई गई थी और शव प्राप्त 12 बजे करीबन हुई थी। 21 तारीख को दोपहर 2 बजे शाकिर और शफी को दफनाया गया था। "" कुट परीक्षण की कंडिका 14 का सुसंगत अंश इस प्रकार से रहा है – "" जब झाबुआ में लाश का पंचायतनामा बनाया था, शफी और शाकिर को किस हथियार की चोटें हैं, यह मुझे कालुम था। मैने लाश का पंचायतनामा बनाने वाले अधिकारी का यह – बताया था कि शाकिर और शफी को किस हथियार से चोटें आई हैं, अधिकारी ने पूछा था कि शफी और शाकिर को किसकी चोटें है, तब मैने बताया था कि किन–किन हथियारों की चोटें है। "" कुट परीक्षण की कंडिका 14 का सुसंगत अंश इस प्रकार से रहा है – "" यदि शाकिर मोहम्मद के नक्शा पंचायतनामा प्र.पी. 3 में उसे किस हथियार से चोटें आई है, हथियारों का उल्लेख नहीं हो, तो मैं कारण नहीं बता सकता । शफी मोहम्मद के लाश पंचायतनामा प्र.पी. 5 में भी किसी हथियार का उल्लेख नहीं हो, तो मैं कारण नहीं बता सकता। "" यहॉ स्वयं (असा. 3) मोहम्मद मंसुरी द्वारा प्रस्तुत हुए साक्ष्य के अध्ययन से यहॉ यह स्पष्ट है कि अभियोजन पक्ष ने दिनॉक 20–02–2003 को स्लेशन हाऊस झाबुआ में (असा. 3) मोहम्मद मंसुरी को धारा 175 दण्ड प्रकिया संहिता के तहत् प्र.पी. 2 एवं पी. 4 का सुचना पत्रजारी कर उसके समक्ष शफी मोहम्मद पिता मोहम्मद वजीर की लाश का नक्शा पंचायतनाम प्र.पी. 5 तथा शाकिर मोहम्मद पिता अब्दुल रहमान की लाश की नक्शा पंचायतनामा प्र.पी.ा 3 बनाया था। मृत्यु समीक्षा रिपोर्ट तैयार करते समय आहुत किए गए सभी पंचों का न्यायालय में बयान कराना आवश्यक नहीं है।

29. This shows that the witness had not stated anything about the weapon by which the injuries were caused yet he had guts to say that he was aware of the weapons by which the injuries were caused and that he had stated so to the person who prepared the panchanama which has stated above, was not prepared in his presence.

30. Further observations made by the learned Trial Judge in this paragraph is also relevant which reads as under :

> इसी तरह धारा 174 दं.प्र.सं. के अधीन मृत्यु समीक्षा रिपोर्ट में दुर्घटना के सभी गवाहों कोपरीक्षित करवाया जाना भी आवश्यक नहीं है, क्योंकि इस धारा के अधीन मृत्यु समीक्षा मृत्यु का कारण अभिनिशिचित करने से संबद्ध होता है। मृत्यु समीक्षा रिपोर्ट

तैयार करते समय पंच तथा पुलिस अधिकारी मृतक के शरीर पर जो चोटें पाते है, उसका विवरण अंकित करना होता है। किसने मारा, कैसे मारा, या किस परिस्थिति में मारा, इस प्रकार पंचायतनामा न तो सुसंगत होता है और न ही विधि में आवश्यक है। इसी तरह हथियारों का उल्लेख न होना भी घातक नहीं है, तब (असा. 3) मोहम्मद मंसुरी द्वारा प्रस्तुत हुओ साक्ष्य मामले की पृष्ठ भूमि में सुसंगत एवं स्वाभाविक होने के कारण प्रस्तुत हुआ साक्ष्य, साक्ष्य में ग्राह्य है और उसके द्वारा प्रस्तुत हुई साक्ष्य से यहां यह स्पष्ट है कि पुलिस ने उसके समक्ष प्र.पी. 3 तथा प्र.पी. 5 की मृत्यु समीक्षा रिपोर्ट तैयार किया है।

31. Further in para-19 of the impugned judgment, some other observations made by the learned trial Judge also refers to lack of deficiency in the case of prosecution which reads as under :

घायल शफी मोहम्मद को डाक्टर बघेल ने इंदौर एमवाय. अस्पताल के लिए रैफर किया था। प्रस्तुत हुए साक्ष्य का प्रतिखंडन कुट परीक्षण की कंडिका –6 एवं 8 में करवाए जाने पर उसने यह तो स्वीकार किया हैकि प्रस्तुत डिस्चार्ज टिकिट प्र.पी. 40 में रोगी के पिता का नाम, उम्र, पता, ओ.पी.डी. नंबर, डिस्चार्ज तिथि का उल्लेख नहीं किया है, किंतु दिए गए इस सुझाव से इंकार कर दिया हैकि उसने प्र.पी. 4 का डिस्चार्ज टिकिट पुलिस के कहने पर पश्चात्वर्ती समय में तैयार कर लिया था। इसी तरह इस चिकित्सक ने यह भी स्वीकार किया हैकि मृतक शफी मोहम्मद के शव का आंतरिक परीक्षण करने पर उसकी खोपड़ी के अंदर टैम्पोरल बोन का फ्रैक्चर बेस ऑफ स्कल तक पाया था और उसके नीचे बडी मात्रा में हेमोटोमा पाया। खोपड़ी के अंदर फ्रेक्चर हेमोटोमा का सबड्यरल हेमोटोमा पाए जाने के कारण मृतक शफी मोहम्मद कौमा मे गया था, जिसके कारण खोपड़ी के अंदर अत्यधिक रक्त स्त्राव हुआ। खोपड़ी में आई हुई इस चोट के कारण कुछ ही समय में बेहोशी होने की संभावना रही है। इसी तरह इसी चिकित्सक ने यह भी स्वीकार किया है कि उसने शाकिर मोहम्मद और शफी मोहम्मद दोनों को किसी प्रकार का पैनीट्रेटिंग वुंड (छेदक क्षति) या घोपा हुआ घाव नहीं पाया था।

32. This observation in fact supports the case of the defence that the statement of PW-1 Shahjad was not free from doubt. Para-21 of the impugned judgment is relevant, wherein the trial Court while admitting the relationship of Shahjad PW-1 and other witnesses with the deceased persons has simply brushed aside the aforesaid aspect of the matter while appreciating the evidence. In this regard, the trial Court has observed as under :

<u>यहां यह निर्विवादित है कि अभियोजन साक्षी क0 – 1 शहजाद, (असा. 2) फखरू, (असा. 3) मोहम्मद मंसुरी, (असा. 4) शिकंदर, (असा. 5) इमरान, (असा. 9) माखनसिंह तथा (असा. 10)</u>

रमेश तथा स्वयं अभियुक्तगण एक ही ग्राम छड़ावद के निवासी होकर एक दूसरे से परिचित हैं । परीक्षित साक्षी (असा. 1) शहजाद न अपने प्रतिपरीक्षण की कं0–5 में यह भी स्वीकार किया हैकि मृतक शाकिर तथा शफी उसके बड़े पिता के लड़के होकर उसका भाई थे। (असा. 2) फखरू उसका चचेरा भाई है। (असा. 3) मो0 मंसुरी उसका भाई है। (असा. 4) शिकंदर उसका भतीजा है, (असा. 5) इमरान मृतक शाकिर के पुत्र होकर उसका भतीजा है। (असा. 6) अब्दुल सलाम उसका भानजा है। स्वयं (असा. 1) शहजाद द्वारा प्रस्तुत हुई साक्ष्य के अध्ययन से यहॉ यह भी स्पष्ट है कि (असा. 6) अब्दुल सलाम के पिता इशाक मोहम्मद स्वयं (असा. 1) शहजाद का जीजा है तथा इशाक मोहम्मद राजगढ़ में निवासीत् है। परीक्षिति हुए इन साक्षियों के कथनों से यहां यह भी स्पष्ट हैकि रांजगढ़ से लगभग 9 कित्रमीत्र की दूरी पर ग्राम छड़ावद स्थित है। राजगढ़ तथा छड़ावद कें मध्य घटनास्थल टिटोडिया खाल (नाला) स्थित है, जो राजगढ़ से करीब 7–8 किलोमीटर की दूरी पर स्थित है। परीक्षित हुए इन साक्षियों के कथनों से यहां यह भी निर्विवादित है कि विचारण के दौरान अभियुक्त अमरा पिता गोमाजी की मृत्यु हो चुकी है, जिसकी रिपोर्ट पर से (असा. 1) शहजाद, (असा. 2) फखरू के विरूद्ध इसी न्यायालय में सत्र प्रकरण कमांक 207/2004, अन्तर्गत धारा 148, 294, 307/34 भा.दं.सं. के तहत् मामला विचारधीन है। स प्रकार फरियादी पक्ष तथा अभियुक्तगण के मध्य पूर्व से आपसी सम्बन्ध मधुर नहीं रहे है। परीक्षित हुए इनसाक्षियों के कथनों से यहॉ यह भी निर्विवादित हैकि घटना दिनांक 20–02–2003 के समय धार जिले में स्थित भोजनशाला को लेकर साम्प्रदायिक तनाव उत्पन्न हो गया था, जिसके कारण कस्बा राजगढ़ सहित पूरे धार जिसे में कर्फयु लगा हुआ था। अतः जहॉ परीक्षित हुए साक्षीगण आपस में सगे संबंधी होकर अभियुक्तगण से उनकी पूर्व से ही आपसी रंजिश रही है, वहॉ अभियोजन पक्ष द्वारा प्रत्यक्षदर्शी साक्षी के रूप में प्रस्तुत हुए (असा. 1) शहजाद खॉ तथा (असा. 2) फखरू तथा घटना के तुरंत पश्चात् घटनास्थल पर उपस्थित हुए (असा. 3) मोहम्मद मंसुरी, (असा. 4) शिकंदर, (असा. 5) इमरान, (असा. 6) अब्दुल सलाम, (असा. 7) शांतिलाल तथा (असा. 9) माखनसिंह द्वारा प्रस्तुत हुए साक्ष्य पर सावधानी बरते जाने की आवश्यकता है, तब परीक्षित हुए इन साक्षियों द्वारा प्रस्तुत साक्ष्य की विवेचना करने के पूर्व माननीय उच्च न्यायालय तथा उच्चतम –न्यायालय द्वारा समय समय पर रिए गए मार्गदर्शन का स्मरण किया जाना न्यायोचित होगा। (ए.आईआर. 1953 सुप्रीम कोर्ट 364) के मामले में साक्ष्य अधिनियम 1872 की धारा (1) साक्ष्य की विवेचना के तरीके का खुलासा करते हुए यह स्पष्ट किया गया हैकि आम तौर पर एक गवाह को स्वतंत्र ही समझाा जाता है, जब तक कि गवाह के पास अभियुक्त के विरूद्ध दुश्मनी आदि का करण न हो, क्योंकि जब भावनाए व्यक्तिगत दुश्मनी के कारण इतनी तीव्र होती है कि गवाह झूठे व्यक्ति की

निशान – देही भी कर देता है। अतः प्रत्येक प्रकरण का विचारण उसके तथ्यों के आधार पर किया जाना चाहिये। इसी तरह (ए.आई.आर. 1080 सुप्रीम कोर्ट 443) के मामले में पुनः यह स्पष्ट कर दिया गया है कि जहॉ साक्षीगण हितबद्ध हों, वहां न्यायालय को साक्षियों का परीक्षण अत्यंत सावधानीपूर्वक करना चाहिये। अतः जहॉ स्वाभाविक साक्षी हो, वहॉ निकट सम्बन्धी को हितबद्ध साक्षी नहीं समझा जाता है, क्योंकि विधि में ऐसा कोई भी सिद्धांत नहीं है, जो यह कहता हो कि हितबद्ध और दुश्मनी रखने वाले साक्षियों के साक्ष्य पर गुणवत्ता के आधार पर विचार किए बिना ही उनकी उपेक्षा करना चाहिये। सत्य कथन हितबद्ध तथा दुश्मनी रखने वाले स्रोतों से भी प्राप्त हो सकते हैं, केवल सावधानी बरतना चाहिये।

33. This observation not only shows bent up of the mind of the learned Trial Judge who was not at all concerned with the deficiency and lackness in the case of prosecution and despite the evidence having come on record that there was tension on account of Bhojshala as admitted that as the reason for the incident whereas according to Shahjad PW-1, the dispute had occurred on account of the intention of the accused persons to take possession of their land, about which there is absolutely no evidence.

34. The trial Court further presumed the case of prosecution in the observations made by him in para-22 of the impugned judgment, which is reproduced hereunder for the sake of reference.

यहॉ परीक्षित साक्षी (असा. 1) शहजाद ने अपने मुख्य कथन में इस आशय का साक्ष्य प्रस्तुत किया है कि घटना दि. 20 फरवरी 2003 की है। करीब साढ़े चार बजे की बात है, मैं, शाकिर, शफी और फखरू मोटरसाइकिल से राजगढ़ से छत्रावद के लिए चार, साढ़े चार बजे शाम को जा रहे थे, जैसे ही हम लोग टिटोडिया खाल पर पहुंचे, आरोपीगण ईश्वरसिंह, अमर, अमरा और गोपाल चारोंपहले आए। इन्होने आकर वार किया, वार शफी और शाकिर पर किया। झाड़ियो में छिपे हुए व्यक्ति जालमसिंह, शंभुसिंह, वीरेंनद्रसिंह, पूनम, लालू, प्रकाश, हरेसिंह, हटेसिंह, जादूसिंह, लालू, कालू, रोहित ये सभी झाड़ियों में से निकल कर आए और सब ने मिलकर एक साथ वार किया। ईश्वरसिंह, गोपाल सभी ने मिलकर पहले लाठियों से शाकिर और शफी को मारा, शाकिर को पूरे पेट पर ग्यारह घाव थे। शफी का सिर फट गया था और दोनों हाथ की कलाइयों को तोड़ दिया था, फिर मैं वहॉ से राजगढ़ के लिए मोटरसाइकिल से भागा। चौकी पर आया। पुलिस चौकी पर आकर मैने घटना के बारे में बताया। पुलिसने कहा कि हम जा रहे है तुम जहॉ ठहरे हो, वहॉ चले जाओ, तो मैं अपने जीजा इशाक मोहम्मद के यहॉ राजगढ़ में चला गया। झगड़े का कारण भोजनशाला का था। प्रस्तुत हुए साक्ष्य का प्रतिखंडन क्रुट परीक्षण की

कंडिका – 18 में करवाए जाने पर उसने यह स्वीकार किया हैकि रिपोर्ट लिखाते समय उसने यह नहीं बताया था कि झगड़े का कारण भोजशाला का था। इसी तरह इस साक्षी ने अपनी प्रतिपरीक्षण की कंडिका – 43 में बचाव पक्ष की ओर से दिए गए इस सुझाव को स्वीकार किया हैकि उनके गॉव छड़ावद में बी.जे.पी. तथा कांग्रेस के लोग है, जिस समय घटना घटी, उसे पहले से हिन्दू जागरण मंच और भाजपा वालों का पूरे धार जिले में भोजशाला का आंदोलन चल रहा था तथा इस साक्षी ने दिए गए इस सुझाव को भी स्वीकार किया है कि राजगढ़ मे भी भोजशाला का आंदोलन चल रहा था। इसी तरह अपने प्रतिपरीक्षण की कंडिका – 36 में उसने बचाव पक्ष की ओर से दिए गए इस सुझाव से इंकार कर दिया हैकि गांव में उसकी जमीन को लेकर झगड़ा चल रहा है, कुछ लो उसकी जमीन पर कब्जा करना चाहते है, किंतु जब इस साक्षी से यह पूछे जाने पर कि प्र.पी. 1 की रिपोर्ट में झगड़े का कारण इन लोगों द्वारा जंमीन पर कब्जा करने को उल्लेख है, तब साक्षी ने इसका उत्तर यहं दिया हैकि उसने अपने रिपोर्ट में लिखाया है।

यहॉ प्रस्तुत हुई प्रथम सुचना रिपार्ट प्रपी. 1 में स्वयं (असा. 1) शहजाद ने यह उल्लेख करवाया था कि झगड़े का कारण अभियुक्तगण उनकी जमीनों पर कब्जा कर गांव से भगा देना चाहते हैं तथा इस साक्षी ने अपने प्रतिपरीक्षण में इस तथ्य से इंकार कर दिया हैकि जमीन को लेकर झगड़ा है और अभियुक्तगण उनको जमीन पर कब्जा करना चाहते हैं, किन्तु पुनः जब स्वयं बचाव पक्ष की ओर से सत्य की खोज करते हुए इस साक्षी से यह पूछे जाने पर कि उसकी प्र.पी. 1 की रिपोर्ट में झगड़े का कारण अभियुक्तगण द्वारा जमीनों पर कब्जा करना चाहते है, का उल्लेख हुआ है, तब इस साक्षी ने यह स्वीकार किया हैकि उसने अपनी रिपोर्ट प्र.पी. 1 मे यह लिखवाया था कि झगड़े के कारण अभियुक्तगण उनकी जमीनों पर कब्जा करना चाहते हैं, तब इस साक्षी द्वारा प्रस्तुत हुआ यह साक्ष्य भी मामले की पृष्ठ भूमि में सुसंगत एवं विश्वसनीय है कि झगड़े का कारण – अभियुक्तगण द्वारा उनकी जमीनों पर कब्जा करने का भी रहा है। अतः इस बिन्दु पर प्रस्तुत हुए साक्ष्य में किसी प्रकार का कोई विरोधाभास नहीं है। इसी तरह स्वयं (असा. 1) शहजाद ने अपनी न्यायिक परीक्षा काल में – यह भी स्पष्ट किया हैकि झगड़े का कारण भोजशाला का आंदोलन रहा है। उसने अपने प्रतिरपरीक्षण में बचाव पक्ष की ओर से दिए गए इस सकारात्मक सुझाव को भी स्वीकार किया हैकि जिस समय घटना घटी, उसके पहले से हिन्दू जाकरण मैच और भारतीय जनता पार्टी वालों का पूरा धार जिले में भोजशाला का आंदोलन चल रहा था। राजगढ़ में भी भोजशाला का आंदोलन चल रहा था, तब प्रस्तुत हुई प्रथम

सुचना रिपोर्ट में झगड़े का कारण भोजशाला का आंदोलन का उल्लेख न करवाए जाने से इस साक्षी द्वारा प्रस्तुत हुई साक्ष्य पर कोई विपरीत प्रभाव नहीं पडता है और न ही इस आधार पर प्रस्तुत हुए साक्ष्य को अस्वाभाविक माना जा सकता है, क्योंकि प्रथम सुचना रिपोर्ट में घटना के समस्त तथ्यों का उल्लेख होना आवश्यक नहीं है। इसी कारण (1983 जे.एल.जे. 579 मोहनलाल विरूद्ध राज्य) के मामले में यह स्पष्ट किया गया है कि प्रथम सुचना रिपोर्ट को घटना के समस्त विवरणों का कोष नही माना जाना चाहिये।

35. Thus, the entire paragraphs also show that the appreciation of the evidence has not been done by the learned trial Court on the basis of the evidence, which has come on record, but the appreciation is based upon the presumption and assumption in favour of the prosecution.

36. The trial Court has also not taken into consideration that all the witnesses cited by the prosecution are relatives of the deceased. If the statement of Shahjad PW-1 is to be taken as it is then evidence of the other witnesses, some of whom have not been believed by the trial Court himself would also caste serious doubt even on the version of PW-1 Shahjad, but this aspect has not been considered by the trial Court.

37. The trial Court has also failed to appreciate that the statement of PW-1 Shahjad is not corroborated by the medical evidence. As per the postmortem report, penetrating wound have not been found on the dead body of both the deceased. Question of using any such weapon which would cause penetrating would such as Gupti, spear and gun was certainly inadmissible in evidence. In any case, gun has not been used in this case, yet the witness has pointed out that one of the accused was having gun. It may be observed here that even the trial Court has directed to release of the gun, in as much as that the gun was a licencee gun and was not even used in the incident. This again casts serious doubt on the story of the prosecution.

38. In his statement recorded as Ex.-P/1, the dispute was with respect to certain land belonging to the witness and their family which according to PW-1 Shahjad was wanted to be occupied by the accused persons. However, no such details about any such property was found mentioned in the statement of the witnesses, rather, new story i.e. about the dispute of Bhojshala has been introduced by PW-1 Shahjad, which was not so stated by him in his statement Ex.-P/1. This also casts serious doubt in the story of the prosecution.

39. Another important thing which should have been considered by the trial Court while appreciating the evidence is that while all the accused persons are from particular community, the complainant and the witnesses cited are from the different community.

40. It has come on record, there was some dispute between two community about Bhojshala. The accused persons belonged to particular section of the society and there were some ill-will between the accused persons on the one hand and the witnesses on the other hand. In these circumstances, false implications of the appellants / accused who belonged to particular community, the witnesses belonged to different community and all are relatives to each other, again cannot be disbelieved.

41. All these aspects have simply been ignored by the learned trial Court while delivering the judgment even though in many paragraphs, the trial Court itself has questioned the veracity of the evidence of the prosecution, yet simply relying upon the statement of PW-1 without any corroboration, despite the fact that the witness was very close relatives of the deceased persons and had made number of improvement in his statement and has discussed the story which was not found so stated by him in the FIR.

42. It is well settled principle of criminal law that none of the accused against whom there is no evidence, should be convicted. The prosecution is required to prove its case beyond reasonable doubt. However, in this case, sole testimony of PW-1 Shahjad relied upon by the learned Sessions Judge to convict as many as 14 persons is not free from doubt. Analysis of evidence by the learned Sessions Judge shows number of lackness in the case of prosecution. It is also an admitted fact that the witnesses are near relatives of the deceased. The injuries as alleged in the FIR having been caused with lathies were in fact, according to PW-1 Shahjad while appearing in the Court, were caused with other weapons, which were penetrating weapons, which according to the doctor was not so, yet the conviction has been fasten upon the accused / appellants.

43. In view of the aforesaid, taking into consideration the judgments cited at the bar on behalf of learned counsel for the appellants as quoted above and the submissions made by them in the absence of corroboration by any other witness to the story of Shahjad PW-1, it is difficult to believe the story of the prosecution. In fact, what he says that Shahjad was not the eye witness, this is

also fortified by the fact that just within 15 minutes of the incident, despite the place of incident being 8 – 9 km away from the police station where the FIR has been registered and the witness having gone to village and having returned to the place of incident also falsify the version that the incident had taken place at the time as mentioned in the FIR. Lodging of the FIR by him just after 15 minutes of the incident also falsify the story of the prosecution.

44. Considering the aforementioned observations, we are of the view that in this case, the impugned judgment convicting the accused /appellants is not sustainable.

45. Consequently, both the aforesaid Criminal Appeals are allowed and the accused / appellants are acquitted from the charges under sections 147 and 302/149 of IPC. The accused / appellants in criminal appeal no. 1380/ 2008 are in jail; they are directed to be released forthwith, if not wanted in any other case. Accused / appellants in Criminal Appeal no. 14/2009 are on bail; their bail bonds stand discharges.

A copy of this judgment be retained in the file of Criminal Appeal no. 14/2009.

Appeal allowed.

I.L.R. [2014] M.P., 3231
APPELLATE CRIMINAL

Before Mr. Justice Ajit Singh & Mr. Justice N.K. Gupta

Cr. A. No. 75/2013 (Jabalpur) decided on 14 August, 2014

RAJEEV LOCHAN SINGH ...Appellant
Vs.
STATE OF MADHYA PRADESH ...Respondent

(Alongwith Cr.A. No. 104/2013 & Cr.A. No. 176/2013)

A. Evidence Act (1 of 1872), Section 154 - Hostile witness - Value of his evidence - **Acceptable portion of his testimony - Can also be used in evidence.** **(Para 9)**

क. साक्ष्य अधिनियम (1872 का 1), धारा 154 – पक्षविरोधी साक्षी – उसके साक्ष्य का मूल्य – उसकी परिसाक्ष्य का स्वीकार योग्य भाग – साक्ष्य में भी उपयोग किया जा सकता है।

B. Penal Code (45 of 1860), Section 302 - Murder - Presence of witness - **Complainant lodged the F.I.R. immediately after incident - P.W. 14 although declared hostile admitted that he took the deceased to hospital and complainant was with him - Presence of complainant who himself had sustained injuries cannot be doubted. (Para 9)**

ख. दण्ड संहिता (1860 का 45), धारा 302 – हत्या – साक्षी की उपस्थिति – शिकायतकर्ता ने घटना के तुरंत पश्चात प्रथम सूचना रिपोर्ट दर्ज कराई – अ.सा. 14 यद्यपि पक्ष विरोधी घोषित किया गया, उसने स्वीकार किया है कि वह मृतक को चिकित्सालय ले गया था और शिकायतकर्ता उसके साथ था – शिकायतकर्ता जिसने स्वंय चोटें सहन की हैं, की उपस्थिति पर संदेह नहीं किया जा सकता।

C. Criminal Procedure Code, 1973 (2 of 1974), Section 154 - Delay in F.I.R. - **F.I.R. lodged within 3 hours of incident - Outpost 12 kms. away from place of incident - F.I.R. was lodged promptly. (Para 10)**

ग. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 154 – प्रथम सूचना रिपोर्ट में विलम्ब – घटना के 3 घंटे के भीतर प्रथम सूचना रिपोर्ट दर्ज की गई – घटनास्थल से चौकी 12 किमी की दूरी पर – प्रथम सूचना रिपोर्ट तत्परता से दर्ज की गई।

D. Evidence Act (1 of 1872), Section 3 - Related witnesses - **Testimony of related witnesses should be examined with the test of close and severe scrutiny - Their testimony cannot be thrown away merely on the ground that they are related witnesses. (Para 14)**

घ. साक्ष्य अधिनियम (1872 का 1), धारा 3 – संबंधी साक्षी – संबंधी साक्षी की परिसाक्ष्य का परीक्षण, बारीकी से और कठोर संविक्षा की परीक्षा के साथ किया जाना चाहिए – उनकी परिसाक्ष्य को मात्र इस आधार पर ठुकराया नहीं जा सकता कि वे संबंधी साक्षी हैं।

E. Penal Code (45 of 1860), Sections 148, 149 - Common intention - **One of the accused is alleged to having double barrel gun but did not cause any injury to anybody - Nothing had prevented him from firing - Presence of the accused on spot doubtful - Liable to be acquitted. (Para 23)**

ङ. दण्ड संहिता (1860 का 45), धाराऐं 148, 149 – सामान्य आशय – अभिकथित रुप से एक अभियुक्त के पास दुनाली बंदूक थी, परंतु उसने किसी को कोई चोट कारित नहीं की – उसे गोली चलाने से किसी ने रोका नहीं था –

घटनास्थल पर अभियुक्त की उपस्थिति संदेहास्पद – दोषमुक्त किये जाने योग्य।

***F. Penal Code (45 of 1860), Sections 148, 149 & 302 - Common intention* - The accused person is alleged to have caught hold the deceased and dragged him and gunshot fired from close range by the main accused - No sign of dragging were found on the body of deceased - When main accused could fire from a very close range, then there was no necessity of catching hand of deceased taking the risk of getting injured - Allegation of holding deceased doubtful - Liable to be acquitted. (Paras 24 to 26)**

च. दण्ड संहिता (1860 का 45), धाराऐं 148, 149 व 302 – सामान्य आशय – अभियुक्त ने अभिकथित रुप से मृतक को पकड़ा और उसे घसीटा तथा मुख्य अभियुक्त द्वारा नजदीक से बंदूक से गोली चलायी गई – घसीटे जाने का कोई निशान मृतक के शरीर पर नहीं पाया गया – जब मुख्य अभियुक्त बहुत नजदीक से गोली चला सकता था तब आहत होने का जोखिम उठाते हुए मृतक का हाथ पकड़ने की आवश्यकता नहीं थी – मृतक को पकड़े रहने का अभिकथन संदेहास्पद – दोषमुक्त किये जाने योग्य।

Cases referred :

AIR 1979 SC 135, AIR 1991 SC 1356, AIR 2012 SC 280, (1977) 4 SCC 420, AIR 2011 SC 280, (2002) 5 MPLJ 359, AIR 1981 SC 942, AIR 2004 SC 1169, AIR 2002 SC 3569, (2009) 2 MPLJ 336, (2009) 4 MPLJ 666, AIR 2001 SC 1929.

Raj Bahoran Singh, V.K. Lakhera, Sharad Verma, for the appellant.
Yogesh Dhande, G.A. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by :
N.K. Gupta, J. :- All the three appeals have been filed by different appellants against the judgment dated 26.12.2012 passed by the learned Additional Sessions Judge, Singrauli at Waidhan in S.T.No.12/2010 and therefore, these appeals are hereby disposed off with a common judgment.

2. The appellants have preferred these appeals against the aforesaid judgment, whereby the appellant Ajeet Singh @ Babbe Singh has been convicted of offence under Sections 302, 148 of IPC and sentenced to life imprisonment with fine of Rs.200/-and one year's rigorous imprisonment, whereas remaining appellants have been convicted of offence under Section

302/149, 148 of IPC and sentenced to life imprisonment with fine of Rs.200/-and one year's rigorous imprisonment. All the sentences have been ordered to run concurrently. Default sentence of 3 months rigorous imprisonment was also imposed in lieu of payment of fine.

3. The prosecution's case, in short, is that, the complainant Santosh Singh (P.W.1) was working as a time keeper in the office of PWD at Sidhi. In holi festival, he came to his house at village Kyutali (Police Station Gadhwa, District Singruli). On 9.3.2004, in the evening, he visited *Khalihan* (Granary) (a portion of field where grains are separated from fodder), where his servants were cleaning the crop of Masoor. The appellant Ajeet Singh alias Babbe Singh ('alias' in short '@') and accused Tej Bahadur Singh and Sandeep Singh visited the *Khalihan* and Tejbahadur Singh and Sandeep Singh warned the complainant that he and his companions would be assaulted. At about 8 p.m., the complainant alongwith his labourers, brother deceased Virendra Singh, other relatives Omprakash Singh (P.W.11), Pintu @ Gyanendra Singh (P.W.12), Arvind Kumar Singh (P.W.10) and others went towards his house. Near the shop of Shiv Kumar suddenly the appellants and other accused in all 17 persons surrounded them. The accused assaulted various victims including Santosh Singh by lathis (sticks). The appellant Dalpratap Singh extorted them to fire. The appellant Nagendra and one Rammu Singh held the hands of deceased Virendra Singh and thereafter, the appellant Ajeet Singh @ Babbe Singh fired from a 12 bore gun. Deceased Virendra Singh fell down on the ground after getting injuries through the gun shot. The complainant Santosh Singh had also sustained some injuries. Thereafter, the complainant Santosh Singh visited the Outpost Nowdihawa of Police Station Gadhwa and loged an FIR, Ex.P/2. Thereafter, he took his brother Virendra Singh to the hospital at Gherawal (U.P.), where the concerned doctor declared Virendra Singh to be dead. Again the complainant Santosh Singh visited the Police Station Gadhwa and lodged a merg intimation, Ex.P/1 at about 9 a.m. Dead body of the deceased was sent for postmortem. Dr.Yashwant Singh (P.W.3) had performed postmortem on the body of deceased Virendra Singh at Community Health Center, Singrauli and gave his report, Ex.P/4. He found a single injury in oval shape on the deceased on his left side of sternum, which was a gun shot injury and the deceased Virendra Singh died due to that injury. On the same day, he examined the complainant Santosh Singh and gave his report, Ex.P/5. He found 5 injuries to victim Santosh Singh, caused by hard and blunt object. After due investigation, the chargesheet was filed before the JMFC Deosar, who committed the case to the Sessions Judge, Singrauli and ultimately, it was transferred to Additional Sessions Judge,

Singrauli at Waidhan.

4. The appellants abjured their guilt. They did not take any specific plea but, they have stated that they were falsely implicated in the matter. However, defence witness Maqsood Ali (D.W.1) was examined to prove that there was no electric connection in the temple of Lord Shankar near the spot. Retired DSP Arvind Singh (D.W.2) was examined for the appellant Rajeev Lochan Singh to show that on enquiry he found a plea of alibi of the appellant Rajeev Lochan Singh to be true and he gave such a report. Muneem Kumar Parte (D.W.3) was examined for all of the appellants to show that on the date of incident the complainant Santosh Singh was working at Sidhi and he was not present at the spot.

5. The learned Additional Sessions Judge, after considering the evidence adduced by the parties, convicted and sentenced the appellants Ajeet Singh @ Babbe Singh, Nagendra Singh, Dalpratap Singh and Rajeev Lochan Singh as mentioned above, whereas remaining 9 accused persons were acquitted of all the charges.

6. We have heard the learned counsel for the parties at length.

7. Present case is mainly based upon the testimony of eye witnesses. In the present case, Santosh Singh (P.W.1), Arti Singh (P.W.2), Smt.Indu Singh (P.W.6), Shriram Singh (P.W.8), Arvind Kumar Singh (P.W.10), Omprakash Singh (P.W.11), Pintu @ Gyanendra Singh (P.W.12), Dharmendra Singh (P.W.14), Vandana Singh (P.W.15), Brajesh Singh (P.W.18) were examined as eye witnesses, out of them, Brajesh Singh, Vandana Singh, Dharmendra Singh (P.W.14) and Pushpraj Singh (P.W.16) have claimed that they reached the spot after firing from the gun was done and they found that deceased Virendra Singh was lying on the ground. The witness Devnarayan Singh (P.W.13) has also stated that he reached the spot after hearing sound of firing but has accepted that the complainant Santosh Singh had informed him that Ajeet Singh @ Babbe Singh had fired from the gun, causing fatal injury to deceased Virendra Singh.

8. In the present case, the complainant Santosh Singh is the star witness and the appellants have tried to show that he was not present at the spot, whereas he was the person, who lodged the FIR, Ex.P/2 and a merg intimation, Ex.P/1. In this context, defence witness Muneem Kumar Parte (D.W.3) was examined to show that the complainant Santosh Singh had worked in his office

in the entire month except for those days which were declared to be holidays. He was suggested that distance from Sidhi to Kyutali was 90 to 100 kms and by motorcycle anyone can visit from Sidhi to Kyutali within two hours and he accepted the suggestion. However, the witness Santosh Singh did not claim that in those days, he was moving up and down from Sidhi to Kyutali. He has claimed that he took leave orally from his officers for holi festival and he was present at Kyutali even after 3 days of the holi festival. The complainant Santosh Singh had also sustained some injuries in the incident. He had lodged the FIR, Ex.P/2, soon after the incident and if he was not present at the spot at the time of incident then, he could not do such activity as done by him before and after the incident.

9. The presence of the complainant Santosh Singh is corroborated by the FIR, Ex.P/2 lodged at outpost Nowdihawa and proved by ASI Mangal Prasad Mishra. In this context, the evidence of Dharmendra Singh (P.W.14) is of much importance. The witness Dharmendra Singh is not related to the deceased and the complainant Santosh Singh. He was declared hostile by the prosecution but, he has accepted that he took deceased Virendra Singh in injured condition to hospital at Gherwal in his tractor and he has also proved that Santosh Singh had accompanied the deceased Virendra Singh at that time. Under these circumstances, the witness who was declared hostile has also proved the presence of the complainant Santosh Singh soon after the incident. Acceptable portion of the testimony of a hostile witness can also be used in evidence. The witness Dharmendra Singh has claimed that he took deceased Virendra Singh to the hospital at Gherawal in his tractor then, for that fact his testimony cannot be disbelieved.

10. Santosh Singh has clearly stated that firstly he went to the outpost Nowdihawa and lodged an FIR, Ex.P/2 and thereafter, he took injured Virendra Singh to the hospital at Gherawal. ASI Shri Mangal Prasad Mishra (P.W.17) has stated that he recorded the FIR, Ex.P/2 as told by complainant Santosh Singh and thereafter, he transferred the case to the Police Station Gadhwa. According to the document, Ex.P/2, the incident took place at 8 p.m. and the FIR was lodged at 11 p.m., whereas the outpost was 12 kms away from the spot. On considering the nature of the incident and injuries caused to the complainant Santosh Singh, certainly he would have arranged a vehicle to take the injured deceased to the outpost and thereafter to the hospital. Under such circumstances, it cannot be said that FIR was lodged in delayed manner. FIR was lodged within three hours of the incident then, it can be said that it

was promptly lodged.

11. Learned counsel for the appellant Nagendra Singh has submitted that FIR was lodged after delay of 3 hours and therefore, it creates a doubt in the prosecution story. In support of his contention, he has placed his reliance upon the judgment passed by Hon'ble the Apex Court in cases of *"Ganesh Bhavan Patel and another Vs. State of Maharashtra"*, [AIR 1979 SC 135] and *"Peddireddy Subbareddi and others Vs. State of A.P."*, [AIR 1991 SC 1356]. However, due to factual difference, view taken in those cases, cannot be applied in the present case. In case of *Peddireddy* (supra) there was delay of 15 hours in lodging the FIR, whereas in case of *Ganesh Bhavan Patel* (supra), the Apex Court found inordinate delay in registration of FIR. The learned counsel for the appellant Nagendra Singh has also submitted that no compliance under Section 157 of the Cr.P.C. was made by the SHO, Police Station Gadhwa, which creates a doubt that as to whether the FIR was timely lodged or not. On the other hand, the learned counsel for the State has submitted that the investigation officer could not be examined in the case due to his death and therefore, compliance of Section 157 of the Cr.P.C. could not be strictly proved. The learned counsel for the appellant Babbe Singh @ Ajeet Singh has also submitted about non compliance of the provision of Section 157 of Cr.P.C. and placed his reliance on the judgments passed by Hon'ble the Apex Court in case of *"Shivlal and another Vs. State of Chhattisgarh"*, [AIR 2012 SC 280] and *"Birsingh and others Vs. State of Uttar Pradesh"*, [(1977) 4 SCC 420] to show that if compliance of the provision of Section 157 of Cr.P.C. is not complied properly then, the FIR shall come within the clouds of doubt.

12. However, it would be apparent that no delay has been caused in the investigation and it was possible only when the FIR was promptly lodged. He has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"Brahm Swaroop and another Vs. State of U.P."*, [AIR 2011 SC 280], in which it is held that prompt lodging of FIR proved from check report and statement of complainant under Section 161 of the Cr.P.C., which was recorded immediately after lodging the FIR and therefore, chances of embellishment and concoctions stands rule out. Delay in compliance of Section 157 of the Cr.P.C. is not fatal to prosecution's case. He has also placed his reliance upon the judgment passed by the Cordinate Division Bench of this Court in case of *"State of M.P. Vs. Pattu @ Pratap Singh"*, [(2002) (5) M.P.L.J. 359], in which it is held that mere non compliance of Section 157 of

the Cr.P.C. shall not itself lead to throwing out the case of the prosecution. Compliance of this provision is an external check provided in the Code to prevent ante dating the FIR. In the light of the aforesaid judgments, if the facts of the present case are considered then, it would be apparent that the investigation officer had started the investigation soon after he received the merg intimation. ASI Shri Mangal Prasad Mishra (P.W.17) has stated that he went to Gherawal alongwith SHO Shri M.S.Parihar. Deceased Virendra Singh died at 2.30 a.m. when it was dark at Primary Health Center, Gherawal. He has denied the suggestion that no FIR was lodged by the complainant Santosh Singh at outpost Nowdihawa. After considering the statements of the the complainant Santosh Singh and ASI Mangal Prasad Mishra (P.W.17) and looking to the facts and circumstances of the case, it is established beyond doubt that FIR was promptly lodged.

13. Learned counsel for the appellants have submitted that the complainant Santosh Singh and other eye witnesses could not tell the name of the accused, who assaulted the complainant Santosh Singh and therefore, his presence is doubtful. However, Dr. Yashwant Singh (P.W.3) has proved the MLC report, Ex.P/5 of the complainant Santosh Singh, in which he found that the complainant Santosh Singh had sustained six injuries caused by hard and blunt object at various places of his body like right eyebrow, left eye, right parietal region, right arm and right side of back. Such injuries could not be caused due to single fall and could not be self inflicted. Under these circumstances, looking to the duration and nature of such injuries, it would be apparent that the complainant Santosh Singh had sustained the injuries in the incident and therefore, his presence is duly established. The learned Additional Sessions Judge has mentioned that junior employees like time keeper would have been permitted by his officers to remain absent from his work orally and therefore, if his absence is not marked in the PWD office, Sidhi then, by such record, it cannot be said that he was not present at the spot at the time of the incident. Under these circumstances, by examination of defence witness Muneem Kumar Parte, no doubt is created relating to the presence of the complainant Santosh Singh at the time of the incident.

14. Santosh Singh, Arti Singh, Indu Singh, Ram Singh, Arvind Kumar Singh, Omprakash Singh etc. have claimed themselves to be eye witnesses and each of them has stated that the appellant Ajeet Singh @ Babbe Singh placed a barrel of his gun on the chest of deceased Virendra Singh and fired. It is true that the witness Indu Singh has accepted in para 5 that when the fire

took place, she and her sister-in-law Arti Singh were on the way, whereas her mother-in-law had already reached near the temple. Hence, it can be said that Arti Singh and Indu Singh had reached the spot soon after the incident. A lengthy cross-examination was done to various eye witnesses. However, no material contradiction could be established in such a cross-examination. The learned counsel for the appellants have submitted that most of the witnesses are relatives to the deceased and therefore, their statements cannot be believed as such. In this context, the learned counsel for the appellant Nagendra Singh has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"Ram Ashrit and others Vs. State of Bihar"*, [AIR 1981 SC 942] relating to interested and partisan witnesses. However, the ratio laid in the case may be read as under:

> *" All the material witnesses in a murder case were either related or otherwise interested in the prosecution, their testimony had to pass the test of close and severe scrutiny."*

Hence, the testimony of the interested witness shall not be thrown away because he is interested witness. On the contrary, his evidence should be examined with the test of close and severe scrutiny. On closely examining the evidence given by different witnesses, it would be apparent that Arti Singh and Indu Singh had reached the spot, after firing of the gun. It is true that they left their house when their nephew Jittu informed about the surrounding of the appellants over the complainant Santosh Singh and Virendra Singh but, they could not reach the spot before firing took place and after firing, nothing much was done by the accused persons. Hence, it cannot be said that the witnesses Arti Singh and Indu Singh were the eye witnesses. Similarly, Pintu @ Gyanendra Singh (P.W.12) could not tell about the distance between barrel of gun and the chest of deceased Virendra Singh. If he would have seen the incident then, certainly he could tell about such a position.

15. Remaining witnesses have stated about the incident in detail and no material contradiction is visible in their statements with their previous statement. The learned counsel for the appellants have invited the attention of this Court to the judgment passed by Hon'ble the Apex Court in case of *Ganesh Bhavan Patel* (supra) that if the case diary statements of the witnesses were recorded with a huge delay then, a doubt is created in the testimony of such witnesses. However, if such a fact is examined for the eye witnesses then, it would be apparent that the incident took place on 9.3.2004 and Santosh Singh, Pintu

@ Gyanendra Singh etc. were examined on 15.3.2004 and 20.3.2004 subject to their availability. The witnesses Arti Singh and Indu Singh were examined on 30.5.2004. As discussed above, the testimony of Arti Singh and Indu Singh has already been discarded as eye witnesses, whereas the statements of other witnesses may be brushed aside due to delay in recording their case diary statements.

16. The appellants have examined Maqsood Ali (D.W.1) to show that there was no electric connection in the temple of Lord Shankar. However, he could not deny that one wire was taken from the house of Devnarayan Singh and some bulbs were giving light in the temple of Lord Shankar. It appears that the defence witness Maqsood Ali did not physically examined as to whether bulbs or tubelights were fitted in the temple or not. He gave his evidence on the basis of his official record. Devnarayan Singh (P.W.13) was examined before the trial Court, whereas dispute relating to availability of light was raised before various witnesses prior to his examination. House of the witness Devnarayan Singh was close to the temple and shop of Shiv Kumar but, no question was asked to this witness about availability of any source of light. In spot map, Ex.P/10, it is mentioned that temple of Lord Shiv was of Devnarayan Singh and therefore, he was a competent person to tell about the availability of any arrangement of light in the temple. Under these circumstances, if the witnesses have stated that they could see the entire incident in the light available in the temple then, their testimony cannot be discarded. If the witness Maqsood Ali would have given his statement after a physical inspection of the temple then, his testimony could be believed.

17. Learned counsel for the appellant Nagendra Singh has also placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"Gorle S. Naidu Vs. State of A.P. and others"*, [AIR 2004 SC 1169], to show that the testimony of the complainant Santosh Singh cannot be accepted being an injured witness. The judgment passed in case of *Gorle S. Naidu* (supra) is not applicable in the present case due to factual difference. In that case the injuries of the injured witness were not proved. He was not examined by the doctors, whereas in the present case, injuries of the complainant Santosh Singh have been proved by Dr. Yashwant Singh (P.W.13) and injuries caused to him were of such nature that those could not be caused by a single fall or those could not be self inflicted. Hence, the testimony of the injured eye witness Santosh Singh is believable.

18. On the basis of the aforesaid discussion, it would be apparent that the

testimony of the eye witnesses relating to crime committed by Ajeet Singh @ Babbe Singh is acceptable, which is duly proved by timely lodged FIR, Ex.P/2 and post-mortem report, Ex.P/4. Witnesses have stated that the appellant Ajeet Singh @ Babbe Singh kept the barrel of gun on chest of the deceased and thereafter, he fired. Their testimony is duly corroborated with the fact that the gun used by the appellant Ajeet Singh @ Babbe Singh was a 12 bore gun and if it had been fired from a distance then, pellets would have been dispersed and the deceased Virendra Singh had sustained multiple injuries caused by pellets. In the present case, all the 34 pellets alongwith plastic cap and packaging material of the cartridge were found inside the wound of deceased Virendra Singh, which indicates that barrel of the gun was kept on the skin of deceased Virendra singh otherwise, all the pellets alongwith plastic cap and packaging of cartridge would not go inside the wound. In such a case, when the entire material discharged from the gun went inside the body of deceased Virendra Singh then, there was no question of separate tatooing on his skin. Hence, the post-mortem report has duly corroborated the statements of eye witnesses. The learned counsel for the appellant Ajeet Singh @ Babbe Singh has submitted that in absence of tatooing it shall be presumed that the gun was fired from the distance and hence the medical evidence (the post-mortem report) shall make the eye witnesses disbelievable. He has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"State of Madhya Pradesh Vs. Dharkole @ Govindsingh and others"* [(2005) Cr.L.J. 108]. However, as discussed above, presence of plastic cap and packaging of cartridge inside the wound clearly indicates that medical evidence and occular evidence are not contradictory. Both such evidence corelates each other.

19. On the basis of the aforesaid discussion, the prosecution has proved beyond doubt that the appellant Babbe Singh @ Ajeet Singh kept the barrel of gun on the chest of the deceased and fired from the gun, causing death of the deceased.

20. If the entire circumstances are considered then, according to the eye witnesses, the appellant Ajeet Singh @ Babbe Singh was in search of Virendra Singh and he alongwith his companions had hidden in the field of Arhar till deceased Virendra, complainant Santosh Singh and others etc. passed from that way and thereafter, he surrounded the deceased Virendra Singh with help of his companions and ultimately fired from his gun on the chest of the deceased which was a vital part of his body. Under these circumstances, it is

duly established that the appellant Ajeet Singh @ Babbe Singh had intended to kill deceased Virendra Singh and therefore, the learned Additional Sessions Judge has rightly convicted the appellant Ajeet Singh @ Babbe Singh for offence punishable under Section 302 of IPC for causing murder of the deceased Virendra Singh.

21. On considering the evidence given by the eye witnesses, it would be apparent that more than 5 accused had surrounded the deceased Virendra Singh. Some of them had participated in the crime of murder, whereas some of them assaulted the victim Santosh Singh. Some of the eye witnesses have claimed that they had been assaulted by the accused persons by *lathis* but, in absence of any MLC report, relating to their injuries, their such contention cannot be accepted. Hence, it would be apparent that more than 5 persons had participated in the crime and therefore, an unlawful assembly was constituted.

22. However, the crime of each appellant shall be assessed to consider his common object or intention alongwith the main accused Ajeet Singh @ Babbe Singh. First of all if case of appellant Rajeev Lochan Singh is considered then, it is apparent that his plea of alibi was accepted by the police and therefore, his name was not added in the charge-sheet. However, his name was added thereafter by the trial Court under Section 319 of the Cr.P.C. The defence witness Arvind Singh (D.W.2) who was working as DSP in the concerned area has proved his report to show that the appellant Rajeev Lochan Singh was not present at the spot. On the contrary, he was present at Piparjhar, so that his daughter Mamta Singh could appear in the examination. Learned counsel for appellant Rajeev Lochan Singh has placed his reliance upon the judgment passed by Hon'ble the Apex Court in case of *"Jyantibhai Bhenkaarbhai Vs. State of Gujarat"*, [AIR 2002 SC 3569], in which it is laid that if plea of alibi was constraint and supported by documentary evidence of unimpeachable veracity, then the accused would get the benefit of doubt. However, due to factual difference, the aforesaid judgment passed by Hon'ble the Apex Court in case of *Jyantibhai Bhenkaarbhai* (Supra) cannot be applied in the present case. It was expected from the appellant Rajeev Lochan Singh to prove his alibi with documentary evidence of unimpeachable veracity, whereas he has examined the retired DSP Arvind Singh, who has stated that he enquired the matter and gave his report and found that plea of alibi taken by Rajeev Lochan Singh was correct. When a case is given to a police officer for investigation then, there is no provision of any parallel enquiry done by any

other police officer under Cr.P.C. and therefore, if any enquiry was done by Arvind Singh in the matter then, his enquiry has no evidentiary value. It was for the appellant Rajeev Lochan Singh to prove his alibi that he was not in a position to come from Piparjhar and to participate in the incident. His relatives could say in his favour and therefore, it cannot be said that his plea was supported by any documentary evidence of unimpeachable veracity.

23. Almost all eye witnesses have denied about the plea of alibi suggested by the defence to them for the appellant Rajeev Lochan Singh. Arvind Kumar Singh (P.W.10) has stated the names of the accused persons, who surrounded the deceased and his companions and he did not mention the name of Rajeev Lochan Singh amongst those accused persons but, that omission may be due to excessive number of culprits. Under these circumstances, it was not proved beyond doubt that appellant Rajeev Lochan Singh was present at Piparjhar at the time of incident. However, there is no specific allegation made against appellant Rajeev Lochan Singh by the eye witnesses. When the witnesses were examined after addition of appellant Rajeev Lochan Singh then, the eye witnesses told against him. Smt.Indu Singh has stated that Rajeev Lochan Singh told that he would kill all the persons of that family. Shriram Singh has stated that Rajeev Lochan Singh told that he would fire if anyone tries to escape. Arvind Kumar Singh in his additional statement has stated that he could not see appellant Rajeev Lochan Singh at the spot. Omprakash Singh and Pintu @ Gyanendra Singh have not stated specifically about the overt-act of appellant Rajeev Lochan Singh. Santosh Singh (P.W.1) has stated that appellant Rajeev Lochan Singh was present with a double barrel gun and he provoked appellant Ajeet Singh @ Babbe Singh to fire from gun. If appellant Rajeev Lochan Singh would have participated in the crime then, his participation would have observed by all the eye witnesses and there must be a uniform allegation against appellant Rajeev Lochan Singh. If appellant Rajeev Lochan Singh was interested to kill deceased Virendra Singh then, it was not necessary for him to provoke co-accused Ajeet Singh @ Babbe Singh to fire. He himself could fire from his gun. Under these circumstances, by mere presence of appellant Rajeev Lochan Singh, his common intention or common object cannot be presumed. Presence of appellant Rajeev Lochan Singh is shown with an allegation that he had a double barrel gun with him but, neither he had assaulted any of the eye witnesses including the complainant Santosh Singh with the gun, nor he fired with the gun. Under these circumstances, no overt-act of appellant Rajeev Lochan Singh is proved beyond doubt to show that he had

intended to kill deceased Virendra Singh or to cause injury to the complainant Santosh Singh. No overt-act of appellant Rajeev Lochan Singh is proved that in furtherance of the common object, he participated in the unlawful assembly and therefore, appellant Rajeev Lochan Singh cannot be convicted either for offence under Section 148 or 302 of IPC either directly or with help of Section 149 or 34 of IPC. The learned Additional Sessions Judge has committed an illegality in convicting appellant Rajeev Lochan Singh of the aforesaid offence.

24. Similarly, it is stated against appellant Nagendra Singh that he had held the hands of deceased Virendra Singh alongwith one Rammu Singh. In the FIR, Ex.P/2, it is mentioned that when the complainant and other persons tried to leave the place then, appellant Dalpratap Singh told other accused persons to fire from the gun otherwise, the targeted persons were leaving the spot and thereafter, Nagendra Singh, Rammu Singh held the deceased Virendra Singh and thereafter, appellant Ajeet Singh @ Babbe Singh had fired from his 12 bore gun. In this connection, the witness Arvind Kumar Singh (P.W.10) has stated that appellants Nagendra and Pushpendra held the deceased. The witnesses have also stated that appellant Nagendra Singh tried to drag deceased Virendra Singh. However, if the injuries of deceased Virendra Singh are considered then, it would be apparent that appellant Ajeet Singh @ Babbe Singh kept the barrel of his gun on the chest or abdomen of deceased Virendra Singh and fired. The fact of dragging of deceased Virendra Singh is not mentioned in the FIR, Ex.P/2. If one has to fire from a gun at a particular target and target is so near to that person that he may touch his gun then, certainly there is no need to anyone to hold the target. If someone held the victim then, possibility cannot be ruled out that the person holding the victim will also receive injuries of pellets. Under these circumstances, the allegation made against appellant Nagendra Singh appears to be unnatural.

25. According to the FIR, Ex.P/2 when the victims were surrounded by the assailants then, they tried to leave the spot and started running from the spot then, a person who is leaving the spot cannot say definitely as to whether deceased Virendra Singh was held by someone or not. Since appellant Ajeet Singh @ Babbe Singh had fired from the gun by touching the barrel of gun on the skin of deceased Virendra Singh then, there was no possibility that someone would have held deceased Virendra Singh and therefore, the testimony of these eye witnesses cannot be accepted that appellant Nagendra Singh had caught hold of the hands of deceased Virendra Singh. Learned counsel for the State has invited the attention of this Court to the decision of cordinate Division

Bench of this Court in case of *"Ramesh S/o Trimbak Rao Jadhav Vs. State of M.P."*, [(2009) (2) M.P.L.J. 336] and *"Vijay Singh and others Vs. State of M.P."*, [(2009) (4) M.P.L.J. 666] to show that common intention of appellant Nagendra Singh should be presumed with the main accused Ajeet Singh @ Babbe Singh.

26. Common intention of the accused may be examined on the basis of his overt-act and his participation in the crime. If it is found that appellant Nagendra Singh did not hold the hands of deceased Virendra Singh then, there is no allegation against him that he assaulted the deceased Virendra Singh by any weapon though he had a *lathi* with him. There is no allegation against appellant Nagendra Singh that he had provoked Babbe Singh to kill the deceased or that he assaulted the complainant Santosh Singh by *Lathi* and therefore, there is no evidence beyond doubt to prove the conduct of appellant Nagendra Singh that he had common intention with co-accused Ajeet Singh @ Babbe Singh or he did something in furtherance of common object of the unlawful assembly. Hence, appellant Nagendra Singh could not be convicted either of offence under Sections 148 or 302/149 of IPC. The learned Additional Sessions Judge has committed an error in convicting appellant Nagendra Singh of aforesaid crime.

27. Similarly, if case of appellant Dalpratap Singh is considered then, his overt-act as told by eye witnesses that he told the accused Ajeet Singh @ Babbe Singh to fire and thereafter, appellant Ajeet Singh @ Babbe Singh fired from the gun. In this context, if the entire story as told by the eye witnesses is considered then, first part of the story was that the appellant Ajeet Singh @ Babbe singh went to *Khalihan* of the complainant Santosh Singh in search of Virendra Singh to kill him and nothing was done to Santosh Singh and other eye witnesses there because appellant Ajeet Singh @ Babbe Singh could not trace the deceased Virendra Singh at *Khalihan*. Thereafter, accused persons surrounded the deceased Virendra Singh and the complainant Santosh Singh and others including labours accompanied with the deceased Virendra Singh but such labours had already left the spot immediately and therefore, no such labour was examined as an eye witness in the case. If appellant Ajeet Singh @ Babbe Singh had intended to kill the deceased Virendra Singh from very beginning then, he was not required to wait for any command from the appellant Dalpratap Singh and therefore, there was no need to appellant Dalpratap Singh to ask the appellant Ajeet Singh @ Babbe Singh to fire.

28. On the basis of the aforesaid discussion, the prosecution could not prove beyond that appellant Dalpratap Singh provoked co-accused Ajeet Singh @ Babbe Singh to do fire. No other overt-act of appellant Dalpratap Singh is proved by the prosecution that he participated in assault caused to the deceased or complainant Santosh Singh. It is also not proved that he facilitated the accused Ajeet Singh @ Babbe Singh in committing the crime and therefore, by mere presence of appellant Dalpratap Singh, his common intention with the main accused cannot be presumed. The prosecution could not prove any overt-act of appellant Dalpratap Singh to show that he had done something in furtherance of common object of the unlawful assembly. Hence, appellant Dalpratap Singh could not be convicted either for offence under Sections 148 or 302 of IPC with help of provision under Section 149 of IPC. The learned Additional Sessions Judge has committed an illegality in convicting appellant Dalpratap Singh of the aforesaid offences.

29. The learned counsel for the appellants have submitted that overt-acts of appellants Rajeev Lochan Singh, Nagendra Singh and Dalpratap Singh could not be proved beyond doubt and it is also not proved that they participated in the crime, therefore, their common intention could not be presumed with co-accused Ajeet Singh @ Babbe Singh. In this context, they relied upon the judgment passed by Hon'ble the Apex Court in case of *"Mithu Singh Vs. State of Punjab"*, [AIR 2001 SC 1929], in which it is held that merely because accused knew that co-accused was himself armed with a gun and also had knowledge about previous enmity between co-accused and deceased, inference that accused had common intention to kill cannot be drawn. In the light of aforesaid judgment and considering the overt-acts of these appellants as not proved beyond doubt by the prosecution, it would be apparent that the prosecution failed to prove their common intention with appellant Ajeet Singh @ Babbe Singh.

30. So far as the sentence is concerned, the trial Court has granted the minimum sentence to appellant Ajeet Singh @ Babbe Singh of offence under Section 302 of IPC and therefore, there is no need to interfere on the sentence passed by the trial Court of offence under Section 302 of IPC. Since the sentence of offence under Sections 302 and 148 of IPC had to run concurrently and the appellant is in custody since long, sentence of offence under Section 148 of IPC had already been executed, therefore, it makes no difference if his sentence under Section 148 of IPC is reduced. Under these circumstances, there is no need to interfere in the order of sentence passed by the trial Court

relating to appellant Ajeet Singh @ Babbe Singh.

31. On the basis of the aforesaid discussion, the appeal filed by appellant Ajeet Singh @ Babbe Singh cannot be accepted either on merits or on order of sentence and therefore, it is hereby dismissed by maintaining the judgment, order of conviction and sentenced passed by the trial Court against appellant Ajeet Singh @ Babbe Singh. However, appeals filed by the remaining appellants i.e. Rajeev Lochan Singh, Nagendra Singh and Dalpratap Singh appear to be acceptable. They are entitled to get the benefit of doubt. Consequently, appeals filed by appellants Rajeev Lochan Singh, Nagendra Singh and Dalpratap Singh are hereby allowed. Conviction and sentence directed against these appellants by the trial Court are hereby set aside. These appellants are acquitted of all the charges.

32. The appellant Nagendra Singh is in jail and therefore, Registry is directed to issue release warrant, so that he may be released forthwith. The appellants Dalpratap Singh and Rajeev Lochan Singh are on bail. Their presence is no more required before this Court and therefore, it is directed that their bail bonds shall stand discharged.

Order accordingly.

I.L.R. [2014] M.P., 3247
APPELLATE CRIMINAL
Before Mr. Justice Ajit Singh & Mr. Justice N.K. Gupta
Cr. A. No. 2816/2000 (Jabalpur) decided on 22 August, 2014

RAJENDRA ...Appellant
Vs.
STATE OF MADHYA PRADESH ...Respondent

Penal Code (45 of 1860), Section 302 or 302/34 - Common intention **- Appellant did not make any assault on the deceased and he had no fire arm with him at the time of incident - Appellant did not himself commit any overt- act - Main accused took out a pistol and fired at deceased - It is possible that appellant may not be having knowledge that main accused had hidden a pistol in his pocket - Once offence is committed appellant had no option except to leave the spot - Held - Common intention could not be, therefore, attributed to him, to render him guilty with the help of Section 34 I.P.C. - Hence, his appeal accepted - Appellant acquitted. (Paras 11 to 18)**

दण्ड संहिता (1860 का 45), धारा 302 या 302/34 – सामान्य आशय – अपीलार्थी ने मृतक पर कोई हमला नहीं किया और उसके पास घटना के समय अग्न्यायुध नहीं था – अपीलार्थी ने स्वयं कोई प्रत्यक्ष कृत्य कारित नहीं किया – मुख्य अभियुक्त ने पिस्टल निकाली और मृतक पर गोली चलायी – यह संभव है कि अपीलार्थी को हो सकता है, यह जानकारी ना हो कि मुख्य अभियुक्त ने अपनी जेब में पिस्टल छुपाई है – एक बार अपराध कारित हो जाने के पश्चात् अपीलार्थी के पास घटनास्थल छोड़ने के सिवाय कोई विकल्प नहीं था – अभिनिर्धारित – इसलिए भा.द.सं. की धारा 34 की सहायता से उसे दोषी ठहराने के लिए, उसका सामान्य आशय होना नहीं माना जा सकता – अतः उसकी अपील स्वीकार की गई – अपीलार्थी दोषमुक्त।

Cases referred :

AIR 2001 SC 1929, (1976) 3 SCC 391, AIR 1994 SC 1651, AIR 2004 SC 1808,

S.C. Datt with *Siddharth Datt*, for the appellant.
S.K. Kashyap, G.A. for the respondent/State.
Bhoop Singh, for the objector.

JUDGMENT

The Judgment of the Court was delivered by **N.K. Gupta, J. :-** The appellant has preferred the present appeal being aggrieved with the judgment dated 1.12.2000 passed by the learned Sessions Judge, Sagar in ST No.369/1997 whereby the appellant has been convicted of the offence punishable under Section 302/34 of IPC and sentenced to life imprisonment with fine of Rs.1,000/-, in default of payment of fine, additional RI for six months.

2. The prosecution's case, in short, is that on 23.4.1997 Madan Soni (PW-4), General Secretary of District Congress Committee had called a meeting of all the members in the party office situated near Saraswati Vachnalaya at Teenbatti Sagar. A resolution against the accused Lokman was proposed to be passed in such a meeting. A slogan "Lokman Hatao Congress Bacho" was also published. At about 12 to 12:15 PM the deceased Naval, Madan Soni (PW-4), Vijay Sahu (PW-13), Brij Kishore Rusia (PW-17) and other members of the party were present near Saraswati Vachnalaya and chatting amongst themselves before the proposed meeting. Suddenly accused Lokman Khatik along with other three accused persons came to the spot in a car and got down near the handpump of Teenbatti. The appellant along with

accused Jitendra @ Jittu moved forward towards the deceased Naval Purohit. Lokman by waving his hand to Jitendra @ Jittu identified Naval Purohit. Accused Jitendra @ Jittu reached near deceased Naval Purohit and fired a shot from his pistol due to which Naval fell down on the ground. Thereafter all the four accused persons disappeared in the same car. Rajkishore (PW-1) and Ramesh Datt Dubey (PW-5) took the deceased Naval to the District Hospital, Sagar in an auto-riksha, but he succumbed to the injuries. The police recovered the dead body of the deceased and sent it for postmortem. Dr. Rakesh Kumar Khare (PW-12) had performed the postmortem of the deceased and gave his report Ex.P-20. He found an entry wound of gun shot at left maxillary region. On opening of skull, a fracture of left zygoma and different wounds were found. Base of skull was found fractured. Brain matter was also lacerated. Maxillary was damaged. There was a commuted fracture on the right temporal bone and one peice of bullet was found on the right temporal muscle. Two pieces of bullets were recovered from the head of the deceased. According to the opinion of Dr. Rakesh Kumar Khare, the death of the deceased was homicidal in nature. After due investigation, the charge sheet was filed before the Chief Judicial Magistrate, Sagar, who committed the case to the Sessions Court.

3. The appellant Rajendra abjured his guilt. He took a plea that he was not present on the spot at the time of incident. At the time of incident he was present at Chakarghat Temple in a Yagya. In defence Premnarayan Mishra (DW-1), Constable Jagannath (DW-2), Head Constable Kailashnath (DW-3), Gangaprasad Tiwari (DW-4), Navin Kaithoriya (DW-5) and Gorelal Chourasiya (DW-6) were examined as defence witnesses. Out of them witness Gangaprasad Tiwari (DW-4) gave his statement relating to plea of *alibi* raised by the appellant Rajendra.

4. The learned Sessions Judge, Sagar after considering the evidence adduced by the parties convicted all the accused persons including the present appellant of the offence under Section 302 or 302/34 of IPC whereas accused Jitendra @ Jittu was also convicted of the offence under Section 25(1)(a) of the Arms Act. The appellant was sentenced as mentioned above.

5. During the pendency of this appeal, appellants Lokman and Bhupendra have expired, and therefore their appeal have turned abated. Since accused Jitendra @ Jittu has completed his entire sentence, therefore vide order dated 16.5.2012 his appeal was permitted to be withdrawn.

6. We have heard the learned counsel for the parties at length.

7. In the present case Shailendra Singh (PW-3), Madan Soni (PW-4), Ramesh Datt Dubey (PW-5), Sachin Jain (PW-18), Sunil Kumar Yadav (PW-19), Anoop Kumar Vaidya (PW-20), Santosh Shrivastava (PW-21), Anil Kumar Jain (PW-22), Raja Thakur (PW-23), Rakesh Gupta (PW-24), Mukesh Shukla (PW-25), Rajkumar Raikwar (PW-29) and Sanjay Babu Soni (PW-30) were examined as eye-witnesses. Out of them, Sachin Jain, Sunil Kumar Yadav, Anoop Kumar Vaidya, Santosh Shrivastava, Anil Kumar Jain, Mukesh Shukla, Rajkumar Raikwar and Sanjay Babu Soni have turned hostile. The remaining eye-witnesses have stated that deceased Naval Purohit was standing with other witnesses near Saraswati Vachnalaya. Suddenly the appellant with other accused persons came in a car and got down at the spot. Accused Lokman pointed out the deceased Naval Purohit to accused Jitendra @ Jittu and thereafter Jitendra @ Jittu fired from his pistol causing death of the deceased. The testimony of these eye-witnesses is duly corroborated by time lodged FIR Ex.P-1 and the postmortem report Ex.P-20 proved by Dr. Rakesh Kumar Khare (PW-12). The single firearm injury was found to the deceased and hence the postmortem report was corroborative to the testimony of the eye-witnesses.

8. The appellant took the plea of *alibi* that he was not present at the spot. In defence Ganga Prasad Tiwari (DW-4) was examined to show that appellant Rajendra was present in the Chakraghat temple to perform a Yagya. However, Pandit Ganga Prasad Tiwari could not say about the exact time as and when appellant Rajendra left the function. To prove the plea of *alibi*, there should be some documentary evidence to show that the appellant was present at any other place at the time of incident. The oral testimony of the witness Ganga Prasad Tiwari is not sufficient to prove the plea of *alibi* raised by the appellant. The learned Sessions Judge has rightly discarded the plea of *alibi*.

9. All the accused persons had also taken the plea that they were falsely implicated in the matter due to enmity. It is true that there was a political rivalry between the deceased Naval Purohit and accused Lokman. But enmity is a double edged weapon, that means due to enmity the accused could assault the victim or due to that enmity the appellant could be falsely implicated by the victim, and therefore the evidence of witnesses should be examined minutely. In the present case, a meeting was to be held against the accused Lokman by

different members of a particular political party and the deceased Naval Purohit was the President of the Congress Seva Dal, who had to preside over the meeting. Hence there was political enmity between the deceased and accused Lokman, whereas appellant Rajendra was the nephew of accused Lokman. It is true that the incident was witnessed by so many persons and out of them many witnesses were the followers of the deceased. At the same time many members of that political party have turned hostile. Hence the testimony of the eye-witnesses cannot be discarded merely on the ground that they were the members of the political party and also the followers of deceased Naval Purohit. Raja Thakur (PW-23) was a student and he did not accept that he was the member of the political party. However, he went to the spot to attend the meeting. He is not closely connected with the deceased but still he has stated that appellant Rajendra along with other three accused persons boarded down from the car and thereafter accused Lokman pointed out the deceased Naval Purohit to accused Jitendra @ Jittu who by firing a shot killed the deceased Naval Purohit. Under these circumstances, looking to the uniformity in the evidence given by various eye-witnesses, their testimony is acceptable and it was not the case in which appellant Rajendra or accused Jitendra @ Jittu were falsely implicated.

10. On the basis of the aforesaid discussion, there is sufficient evidence against accused Jitendra @ Jittu that he murdered the deceased Naval Purohit by firing a shot from his pistol. Hence, the learned Sessions Judge, Sagar has rightly convicted the accused Jitendra @ Jittu for commission of offence under Section 302 of IPC.

11. It is apparent that the appellant did not make any assault on the deceased and he had no firearm with him at the time of incident. The learned counsel for the appellant has submitted that the witnesses have exagratted (sic:exaggerated) about the conduct of appellant Rajendra during the incident. For example, witness Ramesh Datt Dubey (PW-5) has stated that appellant Rajendra exhorted the co-accused Jitendra @ Jittu to kill the deceased Naval Purohit. However, it was not the case of the prosecution. If appellant Rajendra would have exhorted the co-accused Jitendra @ Jittu that fact would have been told by Madan Soni (PW-4) and complainant Rajkishore (PW-1), who had lodged the FIR Ex.P-1. Complainant Rajkishore did not mention in the FIR that appellant Rajendra exhorted the accused Jitendra @ Jittu to kill the deceased. Hence, the allegation as made by witness Ramesh Datt Dubey and other eye-witnesses appears to be an improvement in the factual position.

12. It is stated by some of the eye-witnesses that on pointing out the deceased, appellant Rajendra and co-accused Bhupenjdra had also moved forward along with the co-accused Jitendra @ Jittu. However, this fact is also not mentioned in the FIR Ex.P-1, and therefore it is an improvement after lodging the FIR. The contention raised by the learned counsel for the appellant appears to be acceptable that the testimony of the eye-witnesses can be accepted, but their exaggeration should be discarded.

13. According to the testimony of various eye-witnesses which was duly corroborated by the FIR Ex.P-1, it would be apparent that there is an allegation against appellant Rajendra that he came with Lokman and Jitendra @ Jittu in a car. He got down from the car and thereafter when the co-accused Jitendra @ Jittu fired from his pistol, he disappeared from the spot. Rajkishore (PW-1) has stated that after firing from a pistol by accused Jitendra @ Jittu, deceased Naval Purohit sustained a fatal injury due to which he fell down, and therefore attention of witnesses was towards the deceased Naval Purohit and he could not see as to how the accused persons left the spot. However, when he saw, he found that accused persons have disappeared from the spot and the car was also taken from the spot. Hence, it is not proved beyond doubt that the appellant disappeared from the spot along with accused Lokman or Jitendra @ Jittu.

14. The learned senior counsel for the appellant has also submitted that all the witnesses including Ramesh Datt Dubey (PW-5) have accepted that when the accused Jitendra @ Jittu alighted down from the car, he did not have a pistol in his hand. On pointing out the deceased Naval Purohit, he took out the pistol from his pocket and thereafter fired from that pistol. In the FIR Ex.P-1, it is clearly mentioned that after pointing out the deceased Naval Purohit, accused Jitendra @ Jittu took out a pistol from his pocket and fired with that pistol, and therefore appellant Rajendra had no chance to know that accused Jitendra @ Jittu had hidden a pistol in his pocket. It is further submitted that as per allegation, the appellant came with accused Jitendra @ Jittu and Lokman. He did not participate in the crime, but when the accused Jitendra @ Jittu fired from his pistol, he also disappeared along with other accused persons. There is no evidence advanced by the prosecution that there was a meeting of mind between all of the accused persons when they came to the spot in a car, and therefore by mere presence at the spot, the common intention of appellant Rajendra cannot be presumed. The learned senior advocate for the appellant has placed his reliance upon the judgments of Hon'ble the Apex Court in the cases of *"Mithu Singh Vs. State of Punjab"*

(AIR 2001 SC 1929), *"Gajjan Singh Vs. State of Punjab"*, [(1976) 3 SCC 391], *"Kashmira Singh Vs. State of Punjab"* (AIR 1994 SC 1651) and *"Girja Shankar Vs. State of UP"*, (AIR 2004 SC 1808) to show as to when the common intention of the accused shall be counted in such circumstances. It is held in the aforesaid judgments that the common intention may be even developed at the spot. However, the development of common intention can be considered on the basis of overt-act of the accused done by him along with the co-accused. The entire position of the common intention depends upon the factual position of that particular case. However, in the case of *Mithu Singh* (supra) the factual position was approximately similar. The portion of para 6 of that judgment may be read as under:-

> "6.....It is true that it is difficult, if not impossible, to collect and produce direct evidence in proof of the intention of the accused and mostly an inference as to intention shall have to be drawn from the acts or conduct of the accused or other relevant circumstances, as available. An inference as to common intention shall not be readily drawn; the culpable liability can arise only if such inference can be drawn with a certain degree of assurance....."

In the case of *Mithu Singh* (supra) it was found that *Mithu Singh* knew that his co-accused Bharpur Singh was armed with a pistol, however his common intention was not found established with the co-accused.

15. If the ratio laid down in the case of *Mithu Singh* (supra) is applied in the present case, then it is established against appellant Rajendra that he came to the spot along with other accused persons, but accused Lokman did not point out the deceased Naval Purohit to the appellant. Appellant Rajendra was unarmed. He did not commit any supporting act to help the co-accused Jitendra @ Jittu, who took out a pistol from his pocket soon before the incident and possibility cannot be ruled out that appellant Rajendra had no knowledge that the accused Jitendra @ Jittu had hidden a pistol in his pocket. Under these circumstances, the overt-acts of appellant Rajendra as proved by the prosecution are not sufficient to prove his common intention with the co-accused Jitendra @ Jittu.

16. It is possible that appellant Rajendra came to the spot to give a company to his co-accused Jitendra @ Jittu. However, the conviction could not be directed on the basis of possibility or suspicion. Hence, it is not proved beyond doubt that

appellant Rajendra had any common intention with the co-accused Jitendra @ Jittu to kill the deceased Naval Kishore. When such an act was committed by the companion, the appellant had no option except to leave the spot. Hence, if he disappeared soon after the incident, then by his such conduct alone his common intention cannot be presumed. Under these circumstances, as discussed above appellant Rajendra has neither committed any crime on his own nor he had any common intention with the co-accused Jitendra @ Jittu, and therefore appellant Rajendra cannot be convicted for commission of offence under Section 302 of IPC or any inferior offence of the similar nature either directly or with the help of Section 34 of IPC. The learned Sessions Judge has committed an error in convicting appellant Rajendra for the aforesaid offence.

17. On the basis of the aforesaid discussion, the present criminal appeal filed by appellant Rajendra can be accepted. Consequently, it is hereby accepted. The conviction as well as the sentence directed against appellant Rajendra is hereby set aside. He is acquitted of the charges appended against him. He would be entitled to get the fine amount back, if he has deposited the same before the trial Court.

18. At present appellant Rajendra is on bail, his presence is no more required before this Court, and therefore it is directed that his bail bonds shall stand discharged.

Order accordingly.

I.L.R. [2014] M.P., 3254
APPELLATE CRIMINAL
Before Mr. Justice Subhash Kakade
Cr.A. No. 2283/2006 (Jabalpur) decided on 30 September, 2014

PRADUMANLAL KUSHWAHA ...Appellant
Vs.
STATE OF MADHYA PRADESH ...Respondent

Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 20-B II (C) - Sentence and fine **- Sentence and fine awarded to the appellant is the minimum stipulated under N.D.P.S. Act is not excessive calls for no reduction - However, the sentence imposed in default of payment of fine for one year is excessive same is reduced from 1 year R.I. to three months R.I. - Appeal is partly allowed. (Paras 9,12,13 & 14)**

स्वापक औषधि और मन:प्रभावी पदार्थ अधिनियम (1985 का 61), धारा 20बी II (सी) – दण्डादेश एवं अर्थदण्ड – अपीलार्थी को अवार्ड किया गया दण्डादेश एवं अर्थदण्ड, एन.डी.पी.एस. अधिनियम के अंतर्गत दिया गया न्यूनतम है, जो अत्याधिक नहीं, जिसे घटाने की आवश्यकता नहीं – किन्तु अर्थदण्ड के व्यतिक्रम में अधिरोपित एक वर्ष का दण्डादेश अत्याधिक है, उसे 1 वर्ष के सश्रम कारावास से घटाकर तीन माह सश्रम कारावास किया गया – अपील अंशतः मंजूर।

Jitendra Tiwari, for the appellant.
R.N. Yadav, P.L. for the respondent/State.

JUDGMENT

SUBHASH KAKADE, J. :- Through this appeal the appellant Pradumanlal Kushwaha has assailed the judgment dated 09/10/2006 passed by learned Special Judge, NDPS, Rewa in Special Case No.10/2005, whereby he has been convicted and sentenced in the manner stated here-in-after:-

2. Under Section 20-B II(C) of N.D.P.S. Act and sentenced to undergo rigorous imprisonment of ten years with fine of Rs.1.00 lac, in default to suffer R.I. for one year.

3. The prosecution case in short is that on 02/08/2005, Civil Line Police received an information regarding carrying of Ganja in a car and when the police stopped car MP 19 - 8916, one Surjit run away from the spot and police seized contraband article Ganja at about 20 Kg in weight. The alleged contraband article sent to FSL, Sagar and after recording the statement of prosecution witnesses and after completing the investigation, police filed challan against the appellant and co-accused Shivdhar Singh and Surjit.

4. In order to bring home the charges against appellant the prosecution examined nine witnesses and exhibited 42 documents and the defence exhibited 04 documents.

5. The learned Special Judge held the appellant guilty for the offence punishable under Section 20-B II(C) of N.D.P.S. Act, convicted and sentenced him on the counts mentioned in above para.

6. Shri Jitendra Tiwari, learned counsel for the appellant submits that the learned trial Court committed error in holding the appellant guilty under Section20-B II(C) of N.D.P.S. Act. It is also submitted that learned trial Court committed grave error in overlooking material contradictions, omissions in depositions of prosecution witnesses. It is further submitted by learned counsel for the appellant that this Court vide order dated 19.11.2007 obliged

the appellant to be released on bail, but poor fellow does not manage to deposited the fine amount of Rs. 1.00 lac, hence still under custody and has completed more than clear nine years of jail sentence.

7. Per contra, Shri R.N. Yadav, learned Panel Lawyer for the respondent has submitted though the appellant has been served substantive period of sentence even then he does not deserve any benefit out of it because after due appreciation of prosecution evidence, the learned trial Court has rightly found the offence proved against the appellant, which requires no interference.

8. Heard learned counsel for the parties at length, perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; statement of the appellant recorded under section 313 Cr.P.C., and also perused the documents (Ex-D-1, D-1 to D-3) proved by the defence; and the impugned judgment. After reflecting over the matter, I am implicitly satisfied that on merits, the conviction of the appellant, warrants no interference.

9. Learned trial Court rightly came to the conclusion that testimony of Sanjay Singh (PW/5) and S.K. Gupta (PW/9) is of sterling quality and can be the basis of conviction of the appellant. Other discrepancies which have been highlighted do not really earn the status of contraction to make the evidence of these witnesses impeachable, incredible or not beyond reproach. Therefore, the present appeal deserves to be dismissed on its merits.

10. Now, the question arises that as to how a balance should be struck and maintained in regard to the sentence?

11. It is pertinent to importantly mentioned here that 37 years old appellant Pradumanlal Kushwaha is under custody since his initial date of arrest i.e. 09.08.2005, that way, he has served out the maximum period of jail sentence.

12. But, the sentence awarded to the appellant is not excessive and calls for no reduction, because the jail sentence of the appellant and the quantum of fine imposed on him is concerned, I find that it is the minimum stipulated under the N.D.P.S. Act.

13. However, I feel that the sentence imposed in default of payment of fine namely one year R.I., is far too excessive and calls for reduction. I feel that the ends of justice would be squarely satisfied if the sentence in default of payment of fine be reduced from one year R.I. to three months R.I.

14. In the result, this appeal is partly allowed, maintaining the jail sentence of the appellant and the sentence of fine, but reduce the sentence in default of

payment of fine from one year R.I. to three months R.I. The appellant is in jail and shall be released therefrom only after he serves out his sentence. If the appellant is served out his entire jail sentence after calculation of remission period as per Jail Manual and other Act and Rules, he be set at liberty, if not required in any other criminal case.

Appeal partly allowed.

I.L.R. [2014] M.P., 3257
CENTRAL EXCISE REFERENCE
Before Mr. Justice Rajendra Menon & Mr. Justice A.K. Sharma
C.E.R. No. 8/2003 (Jabalpur) decided on 4 September, 2014

BHARAT HEAVY ELECTRICALS LTD., BHOPAL (M/S) ... Applicant
Vs.
COMMISSIONER, CUSTOMS & CENTRAL EXCISE, BHOPAL ...Non-applicant

(alongwith C.E.R. No. 9/2003, C.E.R. No. 10/2003 & C.E.R. No. 11/2003)

Central Excise Act (1 of 1944), Section 35 H(1) & Central Excise Rules, 1944, Rule 57-1 - Show Cause Notice **- Issued by an unauthorized person - Superintendent could not issue the show cause notice in relation to the recovery of MODVAT credit after disallowing it and it was only the Assistant Collector or Collector who could issue the notice - Entire action initiated is unsustainable, void ab initio and stands vitiated. (Para 10)**

केन्द्रीय उत्पाद–शुल्क अधिनियम (1944 का 1), धारा 35एच(1) व केन्द्रीय उत्पाद–शुल्क नियम, 1944, नियम 57-1 – कारण बताओ नोटिस – अप्राधिकृत व्यक्ति द्वारा जारी किया गया – एमओडीव्हीएटी जमा राशि, नामंजूर किया जाने के पश्चात उसकी वसूली के संबंध में कारण बताओ नोटिस, अधीक्षक जारी नहीं कर सकता और वह केवल सहायक जिलाधिकारी या जिलाधिकारी है जो नोटिस जारी कर सकता है – आरंभ की गई संपूर्ण कार्यवाही अपोषणीय, आरंभ से शून्य और दूषित है।

Cases referred :

2001 (127) ELT 190 (Tri-Delhi), 1996 (87) ELT 19 (SC), 1997 (94) ELT 460 (SC), 1999 (112) ELT 765 (SC), 2002 (139) ELT 3 (SC), 2008 (231) ELT 22 (SC), 2005 (181) ELT 339 (SC).

Z.U. Alvi with *Ashok Lalwani,* for the applicant.
S.A. Dharmadhikari, for the non-applicant.

ORDER

The Order of the Court was delivered by : **RAJENDRA MENON, J. :-** As common question of law based on identical facts are involved in all these four references made under section 35H(1) of the Central Excise Act, 1944 and as a common order is passed by the then existing Central Excise & Gold (Control) Appellate Tribunal in disposing of four appeals, all these four references are being disposed of by this common order and for the sake of convenience the documents and pleadings available in C.E.R.No.8/2003 is being referred to in this order.

2. The questions of law formulated in the cases read as under :-

> "1. Whether the Tribunal is justified in negativating the contention raised by the assessee that in the obtaining factual matrix the Superintendent of Central Excise could have issued the notice to show cause in relation to excess availability of MODVAT Credit by the assessee or it was either the Assistant Commissioner or the Collector Central Excise in the case at hand ?
>
> 2. Whether the Tribunal is justified in arriving at the conclusion that the department's circulars have not legal sanctity as they have not been issued in accordance with Rule 33 of the Rules ?"

3. The facts in nutshell relevant for deciding the question involved goes to show that the applicant/company was issued with show cause notices by the Superintendent Central Excise claiming payment of duty after disallowing the MODVAT Credit granted to them for various periods.

4. Four show cause notices were issued in the following manner, particulars of which are as under :-

CER No:	SCN Date	Period	Credit Disallowed vide OIO dt.27.2.99
8/2003	21.07.1988	Nov.87-Jan.88	Rs.11,12,341/-
9/2003	11.07.1990	Feb.89-Feb.90	Rs.62,48,190/-
10/2003	13.02.1992	Nov.91-Dec.91	Rs. 8,88,543/-
11/2003	28.11.1991	Apr.90-May.91	Rs. 3,69,835/-

All these notices were issued by the Superintendent Central Excise and as objections with regard to the same were rejected, appeals were filed, which were also dismissed by the Tribunal, hence these references.

5. Having appreciated facts of the case we find that two questions of law arises for consideration as has been detailed above.

6. The first question is as to whether the Tribunal was justified in holding that the department's circulars issued giving powers to issue show cause notice under Rule 57-1 of the Central Excise Rules, 1944 (hereinafter referred to as 'Rules' for short) to the Assistant Collector and Collector can be given effect to the same being executive and advisory in nature and not issued under the provision of Rule 233 (wrongly mentioned as 33 in the question of law framed) of the Rules. It would be seen that initially the circular was issued by the Department on 12.5.1987 designating "proper officers" entitled to take action under the Rules. In the Annexure to this circular the Superintendent Central Excise was indicated as the "proper officer" for issuing notice and taking action under Rule 57-1. However subsequently another administrative circular was issued on 15.12.1987 in the matter of issuing show cause notice under Rule 57-1(i) for disallowing MODVAT Credit wrongly availed of and in this circular it was indicated that if the MODVAT Credit is wrongly availed then the show cause notice invoking the penal provision has to be issued and decided by the Collector or the Additional Collector. Placing reliance on this circular dated 15.12.1987 the assessee argues that the show cause notice issued by the Superintendent was unsustainable and void ab initio, whereas it is the case of the Revenue that once a circular is issued under Rule 233 on 12.5.1987 authorizing the Superintendent Central Excise to take action the finding of the Tribunal is proper and the question be answered in favour of the revenue.

7. We find that after the circular was issued on 12.5.1987 exercising the powers under Rule 233 certain judgments were rendered in the matter by various courts including the Supreme Court and therefore the administrative clarificatory circular dated 15.12.1987 has been issued. Records indicate that in a case of the same assessee, the same Tribunal in, *Bharat Heavy Electricals Ltd. Vs. Commissioner of Central Excise, Indore* reported in [2001 (127) ELT 190 (Tri. - Delhi] has held that the show cause notice issued by the Superintendent is void ab initio and similar show cause notice issued by the Superintendent has been quashed and based on the subsequent circular

issued on 15.12.1987 it has been held that it is only the Collector who can issue show cause notice.

8. Be it as it may, we may now proceed to consider as to what is the binding effect of the circular issued as has been done in the present case. The question of a departmental circulars' effect and its binding nature on the officers of the Department has been considered in various cases and in the case of *Ranadey Micronutrients Vs. Collector of Central Excise* [1996 (87) ELT 19 (SC)] it has been held by Hon'ble Supreme Court that the circulars are issued by the Board under section 37B and merely because the circular does not recite so, it does not mean that they do not bind the departmental officers. It has also been held by the Supreme Court in the aforesaid case that it is the Central Board, which is statutorily entrusted with the task of classifying excisable goods uniformly and the circulars issued by the Board are binding on the departmental officers. It is held in this case that even if the circular is found to be inconsistent to the statutory provision, for the purpose of maintaining consistency, uniformity in imposition of duty and discipline in the department these circulars should be followed by the departmental officers. Thereafter this judgment has been followed by the Supreme Court again in the case of *Collector of Central Excise, Patna Vs. Usha Martin Industries* [1997 (94) ELT 460 (SC)] and it has been held that the circular issued by the Board are binding on the departmental authorities. Similar is the view taken by the Supreme Court in the case of *Paper Products Ltd. Vs. Commissioner of Central Excise* [1999 (112) ELT 765 (SC)].

9. In the meanwhile, even though in the case of *Collector of Central Excise, Vadodara Vs. Dhiren Chemical Industries* [2002 (139) ELT 3 (SC)] a Constitutional Bench of Supreme Court held that the circular issued by the Board despite decision of the Courts to the contrary are binding on the department, another Constitutional Bench of the Supreme Court reconsidered the matter and in the case of *Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries* [2008 (231) ELT 22 (SC)] held that when the Supreme Court or the High Court declares the law on a question that will be binding on the Department, and if a circular is issued which is not in conformity or is contrary to the law laid down by the Supreme Court or High Court the decision of the court shall be binding on the department and not the circular. If the judgments cited by the learned counsel for parties in this regard

alongwith the written submission are taken note of it can be safely construed by us that when a circular is issued by the Board it is binding on the officers of the department and they cannot refuse to follow the same on the garb of same being an administrative circular, advisory in nature and not binding in fact the law is that such circulars are binding on the officers of the department, even if not issued under the statutory provision, in all the cases cited before us various aspects of the matter have been taken note of and principles of law which can be derived from these judgments indicates that for the purpose of maintaining discipline and consistency in the department and the Board being the highest statutory authority in the department, any circular issued by the Board has to be followed by the officers until and unless it is shown that the circular is contrary to any law laid down by the Supreme Court or any judgment of the High Court with regard to the issue covered by the circular.

10. Accordingly the officers of the department cannot in violation to the circular proceed to take action by saying that the circular is only advisory in nature or that it is not a circular issued under the statutory rule i.e. Rule 233. Once we find that the legal position in this regard is well settled, then we have to hold that in the light of the circular issued by the Board clarifying the position with regard to who is the "proper officer" as defined under section 2(b) of the Rules, the departmental authorities are duty bound to follow the circular. Even though in the statutory circular issued by the department on 12.5.1987 initially, the Superintendent Central Excise was declared as the proper officer to take action under Rule 57-1, but this circular has further been clarified on 8.9.1987 and finally on 15.12.1987 and with regard to taking action and for issuing of notice under rule 57-1(i), after considering the provision of law and the judgment of Supreme Court in the case of *Pahwa Chemicals Pvt. Ltd Vs. Commissioner of Central Excise, Delhi* [2005 (181) ELT 339 (SC)], it has to be held that for the purpose of issuing show cause notice and taking action under rule 57-1, it is the Assistant Collector and Collector who are authorized to take action and in the light of the circular dated 15.12.1987, we find that the order passed by the Tribunal is unsustainable. It is not known as to how the Tribunal could take a different view from the one taken by it in an appeal filed by the same assessee on 17.10.2000 in the case of *Bharat Heavy Electricals Ltd Vs. Commissioner of Central Excise, Indore* (supra). Once it is found that the show cause notice is issued by an unauthorized person, we have to hold that the entire action initiated is unsustainable, void ab initio and

stands vitiated. Accordingly, we answer the question formulated to say that in the obtaining factual matrix, the Superintendent could not issue the show cause notice in relation to the recovery of MODVAT Credit after disallowing it and it was only the Assistant Collector or Collector who could issue the notice. Accordingly the first question is answered thus.

11. As far as second question is concerned, we hold that when a departmental circular is issued by the Board, it would be in accordance to the power available to the Board under section 37-B and until and unless it is not shown that the circular is contrary to any law laid down by the Supreme Court or judgment of High Court, the same shall be binding on all the officers of the Excise Department and only on the ground that the circular is not issued under Rule 233 of the Rules, the officer cannot refuse to follow the circular by saying that it is only advisory in nature. All the circular issued by the Board in its administrative and executive jurisdiction are binding on the officers of the Board until and unless it can be shown that they are contrary to any law laid down by Supreme Court or High Court with regard to the subject matter of the circular.

12. In view of aforesaid answer given to the substantial question formulated, we allow all the four appeals and hold that the entire action initiated vide issuance of show cause notice details of which are given as under :-

CER No:	SCN Date	Period	Credit Disallowed vide OIO dt.27.2.99
8/2003	21.07.1988	Nov.87-Jan.88	Rs.11,12,341/-
9/2003	11.07.1990	Feb.89-Feb.90	Rs.62,48,190/-
10/2003	13.02.1992	Nov.91-Dec.91	Rs. 8,88,543/-
11/2003	28.11.1991	Apr.90-May.91	Rs. 3,69,835/-

by the Superintendent of Central Excise is void ab initio and are accordingly quashed.

13. Accordingly, all the proceedings based on the aforesaid proceedings are quashed. The reference stands allowed and disposed of accordingly.

Reference allowed.

I.L.R. [2014] M.P., 3263
CIVIL REVISION
Before Mr. Justice A.K. Shrivastava
Civil Rev. No. 44/2007 (Jabalpur) decided on 1 March, 2013

JEEVANLAL RATHORE ...Applicant
Vs.
DEEPCHAND & ors. ...Non-applicants

A. Civil Procedure Code (5 of 1908), Order 23 Rule 3 - Compromise of Suit - **Scope - Property which is not the subject matter of the suit but related to the parties to the suit, for that property also compromise may be arrived at in the court and a compromise decree can be passed, if it is arrived at by a lawful agreement. (Para 9)**

क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 23 नियम 3 – वाद का समझौता – व्याप्ति – सम्पत्ति जो वाद की विषय वस्तु नहीं किन्तु वाद के पक्षकारों से संबंधित है, उस सम्पत्ति हेतु भी न्यायालय में समझौता किया जा सकता है और समझौता डिक्री पारित की जा सकती है, यदि विधिपूर्ण करार द्वारा उसे किया जाता है।

B. Court Fees Act (7 of 1870)(As applicable in M.P. State), Section 7 (iv)(c) - **Plaintiff filed suit that the sale deed is not binding on him - Transaction is voidable - Plaintiff is required to pay ad valorem court fee upon it. (Para 10)**

ख. न्यायालय फीस अधिनियम (1870 का 7), (जैसा कि म.प्र. राज्य में लागू है), धारा 7(iv)(सी) – वादी ने वाद प्रस्तुत किया कि विक्रय विलेख उस पर बंधनकारी नहीं – संव्यवहार शून्यकरणीय है – वादी को उस पर मूल्यानुसार न्यायालय फीस अदा करना अपेक्षित है।

Case referred :

1976 JLJ 703.

R.K. Verma, for the applicant.
None for the non-applicants No. 1 & 2.
Akhilesh Singh, P.L. for the non-applicant No.3.

ORDER

A.K. SHRIVASTAVA, J. :- This revision has been filed by the applicant-plaintiff under Section 115 CPC against the order dated 22.02.2006 passed by learned 1st Additional District Judge, Damoh in Civil Suit No. 32-A/2003

whereby the suit of plaintiff has been disposed of on compromise basis.

2. The contention of learned counsel for the applicant-plaintiff is that earlier an appeal was filed before this Court which was registered as F.A.No. 319/2006 but it was disposed of by giving direction to the applicant-plaintiff to file civil revision since against the compromise decree an appeal is specifically barred under Section 96(3) CPC. Hence the said appeal was permitted to be withdrawn with liberty to file this revision application. Eventually, this revision application has been filed.

3. Indeed, a suit for declaration that plaintiff-applicant is the owner of the suit house (the description whereof is mentioned in the plaint) and for injunction that first and second defendants namely Deepchand and Smt. Alka Jain may not interfere in the possession of the plaintiff has been filed by the applicant-plaintiff. During the pendency of the civil suit good sense prevailed in the minds of the parties as a result of which compromise application was submitted to get the suit decided on compromise basis. On bare perusal of the said application for compromise, this Court finds that it was agreed upon between the parties that the defendant no.1 Deepchand shall be the owner of smaller house, the description whereof is mentioned in the compromise application. However, the bigger house shall be owned and possessed by the plaintiff-applicant with a further stipulation that he will pay a sum of ₹ 3,00,000/- to defendant no.2 Smt. Alka Jain. According to the compromise application, a sum of ₹ 35,000/- shall be paid within a period of one month and the balance amount of ₹ 2,65,000/- shall be paid within a period of one year. Further it has been averred in the application that if the plaintiff fails to pay a sum of ₹ 3,00,000/- as per the aforesaid arrangement, the defendant no. 2 Smt. Alka Jain shall be entitled to recover possession of the bigger house from plaintiff. However, in case plaintiff pays the said amount of ₹ 3,00,000/- to the defendant no.2, his possession shall be continued in that house.

4. In support of compromise application the parties examined themselves in the Trial Court and the learned Trial Court has decreed the suit in terms of the compromise mentioned in para 13 of the impugned order.

5. The contention of learned counsel for the applicant is that learned Trial Court has acted illegally with material irregularity in exercise of its jurisdiction by not passing a decree in respect to the bigger house which is in possession of the plaintiff. Learned counsel submits that the only reason which has been assigned by learned Trial Court is that it is not the subject matter of

the suit. However, by hammering the finding of the learned Trial Court, learned counsel submits that the said finding is totally in derogation to provisions of Order 23 Rule 3 CPC because with effect from 1.2.1977 the scope of Order 23 Rule 3 has been widened and accordingly now even the property which is not the subject matter of the suit if by a lawful agreement a compromise has been arrived at between the parties the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the parties to the suit. Hence it has been submitted that on the basis of such provision the lawful compromise which was arrived at between the parties should have been allowed by the Trial Court. Learned counsel further propounded that although entire description has been stated in the plaint in regard to the bigger house but unfortunately in the relief clause nothing has been stated for this house but the relief should be taken into account on the basis of the allegations made in the plaint which is also in respect of the bigger house and, therefore, it cannot be said that the bigger house is not the subject matter of the suit.

6. In the present case despite defendants-respondents have been served they have not appeared . This Court directed to issue notice to the State of M.P. since learned Trial Court has directed the plaintiff to pay the court fee in regard to cancellation of sale deed of smaller house.

7. Having heard learned counsel for the applicant-plaintiff and State and after perusal of the record and by paying heed to the impugned order, this Court finds that this revision deserves to be allowed.

8. According to me, learned trial Court while rejecting the compromise application in respect of the bigger house of which the plaintiff-applicant is in possession has failed to take into account the provisions of Order 23 Rule 3 CPC which in its amended form came into force with effect from 1.2.1977. For ready reference, it would be condign to quote Order 23 Rule 3 CPC in its entirety :-

> **"3. Compromise of suit-** Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith {so far as it relates to the

parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit};

{Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.}

{Explanation :- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872(9 of 1872), shall not be deemed to be lawful within the meaning of this rule.}"

9. According to me, by amending Rule 3 of Order 23, the legislature has deliberately used the word "whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit." If this provision is applied in its *stricto sensu*, it would reveal that the property which is not the subject matter of the suit but related to the parties to the suit, for that property also compromise may be arrived at in the Court and a compromise decree can be passed if it is arrived at by a lawful agreement. Hence, I am of the view that learned Trial Court has acted illegally with material irregularity in exercise of its jurisdiction while rejecting the compromise application and by not passing the compromise decree in regard to the bigger house, the description whereof is mentioned in the compromise application as well as in the plaint. The compromise application is thus allowed in *toto* and the decree passed by the learned Trial Court is hereby modified.

10. So far as payment of court fee in respect to smaller house which has been compromised is concerned, since plaintiff has filed the suit that the sale deed is not binding on him, I am of the view that plaintiff is challenging the transaction which is voidable and in this regard the decision of *Pratap and another Vs. Punia Bai and Others* 1876 JLJ 703 is quite relevant and, therefore, plaintiff is required to pay *ad valorem* court fee upon it. However, the respondent/State is only having a right to recover the amount of court fee from the plaintiff. The State Govt. is free to recover the court fee from the plaintiff as land revenue if it is not paid.

11. This revision succeeds and is hereby allowed and the suit of plaintiff is

hereby decreed in *toto* in terms of the compromise which is recorded in para 13 of the impugned order. The compromise application filed in the Trial Court shall be the part of decree. Registry is hereby directed to draw a decree accordingly. No costs.

Revision allowed.

I.L.R. [2014] M.P., 3267
CIVIL REVISION
Before Mr. Justice J.K. Maheshwari
Civil Rev. No 64/2014 (Jabalpur) decided on 14 October, 2014

DEEPAK KUMAR SONI ...Applicant
Vs.
ASHOK KUMAR & ors. ...Non-applicants

***Municipalities Act, M.P. (37 of 1961), Section 26(2) & Municipalities (Election Petition) Rules, M.P. 1962, Rule 19(2) - Security for the Cost* - Applicant has not deposited a sum of Rs. 250/- as security for the cost of the revision with the High Court "at the time of presentation" of the petition - Due to non-compliance of the same, this petition ought to be dismissed - Held - When the decision passed by the Judge has been challenged by filing the revision before the High Court u/s 26(2) of the Act, then at the time of presentation, the security of the cost must be deposited and after pointing out of the defect, if such deposit is made in the later part of the day, it would not come within the connotation "at the time of presentation" and it would lead to consequence of dismissal as specified in the later part of sub-rule 2 of Rule 19 of Election Petition Rules. (Paras 2 & 10)**

नगरपालिका अधिनियम, म.प्र. (1961 का 37), धारा 26(2), एवं नगरपालिका (निर्वाचन याचिका) नियम, म.प्र. 1962, नियम 19(2) – खर्चों के लिए प्रतिभूति – आवेदक ने उच्च न्यायालय में याचिका के "प्रस्तुतीकरण के समय" पुनरीक्षण के खर्चे के लिए प्रतिभूति के रूप में रू. 250/– की रकम जमा नहीं की – उक्त के अपालन के कारण, इस याचिका को खारिज किया जाना चाहिए – अभिनिर्धारित – जब न्यायाधीश द्वारा पारित निर्णय को चुनौती देते हुए, अधिनियम की धारा 26(2) के अंतर्गत उच्च न्यायालय के समक्ष पुनरीक्षण प्रस्तुत किया जाता है तब प्रस्तुतीकरण के समय, खर्चों के लिए प्रतिभूति जमा की जाना चाहिए और त्रुटि को दर्शाने के पश्चात् यदि उक्त को उस दिन बाद में जमा किया जाता है, वह "प्रस्तुतीकरण के समय" के अर्थान्तर्गत नहीं आयेगा और उसका परिणाम खारिजी होगा जैसा कि

निर्वाचन याचिका नियम के नियम 19, उप–नियम 2 के आगे के भाग में विनिर्दिष्टित है।

Cases referred :

AIR 1973 SC 2464, AIR 1981 SC 1199, AIR 1995 MP 272, 1997(2) JLJ 154, AIR 1983 SC 558, (2003) 6 SCC 186, (2011) 6 SCC 321, AIR 1980 SC 303, AIR 2006 NOC 792(All).

V.S. Shroti with *Ashish Shroti,* for the applicant.
Imtiyaz Hussain, for the non-applicant No. 1.
Sanjay Dwivedi, G.A. for the non-applicant/State.

ORDER

J.K. MAHESHWARI, J. :- Assailing the order dated 29.1.2014 passed by the First Additional District Judge, Harda in Election Petition No.34/2011 declaring the election of the applicant as Councillor from Ward No.12 of V.V. Giri Ward, Harda, as null and void this petition has been filed under Section 26(2) of the M.P. Municipalities Act, 1961 (hereinafter called as 'the Act').

2. Non-applicant no.1 by filing I.A. No.5147/2014 on 20.3.2014 has raised the preliminary objection regarding maintainability of this petition due to non-compliance of Rule 19(2) of M.P. Municipalities (Election Petition) Rules, 1962 (hereinafter referred to as 'Election Petition Rules'). It is said that as per the requirement of Rule 19(2), the applicant has not deposited a sum of Rs.250/- as security for the cost of the revision with the High Court "at the time of presentation" of the petition. However, as per the consequence specified therein, the election petition ought to be dismissed in *limine.*

3. Learned counsel Shri Imtiyaz Hussain representing non-applicant no.1 referring Rule 19(2) urged with vehemence that applicant at the time of presentation of the revision petition under Section 26(2) of the Act challenging the decision of the Judge has not deposited the sum of Rs.250/- as security for the cost. Due to non-compliance of the same, this petition ought to be dismissed. In support of his contention, reliance has been placed on the judgments of Hon'ble Apex Court rendered in the case of *Charan Lal Sahu vs. Nandkishore Bhatt and others* AIR 1973 SC 2464 and *Aeltemesh Rein vs. Chandulal Chandrakar and others* AIR 1981 SC 1199. Reliance has also been placed to the judgment of this Court in the case of *Radheshyam S/o Nandlalji Patidar vs. Jagdish S/o Gangaram Patidar* AIR 1995 MP

272. Lastly, reliance has been placed upon the judgment of *Aslam Beg Mirdha vs. Babulal and others* 1997 (2) JLJ 154 wherein Rule 19(2) has been interpreted and its compliance is held mandatory and non-deposit of the security alongwith revision was found fatal. It is held by this Court that High Court do not have any discretion to condone the said lapse. In context of the said argument it is urged that that this petition may be dismissed due to non-compliance of the mandatory requirement of the Rules.

4. In counter to the argument of the non-applicant no.1, learned senior counsel Shri V.S. Shroti contends that the requirement of Rule 19(2) of the Election Petition Rules is mandatory which has been complied immediately after presentation of this revision by the applicant depositing the amount of security for the cost of the revision. However, the purposive interpretation of Rule 19(2) ought to be done by the Court. In such circumstances, the objection raised by the non-applicant no.1 may be dismissed. In support of his contention reliance has been placed on a judgment of Hon'ble Apex Court in the case of *M. Karunanidhi vs. H.V. Handa and others* AIR 1983 SC 558. Reliance has further been placed on another judgment of Hon'ble Apex Court rendered in the case of *D. Saibaba vs. Bar Council of India and another* (2003) 6 SCC 186 and said that interpretation of statute where literal construction or plain meaning may cause hardship, futility, absurdity or uncertainty the Court may prefer purposive or contextual construction to arrive at a more just, reasonable and sensible result. Further, relying upon the judgment of Hon'ble Apex Court in the case of *Mahadev Govind Gharge and others vs. Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka* (2011) 6 SCC 321 in the context that in procedural law the purpose and interpretation is always intended to facilitate process of achieving ends of justice besides expeditious disposal of cases and courts normally favour interpretation which would achieve said object. It is further said that the provisions of the procedural law which have no penal consequence in default of their compliance and even clothe court with discretion to condone same should normally be construed as directory in nature and receive liberal construction. Learned senior counsel referring the meaning of "at the time" in the context of the Words and Phrases State and Federal Court from America by the Book of Permanent Edition, West Publishing Company submits that within statute providing that certificate of title duly assigned shall be delivered to purchaser at the time motor vehicle is delivered, refer to the whole transaction or series of circumstances and do not literally mean *"eo instanti"*.

However, if after filing the revision and on pointing out the defect of non-deposit of the security for the cost of the revision, it was rectified on the same day then the words "at the time of presentation" en-grafted in Rule 19(2) of Election Petition Rules should be construed liberally maintaining this petition. It is further submitted by him that Chapter 20 of High Court of Madhya Pradesh Rules, 2008 do not prescribe any mode and manner to deposit the security for cost, however, on rectification of the defect pointed out by the Registry on the same day, if this revision is dismissed, then it will run contrary to the interpretation of the statute and would not be meaningful. In view of the aforesaid, it is submitted that the objection raised by the non-applicant no.1 may be turned down at threshold.

5. After having heard learned counsel appearing on behalf of the parties and on perusal of the facts of this case, it is apparent that non-applicant no.1 has filed the election petition bearing No.34/2011 before the First Additional District Judge, Harda challenging the election of the applicant as Councillor from Ward No.12 (V.V. Giri Ward, Harda) which was allowed by the order impugned dated 29.1.2014. By filing this revision under Section 26(2) of the Act by the applicant on 3.2.2014 order impugned is challenged. On presentation of this revision, Section Officer has pointed out two defects which are reproduced as under -

(1) Legible copies/typed copies-- Typed copy of hand written Annexure A/8.

(2) Deposit Receipt-- Receipt of deposit amount Rs.250/- Not deposited in the High Court Cashier Judicial.

However, on the next date learned counsel for the applicant appeared and put up the note that "default removed". In the record of this petition, an application submitted by the counsel for the applicant to the Registrar General, High Court of M.P. in respect to deposit of Rs.250/- as per Rule 19 of the Election Petition Rules is available by which it was deposited on 3.2.2014 on the same day. In the said application number of the Civil Revision has also been specified, meaning thereby after presentation of the revision, it was registered as Civil Revision alloting its number and when the defect has been pointed out by the Registry, it has been cured by deposit of Rs.250/- as reflected from the note of applicant's counsel regarding removal of the defect. In the said context, while considering the objection raised by non-applicant no.1, it is to be examined that the compliance of Rule 19(2) of the Election

Petition Rules is mandatory and such compliance has been truly made by the applicant to maintain the revision at the time of its presentation.

6. In the said context, first of all Rule 19 of the Election Petition Rules is required to be referred which is quoted hereinbelow :-

> **"Revision.-** (1) No petition by way of revision shall lie against any interlocutory order passed by the Judge.
>
> (2) At the time of presentation of the petition for revision under sub-section (2) of Section 26 against the decision of the Judge, the petitioner shall deposit with the High court a sum of Rs.250/- as security for the costs of the revision. If the provisions of this rule are not complied with the High Court shall dismiss the petition."

A bare reading of sub rule 2 it is clear that "at the time of presentation" of the petition challenging the decision of the Judge, under Section 26(2) of the Act, the petitioner "shall" deposit a sum of Rs.250/- as security for the cost of the revision. The later part of sub rule 2 specifies the consequence, if the provisions of this rule are not complied with, the High Court "shall" dismiss the petition. In view of the aforesaid, it is apparent that the starting of sub rule 2 emphasize that "at the time of presentation" security deposit should be made, otherwise consequence of such non-compliance has been specified in the later part of the said rule using the words, that High Court "shall" dismiss it. In the said context by the judgment of this Court interpreting Rule 19(2) in the case of *Radheshyam* (supra) it was held that the requirement to deposit the security amount for cost under Rule 19 is mandatory. It has further been held that by filing a subsequent petition and depositing security at the time of presentation with an intent to cure such illegality would not amount to cure the same. However, this Court while dismissing the revision petition, held that, if it is allowed for the purpose of maintaining the subsequent petition, it would defeat the provisions of law.

7. In another decision of *Aslam Beg Mirdha* (supra), this court has interpreted Rule 19(2) of the Election Petition Rules and held that while filing revision petition under Section 26(2) of the Act, the compliance of provisions of Rule 19(2) of Election Petition Rules is mandatory. It is further held that the security amount has to be deposited alongwith revision petition and the High Court has no discretion to condone the lapse. This judgment was

delivered relying upon the judgments of Hon'ble Supreme Court rendered in the case of *Charan Lal Sahu* (supra) and *Aeltemesh Rein* (supra).

8. Learned senior counsel Shri Shroti has placed reliance on the judgment of *M. Karunanidhi* (supra) wherein the issue regarding dismissal of election petition under Section 117 of the Representation of Peoples Act for depositing the security alongwith the election petition by way of challan in the name of Registrar of the Madras High Court in the Reserve Bank of India. It was urged, that the High Court dismissed the said election petition because the security has not been deposited in cash as specified in Rule 8 of Madras High Court Election Petition Rules 1967 as specified therein. It is submitted by him that as the manner to deposit was not specified in the rules and deposit was made by challan at the time of filing, therefore, treating the manner to deposit directory, which was not specified in the rules, deposit of security was accepted by way of challan in the name of Registrar. Thus, even in a case where compliance to deposit security is found mandatory but its manner was not specified, however, the dismissal of petition by the High Court was set aside. In the facts of present case wherein the amount of security for cost of revision has been deposited on the same day and date, however, even the compliance of Rule 19(2) of the Election Petition Rules is found mandatory, this petition should not be dismissed merely because the deposit was in later part of the day, which cannot be fatal as it is on the date of presentation of election petition.

9. In order to advert the said contention, interpretation of Rule 19(2) of the Election Petition Rules is necessary, the starting word of sub rule 2 is "at the time of presentation" of the petition for revision challenging the decision of the Judge shall deposit with the High Court a sum of Rs.250/- as security for the cost of the revision. However, in the first part of Rule 2, it is clear that at the time of presentation of the petition, the security deposit should be made. The aforesaid view finds support from the judgment of the Co-ordinate Bench of this Court in the case of *Aslam Beg Mirdha* (supra) and *Radheshyam* (supra). However, looking to the language of the rule using word "shall" for deposit, there is no reason to differ from the said view and it is reiterated that compliance of Rule 19(2) to deposit security for cost is the mandatory compliance. The later part of this rule starts from the words that if the provisions of this rule are not complied with, the High Court "shall" dismiss the petition; meaning thereby in the first part as well as in the later part the word "shall" has been used. However, the deposit of security of cost is mandatory

"at the time of presentation" and if it is not deposited in compliance of the rules, dismissal is the consequence. In the case of *Sharif-ud-din vs. Abdul Gani Lone* AIR 1980 SC 303, E.S. Venkataramiah, J. delivering the judgment in the case observed that- "Whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow".

10. In addition to the aforesaid, as per the Major Law Lexicon by P. Ramanatha Aiyar, 4th Edition 2010 590 the connotation "at the time of presenting of application" has been dealt with in the context of Section 17 of the Provincial Small Cause Courts Act, 1887. Referring the judgment of the Allahabad High Court in the case of *Har Kumar Vidyarthi vs. Sudha Devi* AIR 2006 NOC 792 (All) it is held that the expression "at the time of presenting of application" occurring in Section 17 of the Act means time when application is presented to the proper officer of the Court. However, in the said context, if the language of Rule 19(2) is looked into, then it is apparent that at the time of presentation of the petition for revision the sum of Rs.250/- as security for the cost of the revision must be deposited with the High Court and as per the later part of the said Rule if the provisions of this rule are not complied with then the election petition shall be dismissed. Thus legislature using the word "shall" in first part as well as in later part expressed the concern in the context of depositing the security at the time of presentation otherwise the dismissal is a consequence. Using "shall" makes the compliance of Rule 19(2) *strictio sensu* at the time of presentation of the election petition, the deviation from such non-compliance lead to dismissal of the petition. In the said context, it is to be held that Rule 19(2) either in first part or later part is mandatory. In view of the discussion made hereinabove, it is apparent that at the time of presentation of the petition for revision if the cost was not deposited, however, the defect was pointed out by the Section Officer and to rectify the said defect, the cost though deposited on the same day but subsequently which would not lead to different consequence to maintain the petition for the Rule 19(2) as referred in the statute. In such circumstances, the arguments as advanced by learned senior counsel Shri Shroti relying upon the judgment of *M. Karunanidhi* (supra) would not be applicable in this case. It is not a case where the whole transaction or series of circumstances requires to comply the provisions of Rule 19(2) of the Election Petition Rules. In-fact, it is to be

interpreted in the context that when the election petition is presented, the cost shall be deposited by way of security to the High Court. However, the word "at the time of presentation of petition" has been used therein to deposit cost on presentation meaning thereby *"eo instanti"*. In other words we can say that as and when the decision passed by the Judge has been challenged by filing the revision before the High Court under Section 26(2) of the Act then at the time of presentation, the security of the cost must be deposited and after pointing out of the defect if such deposit is made in the later part of the day, it would not come within the connotation "at the time of presentation" and it would lead to consequence of dismissal as specified in the later part of sub rule 2 of Rule 19 of Election Petition Rules.

11. In view of the foregoing discussion, relying upon the judgment of this Court in the case of *Radheshyam* (supra) as well as *Aslam Beg Mirdha* (supra) having no discretion with the High Court to condone the lapse of non-depositing the security of cost of revision at the time of presentation of revision, in my considered opinion objection raised by the non-applicant no.1 deserves to be upheld and this petition is liable to be dismissed.

12. Accordingly, upholding the objection filed by the non-applicant no.1, this petition is hereby dismissed due to non-compliance of Rule 19(2) of Election Petition Rules, in the facts. Parties to bear their own cost.

Petition dismissed.

I.L.R. [2014] M.P., 3274
CRIMINAL REVISION
Before Mr. Justice J.K. Maheshwari
Cr. Rev. No. 803/2013 (Indore) decided on 15 January, 2014

GYANESH ...Applicant
Vs.
CENTRAL BUREAU OF INVESTIGATION & anr. ...Non-applicant

A. ***Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401, 399, Penal Code (45 of 1860), Sections 100, 103 & Evidence Act (1 of 1872), Section 105 - Right of Private Defence*** **- The benefit of general exception u/s 100 and 103 of I.P.C. may be available to the accused on discharging the burden in the court and not before the prosecution agency - The said occasion is not available to the prosecution agency including CBI. (Para 26)**

क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401, 399, दण्ड संहिता (1860 का 45), धाराऐं 100, 103 व साक्ष्य अधिनियम (1872 का 1), धारा 105 – प्राईवेट प्रतिरक्षा का अधिकार – भा.द.सं. की धारा 100 एवं 103 के अंतर्गत सामान्य अपवाद का लाभ अभियुक्त को न्यायालय में भार उन्मोचित किये जाने पर उपलब्ध हो सकता है और न कि अभियोजन एजेंसी के समक्ष – उक्त अवसर अभियोजन एजेंसी को उपलब्ध नहीं, इसमें सीबीआई भी शामिल है।

***B. Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 401, 399 - Exercise of Revisional Jurisdiction* - On the basis of material available on record, Revisional Court is not supposed to exercise revisional jurisdiction while setting aside the order of the trial court, which is based upon well considered reasoning supported by the material available on record - Therefore, Revisional Court exceeded the jurisdiction - Impugned order is set-aside. (Para 27)**

ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 401, 399 – पुनरीक्षण अधिकारिता का प्रयोग – अभिलेख पर उपलब्ध सामग्री के आधार पर पुनरीक्षण न्यायालय को विचारण न्यायालय का आदेश जो अभिलेख पर उपलब्ध सामग्री द्वारा समर्थित भलिभांति विचार किये गये तर्क पर आधारित है, को अपास्त करते हुए पुनरीक्षण अधिकारिता का प्रयोग करना अपेक्षित नहीं – अतः पुनरीक्षण न्यायालय अपनी अधिकारिता की सीमा से बाहर गया – आक्षेपित आदेश अपास्त।

Cases referred :

(2010) 9 SCC 479, 2013 AIR SCW 369, AIR 2001 SC 2747, (2001) 8 SCC 522, (2013) 4 SCC 275, 2013 CR.L.R. (SC) 818, AIR 1967 SC 1167, AIR 2004 SC 4674, (2004) 13 SCC 324, (2008) 9 SCC 140, (2007) 1 SCC 1, (2008) 17 SCC 157, (2011) 3 SCC 496, (2007) 12 SCC 64, AIR 1978 SC 1568.

Jai Singh with *Vivek Singh*, for the applicant.
Vivek Sharan, Assistant Solicitor General, for the non-applicant No. 1/CBI.
Raghvendra Kumar & S. Joglekar, for the non-applicant No.2.

ORDER

J.K. MAHESHWARI, J. :- This Revision has been filed under Sections 397, 399, 401 and 482 of the Code of Criminal Procedure being aggrieved by the order dated 24.06.2013 passed by the IV Additional Sessions Judge-cum- Special Judge, CBI, Indore in Criminal Revision No.77/2013 whereby the order passed by the Judicial Magistrate-cum-CBI Judge, Indore in Special

Criminal Case No.2/2010 on 29.12.2012 taking cognizance against non-applicant No.2 [Rajendra Patel] has been set aside, and the matter has been remitted back to the Judicial Magistrate to decide the application under Section 190 of Cr.P.C., as per the guidelines issued in the order of revisional court.

2. The facts leading to the case are, for an incidence took place on 5.3.2008 at 10.40 pm within the residential premises of Rajendra Patel, an intimation has given by him to the police in writing at 1.20 am in the intervening night of 5-6/3/2008 *inter-alia* contending that Sandeep Patel along with three others persons trespassed the house breaking the gate with Tavera vehicle bearing No.MP04 CA 2789 at 10.45 pm and one of them fired, which was missed. In retaliation Rajendra Patel fired two shots, former by means of 12 bore gun and later by means of 315 bore rifle supplied by his wife, thereby someone received injury. On the said written report, FIR was registered at crime No.107/08 on 6/3/2008 at 3.15 am for the offence u/s 451, 336/34 of the IPC against Sandeep and three others. Thereafter statement of Rajendra Patel was recorded by police u/s 161 Cr.P.C. first time on 6/3/2008 where, in addition to the aforesaid prosecution story, it is stated that fire shot was received to one boy and another on the body of Tavera vehicle. It is also stated that those accused persons have first reached to the house of Kamal Patel and the vehicle used in offence is also of him. Thus on receiving the injury the accused persons became panic and flee away from the spot in the said vehicle.

3. On 11/5/2008, Ramvilas Jaat, father of Durgesh Jaat lodged the Gumshudgi of his son which was registered on 11/5/2008. Thereupon investigation was done and on completion of investigation offence u/s 302 IPC was registered against Rajendra Patel(non-applicant No.2) and under section 201/34 IPC against Sudeep Patel, Arun Jaat, Deepak Saran, Manoj Kushwaha, Amit Patel and others on 5/10/2008 at crime No.524/2008.

4. As the dead body of Durgesh Jaat was not found and recovered by the police during investigation, therefore Ramvilas Jaat, father of the missing (deceased Durgesh Jaat) filed a Habeas Corpus petition (W.P.No.11986/2008) which was decided by Principal Seat, Jabalpur issuing direction to the Director, CBI to take over the investigation of both the cases of the incidence of shooting and death of Durgesh as they are interrelated and bring the investigation to its logical conclusion in accordance with law. In view of the

order of CBI investigation passed by the High Court, both the cases were handed over to the CBI whereupon two cases were registered, the details thereof are- (1) CBI 1st FIR No. – RC.5(S)/2008/CBI/SCB/LKO (case of crime No.107/08), (2) CBI 2nd FIR No. – RC.6(S)/2008/CBI/SCB/LKO (case of crime No.524/08).

5. After completion of investigation, a common charge-sheet no.3/2010 was filed, by CBI in both the FIRs before the Special Judicial Magistrate, CBI Indore, under Sections 34, 307, 458/304(II), 201 and 120B of IPC and under Section 27 of the Arms Act against Sudeep Patel, Deepak Saran, Arun Jaat, Amit Patel, Manoj Kushwah, Rajesh Lathi, Raghunandan Singh, Kamal Patel and Sandeep Patel. As Durgesh Jaat died and his dead body was not found, however, he cannot made accused and in charge-sheeted. It was also found that by gunshot fire of Rajendra Patel, Durgesh Jaat died, but, the said fire was shot by him in right to private defence, however, despite allegation against him, offence under Section 302 IPC was not registered extending benefit of right to private defence and challan has not been filed against him.

6. On filing challan, the Committal Court has taken cognizance on the said charge sheet against the aforementioned accused persons. On 03.11.2010, supplementary charge sheet was filed against accused Gyanesh Jaat also. Thereafter, on 13.1.2011, the court passed the order of committal to the District and Sessions Judge, Harda. After committal, the Addl. Sessions Judge, Harda vide order dated 20.07.2011 discharged the accused Kamel Patel from the offence under Section 120B, 304II, 201 of IPC; whereas accused Sandeep Patel, Sudeep, Deepak and Arun Jaat were also discharged from the offence under Section 27 of the Arms Act and directed to face the trial for remaining offences. Against the order of committal to Harda Court, Criminal Revision No.703/2011 was filed at Indore Bench by Union of India *inter-alia* contending that the Additional Sessions Judge, Harda is having no jurisdiction to try the offences, however, the order to commit the case was set aside and the matter was remitted back to JMFC, Indore to pass fresh order of committal. In the said Criminal Revision, this Court while passing the order dated 17.09.2012 set aside the order of committal court to Additional Sessions Judge, Harda and directed to transmit the record of the Sessions Trial No.27/2011 pending before him to the Judicial Magistrate-cum-CBI Court, Indore for passing the fresh order of committal to Sessions Court, Indore in accordance with law as expeditiously as possible.

7. On remittance of the case to the Judicial Magistrate-cum-CBI Court,Indore, an application under Section 190 of Cr.P.C. was filed before him by the accused Gyanesh Jaat making request to take cognizance of offence under Section 302 of IPC against Rajendra Patel (Non-applicant No.2) because he shot fire over the deceased Durgesh Jaat, and on receiving such injury he succumbed. The Committal court vide order dated 29.12.2012 allowed the said application and after detailed discussion of the statement of prosecution witnesses found that sufficient material to take cognizance against accused Rajendra Patel is available and the action of CBI to not to file charge-sheet joining him as an accused was not found in accordance with law. It is observed that the benefit of right to private defence cannot be extended by the officers of CBI and it may be granted by the court on discharging burden of accused after considering the said plea in view of the exceptions specified under Section 100 and 103 of IPC and as per section 105 of Evidence Act, however, by taking cognizance under section 302 of IPC against Rajendra Patel summoned him issuing non-bailable warrant of arrest.

8. Against the order passed by the Committal court, non-applicant No.2 Rajendra Patel filed a Criminal Revision No.77/2013 which was allowed by IV Additional Sessions Judge, cum Special Judge CBI, Indore vide order dated 24.06.2013 and the order of Committal Court was set aside with an observation that the power under Section 190 of Cr.P.C. to take cognizance conferred to the magistrate is not circumscribed, but while taking cognizance it is required to consider the case of the revisionist and non-revisionist fall within the purview of cross-case or counter case. It is to be further examined that both the cases can be tried in one trial and the charge may be framed against both the persons in one trial. It is further required to be examined that both the parties may be an accused and witnesses in one prosecution against each other and the witnesses may be made accused. It is to be further examined that such trial shall not prejudice the right of both the parties. Thus by setting aside the order, it was directed that JMFC Court to consider the said points and to pass the order afresh. Being aggrieved the applicant has assailed the findings recorded by the Revisional Court filing this revision.

9. Shri Jai Singh, learned senior counsel, appearing on behalf of the applicant argued at length and referring the provisions of Section 190 read with Sections 207 and 209 of Cr.P.C. submitted that the power to take cognizance against the accused named in the FIR, though not charge-sheeted

has been conferred to the magistrate under Section 190(1)(b) of Cr.P.C., who can take cognizance on consideration of the material available in the charge sheet filed, and after recording satisfaction. If any order is passed on due consideration, it cannot be set aside in exercise of the revisional jurisdiction by the higher court. In support of the aforesaid contention, reliance has been placed on a judgment rendered by Hon'ble the Apex Court in the case of *Uma Shankar Singh Vs. State of Bihar and another,* (2010) 9 SCC 479] and on a recent judgment in the matter of *Nupur Talwar Vs. Central Bureau of Investigation & another,* 2013 AIR SCW 369. He has also placed reliance on a judgment of *M/s Swil Ltd Vs. State of Delhi and another,* AIR 2001 SC 2747 and also on *Rajinder Prasad Vs. Bashir and others,* (2001) 8 SCC 522., and submitted that the magistrate is having power to disagree with the police report and may summons to a person named in the FIR not made accused at the time of filing challan. In support of such contention, reliance has also been placed on a judgment of *Dhrup Singh and others Vs State of Bihar* [(2013) 4 SCC 275] and in the case of *Dharam Pal & Ors Vs. State of Haryana & Anr,* 2013 Cr.L.R. (SC) 818 by the Bench consisting of five judges has observed that cognizance against the persons not shown as an accused in the charge-sheet and the magistrate took cognizance under section 190 Cr.P.C. in a case triable by Sessions Court then after committal the Sessions Court has right to issue the summons to the said accused. Lastly, it is submitted by him that the cognizance in a criminal case ought to be taken for an "offence" and not against an "offender". In support of such contention, reliance has been placed on a judgment of the Apex Court in the case of *Raghubans Dubey Vs. State of Bihar,* AIR 1967 SC 1167. In the said context, it is urged that the observations of the revisional court while remitting back the matter to the Judicial Magistrate cum CBI Court to pass an order afresh is unsustainable in law.

10. Shri Vivek Sharan, Assistant Solicitor General, representing the Central Bureau of Investigation has strenuously urged that the order passed by the revisional Court is in conformity to law. It is submitted by him that in the present case the cognizance has been taken by the court long back and the order of committal was passed on 29.12.2011 to commit the case to the Sessions Court, Harda. The said order was set aside by this Court in Criminal Revision No.703/2011 vide order dated 17.09.2012 directing the magistrate to pass the order afresh of committal to the court of Sessions Judge, Indore.

Thereafter, the magistrate ceases the power to take cognizance, and ought to pass the order of committal only, without exercising the power under Section 190 of Cr.P.C., otherwise if the power is exercised afresh, it would amount to review of the order taking cognizance passed by the magistrate earlier. In support of such contention, reliance has been placed on a judgment rendered by Hon'ble Supreme Court in the case of *Adalat Prasad Vs. Roopal Jindal & Others* [AIR 2004 SC 4674], *Subramanium Sethuraman Vs. State of Maharashtra & Another* [(2004) 13 SCC 324] and *Bholu Ram Vs. State of Punjab and another* [(2008) 9 SCC 140]. It is further contended that after remand by the High Court to pass the order of committal by the magistrate, without condoning the delay of such a long period, passing an order in exercise of the powers under Section 190 Cr.P.C. is not permissible. In any case, if the jurisdiction was required to be exercised under Section 190 of Cr.P.C. then it is obligatory on the magistrate to take report from CBI under Section 156(3) of Cr.P.C. or to direct for filing a fresh report as per Section 173(8) of Cr.P.C.. In support of the said contention, reliance has been placed on *Prakash Singh Badal Vs. State of Punjab,*(2007) 1 SCC 1, *Fakhruddin Ahmed Vs. State of Uttaranchal,* (2008) 17 SCC 157, *Mona Pawar Vs. High Court of Judicature of Allahabad,* (2011) 3 SCC 496 and *Dilawar Singh Vs. State of Delhi*, (2007) 12 SCC 64. The reliance has also been placed on some other judgments but since they are in the context of Section 319 of Cr.P.C. which is not relevant at this juncture, thus, those are not being referred.

11. Shri Raghvendra Kumar, counsel appearing on behalf of respondent No.2, submits that after passing the order by this Court in Criminal Revision No.703/2011, the magistrate ceases with the powers to take cognizance under Section 190 of Cr.P.C. again reviewing earlier order of taking cognizance. The magistrate has to pass an order from the stage of 207 and 209 of Cr.P.C. only. On the merits of the case, it is fairly submitted by him that the investigation has not properly been done by the prosecution agency including CBI with a view to help the accused persons. At last, he has adopted the arguments advanced by the learned counsel for CBI on all the points.

12. After having heard learned counsel for the parties at length and in the facts and circumstances of the case, it is required to be examine whether the order passed by the revisional court setting aside the order of JMFC cum CBI Court and remitting back the matter to pass appropriate order on the application under Section 190 of Cr.P.C. considering the observations made

by the revisional court is in accordance with law? It is to be further examined whether observations made by the revisional court are relevant for a magistrate while deciding the application under Section 190 of Cr.P.C.? It is further required to be examined that after setting aside the order of magistrate to commit the case to court of Sessions Judge, Harda by this Court and on remitting the matter to the magistrate, he can exercise the powes under section 190 of Cr.P.C.? it is further to be seen while passing the order impugned, the satisfaction has been recorded by the magistrate and thereafter revisional Court has rightly exercised the jurisdiction by passing the order impugned?

13. All the aforementioned question are co-related with each other; however, to answer these questions, the facts and legal position are required to be considered simultaneously. As per the prosecution story, it is clear that on 5.3.2008 at about 10.45 pm accused Sandeep along with three others, including Durgesh Jaat made criminal trespass after breaking the Gate of the house of Rajendra patel by a Tavera vehicle. One of the persons boarded in the said vehicle fired on Rajendra Patel which was missed. In retaliation, Rajendra Patel made two fires; one by means of 12 bore gun and another by means of 315 bore rifle supplied to him by his wife on the spot. As per the statement of Rajendra Patel recorded by the police under section 161 Cr.P.C, the said fire injury was received to the accused and thereby they flee away from the spot. It is not in dispute that on crime No.107/2008 offence under section 451,336 and 34 of the IPC was registered against Sandeep patel and three others; and one another offence was registered at Crime No.524/2008 under section 302, 201 and 34 of IPC against Rajendra Patel, Sudeep Patel, Arun Jaat, Deepak Saran, Manoj Kushwah, Amit Patel and others. It is also not in dispute that as per the order of the High Court passed in WP No.11986/2008 [*Ramvilas Jaat Vs. CBI*], the investigation was handed over to the CBI. Thereupon, two FIRs were registered by CBI as aforementioned. It is also not in dispute that after investigation, CBI filed the charge-sheet no.3/2010 registering an offence under Section 34, 307, 458/304(II), 201 and 120B of IPC and under Section 27 of the Arms Act against Sudeep Patel, Deepak Saran, Arun Jaat, Amit Patel, Manoj Kushwah, Rajesh Lathi, Raghunandan Singh, Kamal Patel and Sandeep Patel. In the charge sheet the name of Durgesh Jaat and Rajendra Patel were shown as accused, but because Durgesh Jaat died therefore challan has not been filed. The name of Rajendra Patel has been shown as an accused No.11 but for the following reasons, the

charge-sheet has not been filed against him:

> "Investigation has further revealed that the accused persons Sudeep Patel, Deepak Saran, Arun Jat and one more person alongwith deceased Durgesh Jat had committed the offence of criminal trespass and house breaking by night and had fired upon the complainant Rajendra Patel with intention to kill him. As such the right of private defence of the body and property of Rajendra Patel extended to causing death in terms of Section 100 and 103 IPC.
>
> From the facts and circumstances of the case and the evidences oral and documentary and the material exhibits collected during the course of investigation it has been established that, the accused persons Sudeep Patel, Deepak Saran and Arun Jat have committed offences u/s 34/307/458/304(II)/201 IPC and sec 27 Arms Act and Rajesh Lathi, Amit Patel, Manoj Kushwaha, Sandeep Patel and Kamal Patel have committed offence u/s 120B/304(II)/201 IPC and Raghunandan Singh u/s 120-B/201 IPC.
>
> Durgesh Jat had committed offence u/s 34/307/458/ IPC and sec 27 Arms Act. However, since he has died, he can not be sent up for trial and his name has been mentioned in column No.12 of this report.
>
> No case is made out against Rajender Patel as his act was done in exercise of his right to self defence under section 100 and 103 IPC and his name has been mentioned in column No.12 of this report."

14. In the aforesaid sequel of facts, it is clear that in a prosecution case, the name of Rajendra Patel has been specified as an accused but in exercise of power under Section 100 and 103 of IPC, the CBI officers extending the benefit of right to private defence, not filed the challan against him. Applicant herein filed an application under Section 190 of Cr.P.C., to take cognizance, which is allowed by the Committal Court vide order dated 29.12.2012 holding that in the facts of this case, action of the CBI to not to made accused to Rajendra Patel and not to file charge-sheet against him is not in accordance

with law. It was also observed that the benefit of right to private defence cannot be extended by the prosecution agency to him. As per Section 105 of the Evidence Act, the accused has to prove the said fact in a court discharging burden lay on him. For the purposes of taking cognizance against him under Section 190 of Cr.P.C., sufficient material is available on record, however, taking cognizance non-bailable warrant of arrest has been issued securing production of the accused Rajendra Patel in the court.

15. In the aforementioned facts of the case, it is to be examined that what are the powers to the magistrate for taking cognizance of the offence. In this regard, Section 190 of Cr.P.C. is reproduced below:

> **"190. Cognizance of offences by Magistrates.**-(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-
>
> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report of such facts;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.
>
> (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

16. In view of the above, it is clear that the magistrate specially empowered in this behalf may take cognizance of an offence upon a police report of such facts. Thus, taking cognizance by the magistrate is of an "offence" and not against "offender". In the process of taking cognizance, magistrate has to proceed and enquire into the commission of offence to adjudicate upon the guilt of the persons before him or may commit to the Court of Sessions for adjudication of guilt. In the aforementioned facts, the question would be that having taken cognizance of an offence qua certain accused persons, does the

Magistrate become *defenctus officio* in the sense that he is debarred from proceeding against such other persons as may be found by him to have been the real culprits, if left out by the person or authority at whose instance the proceedings had been initiated. The Apex Court in the case of *Raghubans* (supra) observed as under:

> "In our opinion, once cognizance has been taken by the magistrate, he takes cognizance of an "offence" and not the "offenders"; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."

17. The said view has been reiterated by their Lordships in the case of *Hariram Vs. Tikaram* [AIR 1978 SC 1568] laying down the law in the following para which is reproduced as under :

> "In the instant case the Sub-Divisional Magistrate took cognizance of the offence on the police report, and after taking cognizance of the offence and perusal of the record he appears to have satisfied himself that there were prima facie grounds for issuing process against the respondents. In so doing the Magistrate did not in our Judgment exceed the power vested in him under law."

18. The Hon'ble Apex Court in the case of *Uma Shankar Singh* (Supra), in para 19 and 20, has held as under:

> "19. The law is well settled that even if the investigating authority is of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon in exercise of his powers under Section 190(1)(b) CrPC. That is precisely what has happened in the present case.
>
> 20. In the instant case the investigation had been handed

over to CID and both CID and the local police had submitted their reports in final form exonerating the petitioner of the allegations made against him in the FIR. However, the Chief Judicial Magistrate, Siwan took cognizance of the offence under Sections 302/379 IPC and Section 27 of the Arms Act against the petitioner. This is not a case where the Magistrate took recourse to any further inquiry but took cognizance on the police report itself, which he was entitled to do under Section 190(1)(b) CrPC."

19. The Hon'ble Supreme Court recently in the case of *Nupur Talwar* (supra) has held that it is imperative for the magistrate to record the reasons differing with the prayer made by the prosecution agency and if the reasons have been assigned recording satisfaction, the court not found the order of issuance of process is at fault because it was supported by plausible reasons. In the said case, it was also held that against the order issuing process revisional court cannot go into the question whether reasons given by the magistrate were good or bad sufficient or insufficient. The revisional Court can only see whether the material before the Magistrate to take a view with sufficient grounds for issuing process is available or not. It is also held that the further investigation cannot be ordered once cognizance has been taken by the magistrate on a police report.

20. In the case of *Dharam Pal* (Supra), Hon. The Apex Court has observed that a person is not shown as an accused in the charge sheet and if magistrate took cognizance under Section 190 of Cr.P.C. in a case triable by the Court of Sessions and order upheld up to the High Court, then on committal of the case, Sessions Judge is entitled to issue summons. It is observed that view taken in the case of *Kishun Singh* (supra) is a correct view disagreeing with the view in case of *Ranjit Singh Vs. State of Punjab* [(1998) 7 SCC 149]. Similarly in the case of *Dhrup Singh* (supra), it is held that the power of the magistrate to disagree with the police report and to issue summons to the persons named in the FIR but not charge-sheeted upon independent application of mind by the magistrate to the materials on record may be exercised and it is not required to wait upto the stage of 319 of Cr.P.C.

21. In the case of *M/s Swil Limited* (Supra), the Hon'ble Supreme Court has observed that if a person not joined as accused in charge sheet can be

summoned at the stage of taking cognizance under Section 190 Cr.P.C. since at the stage of taking cognizance of an offence magistrate can ascertain from statement of witnesses examined by investigating officer as to who the offenders really are. It has been observed that there is no bar under Section 190 Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge-sheet.

22. In the case of *Rajinder Prasad* (Supra) while dealing with the said issue, the Hon'ble Supreme Court has emphasized about the duties of the magistrate while taking cognizance under Section 190, 209 of Cr.P.C. The Court observed that cognizance can be taken by the magistrate of an offence not included in the charge sheet submitted by the police and thereafter on being prima facie satisfied on the basis of the evidence collected by the police about the commission of that offence and also by some persons other than those arrested by the police then it is the duty of the Magistrate to proceed against the remaining persons.

23. In view of the foregoing observations of the Hon'ble Supreme Court, reliance placed by the counsel for the CBI in *Adalat Prasad* (Supra) is of no consequence. It can be observed that the case of *Adalat Prasad* (Supra) is on different facts and to answer the different legal issues and not in the context of taking cognizance against a person shown as accused in the prosecution case, but not joined accused taking cognizance of offence. The observations made in *Subramanium Sethuraman* (Supra) *Bholu Ram* (Supra) and *Fakhruddin Ahmed* (Supra) are also not in the context of the legal issues involved in the present case. Simultaneously, it can be observed that in the recent judgment of *Nupur Talwar* (Supra), the judgments of *Mona Pawar* (supra), *Dilawar Singh* (supra) and *Prakash Singh Badal* (supra) have been considered, thus which are of no help to the respondent-CBI.

24. As per the judgment of *Raghubans Dubey* (supra), it is clear that when the magistrate exercises the power under Section 190 of Cr.P.C. it relates back to power under Section 207 of Cr.P.C and thereafter power under Section 209 of Cr.P.C. can be exercised. In the present case, if court without taking cognizance against non-applicant no.2 earlier committed the case to the court of sessions, Harda and on setting aside of such order by the High

Court in Criminal Revision No.703/2011 passed on 17.09.2012, would not mean to exercise the power of the magistrate only under Section 209 of Cr.PC. and to act upon like post-office to commit it to the Sessions Court, Indore like *defunctus officio*. As and when the order of committal passed by the Magistrate is set aside and the matter is remitted back to the Magistrate, he can exercise the power under Section 190 of Cr.P.C. from the said stage again looking to the material available in charge sheet and in the facts and circumstances of the case. The power of the magistrate conferred to him under the statute is not hampered by the order of remand passed by the High Court. In this respect revisional court itself in para 12 observed that the power of magistrate to take cognizance again is not circumscribed or hampered and such finding has not been assailed by the respondent No.2 taking recourse before this court. In such circumstances, it can safely be held that on receiving the case by a magistrate again for committal, the said court can exercise the power under Section 190 of Cr.P.C, for taking cognizance of an offence against accused, though not shown in charge sheet.

25. In view of the law laid down by the Hon'ble Apex Court in various preceding judgments, it is clear that if on the basis of a police report a person has been made accused by a magistrate considering the material brought on record and satisfying himself to take cognizance, the revisional court ought to have exercise the revisional jurisdiction looking into the fact whether the power exercised by the magistrate is based upon the material available or not. In my considered opinion, looking to the reasonings assigned by the magistrate as discussed hereinabove it is clear that Rajendra Patel has been made accused by the Police and the CBI also observing that he is having right to private defence and by giving benefit of exception of Section 100 and 103 of IPC he is not made accused by the CBI as apparent from the afore-quoted final report prepared at the time of filing of the challan.

26. In this respect, chapter IV of the IPC specifies the general exceptions. Section 100 deals with exception of right to private defence of the body extends to causing death. As per the language of aforesaid section, it is clear that right of private defence of body extends under the restrictions mentioned in the last preceding section, to voluntarily causing death or of any other harm to the assailant, if the offence occasioned, in exercise of the right of any of the descriptions under Section 100 of IPC. If an assault as made may reasonably cause apprehension that death will otherwise be consequence of such assault

then right of private defence is available. In the facts of this case, accused persons may take the benefit of those exceptions. In the said context, chapter-7 of the Evidence Act deals the burden of proof. As per section 105, the burden of proving that the case of the accused falls within exceptions, of IPC is on him. The said burden can only be discharged by him when he is an accused of an offence and proves the existence of the circumstances proving his case within any of the general exceptions specified in chapter-IV of the IPC or within any special exception or proviso contained in any other part of the code or in any law defining the offence is upon him and on discharging the burden the Court shall presume absence of such circumstances. In view of foregoing and looking to the final report of the CBI in the charge-sheet, it is clear that Sudeep patel, Deepak Saran, Arun Jat and one more person along with deceased Durgesh jaat has committed an offence of criminal trespass and breaking of the house at night, who were fired by the complainant Rajendra Patel (non-applicant No.2). As such the act done by Rajendra patel in retaliation causing injury by use of a fire arm to Durgesh Jaat has been assumed the cause death, thus applying the exception of sec.100 and 103 IPC, he was not made accused in the charge-sheet. In view of legal position discussed above it is clear that the benefit of the general exceptions may be available to the accused on discharging the burden in the Court and not before the prosecution agency, however, he ought to have first join as accused, thereafter he may make out a case within the exceptions specified under Section 100 and 103 of the IPC, while adjudication of guilt in the trial. The said occasion is not available to the prosecution agency at the time of taking cognizance against a person of an offence who is an offender. It can be observed here that burden of proving guilt is on the prosecution agency alike to prove a civil case lies on a plaintiff, and the similar burden is not on the accused or on the defendant but they have to discharge the burden to prove their defence as specified, as per provisions of the Evidence Act. In the present case if the prosecution agency is of the opinion that Rajendra Patel made an assault by fire arm which caused injury to Durgesh Jaat, then in such case he ought to be joined as accused, thereafter, before Court he may take a plea of the exceptions available to him under section 100 and 103 of the IPC discharging burden as per section 105 of the Evidence Act, and Court may pass appropriate orders, but grant of benefit to one of the accused in lieu of right of private defence is not available to the prosecution agency including CBI.

27. In such circumstances, for taking cognizance of offence, the satisfaction recorded by the trial court cannot be said to be illegal warranting interference by the revisional Court, that too on the ground which are not required to be examined by the revisional Court. The revisional court while setting aside the well considered findings of the order of magistrate has observed that he is having power under Section 190 of Cr.P.C. but, remitted back the matter on the observation which are not required to be looked into at the stage of taking cognizance by magistrate. However, the observation made by the revisional Court in para 12 of impugned order is unwarranted. It may further be observed that the revisional Court on the basis of material so available on record are not supposed to exercise revisional jurisdiction while setting aside the order of the trial Court which is based upon well considered reasoning supported by the material available on record. Therefore, the revisional Court exceeded from the jurisdiction while passing the order impugned, though not conferred on him under the law as per the judgment of the Apex Court in the case of *Nupur Talwar* (supra).

28. In view of the forgoing discussions, order passed by the revisional Court dated 24.06.2013 is hereby set aside and the order of the magistrate is in accordance to law, therefore, up held. In the facts and circumstances of this case, parties to bear their own costs.

Order accordingly.

I.L.R. [2014] M.P., 3289
CRIMINAL REVISION
Before Mrs. Justice S.R. Waghmare
Cr. Rev. No. 339/2012 (Indore) decided on 11 April, 2014

RADHESHYAM ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Penal Code (45 of 1860), Sections 107 & 306 - Abetment to commit suicide - Demand of due loan* - Does not amount to instigation - Demand made by petitioner from deceased did not amount to threats - Does not amount to abetment to commit suicide. (Para 7)**

दण्ड संहिता (1860 का 45), धाराऐं 107 व 306 – आत्महत्या कारित करने के लिए दुष्प्रेरण – देय ऋण की मांग – उकसाहट की कोटि में नहीं आता – याची

द्वारा मृतक से की गई मांग, धमकी की कोटि में नहीं आती – आत्महत्या कारित करने के लिए दुष्प्रेरण की कोटि में नहीं आता।

Cases referred :

Cr.L.J. 2007 (3343), 2003(I) MPWN 73, 2007(III) MPWN 95, 2007(I) MPWN 20.

Amit Singh Sisodiya, for the applicant.
Suraj Sharma, P.L. for the non-applicant/State.

ORDER

MRS. S.R. WAGHMARE, J. :- By this revision petition under Section 397 r/w S.401 of the Cr.P.C. accused petitioner Radheshyam has challenged the order dated 02.03.2012 passed by Additional Sessions Judge, Neemuch in Sessions Trial No.60/12 framing charges for offence u/S.306 of the IPC against the petitioner.

2. Brief facts necessary for elucidation are that on 01.01.2011 Sarpanch Radheshyam of village Athawakala received an information that there was a dead body lying near the Balaji Temple near the Jungle. The body belongs to an un known male person and merg was registered at No.21/11 under Section 174 of the Cr.P.C. The dead body was identified by the family members to be Kamlesh s/o Heeralal Sharma; aged 40 years, resident of Khajuria, police station Ratangarh, District-Neemuch. The merg intimation upon being investigated, it was found that the deceased Kamlesh had a wife Bhanvaribai, son Sanjay, brother Nandkishore and cousin Prahalad Sharma and Gulab Gurjer. The deceased Kamlesh was a driver by profession and had a dispute with the owner of the truck Radheshyam (present petitioner). The quarrel arose between his employer and Kamlesh regarding the account at the petrol pump at Ratangarh and the petitioner had issued threats, as a result of which, it was alleged that Kamlesh committed suicide on 29.10.2011. The postmortem was conducted and during the investigation, visra was also preserved and offence was registered u/S.306 of the IPC against the accused petitioner and being aggrieved the revision petition filed by the present petitioner.

3. Counsel for the petitioner has vehemently urged the fact that the case was based on circumstantial evidence and the petitioner has been falsely implicated for offence u/S.306 of the IPC and there was not an iota of evidence on record. Counsel submitted that only statements of interested witnesses

have been recorded by the police and even if the allegations by the wife of deceased Bhanvaribai and other witness are considered the only allegations available against the petitioner were that he made demand for the return of his money given to the deceased Kamlesh as a loan from advance salary and other account such a demand cannot be said to be abetment of the offence to commit suicide. Counsel placed reliance in the matter of *Pramjeetsingh Chawala v. State of M.P.* Cri.L.J.2007 (3343) and *Laxmi Prasad Vishwakarma v. State of MP* WN (I) 2003 pg.73 and *Devendra Singh v. State of M.P.* 2007(III) MPWN 95 and *Prakashchand v. State of M.P.* 2007 (I) MPWN 20 to submit that several decisions of the Court indicate that demand for due loan does not amount to abetment to commit suicide and the FIR was quashed.

4. Counsel for the petitioner has also drawn attention of this Court of Criminal Revision No.816/2001 *Laxmi Prasad Vishwakarma* (supra) to urges that this Court had categorically held that borrower saying to creditor that he may commit suicide does not amount to instigation, any conversation between borrower and creditor does not amount to abetment to commit suicide then under the present circumstances the statement of deceased's wife Bhanvaribai is considered, merely because the present petitioner demanded back his money it cannot be said that the petitioner had abetted to commit suicide. Counsel vehemently urged that the learned Judge of the Trial Court had erred in drawing the conclusion that the threats issued by the petitioner were ingredients of abetment. Counsel submitted that the impugned order framing charge be set aside.

5. Counsel for the respondent/State per contra stated that the petitioner was fully implicated in the matter and submitted that at the time of framing of charge all that the Court required to do is consider whether prima facie there is material available of frame charge and proceed against the accused petitioner. The Court is not bound to consider whether the material is sufficient for conviction. Counsel submitted that the statement of Bhanvaribai and others witnesses u/S.164 of Cr.P.C. clearly indicated that the petitioner had issued threats to such a extent as observed by the learned trial Court that the deceased Kamlesh had been frightened and decided to commit suicide and in the circumstances, it can be said that the petitioner, who was the owner of the truck had abetted in the commitment of suicide by the deceased Kamlesh and no infirmity cannot be found in the order imposing charge by the trial Court. Counsel submitted that the revision petition is without merit and the same be dismissed.

6. On considering the above submissions, I find that there is no other evidence on record to indicate that the accused in anyway abetted suicide. Besides the diary of accounts as has been produced by the police and alleged to be recovered from the accused petitioner; clearly indicated that the deceased Kamlesh used to borrower money heavily from the employer then under the circumstances, it cannot be said that the demanding money back was an act of harassment to the deceased. In the matter of *Devendra Singh* (supra) suicide note contains the name of the accused petitioner undoubtedly, however the Court held that it cannot be demand of money or loan amount or the alleged threating in connection with the demand of money cannot be said to be a provocation for committing suicide u/S.107 of the IPC, which defines abetment of thing and involvement of instigating or intentionally aided by any act of illegal omission and, therefore, there must willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures for a thing to be done and in the present case the petitioner was an employer to deceased Kamlesh and the deceased was in service for quite some time as indicated by the account book. Moreover the employer is bound to keep account of his money advanced to the employee in the nature of the business and then in such circumstances, it cannot be said that the words used in heat of the moment were threats which amount to abetment to commit suicide.

7. Consequently I place reliance *Laxmi Prasad Vishwakarma* (supra) to hold that demand made by petitioner Radheshyam from deceased Kamlesh did not amount to threats; the test or touchstone as per various authorities cited above; clearly indicated that the act of the petitioner would not come under the act of instigation; and if all ingredients of S.107 of the IPC are scanned in proper perspective it would be clear that there is no instigation or any illegal omission. Therefore, in my considered opinion there is nothing on record to show that the petitioner did anything by which it can be said that he abetted in the suicide of the deceased Kamlesh. I find that the order of framing charge against the petitioner u/S.306 of the IPC requires to be quashed. It is hereby quashed.

The Criminal Revision is accordingly allowed to the extent here in above indicated.

Cc. as per rules.

Revision allowed.

I.L.R. [2014] M.P., 3293
CRIMINAL REVISION
Before Mr. Justice Subhash Kakade
Cr. Rev. No. 1785/2004 (Jabalpur) decided on 26 August, 2014

PRAKASH SAHU & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Sections 397/401 - **Applicants were tried for offence u/s 498-A, r/w 34 of I.P.C. - They were convicted for the same - In appeal learned Sessions Judge acquitted them from the charge punishable u/s 498-A of IPC, but convicted them for offence punishable u/s 323 & 354 of I.P.C respectively - Held - Where two offences involve two different elements and different question of facts one offence cannot be said to be the minor to the other and the conviction cannot be passed in the absence of specific charge - Minor offence essentially be a cognate offence of the major offence - Applicants were deprived of from their right of natural justice to defend - Ingredients of Sections 354 & 498-A of IPC are entirely different to each other - There is no similarity, correlation, cognation or commonness between these two sections - Revision is allowed, applicants are acquitted.** **(Paras 22 & 31)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 397/401 – भा.द.सं. की धारा 498-ए सहपठित धारा 34 के अंतर्गत अपराध के लिए आवेदकगण का विचारण किया गया – उक्त के लिए उन्हें दोषसिद्ध किया गया – अपील में विद्वान सत्र न्यायाधीश ने उन्हें भा.द.सं. की धारा 498-ए के अंतर्गत दण्डनीय आरोप से दोषमुक्त किया परंतु उन्हें क्रमशः भा.द.सं. की धारा 323 व 354 के अंतर्गत दण्डनीय अपराध के लिए दोषसिद्ध किया – अभिनिर्धारित – जहां दो अपराधों में दो भिन्न तत्व एवं भिन्न प्रश्न अंतर्विष्ट हैं, एक अपराध को अन्य से छोटा नहीं कहा जा सकता और विनिर्दिष्ट आरोप की अनुपस्थिति में दोषसिद्धि पारित नहीं की जा सकती – छोटा अपराध, बड़े अपराध का आवश्यक रूप से सजातीय अपराध होना चाहिए – भा.द.सं. की धारा 354 व 498-ए के घटकांग पूर्ण रूप से एक दूसरे से भिन्न हैं – इन दो धाराओं के मध्य कोई समानता, परस्पर संबंध, सजातीयता या समानता नहीं – पुनरीक्षण मंजूर, आवेदकगण दोषमुक्त।

Cases referred :

AIR 1996 SC 2439, (2009) 10 SCC 604, (2010) AIR SCW 2809,

(2005) 6 SCC 281, AIR 2005 SC 3100, 2005 CRL.J. 3439, (1998) 3 SCC 309, 1998 SCC (Cri) 740, (2004) 1 SCC 215, AIR 2004 SC 536, (2004) SCC (Cri.) 1259.

None for the applicant.
R.S. Shukla, P.L. for the non-applicant/State.

ORDER

SUBHASH KAKADE, J. :- Before I dwell upon the factual scenario of this case pending since the year 2004, I think it appropriate and condign to refer to a significant aspect. When this more than 10 year old matter was called, nobody appear for the applicants nor make any prayer for adjournment from any source or medium. Previously, under same circumstances, the case was adjourned in the presence of learned counsel for the respondent/State. Under these circumstances, I did not think fit it appropriate to adjourn this matter. Under these circumstances I proceeded with the hearing of this case. In this context I am profitably refer to the decision of the Apex Court rendered in the case of *Bani Singh and others vs. State of Uttar Pradesh*, AIR 1996 SC 2439.

2. Vide judgment dated 21.07.04 passed in Criminal Case No.405/2002 learned Judicial Magistrate First Class, Mandla have convicted the applicants for the offence punishable under Section 498-A/34 of IPC and sentenced to undergo R.I. for one year and fine of Rs.500/-each. The applicants have assailed this judgment before the Court of Sessions Judge, Mandla. In Criminal Appeal No.74/04. Learned Appellate Court though acquitted the applicants from the charges punishable under Section 498(A) of IPC, but convicting the applicant no.1 for offence punishable under Section 323 of IPC and applicant no.2 for the offence punishable under Section 354 of IPC vide judgment dated 19.11.2004 and sentencing them to pay fine of Rs.2000/- and Rs.6,000/- respectively with default stipulations, hence, this criminal revision under the provisions of the Sections 397/401 of the Code.

3. To understand the case of the prosecution clearly it will be profitable to reproduce the facts of F.I.R. lodged by the complainant on dated 19.04.1999 which reads as under:-

"वर्तमान मै अपने पिता के साथ ग्राम छोड में रह रही हूँ। मेरा एक लड़का करीब रहता। मेरी शादी करीब 6 साल पहले ग्राम मोहाड़ में प्रकाश साहू के साथ हुई थी । हमें लड़का हुआ था। 3–4 साल ठीक ठाक ससुराल में रही उसके बाद सास ससुर पति परेशान करने लगे परंतु

मैंने रिपोर्ट थाने में नहीं की पिछले साल दशहरा के समय में घर पर आकेली थी। सास पति दुर्गा देखने गांव में गए थे। कि मेरे ससुर और मैं घर में थी। ससुर ने बुरी नीयत से घर की लाइट बुझाकर मेरे बिस्तर में सो गया मैने विरोध किया और बाहर आकर मैनें पति को बुलवाया और पति को मैनें सारी बात बतायी तो मेरे पति मेरे ससुर को कुछ कहने की बजाय उल्टा मुझ पर ही दोष देने लगा कि इस बात से मुझे ठेस पहुँची और मैं मानसिक रूप से दुखी रही। इस बात को मेरे मौसिया, ससुर बंजारी तथा मेरी सास मुझे बहुत प्रताड़ित करने लगे। तथा मेरे पति से मेरी सास ससुर मौसिया ससुर मारपीट करवाने लगे प्रतिदिन मुझे मारपीट की जाने लगी परन्तु मैनें अपना घर बिगड़ जाने की डर से कोई रिपोर्ट नहीं की दिसम्बर माह में मुझे कोड़ा से मारपीट की तथा मुझे ऐसा लगा कि अब यह लोग मुझेसम जिन्दा नहीं छोड़ने तो मैं भागकर अपने पिता के पास घर पहुँची तथा सारी बातें मां पिता काकी और भी लोगों को बताया फिर मैं मायके रही।"

"ससुराल से कोई लेने नहीं आया तब मेरे पिता मुझे लेकर तथा पंचों को लेकर मेरी ससुराल मोहाड़ गये और वहां भी पंचायत करवाकर मुझे छोड़कर आ गये करीब पंद्रह दिन तक ठीक रही और फिर मेरे ससुर तथा मेरे पति जूते से मारपीट किए और फिर जाने को कहे उस समय वहां जमना बाई भूतनाथ ने बीच बचाव किया गांव का पुन्नु साहू जिससे मेरे पति की दूसरी शादी लड़की से चल रही है वह भी उस समय आया और बोला साली बदचलन को निकाल दो इससे मुझे काफी मानसिक रूप से प्रताड़ना हुई और मेरी बहन जो मोहाड में उनके द्वारा मायके खबर भेजी तब मेरे पिता मोहाड जाकर मुझे लाकर थाने रिपोर्ट कराया तब मेरा उस समय मुलाहजा कराया गया। अब मेरा पति पुन्नु साहू की लड़की से शादी कर रहा है। मैं मानसिक एवं शारीरिक रूप से अपने ससुराल वालों द्वारा प्रताड़ित हूँ। रिपोर्ट कर रही हूँ कार्यवाही चाहती हूँ। रिपोर्ट मेरे पिता से पढ़वाकर उसी कहे अनुसार लिखी गई।."

4. On the basis of FIR lodged by the complainant Smt. Laxmi Bai a criminal case for the offence punishable under Section 498-A of IPC has been registered against the applicant No.1 Prakash Sahu, husband of complainant, the applicant No.2 Devkaran Sahu, father-in-law and the three others relatives of husband Premwati Bai, Punnu and Bajari. After conclusion of investigation during Crime No. 102/1999 of Police Station Bichiya, District Mandla the challan has been filed before the Court below.

5. Learned trial Court leveled charge for the offence punishable under Section 498(A) read with Section 34 of IPC against every accused which reads as under:-

आरोप

" ..... न्यायिक दण्डाधिकारी प्रथम श्रेणी, मण्डला

तुम अभियुक्त, प्रकाश पिता देवकरण

निम्नलिखित अपराधों के आरोप लगाता हूँ–

प्रथमः— यह कि वर्ष—1998 से 19.4.99 के दरम्यान ग्राम मोहाड़ में प्रार्थिया लक्ष्मीबाई जो कि अभियुक्त प्रकाश की विवाहिता पत्नी होकर अन्य अभियुक्तों की रिश्तेदार है, उक्त प्रार्थिया लक्ष्मीबाई को मारपीटकर परेशानकर घर से भगाने के सामान्य आशय की पूर्ति एवं अग्रसरण में मिलकर तुम सह अभियुक्तों प्रकाश, देवकरण, परमवती उर्फ प्रेमवती, पुन्नू, बजारी ने मिलकर प्रार्थिया लक्ष्मीबाई को मारपीटकर, प्रताड़ित कर और उसे विभिन्न प्रकार की यातनाएं देकर उक्त प्रार्थिया लक्ष्मीबाई के प्रति तुम अभियुक्तों ने क्रूरतापूर्ण व्यावहार कारित किया। तुम्हारा उक्त कृत्य धारा—498 (ए)/34 भा.दं.वि. के अंतर्गत दंडनीय अपराध है।

तुम्हारे उपरोक्त अपराध के संज्ञान का अधिकार मेरे न्यायालय को है अतः इस आरोप पत्र के द्वारा यह आदेशित किया जाता है कि तुम्हारी प्रवृत्ति ऊपर लिखे अपराधों में की जावे।"

6. In order to bring home the charges against applicants and other co-accused persons, the prosecution examined eight witnesses and placed three documents on record. The defence did not choose to examine any witness.

7. The learned trial Court convicted the applicants for the offence punishable under Section 498-A/34 of IPC, but acquitted other two co-accused persons, namely, Premwati and Bajari. Co-accused Punnu Sahu expired on 28.05.2004 during the trial of the case.

8. Convicted applicants filed a Criminal Appeal before the Sessions Court, Mandla who in his turn acquitted the applicants from the charge of offence punishable under Section 498-A of IPC, instead convicted the applicant no.1 for the offence punishable under Section 323 IPC and the applicant no.2 for the offence punishable under Section 354 IPC and sentenced them as mentioned aforesaid. Against this acquittal, the respondent State does not prefer any appeal.

9. The crux of the revision petition is that learned Sessions Judge failed to see that applicants have not been charge sheeted for the offences punishable under Section 354 and 323 of IPC nor charges were framed against them for the same during the trial, therefore, applicants could not be convicted under these sections. The Appellate Court altered the charge its own at this belated stage without applying judicial mind and sentenced, due to this aspect the applicants were deprived of from their right of natural justice to defence. Finally, it is prayed that revision be allowed and the applicants be acquitted from the charges punishable under Sections 323 and 354 of I.P.C. which are not minor

to the offence punishable under Section 498(A) of I.P.C., because it is clear violation of provision of Section 216 and 221 of the Code of Criminal Procedure.

10. Shri R.S. Shukla, learned Panel Lawyer for the respondent has submitted that after due appreciation of prosecution evidence, the learned appellate Court has found the aforesaid offence proved against the applicants, which requires no interference.

11. Having heard learned counsel for the respondent/State, gone through the impugned judgment passed by learned Sessions Judge, records of Courts below and statements of prosecution witnesses, particularly complainant (PW.3) and her parents Mallu (PW.4) and Sumatiya Bai (PW.5), I am of the view that gross error has been committed by learned appellate Court in recording the guilt of the applicants for the offence punishable under Sections 323 and 354 of IPC instead acquitted them from the offence punishable under Section 498(A) of IPC.

12. Learned Sessions Judge, the senior most judicial officer in the hierarchy of subordinate judiciary held in para 08 of the impugned judgment presuming that he is dealing with the case of the prosecution for offence punishable under Section 354 of the I.P.C. which reads as under:-

> 8 लक्ष्मीबाई ने अधीनस्थ न्यायालय में जो भी घटना बताई है उसके अनुसार 1998 में पहिलीबार यह घटना हुई। लक्ष्मीबाई के कथन से यह भी स्पष्ट है कि यथार्थ में अपीलार्थी देवकरण जो लक्ष्मीबाई का ससुर है, लक्ष्मीबाई के पलॅग पर रात के समय आ गया था और लक्ष्मीबाई की इज्जत लेने के उद्देश्य से लक्ष्मीबाई की साड़ी खींचने लगा था। लक्ष्मीबाई का यह भी कथन है कि उसके चिल्लाने पर अपीलार्थी देवकरण अलग हो गया। लक्ष्मीबाई ने यह आरोप भी लगाया है कि अपीलार्थी देवकरण ने ऐसी ही घटना लक्ष्मीबाई की जेठानी के साथ तीन–चार साल पहिले की थी। लक्ष्मीबाई के प्रतिपरीक्षण में अपीलार्थी पक्ष ने ऐसा सुझाव नहीं दिया है कि देवकरण ने 1998 में लक्ष्मीबाई की शीलभंग करने का प्रयास नहीं किया। अतः यह स्पष्ट है कि इस संबंध में लक्ष्मीबाई का कथन विश्वास किये जाने योग्य है। फलस्वरूप यह निष्कर्ष निकलता है कि यथार्थ में 1998 में दशहरे के समय अपीलार्थी देवकरण ने प्रार्थिया लक्ष्मीबाई का शीलभंग करने का प्रयास किया था।

13. Learned Sessions Judge does not stop here, but further proceeded and held in para 09 of the impugned judgment on the strength of above

mentioned para 08 as he is dealing with the case of assault on woman to outrage her modesty, which reads as under:-

> "9 लक्ष्मीबाई ने यह भी कथन किया है कि उक्त घटना के समय अपीलार्थी प्रकाश उपस्थित नहीं था परन्तु जब उसने अपने पति प्रकाश को यह घटना बताई तो प्रकाश ने भी रिपोर्ट करने से मना कर दिया इस कारण रिपोर्ट नहीं की गई। इस स्पष्टीकरण को भी प्रतिपरीक्षण में चुनौती नहीं दी गई है।"

14. Learned Sessions Judge finally verdict in para 11 of the impugned judgment, which was totally unwarranted which reads as under:-

> "11 मूल घटना के संबंध में प्रार्थिया लक्ष्मीबाई के अतिरिक्त और कोई साक्षी उपलब्ध नहीं है और सामान्यतः ऐसी घटना का कोई भी अन्य साक्षी नहीं हो सकता क्योंकि घटना रात में और सूने मकान में की गई थी और जिसे दबाने का प्रयास भी किया गया। लक्ष्मीबाई के माता–पिता मल्लू तथा सुमतियाबाई (अ0सा0क0 4,5) ने केवल यह कथन किया है कि उन्हें लक्ष्मीबाई ने मायके आकर घटना बताई थी। इस तथ्य को भी प्रतिपरीक्षण में अपीलार्थीपक्ष ने विवादित नहीं किया है। अन्य साक्षी जो प्रार्थिया के रिश्तेदार हैं ने भी केवल यही कथन किया है कि प्रार्थिया ने उन्हें घटना बताई थी जो पूर्णतः स्वाभाविक है।"

15. **Essential ingredients of offence under Section 498-A IPC are:-**

(i) A woman must be married

(ii) She must be subjected to cruelty

(iii) Cruelty must be of the nature of :

- (i) any willful conduct as was likely to drive such woman :
  - (a) to commit suicide;
  - (b) cause grave injury or danger to her life, limb, either mental or physical;
- (ii) harassment of such woman:
  - (a) with a view to coerce her to meet unlawful demand for property or valuable security,

(b) or on account of failure of such woman or by any of her relation to meet the unlawful demand;

(iii) woman was subjected to such cruelty by

1. husband of that woman, or

2. any relative of the husband.

Please see: *Bhaskar Lal Sharma vs. Monica* (2009) 10 SCC 604 : (2010) AIR SCW 2809, *Sushil Kumar vs. Union of India* (2005) 6 SCC 281: AIR 2005 SC 3100: 2005 Cri.L.J.3439. Cruelty includes mental cruelty also- *Pawan Kumar vs. State* (1998) 3 SCC 309: 1998 SCC (Cri) 740.

16. **Essential ingredients of the offence under Section 354 of IPC are:-**

(i) that the person assaulted must be a woman;

(ii) that the accused must have used criminal force on her, and

(iii) that the criminal force must have been used on the woman intending thereby to outrage her modesty.

Please see: *Vindhadharan vs. State of Kerala* (2004) 1 SCC 215 : AIR 2004 SC 536; *Raju Pandurang vs. State* (2004) SCC (Cri) 1259.

17. Keeping in mind the above mentioned essential ingredients of Section 354 of I.P.C. versus Section 498 (A) of I.P.C. even a person having elementary knowledge of law will not confuse that both are totally different offences to each other, there is no similarity, co-relation, cognation or commonness between these two sections.

18. The case in hand does not covers under the provisions Sections 216, 221 of the Code as wrongly mentioned in the revision memo, it squarely governs by the provisions of mandate of Section 222 of the Code, which reads as under:-

"(1) When a person is charged with an offence consisting of several

particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorize a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

19. The Section 222 of the Code is in the nature of a general provision which empowers the Court to convict an accused for a minor offence even though charge has been framed for a major offence. This section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence. The Court can then convict the accused of the minor offence even though he is not charged with it.

20. The words 'minor offence' have not been defined by law; they are to be taken, not in any technical sense, but in their ordinary sense. The graver charge in such cases gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. But the Court must see that the accused is not prejudiced thereby. In determining the question of prejudice the nature of the case made at the trial, the evidence given, and the line of defence of the accused, are matters to be taken into consideration. An accused can be convicted for a minor offence than charged for, if he had taken full advantage of cross-examining prosecution witnesses and the questions put to him under S.313 of the Code and the answers given by him showed that no prejudice was caused to him.

21. The test of minor offence is not merely that the prescribed punishment is less than the major offence. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them

with a lesser sentence can be regarded as a minor offence vis-a-vis the other offence. The major and minor offences must be cognate offences, which have the main and principal ingredients in common.

22. This section does not enable a Court to convict an accuse of a major offence, when he is charged with a minor offence.

Where two offences involve two different elements and different questions of facts, one offence cannot be said to be the minor to the other and the conviction cannot be passed in the absence of specific charge. An accused charged with one offence cannot be convicted of an offence of an entirely distinct and different type of offence merely because the facts proved constitute a minor offence for the simple reason that he had no notice of the offence and was not provided that opportunity for defending himself for such a different and distinct offence. The minor offence should be composed of some of the ingredients constituting the main offence and be a part of it. In other words the minor offence should essentially be a cognate offence of the major offence and not entirely a distinct and different offence constituted by altogether different ingredients.

23. It is crystal clear from the plain reading of above mentioned F.I.R. that the complainant's intention was firstly to point out the reason behind subjecting her to cruelty by the husband and relatives of the husband. In second portion of F.I.R. she mentioned the way in which husband and relatives of husband committed cruelty against her, tortured her, cause grave injury or danger to her life, limb, either mental or physical for fulfillment of unlawful demand for property or valuable security.

24. In other words plain reading of F.I.R. goes to show clearly that it was never her intention to register the case against the applicant No.2 for the offence punishable under Section 354 of I.P.C. assault or using criminal force to woman with intention to outrage her modesty. Her intention was to register a case against the husband and relatives of husband for the offence punishable under Section 498(A) of I.P.C. and nothing else.

25. The police rightly gathered the above intention of the complainant, hence, registered the crime for the offence punishable under Section 498-A of IPC and after completion of investigation charge-sheet has been filed for this offence only.

26. Learned JMFC was also very much clear in his mind when he leveled charges against the applicants and other co-accused persons on the basis of F.I.R. and other collected evidence by the prosecution for the offence punishable under Section 498(A) read with Section 34 of IPC i.e. for the offence where a married woman subjected to cruelty or harassment with a view to meet unlawful demand for property or valuable security by her husband on any relative of the husband.

27. When accused is charged for offence under S. 304-B for dowry death, he can be convicted for offence under S. 498(A) as ingredient of cruelty is common in the two offences.

28. In any case charge of offence punishable under Section 354 of I.P.C. i.e. the accused assaulted or must have used criminal force on a woman intending thereby to outrage her modesty is not minor to that of charge punishable under Section 498(A) of I.P.C. The ingredients of both the sections are not similar even related with the woman because section 498(A) of I.P.C. is related with the married woman only whereas Section 354 of I.P.C. covers womanhood i.e. each and every woman irrespective of her matrimonial status or her age.

29. Where the prosecution has not been able to bring home the guilt of accused in respect of an offence under S. 376 I.P.C., but, however outraging the modesty of woman being a lesser offence than rape, when from the facts proved such an inference can be drawn accused shall not be prejudiced if he is convicted for the lesser offence under Section 354 of I.P.C.

30. Where accused is charged under Ss. 376/511 IPC, and the charge is not proved, he can be convicted for minor offence under Ss. 354 and 366 IPC proved against him.

31. In the light of above mentioned facts and circumstances of the case after perusal of the impugned judgment it is simply clear that learned Sessions Judge altered the charge its own at belated stage of appeal without applying judicial mind that the applicants were deprived of from their right of natural justice to defend and also without keeping in mind essential ingredients of Section 354 of IPC versus Section 498(A) of IPC as both are entirely different offences to each other, there is no similarity, correlation, cognation or commonness between these two sections.

32. It was not open to learned Sessions Judge, Mandla in appeal to change

the conviction from one offence to another offence which is not a minor offence. Thus, the plea of the applicants that the omission of charge under S. 354 of I.P.C. has prejudiced them or that there has been failure of justice is very much available to them.

33. On the basis of the aforesaid discussion, this revision filed by the applicants Prakash Sahu and his father Dev Karan is hereby allowed because learned Sessions Judge, Mandla committed grave error. Hence, their conviction as well as sentence directed for the offence punishable under Sections 323 and 354 of I.P.C. respectively, are hereby set aside and the applicants are acquitted from the charges of the offence punishable under Sections 323 and 354 of IPC.

34. The applicants would be entitled to get the fine amount back, if they have deposited the same before the learned trial Court.

35. A copy of this order be sent to the Courts below along with their records for information.

Revision allowed.

I.L.R. [2014] M.P., 3303
MISCELLANEOUS CRIMINAL CASE
Before Mrs. Justice S.R. Waghmare
M.Cr.C. No. 26/2014 (Indore) decided on 30 April, 2014

SURESH ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Narcotic Drugs and Psychotropic Substances Act (61 of 1985), Section 8/18 r/w Sections 29, 37, 42 & 67* - Accused supplying contraband opium more than commercial quantity to the co-accused - Cannot be released on bail generally - Application for grant of bail is rejected as being without merit. (Para 6)**

स्वापक औषधि और मनःप्रभावी पदार्थ अधिनियम (1985 का 61), धारा 8/18 सहपठित धाराऐं 29, 37, 42 व 67 – अभियुक्त ने सह-अभियुक्त को वाणिज्यिक मात्रा से अधिक विनिषिद्ध अफीम प्रदाय किया – सामान्य रुप से जमानत पर नहीं छोड़ा जा सकता – बिना गुणदोष का होने के नाते, जमानत प्रदान किये जाने हेतु आवेदन नामंजूर किया गया।

Cases referred :

(2007) 6 SCC 410, (418), (2008) 4 SCC 668, (2009) 16 SCC 496, 1997(II) MPWN 173, 2008(4) M.P.H.T. 311(SC), 2001 SCC (Cri.) 1520.

Sunil Jain, for the applicant.
Suraj Sharma, for the non-applicant/State.

ORDER

MRS. S.R. WAGHMARE, J. :- By this application filed under section 439 of the Cr.P.C., applicant Suresh has moved the application for grant of bail being implicated in crime No.518/11 registered by police station Neemuch Cantt. District- Neemuch for offence under Sections 8/18 r/w 29 of NDPS Act.

2. Counsel for the applicant has vehemently urged the fact that the applicant has been falsely implicated in the matter. He submitted that there is not an iota of evidence on record except a memo under Section 27 of the Evidence Act of co-accused Balkishan and Omprakash. It was stated by the co-accused that the contraband weighing 10 kg of opium found in the Bolero Jeep was supplied to them by the present applicant Suresh and except this piece of evidence, there is nothing on record against the applicant. Moreover Counsel submitted that the investigation is complete and the applicant is not required for any other investigation. He candidly admitted that this is third application moved on behalf of the applicant and that there is one other case for offence under Sections 376, 366 & 366/34 of the IPC registered against the applicant. He had been convicted and sentenced to three years R.I.; however, the Criminal Appeal is pending before this Court. More importantly Counsel urged the fact that the conviction cannot be based on the statement of co-accused under Section 27 of the Evidence Act. It is only a corroborative peace of evidence and relying on several cases, Counsel submitted that the facts disclosed under Section 27 of the Evidence Act can be used only against the person making disclosure and not against any other person. Similarly he submitted that Section 67 of the NDPS Act was also different from Section 27 of the Evidence Act and only an authorised officer under the provisions of Section 42 of the NDPS Act during the course of any **enquiry** in connection with the contravention of the provisions of the NDPS Act with intention to collect the information and if any person voluntary intending to give confessional

statement may record the same and if ultimately it is found that the confessional statement was recorded voluntarily by the person concerned, then that statement is admissible in evidence and can be used for the person making the same. However, Counsel urged that even such a statement under Section 67 of the NDPS Act, is not admissible and in the present case coaccused persons have implicated the applicant; then there can be no conviction of that person only on the basis of their statement. He relied on (2007) 6 SCC 410 (418), (2008) 4 SCC 668 & (2009) 16 SCC 496. He also relied on *Sharif Vs. State* [1997(II) MPWN 173, *Gotulal Vs. State* [Cr.R. No.650/02], *Sadique Vs. State* [Cr.R. No.383/03 & *Kanhaiyalal Vs. State* [Cr.R. No.652/2000 to bolster his submissions. Besides he produced a list of cases in which the applicant accused solely on the basis of memo prepared under Section 27 of the Evidence Act was granted bail by the Court in several cases i.e. M.Cr.C. No.6722/12 (*Prahlad Vs. State of M.P.*), M.Cr.C. No.156/13 *(Kailash Vs. State of M.P.)*, M.Cr.C. No.1571/13 *(Shivlal Vs. State of M.P.)* M.Cr.C. No.154/13 *(Bhagwatilal Vs. State of M.P.)*, M.Cr.C. No.6556/13 *(Dilip Singh Vs. State of M.P.)*, M.Cr.C. No.711/13 *(Vinod Singh Vs. State of M.P.)* and M.Cr.C. No.4850/13 *(Bhopalsingh Vs. State of M.P.)*. Counsel prayed for grant of bail since the applicant has been arrested on 22.7.2012.

3. Counsel for the respondent State per contra has opposed the contentions put forth by the Counsel for the applicant and categorically stated that the accused has already been convicted for another offence and does not deserve any sympathy. Besides more than the commercial quantity of the contraband as prescribed under the provisions of the NDPS Act i.e. contraband opium weighing 10 kg was seized from the possession of co-accused Balkishan and Omprakash and although their memos have been prepared under Section 27 of the Evidence Act, the case of the petitioner being supplier is hit by Section 37 of the NDPS Act which bars grant of bail to the accused since more than commercial quantity of contraband opium has been recovered. Besides Section 67 of the NDPS Act empower the officers when read with Section 42 of the NDPS Act and such statements are admissible in evidence. Counsel prayed for dismissal of the application primarily on the grounds that looking to the gravity of the offence and the bar under Section 37 of the NDPS Act. He urged that the application is without merit.

4. On considering the above submissions, and looking to the materials

available in the case diary, I find that bail cannot be allowed to the present applicant. However, dealing with the controversy raised regarding the admissibility of the statements under Section 27 of the Evidence Act recorded first; I find that unless it is established that the statements were obtained by the officers by subjecting the accused to coercion or procured under duress the statements are admissible in evidence under Section 67 read with Section 42 of the NDPS Act.

5. Moreover considering the fact that the applicant is a supplier and admittedly was not found in the conscious possession of the contraband. However his implication under the circumstances would have to be based on the evidence recorded by statements of the co-accused who were found in possession of the contraband and such statements would have to be relied on by the trial Court and there is no deviation from the fact as directed by the Apex Court in the matter of *Kanhaiyalal Vs. Union of India* reported in 2008(4) M.P.H.T. 311 (SC) whereby the Apex Court has considered the gravity of Sections 42 & 67 of the NDPS Act and held that confessions recorded by an officer under Section 67 of the NDPS Act are not hit by the bar under Sections 24 to 27 of the Evidence Act and the Court held thus:

> "Therefore, a confessional statement recorded by such officer in the course of investigation of a person accused of an offence under the Act is admissible in evidence against him. It was also held that power conferred on officers under the NDPS Act in relation to arrest, search and seizure were similar to powers vested on officers under the Customs Act."

And the Court further held thus:

> "that an officer vested with the powers of an Officer-in-Charge of a Police Station under Section 53 of the above Act is not a "Police Officer" within the meaning of Section 25 of the Evidence Act, it is clear that a statement made under Section 67 of the NDPS Act is not the same as a statement made under Section 161of the Code, unless made under threat or coercion."

6. In the instant case I find that the statements have been recorded by the investigating officer Shri Avinash Shrivastava SI and there are two testifying

witnesses Don @ Shafiq Khan and Dhansingh and so under the circumstances the bar would not be applicable and what is to be seen prima facie at the time of granting bail is whether there is a prima facie case against the accused ? Rest of the arguments put forth by the Counsel for the applicant would be considered at the time of final hearing and conviction if any. And considering the Section 27 of the Evidence Act, the plea requisite for admissibility of the memo under Section 27 is that the information or disclosure received by the police officer should be free from any ailment of compulsion and there is no bar as such against respondent. Such information in evidence cannot be discarded merely because it amounts to a confession. It has also been clarified by the Apex Court that the confessional part is admissible so far as it pertains to such information or part of it which relates distinctly to the fact discovered by means of information furnished. Hence the incriminating factor is that some fact should be discovered which was not within the knowledge of the police officer at the time of the investigation. Under the circumstances, the source of supply of contraband is against the applicant and shall be considered by the Trial Court at the time of his conviction and final hearing. At present it would be profitable to consider the matter of *State of M.P. Vs. Kajad* reported in 2001 SCC (Cri) 1520 that "Section 37 of the NDPS Act enjoins that a person accused of an offence punishable for a term of imprisonment of five years or more, shall generally be not released on bail. **Negation of bail is the rule and its grant an exception under sub-clause (ii) of clause (b) of Section 37(1).** For granting the bail the Court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (I) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the NDPS Act is uncalled for."

Besides it is a recorded fact that there is already a conviction against the present applicant in another case. In view of the above, the application for grant of bail is **rejected** as being without merit.

Application rejected.

I.L.R. [2014] M.P., 3308
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice M.K. Mudgal
M.Cr.C. No. 2926/2013 (Jabalpur) decided on 17 July, 2014

RAJU & ors. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482, Evidence Act (1 of 1872), Section 165 **- Documents pertaining to medical report of injured were taken on record - Same were produced by the prosecution in compliance of the direction of the trial court - Held - Since the documents are necessary for just decision and also for proving the nature of injury, trial court has properly used its discretion as Court was having power to order production of necessary documents u/s 165 of the Evidence Act - Trial Court has rightly allowed the application - Petition is dismissed. (Paras 5 & 6)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482, साक्ष्य अधिनियम (1872 का 1), धारा 165 – आहत के चिकित्सा प्रतिवेदन से संबंधित दस्तावेज अभिलेख पर लिये गये – उक्त को अभियोजन द्वारा विचारण न्यायालय के निर्देश के अनुपालन में प्रस्तुत किया गया – अभिनिर्धारित – चूंकि उचित निर्णय एवं क्षति की प्रकृति को साबित करने के लिये भी दस्तावेज आवश्यक हैं, विचारण न्यायालय ने उचित रुप से अपने विवेकाधिकार का प्रयोग किया जैसा कि साक्ष्य अधिनियम की धारा 165 के अंतर्गत न्यायालय को आवश्यक दस्तावेज प्रस्तुत करने के आदेश देने की शक्ति है – विचारण न्यायालय ने उचित रुप से आवेदन मंजूर किया – याचिका खरिज।

Cases referred :

AIR 1959 MP 290, 2004(2) MPHT 53.

Sourabh Bhushan Shrivastava, for the applicants.
B.P. Pandey, P.P. for the non-applicant/State.

O R D E R

M.K. Mudgal, J. :- Heard argument both the parties.

Petitioners have filed this petition under Section 482 of Cr.PC for quashment of the order dated 20-02-2013 passed by the Court of Second

Additional Sessions Judge, Gadarwara in S.T. No. 125/2010, whereby the additional medical report filed by Dr. A.S. Bansal was taken on record.

2. Learned Counsel for the petitioners submits that learned Trial Court has committed error in taking additional documents as medical report on record, whereas tha said documents were not earlier filed along with the charge sheet. Further the order passed under Section 311 of the Cr.PC is totally erroneous. Counsel further contends that the documents along with application, dated 22-12-2011, in connection with bed head ticket and papers concerning prescription by City Hospital, Jabalpur ought not to have been allowed in the case because the prosecution could not be permitted to fill up lacuna of the investigation. Learned Counsel for the petitioners prayed for setting aside the impugned order.

3. Learned Public Prosecutor opposing the submissions made on behalf of the petitioners has submitted that the learned Trial court has used the discretion properly in allowing the application and taking the documents on record, as the said documents, are necessary for just decision of the case. Counsel further contends that the injured was treated in the City Hospital, Jabalpur by Dr. A.S. Bansal, whose statement has to be recorded before that Trial Court. When it was found by the learned trial Court that the papers of treatment have not been filed on the record, the learned trial Court directed to the prosecution for producing the documents. In consequence of the said order the aforesaid documents have been produced on record. Therefore, the petition filed by the petitioners be dismissed.

4. Arguments were considered.

5. Petitioners are being tried before the trial Court under Sections 323, 324, 506-B, 294 and 326/34 of IPC. The offence under Section 326 of IPC is a serious offence. To prove the grievous nature of injury it was necessary for the trial Court to call the papers of the treatment of the injured, who was treated by Dr. A.S. Bansal in the City Hospital, Jabalpur.

6. The statement of Dr. A.S. Bansal is to be recorded in this case to prove the injury and nature of injury of the injured. In view of the facts and circumstances of the case it is concluded that the learned trial Court has properly used its discretion in taking the documents on record, Under Section 165 of the Evidence Act as the trial Court has the power to order production or

admit of the necessary document to the end of justice. In this regard the judgments in case of *Shantilal and Others Vs. State of M.P.* AIR 1959 M.P. 290 and *Mahesh Jethani and Others Vs. State of M.P.* 2004 (2) MPHT, 53 may be perused.

7. Keeping in view of the aforesaid facts and circumstances, this Court comes to the conclusion that the trial Court has not committed any error in allowing the application, the petition, being devoid of merit, is hereby dismissed.

Copy of the order be sent forthwith to the concerned Court.

Petition dismissed.

I.L.R. [2014] M.P., 3310
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Subhash Kakade
M.Cr.C. No. 1324/2014 (Jabalpur) decided on 30 July, 2014

NAVEEN & ors. ...Applicants
Vs.
STATE OF M.P. & anr. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974) Section 482, Penal Code (45 of 1860) Section 498-A - Quashment* - The settlement arrived at between the parties in form of compromise petition filed before the appellate court and submission made before High Court is a sensible step that will benefit the parties will give quietus to the controversy and rehabilitate and normalize the relationship between them - The continuation of criminal proceedings would tantamount to abuse of process of law - Criminal proceeding is hereby quashed. (Para 8)**

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2) धारा 482, दण्ड संहिता (1860 का 45), धारा 498–ए– अभिखंडित किया जाना – पक्षकारों के मध्य, अपीली न्यायालय के समक्ष प्रस्तुत समझौता याचिका के रूप में समझौते पर पहुँचना और उच्च न्यायालय के समक्ष किया गया निवेदन एक समझदारी भरा कदम है जिससे पक्षकारों को लाभ होगा, जो विवाद को शांत करेगा और उनके बीच संबंधों को पुनःस्थापित और सामान्य करेगा – दाण्डिक कार्यवाहियां जारी रखना विधि की प्रक्रिया का दुरुपयोग होगा – एतद् द्वारा दाण्डिक कार्यवाही अभिखंडित।

Cases referred :

(2012) AIR SCW 5333.

R.P. Prajapati, for the applicants.
Umesh Pandey, G.A. for State/non-applicants No. 1.
Sandeep Koshta, for non-applicants No. 2.

ORDER

SUBHASH KAKADE, J. :- This application under Section 482 of Cr.P.C. has been filed by the applicants for quashing of Criminal Case No.1633/2006, pending in the Court of learned Judicial Magistrate First Class, Katni.

2. On the basis of complaint lodged by the respondent no.2 Smt. Shaili Mishra a criminal case for the offences punishable under Section 498-A/34 of IPC and Section 3 and 4 of Dowry Prohibition Act has been registered against the applicant No.1 Naveen, husband, applicant No.2 Ram Pratap, applicant No.3 Smt. Sakuntala and applicant No.4 Niharika, husband's sister. After conclusion of investigation the challan has been filed before the learned J.M.F.C., Katni. Vide judgment dated 07.05.2011 learned trial Court acquitted the accused applicants No.1 to 4 from the charges punishable under Section 3 and 4 of the Dowry Prohibition Act, but convicted them for the offence punishable under Section 498-A of IPC.

3. The applicants preferred appeal against their conviction and punishment. During trial of Criminal Appeal No.98/2011 before Special Judge (SC/ST Act), Katni, the complainant/respondent no.2 filed two applications as envisaged under Section 320 (1) and 320 (2) of Cr.P.C. The learned Appellate Court endorsing such application for compounding, however, declined to discharge the applicants from Section 498-A of IPC on the ground that such offence is not compoundable.

4. The question which now remains to be answered is whether since the offences under Section 498-A/34 of IPC is not compoundable, the proceedings of complaint case could be quashed.

5. It is apparent from the impugned order of the Appellate Court annexed with the petition that the respondent No.2 has entered into compromise with the applicants voluntarily without any undue influence or coercion so till this

extent, no further verification is required.

6. Learned counsel for the parties submitted at the bar that their clients have amicably resolved their disputes and there is no likelihood of any kind of dispute between them. It is pertinent to mention here that dispute between the parties is of private nature and having no adverse effect on the society as the nature is personal.

7. The Apex Court in the case of *Gian Singh vs. State of Punjab and another* 2012 AIR SCW 5333 considered the relevant provisions of the Code and concluded as under:-

> "The power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court."

8. Since the parties had buried the hatchet by amicably settling their disputes, this Court could allow the matter to be compounded. In the totality of the circumstances, I am of the view that the settlement arrived at between the parties in form of compromise petitions filed before the learned Appellate Court and as submissions made by their learned counsel today before this Court is a sensible step that will benefit the parties, give quietus to the controversy and rehabilitate and normalize the relationship between them. In light of compromise between the parties for offences related to matrimonial disputes chances of recording of conviction against the petitioners are remote and bleak and the entire exercise of trial is destined to be exercise of futility. The continuation of criminal proceedings would tantamount to abuse of process of law.

9. It is pertinent to mention here that the relief clause is not complete as the litigation between parties now pending before learned Appellant (sic:Appellate) Court Katni.

10. In the above facts and circumstances of the case the answer of question giving in affirmative and resultantly this petition under Section 482 of Cr.P.C. has been allowed for quashing of Criminal Appeal No.98/2011 pending before Special Judge (SC/ST Act), Katni, is hereby quashed. The applicants are acquitted from the offences punishable under Section 498-A/34 of IPC.

11. This application accordingly disposed of.

12. Let a copy of this order be sent to the learned Appellate Court Katni for intimation and necessary compliance.

13. Before parting with the case it will be in larger public interest that a copy of this order be personally forwarded by the Registry office to the Chief Secretary of the State of Madhya Pradesh to take necessary action, if advisable so to bring Section 498(A) of Indian Penal Code, 1860 under the category of offence compoundable under the provisions of Section 320 Table 2 of the Code of Criminal Procedure, 1973 as made compoundable in other State/s with appropriate conditions.

Application disposed of.

I.L.R. [2014] M.P., 3313
MISCELLANEOUS CRIMINAL CASE
Before Mr. Justice Subhash Kakade
M.Cr.C. No. 2053/2013 (Jabalpur) decided on 26 August, 2014

SADHE PRASAD ...Applicant
Vs.
SANTOSH KUMAR ...Non-applicant

Criminal Procedure Code, 1973 (2 of 1974), Section 482 - Quashing of Charge - **Applicant and sister of respondent, who is a practicing lawyer are husband and wife - Applicant's wife filed an application u/s 127 of Cr.P.C. for enhancement of amount of maintenance - Applicant filed a transfer application contending that respondent and his sister publicly claiming with proud that the decision will be in their favour, because they regularly visit the house of Judicial Magistrate and therefore the applicant apprehends that he will not get justice from that court - Case was transfered to another Court -**

However, on the basis of above written label complaint was filed by respondent and Magistrate framed the charge u/s 500 of IPC against the applicant - Held - On the basis of available record and the fact that the publication of written 'words' are duly proved, prima-facie commission of offence punishable u/s 500 of IPC is made out - There is no material to show that the allegations are mala fide, frivolous or vexatious - No interference is warranted - Petition is dismissed. (Paras 2,3,7 & 15)

दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482 – आरोप अभिखंडित किया जाना – आवेदक और प्रत्यर्थी की बहन जो वकालत करती है, पति–पत्नी हैं – आवेदक की पत्नी ने द.प्र.सं. की धारा 127 के अंतर्गत, भरण पोषण की राशि बढ़ाये जाने हेतु आवेदन प्रस्तुत किया – आवेदक ने अंतरण हेतु आवेदन इस तर्क के साथ प्रस्तुत किया कि प्रत्यर्थी और उसकी बहन घमंड से सार्वजनिक रूप से दावा कर रहे हैं कि निर्णय उनके पक्ष में होगा क्योंकि वे नियमित रूप से न्यायिक मजिस्ट्रेट के घर आते–जाते हैं और इसलिए आवेदक को आशंका है कि उस न्यायालय से उसे न्याय नहीं मिलेगा – प्रकरण को अन्य न्यायालय को अंतरित किया गया – किन्तु, उपरोक्त के आधार पर प्रत्यर्थी द्वारा लिखित लेबल शिकायत प्रस्तुत की गई और मजिस्ट्रेट ने आवेदक के विरूद्ध भा.द.सं. की धारा 500 के अंतर्गत आरोप विरचित किया – अभिनिर्धारित – उपलब्ध अभिलेख और इस तथ्य के आधार पर कि लिखित "शब्दों" के प्रकाशन को सम्यक् रूप से साबित किया गया, प्रथम दृष्ट्या भा.द.सं. की धारा 500 के अंतर्गत दण्डनीय अपराध किया जाना साबित होता है – यह दर्शाने के लिए कोई सामग्री नहीं कि अभिकथन असद्भावपूर्ण, तुच्छ या परेशान करने वाला है – हस्तक्षेप की आवश्यकता नहीं – याचिका खारिज।

Cases referred :

(2010) 3 SCC (Cri.) 138, (2010) 6 SCC 243, AIR 1998 SC 889, AIR 1995 SC 4100, AIR 1997 SC 415.

Y.P. Sharma, for the applicant.
P.K. Verma, for the non-applicant.

ORDER

Subhash Kakade, J. :- This petition under Section 482 of the Criminal Procedure Code, 1973, here-in-after in short the Code, has been filed by the applicant against impugned order dated 22.12.2010 of rejection passed by the learned Additional Upper District Session Judge, Singrouli, by which

revision preferred by the applicant for quashing the charge framed against him punishable under Section 500 of the IPC by learned Judicial Magistrate First Class Deosar, District Singrouli, has been rejected.

2. To understand the say of the applicant Sadhe Prasad clearly we will go back in the year 1980 when Lalita Bai, sister of the respondent Santosh Kumar was married with him. Since 1984 this couple, Sadhe Prasad and Lalita Bai were living separately. Lalita Bai filed an application for maintenance in the year 2000. Thereafter she filed an application under the provisions of Section 127 of the Code, for enhancement amount of maintenance for her daughter Indira before learned Judicial Magistrate First Class, Devsar, District Sidhi. In that proceedings the applicant enters his appearance by filing reply denying the averments made in the application with this fact that Lalita Bai is living in adultery.

3. Here the problem crop up, when this maintenance enhancement case was fixed for final arguments on 09.11.2006. Prior to this date, anyhow the applicant came to know this fact that Santosh Kumar and Lalita Bai publicly claiming with proud that the decision will be in their favour, because they regularly visits the house of learned Judicial Magistrate. The applicant shocked to hear this declaration, hence immediately rushed to the Court of competent jurisdiction and filed a transfer application (Annexure D-1) under the provision of Section 410 of the Code. In this transfer application (Annexure D-1) the applicant mentioned following facts, which are root cause of this criminal Litigation reads as under:-

> *6 यह कि अनावेदिका का भाई एडवोकेट संतोष कुमार रजक देवसर न्यायालय में वकालत करता है इस कारण अनावेदिका को अक्सर माननीय अधीनस्थ न्यायालय के आवास में लेकर जाता रहता है तथा अनावेदिका द्वारा एवं संतोष कुमार एडवोकेट द्वारा सार्वजनिक रूप से यह घोषणा की जा रही है न्यायिक मजिस्टेट ..... से अनावेदिका जैसी चाहेगी निर्णय करा लेगी।*
>
> *7 यह कि अनावेदिका एवं उसके भाई अधिवक्ता संतोष कुमार रजक की गर्वोक्ति से आवेदक को यह आशंका हो गई है कि माननीय न्यायिक मजिस्टेट ..... से आवेदक को न्याय नहीं मिल सकेगा।*

Note:- Observing judicial discipline name of Magistrate which

was also part of above para purposely not mentioned.

4. Learned Chief Judicial Magistrate, Sidhi also mentioned above facts in order dated 25.01.2007 and transferred this maintenance enhancement case to another court of competent jurisdiction for further trial.

5. On the basis of above written label complaint was filed by the respondent against the applicant herein under Section 500 of the Indian Penal Code. After receiving the evidence of the prosecution as contemplated by Section 244 of the Code, the learned Magistrate framed the charge against the applicant for the offence punishable under Section 500 of the Indian Penal Code.

6. The applicant preferred Criminal Revision Petition No.184/2009 before the Additional Sessions Judge, Sidhi against the order of the learned Magistrate. The learned Sessions Judge dismissed the Revision observing that inasmuch as the learned Magistrate has framed the charge on a consideration of the evidence adduced by the complainant oral and documentary and on being satisfied that there was a prima facie case made out against the applicant, his order is not liable to be interfered with in revision.

7. Shri Y.P. Sharma, learned counsel for the applicant has submitted that application (Annexure D-1) for transfer of the case was filed. "Words" spoken by the respondent in public place by the applicant, hence for own protection and in interest of justice before the Chief Judicial Magistrate, Sidhi. The applicant was not having any knowledge or reason to believe that the averment made in and by using those "Words" in the application (Annexure D-1) he is going to harms the reputation of the respondent. The learned Chief Judicial Magistrate allowed the transfer application (Annexure D-1) on found it just and proper hence in the interest of justice transfer the case which fact is at all not considered by the learned trial Court. It is also submitted by learned counsel for the applicant that the allegations made in complaint even if they were taken true at their face value and accepted in their entirety, do not prima facie constitutes any offence or make out a case against the applicant. It is finally submitted that the criminal proceeding is manifestly filed with malafide, with an ulterior motive for wreaking vengeance on the applicant and with view to spit him due to private and personal grudge after silence of four months.

8. Shri P.K. Verma, learned counsel for the respondent has vehemently opposed the revision contending that the applicant has rightly been charged, thus, the revision is liable to be dismissed.

9. Considering the rival submissions made by the learned counsel for the parties and after perusal of available record as well as case diary, the Court is of the opinion this revision petition deserves to be rejected.

10. In this case in hand, the accused invokes the aid of Tenth Exception to Section 499 of I.P.C., "good faith". The mere plea that the accused believed that what he had stated was in "good faith" is not sufficient to accept his defence and he must justify the same by adducing evidence. However, he is not required to discharge that burden by leading evidence to prove his case beyond a reasonable doubt.

11. It is well settled that the degree and the character of proof which an accused is expected to furnish in support of his plea cannot be equated with the degree of proof expected from the prosecution in a criminal trial. The moment the accused succeeds in proving a preponderance of probability, onus which lies on him in this behalf stands discharged. Therefore, it is neither feasible nor possible to lay down a rigid test for deciding whether an accused person acted in "good faith" and for "public good" under the Tenth Exception of Section 499 of I.P.C.

12. Please see - *Jeffrey J. Diermeier v State of West Bengal* (2010) 3 SCC (Cri) 138: (2010) 6 SCC 243.

13. Time and again the Apex Court has been pointing out that the quashing of criminal proceeding in exercise of inherent powers of the High Court should be limited to very extreme exceptions. The settled legal position is that the power to quash a criminal proceeding should be exercised sparingly and only in exceptional cases – *Pepsi Foods Ltd.* AIR 1998 SC 889; *Roopam Deol Bajaj* AIR 1995 SC 4100; *Rashmi Kumar* AIR 1997 SC 415.

14. Whether the material is sufficient for holding the accused guilty or not is the matter of trial. The High Court at this stage should not usurp the jurisdiction of the Magistrate and to see whether any case is made out or not. It is not required to go into the *pros* and *cons* of submissions made by the

applicant whether material supplied by the respondent charge is made out or not. At this stage, available evidence is not required to discuss as discussing at the stage of passing of judgment by the trial Court. The broad test to be applied is whether the material available on record is reasonably sufficient for putting the accused on trial or not.

15. When available record read as a whole in the light of above mentioned written label discloses the *prima facie* commission of the alleged offence punishable under Section 500 of IPC and there is no material to show that the allegations are mala fide, frivolous or vexatious, hence not proper for the High Court to quash the charge. Any extreme exception is not pointed out by learned counsel for applicant, but publication of written "words" are duly proved.

16. However, it will be open for the applicant to rise all above mentioned his possible defenses including "good faith" and others at the time of trial and same should be considered by the learned trial Court.

17. A copy of this order be sent to the learned trial Court to proceed further with the trial as stay order dated 20.02.2013 of this Court is hereby vacated.

18. Accordingly, this petition stands dismissed as having no merits.

Petition dismissed.