# THE INDIAN LAW REPORTS

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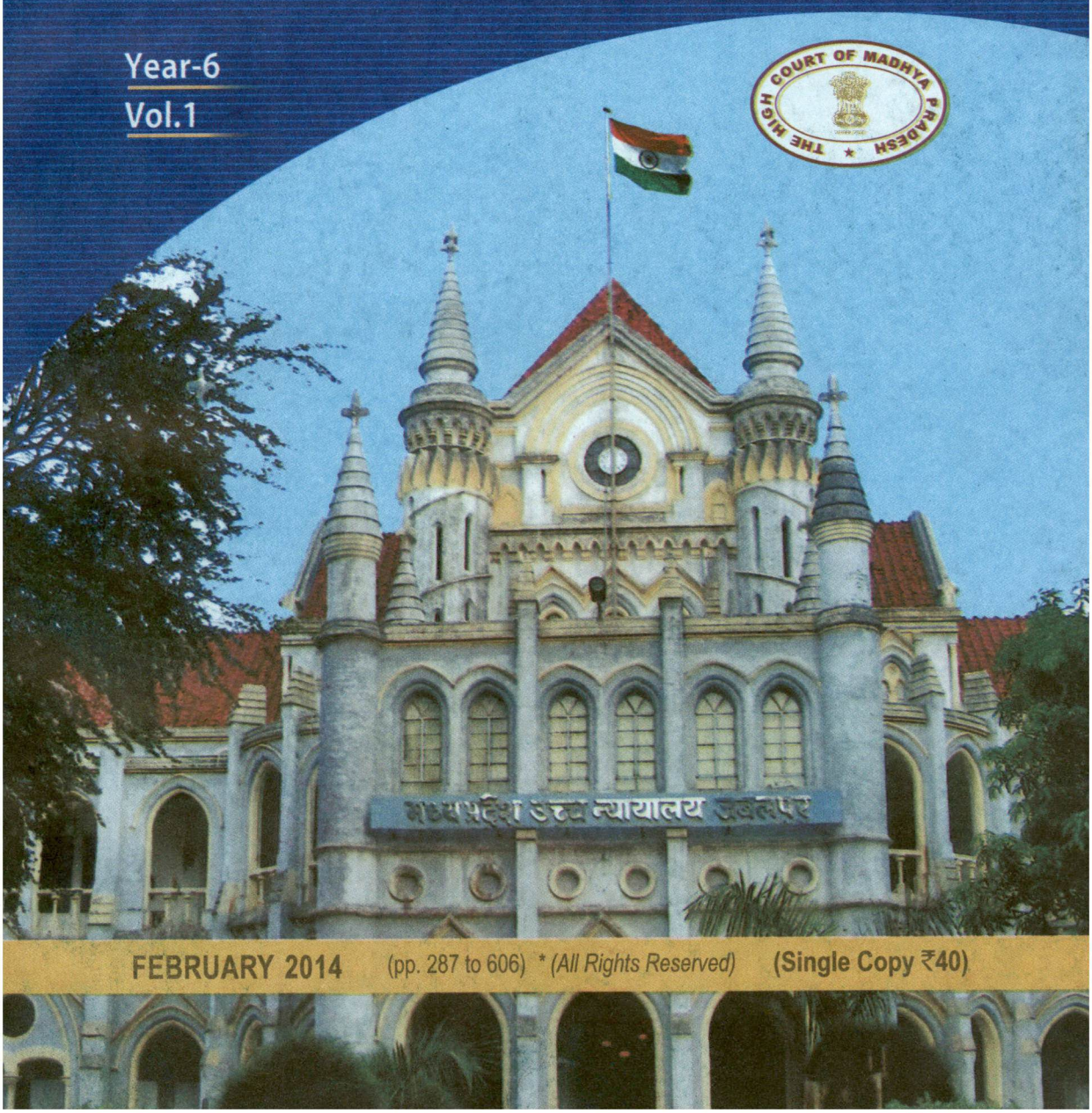


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## 2014

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# TABLE OF CASES REPORTED

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

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## APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Mr. Sushil Kumar Gupta on his appointment as Additional Judge of the High Court of Madhya Pradesh. Mr. Sushil Kumar Gupta took oath of the High Office on 28.02.2014.

### HON'BLE MR. JUSTICE SUSHIL KUMAR GUPTA

Born on May 12, 1954 in Neemuch. After obtaining degrees of M.A., B.Sc., LL.B., was enrolled as an Advocate on December 4, 1976. Joined M.P. Judicial Services as Civil Judge Class-II on September 30, 1981 at Mandsaur. Promoted as Civil Judge Class-I in the year 1987 and Chief Judicial Magistrate in the year 1991 at Ambikapur. Promoted in Higher Judicial Services in 1993 as Additional District and Sessions Judge at Raisen. Was granted Selection Grade on 07.06.1999. Posted as a Special Judge (SC/ST) (P.A.) Act, Rewa in the year 2002. Appointed as President, District Consumer Forum at Indore in the year 2003. Was posted as first District & Sessions Judge of newly established Civil District Barwani in the year 2005. Was granted Super Time Scale on 10.10.2007. Worked as Principal Judge, Family Court, Rewa in the year 2008 and as District & Sessions Judge, Dhar in the year 2009. Was working as Commissioner Departmental Enquiries at Bhopal from October 12, 2010 till elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh and took oath on 28.02.2014.

We wish Mr. Justice Sushil Kumar Gupta, a successful tenure on the Bench.

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## APPOINTMENT TO THE MADHYA PRADESH HIGH COURT

We congratulate Mr. Jarat Kumar Jain on his appointment as Additional Judge of the High Court of Madhya Pradesh. Mr. Jarat Kumar Jain took oath of the High Office on 28.02.2014.

### HON'BLE MR. JUSTICE JARAT KUMAR JAIN

Born on January 23, 1955 in Khandwa. After obtaining degrees of M.Com., LL.B., joined Judicial Service on September 19, 1981. Was confirmed as Civil Judge on May 5, 1985. Appointed as Civil Judge Class-I on October 27, 1987. Appointed as C.J.M on August 16, 1991. Posted as VII A.D.J. on June 13, 1994 at Indore. Was posted as Deputy Secretary, Law Department, Bhopal in May, 1997. Was confirmed as District Judge in Higher Judicial Service on October 4, 1997. Was granted selection grade scale on July 8, 2000. Was posted as Additional Welfare Commissioner, Bhopal Gas Victims Tragedy, Bhopal in the year 2000. Was posted as Special Judge for Cases under SC/ST (P.A.) ACT & N.D.P.S. Act, Shajapur in the year 2002. Also worked as I/C District & Sessions Judge and I AJ to I A.D.J. at Shajapur in the year 2005. Was posted as District & Sessions Judge, Shivpuri on November 7, 2005. Was granted super time scale on October 10, 2007. Was posted as Registrar (I.L.R. & Examination), High Court of M.P., Jabalpur on November 1, 2007 and as Principal Registrar (I.L.R.), High Court of M.P., Jabalpur in September 2009. Was posted as District & Sessions Judge, Jabalpur in May 2010. Was working as District & Sessions Judge, Chhindwara from March 29, 2012 till elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh and took oath on 28.02.2014.

We wish Mr. Justice Jarat Kumar Jain, a successful tenure on the Bench.

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## OVATION TO HON'BLE MR. JUSTICE S.K. GUPTA AND HON'BLE MR. JUSTICE J.K. JAIN, GIVEN ON 28-02-2014, IN THE CONFERENCE HALL OF THE HIGH COURT OF M.P., AT JABALPUR.

**Shri R.D. Jain, Advocate General, M.P., while felicitating the new Judges, said :-**

I feel great pleasure in extending hearty welcome to Hon'ble Justice Shri Sushil Kumar Gupta and Hon'ble Justice Shri Jarat Kumar Jain appointed as Additional Judges of the High Court to whom oath of office has been administered today. I congratulate the Hon'ble Judges on their elevation as Additional Judges of the High Court of Madhya Pradesh.

Shri Sushil Kumar Gupta was born on 12th of May 1954 in District Neemuch (Madhya Pradesh). After obtaining the degree of B.Sc. and LL.B My Lord joined Judicial Services as Civil Judge on 30th of September 1981. Your Honour has held all the important assignments in lower judiciary. Your Honour were promoted as Chief Judicial Magistrate on 29.8.1991 and posted in Ambikapur district in the erstwhile State of Madhya Pradesh. My Lord was promoted as District & Sessions Judge in the Higher Judicial Service on 18.10.1993 and was posted in district Raisen. My Lord was granted Selection grade with effect from 7.6.1999 and Super Time Scale with effect from 10.10.2007. While working in the lower judiciary My Lord has rendered services to various assignments, prominent among them are President District Consumer Forum and Principal Judge Family Court. Before appointment as Additional Judge, Your Lordship was posted as Commissioner, Departmental Enquiry in Bhopal. It is apparent from this narration that Your Lordship possesses long experience of judicial working in different capacities. I am sure that this vast experience on judicial side will bring landmark improvement in our judicial system.

Shri Jarat Kumar Jain was born on 23rd of January 1955 in Khandwa. After obtaining the degree of M.Com, LL.B. Your Honour joined judicial service on 19th of September 1981. Your Lordship was promoted to the post of Chief Judicial Magistrate with effect from 16.8.1991 and was posted in district Dhar. Your Honour was promoted as District Judge in Higher Judicial Services with effect from 13.6.1994. My Lord was granted Selection grade with effect from 8.7.2000 and Super Time Scale with effect from 10.10.2007. Looking to your acumen on the administrative and Judicial side your honour were picked up for the post of Principal Registrar (I.L.R), High Court of Madhya Pradesh Principal Seat at Jabalpur in September 2009. On 27.5.2010 Your honour was posted as

District and Sessions Judge, Jabalpur. Before appointment as Additional Judge, Your Lordship was working as District & Sessions Judge Chhindwara with effect from 29.3.2012.

Your Lordships have worked as District and Sessions Judges before elevation and your vast experience of judicial work will certainly help in settling the complicated issues that crop up during the appellate and revisional jurisdiction of this Court. We the members of legal fraternity are happy on this occasion of appointment of Your Lordships in the Hon'ble High Court.

The legal disputes are increasing with the consciousness of people about their Constitutional and legal rights. Every individual is eager to protect his fundamental rights, legal rights and human rights. Increasing load of cases is now a challenge to our Judicial system. Vacant seats of Judges result in multiplying the problems of pendency of cases and unfortunately in our Courts, cases pending since 10- 15 years are in huge number. This is causing frustration in common man. We are extremely happy and full of pleasure on the appointment of Hon'ble Judges which will be a step towards amelioration of this condition.

While dealing with the qualities of a good Judge Justice R.V. Raveendran has once observed that :-

> *"Rendering justice in a larger sense means giving every person, his or her due. All those entrusted with power -power to govern, power to legislate, power to adjudicate and power to punish or reward - in a sense, render justice. In the context of Judges, rendering justice, means speedy, effective and competent adjudication of disputes and complaints in a fair and impartial manner, in accordance with law, tempered by equity and compassion wherever required and permissible, after due hearing."*

The appointment of your Lordships will be an asset and we are sure that under your stewardship the staff will remain public and bar friendly which will result in smooth functioning of the whole system. In this direction the State Government and the law Officers of the State will provide full cooperation and assistance.

Needless to say that cordiality of relation and mutual respect will solve major problems in the path of speedy and efficient judicial functioning. With the vast experience there would not be any problem to the Hon'ble Judges to strike balance between conflicting claims of speedy disposal according to law. We all know that we are not infallible but the chances of mistake may be avoided if we

adhere to the path shown by the veteran judges. The High Court is a superior court of record. It has original and appellate jurisdiction and possess plenary powers due to which the responsibilities are multiplied but the judge should have bastion for the people to uphold the majesty of law which is the backbone of fair and impartial dispensation of justice.

It will be appropriate to recall the principles laid down by Justice R. V. Raveendran to become a good judge and according to him. Time Management, Board Management, Power Management, Self Management are some of the necessary requirements for development of judicial skill. According to Justice Raveendran a judge is subject to constant judicial scrutiny and therefore he should conduct in a way consistent with the dignity of the judicial office. This will help in bringing cordiality in the atmosphere of the court and whatever we have heard about various qualities possessed by Your Lordships, these traits are in abundance. We hope that Your Lordships' working in the High Court will bring an era of cordiality and congeniality in the working of the High Court.

I once again congratulate your Lordships on behalf of the State of MP, on my own behalf and on behalf of Law Officers of the State on your Lordships appointment as additional Judges of the High Court of Madhya Pradesh.

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

आज भीगी भीगी धरा पर माटी की भीनी भीनी सुगंध है। बगिया में प्रस्फुटन हुआ है और दो नये पुष्प खिले हैं। हम सब यहां आज न्याय के इस पावन गरिमामय अनुष्ठान में न्याय–निष्ठा की शपथ लेने पर आप दोनों न्यायमूर्तिगण माननीय श्री सुशील कुमार गुप्ता जी और माननीय श्री जरत कुमार जी जैन का भाव भीना स्वागत वंदन अभिनंदन करने के लिये एकत्रित हुए हैं।

आप न्यायमूर्ति श्री सुशील कुमार जी गुप्ता मालवा की नेहमयी धरती के गौरव पुत्र हैं। दिनांक 12 मई 1954 को आपने नीमच में जन्म लिया। विज्ञान स्नातक एवं विधि स्नातक उपाधियां अर्जित की और 30 सितम्बर 1981 को व्यवहार न्यायाधीश के रूप में राज्य न्यायिक सेवा के सदस्य के रूप में न्याय ध्वजा के वाहक के रूप में आपने भगवान पशुपतिनाथ की नगरी मंदसौर में अपना कार्यभार संभाला। व्यवहार न्यायाधीश वर्ग–2 के रूप में बड़नगर और उज्जैन की पदस्थापना के उपरान्त वर्ग–1 में पदोन्नत होकर आप खचरौद में पदस्थ हुए और पुनः मालवा के पठार के एक छोर से सुदूर पूर्व दिशा में धान के कटोरे को सुरभित करते हुए 29 अगस्त 1991 को अम्बिकापुर में मुख्य न्यायिक दण्डाधिकारी का पदभार ग्रहण किया। मध्यप्रदेश की धरती की परिक्रमा करते हुए पदोन्नति पर रायसेन, चाचोड़ा और राजा भोज की नगरी धार में अतिरिक्त जिला न्यायाधीश के रूप में आपने कार्य किया। फिर विन्ध्य की पावन धरा का स्पर्श करते हुए 4 फरवरी 2002 से अनुसूचित जाति जनजाति संबंधी प्रकरणों में न्याय दान हेतु रीवा में विशेष न्यायाधीश का पदभार ग्रहण किया। पुनः 23 जून 2003 से इन्दौर में जिला

उपभोक्ता फोरम के अध्यक्ष बने और 19 मई 2005 को बड़वानी में जिला एवं सत्र न्यायाधीश के रूप में पदस्थ हुए। पुनः रीवा में प्रमुख न्यायाधीश परिवार न्यायालय, जिला एवं सत्र न्यायाधीश धार एवं प्रमुख न्यायाधीश परिवार न्यायालय टीकमगढ़ के दायित्वों को संभालने के उपरान्त 12 अक्टूबर 2010 को भोपाल में आयुक्त विभागीय जांच के रूप में कार्य करते हुए आज म.प्र. उच्च न्यायालय के न्यायाधीश के रूप में महिमा मंडित हुए हैं। आपने न्याय के विभिन्न क्षेत्रों में दीर्घकालीन अनुभव प्राप्त करते हुए अधीनस्थ न्याय पालिका में एक निष्पक्ष ज्ञान गरिमा युक्त न्यायाधीश के रूप में कार्य किया है। उच्च न्याय पालिका में आपको गुरूतर दायित्व संभालना है। नाम के अनुकूल ही आपकी कीर्ति एक सुशील, विनम्र, मृदुभाषी न्यायिक व्यक्तित्व के रूप में विस्तारित होती रही है।

आप न्यायमूर्ति श्री जरत कुमार जैन नर्मदांचल की धरती खंडवा के गौरवपुत्र हैं। आपका जन्म 23 जनवरी 1955 को हुआ। 23 जनवरी भारत के महान सपूत नेताजी सुभाषचंद्र बोस का भी जन्म दिन है। निश्चित रूप से आप में भी नेतृत्व के जन्मजात गुण हैं, जिनमें उत्तरोत्तर अभिवृद्धि हो रही है। खंडवा वैसे भी वीर भूमि है और महाकोशल में स्वतंत्रता संग्राम के दिनों में खंडवा ने अग्रणी भूमिका का निर्वहन किया था। इसी भूमि पर कभी महान कवि माखनलाल चतुर्वेदी ने लिखा था–

"मुझे तोड़ लेना वनमाली, उस पथ पर तुम देना फेंक।

मातृभूमि पर शीश चढ़ाने, जिस पथ जायें वीर अनेक।।"

एक प्रसिद्ध भूगोल विद् प्रो. डॉ. शिवकुमार तिवारी ने अपनी अन्तर्राष्ट्रीय ख्याति प्राप्त शोध में यह प्रमाणित किया है कि जन्म भूमि का व्यक्तित्व और संस्कारों पर अमिट प्रभाव होता है। आपके संस्कार निश्चित ही उस पावन आकांक्षा वाले पुष्प की तरह ओज और स्वाभिमान से परिपूर्ण है। आपने वाणिज्य में स्नातकोत्तर उपाधि एम.कॉम.और विधि स्नातक की उपाधि अर्जित की। दिनांक 19 सितम्बर 1981 को आपने व्यवहार न्यायाधीश वर्ग–2 के रूप में इंदौर से राज्य न्यायिक सेवा में प्रवेश किया। 27 अक्टूबर 1987 को बड़वानी में व्यवहार न्यायाधीश वर्ग–1 के रूप में आप पदस्थ हुए और इसी रूप में मंदसौर में भी भगवान पशुपतिनाथ की नगरी में भी पदांकित हुए। 16 अगस्त 1991 को धार में मुख्य न्यायिक दंडाधिकारी का पदभार ग्रहण किया और 13 जून 1994 से पुनः इन्दौर में अतिरिक्त जिला न्यायाधीश के रूप में पदस्थ हुए। मई 1997 से भोपाल में विधि एवं विधायी कार्य विभाग के उपसचिव के रूप में आपने प्रशासनिक दायित्व संभाला। पुनः भोपाल में ही भोपाल गैस त्रासदी के अतिरिक्त कल्याण आयुक्त का महत्वपूर्ण सेवा कार्य 31 अक्टूबर 2000 से प्रारंभ किया। फिर शाजापुर में विशेष न्यायाधीश अनुसूचित जाति जनजाति और विशेष न्यायाधीश एनडीपीएस के साथ प्रभारी जिला एवं सत्र न्यायाधीश का दायित्व भी वहन किया। 7 नवम्बर 2005 से जिला एवं सत्र न्यायाधीश के रूप में शिवपुरी में कार्यभार ग्रहण किया। फिर जबलपुर में म.प्र.उच्च न्यायालय के रजिस्ट्रार प्रथम (आईएलआर और परीक्षा) के रूप में 1 नवम्बर 2007 से पदस्थ होने के उपरान्त सितम्बर 2009 में प्रिंसिपल रजिस्ट्रार (आईएलआर) का कार्यभार ग्रहण किया। 27 मई 2010 को आप जबलपुर के जिला एवं सत्र न्यायाधीश के रूप में पदस्थ हुए और 29 मार्च 2012 को जिला एवं सत्र न्यायाधीश के रूप में छिंदवाड़ा में कार्यभार ग्रहण किया। उच्च न्याय रथ पर आरूढ़ होने के पूर्व तक आप छिंदवाड़ा में ही पदस्थ रहे। अब एक गुरूतर दायित्व आपके समक्ष है। जबलपुर के अधिवक्ता आपके विनम्र स्वभाव, ज्ञान गरिमा और निष्पक्ष न्याय दान से पूर्णतया परिचित हैं।

आप दोनों माननीय न्यायमूर्ति मध्यप्रदेश के विभिन्न भू–भागों में न्यायाधीश के रूप में कार्य कर

चुके हैं। यह प्रदेश वन प्रांतर, प्रचुर नदी जल, खनिज सम्पदा व पशु धन से सम्पन्न हैं। जनसंख्या का एक बड़ा भाग आदिवासियों, अनुसूचित जाति और पिछड़ा वर्ग के लोगों का है। प्रदेश की बहुत बड़ी आबादी गरीबी, भूख, बेरोजगारी से त्रस्त है। बाल एवं महिला कुपोषण में हमारा प्रदेश अग्रणी है भारत के संविधान की पांचवी अनुसूची में म.प्र. का एक बड़ा भू भाग सम्मिलित है। पर आज कथित विकास के नाम पर आदिवासियों को भूमिहीन बनाकर उनके अपने घर से बेघर और अपनी ही संस्कृति व परिवेश से दूर किया जा रहा है। एंग्लो सेक्शन न्याय शास्त्र कठोर है, उसके कानून पीड़ा की भाषा को नहीं समझते। हमारे न्याय–दर्शन में 'करूणा' का तत्व प्रधान है। हमें इस प्रदेश की पीड़ा को समझना होगा। तकनीकियों पर न्याय को खारिज नहीं होना चाहिए। कानून की भाषा में कानून की जानकारी न होना अक्षम्य है। पर हम यूरोप में नहीं एक विकासशील देश के गरीब एवं पिछड़े प्रदेश में रहते हैं। क्या एक निरक्षर, साधनहीन, अपढ़ व्यक्ति को न्याय से मात्र इसीलिए वंचित कर दिया जावेगा कि वह कानून नहीं जानता। न्याय की भाषा में उस पीड़ा के लिये भी कुछ शब्द होने चाहिए। इतिहास यदि समय समय पर करवट नहीं लेता तो उसके कुछ पृष्ठ अधूरे ही छूट जाते हैं। न्याय के इतिहास को करवट लेना चाहिए। आप दोनों माननीय न्यायमूर्तियों को न्याय की एक ऐसी भाषा अन्वेषित करना होगी जहां पीड़ा और करूणा के लिये भी कुछ शब्द तो हों।

हमारे माननीय मुख्य न्यायामूर्ति श्री अजय मानिकराव खानविलकर के इस प्रदेश में दिये गये पहले उद्‌बोधन में ही प्रदेश के आदिवासियों का उल्लेख था, उन गरीबों की पीड़ा का बोध था जिन तक न्याय की पहुंच नहीं है। उनके लिए करूणा भरी आश्वस्ति थी। हम उन युवा अधिवक्ताओं की कर्तव्य भावना की सराहना करते हैं, जो बहुत कम शुल्क लेकर भी इन असंख्य गरीबों, आदिवासियों, पिछड़े, मूक, पीड़ितों के प्रकरणों में उच्च न्यायालय में पैरवी करते हैं, वे लोग जो बड़े नामी अधिवक्ताओं की चौखट पर जाने तक का साहस नहीं कर पाते, उन्हें ये युवा अधिवक्ता ही न्याय दिलाने का प्रयास प्राण प्रण से करते हैं, क्या वे स्तुत्य नहीं हैं ? वे ही तो न्याय मंदिर के आधार–प्रस्तर है।

और हमारे मुख्य न्यायमूर्ति जी ने इतिहास को परिवर्तन की एक नवीन भाषा से परिचित कराया है, ताकि वर्षों से लम्बित पड़े प्रकरणों में निर्णय हो सकें। न्याय की प्रतीक्षा में थके हुए चेहरों पर किंचित सी मुस्कान खिल सके। अधिवक्ता समुदाय को कहीं कुछ परेशानियां तो हो रही है, पर मुझे विश्वास है कि शनैः शनैः वें दूर होंगी। नये परिवर्तन प्रारंभ में सहज नहीं लगते। पर परिवर्तन नहीं होंगे, जड़ता दूर नहीं होगी, तालाब का पानी बदला नहीं जायेगा तो कमल कुम्हलाने लगेंगे।

कवि दुष्यंत ने कहा है–

"इस तालाब का पानी बदल दो।
अब तो कमल कुम्हलाने लगे हैं।।"

रामचरित मानस में महाकवि तुलसीदास ने कहा है–

"मूक होंहिं वाचाल, पंगु चढ़हिं गिरिवर गहन।।"

न्याय में ही वह सामर्थ्य है जो मूक को भाषा दे सकता है और जिसकी शक्ति से पंगु पर्वत की चोटी पर चढ़ जाता है। माननीय मुख्य न्यायमूर्ति अपनी करूणा से इस प्रदेश के मूक और मौन को मुखरता दे रहे हैं।

कौटिल्य विष्णुगुप्त चाणक्य ने कहा है कि न्यायाधीश का कार्य तलवार की तीक्ष्ण धार पर

चलने के समान है। आज कर्तव्यपथ पर चलने की महान शपथ लेने और धारण करने के उपरान्त आपके ऊपर वंचितों को न्याय देने का महान दायित्व आ गया है। इस देश में न्याय को ही धर्म माना जाता है और मराठों के राज काल में न्यायाधीश धर्माधिकारी कहलाते थे। मनुस्मृति कहती हैं–

"धर्म एव हतो हन्ति।
धर्मो रक्षति रक्षितः।।"

आप धर्म अर्थात् न्याय की रक्षा करें। धर्म आपकी रक्षा करेगा।

"कृतं में दक्षिणे हस्ते।
जयो में सत्य आहितः।।"

पुरूषार्थ सदैव आपका दाहिना हाथ रहे और जय तथा कीर्ति बायां हाथ। और कवीन्द्र रवीन्द्र नाथ टैगोर के शब्दों में–

"Into the mouths of these
Dumb, pale and meek
We have to infuse
The language of the soul."

म.प्र. उच्च न्यायालय अधिवक्ता संघ के समस्त सदस्यों और स्वयं मेरी ओर से आप दोनों न्यायमूर्तियों को इस शुभ पर्व पर असीम शुभकामनायें आप दोनों सफल न्यायाधीश की भूमिका निर्वाह करें। राबर्ट फ्रास्ट के शब्दों में सफलता का मार्ग है–

"Two roads diverged in a wood, and I
I took the one less travelled by,
And that has made all the difference."

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

I extend heartly welcome to Hon'ble Justice Shri Sushil Kumar Gupta and Hon'ble Justice Shri Jarat Kumar Jain on their elevation to the High Office of the Judge of this Court. The appointment of my lords has come when this Court is eagerly waiting for new Judges to come. In fact it is the need of the hour to see the new appointment as early as possible. The appointments of my lords will give some solace to this institution.

I welcome the appointment of Hon'ble Justice Shri Sushil Kumar Gupta as a Judge of this Court. Though he was not posted in this region, but whatever we have come to know about him is really very encouraging. He is possessing all the good qualities of a Judge and I am sure that the bar will get proper treatment at his hands. I congratulate him at this juncture.

I welcome the appointment of my lord Hon'ble Justice Shri J. K. Jain who is known to me since long when he joined the bar here, as an advocate. He is very simple, soft spoken and always conscious of his duties. He is working since long as a Judge and also seen his father working as a Judge who was also posted at Jabalpur as Addl. Distt. Judge, Hon'ble Justice J.K. Jain has got all the qualities of a judge and I am sure that he will be proved an asset to this Court. I congratulate my lord on his appointment as a Judge of this Court.

The need of the present is very demanding and the bar and the bench both are required to see that the general public of the state get the justice that too in proper time and may not lose faith in the system. The bar also hope that its members will get proper treatment in the Courts of my lords.

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

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

**माननीय न्यायाधिपति श्री सुशील कुमार गुप्ता जी–**

आप 1981 से लगातार विभिन्न अदालतों में न्यायदान करते हुए आज इस मुकाम पर पहुंचे हैं कि आपके अनुभवों का लाभ म.प्र. उच्च न्यायालय एवं मध्य प्रदेश के पक्षकारों को प्राप्त होने का सौभाग्य प्राप्त हो रहा है। आपकी कार्यशैली को दृष्टिगत रखते हुए विश्वास के साथ कहा जा सकता है कि आप मध्यप्रदेश उच्च न्यायालय में न्यायाधिपति के पद पर शोभायमान होने के साथ ही प्रदेश के पक्षकारों को न्यायदान में सहायता प्राप्त होगी। मैं सौभाग्यशाली हूं कि सन् 2002 एवं 2008 में आपके साथ कार्य करने का अवसर मिला। साथ ही आपकी कार्यशैली एवं तथ्यों की नजदीकी परख को बहुत करीब से देखने का अवसर प्राप्त हुआ है।

30 सितम्बर 1981 से मंदसौर से प्रारंभ आपकी यह न्यायिक यात्रा 28 फरवरी 2014 को प्रदेश के न्यायिक शिखर तक पहुंची एवं भविष्य में भी आपकी यह न्यायिक यात्रा अनवरत चलती रहेगी। इसी शुभकामना के साथ मैं स्वयं अपनी ओर से एवं बार कौंसिल की ओर से आपको मध्यप्रदेश उच्च न्यायालय में न्यायाधिपति के रूप में नियुक्त होने पर आपका हार्दिक अभिनंदन, वंदन करते हुए आपके उज्जवल भविष्य की कामना करता हूं।

**माननीय न्यायाधिपति श्री जरत कुमार जैन जी–**

आपने सन् 1981 से अपनी न्यायिक यात्रा प्रारंभ करने के साथ ही लगातार ऊंचाई को छूते हुए आगे बढ़े और आज का दिन आपके लिये एवं प्रदेश के पक्षकारों के लिये बहुत सौभाग्यशाली है कि आज आप मध्यप्रदेश उच्च न्यायालय में न्यायाधिपति के पद पर आसीन हो रहे हैं।

आपने प्रदेश की विभिन्न अदालतों में न्यायादान कर अपनी एक अलग पहचान बनाते हुए

मध्यप्रदेश उच्च न्यायालय में रजिस्ट्रार परीक्षा का दायित्व संभालते हुए प्रशासनिक व्यवस्था को उच्च स्तर तक पहुंचाया है।

आपकी कार्यशैली व निर्भिकता, कार्य करने की क्षमता को जबलपुर के अधिवक्ताओं ने करीब से देखा है। आशा ही नहीं विश्वास है कि आपकी समर्पित कार्यशैली उच्च न्यायालय में भी पक्षकारों को न्यायदान में मदद करेगी। आपके उच्च न्यायालय में न्यायाधिपति के रूप में नियुक्त होने पर मैं मध्य प्रदेश राज्य अधिवक्ता परिषद की ओर से, स्वयं अपनी ओर से एवं प्रदेश के समस्त अधिवक्ताओं की ओर से आपका हार्दिक अभिनंदन, वंदन करते हुए आपके उज्जवल भविष्य की कामना करता हूं।

आप दोनों न्यायाधिपतियों से यह आशा करता हूं कि माननीय मुख्य न्यायाधिपतिजी के त्वरित न्याय के प्रयास में आप अपना योगदान देंगे। पुनः आप दोनों को उच्च न्यायालय में न्यायाधिपति नियुक्त होने पर बधाई देता हूं एवं आपका अभिनंदन करता हूं।

जय हिन्द, जय भारत

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**Shri O.P Namdeo, Central Government Counsel, said:-**

My Lords, it is my proud privilege and pleasure to felicitate and welcome Newly Sworn Justice Sushil Kumar Gupta and Newly Sworn Justice Jarat Kumar Jain, on behalf of Union of India, Assistant Solicitor General, my colleagues Central Government Counsels and my own behalf, on your Lordships elevation as Judge of this High Court of repute.

My Lords all judges decide cases to the best of their ability. But the nobility of Judge springs from the manner he hears the cases impartially and with an open mind. The best Judge is one who can keep at arms length his own predilections and prejudices and then approach the matter and try the case before him with stern judicial frame of mind and without bias of any kind. To this he is compelled by his oath, upbringing and training. In this sense your Lordships will, we hope, make mark as distinguished Judges of this Court.

Your Lordships rich and varied experiences in the subordinate judiciary and the depth of insight and breadth possessed by you both have fully qualified you both to grace this high office. Your Lordships have achieved this distinction by shear dint of your merit which has brought your goodself to this high office.

Your Lordships achievements virtues and values have been elaborately mentioned by my previous speakers to which I entirely agree by saying in two words "I agree" and I need not repeat the same. With this I once again welcome and congratulate your Lordships on your elevation to the Bench and wish you both a very successful and illustrious tenure as Judge, coupled with good health.

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

It is a matter of great pleasure to congratulate My Lords Mr. Justice Sushil Kumar Gupta and Mr. Justice Jarat Kumar Jain on their elevation as judges of Hon'ble High Court. My former speakers have already spoken about their achievements gentlemanliness and learning in law. To avoid prolixity I do not repeat the same and share and join with the sentiments expressed by my brotheren Gladwill said and I quote **"Achievement is talent plus preparation. The closer psychologist look at the career of the gifted, the smaller role innate talent seems to play and the bigger preparation seems to play"** - unquote

My Lords during the course of your judicial career you have gone through constant and continuous preparation to sharpen your talents and thereby have gained wide experience, deep knowledge of law and how to maintain dignity of the office held and decorum of the court and I am sure the Bar shall have full benefit of your Lordships wisdom, talent and legal acuman. Your Lordships shall have full cooperation and unfailing support from the Bar in performance of your duty in dispensation of justice.

On behalf of the Senior Advocates' Council and on my own behalf I once again facilitate your Lordships on your elevation and wish you well.

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

First of all I would bow to my only Guru & Goddess Maa Sharda of Maihar who has blessed me with sufficient abilities and wisdom to act and reach to this August position.

नमस्ते शारदे देवी काश्मीरापुरवासिनि

त्वामहं प्रार्थये नित्यं विद्यादानमं च देहि मे

It is really almost an extinct art to appreciate someone so elaborately. It really requires very kind heart and keen brain like you to do this pleasingly. I am really obliged for the kind words spoken about me. I am very thankful to all.

I would like to express my heart-felt gratitude to my Lord Hon'ble Shri Justice K.K. Lahoti and members of the collegium, Hon'ble Shri Justice Ajit Singh and Hon'ble Shri Justice Rajendra Menon for having considered and recommended my name for elevation to this August office. I highly value your trust and will work hard to keep it. Thanks again for all your help. I am truly grateful for your support.

I pay my humble regards for the kindness, bestowed upon me by the Hon'ble Chief Justice of India and Hon'ble Judges of the collegium of the Supreme Court.

I also pay my humble regards to my lord Justice A.K.Patnaik, Judge, Supreme Court of India, former Chief Justice of this Court, Hon'ble Shri Justice Deepak Misra, Judge, Supreme Court of India, Hon'ble Shri Justice Deepak Verma, former Judge of the Supreme Court of India, Hon'ble Shri Justice R.S.Garg former Chief Justice of Gauhati High Court and other Hon'ble Judges of this High Court for their love, guidance and affection showered on me.

It is a matter of great privilege and honor for me that the oath of the office has been administered to me by Hon'ble Chief Justice Shri A.M.Khanwilkar.

I also wish to thank everyone involved in the process allowing me this opportunity to express my gratitude towards some very important personalities in my personal and professional life.

On personal front, my first gratitude is due towards my mother Smt. Durga Devi and my father late Shri Ramkumar ji Porwal who supported my decision to join this field and taught me the lessons of perseverance with undeterred determination and nurtured the thought of यतो धर्मस्ततो जयः in me without which I could not have reached so far in my journey successfully.

My thank is also due towards my wife who has been a great companion during all ups and downs of life. She has proved to be my strength in all hardships and deserves an expression of my true feelings on this occasion. You really are my better half Lalita. Thank you for being with me.

I have always followed the concept of 'work is worship' throughout my life. Both of my daughters Abhilasha Arvind Batwal, and Pratiksha Vinay Porwal, and my only son Abhinandan have been like those pious, lovely flowers without whom this worship could not be called complete. They, all three of my children, have always respected my professional obligations and never complained of reflective disciplinary limitations on their own expressions. How can I forget to mention my grandson Keshav whose one smile always makes me feel happier and energetic. Thank you my dears.

I am also thankful to my relatives and friends who have come here to shower their blessing and good wishes on me.

It's an honor to be the first person from the district Bar Association of Neemuch to be elevated this august office. I am proud of all my seniors and

colleagues of the Neemuch Bar Association.

I belong to Neemuch from a business family. I did my graduation in science but after completing graduation my father suggested me to take-up Law as a Profession. After completing my Law graduation I became an intern under the kind guidance of Advocate late Shri Ramchandra Sharma. I learnt a lot from his excellence.

My journey in judiciary began when I got selected for the post of civil judge in the year 1981 by Hon'ble Justice late Shri G.G.Sohani who later became Chief Justice of Patna High court. Thanks for trusting me and making me part of judicial system, it's a journey I cherished all my life and still continuing. This has been a long journey since, to reach here a dream of every Judicial Officer.

Like a tree laden with fruits I am feeling fulfilled with the gifts I have got from both my personal and professional life so far and can feel even greater responsibility on my shoulder to support and safeguard absolute justice within the society unabated.

This auspicious development has instilled a new energy in me. I am feeling quite encouraged and excited to start a new inning with a strong vigor and stronger resolution. I promise to abide by my official responsibilities to the best of my abilities in all respect.

Throughout my career I always believed judges should be fair and open minded and should ask necessary question to get the heart of the issue before the court. I may not narrate all qualities of a good judge here, but I promise to be one.

I assure you of my best because, when I demit this August office. I want all present to offer me a little better than what you have showered upon me today.

At last but not the least I thank you everyone and all who have contributed positively, and even if negatively, in making my life worth it. I would always revere my critics because when they criticize, they infact are suggesting me shortcomings to improve .Thank you very much.

Jai Hind.

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**Reply to ovation, by Hon'ble Mr. Justice Jarat Kumar Jain:-**

I am deeply touched by your noble sentiments and good words said about me. It is indeed difficult for me to express my gratitude for your kindest regards.

I can however assure you of my best efforts to rise to your expectations.

Today when I look back, I recall the old days at the bar..Though I practiced for a very short term, but the days spent at the Bar had an immense impression upon me.

My journey started as a Civil Judge and slowly I moved up on the ladder. Though it was slow, but fortunately steady. On this occasion I cannot forget the affection and cooperation of the members of the Bar, which I readily received throughout the places where I happened to be posted.

I am aware of the magnitude of my task and the onerous duties of this High Office, and I'm sure that with your co-operation I shall be able to discharge my duties and obligations to the satisfaction of all concerned.

I'm also grateful to the present and former judges of this Court who have instilled faith in me and have brought me up on the ladder.

Friends, on this occasion I also take the opportunity to thank my parents whose blessings and desires have shaped me into whatever I am today, I'm also thankful to my wife who stood by me all these years- her patience and sacrifices are precious to me. I have no doubt that the blessings of all of them coupled with the grace of God have brought me this honour.

I once again thank all of you for your good wishes and blessings. And I pray to God to give me strength to discharge my duties to the best of my abilities.

Thank you.

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# FAREWELL

***HON'BLE MR. JUSTICE B.K. DUBE***

Born on January 20, 1952 at Village Nakau, District Mainpuri (Uttar Pradesh). Passed Higher Secondary Examination in the year 1970 from Uttar Pradesh Board of Secondary Education, Allahabad. Passed B.Sc. in the year 1972 from Government College, Bhind. Passed LL.B. in the year 1975 from M.L.B. Arts & Commerce College, Gwalior. Was Awarded Merit Scholarship during the Academic Session of 1975-76 for LL.M.. Passed LL.M in the year 1979 from M.L.B. Arts & Commerce College, Gwalior. Joined as Civil Judge, Class-Il on August 23, 1979. Promoted as Civil Judge, Class-I on 25.11.1985 and then as A.C.J.M., on 20.10.1989. Was appointed as Additional District Judge on 12.10.1991. Worked as Additional Registrar, High Court of Madhya Pradesh at Jabalpur from June 1997 to August 2003 and as District & Sessions Judge, Sagar from September 2003 to April 2005. Worked as Member Secretary, Madhya Pradesh State Legal Services Authority, Jabalpur from April 19, 2005 to June 30, 2008. Was granted Selection Grade scale on 08.05.1999 and Super Time Scale on 26.02.2006. Worked in different capacities at Datia, Rewa, Satna, Mehgaon, Bemetara, Morena, Bhind, Neemuch, Jabalpur and Sagar. Worked as District & Sessions Judge, Jabalpur from July, 2008 till elevation.

Elevated as Additional Judge of the High Court of Madhya Pradesh on May 3, 2010, sworn in as permanent Judge on September 24, 2011 and demitted office on January 19, 2014.

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

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## FAREWELL OVATION TO HON'BLE MR. JUSTICE B.K. DUBE, GIVEN ON 17-01-2014, AT GWALIOR BENCH, GWALIOR.

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

Today, we have assembled here to honour and to give farewell/ovation to My Lord Hon'ble Mr Justice Brij Kishore Dube, who after rendering his valuable services at this prestigious Constitutional Institution of Indian Judiciary is demitting the office of the Judge of the High Court of Madhya Pradesh on 19th January,2014.

To recapitulate, Justice Dube was born on 20th January,1952 at village Nakau, District Mainpuri, Uttar Pradesh. His Lordship passed B.Sc. Degree in 1972 from Government College, Bhind and obtained LL.B. Degree from M.L.B. Arts and Commerce College, Gwalior with first class marks and fifth in order of merit in Jiwaji University. His Lordship passed his LL.M. Degree from the same college. My Lord joined judicial service as Civil Judge Class II on 23rd August, 1979, promoted as Civil Judge Class I in November, 1985, Chief Judicial Magistrate on 22nd October, 1989 and officiating District Judge on 12th October, 1991. Justice Dube was granted selection grade on 8th May, 1999 and super-time grade scale on 26th February, 2006. His Lordship worked as Additional Registrar in the High Court of Madhya Pradesh Jabalpur in June 1997 and became Member Secretary of Madhya Pradesh Legal Service Authority. Before elevation as Judge of this High Court, His Lordship was posted as District and Sessions Judge, Jabalpur. His Lordship was elevated to the Bench as a Judge of Madhya Pradesh High Court on 03rd May, 2010 and sworn in as Permanent Judge on 24th September, 2011.

Justice Dube is a man of kind heart, always polite and graceful. The height of His Lordship's humbleness manifests from the reply of ovation at the time of taking oath of the office of Judge when he expressed his deep sense of gratitude to each and everyone, who came into contact of His Lordship. He is well known for his sound knowledge of law and legal acumen. He has maintained the highest standards of judicial conduct and behaviour in dignified manner. He never lost his temper even on unjustified provocation and maintained a strong sense of firmness. The Bench and Bar hold him in high esteem and regard, due to his simplicity, modesty and integrity.

Judicial approach of Justice Dube is excellent and is well known to all of us. The four fold responsibilities of a Judge in the words of Socrates are:

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

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

The system of "Administration of Justice" is passing through a challenging time and the citizens of the country have high hopes and expectations from the judiciary. In a democratic society where the constitutional approach is of welfare state and the Court has to discharge its functions for the public at large with a view to render public service, Justice Dube has proved his worth in rendering services as a Judge to the society.

Justice Dube has delivered many landmark judgments which would enlighten the judicial fraternity in the time to come.

I have occasion to sit with Justice Dube in Division Bench. It was a unique experience. His approach in deciding cases was clear and I found Justice Dube has a deep understanding of law. His Lordship has worked hard in delivering judgments. The Court is indebted to the valuable contribution rendered by Justice Dube. I have gained a lot from Justice Dube, while sitting with him Division Bench.

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

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**Shri M.P.S. Raghuvanshi, Addl. Advocate General, M.P. High Court, Gwalior, bids farewell:-**

We have assembled here today on January, 17th, 2014, to bid farewell to one of our Eminent Judge, Justice B.K. Dube. I on behalf of all law officers, Advocate General of the State, State of M.P. and on my own behalf offer our heartiest felicitation on this occasion.

**"Hon'ble Justice Brij Kishore Dube"**

Born on 20th of January, 1952 at village Nakau District Mainpuri (U.P.) in a middle class family. My lord's parents though lacked material resources, but

were rich in inculcating moral values in life and gave required emphasis on education. After graduating from Government College Bhind, My lord studied Law graduation and Post-graduation from M.L.B. Arts & Commerce College, Gwalior with first division and got 5th rank in merit list of the Jiwaji University, Gwalior.

My lord joined as Civil Judge Class II on 23rd August 1979, was promoted as Civil Judge Class I on 25-11-1985. Then Additional District Judge on 12-10-1991. My lord worked as Additional Registrar High Court of M.P. at Jabalpur between June 1997 to August 2003, and thereafter as District & Sessions Judge Sagar between September 2003 to April 2005.

Considering ability and deep knowledge, My lord was nominated as Member of M.P. State Legal Services Authority. My lord also worked as Member Secretary M.P. State Legal Services Authority Jabalpur between 19th April 2005 till 30th of June 2008.

Looking towards extraordinary jurist, in My lord, he was elevated as Additional Judge of this prestigious High Court on May, 3rd 2010 and was made permanent judge on 24th September 2011.

My lord Your judgements reveals your emotional attachment to the concept of equality, secularism and socialist republic. My lord always involved by heart and soul in all the assignment spared no efforts in discharge of Your duties even in detriment of your health. As a Judge, You never seen angry with anyone. Nobody can blame You on count being conservative in your approach as a Judge. My lord's judgements are path, breaking, opening new vistas which is amply evident from the judgements. My lord, You have proved yourself to be a good judge who will be remembered by your landmark judgements.

Though partening is always painful our good wishes follow you wherever you are and we are proud of you. May Almighty shower all blessings on You and Your family.

I conclude my speech with the following lines of

"Wadsworth Long Fellow":

The heights by great men reached & kept were not attained by sudden flight.

But they, while their compassions slept were toiling upward in the Night

Thanking You.

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

Your Lordship Hon'ble Justice Shri Brij Kishore Dube is completing his tenure as judge today.

Hon'ble justice Shri Brij Kishore Dube born on 20th January, 1952 at village Nakau Distt. Mainpuri, Uttar Pradesh, he passed Higher Secondary Examination in year 1970 from Allahbad, passed B.Sc. in the year 1972 from Govt. College, Bhind and passed LL.B. in the year 1975 from M.L.B. Arts and Commerce College, Gwalior. He joined Judicial Service as Civil Judge, Class-II, on 23.08.1979, promoted as Civil Judge, Class I, in November 1985, as Chief Judicial Magistrate on 22nd October,1989 and as Officiating District Judge on 12-10-1991. He was granted Selection Grade on 08-05-1999 and super-time scale on 26.02.2006, He worked in different capacities. He also worked as Addl. Registrar in High Court of M.P. at Jabalpur and as Member Secretary of Legal Services Authority.

Thereafter, Hon'ble Shri Justice Dube elevated as Additional Judge of the High Court of Madhya Pradesh on 03-05-2010 and permanent Judge on 24th September 2011.

Hon'ble Justice Shri B.K. Dube in his tenure of judicial services assured a patient hearing, earnest attention to the submissions made and courteous behavior. His Judgments are backed by forceful logic. His approach to the cases was with absolute clarity of thought. Some of such Judgments are landmarks in the judicial system.

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

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**Shri Prem Singh Bhadauriya, Member, State Bar Council of M.P., bids farewell :-**

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

माननीय न्यायमूर्ति श्री बी.के. दुबे जी का जन्म स्व. श्री रामदुलारे लाल दुबे जी के पुत्र के रूप में दिनांक 20.01.1952 को ग्राम नकुआ जिला मैनपुरी उ.प्र. में हुआ था।

माननीय न्यायमूर्ति द्वारा प्रारंभिक शिक्षा उपरांत हायर सेकेण्डरी परीक्षा वर्ष 1970 में उ.प्र. बोर्ड इलाहाबाद से उत्तीर्ण की थी तदोपरांत माननीय न्यायमूर्ति द्वारा बीएससी की परीक्षा 1972 में शासकीय कॉलेज भिण्ड से एवं एल.एल.बी. की परीक्षा वर्ष 1975 में महारानी लक्ष्मीबाई कला एवं वाणिज्य महाविद्यालय ग्वालियर से प्रथम श्रेणी छात्र के रूप में जीवाजी विश्वविद्यालय मेरिट लिस्ट के अनुसार

पांचवी रैंक के आधार पर उत्तीर्ण की थी।

माननीय न्यायमूर्ति द्वारा कर्मयोगी पुरूष की भांति न्यायदान में सहयोग का संकल्प लेते हुए एल.एल.एम. की परीक्षा वर्ष 1979 में उत्तीर्ण की थी। एल.एल.एम. की परीक्षा अवधि में उन्हें छात्रवृत्ति भी प्रदान की गई थी और एल.एल.एम. की परीक्षा उपरांत उनकी नियुक्ति दिनांक 23 अगस्त 1979 को व्यवहार न्यायाधीश वर्ग 2 के रूप में हुई।

माननीय न्यायमूर्ति के न्यायिक सेवा के दौरान आपको दिनांक 25.11.1985 को व्यवहार न्यायाधीश वर्ग 1 एवं अतिरिक्त मुख्य न्यायिक मजिस्ट्रेट के रूप में दिनांक 20.10.1989 को एवं दिनांक 12.10.1991 को अतिरिक्त जिला एवं सत्र न्यायाधीश के रूप में नियुक्त किया गया। न्यायिक सेवा के दौरान आपको शनैः शनैः दिये गये सभी दायित्वों का आपके द्वारा सफलतापूर्वक निर्वाहन किया गया।

आपके न्यायिक सेवा के दौरान अतिरिक्त रजिस्ट्रार माननीय उच्च न्यायालय जबलपुर एवं जिला एवं सत्र न्यायाधीश सागर के पद पर रहते हुए माननीय मुख्य न्यायधिपति द्वारा मप्र विधिक सेवा प्राधिकरण का सदस्य भी नियुक्त किया गया।

माननीय न्यायमूर्ति को दिनांक 08.05.1999 को सिलेक्शन ग्रेड एवं दिनांक 26.02.2006 को सुपर टाईम स्केल प्रदान करते हुए जुलाई 2008 में जिला एवं सत्र न्यायाधीश जबलपुर के पद पर पदस्थ किया गया।

माननीय न्यायमूर्ति की छवि व विधि विज्ञान के आधार पर दिनांक 03.05.2010 को मप्र उच्च न्यायालय में अतिरिक्त न्यायमूर्ति के रूप में नियुक्त करते हुए स्थाई न्यायमूर्ति के रूप में दिनांक 24.11.2011 को शपथ दिलाई गई।

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

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

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

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

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

फूलों का आफताब हो आपकी जिंदगी, खुशियों का सरताज हो आपकी जिंदगी।
झलक उठें आसमान तक, ऐसा सुंदर साझ हो आपकी जिंदगी।।

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**Shri K.B. Chaturvedi, Senior Advocate Gwalior, bids farewell:-**

We have assembled here at the farewell ovation of Hon'ble Justice Shri B.K. Dube who is demitting the office on 19th January 2014 after a distinguished career as a Judge of the M.P. High Court. Your Lordship was born on 20th January, 1952 at Village Nakau District Mainpuri (U.P,). Having passed higher secondary examination in 1970, from Allahabad, graduated in Science-subject, in the year 1972 from Government College, Bhind.

Your Lordship obtained L.L.B Degree from MLB College, Gwalior with first division and got 5th rank in Jiwaji University, Gwalior. He passed L.L.M., in the year 1979 from MLB College, Gwalior.

Your Lordship joined Judicial Service as Civil Judge, Class II on 23.08.1979 promoted as Civil Judge Class-I in November, 1985 then posted as Chief Judicial Magistrate on 20th October, 1989 and promoted Additional District Judge on 12.10.1991.

Your Lordship worked as Additional Registrar High Court of M.P. at Jabalpur. Then posted as District & Session Judge, Sagar in September, 2003.

Your Lordship nominated by the State Government in consultation with Hon'ble Chief Justice as Member of the M.P. State Legal Services Authority.

Your Lordship worked as District & Session Judge, Jabalpur from July 2008 till elevation.

Your Lordship elevated as Additional Judge of the High Court of M.P. on 3rd May 2010 and posted at Gwalior and sworn as permanent Judge on 24th September, 2011.

We all have seen him very closely and found in him a very gentle soul and a good human being, always ready to help the right litigant. Nobody has ever suffered any adverse treatment in his court.

I personally feel that your lordship tenure as a Judge, will always be remembered. I also think that a person in legal profession never retires. He only changes the vocation and your lordship will also continue to provide guidance to the legal fraternity which may result in bringing up perfect judicial system.

समय, सत्ता, सम्पत्ति और शरीर साथ सदा नहीं देते पर, स्वभाव, समझदारी, सत्संग और सच्चे संबंध सदा साथ देते हैं।

I my self & on behalf of. Senior Advocates & members of the Bar convey our good wishes to Hon'ble Justice Shri BK. Dube & his family & pray to God to give him good health & prosperity in future life.

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**Farewell speech delivered by Hon'ble Mr. Justice Brij Kishore Dube:-**

GOOD AFTERNOON TO EVERY BODY

I am extremely grateful to the Administrative Judge and other speakers for their good and nice words spoken about me ignoring so many shortcomings and failures of mine.

Lord Denning had said that when a Judge sits in Court he himself is on trial. I have tried my level best to perform the duty with utmost devotion, harmony and determination.

I have completed more than 35 years in this service as a Judge and going to demit the office on 19th January, 2014 which is the end of my innings as a Judge. The date of retirement is fixed with the joining of the initial service.

I am very happy to feel that I have completed the tenure satisfactorily without any interruption and displeasure at any moment by the blessings of the Almighty God and my parents.

I am very much satisfied with my life and I have fully enjoyed my service life peacefully with harmony.

A farewell address runs the risk of being reduced to a mere bundle of uninteresting thank you cards for the listeners. But, I have to take the risk, even if it may appear to be unnecessary for the others.

Firstly. I am grateful to the Almighty God who gave me the strength, courage and wisdom to perform the responsibility of administering the justice. I am here only because of His blessings.

I remember with gratitude Shri Justice A.K.Patnaik, the then Chief Justice presently, sitting Judge of the Apex Court and the Members of the Collegium, Shri Justice R.S.Garg, Former Chief Justice, Guwahati High Court and Shri Justice Dipak Misra, presently sitting Judge of the Apex Court who found me suitable for elevation to the Bench.

I am very grateful to Justice S.R. Alam, the then Chief Justice, Justice Sushil Harkauli, the then Acting Chief Justice, Justice S.A. Bobde the then Chief Justice, presently sitting Judge of the Apex Court, Justice K.K.Lahoti, the then Acting Chief Justice and now Administrative Judge and Chief Justice Shri A.M. Khanwilkar, Chief Justice who always been very kind and supporting me.

At the same time, I am also grateful to the Senior Judge Justice Arun Mishra, presently Chief Justice, High Court of West Bengal. Justice S.L.Kochhar,

Justice A.K.Shrivastava, Justice N.K.Mody, Justice U.C.Maheshwari, Justice S.K.Gangele, Justice A.M.Naik, Justice Jitendra Kumar Maheshwari, Justice S.N.Aggarwal, Justice Mool Chand Garg and also to my younger Brother Judges Justice A.K.Sharma, Justice G.D.Saxena, Justice Sheel Nagu, Justice Sujoy Paul, Justice B.D.Rathi, Justice M.K.Mudgal and Justice Rohit Arya. I learnt a lot and enriched my knowledge while sitting with these Hon'ble Judges in Division Bench of this Court.

I do remember, when a Saint known as Fakkad Baba proclaimed a forecast to my Naniji late Smt. Renuka Mishra, just before my birth, utterly unbelievable at that time as my family was ordinary middle class, that the boy being born become a big person in future. By the blessings of God, my Naniji and parents I have achieved the goal proclaimed by the Saint Fakkad Baba.

The administration of justice is a co-operative effort between the judges and the lawyers. I am lucky enough to receive the full cooperation of the lawyers and learnt a lot at all my places of posting including Gwalior.

The existing advocates of Gwalior are men of tremendous character, intellectual and laborious. The arguments of the senior members of the Bar enlightened and helped me to reach a well reasoned orders.

I am thankful to the then Principal Registrar, Shri B.D.Rathi, presently Judge of this Court, Shri Avadesh Shrivastava, the then Principal Registrar, Shri J.P.Gupta, Principal Registrar, the then Registrar Shri M.K.Sharma, presently Additional District Judge, Jabalpur, Shri P.C.Mishra, Registrar and Shri V.B.Singh, presently PPS to the Chief Justice for providing help in day to day functioning of the office and providing help in day to day functioning of the office and personal life as well.

I would like to record my appreciation for the day to day assistance provided by the Protocol Section, more particularly by Shri Abhishek Bhargava, Shri Harendra Savita and Shri Bhushan Telang.

I would like to thank the Accountant Shri Nishikant Rashinkar for giving full cooperation and also other members of the Registry including Class IV staff who have equally assisted me.

I feel obliged to Dr. R.K.Chaturvedi and Dr. R.K.Sharma who not only assisted medically but also took extra pains in looking after our health.

I cannot forget the love, affection and assistance given by the members of my personal staff, Private Secretary Shri M.V.R.Balaji Sarma, a person of great dignity, integrity and competence, Personal Assistant Shri Ashish Pawar, Stenographer Shri Ranjeet Ahirwal, Reader Shri Sunil Moghe, Law Assistant Ms. Preeti Chauhan

and Jamadar Jaswant Singh. I have, right through in my career, been fortunate to have a disciplined and committed team of staff to work with.

Similarly, I cannot forget the assistance and security given by P.S.Os., Shri Anand Sharma and Shri Virendra Singh Bhadoriya and also the class IV staff posted at my residence who have worked very much sincerely with me. I cannot but specially mention the affectionate and disciplined services of my driver Shri Chhote Singh. I will miss all of them.

I shall always be indebted to my Naniji and parents as what I am today is due to their prayers and blessings.

I express my heartfelt gratitude to my wife Smt. Mamta Dube for cooperative with me in every walk of my life. She offered to me all that can be legitimately expected from a Judge's wife, to make my long stint as a Judge happy and contended. I have done little to reciprocate. I shall try to make amends to her during the last phase of my life.

I am also extremely grateful to my son Manas, daughter, Kanchan, daughter-in-law, Divya and son-in-law Mridul as they all gave me moral support and cooperation in discharging my duties nicely with full dedication. My wife and children never put any undue demands and they are always satisfied what ever I have provided to them. My son could not and did not choose to practice in this High Court. He made the sacrifice only to enable me to occupy the crease as a Judge of this Court.

I am also thankful to all the officials and the judges of the subordinate judiciary associated with me for their co-operation in achieving the greater result of performing the functions of the office.

I express my heartfelt gratitude to all the persons known or unknown to me, members of the Bar and Law Officers for extending their highest cooperation during my tenure as Judge without which I could not have been able to conveniently perform all the duties as expected to be performed.

I am also grateful to my sisters, brothers-in-laws, friends, well-wishers, relatives, guests and those who have bestowed their affection and blessing at all times to me and assembled here to witness the occasion.

If I hurt anyone at any time, I do hope that they will forgive me.

Wishing you all the best.

I conclude by thanks to you all once again.

JAI HIND.

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*Short Note*

**(3) (DB)*

***Before Mr. Justice Shantanu Kemkar and Mr. Justice J.K. Maheshwari***

*W.P. No. 11281/2012 (Indore) decided on 20 March, 2013*

ISLAMUDDIN @ CHHOTIYA ... Petitioner

Vs.

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

***National Security Act (65 of 1980), Sections 3(2), (5) & Constitution, Article 21 - Prevention detention*** - **Non-compliance of provisions by Detaining Authority and procedural illegalities - Approval of detention reported by State Government to Central Government beyond prescribed period of 7 days - Ground of detention and necessary particulars not reported to Central Government - It violates provisions of Section 3(5) of National Security Act which are mandatory - Detention order and its confirmation set aside.**

*राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धाराऐं 3(2),(5) व संविधान, अनुच्छेद 21 – निवारक निरोध* – निरोध प्राधिकारी द्वारा उपबंधों का अनुपालन एवं प्रक्रियात्मक अवैधताऐं – राज्य सरकार द्वारा केन्द्र सरकार को निरोध का अनुमोदन 7 दिनों की विहित अवधि बीत जाने के बाद रिपोर्ट किया गया – निरोध का आधार तथा आवश्यक विशिष्टियां केन्द्र सरकार को रिपोर्ट नहीं की गई – यह राष्ट्रीय सुरक्षा अधिनियम की धारा 3(5) के उपबंधों का उल्लंघन करता है जो आज्ञापक है – निरोध आदेश एवं उसकी संपुष्टि अपास्त।

**The order of the Court was delivered by: SHANTANU KEMKAR, J.**

**Cases referred :**

(2011) 2 SCC (Cri) 596=(2011) 5 SCC 244.

*Sanjay Sharma*, for the petitioner.

*Bhuwan Deshmukh*, G.A. for the respondents.

*Short Note*

**(4)*

*Before Mr. Justice N.K. Mody*

M.A. No. 1822/2008 (Indore) decided on 21 March, 2013

NEW INDIA ASSURANCE CO. LTD. ... Appellant

Vs.

SMT. SHOBHA SHARMA & ors. ... Respondents

***Motor Vehicles Act (59 of 1988), Sections 149 & 147 - Compensation* - Liability of Insurance Company to pay - Policy was cancelled before accident for dishonour of cheque issued towards premium - Intimation to owner about cancellation of insurance policy not proved - Insurance company liable to pay compensation - It may recover amount from owner and driver of vehicle.**

*मोटर यान अधिनियम (1988 का 59), धाराऐं 149 व 147 – प्रतिकर* – भुगतान करने का बीमा कम्पनी का दायित्व – प्रीमियम के लिये जारी किये गये चैक अनादृत होने से, दुर्घटना से पूर्व पॉलिसी निरस्त की गई थी – बीमा पॉलिसी के रद्दकरण के बारे में स्वामी को सूचित किया जाना साबित नहीं – बीमा कम्पनी प्रतिकर अदा करने के लिये दायी – वह, वाहन के स्वामी तथा वाहन चालक से रकम की वसूली कर सकती है।

***Cases referred :***

2008 ACJ 581, 1998 ACJ 123, 2000 ACJ 630.

*S.V. Dandwate*, for the appellant.

*G.K. Neema*, for the respondents No. 1 to 4.

**I.L.R. [2014] M.P., 287**
**WRIT PETITION**
***Before Mr. Justice J.K. Maheshwari***
W.P. No. 2293/2001 (Indore) decided on 16 August, 2011

BHAGWANDAS ...Petitioner
Vs.
INDORE MUNICIPAL CORPORATION & anr. ...Respondents

***Municipal Corporation Act, M.P. (23 of 1956), Sections 132, 433 & Nagar Palika (Bhawno/Bhumiyo Ke Varshik Bhada Mulya Ka Avdharan) Niyam, M.P. 1997*** **- Imposition of service tax by corporation, by resolution and demand thereof - Held - Various clauses of Section 132 empowers corporation to impose service tax by resolution - Corporation is within its competence - Recovery of the same is in accordance with law - No case for interference. (Para 15)**

*नगरपालिक निगम अधिनियम, म.प्र. (1956 का 23), धाराऐं 132, 433 व नगर पालिका (भवनों/भूमियों के वार्षिक भाड़ा मूल्य का अवधारण), नियम म.प्र. 1997* – निगम द्वारा संकल्प पारित कर सेवा कर का अधिरोपण तथा उसकी मांग – अभिनिर्धारित – धारा 132 के विभिन्न खंड निगम को संकल्प द्वारा सेवा कर अधिरोपित करने के लिये शक्ति प्रदान करते हैं – निगम अपनी सक्षमता के भीतर है – उक्त की वसूली विधिनुसार है – हस्तक्षेप का प्रकरण नहीं।

**Cases referred :**

AIR 1992 SC 2038, (2002) 6 SCC 227, AIR 1971 SC 517, 1982 JLJ 409.

*V.K. Jain & Sumit Mittal*, for the petitioner.
*Shekhar Bhargava* with *Romesh Dave*, for the respondents.

**ORDER**

**J.K. Maheshwari, J.:** Invoking the jurisdiction under Article 226 of the Constitution and challenging the resolution (Annexure P/1) the bill of recovery (Annexure P/2) issued by the Municipal Corporation, Indore, the petitioner has filed this petition.

2. It is said that petitioner is the tenant of Shop No.8, Purana M.T.H. Compound, Indore on a monthly rent of Rs.125/-. The respondent No.1-Corporation is the owner thereof. However the petitioner is having a lease

hold right in the said property. As per Section 132 of the M.P. Municipal Corporation Act, 1956 (hereinafter referred to as 'the Act'), the respondent No.1 is entitled to impose and recover the tax only against the owner of the property and no tax can be imposed on a person having a lease hold right and to recover it. It is further said that in exercise of the power under Section 433 read with Section 138 of the Act, the Rules were framed which were known as Madhya Pradesh Nagar Palika (Bhawno/ Bhumiyo Ke Varshik Bhada Mulya Ka Avdharan) Niyam, 1997 (in short 'the Rules '). As per the said rules, the Corporation is bound to divide the municipal area in zones and by passing a resolution the rate to determine the annual letting value of the properties may be fixed. As per the Rules, the respondent-corporation passed resolution No.338 dated 11.12.1997, determining the property tax and also resolved for imposition of service tax. It is urged that the imposition of the tax by the said resolution and to make demand is not in conformity to the provisions of the Act and the Rules made thereunder, therefore such resolution may be set aside and the demand as made may also be quashed.

3. The respondent-Corporation by filing their return stated that the petition as filed by the petitioner is entirely on wrong and incorrect basis, treating service tax/fee as a property tax. It is said that the property tax on a property owned by Corporation is not leviable, however as per Section 132 (1) (c) (d) and (e) of the Act, the taxes for the services rendered in general may be leviable. If the Corporation by the said resolution fix the tax considering the notification issued by the State Government in the Gazette of State of M.P. dated 9th May, 1997 (Annexure R/2) and the letter issued (Annexure R/3) and directed such recovery, it cannot be said to be illegal. In fact, it is within the competence of the Corporation to impose such taxes and in view of the language of clause (10) of the lease deed (Annexure R/4), the petitioner is bound to pay such an amount without raising any objection on the said issue. In view of the foregoing, it is urged that the resolution (Annexure P/1) and the demand (Annexure P/2) has rightly been made by the respondent-Corporation.

4. By filing the rejoinder, it is said that the documents filed after filing of the return cannot be taken on record and to take coercive measure in furtherance to the resolution (Annexure P/1) is not in conformity to law and the action of the respondent-Corporation is illegal and arbitrary.

5. Shri V.K.Jain, learned counsel appearing on behalf of the petitioner contends that the resolution (Annexure P/1) was passed in view of the

amendment made under Section 138 of the Act for determination of the annual letting value of land or building by self-assessment after framing the Rules of 1997. Bare reading of the resolution, it is apparent that it is in furtherance to the rules for imposition of the property tax. In the said resolution the Corporation is not required to resolve for the imposition and recovery of service tax. It is contended that the service tax imposed under Section 132 of the Act may not be recoverable from the tenant. It is also contended that as per clause (4) (Sa) (3) of the resolution, a fixed rate for recovery of the service tax has been specified irrespective to the area and location of the leased shop, however fixing such a flat rate is unreasonable and not rational, therefore the recovery thereto cannot be made by issuing the bill (Annexure P/2). Lastly it is contended that the notification as issued by the State Government does not prescribe the maximum rate of tax for sanitation, lighting and fire taxes, however ignoring the minimum amount, recovery of service tax by the the Corporation @ Rs.500/- is unreasonable. Therefore the resolution as passed is in violation of Section 132(5) (a) of the Act. In support of his contention, reliance has been placed on the Judgment of the Apex Court in the case of *Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others,* AIR 1992 SC 2038 and *Hansraj & Sons Vs. State of Jammu & Kashmir and others* , (2002) 6 SCC 227 and contended that the taxing statute should be construed strictly and unless and until the delegated authority having the express power to that effect which are necessary, it cannot be implemented. Placing further reliance on the judgment of the Apex Court in the case of *B.C. Banerjee Vs. State of M.P.* , AIR 1971 SC 517 it is urged that unless and until the rule or regulation specifies the imposition of the tax, it cannot be imposed by the Corporation. In that view of the matter, it is submitted that by passing joint resolution for imposition and recovery of property tax and the general sanitation, fire and lighting taxes is not in coformity to the principle of law laid down in the aforesaid cases.

6. Per contra Shri Shekhar Bhargava, learned senior counsel contends that Section 132 of the Act empowers the Corporation to impose the property tax as well as other taxes subject to general or special order which the State Government may make in this behalf. Clause (a) of sub-section (1) of Section 132 specifies the imposition of the tax upon the building or land owner and payable by the owner subject to provisions of Section 135, 136 and 138. While the taxes as specified under clause (c) (d) and (e) of sub-section (1) of Section 132 are related to the sanitary cess, for the construction and

maintenance of public latrines and for removal and disposal of refuse and general cleanliness of the city, general lighting tax, where the lighting of public streets and places is undertaken by the corporation and general fire tax for the conduct and management of the fire service and for the protection of the life and property in the case of fire. The legislation while specifying the imposition of the said taxes not specified that such recovery may be made only against owner, however such imposition and recovery may be made against the users. It is also contended as per clause (a) of sub-section (5) of Section 132, it is apparent that the taxes under clause (c) (d) and (e) of sub-section (1) of Section 132 shall be levied at a consolidate rate on buildings and lands which are exempted from the property tax at a rate determined by the corporation subject to a minimum and maximum rate as may be prescribed by the State Government. Having competence of the aforesaid powers and subject to the rate as prescribed by the State Government by issuing a notification (Annexure R/2), the consolidated amount has been fixed by the said resolution imposing the tax and directed for recovery, however the said resolution cannot be said to be illegal as the Corporation is having competence to impose such taxes.

7. In reply to the argument of passing a joint resolution (Annexure P/1), it is contended that the Municipal Corporation is well within the competence under Section 133 of the Act to pass a consolidated resolution for imposition of the tax and fees as specified under the Act, however if a consolidated resolution of property tax and other taxes has been passed, it cannot be said to be in excess to the jurisdiction or illegal. In alternative it is submitted by him that in any case if this Court comes to the conclusion that if the resolution (Annexure R/1) ought to be passed for a specific purpose and the Corporation is having the competence to impose the tax then it may amounting to irregularity and may be crept out by passing a separate resolution but it cannot be termed as illegal to make the action of the Corporation as without jurisdiction or *void ab initio*. On the point of not fixing the maximum rate by the State Government by the notification (Annexure R/2), placing reliance on a Division Bench decision of this Court in the case of *M.T. Cloth Market Marchants Asso. Vs. Municipal Corporation, Indore,* 1982 JLJ 409, it is contended that once the Corporation is having power to impose such tax, and the limit has not been specified it would not oust the power of the Corporation to impose the tax; in view of the foregoing it is urged that the resolution (Annexure P/1) has rightly been passed imposing the service tax by fixed rate and the notice of demand (Annexure P/2) has rightly been issued.

8. After having heard learned counsel appearing on behalf of the parties, to appreciate the rival contentions, the basic relevant provisions of Section 132 and 133 are required to be reproduced hereunder :-

> **"132. Taxes to be imposed under this Act.-** (1) For the purpose of this Act, the Corporation shall, subject to any general or special order which the State Government may make in this behalf, impose in the whole or in any part of the Municipal Area, the following taxes, namely:-
>
> (a) a tax payable by the owners or building or lands situated within the city with reference to the gross annual letting value of the buildings or lands, called the property tax, subject to the provisions of Section 135, 136 and 138.
>
> (b) a water tax, in respect of lands and buildings to which a water supply is furnished from or which are connected by means of pipe with municipal water works.
>
> (c) a general sanitary cess, for the construction and maintenance of public latrines and for removal and disposal of refuse and general cleanliness of the city.
>
> (d) a general lighting tax, where the lighting of public streets and places is undertaken by the corporation.—
>
> (e) a general fire tax, for the conduct and management of the fire service and for the protection of life and property in the case of fire.
>
> (f) a local body tax on the entry of such goods as may be declared by the State Government by notification in the Official Gazette into the municipal area for consumption, use or sale therein at a rate not exceeding four percent of the value of goods:
>
> Provided that no local body tax shall be levied on the goods:-
>
> (i) xxx xxx xxxx
>
> (ii) xxx xxx xxx--

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(iii) xxx xxx xxx

(2) Notwithstanding anything contained in clause (f) of sub-section (1) if in the opinion of the State Government it is expedient to do so, it may delegate the power to the Corporation to declare the goods on which local body tax shall be levied and the rates thereof.

(3) The mode of assessment and collection of the local body tax shall be such as may be prescribed.

(4) The water tax under clause (b) of sub-section (1) shall be charged --

(a) on buildings and lands which are exempted from property tax, at a rate as shall be determined by the Corporation, subject to a minimum rate as may be prescribed by the State Government.

(b) on buildings and lands which are not exempted from property tax, at a minimum rate as determined in clause (a) plus such percentage of the property tax, as shall be determined by the Corporation:

[Provided that the water tax under clause (b) of sub-section (1), shall not be levied on building and land owned by freedom fighters during their life time, if they are exempted from Income Tax and the water connection is for domestic purpose and which does not exceed half inch connection.]

(5) The taxes under clauses (c), (d) and (e) of subsection (1) shall be levied at a consolidated rate as under:-

(a) on buildings and lands which are exempted from property tax at a rate as determined by the corporation subject to a minimum and maximum rate as may be prescribed by the State Government.

(b) on buildings and lands which are not exempted from property tax at a minimum rate prescribed under clause (a) plus such percentage of the property tax as may be determined by the Corporation."

"[133. **Imposition of Taxes and Fees.-** (1) The Corporation may, by a resolution, at the time of final adoption of the budget estimates for the next financial year, subject to the provisions of this Act and subject to such limitations and conditions, as may be prescribed by the State Government in this behalf --

(a) impose any of the taxes or fees specified in this Act; or

(b) increase the rates of taxes or fees already imposed.

(2) The resolution as referred to in sub-section (1) shall contain

(a) in case of imposition of any tax or fees, the provisions under which such tax or fee is being imposed, class of persons or description of property to be taxed, the amount or rate of tax or fee being imposed, system of assessment and collection to be adopted and the date from which imposition of such tax or fee shall take effect;

(b) in case of increase of rate of any tax or fee, the prevailing rate of such tax or fee, the proposed increased rate of such tax or fee and the date from which increase of rate of such tax or fee shall take effect.

(3) The resolution, as passed, shall be conclusive evidence of the imposition of a new tax or fee, or increase of rate of any tax or fee, as the case may be:

Provided that if the Corporation decides to have supplementary taxation during the financial year, it may do so from such date as the Corporation may resolve, subject to the provisions of this Act and subject to such limitation and conditions, as may be prescribed by the State Government in this behalf.

(4) Nothing contained in this Section shall apply to tax mentioned in clause (a) of sub-section (1) of Section 132, which shall be charged and levied in accordance with Section 135].

9. On reading of the aforesaid, it is apparent that under the Act, the Corporation is empowered to impose various taxes subject to general or special order of the State Government. Clause (a) of sub-section (1) of Section 132 specifies that the owner is liable to pay a tax on a building or land situated within the city with reference to gross annual letting value and it shall be called as a property tax subject to provisions of Section 135, 136 and 138 of the Act. Section 135 of the Act specifies the rate of property tax which may be in between six percent to ten percent of the annual letting value as determined by the Corporation for each financial year. Section 136 relates to exemptions of the property tax leviable under Section 135 of the Act, whereby the buildings and lands owned by or vested in the Union Government, the State Government and the Corporation are exempted from payment of property tax. Section 138 relates to annual letting value of land of building.

10. As per Section 133 of the Act, it is apparent that the Corporation by a resolution at the time of final adoption of the budget estimates for the next financial year, subject to the provisions of the Act and subject to such limitations and conditions, as may be prescribed by the Government may impose any tax or fee specified and increase the rate of tax or fee already imposed. Sub-section (2) of Section 133 of the Act makes it clear that when the resolution is passed then the way of assessment, collection and the date from which the imposition is required to be specified and in case of increase the rate of tax or fee from the prevalent rate and from which date the increased rate shall be given effect to is also specified. It has further been made clear in sub-section (4) that this Section shall not apply to the taxes as specified under clause (a) of sub-section (1) of Section 132 of the Act as it be charged and levied in accordance with Section 135. Section 138 of the Act specifies the annual letting value of land of building. Section 138 has been replaced by the Act 18 of 1997, thereafter by Act 29 in the year 2003, clause (a) of sub-section (1) of Section 132 has been replaced. In the year 1997, the rules have been framed which are known as the Rules of 1997. As per the said rules, the Corporation is bound to divide the area of the city within various zones for the purposes of determination of the letting value of the land of property situated. Thereafter, by passing a resolution the Corporation may fix the rate thereof for the purposes of self-assessment. Accordingly, as per Section 138, the

self-assessment form is required to be submitted by the owner. The imposition of the said tax and recovery thereof is as per clause (a) of sub-section (1) of Section 132 of the Act. Clause (b), (c), (d), (e) and (f) of sub-section (1) of Section 132 of the Act empowers the Corporation for imposition of water tax, general sanitary cess, general lighting tax, general fire tax and the local body tax on the entry of goods. Bare reading of the language of the aforesaid provisions, the legislative intent is clear whereby the imposition and recovery of such taxes is not akin to the provisions of clause (a) of sub-section (1) of Section 132 of the Act, taxes payable by the owners of building or lands.

11. In context of the aforesaid legal position, in the facts of the present case, it is to be determined that the imposition of the service tax by passing the resolution (Annexure P/1) and demand made vide Annexure P/2 is illegal or not. Bare reading of the resolution (Annexure P/1), reveals that the Standing Committee passed the resolution No.865 with respect to self-assessment of the property tax which was taken into consideration. Referring the Gazette of the State Government of Madhya Pradesh dated 21st April, 1997 making an amendment in the provisions of the Act for the year 1997 and 1998, the tax over the properties were determined in clause 4(aa) (ba). In clause 4 (sa) it is referred that with respect to the properties owned and vested in Central Government, State Government and the Corporation, the service tax may be leviable. While dealing the issue of imposition of service tax with respect to the properties of the Corporation, it is said that in the main market area if a shop is situated the service tax at the rate of Rs.500/- per annum and to the shop situated in other areas, it shall be Rs.250/- per annum while for Ghumtis the service tax of Rs.100/- annum shall be payable.

12. As per Section 132 of the Act, various taxes can be imposed by the Corporation out of which property tax is payable by the owners or (sic:of) building or lands as specified under clause (a) of sub-section (1) of Section 132 of the Act. While giving power for imposition and recovery of other taxes like water tax, general sanitary cess, general lighting tax, general fire tax as specified under clause (b), (c) (d) and (e) of sub-section (1) of Section 132 of the Act, it has not been specified that it be payable by whom or recoverable from the owners of building or lands. The general sanitary cess, general lighting tax, general fire tax are the taxes for the services rendered by the Corporation in general to the users or by citizens and not to the owners of building or lands. The general sanitary cess is for the construction and maintenance of public latrines and for removal and disposal of refuse and general cleanliness

of the city and the general lighting tax is where lighting of public streets and places is undertaken by the Corporation. The fire tax is for the conduct and management of fire service and for the protection of life and property in case of fire. Thus it is apparent that the aforesaid taxes may be imposed for the services rendered by the Corporation. Sub-section (4) of Section 132 makes it clear that the water tax may be imposed on buildings and lands even which are exempted from property tax, but it is not relevant in the facts of the present case. But, the intention of legislation for imposition of the similar tax like sanitary cess, general lighting tax and fire tax may be gathered in such cases. Sub-section (5) further makes it clear that the taxes under clause (c) (d) and (e) of sub-section (1) of Section 132 shall be levied at the consolidated rate as determined by the Corporation subject to minimum and maximum rate as may be prescribed by the State Government. Thus, it is clear that the imposition of these three taxes is well within the competence of the Corporation and may be imposed for the general services provided by the Corporation to the users and citizens as determined subject to minimum and maximum rate as prescribed by the State Government. In the present case, it is not in dispute that the petitioner is a lessee of the Corporation of a shop No.8, Purana M.T.H. Compound, Indore owned by the Corporation, however the said property is exempted from payment of the property tax which may be levied as per clause (a) sub-section (1) of Section 132 of the Act.

13. In the present case, the State Government by issuing a notification Annexure R/2 on 9th May, 1997 specified the minimum rate of general sanitation tax, general lighting tax and general fire tax @ Rs.180/- per annum but the maximum has not been specified thereunder. Thus by reading sub-section (5) of Section 132, it is clear that the determination of taxes as specified under clause (c) (d) and (e) of sub-section (1) of Section 132 shall be made by the Corporation but if the minimum and maximum rate is prescribed by the State Government, it shall be in accordance with the same. In the present case, the State Government while issuing the notification (Annexure R/2) has not prescribed any maximum limit but the minimum is prescribed, however determination, if any, made by the Corporation fixing the service tax @ Rs.500/- per annum, cannot be said to be illegal as the Corporation is competent to determine it. If the maximum has not been prescribed in the notification, it would not oust the power of the Corporation to fix the limit more than the minimum as prescribed by the State Government. The said view fortifies from the view taken by the Division Bench judgment of this Court in the case of M.T. Cloth Market Marchants Asso. (supra). It is clear that the service

tax may be imposed on the building and the land which are exempted from payment of the property tax as per Section 136 of the Act. Thus bare reading of clause (c) (d) and (e) of sub-section (1) of Section 132, it does not reveal that the imposition of the said tax is only recoverable from the owner and not from the lessee. However, the argument as advanced by Shri Jain, learned counsel for the petitioner that the imposition and recovery of such tax cannot be made against the petitioner who is the lessee of a shop owned by the Corporation is hereby repelled.

14. In the present case the lease deed (Annexure R/4) as executed by the petitioner in favour of the Corporation is also available on record. As per clause (10) of the lease deed it is clear that the further tax, if any, payable time to time shall be paid by the lessee. Both the said clauses relate to the taxation, if any, imposed by the statute time to time, which will not make immune the lessee from payment of the general taxes to the services utilized by him while occupying the tenanted shop of the Corporation. The taxes as specified under clause (b) (c) and (d) of sub-section (1) of Section 132 is for the use of public latrines and for removal and disposal of refuse and general cleanliness of the city and also lighting on public streets and the places, and fire safety undertaken by the Corporation for the well being of life. Therefore, the imposition of the said tax by the Corporation may be recoverable even from a lessee or a tenant utilizing the said facilities which may fall within the purview of services utilized by him. Thus the argument as advanced on the said issue by Mr. Jain is also of no substance.

15. On going through the resolution (Annexure P/1), it reveals that as per the amendment under Section 138 of the Act and the Rules of 1997 as framed, the resolution of the Standing Committee had taken into consideration. The Corporation has decided the imposition of the property tax by way of self-assessment as per the Rules of 1997. Simultaneously the taxes as specified under clause (b) (c) (d) and (e) of sub-section (1) of Section 132 of the Act has also been imposed. Thus, the challenge made in this petition that the joint resolution may not be possible, in the opinion of this Court, such challenge is wholly untenable in view of the discussions made herein above. It is to be observed here that once the Corporation is having competence for imposition and recovery of various taxes specified in various clauses of Section 132 of the Act then by passing a common resolution would not make it illegal or irregular. Thus while passing the resolution (Annxure P/1) to determine the property tax against the owner of building or lands, the imposition of general sanitary cess, general lighting tax, general fire tax, if any, decided specifying the fixed amount as per the location of the shop

ignoring the size; it would not make such imposition and recovery irrational, unreasonable or arbitrary even against the lessee. In view of the foregoing discussions, the judgments as relied upon by Mr. Jain in the cases of *Ahmedabad Urban Development Authority* (supra), *Hansraj & Sons* (supra) and *B.C. Banerjee* (supra) are having no application because in those cases the authority was not competent or empowered under the Act or Regulation, however in the said context the Apex Court has expressed the view of strict compliance of the taxation statute. In view of the foregoing, I am of the considered opinion that the resolution for imposition of service tax as passed by the Corporation is within its competence and the recovery as directed is in accordance with law, however the interference by this Court in exercise of jurisdiction under Article 226 of the Constitution of India is not warranted.

16. In the result, the petition filed by the petitioner is devoid of any substance, hence it is dismissed. In the facts and circumstances of the case, the parties are directed to bear their own costs.

*Petition dismissed.*

**I.L.R. [2014] M.P., 298**
**WRIT PETITION**

***Before Mr. Justice Shantanu Kemkar & Mr. Justice Prakash Shrivastava***
W.P. No. 416/2005 (Indore) decided on 5 March, 2013

KAPIL STEELS LTD. ... Petitioner
Vs.
ASSISTANT COMMISSIONER OF COMMERCIAL TAX & ors. ...Respondents

***General Sales Tax Act, M.P. 1958 (2 of 1959), Section 12 - Denial of exemption from payment of entry tax under the notification No. A-3-9-95-ST-V(57) dated 5th July, 1995 for the period 01.04.1996 to 31.03.1997*** - **Held - Dealer is exempted from payment of sales tax under notification dated 23rd October, 1981 but the goods are not exempted - Liability to pay sales tax continued - Under the notification No. 55 dated 05.07.1995 said liability was reduced to 2% therefore, in terms of notification, petitioner was entitled to claim exemption from payment of entry tax on the goods in question on satisfaction of other conditions specified in notification. (Para 18)**

*साधारण विक्रय–कर अधिनियम, म.प्र. 1958 (1959 का 2), धारा 12 – 01.04.1996 से 31.03.1997 तक की अवधि हेतु अधिसूचना क्र. ए–3–9–95–एसटी–V (57) दिनांकित 5 जुलाई 1995 के अधीन प्रवेश कर के भुगतान से छूट नामंजूर की जाना* – अभिनिर्धारित – अधिसूचना दि. 23 अक्टूबर 1981 के अंतर्गत विक्रय कर के भुगतान से डीलर को छूट प्राप्त है किन्तु माल को छूट नहीं – विक्रय कर अदा करने का दायित्व जारी था – अधिसूचना क्र. 55 दि. 05.07.1995 के अंतर्गत उक्त दायित्व 2 प्रतिशत तक घटाया गया इसलिए, अधिसूचना की शर्तों नुसार, याची, अधिसूचना में विनिर्दिष्टत अन्य शर्तों की संतुष्टि होने पर प्रश्नगत माल पर प्रवेश कर के भुगतान से छूट का दावा करने का हकदार था।

**Cases referred :**

(1957) 8 STC 561, 2004 (137) STC 389, 1995 (96) STC 355, 1990 (77) STC 313, 1987 (67) STC 161, 1988 (69) STC 341 (Ker.), 1983 (52) STC 110.

*P.M. Choudhary,* for the petitioner.
*M. Raveendran,* Dy. G.A. for the respondents.

**ORDER**

The Order of the court was delivered by,
**PRAKASH SHRIVASTAVA, J.:** The petitioner is aggrieved with the denial of exemption from payment of entry tax under the Notification No. A-3-9-95-ST-V(57) dated 5th July 1995 for the period 1/4/1996 to 31/3/1997. The petitioner's case for grant of the said benefit has been rejected by the Revisional Authority by impugned order dated 12/1/2005 (Annexure P-15).

2/ In brief the petitioner's case is that it is engaged in various activities, including the manufacture and sell of re-rolled products in its rolling mill at Pithampur District Dhar. The petitioner manufactures various type of steel structures of iron and steel. The raw material used by the petitioner company falls in category (ii) of Section 14(iv) of the Central Sales Tax Act and the finished products manufactured by petitioner fall in category (v) of the said Section. On establishing the new industrial undertaking, the petitioner was granted exemption from payment of sales tax initially for a period of 5 years from 1/7/1991 to 30/6/1996 under the exemption notification dated 23/10/1981 and 29/6/1982. The exemption period under the Sales Tax was extended for 2 years i.e. up-to 30/6/1998 and the eligibility certificate was accordingly amended. Similar exemption was granted to the petitioner under the Entry

Tax Act (Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam,) for a period of 5 years from 21/6/1991 to 20/6/1996. Thereafter the petitioner became liable to pay entry tax for the period under consideration. The Assessing Authority had granted the benefit of exemption under the Sales Tax Act vide order dated 30/12/1999 but by another order passed on the same day, the Assessing Authority had levied the entry tax since the exemption period for the entry tax had expired on 20/6/1996. In revision the order of assessment was set aside and matter was remanded. The Fresh assessment was done vide order dated 13/2/2004, whereby the entry tax for the period in question was again levied. In the second round of litigation, the petitioner before the revisional authority had raised the issue that in view of Notification No. A-3-9-95-ST-V(57), dated 5/7/1995 (for short Notification No. 57, dated 5th July, 1995) and Notification No.A-3-9-95-ST-V(55), dated 5/7/1995 (for short Notification No. 55 dated 5th July 1995, the petitioner is not liable to pay any entry tax. The Revisional Authority has rejected the said contention. Being aggrieved with the same, the petitioner has filed the present writ petition.

3/ Learned counsel appearing for the petitioner submits that under the notification dated 23rd October, 1981, the petitioner is exempted from payment of sales tax as a dealer but the tax liability on the goods is not extinguished and under Notification No. 55, dated 5th July 1995, the rate of sales tax was reduced to 2% and therefore, under the Notification No. 57, dated 5th July, 1995, the petitioner became entitled for exemption from payment of entry tax for the period under consideration.

4/ Learned counsel for the respondent/State has submitted that since the petitioner was exempted from payment of sales tax by virtue of the notification dated 23rd October, 1981, therefore, no question of reduction of the rate of sales tax to 2% under Notification No. 55, dated 5th July 1995 arises in his case and since Notification No. 55, dated 5th July, 1995 is not attracted, therefore, the petitioner cannot be granted the benefit of Notification No. 57 dated 5th July, 1995 and the revisional authority has not committed any error in rejecting the petitioner's revision.

5/ We have heard learned counsel for the parties and have minutely perused the record of the case.

6/ Undisputedly, the petitioner has been granted the eligibility certificate

for exemption from payment of sales tax from 1/7/1995 to 30/6/1998 under the exemption notification No. A-3-41-81 (35) ST-V, dated 23rd October, 1981 which is a notification issued under Section 12 of M.P. General Sales Tax Act, 1958 granting exemption to certain class of dealers specified in the schedule to the notification on establishing the new industrial unit and on satisfying certain conditions. The relevant extract of the notification is reproduced as under:

> "[1] Notification No. A-3-41-81(35)-ST-V, dated 23rd Oct.1981 Notification exemption New Units.
>
> [In exercise of the powers conferred by Section 12 of the Madhya Pradesh General Sales Tax Act, 1958 (No.2 of 1959), the State Government hereby exempts the class of dealers specified in column (1) of the Schedule below who establish new industrial units for the manufacture of automobiles or agricultural machinery in any of the districts in Madhya Pradesh specified in Annexure I and commence commercial production before 6th May, 1994, or such dealers having taken any two of the following effective steps before the said date but have commenced commercial production on or after the said date, but before 1st April, 1995:
>
> (i) Possession of land has been taken;
>
> (ii) at least fifty percent of the expenditure on building as per project report has been incurred.
>
> (iii) firm orders of atleast fifty percent of the plant and machinery as per project report has been placed.
>
> from payment of tax under the said Act for the period specified in column"

The schedule to the notification provides for the restrictions and conditions subject to which the exemption is granted to the different categories of dealers and the periods for which exemption is granted.

7/ The case of the petitioner is that the aforesaid exemption has been granted to him as a dealer but by the said notification the liability to pay the sales tax on the goods produced by the petitioner is not extinguished, and

therefore, the notification No. 55, dated 5th July, 1995 applies by which the rate of tax on those goods is reduced to 2%. The relevant clause of the said notification is extracted as under:

**"[24] Notification No. A-3-9-95-St-V(55) dated 5th July, 1995**

Part/full exemption on various categories of Iron and Steel....

In exercise of the powers conferred by Section 17 of the Madhya Pradesh Vanijyik Kar Adhiniyam, 1994 (No.5 of 1995), the State Government hereby exempts the class of goods specified in column (2) of the Schedule below from payment of tax under the said Adhiniyam to the extent specified in column (3), for the period specified in column (4) subject to the restrictions and conditions specified in column (5) of the said Schedule:-

**SCHEDULE**

| S No. | Class of goods | Extent of exemption | Period | Restrictions and conditions subject to which exemption is granted. |
|---|---|---|---|---|
| (1) | (2) | (3) | (4) | (5) |
| 1. | ..... | | | |
| 2. | Iron and steel as specified in categories (iv), (v) and hoops and strips falling in category (vi) of clause (iv) of Section 14 of the Central Sales Tax Act, 1956 (No. 74 Of 1956). | Partly so as to reduce the rate of tax under Section 9 to [2%] | From 1st April, 1995 to [31st March, 1998] (both days inclusive) | When sold by a registered dealer who proves to the satisfaction of the assessing authority at the time of assessment that: (a) the goods were manufactured by him in his own steel rolling mill in Madhya Pradesh. (b) they were manufactured by him out of such goods belonging to categories |

(ii) and (xvi) of clause (iv) of Section 14 of the Central Sales Tax Act, 1956 that had been purchased in the circumstances in which no tax under Section 9 of the Madhya Pradesh Vanijyik Kar Adhiniyam 1994 was paid."

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8/ The further case of the petitioner is that since by the notification No. 55 dated 5th July, 1995, rate of sales tax on the goods produced by him is reduced to 2%, therefore, under Notification No. 57, dated 5th July, 1995, the petitioner is exempted from payment of entry tax. The relevant extract of notification No. 57, dated 5th July, 1995 is as under:

**"[43] Exemption on different categories of Iron & Steel**

Notification No. A-3-9-95-ST-V(57), dated 5th July,1995

In exercise of the powers conferred by Section 10 of the Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 (No. 52 of 1976), the State Government hereby exempts in whole from payment of entry tax under the said Adhiniyam, the class of goods specified in column (1) of the Schedule below, for the period specified in column (2) subject to the restrictions and conditions specified in column (3) of the said Schedule:-

**SCHEDULE**

| Class of goods | Period | Restrictions and conditions subject to which exemption is granted. |
|---|---|---|
| (1) | (2) | (3) |
| Iron and steel as | From 1st April, | When entered into a local area by a |

| | | |
|---|---|---|
| specified in categories (ii) and (xvi) of Section 14 of the Central Sales Tax Act, 1956 (No. 74 Of 1956). | as to 1995 to [31st March, 1998] (both days inclusive) | dealer liable to pay tax under the Commercial Tax Act for consumption or use as raw material in the manufacture of goods covered by categories (iv) and (v) and hoops and strips falling in category (vi) of clause (iv) of Section 14 of the Central Sales Tax Act, 1956 and such dealer proves to the satisfaction of the assessing authority at the time of assessment that the said goods had been purchased from a registered dealer at the reduced rate of tax of [2]% under item 4 of the Schedule to CTD Notification No. A-3-5-9-95-ST-V(55) dated 5th July, 1995 by issuing to the selling registered dealer a declaration in the form specified in the said notification, or the goods manufactured out of such raw material are liable to tax at the rate of [2]% on the sale under item No. 2 of the schedule to the CTD notification referred above." |

9/ In simple words, the petitioner case is that under the notification dated 23rd October 1981 he as a dealer is exempted from payment of sales tax but the goods are not exempted therefore, liability to pay the sales tax on the goods continued and the rate of sales tax on goods was reduced to 2% under the Notification No. 55, dated 5th July, 1995 and therefore, in terms of the notification No. 57, dated 5th July, 1995, the petitioner is entitled for exemption from payment of entry tax.

10/ The Supreme Court in the matter of *A.V. Fernandez Vs. The State of Kerala,* reported in (1957)(8) SC 561 has considered the distinction between the exemption from tax or rebate of tax as against the non liability or non-imposing of tax by observing as under:

> "The appellant, however, forgets that the three stages in the imposition of a tax which are laid down here predicate, in the

first instance, a declaration of liability as the starting point. If there is a liability to tax, imposed under the terms of the taxing statute, then follow the provisions in regard to the assessment of such liability. If there is no liability to tax there cannot be any assessment either. Sales or purchases in respect of which there is no liability to tax imposed by the statute cannot at all be included in the calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be ascertain without any reference whatever to the same.

There is a broad distinction between the provisions contained in the statute in regard to the exemptions of tax or refund or rebate of tax on the one hand and in regard to the non-liability to tax or non-imposition of tax on the other. In the former case, but for the provisions as regards the exemptions or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they *prima facie* liable to tax and the only thing which the dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. In the latter case, the sales or purchases are exempted from taxation altogether. The Legislature cannot enact a law imposing or authorising the imposition of a tax thereupon and they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed."

Present is a case where the petitioner is liable to pay sales tax and entry tax under the relevant statute but he has been granted exemption from payment of sales tax and dispute is about exemption from payment of entry tax.

11/ In the matter of *Associated Cement Companies Ltd. Vs. State of Bihar and Others,* reported in 2004 (137 STC 389, the Supreme Court has examined the meaning of phrase exemption and has held that the exigibility to tax is not the same thing as liability to tax. It has been held by the Supreme

Court as under:

> "18. The stand of the respondents appears to be that since there was no liability in respect of a portion of sales because of notification of the State Government S.O.No. 479 dated December 12,1995 as part of the Industrial Policy, 1995 granting exemption from payment of sales tax on production of extended industrial unit which under takes expansion of their capacity, no question of adjustment arises. To put differently stand of the respondent is that when there was no tax liability on such sales, there was no liability to pay any tax and, therefore, the benefit of adjustment available under clause (2) of the Notification S.O.No. 37, dated February 25, 1993 does not arise. The interpretation put forward by the respondent found acceptance by the High Court.
>
> 19. Crucial question, therefore, is whether the appellant had any " liability" under the Act. The answer to this lies in section 3 of the Act which is extracted above and is the charging section. In sub-section (1) subject of the provisions of the Part (i.e., Part I) sales tax or purchase tax, as the case may be, shall be paid by every dealer as provided in the section itself. Section 7 speaks of exemption. Sub-section (3) of Section 7 stipulates that State Government may, by notification and subject to such conditions or restrictions as it may impose, exempt from sales tax or purchase tax certain sales or purchases as the case may be. The question of exemption arises only when there is a liability. Exigibility to tax is not the same as liability to pay tax. The former depends on charge created by the statute and the latter on computation in accordance with the provisions of the statute and Rules framed thereunder if any. It is to be noted that liability to pay tax chargeable under Section 3 of the Act is different from quantification of tax payable on assessment. Liability to pay tax and actual payment of tax are conceptually different. But for the exemption the dealer would be required to pay tax in terms of section 3. In other words, exemption pre-supposes a liability. Unless there is liability question of exemption does not arise. Liability arises in term of section 3 and tax become payable at the rate as

provided in section 12. Section 11 deals with the point of levy and rate and concessional rate.

20. The word "liable" in the Concise Oxford Dictionary means, "legally bound, subject to a tax or penalty, under an obligation". In Black's Law Dictionary (Sixth Edition) the word "liable" means, "bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution..... Obligated; accountable for or chargeable with". The above position was noted in *Zunjarrao Bhikaji Nagarkar Vs. Union of India* (1999) 7 SCC 409.

21. Tax at the appropriate rate would have become payable but for the exemption. Decision in *Australian Mutual Provident Society V. I.R.C.* [1962] AC 135(PC) has stated the position as follows:

'The phrase 'exempt from taxation' (Land and Income-tax Act, 1954 (No.6701) (New Zeland) Section 86(1) does not cover income that is not at all within the reach of the New Zeland tax laws. It refers to income that would, had it not been for the exemption, otherwise have been so taxable.

22. Therefore, it cannot be said that as tax was not paid on portion of the turnover of the schedules goods, i.e. cement, the assessee-appellant had no liability under the Act. It was definitely liable to pay tax under the Act, but for the exemption. There is no dispute that the assessee-appellant was liable to pay tax under sub-section (3) of the Entry Tax Act. Therefore, it was entitled to reduction to the extent of tax paid under the Entry Tax Act while working out tax payable by it under the Act."

12/ The Supreme Court in the matter of Commissioner of *Sales Tax, Jammu and Kashmir and Others Vs. Pine Chemicals Ltd. and Others,* reported in 1995(96) STC 355, considered the distinction between general and conditional exemption and has held as under:-

"The idea behind sub-section (2-A) of section 8 of the Central Sales Tax Act, which we have analysed hereinbefore, is to

exempt the sale/purchase of goods from the Central Sales Tax where the sale or purchase of such goods is exempt generally under the State sales tax law. We must give due regard and attach due meaning to the expression "generally" which occurs in the sub-section and which expression has been defined in the Explanation. If the said expression had not been there, it could probably have been possible to argue that inasmuch as the goods sold by a particular manufacturer-dealer are exempt from the State tax in his hands, they must equally be exempt under the Central Act. But sub-section (2-A) requires specifically that such exemption must be a general exemption and not an exemption operative in specified circumstances or under specified conditions. Can it be said that the goods sold by the dealers in this case are exempt from tax generally under the State tax enactment? The answer can only be in the negative. Such goods are exempt from tax only when they are manufactured in a large or medium scale industrial unit within five years of its commencement of production and sold within the said period, i.e. in certain specified circumstances alone. The exemption is not a general one but a conditional one. The exemption under the Government Order No. 159 is not with reference to goods or a class or category of goods but with reference to the industrial unit producing them and their manufacture and sale within a particular period. For the purposes of the Government order, the nature, class or category of goods is irrelevant; it may be any goods. It is concerned only with the industrial unit producing them and the period within which they are manufactured and sold. Can it be said in such a case that it is instance where the sale is of goods, the sale or purchase of which is under sales tax law of the appropriate State, exempt from tax generally? Certainly not. Exemption provided by Government Order No. 159, to repeat, is not with reference to goods but with reference to the industrial unit. So long as it is (i) a large or medium scale industry and (ii) it manufactures and sells goods within the five years of its going into production, the sale of such goods is exempt irrespective of the nature or classification of goods. Similar goods may be manufactured by another unit but if it does not

satisfy the above two requirements, the goods manufactured and sold by it would not be entitled to exemption from tax. Indeed, the goods manufactured by that very unit would not be eligible for exemption if they are manufactured after the expiry of five years from the date it goes into production and/ or sells them beyond the said period. The period of exemption may also vary from unit to unit depending on the date of commencement of production in each unit. For the above reasons, we are of the opinion that the exemption granted under the aforesaid Government order does not satisfy the requirements of section 8(2-A)."

13/ The Division Bench of Kerala High Court in the matter of *Sales Tax Officer, Angamaly Vs. Ragam Plastics,* reported in (1990) 77 STC 313, while considering the issue if a new unit entitled to exemption from payment of tax on the turnover of the goods could avail the benefit of lower rate of tax on raw material under the Act although no tax was payable by such new unit because of exemption, has held that:-

"7. In order to attract the proviso, the finished products should not be liable to tax either under the Kerala General Sales Tax Act or under the Central Sales Tax Act or when such finished products are exported out of the territory of India. The words " liable to tax under this Act" mentioning along with the liability under the Central Sales Tax Act or liability under export sale would indicate that the proviso will apply to exclude section 5(3) only in the case of a non-applicability of "the Act", as in the case of liability under the Central Act or liability for export sale. Since the assessees are given limited exemption by the notification from payment of sales tax in respect of their turnover, it cannot be construed that there is "no liability" to tax under "the Act". The second proviso to the notification states that the cumulative sales tax concession granted to a unit at any point of time within this period shall not exceed 90 per cent of the cumulative gross fixed capital investment of the unit. Therefore, section 5(3) of the Act would apply to the assessees and the goods manufactured by them are liable to tax under the Act though tax is not payable by virtue of the notification exempting the small-scale industrial units for a

limited period on complying with certain conditions."

14/ The Division Bench of Rajasthan High Court in the matter of *Commercial Taxes Officer, Special Circle, Jodhpur Vs. Gadia Textiles and Another*, reported in 1987(67) STC 161 has considered the issue in respect of the continuation of the liability to pay tax inspite of exemption and following the Supreme Court judgment in the matter of *A. V. Fernandez* (supra) the Rajsthan High Court has held as under:-

> "On a careful perusal of the various provisions of the Act and the Rules referred to hereinabove the two expressions "liable to pay tax under the Act" and "tax shall be payable" deserve our pointed attention. In rule 42 the words used in both the sub-rules(1) and (2) are "liable to pay tax under the Act". In rule 42 the words used in both the sub rules (1) and (2) are "liable to pay tax under the Act". We shall first examine the connotation of the word "liable". The word "liable" is generally/ normally interpreted to mean, "exposed to a certain contingency or casualty, i.e. it means a future possibility, probability, happening which may or may not actually occur". The word "liable" ordinarily denotes (1) "legally subject or amenable to", (2) "exposed or subject to or likely to suffer from (something prejudicial)", (3) "subject to the possibility of (doing or undergoing something undesirable)". According to Webster's New World Dictionary also the word "liable" denotes "something external which may befall us". It is not in dispute that the cloth that was manufactured by the manufacturer during the periods under consideration was exempt from payment of tax either under section 4(1) or section 4(2) of the Act and since the cloth which is a cotton fabric which the manufacturer was dealing was exempt for payment of tax, he was not required to pay any tax on it or in other words the tax was not payable by him. But none the less when non-petitioner No. 1 is a manufacturer [dealer within the meaning of section 2(f) of the Act] and does the business as defined in section 2(cc) of the Act having a turnover which is taxable under section 3 of the Act, can still be said to be not liable to pay tax under the Act though the tax is not payable on the cloth manufactured by him by virtue of the exemption under Section 4(1) or 4(2) of

the Act?".

15/ The above question has been answered by Rajasthan High court as under:

> "But for the exemption, the manufacture in this case was required to pay tax under the Act on the cloth dyed and printed by him or in other words on the cloth manufactured by him, the tax was payable. Section 3 to our mind is a provision for levy of tax, if the conditions laid down therein are satisfied, then the dealer/manufacturer is liable to pay tax under the Act. It is a charging section. The liability to pay tax is dependent on the turnover and the tax is payable on the taxable turnover. The word 'turnover' in section 3 of the Act is significant, for, section 3 lays down that every dealer whose gross turnover exceeds the limit laid down therein, he is liable to pay tax on his taxable turnover, within the gross turnover could be included the entire turnover of goods on which the tax could be imposed and it is immaterial whether tax has been imposed or not. Liability to pay tax springs on the basis of turnover and tax becomes payable on taxable turnover. Under Section 3, the sales of printed and dyed cloth by the manufacturer were required to be included in his gross turnover but on account of the exemption under Section 4(1) or 4(2), he was not required to pay tax on the cloth, i.e. cotton fabrics. The tax may not be payable by the dealer/manufacturer, nevertheless, if section 3 is attracted, he will be said to be liable to pay tax. The words used in rule 42(1) and (2) are "liable to pay tax under the Act". The conditions laid down in section 3 are satisfied in the case of the assessee, but the tax is not payable by him, for, the cloth, i.e. the cotton fabrics are exempted from payment of tax. Rule 42(2) of the Rules provides that a manufacturer who is liable to pay tax under the Act has to maintain a stock book of the raw materials and of finished goods. The manufacturer in this case admittedly did not maintain the stock book of the raw materials, i.e. of the cloth purchased by him. The manufacturer was not required to pay tax as cloth was

> exempt from payment of tax. But, on this ground alone it cannot be said that he was not liable to pay tax under the Act as envisaged by rule 42(2) of the Rules, keeping in view of the scheme of the various sections of the Act referred to hereinabove. The basis of the view taken by the Board is that only those dealers or manufactures are required to maintain stock books under rule 42(2) of the Rules from whom tax is payable. The Board has construed "liable to pay tax under the Act", as tax payable under the Act. In doing so, the Board ignored the distinction and difference between the two expressions "liable to pay tax" and "tax shall be payable", for, a manufacturer may be liable for payment of tax but on account of exemption, tax is not payable by him. We have already given reasons that "liable to pay tax" does not mean that tax is payable by the dealer/ manufacturer under the Act. From a dealer/manufacturer tax may not be payable because of exemption under the Act, none the less it cannot be said that he is not liable to pay tax under the Act."

16/ The Kerala High Court in the matter of *Rangam Plastics Vs. Sales Tax Officer,* reported in [1988] 69 STC 341 (Ker) has held that partial exemption of sales tax does not mean sale of finished goods was not liable to tax under the Act by holding as under:-

> "It is clear from the above authorities that the taxable event is the sale or purchase of goods and the sale of the finished products referred to in the first proviso to section 5(3) does not cease to be liable to tax for the reason of the partial exemption provided for in the Notification SRO No. 968/80. The mere fact that in the matter of computation of tax payable the benefits of exemption will be available to the small-scale industrial units is not a ground to hold that the sale of its finished products is not liable to tax under the Act."

17/- The Division Bench of Allahabad High Court in the matter of *Deep Chand Goyal and Another Vs. The Sales Tax Officer and Another,* reported in 1983 (52) STC 110, has considered the distinction between the exemption and nonliability to pay tax and has held as under:

> "It is thus settled that transactions or sales which enjoy exemption have to be included in the gross turnover but they are exempted when the net turnover is calculated and as for non-liability to tax, the turnover in respect of such transactions or sales is not included in the gross or the net turnover. An exemption can be granted only in respect of goods which are liable to tax: See *Commissioner of Sales Tax Vs. Rita Ice Cream Co.* [1982] 49 STC 297; 1981 UPTC 1239.

18/ Thus from the aforesaid judgments, it emerges that if no tax is charged on goods in the taxing statute then there is no liability to pay tax but if in terms of the taxing statute the goods are liable to tax and the conditional exemption is granted from payment of tax, then the liability to pay the tax continues even if no tax is paid. In the present matter the petitioner was liable to pay the sales tax under the provisions of the M.P. General Sales Tax Act, 1958 but as a dealer conditional exemption was granted by the Notification dated 23.10.1981. Therefore, though no sales tax was paid by the petitioner for the period in question, its liability to pay the sales tax continued and under the Notification No.55 dated 5.7.1995, his liability to pay the sales tax was reduced to 2%, therefore, in terms of the Notification No.57 dated 5.7.1995 the petitioner was entitled to claim exemption from payment of entry tax on the goods in question on satisfaction of the other conditions, which have been specified in the Notification No.57 dated 5.7.1995.

19/ In view of the aforesaid, we are of the considered view that the impugned orders of the Assessing Authority dated 13.2.2004 as well as the Revisional Authority dated 12.1.2005 cannot be sustained and are hereby set aside. The Assessing Authority is directed to pass a fresh order of assessment by treating that the Notification No.57 dated 5.7.1995 is attracted in the case of the petitioner, since the petitioner is liable to tax @2% on the sale under the Item No.2 of the Notification No.55 dated 5.7.1995, and extend him the benefit accruing from the exemption Notification No.57 dated 5.7.1995, if the petitioner satisfies all other relevant conditions of the said notification.

The petition is allowed to the extent indicated above.

*Petition allowed.*

**I.L.R. [2014] M.P., 314**
**WRIT PETITION**

***Before Mr. Justice Shantanu Kemkar & Mr. Justice J.K. Maheshwari***
W.P. No. 1565/2013 (Indore) decided on 14 March, 2013

COMPUTER SCIENCE CORPORATION INDIA PVT. LTD. ... Petitioner
Vs.
ADDITIONAL COMMISSIONER OF INCOME-TAX & ors. ... Respondents

***Income Tax Act (43 of 1961), Sections 10A, 144-A*** - **Whether direction issued by the CIT(A) to the AO for the other years which were not before the CIT(A) is contrary to the provision - Held - Directions contained in the impugned order passed by CIT(A) shall not be construed to be of binding nature by the AO - It will be open for the AO to proceed with the assessment proceedings in accordance with law.** **(Para 7)**

*आयकर अधिनियम (1961 का 43), धाराऐं 10ए, 144–ए* – क्या सी.आई.टी. (ए) द्वारा ए.ओ. को अन्य वर्ष, जो सी.आई.टी.(ए) के समक्ष नहीं थे, के लिए जारी किया गया निदेश, उपबंध के विपरीत है – अभिनिर्धारित – सी.आई.टी.(ए) द्वारा पारित किये गये आक्षेपित आदेश में अंतर्विष्ट निदेशों का ए.ओ. द्वारा बाध्यकारी स्वरूप का अर्थ नहीं लगाया जायेगा – ए.ओ. के लिये विधिनुसार निर्धारण की कार्यवाही करने के लिये अग्रसर होने का विकल्प खुला रहेगा।

*Ajay Vohra* with *Satpal Singh*, for the petitioner.
*R.L. Jain* with *Veena Mandlik*, for the respondents.

**ORDER**

The Order of the Court was delivered by,
SHANTANU KEMKAR, J.: With consent heard finally.

2. By filing this petition under Articles 226/227 of the Constitution of India, the petitioner has made a prayer for issuance of writ, order or direction expunging the directions issued by the CIT (A) while passing order dated 30.11.2012 to the extent that such directions pertaining to A.Y. 2008-09 to 2011-12 the years which were indisputably not the subject matter of the appeal before the CIT(A). The petitioner has also sought directions to the authorities/ officers working under the supervision of or hierarchically subordinate or administratively answerable to CIT (A) from acting upon such directions.

3. Briefly stated, challenging the final assessment order dated 31.12.2010 passed by Additional Commissioner of Income Tax, Range-2, Indore pertaining to AY 2007-08,the petitioner had filed appeal No. IT-361/10-11/396 before the CIT (A)-1, Indore. The CIT (A), while passing the impugned order dated 30.11.2012 issued the directions as contained in paragraph 5 and its sub paragraphs of the order regarding allowability of deduction under section 10A of the Income Tax Act to Noida Unit 1, Noida Unit 2, Noida Unit 3, Hyderabad, Chennai Unit 1 and Chennai SEZ-remedial action requires for withdrawal of claim for AY 2008-09 to 2011-12.

4. According to Shri Ajay Vohra, the learned counsel for the petitioner the CIT (A) in excess of its jurisdiction held in paragraph 5.10 of the impugned order that in the four assessmnet years (AY 2008-09 to 2011-12) the total claim under section 10A of the Act will have to be denied. It gone to the extent of issuing directions to the AO to take note of the observations / findings made while completing the regular assessment on the issue of denial of deductions under section 10A of the Act and further proceed for taking remedial action in accordance with law. It further directed to AO that the entire paragraph (5) and its sub paragraph of the order dated 30.11.2012 may be incorporated in the assessment orders.

5. The learned counsel for the petitioner has also argued that the aforesaid directions contended in paragraph (5) and sub-paragraphs are in excess of the jurisdiction vested in the CIT(A) under section 251 of the Income tax Act. 1961. According to him, the CIT (A) has pre-judged the issue regarding the allowability of deduction of petitioner's Units' for the AY 2008-09 to 2011-12. He submits that issuance of such directions by the CIT(A) to the AO for the other years which were not before the CIT (A), is contrary to the provisions of law and various judicial pronouncements.

6. Shri RL Jain, learned Senior Counsel appearing for the respondents submitted that the directions which have been made are not binding in nature and it is open for the AO to act independently in accordance with law. In paragraph 5.37 of the return filed on behalf of the respondents we find a categorical stand taken by the respondents "that the findings and observations mentioned in the appeal order were required to be looked into and a decision was to be taken by learned AO independently as per law. Further the AO is not bound to agree with the findings and observations given by the learned CIT (A) and as per the Income-tax Act no binding directions can be issued to AO except under section 144-A by

the Additional or Joint Commissioner of Income tax." In paragraph 5.40 of the return it has been further stated on behalf of the respondents "that the learned CIT (A) has only mentioned his findings and observations and no binding directions were issued as the learned CIT (A) cannot issue any binding direction for other assessment years which is sub-judice."

7. Having considered the submissions made by learned counsel for the parties and in view of the categorical stand taken by the respondents in reply to the petition in paragraph 5.37 and 5.40 as extracted above, we dispose of this petition by observing that the directions contained in para 5 and its sub-paragraphs of the impugned order passed by CIT (A)shall not be construed to be of binding nature by the AO and it will be open for AO to proceed with the assessment proceedings in accordance with law uninfluenced by the said impugned observations/ directions contained in the impugned order.

8. With the aforesaid observations, we dispose of the Writ Petition. We further make it clear that in case the petitioner is aggrieved by the other part of the order dated 30.11.2012 passed by the CIT (A), the petitioner is free to approach the Tribunal with a prayer for condonation of delay and the Tribunal shall consider such prayer for condonation of delay, keeping in view that the petitioner was prosecuting the remedy before this Court.

*Petition disposed of.*

**I.L.R. [2014] M.P., 316**
**WRIT PETITION**

***Before Mr. Justice Shantanu Kemkar and Mr. Justice J.K. Maheshwari***

W.P. No. 10643/2012 (Indore) decided on 24 April, 2013

JILA SAHKARI KENDRIYA BANK MARYADIT, MANDSAUR ... Petitioner

Vs.

ALEEMUDDIN ANSARI ... Respondent

***Cooperative Societies Act, M.P. 1960 (17 of 1961), Section 55(2) - Withdrawal of resignation*** **- Respondent was allowed to withdraw his resignation which was to take effect from 01.04.1977 and was taken back in service vide order dated 20.09.1979 treating him in service w.e.f. 01.04.1977 but without paying him salary for the period 01.04.1977 to 20.09.1979 for the period he did not work - Order does not reflect that the respondent has been given a fresh appointment - In absence**

**of any such mention, the respondent's past services since 1966 cannot be said to be washed away depriving him all consequential benefits arising out of it on attaining the age of superannuation.(Paras 4, 9 &10)**

*सहकारी सोसाइटी अधिनियम, म.प्र. 1960 (1961 का 17), धारा 55(2). – त्यागपत्र वापस लिया गया* – प्रत्यर्थी को अपना त्यागपत्र वापस लेने की अनुमति दी गई जो 01.04.1977 से प्रभावी होने वाला था और उसे आदेश दिनांक 20.09.1979 द्वारा 01.04.1977 से प्रभावी रूप से सेवारत मानते हुए, वापस सेवा में लिया गया किन्तु उसे 01.04.1977 से 20.09.1979 तक की अवधि, जिस अवधि में उसने कार्य नहीं किया था, के वेतन का भुगतान किये बिना – आदेश यह प्रदर्शित नहीं करता है कि प्रत्यर्थी को नवीन नियुक्ति दी गई है – उक्त किसी उल्लेख की अनुपस्थिति में, प्रत्यर्थी की पूर्व की 1966 से दी गई सेवा मिट जाना नहीं कहा जा सकता जिससे वह अधिवार्षिकी आयु प्राप्त करने पर उत्पन्न होने वाले सभी परिणामिक लाभों से वंचित हो जाये।

*Surendra Patwa*, for the petitioner.

**ORDER**

The Order of the Court was delivered by, SHANTANU KEMKAR, J.: Heard on the question of admission.

2. This petition which though filed under Article 226 and under Article 227 of the Constitution of India but it is essentially a petition under Article 227 of the Constitution of India.

3. The petitioner has filed this petition challenging the order dated 04-07-2011 passed by M.P. State Co-operative Tribunal, Bhopal (for short, the Tribunal) in F.A. No.162/2007 affirming the order dated 07.09.2007 passed by the Joint Registrar, Ujjain.

4. The respondent who was employee of the petitioner since 1966 submitted a letter of resignation from service on 31.01.1977 making it effective from 01.04.1977. The said letter of resignation was accepted by the petitioner vide order dated 28.03.1977. Thereafter the respondent submitted an application for taking back him in service. His prayer was accepted by the petitioner vide order dated 20.09.1979 and he was taken back in service treating him in service w.e.f. 01.04.1977 i.e. the date when the resignation was made effective. As regards salary of the period from 01.04.1977 to 20.09.1979 it was ordered that since he did not work from 01.04.1977 to 20.09.1979 he will not be entitled for any

salary of the said period on the principle of "no work no pay".

5. When the matter stood thus, on attaining the age of superannuation the respondent was retired from service w.e.f. 31.01.2003. However as he was not paid the full retiral benefits viz, gratuity and leave encashment as per his entitlement from the date of his appointment which was 19.01.1966, he raised a dispute under Section 55(2) of the M.P. Co-operative Societies Act, 1960 (for short, the Act) before the Joint Registrar. The Joint Registrar, Ujjain rejected the preliminary objection raised by the petitioner about the maintainability of dispute under the Act by order dated 14.02.2005 and thereafter vide order dated 07.09.2007 passed in Case No.C/06/2003-04 allowed the dispute in favour of the respondent employee by directing the petitioner Bank to pay the balance amount of gratuity to the extent of Rs.62,930/-treating his period of employment w.e.f. 19.01.1966 and to pay the amount of leave encashment with interest as mentioned in the order.

6. The said order passed by the Joint Registrar was challenged by the petitioner by filing F.A. No.162/2007 under section 78(1)(b) of the Act. The Tribunal vide order dated 04.07.2011 dismissed the appeal. It also rejected the preliminary objection of the petitioner that the dispute filed before the Joint Registrar was not maintainable and only the controlling authority under the Payment of Gratuity Act is the competent authority. On merits also the Tribunal upheld the order passed by the Joint Registrar

7. Learned counsel for the petitioner has argued that the respondent was taken back in service w.e.f. 01.04.1977, therefore, his prior service period was rightly not taken into consideration for the purpose of calculation of period for grant of gratuity. He further submits that the dispute in question could not have been entertained by the Joint Registrar under the Act and as such the orders passed by the Joint Registrar and the Tribunal, are liable to be quashed.

8. We have considered the aforesaid contentions raised by learned counsel for the petitioner.

9. In our considered view the petitioner's contention that the dispute about the gratuity as has been raised could not have been raised under the Act cannot be accepted in view of the clear provision of Section 55(2)

of the Act providing for a dispute, including a dispute regarding terms of employment, working conditions and disciplinary action by a Society arising between a Society and its employees shall be decided by the Authority mentioned in it. In view of this wide scope of section 55(2) of the Act in our view, this objection has rightly been rejected by both the authorities below. So far as the merits of the matter, we find that while passing the order dated 20.09.1979 regarding reinstatement in favour of the respondent, the petitioner had merely denied him the salary for the period from 01.04.1977 to 20.09.1979. The order does not reflect that the respondent has been given a fresh appointment nor does it contain that his past services will not be counted for any purposes. In the absence of any such mention in the order, the respondent's past services cannot be said to be washed away depriving him all the consequential benefits arising out of it.

10. In the circumstances, we are of the view that Joint Registrar and the Tribunal, have committed no error in passing the impugned orders. No case for interference is made out. The petition fails and is hereby dismissed.

*Petition dismissed.*

**I.L.R. [2014] M.P., 319**
**WRIT PETITION**
***Before Mr. Justice R.S. Jha***
W.P. No. 10965/2013 (Jabalpur) decided on 3 July, 2013

SOMDUTT DIXIT ...Petitioner
Vs.
M.P.P.S.C. & ors. ...Respondents

***Constitution - Articles 226, 14 & 16 - Extension of time for depositing documents*** **- Petitioner a successful candidate of State Services Examination 2010 could not submit requisite documents before the Competent Authority by the cut-off date of 21.05.2013 as he failed to note the result of the main examination on Internet on 27.04.2013 - Petitioner or any candidate has no indefensible, constitutional or statutory right to claim relaxation of the date only for himself in absence of any justifiable reason - Relaxation as prayed by the petitioner to accept his document beyond cut-off date would offend**

**Article 14 & 16 of the Constitution - Prayer of the petitioner rejected. (Paras 5 to 9)**

*संविधान – अनुच्छेद 226, 14 व 16 – दस्तावेज जमा करने हेतु समयावधि बढ़ायी जाना* – याची, राज्य सेवा परीक्षा 2010 का उत्तीर्ण अभ्यर्थी, अंतिम तिथि 21.05.2013 तक सक्षम प्राधिकारी के समक्ष आवश्यक दस्तावेज प्रस्तुत नहीं कर सका क्योंकि वह इन्टरनेट से 27.04.2013 को मुख्य परीक्षा का परिणाम नोट करने में असफल रहा – याची या किसी अभ्यर्थी को बिना किसी न्यायोचित कारण क केवल स्वयं के लिये तिथि की छूट का दावा करने का कोई अरक्षणीय, संवैधानिक या कानूनी अधिकार नहीं–जैसा कि याची द्वारा उसके दस्तावेजों को अंतिम तिथि से परे स्वीकार किये जाने के लिये छूट की प्रार्थना की गयी है, संविधान क अनुच्छेद 14 व 16 का उल्लंघन करेगी–याची की प्रार्थना अस्वीकार की गयी।

**Case referred :**

1999(2) SLR 444.

*Avinash Zargar,* for the petitioner.
*K.S. Wadhwa,* for the respondents.

**ORDER**

**R.S. JHA, J.:** The petitioner has filed this petition praying for a direction to quash the order dated 17.6.2013 Annexure P/1 and permit him to appear in the interview being conducted by the respondent no. 1/State Services Examination 2010 for appointment in the State Services.

2. The brief facts leading to the filing of the present petition are that the petitioner had appeared in the preliminary and main examination of State Services Examination 2010 and has cleared the same. It is stated that the result of the preliminary examination was declared on 5.8.2011, thereafter the main examination was conducted in December 2011 and January 2012, however, the result thereof was declared after one year four months by releasing the same on the Internet on 27.4.2013 and was also published in the Rojgar and Nirman on 6.5.2013. In the said result, it was stated that the selected candidates were required to complete all formalities and submit requisite documents before the competent authority by the cut-off date of 21.5.2013 but as the petitioner failed to note the result of the main examination in time, he could not complete the formalities by 21.5.2013 but did so, after 20 days i.e. 10.6.2013, on account of which, the respondents have issued communication dated 17.6.2013 Annexure P/1 rejecting the candidature of the petitioner.

3. It is submitted by the learned counsel for the petitioner that the petitioner is a successful candidate having passed the preliminary as well as the main examination inspite of which he has been debarred only on account of the fact that he could note the result of the main examination in time and in such circumstances, the respondents/authorities be directed to consider the case of the petitioner for selection in the State Services.

4. The learned counsel appearing for the respondents/ Public Service Commission, per contra, submits that the respondents had published the result in the Internet on 27.4.2013 and had also published in Rojgar and Nirman on 6.5.2013 alongwith a specific and clear note that all relevant documents and formalities were required to be completed by the selected candidates latest by 21.5.2013, failing which it would be presumed that the applicant concerned does not wish to participate in the process. This fact is mentioned at the back of page no. 28 of Annexure P/3, filed alongwith the petition. It is submitted that in such circumstances as the necessary formalities were completed after the cut-off date of 21.5.2013 by the petitioner, therefore, the petitioner's claim has rightly been rejected and in such circumstances, there can be no consideration on sympathetic ground as this would open a flood gate and would make the entire selection process unending and illegal as it would result in participation of disqualified candidates in the selection process.

5. Having perused the averments made in the petition and the documents filed therewith, it is clear that though on the one hand the petitioner claims to be an alert and intelligent candidate as he has cleared the preliminary and main examinations, however on the other hand he has himself stated that he failed to take note of the fact that the result of the main examination was declared on the Internet on 27.4.2013 and thereafter published in the Rojgar and Nirman on 6.5.2013. The aforesaid contention of the petitioner is unacceptable as no reasonably acceptable explanation has been furnished as well as in view of the fact that the entire process of selection including filling of the initial application form was done through Internet by the petitioner himself. The petitioner has also not stated or specified the date on which he actually came to know about the result nor has he stated any reason as to why he could not take the necessary steps between 6.5.2013 and 21.5.2013 i.e. from the date of publication of the result in the news paper. For the above reasons, the submissions of the petitioner do not deserve to be accepted.

6. It is also observed that the process of selection undertaken by the

respondents is a tedious one, which requires time and meticulous scrutiny and therefore, specific and clear dates for doing particular acts like filing of applications, documents, conducting examinations, interview etc., are specified only for the purposes of ensuring that the entire selection process is transparent and fair and that equal opportunity and notice to all those who participate in the selection process is given.

7. It also goes without saying that in the instant case after declaration of the result and completing all the formalities regarding filing documents etc., the respondent PSC is required to scrutinize the documents of each and every applicant and thereafter prepare a list, which is a time consuming meticulous process and it is for this purpose that the PSC in the instant case has specifically stated while declaring result of the main examination that the requisite formalities have to be completed by the candidate concerned latest by 21.5.2013, failing which it shall be presumed that the candidate is not interested in participating any further in the selection process. I am also of the considered opinion that this cut off date mentioned by the PSC in the result is final and binding on all concerned and should not generally be extended or relaxed in individual cases. It may however, be extended for justified reasons by the PSC itself by a general order extending the date uniformly for all the candidates concerned. If relaxation is granted or permitted in individual cases on selective basis without public notice and general relaxation, it would offend Articles 14 and 16 of the Constitution of India as it would deprive other candidates of participation, who for some reason have not been able to apply or comply with the stipulations before the cut off date and who may be more deserving and meritorious. I am inclined to say so, as the petitioner or any candidate for that matter has no indefensible, constitutional or statutory right to claim relaxation of the date only for himself except in exceptional cases of extreme hardship and injustice on account of reason beyond the control of the candidate which is not the case in the present petition, which may be granted by this Court in exercise of its extra ordinary jurisdiction.

8. From the above discussion, it is clear that any relaxation of the date in individual cases would offend Articles 14 and 16 of the Constitution of India and would also result in opening a flood gate thereby frustrating the entire selection process as well as depriving the PSC of sufficient and adequate time to scrutinize documents and applications of the candidates thereby prejudicing the fairness of selection and therefore, the prayer for sympathetic consideration made by the petitioner without any acceptable and justifiable reasons deserves

to be rejected. Similar view has been taken by the Full Bench of the Patna High Court in the case of *Braj Kishore Prasad and etc.etc V. State of Bihar and others* reported in 1999 (2) SLR 444.

9. In the circumstances, the petition filed by the petitioner being meritless, is accordingly dismissed.

*Petition dismissed.*

**I.L.R. [2014] M.P., 323**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
W.P. No. 6134/2013 (Jabalpur) decided on 9 July, 2013

MUNNI BAI (SMT.) ...Petitioner
Vs.
STATE OF M.P. ...Respondent

***Panchayat Raj Evam Gram Swaraj Adhiniyam, M.P. 1993 (1 of 1994), Sections 21(4) & 38(1), Clause (b) - Appeal against no confidence motion* - Collector granted status-quo directing restoration of Sarpanch - Before passing of the said order petitioner was appointed as adhoc Sarpanch - Held - It was beyond the power of Collector to stay the operation of no confidence motion which lead to cessation to hold office forthwith - Petitioner is directed to be restored as adhoc Sarpanch.**
**(Paras 6 & 10)**

*पंचायत राज एवं ग्राम स्वराज अधिनियम, म.प्र. 1993 (1994 का 1), धाराऐं 21(4) व 38(1), खंड (बी) – अविश्वास प्रस्ताव के विरुद्ध अपील* – कलेक्टर ने यथा स्थिति प्रदान करते हुए सरपंच की बहाली के निदेश दिये – उक्त आदेश पारित किये जाने से पूर्व, याची तदर्थ सरपंच के रुप में नियुक्त था – अभिनिर्धारित – अविश्वास प्रस्ताव जिससे तत्काल प्रभाव से कार्यभार समाप्त हुआ, के प्रवर्तन को रोकना कलेक्टर की शक्ति से परे था – याची को तदर्थ सरपंच के रुप में बहाल करने के लिये निर्देशित किया गया।

**Cases referred :**

1998(I) MPWN 236, 1985 MPLJ 332.

*Anil Dwivedi*, for the petitioner.
*Vandana Shrivastava*, for the respondents No. 1 to 8.
*Malti Dadariya*, for the respondent No. 10.

## ORDER

SANJAY YADAV, J.: With consent of learned counsel for the parties, matter is heard finally.

1. Challenge is to an order-dated 26.2.2013, as also an order-dated 13.3.2013. By order-dated 26.2.2013, Collector, Shahdol, while entertaining the dispute raised under sub-section (4) of Section 21 of the Madhya Pradesh Panchayat Raj Evam Gram Swaraj Adhiniyam, 1993 (for short 'Adhiniyam, 1993'), has directed status quo of execution of order under reference i.e. no-confidence motion dated 7.12.2012 passed against respondent no.10.

2. Whereas, by order-dated 13.3.2013, respondent no.6 viz. Chief Executive Officer, Janpad Panchayat Jaisinghnagar Distt. Shahdol in purported compliance of order-dated 26.2.2013 has reposted respondent no.10 as Sarpanch of Gram Panchayat Jhiria by removing the petitioner who was appointed as adhoc Sarpanch.

3. Relevant facts borne out from the record and not in dispute are that in a proceeding held on 7.12.2012, no-confidence motion was passed against respondent no.10, the Sarpanch of Gram Panchayat Jhiria. Respondent no.10 raised the dispute under sub-section (4) of Section 21 'Adhiniyam, 1993 before Collector, Shahdol wherein an order of status quo came to be passed on 26.2.2013. However, before passing of the said order, the petitioner was appointed as adhoc Sarpanch on 10.12.2012 in consonance with clause (b) of sub-section (1) of Section 38 of the Adhiniyam, 1993. That Chief Executive Officer, Janpad Panchayat Jaisinghnagar on receiving the order-dated 26.2.2012 passed by Collector, Shahdol, by order-dated 13.3.2013, directed restoration of respondent no.10 as Sarpanch of Gram Panchayat Jhiria.

4. Grievance of the petitioner is two-fold. Firstly, it is contended that once no-confidence motion is passed, the incumbent ceases to hold office of Sarpanch forthwith as per stipulation contained in sub-section (1) of Section 21 of the Adhiniyam, 1993. Secondly, it is contended that the order-dated 26.2.2013 was of status quo of operation of order of no-confidence motion as on 26.2.2013 and was not from the retrospective date. In other words, the order was not status quo ante whereas the same has wrongly been construed by respondent no.6 as an order of status quo ante by relocating the respondent no.10 as Sarpanch of Gram Panchayat Jhiria.

5. Learned counsel appearing on behalf of respondent no.10 on his turns

supports the order-dated 26.2.2013 as well as the order-dated 13.3.2013. In addition, it is contended that the dispute which has been raised by respondent no.10 before Collector, Shahdol under sub-section (4) of Section 21 of the Adhiniyam, 1993 has since been finally heard and final order is being awaited.

6. After considering the rival contentions, issue which crops up for consideration is as to whether in a case where no-confidence motion is passed in accordance with sub-section (1) of Section 21 of the Adhiniyam, 1993 and as per stipulation contained therein, the incumbent ceases to hold office forthwith and that stop-gap arrangement has been made as per clause (b) of sub-section (1) of Section 38 of Adhiniyam, 1993 whether it would within the power of Collector, Shahdol to stay such order or grant status quo and whether in the given facts of the present case, it could be construed as status quo ante.

7. Section 21 of the Adhiniyam, 1993 deals with no-confidence motion against Sarpanch and Up-Sarpanch. Sub-section (1) of Section 21 stipulates that on a motion of no-confidence being passed by the Gram Panchayat by a resolution passed by majority of not less than three fourth of the panchas present and voting and such majority is more than two third of the total number of Panchas constituting the Gram Panchayat for the time-being, the Sarpanch or Up-Sarpanch against whom such motion is passed, shall cease to hold office forthwith.

8. A fair reading of sub-section (1) of Section 21 of Adhiniyam, 1993 clearly indicates the intention of the legislature that once having suffered a no-confidence motion, the incumbent holding the office of Sarpanch or Up-Sarpanch, as the case may be, forthwith cease to hold office. The happening of events as is stipulated in sub-section (1) of Section 21, in no manner, can be conscribed or stopped even in a case where the dispute is raised before Collector under sub-section (4) of Section 21 of Adhiniyam, 1993 which provides that if the Sarpanch or the Upsarpanch, as the case may be, desires to challenge the validity of the motion carried out under sub-section (1), he shall, within seven days from the date on which such motion was carried, refer the dispute to the Collector who shall decide it, as far as possible, within thirty days from the date on which it was received by him and his decision shall be final.

9. The expression "such motion was carried" has a significance and it is passing of the motion, which lead to cessation to hold office forthwith. Once

cessation is there, the incumbent cannot hold the office till such motion survives. In order words, it will be beyond the power of Collector even to stay the operation of such motion once the same has been carried out.

10. In view whereof, this Court is of the considered opinion that it was beyond the power of Collector to have stayed the operation of no-confidence motion and facilitate the reinstatement of respondent no.10 as Sarpanch of Gram Panchayat Jhiria. This view finds support from the decision rendered in *Kaushaliya vs. Additional Collector* 1998(I) MPWN Short Note 236 wherein it has been observed -

> "Section 21 speaks that if the resolution is passed by a majority of not less than three fourth of the Panchas present and voting and such majority is more than two-third of the total number of Panchas constituting the Gram Panchayat for the time being, the Sarpanch or Up-Sarpanch against whom such motion is passed, shall cease to hold office forthwith. Cessation of holding of the office is statutory. The Rules framed under the Act come under the category of subordinate legislation and the subordinate legislation cannot override the provisions of the Act. A person against whom, a motion of no-confidence is passed, he ceases to function and ceases to hold office forthwith. An authority functioning in exercise of his power given under the rules which come under the category of subordinate legislation cannot stay such a declaration. It is well established principle that the stream cannot go higher than the source".

11. Decision in *Bal Krishan Patel v. Brijendra Patel* 1985 M.P.L.J 332 reliance whereupon has been placed by respondent no.10 is of no assistance for the reason that scope and power of Collector under Section 83 of the M.P. Panchayats Act, 1981 which was under consideration whereunder the Prescribed Authority was empowered to call for and examine the record in a proceeding under the Act of 1981 of a subordinate officer of any panchayat and if he is satisfied with the proceeding resulted in miscarriage of justice, he shall pass such orders thereon as he deems fit whereas in the case at hand, Section 21 of the Adhiniyam, 1993 is couched in a different manner. Sub-section (1) of Section 21 stipulates that with the passing of no-confidence motion, the incumbent forthwith ceases to hold office. Under sub-section (4) of Section 21, a dispute can be

raised only after motion of no-confidence is carried.

12. In view whereof, the impugned order-dated 26.2.2012 cannot be given the stamp of approval. In the result, the same is quashed. Consequently, the order-dated 13.3.2013 also crumbles and will have no effect. Chief Executive Officer, Janpad Panchayat, Jaisinghnagar Distt. Shahdol is directed to restore the petitioner as adhoc Sarpanch of Gram Panchayat Jhiria forthwith subject to final outcome of the dispute raised under Section 21(4) of the Adhiniyam, 1993.

13. In the result, the petition is allowed to the extent above. No costs.

*Petition allowed.*

**I.L.R. [2014] M.P., 327**
**WRIT PETITION**

***Before Mr. Justice Rakesh Saksena and Smt. Justice Vimla Jain***

W.P. No. 20268/2012 (Jabalpur) decided on 29 July, 2013

SHEEBA MALIK (SMT.) ... Petitioner

Vs.

UNION OF INDIA & ors. ... Respondents

***National Security Act (65 of 1980), Section 3 - Preventive Detention*** **- Validity - Grounds of detention were based on similar grounds on which preventive detention order passed by Authorities was earlier quashed by court - Except 'Rojnamcha Entries' no material on record to prove that activities of detenu caused disturbance in public peace and tranquility - District Magistrate was not made aware that detenu was already in custody in connection with offence under Arms Act before he passed order of detention - Vague reports by police not sufficient for reaching subjective satisfaction required for passing of detention order - Detention order reveals non-application of mind and thus not valid - Petition allowed. (Paras 5, 8, 14 and 16)**

*राष्ट्रीय सुरक्षा अधिनियम (1980 का 65), धारा 3 – निवारक निरोध* – वैधता – निरोध के आधार, उन्हीं समान आधारों पर आधारित थे जिन पर पाधिकारियों द्वारा पूर्व में पारित किये गये निवारक निरोध आदेश को न्यायालय द्वारा अभिखंडित किया गया था – 'रोजनामचा प्रविष्टि' को छोड़कर, यह साबित करने के लिये अभिलेख पर कोई सामग्री नहीं कि निरूद्ध के क्रियाकलापों से लोक शांति एवं प्रशांति में बाधा उत्पन्न हुई – जिला न्यायाधीश को निरोध आदेश पारित करने से पहले इससे अवगत नहीं कराया गया कि निरूद्ध पहले से शस्त्र अधिनियम

के अंतर्गत अपराध के संबंध में अभिरक्षा में था – निरोध आदेश पारित करने हेतु अपेक्षित व्यक्तिपरक संतुष्टि पर पहुंचने के लिये, पुलिस के अस्पष्ट प्रतिवेदन पर्याप्त नहीं – निरोध आदेश से मस्तिष्क का प्रयोग नहीं किया जाना प्रकट होता है और इसलिये वैध नहीं – याचिका मंजूर।

**Cases referred :**

AIR 1988 SC 74, (1974) 4 SCC 530, (2012) 7 SCC 181, 2011(1) MPHT 208.

*Manish Datt* with *Siddharth Datt*, for the petitioner.
*R.S. Siddiqui*, Assistant Solicitor General for the respondent no. 1
*Umesh Pandey*, G.A. for the respondents no. 2 to 4.

**ORDER**

The Order of the Court was delivered by,
**RAKESH SAKSENA, J.:** Petitioner, by this petition under Article 226 of the Constitution of India, has challenged the detention of her husband Mukhtar Malik in consequence of the order dated 15.9.2012 passed by the District Magistrate, Bhopal, the respondent No.3, which was approved by the State Government and also by the Advisory Board.

2. The facts, as narrated in the petition as well as in the return submitted by the respondents, are that petitioner's husband Mukhtar Malik has been detained by virtue of the order dated 15.9.2012 passed by the District Magistrate, Bhopal in exercise of the powers conferred by sub-section (2) of Section 3 of the National Security Act (hereinafter referred to as 'the Act'). This order was confirmed by the respondent No.2/State Government as per the provisions of Section 12(1) of the Act. The detention order of Mukhtar Malik has been passed on the grounds enumerated in Annexure P/2, which are as under:

> "3. पिछले वर्षों 1982 से 2010 के मध्य आपके द्वारा 50 बार आपराधिक घटनाएं घटित की गई । इन घटनाओं के संबंध में आपके विरूद्ध निम्नानुसार अपराध कायम किये गये और प्रकरण न्यायालय में प्रस्तुत किये गये:–
>
> (01) दि0 07.06.1982 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 106/82 धारा 376, 506 बी भादवि के तहत चालान न्यायालय में पेश किया गया।
>
> (02) दि0 14.06.1983 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध

क0 113/83 धारा 147, 341, 323 भादवि के तहत चालान न्यायालय में पेश किया गया।

(03) दि0 04.08.85 को थाना तलैया, जिला भोपाल में अपराध क0 498/85 धारा 147, 148, 149, 308 भादवि के तहत चालान न्यायालय में पेश किया गया । न्यायालय द्वारा 25.09.91 को बरी किया गया ।

(04) दि0 10.02.86 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 18/86 धारा 307, 147, 148 भादवि के तहत चालान न्यायालय में पेश किया गया।

(05) दि0 08.09.87 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 178/87 धारा 341, 294, 323, 34 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(06) दि0 06.09.87 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 179/86 धारा 323, 341 भादवि के तहत चालान न्यायालय में पेश किया गया।

(07) दि0 01.08.87 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 70/87 धारा 353, 186, 506 बी भादवि के तहत चालान न्यायालय में पेश किया गया ।

(08) दि0 03.10.87 को थाना सुल्तानपुर जिला रायसेन में अपराध क0 75/87 धारा 379, 353, 186, 506 बी भादवि एवं 26 वन अधिनियम के तहत चालान न्यायालय में पेश किया गया ।

(09) दि0 17.10.87 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 204/87 धारा 341, 294, 506 बी भादवि के तहत चालान न्यायालय में पेश किया गया ।

(10) दि0 03.02.88 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 27/88 धारा 363, 365, 384 भादवि के तहत चालान न्यायालय में पेश किया गया।

(11) दि0 25.04.88 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 99/88 धारा 325, 34 भादवि के तहत चालान न्यायालय में पेश किया गया।

(12) दि0 28.02.89 को थाना सुल्तानपुर, जिला रायसेन में अपराध क0 32/89 धारा 332, 353, 294, 506, 392 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(13) दि0 28.02.89 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 43/89 धारा 376, 341, 506 भादवि के तहत चालान न्यायालय में पेश किया गया।

(14) दि0 28.03.89 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 67/89 धारा 374, 342, 506 बी भादवि के तहत चालान न्यायालय में पेश किया गया ।

(15) दि0 27.02.90 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 233/90 धारा 353, 332, 186, 307, 224 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(16) दि0 28.09.90 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 234/90 धारा 332, 186, 294, 22 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(17) दि0 19.02.91 को थाना– उमरावगंज, जिला रायसेन में अपराध क0 23/91 धारा 365, 224, 511, 34 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(18) दि0 27.10.91 को थाना तलैया, जिला भोपाल में अपराध क0 778/91 धारा 307 भादवि एवं 25/27 आर्म्स एक्ट के तहत चालान न्यायालय में पेश किया गया ।

(19) दि0 09.01.92 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 06/92 धारा 223, 225, 353, 120 बी भादवि के तहत चालान न्यायालय में पेश किया गया ।

(20) दि0 31.01.92 को थाना उमरावगंज, जिला रायसेन में अपराध क0 6/92 धारा 307, 34, भादवि के तहत चालान न्यायालय में पेश किया गया ।

(21) दि0 07.06.94 को थाना– जहांगीराबाद भोपाल में अपराध क0 494/94 धारा 307, 34 भादवि के तहत चालान न्यायालय में पेश किया गया।

(22) दि0 28.11.94 को थाना– तलैया भोपाल में अपराध क0 535/94 धारा 341, 294, 506, 34 भादवि के तहत चालान न्यायालय में पेश किया गया।

(23) दि0 29.11.94 को थाना– तलैया भोपाल में अपराध क0 537/94 धारा 294, 506 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(24) दि0 20.03.95 को थाना– सुल्तानपुर, जिला रायसेन में अपराध क0 40/95 धारा 147, 148, 506, 427 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(25) दि0 03.07.95 को थाना– सुल्तानपुर, जिला रायसेन में अपराध क0 75/95 धारा 294/506 बी भादवि के तहत चालान न्यायालय में पेश किया गया ।

(26) दि0 20.06.95 को थाना– तलैया भोपाल में अपराध क0 350/95 धारा 307, 34 बी भादवि एवं 25 आर्म्स एक्ट के तहत चालान न्यायालय में पेश किया गया ।

(27) दि0 06.08.96 को थाना– तलैया भोपाल में अपराध क0 495/96 धारा 506 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(28) दि0 10.07.96 को थाना– जहांगीराबाद भोपाल में अपराध क0 410/96 धारा 141, 148, 149, 302, 307, 109, 120 भादवि एवं 25 आर्म्स एक्ट के तहत चालान न्यायालय में पेश किया गया ।

(29) दि0 28.10.96 को थाना– थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 216/96 धारा 393, 506 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(30) दि0 07.01.97 को थाना– सुल्तानपुर, जिला रायसेन में अपराध क0 129/96 धारा 393, 392, 506, 211, 213 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(31) दि0 07.01.97 को थाना– औबेदुल्लागंज, जिला रायसेन में अपराध क0 06/97 धारा 365, 366, 384, 212, 216ए, 34 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(32) दि0 08.01.97 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 07/97 धारा 307, 34 भादवि के तहत चालान न्यायालय में पेश किया गया।

(33) दि0 08.01.97 को थाना औबेदुल्लागंज, जिला रायसेन में अपराध क0 08/97 धारा 307, 34 भादवि के तहत चालान न्यायालय में पेश किया गया।

(34) दि0 10.01.97 को थाना– बिलखिरिया, जिला भोपाल में अपराध क0 07/97 धारा 25 आर्म्स एक्ट के तहत चालान न्यायालय में पेश किया गया।

(35) दि0 11.01.02 को थाना– एम0पी0नगर, भोपाल में अपराध क0 25/02 धारा 386, 342, 506, 34 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(36) दि0 09.09.02 को थाना– एमपी नगर भोपाल में अपराध क0 571/02 धारा 294, 506 भादवि के तहत चालान न्यायालय में पेश किया गया।

(37) दि0 06.03.2000 को थाना– तलैया भोपाल के रो0सा0 388/2000 चालान न्यायालय में पेश किया ।

(38) दि0 08.03.2000 को थाना– तलैया भोपाल के रो0सा0 388/2000

चालान न्यायालय में पेश किया ।

(39) दिनांक 04.05.2001 थाना तलैया भोपाल के रो0सा0 200/2001 चालान न्यायालय में पेश किया ।

(40) दिनांक 21.01.2002 तलैया भोपाल के रो0सा0 388/2000 चालान न्यायालय में पेश किया ।

(41) दिनांक 22.03.2003 तलैया भोपाल के रो0सा0 1377/2003 चालान न्यायालय में पेश किया ।

(42) दिनांक 11.04.2003 तलैया भोपाल के रो0सा0 738/2003 चालान न्यायालय में पेश किया ।

(43) दिनांक 23.05.2003 तलैया भोपाल के रो0सा0 1473/2003 चालान न्यायालय में पेश किया ।

(44) दिनांक 19.0.2003 तलैया भोपाल के रो0सा0 1160/2003 चालान न्यायालय में पेश किया ।

(45) दि0 24.01.2003 को थाना– शाह0बाद भोपाल में अपराध क0 586/03 धारा 307, 34, 120बी भादवि के तहत चालान न्यायालय में पेश किया गया ।

(46) दि0 27.04.2005 को थाना– औबेदुल्लागंज, रायसेन में अपराध क0 154/05 धारा 341, 294, 323, 506 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(47) दि0 11.05.2006 को थाना– औबेदुल्लागंज, रायसेन में अपराध क0 235/06 धारा 451, 294, 506, 507, 34 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(48) दि0 11.05.2006 को थाना– औबेदुल्लागंज, रायसेन में अपराध क0 235/06 धारा 451, 294, 506, 507, 34 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(49) दि0 27.09.2009 को थाना– तलैया भोपाल में अपराध क0 283/09 धारा 294, 323, 384, 506, 34 भादवि के तहत चालान न्यायालय में पेश किया गया ।

(50) दि0 12.12.2010 को थाना– शाह0बाद भोपाल में अपराध क0 647/10 धारा 387, 294, 506, 34 भादवि के तहत चालान न्यायालय में पेश किया गया।

4/ आपको वर्ष 1995 में जिलादण्डाधिकारी, भोपाल के आदेश कमांक 30/एनएसए/1995 दिनांक 05/07/1995 द्वारा राष्ट्रीय सुरक्षा अधिनियम

1980 की धारा 3(2) के तहत निरोध में लिया गया । दिनांक 26/08/95 को जेल से मुक्त होने पर आप पुनः आपराधिक गतिविधियों में लिप्त हो गये ।

5/ आपको वर्ष 2002 में जिलादण्डाधिकारी, भोपाल के आदेश कमांक 01/एनएसए/2002 दिनांक 04/02/2002 द्वारा राष्ट्रीय सुरक्षा अधिनियम 1980 की धारा 3(2) के तहत निरोध में लिया गया निरोध अवधि (एक वर्ष ) दिनांक 04/02/2003 को पूर्ण होने के उपरांत आप जेल से मुक्त होने पर आप पुनः आपराधिक गतिविधियों में लिप्त हो गये ।

6/ आपको अतिरिक्त जिलादण्डाधिकारी भोपाल के आदेश कमांक 83/2003 दिनांक 18/11/2003 द्वारा म0प्र0 राज्य सुरक्षा अधिनियम 1990 तहत जिलाबदर किया गया था । इसके पश्चात पुनः आपको अतिरिक्त जिलादण्डाधिकारी भोपाल के आदेश कमांक 83/2003 दिनांक 18/11/2003 द्वारा म0प्र0 राज्य सुरक्षा अधिनियम 1990 के तहत जिलाबदर किया गया ।

7/ इस प्रकार विगत वर्षों में आपके द्वारा घटित अनेकों अपराधों में आपके विरूद्ध न्यायालय में चालान प्रस्तुत किये गये, आपको दो बार राष्ट्रीय सुरक्षा अधिनियम के अंतर्गत निरूद्ध किया गया एवं दो बार मध्यप्रदेश राज्य सुरक्षा अधिनियम 1990 के अंतर्गत जिलाबदर किया परंतु आपके आचरण में सुधार नहीं आया है ।

8/ पिछले एक वर्ष में भी आपके द्वारा भोपाल जिले में लगातार आपराधिक घटनाएं घटित की जा रही हैं तथा आम लोगों को निरंतर आतंकित किया जा रहा है । आपका आतंक इतना बढ़ गया है कि कई घटनाओं में लोग आपके विरूद्ध अपराध कायम कराने में तथा साक्ष्य देने से भी घबराते हैं जिले में एक वर्ष में आपके विरूद्ध निम्नानुसार घटनाएं घटित की गई हैं:-

(1) दिनांक 15/08/2012 को आप अपने साथियों के साथ मिलकर लोगों को डरा धमका कर जबरन पैसों की मांगकर रहे थे आपके उक्त कृत्य से क्षेत्र में आतंक का वातावरण व्याप्त होकर लोक व्यवस्था को आसन्न खतरा उत्पन्न हो गया ।

(2) दिनांक 02/09/2012 को आप अपने साथयों के साथ मिलकर लोगों को डरा धमका कर जबरन पैसों की मांगकर रहे थे आपके उक्त कृत्य से क्षेत्र में भय व आतंक का वातावरण व्याप्त होकर लोक व्यवस्था को आसन्न खतरा उत्पन्न हो गया ।

(3) दिनांक 04/09/2012 को आपने अपने साथियों के साथ वीनस मार्बल की दुकान पर बैठ कर बाल मुकंद वैष्णव पुत्र रूपदास वैष्णव को बुलाया तथा उससे जबरन पांच लाख रूपयों की मांग की गई । उसके द्वारा मना करने पर आपने साथियों के साथ मिलकर उसे डराया धमकाया तथा

आपके द्वारा उसे जान से मारने की धमकी दी गई । आपके उक्त कृत्य से आम नागरिक भयभीत एवं आतंकित हैं और क्षेत्र में भय एवं आतंक का वातावरण व्याप्त होकर लोक व्यवस्था को आसन्न खतरा उत्पन्न हो गया है।

9/ उपरोक्त घटनाओं के संबंध में श्री एम0आर0खान, थाना प्रभारी थाना तलैया, भोपाल ने भी साक्ष्य दिये हैं । उक्त साक्ष्य से इन घटनाओं की पुष्टि होती है कि पिछले एक वर्ष में आपके द्वारा घटित की गई घटनाओं और गतिविधियों से लोक व्यवस्था प्रभावित हुई है, और जिले के लोग आपके भय से आतंकित हैं । वर्ष 1982 से लेकर वर्ष 2012 तक आप संपत्ति के विवाद को हल करने में लगे हुए हैं । जिसमें विधि के विरूद्ध मकान खाली कराने के काम करते हैं, संपत्ति पर अवैध रूप से कब्जा कर रहे हैं तथा आप आम नागरिकों तथा व्यापारियों से हफ्ता वसूली इत्यादि के कार्य कर रहे हैं । आपका भय व आतंक इतना बढ़ गया है कि लोग आपके विरूद्ध पुलिस में रिपोर्ट दर्ज कराने नहीं जा रहे हैं । भोपाल नगर के लोग आपके आतंक व डर से आपके विरूद्ध गवाही नहीं देते हैं । अतः मैं संतुष्ट हूँ कि आपके द्वारा घटित घटनाओं से आपको यदि स्वतंत्र छोड़ा गया और आपकी गतिविधियों को तत्काल प्रभाव से नियंत्रित नहीं किया गया तो जिले की लोक व्यवस्था पर विपरीत प्रभाव पड़ेगा ।

10/ चूंकि भोपाल नगर एक अतिसंवेदनशील नगर है और आपकी आसमाजिक एवं आपराधिक गतिविधियों में कोई नियंत्रण नहीं हुआ है और नगर की लोक व्यवस्था बार–बार भंग होने की संभावना निरंतर बनी हुई है। आपकी असमाजिक एवं समाज विरोधी गतिविधियों पर सामान्य कानून द्वारा नियंत्रण रखा जाना असंभव प्रतीत होता है । आपकी असामाजिक एवं आपराधिक गतिविधियों को नियंत्रित नहीं किया गया तो नगर की लोक व्यवस्था कभी भी भंग हो सकती है ।

(3) Learned counsel for the petitioner has challenged the detention order mainly on three grounds – (1) that the offences registered against the detenu from 7.6.1982 to 27.9.2009 were already the subject matter of the detenu's earlier detention order dated 9th December, 2009 passed by the District Magistrate which after consideration, High Court quashed by order dated 21.3.2010 passed in Writ Petition (*Habeas Corpus*) No.781/2010. Therefore, the grounds taken for detention of detenu for the aforesaid period could not have been repeated in the instant detention order; (2) that the grounds pertaining to offences registered against detenu on 15.8.2012, 2.9.2012 and 4.9.2012 were vague and pertained to merely law and order problem and did not tend to affect the public order of the society; and (3) that at the time when the detention order was passed i.e. on 15.9.2012, the detenu had already been

arrested and he was in custody in connection with Crime No.795/2012 registered against him under Section 25/27/35 of the Indian Arms Act on 14.9.2012. The detaining authority was not made aware of this fact. As such, the detention order was passed without application of mind.

(4) Learned counsel for the respondents have supported the detention order contending that it was made on relevant and valid grounds.

(5) After perusal of the order dated 31.3.2010 passed in Writ Petition (Habeas Corpus) No.781/2010 we find that the grounds narrated in the instant detention order which pertained to the offences registered against detenu from 7.6.1982 to 27.9.2009 were subject matter of the earlier detention order passed against detenu on 9th December, 2009. This Court, after consideration of those grounds, concluded that the aforesaid acts of the detenu did not amount to causing disturbance of the public order as the degree and extent thereof did neither result in panic and terror to the persons of the locality nor affected public at large. In view of the above finding recorded by this Court, the aforesaid cases narrated against detenu cannot be held to have made out valid grounds of detention in isolation to other grounds. No doubt the aforesaid incidents can be taken into consideration as a past conduct of detenu for appreciating his future course of conduct.

(6) Similarly the fact that detenu was detained under the provisions of National Security Act earlier by passing detention orders against him on 5.7.1995 and 4.2.2002 and further that an externment order passed against him by the District Magistrate on 18.11.2003 can be taken into consideration to contribute the formation of the subjective satisfaction of the detaining authority only if recent grounds on which the detention order is passed primafacie make out a case of the breach of public order. In other terms, previous conduct of a detenu can help detaining authority in reinforcing his satisfaction that without detaining the detenu the disturbance of public order by him cannot be prevented. The instant detention order was passed on the basis of incidents dated 15.8.2012, 2.9.2012 and 4.9.2012.

(7) Learned senior counsel for the petitioner submitted that the incidents dated 15.8.2012 and 2.9.2012 are vague and give no particulars about any occurrence. They are general in nature which could have been concocted by the police at their whims. On perusal of record, we find that in respect of these two incidents the police submitted only two Rojnamcha entries. As per Rojnamcha No.1013 dated 16.8.2012 Sub Inspector Ashok Bharavi reported

that during his visit in the area he received information that proclaimed offender Mukhtar Malik was active with his associates and was purchasing and selling the land after frightening the people. He also came to know that after creating terror he was extorting money from the people. People were under his terror, therefore, they were scared of lodging any report. A similar Rojnamcha entry was made in the same police station on 2.9.2012 which revealed that during his round in the area Inspector M.R. Khan received information that proclaimed offender Mukhtar Malik was involved in unsocial activities and was intimidating people by causing terror. He was indulging in deals of land in the neighbouring areas of Bhopal. For earning money illegally, he was indulging in criminal activities. He also used to recover money from the people. Since there was terror of Mukhtar Malik, nobody dared to lodge report.

(8) Except the aforesaid Rojnamcha entries there was no material in the record. A bare perusal of these reports indicates vagueness. In our opinion, such type of vague reports made by police officers even against a habitual offender could not have made a ground for subjective satisfaction of the detaining authority for passing an order of detention. Thus, in our opinion, the grounds formulated on the basis of mere Rojnamcha entries dated 15.8.2012 and 2.9.2012, in the absence of other relevant material, have to be held vague and not sufficient for reaching the subjective satisfaction required for passing of a detention order under the Act.

(9) The ground pertaining to incident dated 4.9.2012 wherein the allegation against the detenu is that he forcibly called Bal Mukund Vaishnav at Venus Marble Shop and made a demand of Rs.5 lacs. When he denied, associates of detenu intimidated him to kill. Though it has been stated in the ground that by his aforesaid conduct the people in general got terrorized and an atmosphere of fear and terror was created in the locality causing disruption of public order, but it can be appreciated that this incident pertained to a particular individual and could not have affected the peace and tranquility of public at large. On perusal of the first information report lodged by the complainant Bal Mukund it is apparent that the incident occurred in the course of dealings in business. There was some dispute about the return of money paid by one Amita for purchase of a house. The incident occurred when she cancelled the deal and demanded her money back. Though it is stated in the first information report that the associates of detenu against the wish of complainant took him to the house of detenu where he intimidated him to return the money, but all these facts go to indicate that the criminal act of detenu emanated from business

dealing:

(10) In case of *Subhas Bhandari v. District Magistrate, Lucknow and others* – AIR 1988 SC 74 the Apex Court observed that :

> "In the instant case the alleged act of assault by fire- arms is confined to the complainant Surya Kumar and not to others. It is an act infringing law and order and the reach and effect of the act is not so extensive as to affect considerable members of the society. In other words, this act does not disturb public tranquility nor does it create any terror or panic in the minds of the people of the locality nor does it affect in any manner the even tempo of the life of the community. This criminal act emanates from business rivalry between the detenus and the complainant, therefore, such an act cannot be the basis for subjective satisfaction of the detaining authority to pass an order of detention on the ground that the impugned act purports to affect public order I.e. the even tempo of the life of the community which is the sole basis for clamping the order or detention. ..... Thus it is the degree and extent of the reach of the act upon the society which is vital for considering the question whether a man has committed only a breach of law and order or has acted in a manner likely to cause disturbance to public order."

Similarly it was observed in *Golam Hussain @ Gama v. The Commissioner of Police, Calcutta and others* – (1974) 4 SCC 530 that the nature of the act, the circumstances of its commission, the impact on people around and such like factors constitute the pathology of public disorder. The act cannot be isolated from its public setting but is to be taken with its total effect on the flow of orderly life. It may be a question of the degree and quality of activity of the sensitivity of the situation and the psychic response of the involved people.

(11) In view of the above propositions of law, we find that the aforesaid grounds did not amount to causing of disturbance to the public order. As such they could not be held to be valid grounds for passing detention order .

(12) Learned senior counsel next submitted that the detaining authority mechanically passed the detention order without taking into consideration that

at the time of passing of the order detenu was already in custody since he was arrested on 14.9.2012 itself in Crime No.795/2012 under Section 25/27/35 of the Arms Act.

(13) Learned counsel for the State has filed the first information report registered by Inspector Umesh Chauhan wherein it has been mentioned that detenu was arrested while going in his car. At that time he was in possession of a pistol without license. After arrest, he was confined in police station.

(14) Learned senior counsel for the petitioner has also filed order sheet dated 15.9.2012 of the Court of Judicial Magistrate First Class, Bhopal wherein it has been mentioned that petitioner was arrested on 14.9.2012 and was produced before him on 15.9.2012. Thus, it is abundantly clear that detenu was already in custody on 15.9.2012 when the detention order was passed. It is also surprising when the matter was placed before the District Magistrate, no first information report in respect of the offence under the Arms Act was produced before him whereby he could have been made aware of the fact that detenu was in custody. Since he was not aware that detenu was in custody in connection with a serious offence, the detention order passed by him reveals non-application of mind on its part. True, the detention order could have been passed even if the detenu was in custody, but it was necessary for the District Magistrate to have considered the fact if there was any reasonable probability of detenu's release on bail.

(15) The Apex Court in case of *Huidrom Konungjao Singh v. State of Manipur and others* (2012) 7 SCC 181 after considering the earlier decisions held:

> "9. In view of the above, it can be held that there is no prohibition in law to pass the detention order in respect of a person who is already in custody in respect of criminal case. However, if the detention order is challenged the detaining authority has to satisfy the Court the following facts:
>
> (1) The authority was fully aware of the fact that the detenu was actually in custody.
>
> (2) There was reliable material before the said authority on the basis of which it could have reasons to believe that there was real possibility of his release on bail and further on being released he would probably indulge in activities which

are prejudicial to public order.

(3) In view of the above, the authority felt it necessary to prevent him from indulging in such activities and therefore, detention order was necessary.

In case either of these facts does not exist the detention order would stand vitiated. The present case requires to be examined in the light of the aforesaid settled legal proposition."

This Court also in case of *Chhenu alias Yunus v. State of M.P. and another* – 2011(1) MPHT 208 (DB) quashed the detention of detenu observing:

"There is nothing to indicate the awareness of the Detaining Authority that detenu was already in jail and yet the impugned order was made. This, in our opinion, clearly exhibits non-application of mind and would result in invalidation of the order."

(16) In view of the foregoing discussion, we allow this writ petition, quash the impugned detention order dated 15.9.2012 passed by the District Magistrate Bhopal and direct that detenu Mukhtar Malik be released immediately from custody, if he is not required in any other case.

*Petition allowed.*

**I.L.R. [2014] M.P., 339**
**WRIT PETITION**
***Before Mr. Justice Sanjay Yadav***
W.P. No. 12055/2013 (Jabalpur) decided on 5 August, 2013

SHUKRAKANT SHUKLA ...Petitioner
Vs.
STATE OF M.P. & ors ... Respondents

***School Education - Transfer Certificate* - School issued Transfer Certificate not on account of any indiscipline by Petitioner but because he is suffering from Tubercular Granules With Frontal Region of Brain disease - Held - An archaic approach of School administration that it apprehends mis-happening is not at all appreciated specifically when the petitioner is adjudged fit and is under constant medication under experts - Transfer Certificate quashed. (Paras 2, 7 & 8)**

*शालेय शिक्षा – स्थानांतरण प्रमाण पत्र* – विद्यालय द्वारा स्थानांतरण प्रमाण पत्र याची की किसी अनुशासनहीनता के कारण नहीं बल्कि इसलिए जारी किया गया क्योंकि वह मस्तिष्क के अग्रभाग में बीमारी के साथ ट्यूबरकुलर ग्रेन्युल्स से पीड़ित था – अभिनिर्धारित – विद्यालय प्रशासन का रुढ़िवादी दृष्टिकोण कि उन्हें अनहोनी की आंशका है, बिल्कुल सराहनीय नहीं है विनिर्दिष्ट रुप से तब जब याची को स्वस्थ्य न्यायनिर्णित किया गया है और वह निरंतर विशेषज्ञों की निगरानी में औषधीयउपचार ले रहा है – स्थानांतरण प्रमाण पत्र अभिखंडित।

*Kamlakar Mishra,* for the petitioner.
*Praveen Namdeo,* for the respondent.

**ORDER**

**SANJAY YADAV, J.:** Heard.

1. Being aggrieved by the transfer certificate and the consequential removal of name from the nominal role, the petitioner student of class 12 Jawahar Navodaya Vidyalaya, Mau, District Shahdol has filed this petition seeking direction to the respondents to permit him to prosecute his study while staying in the hostel.

2. The issuance of Transfer Certificate, as the record reveals is not out of any act of indiscipline by the petitioner but because petitioner suffers a disease i.e. "Tubercular Granules with frontal region of brain" because of which petitioner experience convulsion.

3. It is however, not established even by the District Medical Board which examined the petitioner on 20.10.2012 that the disease is contagious as may require the petitioner to be quarantined.

4. The District Medical Board has clearly opined that it is a "Known case of Seizure disorder" and has been declared "fit with medication" (Annexure R/3).

5. The Seizure disorders as per CECIL: Essentials of Medicine : Second Edn. Section XIII is a disorder or Sensory Function and the patients suffering from temporal lobe epilepsy occasionally suffer Vertigo as the aura.

6. The respondents though have relied on the circular F. No.16-2/90-NVS (Acad) dated 13.02.1992 (Annexure R/4) to justify their action of issuing the Transfer Certificate on health ground. The stipulations in the circular however, is that such Transfer Certificate on health ground can be issued on

the certificate by Civil Surgeon.

7. Whereas in the case at hand, the District Medical Board, comprising of the experts having clearly opined that the petitioner is fit with medication, the respondents are not justified in causing hindrance in the prosecution of studies at Navodaya Vidyalaya, Mau. It is the petitioner's right to prosecute the study in the respondent institution where he has been studying since class 6 and as per the documents on record, the petitioner is a meritorious student. An archaic approach of the respondents that, the school administration apprehends mishappening (Annexure R/5) is not at all appreciated when the fact is that the petitioner has been adjudged fit and is under constant medication under experts (Annexure P/7).

8. For these reasons, the Transfer Certificate issued to the petitioner on 8.3.2013 is quashed. The respondents are directed to take back the petitioner forthwith and allow him to stay in the hostel. The respondent should also permit the petitioner to undergo periodical checkup at the cost of the petitioner.

9. The petition is allowed in the above terms. However no costs.

*Petition allowed.*

**I.L.R. [2014] M.P., 341**
**WRIT PETITION**

***Before Mr. Justice Shantanu Kemkar & Mr. Justice S.C. Sharma***
W.P. No. 9244/2013 (Indore) decided on 27 November, 2013

AMBIKA SOLVEX & ors. ...Petitioners
Vs.
COMMISSIONER OF INCOME TAX & ors. ...Respondents

***Income Tax Act (43 of 1961), Section 127 - Transfer of assessment cases - From Ratlam to Indore*** **- Held - Transfer of assessment cases for administrative convenience and for facilitating coordinated investigation in the group cases - Can never be said to be vague or insufficient reason, particularly wherein proper show cause notice was issued - Opportunity of hearing has been afforded - No case for interference. (Paras 2 & 25)**

*आयकर अधिनियम (1961 का 43), धारा 127 – निर्धारण प्रकरणों का*

*अंतरण – रतलाम से इंदौर* – अभिनिर्धारित – प्रशासनिक सुविधा हेतु एवं प्रकरणों के समूह में जांच के सुविधापूर्ण समन्वयन हेतु, निर्धारण प्रकरणों का अंतरण – कभी भी अस्पष्ट या अपर्याप्त कारण नहीं कहा जा सकता विशिष्ट रुप से जहां समुचित कारण बताओ नोटिस जारी किया गया था – सुनवाई का अवसर प्रदान किया गया – हस्तक्षेप का प्रकरण नहीं।

**Cases referred :**

(1976) 102 ITR 281 (SC), (2010) 190 Taxman 19 (M.P.), (2010) 320 ITR 361, (2000) 241 ITR 807 (Del.), (1998) 234 ITR 860 (Mad), (2007) 294 ITR 147 (Cal.), (2009) 23 DTR (SC) 185, W.A. No. 27/2013 decided on 14/03/2013, (2013) 215 Taxman 203 (Guj.), (2000) 241 ITR 807 (Del.), (2013) 21 ITJ 675 (CG), (2013) 351 ITR 292 (Gauhati), (2009) 318 ITR 299, (2006) 286 ITR 423 (Cal.), (2006) 283 ITR 547 (All.), (2006) 283 ITR 541 (All.), (1997) 225 ITR 298 (Patna).

*Sumit Nema*, for the petitioners.
*R.L. Jain* with *Veena Mandlik*, for the respondents.

**ORDER**

The Order of the Court was delivered by,
**S.C. SHARMA, J.:** The present Writ Petition has been filed challenging the legality and validity of the order dated 31/5/2013, passed by the Commissioner of Income Tax, Ujjain, under Section 127 of the Income Tax Act, 1961 by which the Commissioner of Income Tax has directed transfer of the assessment cases of the petitioners pending before respondent No.4 at Ratlam to respondent No.3 Dy. Commissioner of Income Tax, Central Circle, Indore.

2. The contention of the petitioners is that on 30/4/2013 and 6/5/2013, the Commissioner of Income Tax – I, Ujjain issued notices to the petitioners for centralisation of their cases from Ratlam to Indore. The petitioner No.1 filed a reply to the Show Cause Notice on 6/5/13 and stated that no reason has been assigned in the Show Cause Notice and the returns have been filed at Ratlam and, therefore, the cases should not be transferred and consolidated. A similar reply was filed by the other petitioners to the notices. Thereafter another notice was issued on 20/5/2013 u/S. 127 of the Income Tax Act for transferring the assessment cases of the petitioners from Ratlam to Indore and the reason mentioned in the notices was that for administrative convenience and for facilitating coordinated investigation in the group cases with reference to interlinked documents / transactions, the cases are required to be consolidated and transferred from Ratlam

to Indore. Petitioner No.1 again filed his objection on 27/5/13 and stated that his earlier reply filed on 6/5/13 should be treated as reply to the new Show Cause Notice. The petitioner also informed that the group cases were already centralised at Ratlam vide order dated 16/5/12 and notices have been issued u/S. 153-A by the Dy. Commissioner of Income Tax, Ratlam. Other petitioners have also submitted their objections and they have adopted the reply filed by the petitioner No.1. The petitioners further stated that finally an order was passed on 31/5/13 transferring the cases of the petitioners from Ratlam to Indore. The petitioners have raised various grounds while challenging the validity and legality of the order dated 31/5/13. The contention of the petitioners is that proper reasons have not been recorded for such a transfer and cryptic reasons have been assigned in the Show Cause Notice dated 30/4/13 and 20/5/13 and, therefore, the order passed by the respondents dt. 30/5/13 deserves to be set aside. It has also been stated that earlier by the order of the Chief Commissioner dt. 16/4/12, the cases were centralised under respondent No.4 – The Dy. Commissioner of Income Tax, Ratlam and, therefore, the impugned order which has been passed in supersession of the earlier order deserves to be set aside. Petitioners have also raised a ground before this Court stating that they have not earlier objected to the transfer of their cases to Ratlam and they were cooperating with the assessment proceedings and as their Offices and residence were falling within the territorial jurisdiction of Ratlam and as the entire record and the documents were at Ratlam, the order of transferring the cases from Ujjain to Indore is bad in law. A ground has also been raised stating therein that the order passed by the Commissioner of Income Tax, Ujjain is in complete violation of the judicial precedence established by Hon'ble the Supreme Court of India and followed by the M.P. High Court and relied upon by the Andhra Pradesh High Court as well as Delhi High Court and Madras High Court. It has also been argued that while transferring the cases, proper opportunity of hearing and proper reasons should have been assigned by the transferring authority. Learned counsel has also argued before this Court that reasons for transfer of a case should be properly communicated to the assessee and in the present case, frivolous reasons have been assigned by the respondents and, therefore, the impugned order is bad in law in the light of the judgment delivered by the apex Court in the case of *Ajanta Industries and others Vs. Central Board of Direct Taxes and others* reported in (1976) 102 ITR 281 (SC). The petitioners have placed reliance upon a judgment delivered in the case of *Dr. Ashok Sharma and another Vs. Commissioner of Income Tax and another* reported in (2010) 190 Taxman 19 (MP) and the contention of the petitioners is that the order passed by the respondents is invalid as it is a cryptic and non

speaking order. Learned counsel for the petitioners has also placed reliance upon a judgment delivered by the Calcutta High Court in the case of *Naresh Kumar Agrawal Vs. Union of India and others* reported in (2010) 320 ITR 361 and his contention is that merely stating that transfer is for coordinated investigation and assessment, is not at all sufficient as the assessee should have been intimated about the reasons in a comprehensive manner in order to enable him to make an effective representation. Learned counsel for the petitioners has further relied upon a judgment delivered by the Delhi High Court in the case of *Power Controls and others Vs. Commissioner of Income Tax and others* reported in (2000) 241 ITR 807 (Del.) and again his contention is that non disclosure of specific reasons for transfer will vitiate the order of transfer passed by the Competent Authority. Learned counsel for the petitioners has also placed reliance upon a judgment delivered in the case of *General Exporters Vs. Commissioner of Income Tax and another* reported in (1998) 234 ITR 860 (Mad) and his contention is that in the aforesaid case as the Show Cause Notice was silent and no reasons were disclosed, no opportunity of hearing was afforded to the assessee who had filed objections, the order passed u/S. 127 was quashed and, therefore, in the present case also the order passed in similar circumstances deserves to be quashed. Learned counsel for the petitioners has also placed reliance upon a judgment delivered by the Calcutta High Court in the case of *Lords Distillery Ltd., and another Vs. Commissioner of Income Tax and others* reported in (2007) 294 ITR 147 (Cal.) and his contention is that in the light of the aforesaid judgment, as the requirement of Sec. 127 has not been fulfilled, the impugned notice and the impugned order of transfer deserves to be set aside. A ground has also been raised stating therein that the transferring authority has not applied its mind independently and in fact, the transferring authority has acted pursuant to the instructions received from the higher authority (Commissioner of Income Tax, (Central), Bhopal) and, therefore, as the transferring authority while discharging the judicial or quasi judicial functions has acted at the behest of the higher authority, the impugned order deserves to be set aside. It has also been argued that the impugned order is violative of the principles of natural justice and fair play as the principles of natural justice requires impartial and fair hearing and the respondents have denied the impartial and fair hearing to the petitioners. Lastly, the reliance has been placed upon a judgment delivered in the *case of Commissioner of Income Tax Vs. Greenworld Corporation* reported in (2009) 23 DTR (S.C.) 185 and the contention of the learned counsel is that a higher authority cannot interfere with the independence of a lower authority and in the present case the transfer has been done at the behest of Commissioner of Income Tax, Bhopal and, therefore,

the same deserves to be set aside. The petitioner has prayed for quashment of the order dated 31/5/13 passed by the Commissioner of Income Tax, Ujjain.

3. A reply has been filed and the contention of the respondents is that a proper Show Cause Notice was issued u/S.127 of the Income Tax Act and even if Section 127 was not mentioned in the Show Cause Notice, the order passed u/S.127 cannot be said to be an illegal order and without jurisdiction. It has been stated that the petitioners in response to the Show Cause Notice dt. 30/4/13, 6/5/13 and 20/5/13 submitted detailed and exhaustive reply and the order was passed after granting an opportunity of hearing to the petitioners and, therefore, by no stretch of imagination, it can be said that the order has been passed in violation of principles of natural justice or in violation of the statutory provisions as contained u/S. 127 of the Income Tax Act. The respondents have further stated that the order passed by them, which is under challenge, has been passed with due concurrence of the Chief Commissioner of Income Tax, Indore and by the impugned order 12 cases have been consolidated. It has been stated that Ambika Solves Ltd., Indore, Narayan Niryat India Pvt. Ltd., Indore, Avalanche Realty Pvt. Ltd., Indore and Narayan Ambika Infrastructure Pvt. Ltd., Indore are having their registered Office at Satyageeta Apartment, 90/47, Sneh Nagar, Main Road, Indore and except for Ambika Solvex Ltd., all other cases were assessed at Indore. Respondents have further stated that the case of Suresh Chandra Garg had the address of Akola but was being assessed at Ratlam; cases of Ms. Rashmi Garg, Shri Kailash Chandra Garg and Shri Pawan Garg had the same address at Indore and the case of Ms. Rashmi Garg was assessed at Indore. The residence of Shri Kailash Chandra Garg, Shri Pawan Kumar Garg and Ms. Rashmi Garg is at 87, Samrat Ashok Nagar, Behind Sapna Sangeeta, Indore and, therefore, contention of the petitioners that their Offices and residences were located within the territorial jurisdiction of Ratlam, is false. The respondents have further stated that the order has been passed by the Competent Authority ie., the Commissioner of Income Tax, Ujjain and the Commissioner of Income Tax, Ujjain has acted well within his jurisdiction and passed an order for centralisation dated 31/5/2013 as per the provisions of the Income Tax Act, 1961. It has also been stated in the return that notices were issued on 30/4/13 and 6/5/13 and even though Sec. 127 was not expressly mentioned in the said notices, however, the intent and purpose of the notices was evident from the content of the said notices which the petitioners also understood as they have filed their detailed objection to the proposed centralisation ie., transfer

of cases to one Assessing Officer ie., the Dy. Commissioner of Income Tax, (Central), Indore. It was also mentioned in the notice that the centralisation was necessitated due to the newly set up wing called Central Charge, which as per the administrative guidelines is meant for dealing with specifically the search and seizure cases and accordingly these cases were to be assigned to the Central Charge u/S. 127. This fact was also communicated to the petitioners in the notices. In reply to the petitioners' apprehension that independent appreciation of the seized documents would not be possible, the respondents have stated that the administrative set up of Commissioner of Income Tax, (Central), Bhopal functions in the same manner as that of any other administrative Commissioner of Income Tax. The cases are to be dealt with by the Dy. Commissioner of Income Tax, (Central) who is under the supervisory control of the Addl. Commissioner of Income Tax, (Central), Bhopal who functions below the Commissioner of Income Tax, (Central), Bhopal. It has also been stated that the seized documents are to be examined by the Dy. Commissioner of Income Tax (Central) and not by the Commissioner of Income Tax (Central). The Commissioner of Income Tax (Central) has no powers to issue any directions to the Assessing Officer, to do an Assessment in a particular manner. It has been stated that the Income Tax Act provides adequate administrative controls to prevent individual biases influencing assessment proceedings. Respondents have also denied that they have passed a cryptic order. It has been stated that they have assigned reasons in the Show Cause Notice as well as in the final order for transferring the cases and the centralisation is for the purpose of coordinated investigation in the light of several interlinked incriminating documents seized from different premises during the course of search and seizure. Respondents have also stated that the judgments relied upon by the learned counsel for the petitioners are distinguishable on facts. Respondents have further stated that the Commissioner of Income Tax (Central), Indore has no statutory role in the framing of assessment and reasons have been communicated vide order dated 31/5/13 while ordering transfer of cases. Respondents have also stated that the order passed by them is in consonance with the statutory provisions and they have placed heavy reliance upon a judgment delivered by the High Court of Chattisgarh in the case of *The Commissioner of Income Tax, Raipur Vs. Union of India and others* (W.A.No. 27 / 2013, decided on 14/3/2013). The respondents have prayed for dismissal of the Writ Petition.

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

5. The petitioners before this Court are aggrieved by an order passed u/S. 127(2) of the Income Tax Act, 1961 transferring cases of the petitioners from Ratlam to Indore. A Show Cause Notice was issued on 30/4/2013 for centralisation of the cases with Dy. Commissioner of Income Tax (Central) Indore Region, which reads as under :

**GOVERNMENT OF INDIA**
**MINISTRY OF FINANCE**
**(DEPARTMENT OF INCOME TAX)**
**OFFICE OF THE COMISSIONER OF INCOME TAX**
**AAYAKAR BHAWAN,BHARATPURI,UJJAIN**
**TELEPHONE(0734)2527843,FAX-2515611**

F.No. CIT/UJN/CS./13-14/431 Dated:30.04.2013

TO,

Ambika Solves Ltd.,
Satyageeta Apartment,90/47, Sneh Nagar,
Main Road, Indore.

Sir,

Sub:- Centralization of your case with DCIT ( Central), Indore-Reg.

Pursuant to action under section 132 of the Act, your case was centralized with DCIT-1(1), Ujjain. However, with the creation of the charge of CIT ( Central),Bhopal your case is proposed to centralize with DCIT (m Central), Indore. In case you wish to make statement on the issue, you are directed to do so by attending he office of the undersigned in person or through your authorized representation on or before 06.05.2013, failing which it will be presumed that you have no objection to the proposed action and the matter will be accordingly decided.

(Vijyendra Kumar)
Dy. Commissioner of Income-Tax (HQrs.)
For Commissioner of Income-Tax, Ujjain.

6. In case of petitioner No.1, the address reflected in the Show Cause Notice is of Indore itself. In case of petitioner No.2, the address reflected in the Show Cause Notice is of Mandsaur. In case of petitioner No.3, the address reflected in the Show Cause Notice is again of Indore. In case of petitioner No.5, the address reflected is again Sneh Nagar, Indore. In case of Ms. Rama

Devi Garg, the address is of Mandsaur and in case of Mr. Shreyansh Garg, the address is of Mandsaur. In the notice dated 30/4/2013 there was a typographical error and the case was proposed to be centralised with Dy. Commissioner of Income Tax (Central), Indore and, therefore, again a Show Cause Notice was issued on 6/5/2013, the same reads as under :

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF INCOME TAX)
OFFICE OF THE COMISSIONER OF INCOME TAX
AAYAKAR BHAWAN,BHARATPURI,UJJAIN
TELEPHONE(0734)2527843,FAX-2515611

F.No. CIT/UJN/CS./13-14 Dated:06.05.2013

TO,

Ambika Solvex Ltd.,
Satyageeta Apartment,90/47,
Sneh Nagar,Main Road,
Indore.

Sir,

Sub:- Centralization of your case with DCIT ( Central), Indore-Reg.

Please refer this office letter dated 30.04.2013. In this said letter due to typing error it was mentioned that your case is presently centralized to DCIT-1(1), Ujjain, instead of ACIT/DCIT-1(1),Ratlam. The error is regrettable.

Therefore, in continuation with the same letter you are again being informed that the charge of CIT(Central),Bhopal has been created and your case was proposed to be centralized with DCIT (Central),Indore. Vide this office letter dated 30.04.2013, you were asked to give your comments/ reply on this issue by 06.05.2013. On 06.05.2013 you made the submission wherein you expressed your objection on the proposed centralization. In the light of typing error as mentioned above,you are once again given another opportunity to place your further comments, if any, on the subject matter. You are requested to furnish your reply or appear personally / through Authorized Representatives by 10.05.2013.

(Vijyendra Kumar)

Dy. Commissioner of Income-Tax(HQrs.)
For Commissioner of Income-Tax,Ujjain

7. The petitioners did submit a reply to the Show Cause Notice and raised various grounds and the Competent Authority after considering the reply filed by the petitioners, the Commissioner of Income Tax, Ujjain again issued a letter on 20/5/2013 granting one more opportunity to the petitioners either by appearing in person or through authorised representative or through written statement on 28/5/2013 and the same reads as under :

GOVERNMENT OF INDIA
MINISTRY OF FINANCE (DEPARTMENT OF REVENUE)
OFFICE OF THE COMISSIONER OF INCOME- TAX
AAYAKAR BHAWAN,BHARATPURI,UJJAIN
TELEPHONE(0734)2527843,FAX-2515611

F.No. CIT/UJN/CS./13-14 /868 Dated:20.05.2013

TO,

Ambika Solvex Ltd.,
Satyageeta Apartment,90/47,
Sneh Nagar,Main Road,
Indore.

Sir,

Sub:- Centralization of your case with DCIT ( Central), Indore Under section 127of the Income Tax Act,1961-Reg.

Please refer to this office letter dated 30.04.2013 and 06.05.2013 issued to you on this subject matter. Vide this letter you are being provided the broad reason for proposing your case for centralization with DCIT (Central), Indore and also being given one more and final opportunity to make your representation on the subject matter by appearing before this office in person or through your authorized representatives or through written statement by 28.05.2013.

The search operation in the Ambika Solvex Group of cases, Indore, was conducted on 19.01.2012 wherein,you were also covered under section 132. This search operation was conducted on different premises of different assessees of this group located at different places such as Indore. Mandsaur,

Ratlam, Akola, Mahidpur, etc. These different assessees were being assessed at different places such as Income Tax Office,Indore Income Tax Office, Mandsaur, Income Tax Office, Ratlam, etc, and were being different Assessing Officers. During the search operation as well as on account of post search enquiries several incriminating documents related to different assessees were found and seized from different places. Therefore, with view to carry out coordinated investigation in your case along with all other group cases of Ambika Solvex Group, the cases were centralized to a single officer, i.e. ACIT, Ratlam vide order under Section 127 dated 16.04.2012.

However, with the creation of the charge of CIT(Central), Bhopal,your case along with other group cases is proposed to be centralized with DCIT (Central) Indore. The reason for the same being administrative 'convenience and facilitating coordinated investigation' in the group cases with reference to interlinked documents / transactions. As already mentioned above, various incriminating documents were seized from different premises at different places. The documents are inter- connected and thus, for proper analysis and investigation into all the documents found,all of these case are centralized to a single officer. Further, on account of change in the administrative set-up for dealing with search & seizure cases,your case is proposed to be centralized with the newly created Central Circle, Indore(i.e. DCIT (Central) Indore) which has been created for dealing with search& seizure cases involving number of interlinked group cases. Thus, your case is proposed to be centralized with DCIT (Central), Indore.

(Vijyendra Kumar)
Dy. Commissioner of Income-Tax (HQrs.)
(For Commissioner of Income-Tax,Ujjain)

8. The petitioners did submit their reply to the aforesaid notices which was an exhaustive notice and finally an order has been passed on 31/5/2013. The order passed by the Commissioner of Income Tax is in fact, a very exhaustive order and it contains all minute details of the proceedings which have taken place and also the Commissioner has dealt with all the objections raised by the petitioners. The order passed u/S. 127 of the Income Tax Act, 1961 reads as under :

OFFICE OF THE COMISSIONER OF INCOME TAX,
AAYAKAR BHAWAN,BHARATPURI,UJJAIN
Office (0734) 2527204 / FAX: (251561

Order u/s 127 I.T. Act,1961
Dated 31.05.2013

Search &Seizure operating was carried out on 19.01.2012 in the Ambika Solvex Group of Mandsaur & Indore. The 28 cases of the group were centralized with the DCIT, Ratlam, vide order u/s 127 dated 10/ 16.04.2012. Thereafter notice dated 30.04.2013, 06.05.2013 & 20.05.2013 were issued in all the 28 cases proposing to centralize these cases with the newly created O/o DCIT (Central),Indore under the newly created set- up of CIT (Central), Bhopal. The notices were duly served.

In response to the said notices in the following cases the assessee requested for further time to file its reply in response to first notice dated 30.04.2013. Accordingly further time was given but no reply was file din response to the same.

01. Narayan Trading Co.

02. Shri Yojesh Hotwani.

03. Shri Shiv Kumar Hotwani.

04. Ninnku Exports Pvt. Ltd.

05. Shri Arjun Das Hotwani.

06. Shri Bhagwan Das Hotwani.

07. Shri Rupchand Hotwani.

08. Shri Laxmandas Hotwani.

09. Shri Jethanand Hotwani.

10. Ambika Dehydrates.

In view of the fact that in spite of sufficient opportunities to response has been received from the above assessees, it is deemed that they no objection to the proposed centralization. Accordingly these cases are directed to be centralized with the DCIT ( Central), Indore.

In the following cases the assessee submitted that they have no objection to the proposed centralization. Accordingly these cases are directed to be centralized with the DCIT ( Central), Indore.

1. Keshav Industries Pvt. Ltd.

2. Ambika Refinery.

3. Shri Vinod Kumar Garg

4. Shri Arun Garg

5. Shri Ajay Kumar Garg

In the following cases the assessee have raised objection to the proposed centralization.

01. Ambika Solvex, Ratlam.

02. Suresh Chandra Garg,Ratlam (PAN AGLPG9944N)

03. Suresh Chandra Garg,Ratlam( PAN AGLPG0134B)

04. Narayan Niryat India Pvt. Ltd. Indore.

05. Avalanche Realty Pvt. Ltd. Indore.

06. Narayan Ambika Infrastructure Pvt. Ltd. Indore.

07. Ramkrishna Solvex Pvt. Ltd. Indore.

08. Ms. Rashmi Garg, Indore.

09. Kailash Chandra Garg, Mandsaur.

10. Pawan Kumar Garg, Mandsaur.

11. Ramadevi Garg,Mandsaur.

12. Shreyansh Garg, Mandsaur.

9. In all the above cases common submissions have been made and the gist of the said contentions is that no incriminating documents have found & seized according to them and that there was no stipulation in the notification notifying the jurisdiction of CIT ( Central),Bhopal that search & seizure cases are to be assessed by Central Circle . It was also contended that the accounts of the group as well as accountants/Tax consultant are situated at Jaora, Mandsaur & Neemuch and due to company not doing well most employees from Indore are relieved and so there is lack of sufficient staff at Indore while staff of Jaora & Mandsaur would conveniently manage affairs at Ratlam so centralization at Indore will cause grave hardship.

10. Out of the 12 cases , the cases at Sl. No. 1,4,5,6 had the same address at Indore and out of them only one case was previously assessed at Ratlam that of Ambika Solvex. The case at Sl. No.2 had address of Akola but was being assessed at Ratlam. Cases at Sl. No. 8, 9 & 10 have the same address at Indore but out of them only 1 case was at Indore and 2 were Mandsaur. This shows that assessee has adequate set- up at Indore including the residence at 87, Samrat Ashok Nagar at which Shri kailash Garg. Shri Pawan Garg & Smt.Rashmi Garg are based and only Smt. Rashmi Garg was filing return at Indore. The other two were filing at Mandsaur. The fact of closing of Indore office had not been communicated to the department earlier. The distance between Indore & Ratlam is not so as to cause any hardship and other concerns of the group who are based at Mandsaur which is further then Ratlam, from Indore have expressed no such hardship in the matter.

11. It is further to be noted that in the region there was no separate set-up for dealing with search & seizure case which by their very nature required in depth study of seized material hence such cases were centralized with other Aos of the charge. With the setting up of the CIT (Central), Bhopal this lacuna has been taken care of.

12. In order to facilitate in depth analysis and appreciation of the seized documents co-ordinated investigation of interlinked group cases, the cases are proposed for centralization with DCIT ( Central) from DCIT,Ratlam. This is also with a view to equitable distribution of workload as apart from the search cases the DCIT Ratlam, has other cases to deal with resulting into better administration and administrative convenience. The assessee has also made reference to the judicial pronouncements in the case of *Power Controls & ORS Vs. CIT* (241 ITR 807), Delhi, *V.K. Steel Industries ( P) Ltd. Vs. ACIT* [(187 ITR 403 (AP)] & *Ajantha Industries & ORS Vs. CBDT* [102 ITR 281 (SC)].

13. In this context, reference is necessary to the decision of the High Court of Chhattisgarh in the case Mahamaya Group of Companies wherein the Court has held as under:

1. Section 127 (2) of the Act provides that transfer can be done only if opportunity is afforded to an assessee and after recording reasons. But merely for this reason it cannot be said to be quasi-judicial in nature.

2. The transfer order does not deciding the right of the parties in the

assessment.

3. The ultimate order deciding the right is the order of the assessment which decides the basis and the tax to be paid. This order is a judicial order. The transfer order is merely for administrative reason and it cannot be said that nature of power is judicial.

4. It was not disputed that the search took place in the premises of Mahamaya group of companies , as well as residential and official premises of its direction and its employees, at different places, where incriminating documents were seized.

5. The documents were inter- connected and affected the assessment of the parties. It was necessary to see their overall effect on the assessments. It could only be done after analyzing and investigation into all the documents found at different places and not separately, for which a co-ordinated investigation was necessary. Thus, the words 'coordinated investigation' were not vague.

6. The notice had indicated the reason for transfer as ' centralization' for 'coordinated' investigation'. It was for this reason that order for transfer were made. There was no denial of reasonable opportunity to the assessee.

Another objection which the assessee has raised is that the charge of CIT ( Central), Bhopal is presently with an officer who was actively involved in planning & execution of search operation hence if cases are centralized justice may be denied. Such an argument cannot be a ground at this stage as the post of CIT( Central) is merely being held as an Addl. Charge only. Further the cases involved in planning & execution of the search.

In view of the above after duly considering the objections the above cases are directed to be centralized with the DCIT (Central), Indore for co-ordinated investigation and better administrative control of the work. The list of cases centralized hereby is as per enclosed annexures force w.e.f. 03.06.2013.

(M.S. Pawar)
Commissioner of Income Tax,Ujjain

copy to:

1. The Chief Commissioner of Income -Tax, Indore

2. The Director on Income-Tax ( Inv.),Bhopal

3. The Commissioner of Income Tax( Central),Bhopal

4. The Commissioner of Income-Tax-I&II,Indore

5. The Addl. Director of Income-Tax ( Inv.) ,Indore

6. The Addl. Commissioner of Income -Tax Range-1/2,Ujjain

7. The joint Commissioner of Income-Tax,Ratlam Range,Ratlam

8. The Dy. Commissioner of income-Tax-1(1)/2(1),Ujajin

9. The Dy. Commissioner of Income-Tax,Ratlam

10. The concerned assesse

(Vijyendra Kumar)
Dy. Commissioner of Income-Tax(Hqrs.)
For – Commissioner of Income-Tax, Ujjain

14. The order passed by the Commissioner of Income Tax makes it very clear that large number of assessees are either resident of Indore or they are having their offices at Indore and in order to facilitate coordinated investigation and in order to ensure better administrative control of the work, the impugned order has been passed. As many as 28 cases have been consolidated by the impugned order by the Commissioner of Income Tax, Ujjain.

15. Sec. 127 of the Income Tax Act, 1961 reads as under :

> 127. **Power to transfer cases** (1) The Director General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him.
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> (2) Where the Assessing Officer or Assessing Officers from whom the case is to be transferred and the Assessing Officer or Assessing Officers to whom the case is to be transferred

are not subordinate to the same Director General or Chief Commissioner or Commissioner,

—

(a) where the Directors General or Chief Commissioners or Commissioners to whom such Assessing Officers are subordinate are in agreement, then the Director General or Chief Commissioner or Commissioner from whose jurisdiction the case is to be transferred may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, pass the order;

(b) where the Directors General or Chief Commissioners or Commissioners aforesaid are not in agreement, the order transferring the case may, similarly, be passed by the Board or any such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, authorise in this behalf.

(3) Nothing in sub-section (1) or sub-section (2) shall be deemed to require any such opportunity to be given where the transfer is from any Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) and the offices of all such officers are situated in the same city, locality or place.

(4) The transfer of a case under subsection (1) or sub-section (2) may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Assessing Officer or Assessing Officers from whom the case is transferred.

Explanation.—In section 120 and this section, the word "case", in relation to any person whose name is specified in any order or direction issued thereunder, means all proceedings under this Act in respect of any year which may be pending on the date of such order or direction or which may have been completed on or before such date, and includes also all

proceedings under this Act which may be commenced after the date of such order or direction in respect of any year.

16. Keeping in view the aforesaid statutory provisions, in the present case, it can never be said that the principles of natural justice have been violated by the respondents. Exhaustive Show Cause Notices were issued to the petitioners and they have filed reply to the Show Cause Notices. It has been argued that the reason "for effective and co-ordinate investigation" cannot be said to be sufficient ground for transfer.

17. Learned counsel for the petitioner has placed heavy reliance upon a judgment delivered in the case of *Ajanta Industries and others Vs. Central Board of Direct Taxes and others reported* in (1976) 102 ITR 281 (SC) and his contention is that violation of principles of natural justice and fair play makes an order of transfer to be an invalid order. This Court has carefully gone through the aforesaid case and in the aforesaid case, reasons were not recorded in the order passed u/S. 127 of the Income Tax Act, 1961 and reasons were recorded by the Central Board prior to the passing of the impugned order therein in the file. The apex Court in those circumstances has held that the requirement of recording reasons u/S. 127 (1) is a mandatory direction under the law and non communication thereof is not saved by showing that the reasons existed in the file although not communicated to the assessee. In the present case, the reasons have been recorded and they have been communicated to the assessee that too after granting an opportunity of personal hearing to the assessees and, therefore, the judgment relied upon by the learned counsel for the petitioners is distinguishable on facts.

18. Learned counsel for the petitioners has also placed reliance upon another judgment delivered by this Court in the case of *Dr. Ashok Sharma and another Vs. Commissioner of Income Tax and another* reported in (2010) 190 Taxman 19 (MP). This Court has again gone through the aforesaid judgment and it was a case where a total cryptic and non speaking order was passed and the reasons were also not recorded and in those circumstances the order passed u/S. 127(1) was set aside with a liberty to the CIT to pass a fresh order u/S. 127(1) whereas, in the present case, opportunity of hearing has been granted to the assessee. Again reasons have been assigned in the order passed u/S. 127 of the Income Tax Act and, therefore, again the judgment relied upon by the learned counsel for the petitioners is of no help.

19. Learned counsel for the petitioners has further relied upon a judgment

delivered by the Calcutta High Court in the case of *Naresh Kumar Agrawal Vs. Union of India and others* reported in (2010) 320 ITR 361. In the aforesaid case, the Calcutta High Court was again dealing with the transfer of cases u/S./ 127 of the Income Tax Act. The reason assigned in the proposed transfer was "coordinated investigation and assessment". In the aforesaid case the written objections filed by the petitioner therein were not at all dealt with by the Competent Authority and, therefore, in those circumstances the order passed u/S. 127 of the Income Tax Act was set aside, whereas, in the present case, though the reason assigned is certainly "coordinated investigation and assessment", the objection of the assessees have been dealt with by the Competent Authority and, therefore, taking into account the judgment delivered by the High Court of Gujarat in the case of *Shree Ram Vessel Scrap (P) Ltd., Vs. Commissioner of Income Tax* reported in (2013) 215 Taxman 203 (Gujarat) as opportunity of hearing has also been granted to the petitioners, their objections have been considered, the judgment relied upon by the learned counsel for the petitioners is again of no help.

20. Learned counsel for the petitioners has also placed reliance in the case of *Power Controls and others Vs. Commissioner of Income Tax and others* reported in (2000) 241 ITR 807 (Del.) and his contention is that merely by mentioning that the cases are to be transferred for coordinated investigation, does not mean that proper reasons has been assigned by the Competent Authority. His contention is in the aforesaid case the impugned order passed u/S. 127 was set aside. This Court has again gone through the aforesaid judgment and in the aforesaid case out of four petitioners only in one case it was mentioned that the proposed transfer is for coordinated investigation. In the present case, specific and cogent reasons have been assigned to all the assessees and it is not a case where disclosure has not been done on the part of the Competent Authority transferring the case. Not only this, the Show Cause Notice read with the reply makes it very clear that the petitioners were aware of the reasons for the proposed transfer and they have filed detailed and exhaustive reply to the Show Cause Notice and thereafter with due application of mind a reasoned order has been passed transferring the cases to Ujjain and, therefore, the judgment relied upon is again of no help to the petitioners.

21. Learned counsel for the petitioners has placed reliance upon a judgment delivered by the Madras High Court in the case of *General Exporters Vs. Commissioner of Income Tax and another* reported in (1998) 234 ITR

860 (Mad.). In the aforesaid case it has been held that a Show Cause Notice containing the reasons for the proposed transfer should be given to the assessee and after affording an opportunity of hearing, a speaking order should be passed. In the present case, a Show Cause Notice for proposed transfer containing the reasons was served to the assessees / petitioners and after considering their objections a speaking order has been passed and, therefore, the judgment relied upon is again of no help to the petitioners.

22. Learned counsel for the petitioners has also placed reliance upon a judgment delivered by the Chattisgarh High Court in the case of *Ram Gopal Agrawal Vs. Union of India and Another* reported in (2013) 21 ITJ 675 (CG) and his contention is that in case the reasons have not been communicated to the assessee, the order passed u/S. 127 is bad in law. This Court has carefully gone through the aforesaid judgment and in the aforesaid case the reason assigned in the Show Cause Notice was coordinated investigation and it was stated by the respondents that there are other reasons also recorded in the file but they were not communicated to the assessee, whereas, in the present case, it is not a case where there were other reasons recorded in the file and not communicated to the assessee. The reasons necessary for transfer were communicated to the assessees to which the assessees have filed detailed an exhaustive reply and while passing an order u/S. 127 the reply filed by the assessees have been considered by the Competent Authority and, therefore, again the judgment relied upon by the learned counsel for the petitioners is of no help to the petitioners.

23. The respondent Income Tax Department, on the other hand, has placed reliance upon a judgment delivered by the Gauhati High Court in the case of *Continental Milkose (India) Ltd., Vs. Commissioner of Income Tax and others* reported in (2013) 351 ITR 292 (Gauhati). It was a case of assessment pursuant to search and seizure operation and the case of the petitioner therein was transferred from Dibrugarh to New Delhi for effective coordinated investigation and administrative convenience. The Division Bench of the Gauhati High Court has held the reason to be a valid reason while upholding the order passed u/S. 127 of the Income Tax Act. In the present case also a similar reason has been assigned for transferring the cases to Indore and, therefore, this Court is of the considered view that no interference is called for in the peculiar facts and circumstances of the case.

24. The issue relating to transfer on the ground of effective and co-

ordinated investigation has been dealt with in depth by the Division Bench of the High Court of Gujarat in the case of *Shree Ram Vessel Scrap (P) Ltd., Vs. Commissioner of Income Tax* reported in (2013) 215 Taxman 203 (Gujarat). The Division Bench of the Gujarat High Court, in paragraphs 17 to 25 has held as under :

> 17. We would therefore, like to express our opinion on the issue.
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> 18. Section 127 of the Act, as already noticed, pertains to power to transfer cases. Sub-section(1) empowers the Director General, Chief Commissioner or the Commissioner after giving the assessee a reasonable opportunity of being heard wherever it is possible to do so and after recording his reasons, transfer any case from one more or more Assessing Officers subordinate to him to any other Assessing Officer or Assessing Officers also subordinate to him. Likewise, under sub-section(2) of section 127 after following similar procedural requirements, it is open for the Director General, Chief Commissioner or Commissioner to transfer a case from one Assessing Officer to another who is not subordinate to him in agreement with the authority to whom he may be subordinate. Sub-section(3) of Section 127 provides that nothing contained in sub-section(1) or sub-section(2) shall be deemed to require giving of any such opportunity where the transfer is from any Assessing Officer to another and offices of all such officers are situated in the same city, locality or place. Sub-section(4) of Section 127 provides that the transfer of a case under sub-section(1) or sub-section(2) may be made at any stage of the proceedings and shall not render necessary the re-issuance of any notice already issued by the Assessing Officer from whom the case is transferred.
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> 19. Exercise of power under sub-section(1) and sub-section(2) of the Act comes with certain procedural requirements namely, of granting a reasonable opportunity of being heard in the matter wherever it is possible to do so, of recording of reasons for passing such order and as provided by the Supreme Court in *Ajanta Industries*(supra)

communicating such reasons also to the assessee. Subject to fulfillment of such procedural requirements, the authority under section 127 enjoys considerable discretion while exercising the power contained in sub-section (1) or sub-section(2) thereof. Such discretion of-course has to be exercised for achieving the public purpose and not for any arbitrary or irrelevant consideration. On the other hand, it can also be seen that transfer of a pending case from one Assessing Officer to another outside of a city, locality or place is likely to cause considerable inconvenience to an assessee.

Therefore, even though an assessee may not have a vested right to insist that his assessment be completed only at one place or by a particular Assessing Officer, nevertheless, the reasons for transfer must be weighty enough to off-set against such personal inconvenience of an assessee. In exercise of power under section 127 thus we are concerned with larger public interest on one hand and personal inconvenience on the other. However, as long as such powers are exercised bona fide, for public purpose and in the interest of Revenue, the role of the Court to dissect such reasons and to come to a different conclusion would be extremely limited. It is by now well settled that judicial review against the administrative order in exercise of writ jurisdiction, the Court is concerned with the decision making process and not the final decision itself. Unless the reasons which prompted the competent authority to transfer the case can be stated to be wholly irrelevant or arbitrary, the Court would not interfere with such reasons. Of-course an order of such nature can and need to be quashed if it is demonstrated that same is passed either without jurisdiction or is actuated by mala fide either in fact or in law.

20. In case of *State of U.P. and another v. Johri Mal reported* in AIR 2004 Supreme Court 3800, Supreme Court observed as under :

28. The Scope and extent of power of the judicial review of the High Court contained in Article 226 of the Constitution of India would vary from case to case, the nature of the order,

the relevant statute as also the other relevant factors including the nature of power exercised by the public authorities, namely, whether the power is statutory, quasi judicial or administrative. The power of judicial review is not intended to assume a supervisory role or done the robes of omnipresent. The power is not intended either to review governance under the rule of law nor do the courts step into the areas exclusively reserved by the suprema lex to the other organs of the State. Decisions and actions which do not have adjudicative disposition may not strictly fall for consideration before a judicial review court. The limited scope of judicial review succinctly put are :

(i) Courts, while exercising the power of judicial review, do not sit in appeal over the decisions of administrative bodies;

(ii) A petition for a judicial review would lie only on certain well-defined grounds.

(iii) An order passed by an administrative authority exercising discretion vested in it, cannot be interfered in judicial review unless it is shown that exercise of discretion itself is perverse or illegal.

(iv) A mere wrong decision without anything more is not enough to attract the power of judicial review; the supervisory jurisdiction conferred on a Court is limited to seeing that Tribunal functions within the limits of its authority and that its decisions do not occasion miscarriage of justice.

(v) The Courts cannot be called upon to undertake the Government duties and functions. The Court shall not ordinarily interfere with a policy decision of the State. Social and economic belief of a Judge should not be invoked as a substitute for the judgment of the legislative bodies. (See *Ira Munn Vs. State of Ellinois,* 1876 (94) US (Supreme Reports) 113)

30. It is well-settled that while exercising the power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself. In doing so, it is often argued by the defender of an impugned decision that the Court is not competent to exercise its power when

there are serious disputed questions of facts; when the decision of the Tribunal or the decision of the fact finding body or the arbitrator is given finality by the statute which governs a given situation or which, by nature of the activity the decision maker's opinion on facts is final. But while examining and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the court of judicial review can reappreciate the findings of facts depends on the ground of judicial review. For example, if a decision is challenged as irrational, it would be wellnigh impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touch-stone of the tests laid down by the Court with special reference to a given case. This position is well settled in Indian administrative law. Therefore, to a limited extent of scrutinizing the decision making process, it is always open to the Court to review the evaluation of facts by the decision maker.

In case of *State of N.C.T. of Delhi and another v. Sanjeev alias Bittoo reported* in AIR 2005 Supreme Court 2080, the Court observed as under :

15. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See *State of U.P. and Ors. v. Renusagar Power Co. and Ors.*, AIR (1988) SC 1737. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of

Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

16. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those classes of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is `illegality' the second `irrationality', and the third `procedural impropriety'. These principles were highlighted by *Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service,* [1984] 3 All. ER.

935, (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See *Commissioner of Income-tax v. Mahindra and Mahindra Ltd.*, AIR (1984) SC 1182. The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aldous and John Alder in their book ``Applications for Judicial Review, Law and Practice" thus:

"There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradig, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in council of Civil Service Unions v. Minister for the Civil Service this is doubtful. Lords Diplock, Scaman and Roskil appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. May prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle,including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest."

17. (Also see *Padfield v. Minister of Agriculture, Fisheries and Food,* (LR(1968) AC 997).

18. The Court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

21. In the present case, we notice that that petitioners belonged to the same family or group. They were subjected to common search operation. Their assessments were therefore, under proposal for transfer. A show cause notice was issued to all of them in which the Commissioner called upon them to explain why the cases should not be centralised at Ahmedabad for effective and coordinated investigation. After considering their objections and permitting the oral submissions by the authorised representative, the Commissioner passed the order transferring the cases on the ground that cases were required to be centralised. Since Bhavnagar did not have Central Range Office, they could be transferred at Ahmedabad. Their request that cases be consolidated at Bhavnagar or Mumbai was considered but not accepted. They were instead offered alternative places for transfer of cases within the jurisdiction of Surat, Baroda or Rajkot Office. They did not accept the offer. It was thereupon that the Commissioner proceeded to finalise his proposed transfer of cases from Bhavnagar to Ahmedabad.

22. We do not find that the Commissioner committed any error either in law or in facts. Reason for transfer was clearly indicated in the show cause notice namely, for centralisation of cases and for effective and coordinated investigation. Such reasons were further elaborated while dealing with and disposing of the objections of the petitioners in the final order of the transfer. Before doing so, the authorised representative of the petitioners was offered three other alternatives -Rajkot, Baroda and Surat where the department had centralized wing. We do not find that the reasons either lacked clarity or sufficiency. When it is pointed out that several places of the company were subjected to common search operation, it is

but natural that it would be in the interest of Revenue and perhaps also in the interest of the assessees that cases be consolidated and be placed before one single Assessing Officer. This would avoid duplication of collection of evidence and assessment of evidence. This would also avoid conflict of opinions. The reason that being search cases they had to be placed before a centralised circle office also cannot be stated to be irrelevant. The department for internal convenience and efficient functioning, if has created a special branch for dealing with search cases and has decided to conduct assessments of such cases under such wing, surely assessee cannot have any objection to the same. Assessee has no right in law to insist that his case be kept out of consideration of such branch. Assessees were offered alternative of placing their cases either at Rajkot, Baroda or Surat. It is not even suggested before us that such offer was not made. Under the circumstances we do not find any infirmity in the orders under challenge.

23. We therefore side with the school of thought that the reason for effective and co-ordinate investigation for transfer of assessment cases is neither vague or ground not insufficient. Particularly in the present case when through show cause notice and during hearing of such notices, it was clearly brought to the notice of the assessees the need for transfer of cases, no case for interference is made out. Learned counsel Shri Soparkar submitted that all the judgements taking contrary view pertain to cases which are transferred from one place to another where at-least one assessee is being assessed. This to our mind is not the relevant factor. It may be a factual aspect common to all cases. None of the decisions is based on such fact. Neither Section 127 of the Act, nor any of the decision brought to our notice provides that assessment cases can be transferred from one place to another only as long as at-least one of the case of the group is pending at such place. Section 127 of the Act does not recognise or provide any such limitation on exercise of the powers. Discretion is wide and may be required to be exercised in varieties of situations. We neither can, nor propose to foresee all of them

24. Before closing we may touch upon one aspect which was placed before us by the counsel for the petitioners. At the outset, it was pointed out that the decision of the Division Bench of this Court in case of *Arti Ship Breaking* (supra) was in case of *Millenium Houseware v. Commissioner of Income Tax, Valsad* referred to larger Bench by another Bench under an order dated 12.3.2012. It was pointed out that such decision is pending.

It was therefore, urged that present petitions could also be admitted since earlier petitions are admitted and pending consideration by larger Bench. We have not accepted such a formula for the following reasons :

1) Firstly, the issue referred to the larger Bench in the said order dated 12.3.2012 is wholly different. In case of *Millenium Houseware v. Commissioner of Incometax, Valsad*, this Court had taken a view that by virtue of subsequent judgements of Supreme Court in case of *Managing Director, ECIL, Hyderabad etc. v. B. Karunakar etc.* reported in AIR 1994 Supreme 1074 and *State Bank of Patiala and others v. S.K. Sharma reported* in AIR 1996 Supreme Court 1669 despite the decision in case of *Ajanta Industries*(supra), in facts of the case non communication of the reasons for transferring the case would not vitiate the proceedings. It was this issue which a subsequent Division Bench found unable to persuade itself. It is this reason why the reference has been made to larger Bench. We are not concerned with this aspect at all. Further, counsel urged that since similar petitions are admitted these petitions should also be admitted. Ordinarily, when a similar issue is admitted and pending for consideration, though neither admission nor interim relief is treated as binding precedent, conventionally the Court normally adopts a similar view and does not dismiss the petition. In the present case, however, admission of the petitions would require granting of interim relief. If such interim relief is granted staying the transfer orders, petitions would stand allowed without adjudication if not heard in near future. On the other hand, if no interim relief is granted, the petitions would be rendered infructuous by the time the

same are taken up for hearing. We had therefore, instead of admitting the petitions, heard learned counsel for the parties for final disposal thereof. In the result all the petitions are dismissed.

25. In the light of the aforesaid judgment, the reason for transfer of a case for effective and coordinated investigation can never be said to be a vague nor insufficient reason, particularly in the light of the facts and circumstances of the present case wherein a proper Show Cause Notice was issued, hearing was granted and a final order has been passed in the matter and, therefore, this Court is of the considered opinion that the impugned order cannot be said to be a cryptic order or a vague order, as argued by the learned counsel for the petitioners.

26. Learned counsel for the respondent – Department has also placed reliance upon a judgment delivered by the Delhi High Court in the case of *ATS Infrastructure Ltd., and others Vs. Commissioner of Income Tax* reported in (2009) 318 ITR 299. In the aforesaid case an order of transfer was passed in respect of centralisation of group cases for proper investigation and the cases were transferred to Meerut. The argument was that the ATS Group has no establishment and operations in Meerut and then also the order passed by the Competent Authority was upheld by the Delhi High Court as cases were transferred for coordinated investigation on account of the searches made in group cases in Delhi and several parts of the Uttar Pradesh. It was held by the Delhi High Court that the order is neither malafide nor arbitrary. In the present case also there are no allegations of malafide nor the order can be said to be an arbitrary order, hence, the question of interference by this Court in the peculiar facts and circumstances of the case does not arise.

27. The High Court of Calcutta in the case of *Bal Chand Purohit Vs. Commissioner of Income Tax and others* reported in (2006) 286 ITR 423 (Cal.), has again dealt with the issue of transfer of case and the Calcutta High Court has upheld the order of of transfer of case as reasons for transfer was disclosed in the Show Cause Notice and the order was passed by the Authorities after giving an opportunity of being heard to the assessee. In the aforesaid case, the transfer was made for the same purpose of "coordinated investigation and for centralisation of cases" and the Calcutta High Court has held the aforesaid reason to be a good reason. In the present case also the reason assigned is "coordinated investigation and the assessment" and

centralisation has been ordered and, therefore, this Court is of the considered opinion that in the light of the judgment delivered by the Division Bench of the Calcutta High Court, no interference is warranted.

28. The respondents have brought to the notice of this Court another judgment delivered in the case of *Trimurti Fragrances (P) Ltd., Vs. Commissioner of Income Tax and another* reported in (2006) 283 ITR 547 (All.). In the aforesaid case also the reason assigned was "coordinated and effective investigation" pursuant to search and seizure operation and the Division Bench of the Allahabad High Court has upheld the order of transfer on the ground of "coordinated and effective investigation". The assessee therein was given notice and reasonable opportunity to place its case and was not able to show the prejudice caused to him on account of transfer of case. In the present case also the assessee has not been able to demonstrate any prejudice caused to him by the transfer of cases and, on the contrary, most of the assessees are residents of Indore, they have Office of various Companies at Indore and, therefore, the impugned order of transfer cannot be said to be an arbitrary order or devoid of any rationale or in any way based upon irrelevant considerations.

29. The respondents have placed reliance upon a judgment delivered by the Allahabad High Court in the case of *Virendra Kumar Jain Vs. Commissioner of Income Tax and others* reported in (2006) 283 ITR 541 (All.). In the aforesaid case, the Division Bench of the Allahabad High Court was dealing with a case of transfer u/S. 127 of the Income Tax Act wherein the reason assigned was "coordinated and effective investigation". The Division Bench of the Allahabad High Court has held that the Court cannot go into the sufficiency of the reasons and the Allahabad High Court has upheld the order passed by the Income Tax Authorities. In the present case also cogent and valid reason has been assigned and, therefore, as there is no manifest error apparent on the face of the record in the impugned order, the question of interference by this Court does not arise.

30. Lastly the respondents have placed reliance upon the judgment delivered by the Division Bench of the Patna High Court in the case of *Shibu Soren and others Vs. Commissioner of Income Tax and others* reported in (1997) 225 ITR 298 (Patna). In the aforesaid case, the matter was transferred to Delhi and the petitioner who was a Member of Parliament, was residing at Delhi and having several accounts at Delhi. It was held by the Patna High Court that no inconvenience have been caused to them. Similarly, in the present

case, most of the petitioners – assessees – families – Group Companies are either having their residence, Offices, Head Offices of their Companies at Indore. Show Cause Notices issued to the assessees were containing reasons and detailed and exhaustive replies have been filed by the assessees / petitioners. It is true that earlier an order was passed consolidating cases at Ujjain, but at the same time, the statute does not provide a bar for passing a fresh order u/S. 127 of the Income Tax Act, 1961. The impugned order has been passed after granting an opportunity of hearing to the petitioners and all other concerned persons by assigning cogent reasons and the order communicated to the petitioners reflects that the procedural requirement of Sec. 127 (2) stood satisfied. It is not the case of the petitioners that opportunity of hearing was not granted to them nor the reasons were communicated to them and, therefore, keeping in view the totality of the circumstances of the case, the reason "for effective and coordinated investigation" for transferring of assessment cases was neither vague or ground sufficient and, therefore, in the totality of the circumstances of the case, this Court is of the considered opinion, that the impugned order has rightly been passed by the respondents in exercise of the powers conferred u/S. 127 of the Income Tax Act, 1961 and no case for interference is made out and the Writ Petition deserves to be dismissed and is accordingly dismissed. No order as to costs.

*Petition dismissed.*

**I.L.R. [2014] M.P., 371**
**WRIT PETITION**
***Before Mr. Justice Ajit Singh & Mr. Justice Subhash Kakade***
W.P. No. 4080/2013 (Jabalpur) decided on 18 December, 2013

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

***Contract - Refund of earnest money*** **- Petitioner deposited earnest money as per the terms of the tender - It was agreed that the earnest money would be forfeited in the event of withdrawing the offer - Tender was received on 12.08.2012 and validity period of offer was 120 days i.e. up to 11.12.2012 - Offer was accepted only on 27.12.2012 after the expiry of validity period - Petitioner in reply informed that he is not interested in work therefore, his earnest money be refunded - Held - Respondents were under an obligation to accept the tender**

**before the expiry of the validity period of offer - Offer lapsed it could no longer have been accepted - Earnest money is directed to be refunded alongwith 6% interest per annum. (Para 5)**

*संविदा – अग्रिम धन की वापसी* – याची ने निविदा की शर्तों नुसार अग्रिम रकम जमा की – यह करार था कि प्रस्ताव वापस लिये जाने की स्थिति में अग्रिम धन समपहृत होगा – निविदा 12.08.2012 को प्राप्त की गयी और प्रस्ताव की वैध अवधि 120 दिन थी अर्थात 11.12.2012 तक – प्रस्ताव को 27.12.2012 को ही स्वीकार किया गया, वैधता अवधि समाप्त होने के पश्चात – प्रतिउत्तर में याची ने सूचित किया कि वह कार्य करने में उसकी अभिरुचि नहीं इसलिए उसका अग्रिम धन लौटाया जाए – अभिनिर्धारित – प्रत्यर्थीगण, प्रस्ताव की वैध अवधि समाप्त होने से पूर्व निविदा स्वीकार करने के लिए बाध्य थे – अब व्यपगत प्रस्ताव स्वीकार नहीं किया जा सकता था – अग्रिम धन को 6 प्रतिशत प्रतिवर्ष ब्याज के साथ वापस करने के लिये निदेशित किया गया।

*Rohit Sohgaura*, for the petitioner.
*Nirmala Nayak*, G.A. for the respondents No. 1 to 3.
None for the respondent No. 4

**ORDER**

The Order of the Court was delivered by,

**AJIT SINGH, J.:** By this petition, the petitioner has mainly prayed for a direction against the respondents to refund his earnest money of Rs.8,66,000/- deposited as security in the form of Term Deposit Receipt (TDR) along with interest.

2. On 20.7.2012 respondent Public Works Department of the State of Madhya Pradesh invited tenders from interested persons for the construction of Baxwaha-Nehagir-Dalpatpur Road. Respondent no.2 is the Engineer-in-Chief whereas respondent no.3 is the Executive Engineer in the Public Works Department. As required under the terms and conditions of the tender, all the tenderers including the petitioner deposited the earnest money. The petitioner deposited the earnest money of Rs.8,66,000/- on 9.8.2012 in the form of Term Deposit Receipt in favour of respondent no.3. Also under the terms and conditions of the tender, the petitioner and other tenderers agreed to keep their offer open up to 120 days from the specified deadline of receipt of tenders. They even agreed that the full value of earnest money would be forfeited in the event of their withdrawing the offer before the expiry of the period of validity of offer. The deadline for receiving the tender was 12.8.2012 and, therefore,

the validity period of offer of 120 days was up to 11.12.2012. But respondent no.3 accepted the petitioner's tender only on 27.12.2012 vide Annexure P4 i.e. after the expiry of the validity period of offer of 120 days. The petitioner in reply to the letter of acceptance informed respondent no.3 vide Annexure P5 dated 4.1.2013 that he was not interested in the work because his offer lapsed after the expiry of validity period of 120 days and, therefore, his earnest money be refunded. Respondent no.3 instead, not only forfeited the petitioner's earnest money but also prohibited him to tender for the same work for which fresh Notice Inviting Tender (NIT) was issued. It is in this background the petitioner has filed the present petition.

3. Respondent nos.1 to 3 in their return have stated that since the petitioner failed to execute the agreement as per the terms and conditions of the tender, the action taken against him was just and proper. In support of the action taken, they have also relied upon condition nos.4.7, 4.7.1 and 8.1.1 of the tender.

4. Conditions nos. 4.7, 4.7.1 and 8.1.1 of the tender read as under:

> 4.7 VALIDITY OF OFFER: Tenders shall remain open upto 120 days from the specified deadline of receipt of tender(s) and in the event of the tenderer withdrawing the offer before the aforesaid dates for any reason whatsoever, earnest money deposited with the tender shall be forfeited.
>
> 4.7.1 In the event of tenderer withdrawing his/her offer before the expiry of the period of validity of offer or failing to execute the contract agreement as required by condition no.8.1.1 of the Notice Inviting Tender (NIT) he/she will not be entitled to tender for this work, in the case of recall of tenders, in addition to forfeiture of his/her earnest money as per provision of condition nos.4.7 & 8.1.1 of the NIT as may be applicable for their work. If the tenderer has committed a similar default on the earlier occasion as well his/her registration in the department may be suspended temporarily for period of 6 months from such date as may be ordered by the authority which has registered him/her.
>
> 8.1 AGREEMENT:

8.1.1 Execution of agreement: The tenderer whose tender has been accepted (hereinafter referred to as the contractor) shall produce an appropriate solvency certificate, if so required by the Executive Engineer and wilt execute the agreement in the prescribed form within 10 days from the date of communication of the acceptance of his tender by the department. Failure to do so will result in the earnest money being forfeited to the Govt. of Madhya Pradesh and tender being cancelled.

5. From the combined reading of the above quoted conditions, it is apparent that the validity period of the offer was only up to 120 days from the specified deadline of receipt of tenders and only in the event of tenderer withdrawing the offer before the expiry of the validity period, the earnest money deposited with the tender was liable to be forfeited. Also respondent nos.1 to 3 were under an obligation to accept the tender before the expiry of the validity period of offer and on such acceptance if the tenderer failed to execute the agreement then only his earnest money could be forfeited and in case of recall of tenders he/she would be disentitled to tender for that work. As already seen above, the petitioner undertook to keep his offer open for 120 days and upon the expiry of this period the offer lapsed. Respondent no.3 admittedly did not accept the petitioner's offer within its validity period which expired on 11.12.2012. It was only on 27.12.2012 respondent no.3 sent a communication to the petitioner about the acceptance of his tender to which he declined. Upon the expiry of the validity period of petitioner's offer, the offer lapsed and hence it could no longer have been accepted by respondent no.3. For these reasons, the action taken by respondent Nos.1 to 3 against the petitioner of forfeiting his earnest money and preventing him from tendering for the same work cannot be held as legal and valid.

6. We accordingly direct respondent nos.1 to 3 to immediately refund the petitioner his earnest money of Rs.8,66,000/- along with interest at the rate of 6% per annum. Since the work of construction of Baxwaha-Nehagir-Dalpatpur Road has already been completed by another tenderer, no relief in this regard can be granted to the petitioner.

7. The petition is allowed to the extent above with costs of Rs. 1,000/-.

*Petition allowed.*

**I.L.R. [2014] M.P., 375**
**WRIT PETITION**
***Before Mr. Justice Sheel Nagu***
W.P.No. 8926/2013 (Gwalior) decided on 20 January, 2014

MALA DEVI (SMT.) ...Petitioner
Vs.
STATE OF M.P.. & ors. ...Respondents

***Constitution - Article 226 - Writ for seeking protection of the police from the offenders*** **- Held - Police authorities are duty bound to protect life, liberty, and dignity of all citizens especially complainant / eye witnesses of incident - Prosecution obliged not only to protect the life of such a eye witness but also to provide protection to all members of the family of such witness - Further held, police is custodian of law and order and is constitutionally obliged to instill a sense of security in the heart and mind of every common man - When prosecution is threatned the entire investigative agency is under threat. (Paras 6, 7 & 8)**

*संविधान – अनुच्छेद 226 – अपराधियों से पुलिस का संरक्षण चाहते हुए रिट* – अभिनिर्धारित – पुलिस प्राधिकारी, सभी नागरिकों का, विशेष रुप से शिकायतकर्ता / घटना के प्रत्यक्षदर्शी साक्षियों के जीवन, स्वातंत्र्य एवं सम्मान की रक्षा करने के लिये कर्तव्यबद्ध है – अभियोजन, न केवल उक्त प्रत्यक्षदर्शी साक्षी के जीवन की रक्षा करने के लिए बल्कि उक्त साक्षी के परिवार के सभी सदस्यों को भी संरक्षण प्रदान करने के लिये बाध्य है – इसके अतिरिक्त, पुलिस, विधि और व्यवस्था के संरक्षक है और प्रत्येक सामान्य व्यक्ति के मन मस्तिष्क में सुरक्षा की भावना बिठाने के लिये संवैधानिक रुप से बाध्य है – जब अभियोजन को धमकाया जाता है, तब संपूर्ण अन्वेषक एजेंसी को संकट की आशंका बनती है।

*T.C. Singhal*, for the petitioner.
*Praveen Newaskar*, Dy. G.A. for the respondents/State.

**ORDER**

**Sheel Nagu, J.:** This petition filed under Article 226 of Constitution of India, seeks protection of the Police Authorities of life, liberty and dignity of the petitioner from offenders who are accused of charge of murder of the husband of the petitioner. A further prayer for grant of arms license for self-defence has also been sought.

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

3. From the perusal of the request letter dated 15.10.2013 vide P-5 written by the petitioner, it appears from Para 3 , that a police guard has already been provided to the petitioner. The petitioner has lodged an FIR that her husband was murdered by the offenders leading to registration of an offence bearing Crime No. 77/13 at Police Station Barohi, Distt. Bhind. Seven accused have been alleged in the FIR lodged on 04.10.2013.

4. It is further alleged that on 07.10.2013, certain unknown person have tried to assault and threaten the petitioner and it is also alleged that no one has yet been arrested in regard to the incident of threatening which took place on 07.10.2013 and the petitioner and her family is being threatened and are unable to exercise their right to life and liberty in a free and fair manner. It is contended that the representation given to the Superintendent of Police, Distt. Bhind dated 07.10.2013 P4 has been of no avail.

5. Since it is seen from one of the representation P-5 that a police guard has already been provided, this Court would not like to go into sufficiency or insufficiency of the police protection provided but surely from the circumstances attending the case, it appears that apprehension has been expressed by the petitioner that life , liberty and dignity of her own and her family members is in danger on account of the incident which is alleged to have occurred on 07.10.2013.

6. The police authorities are duty bound to protect life, liberty and dignity of all citizens especially when the said citizen is a complainant eye-witness of incident of murder and as such is a prime witness of the prosecution on whom depends the fate of the prosecution case.

7. The prosecution thus obliged not only to protect the life, liberty and dignity of the said eye-witness from being endangered but also to provide protection to all members of the family of the said eye-witness so that the eye-witness is assured of an environment of safety against the offenders to enable the eye-witness to depose in a free and fair manner before the Court.

8. The police authorities who are the custodians of law and order are constitutionally obliged to instill a sense of security in the heart and

mind of every common man and create an environment where the righteous can roam free with their head held high, while the accused or the offender dare not even think of repeating their culpable misdemeanors. When a prosecution witness is threatened, the entire investigative agency is under threat. Prosecution story predominantly depends upon the prosecution witnesses. If the police fails to provide an atmosphere free from insecurity of life and liberty to its witnesses, then acquittals shall become a rule and conviction exceptions. Out of fear and sense of insecurity, witnesses turn hostile and resile from their earlier stand rendering the entire investigation unsuccessful. When offence does not lead to punishment, then the victim is left cheated, law and order injured and trust of the common man in legal institutions eroded. This kind of situation if allowed to continue unchecked can lead to anarchy. The Superintendent of Police of the district concerned is thus duty bound to at least ensure creation of atmosphere free from any apprehension from the offenders/accused to enable the prosecution witnesses to depose fearlessly before the Court.

9. In view of the above, this Court disposes of this petition with the following directions:

> 1. The petitioner is directed to prefer a representation to the Superintendent, Bhind expressing her apprehension and demanding protection or additional protection as the case may be within a period of 30 days from today.
>
> 2. In case, the above said direction is complied with by the petitioner, then Superintendent of Police, Distt. Bhind shall forthwith attend to the said apprehension and grievance expressed by the petitioner and take appropriate steps in accordance with law which are necessary to protect the life, liberty, dignity and property of the petitioner and her family members so as to provide her an environment free from fear and insecurity to enable her to depose as an eye-witness before the trial Court.
>
> 3. The petitioner is free to apply for an arms license in accordance with law.

*Petition disposed of.*

**I.L.R. [2014] M.P., 378**
**WRIT PETITION**
***Before Mr. A.M. Khanwilkar, Chief Justice &***
***Mr. Justice Krishn Kumar Lahoti***
W.P. No. 6376/2009 (Jabalpur) decided on 28 January, 2014

WAHID BEGUM ...Petitioner
Vs.
UNION OF INDIA & ors. ...Respondents

***Service Law - Pensionary Benefit*** **- Petition for extension of pensionary benefit under category of disabled dependent of the deceased employee - Held - Medical Board has issued disability Certificate - Authorities should have decided her claim on their own - Respondents directed to decide her claim for grant of pension under category of disabled dependent of deceased employee - If the petitioner succeed in her claim and is found to be eligible for handicapped pension, she would be entitled to receive the same from the date of application.**
**(Paras 3, 8 & 9)**

*सेवा विधि – पेंशनी लाभ* – मृतक कर्मचारी के निःशक्त आश्रित की श्रेणी के अंतर्गत पेंशनी लाभ बढ़ाये जाने हेतु याचिका – अभिनिर्धारित – चिकित्सा बोर्ड ने निःशक्तता प्रमाणपत्र जारी किया – प्राधिकारियों को उसका दावा स्वयं से निर्णित करना चाहिए था – प्रत्यर्थीगण को मृतक कर्मचारी के निःशक्त आश्रित की श्रेणी के अंतर्गत उसके दावे को निर्णित करने के लिये निदेशित किया गया – यदि याचिकाकर्ता अपने दावे में सफल होती है और उसे विकलांग पेंशन हेतु योग्य पाया जाता है, वह उक्त को प्राप्त करने के लिये आवेदन की तिथि से हकदार होगी।

*Durgesh Thapa,* for the petitioner.
*Mohan Sausarkar,* for the respondents.

**ORDER**

The Order of the Court was delivered by,
**A.M. KHANWILKAR, C.J.:-** Heard learned counsel for the parties.

1. As short question is involved, petition is taken up for final disposal forthwith, by consent.

2. The relief claimed in this petition filed under Article 226 of the Constitution of India against the respondent is to extend pensionary benefit to the petitioner with 18% interest along with cost and expenses of the litigation.

3. The petitioner had purportedly applied for pensionary benefit on 27.5.1997 under category disabled dependent of the deceased employee. According to the petitioner, her disability was chronic and was by birth rendering her incapable of earning her own livelihood.

4. In response to that representation, the petitioner received a communication from the Assistant Works Manager on 14.7.2008 (Annexure-R/2) calling upon the petitioner to get medical certificate from the Medical Board.

5. In view of this communication, the petitioner applied to the Medical Board from 6.8.2008 and medical certificate came to be issued on 9.8.2008 which mentions that the petitioner is suffering from D.M. with Cardiomyopathy with Chronic Disc Prolapse and she is unable to earn her livelihood because of said disability. This medical certificate is part of record as Annexure-A/9.

6. It appears that the Assistant Works Manager vide communication dated 18.12.2008 informed the petitioner that her request cannot be acceded to as she had not claimed for disability pension and her application for grant of pension was rejected on 6.11.1993 being ineligible on account of age. Notably, the earlier request submitted by the petitioner was for ordinary pension and not for handicapped pension.

7. It is not the case of the respondent before us that once the dependent of the employee submits claim for regular pension and if that claim is rejected, would not be entitled to seek any other type of pension provided under the Rules. It is not in dispute that handicapped pension is one of the Pension Schemes applicable to the employees of Public Works Department. Indeed, the respondents have later on extended the family pension to the petitioner w.e.f. 6.9.2007. However, that can be no ground to deny the pension claimed by the petitioner which she had claimed as back as on 27.5.1997, if she is found to be eligible for that Scheme.

8. As noted earlier, the Medical Board has issued disability certificate (Annexure-A/9). Whether that medical certificate conforms to the requirements of the Handicapped Pension Scheme or not and the petitioner was, therefore, entitled to receive handicapped pension, is a matter which ought to have been examined by the Authorities on their own, on its own merit, irrespective of the rejection of her earlier claim for grant of regular pension on 6.11.1997.

9. If the petitioner succeeds in her claim and is found to be eligible for handicapped pension, she would be entitled to receive the same from the date of application i.e. 27.5.1997. In that case, the Authority would be free to adjust the amount already paid to her under the head of family pension w.e.f. 6.9.2007. Indeed, if the quantum of handicap pension is higher than the quantum of pension under family pension scheme, the petitioner ought to receive that benefit being beneficial to her. Further, if the Authorities were to reject the handicap pension claim of the petitioner that will not impact her right to receive family pension which is already being paid to her. That must continue till she is eligible to receive the same.

10. We, therefore, direct the respondent to consider the claim of the petitioner, keeping in mind the observations made in this order and take an appropriate decision as may be advised and permissible as per law within three months from today and communicate the said decision to the petitioner within the same time. If the petitioner is found eligible for handicapped pension, the amount due and payable to the petitioner be released within six months from the date of decision of the appropriate Authority.

11. The petition is disposed of on the above terms.

*Petition disposed of.*

**I.L.R. [2014] M.P., 380**
**WRIT PETITION**
***Before Mr. Justice Sujoy Paul***
W.P. No. 7875/2013 (Gwalior) decided on 11 February, 2014

GANGA BAI & ors. ...Petitioners
Vs.
SUBHASH CHANDRA MANGAL ...Respondent

*A. Civil Procedure Code (5 of 1908), Section 47 - Questions to be determined by Executing Court* - **The questions relating to the execution, discharge or satisfaction of the decree arising between the parties to the Suit are required to be determined in execution proceedings - Held - No question can be considered vis-à-vis party foreign to the suit. (Paras 7/9)**

*क. सिविल प्रक्रिया संहिता (1908 का 5), धारा 47 – निष्पादन न्यायालय*

*द्वारा निर्धारित किये जाने वाले प्रश्न* – निष्पादन कार्यवाही में वाद के पक्षकारों के बीच उत्पन्न होने वाले, डिक्री के निष्पादन, उन्मोचन एवं संतुष्टि से संबंधित प्रश्नों का निर्धारण किया जाना अपेक्षित है – अभिनिर्धारित – वाद से भिन्न पक्षकार के संबंध में कोई प्रश्न विचार में नहीं लिया जा सकता।

***B. Constitution - Article 227 - Power of Superintendence* - Held - Interference can be made if the impugned order is without authority of law and it suffers from any manifest procedural impropriety or illegality - Interference is made to ensure that courts below act within the bounds of their authority - It cannot be made in a routine manner on drop of hat. (Paras 7/9/11)**

*ख. संविधान – अनुच्छेद 227 – अधीक्षण की शक्ति* – अभिनिर्धारित – हस्तक्षेप किया जा सकता है यदि आक्षेपित आदेश, विधि के प्राधिकार के बिना है और वह प्रकट रूप से किसी प्रक्रियात्मक अनुचितता या अवैधता से ग्रसित है – निचले न्यायालयों की कार्यवाहियां, उनकी प्राधिकारिता की सीमाओं के भीतर रहना सुनिश्चित करने के लिये हस्तक्षेप किया जाता है – यह सामान्य ढंग से तत्काल नहीं किया जा सकता।

**Cases referred :**

2013(I) MPWN 123, 1997(1) JLJ 364, (2010) 8 SCC 329.

*Ankur Maheshwari*, for the petitioners.
*N.K. Gupta*, for the respondent.

**ORDER**

SUJOY PAUL, J.: By invoking jurisdiction of this Court under Article 227 of the Constitution, the petitioner has challenged the order dated 01.10.2013 passed by the executing Court in case No. 32A/2004 Csx50A/2012. By this order, the application preferred by the petitioner under Section 47 read with section 151 C.P.C is rejected.

2. The brief facts necessary for adjudication of this matter are that the respondent preferred a civil suit No. 32A/2004 before Civil Judge Class-II, Jaura for eviction of the petitioner / tenant. Civil suit aforesaid, was allowed by the judgment and decree dated 24.10.2005. Feeling aggrieved by the judgment and decree, the present petitioner preferred an appeal before the lower appellate Court bearing case No. 5A/2011. The said appeal was disallowed. In other words, in civil appeal No. 5A/2011 the lower Appellate Court confirmed the judgment and decree of eviction dated 24.10.2005. Petitioner / defendant then tested the

judgment and decree by filing SA No. 247/2012. The said SA was dismissed on 31.03.2013 by this Court. This Court granted three months time to appellants vacate the suit premises on the condition that they shall pay the rent regularly to the landlord. The petitioner / defendant unsuccessfully challenged this order before the Supreme Court. The Apex Court affirmed the order of this Court. The decree holder / respondent initiated the execution proceedings before the executing Court. Notices were received by the present petitioner. During the course of execution proceeding, the petitioner preferred an application under Section 47 of the Act stating that the property in question belongs to one Meena Sharma and, therefore, execution proceeding be stayed. The Court below rejected the said application on the ground that judgment and decree against the petitioner / defendant has attained finality. In view of dismissal of SLP before the Supreme Court, judgment and decree qua petitioner / defendant has attained finality and, therefore, the application preferred by the petitioner is infact an attempt to delay the proceedings and deprive the decree holder from the fruits of the litigation.

3. Criticizing this order, Shri Ankur Maheshwari, Advocate for the petitioner relied on 2013 (I) MPWN 123 (*Mohammad Khan Vs. Ramgopal*). He submits that although in the application under Section 47 it is stated that the suit property belongs to Meena Sharma, this objection can be raised by the petitioner.

4. Per Contra, Shri N.K. Gupta, learned counsel for the other side supported the order passed by the Court below.

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

6. Section 47 reads as under :-

**47. Questions to be determined by the Court executing decree:-**

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

7. A bare perusal of the provisions shows that the question relating to execution, discharge or satisfaction of decree arising between the parties to the suit are required to be determined in execution proceedings. Admittedly, in the present case, petitioner is raising objection on the ground that the plaintiff is intending to execute the decree by including the dwelling house of one Meena Sharma. This is clearly impermissible and beyond scope of judgment and

decree. Thus, petitioners are not raising objection with regard to any piece of land / property which is related to them. The Court below has rejected the application on the ground that the petitioners cannot be permitted to raise objection with regard to a portion of suit property which is allegedly belongs to Meena Sharma. If aggrieved, Meena Sharma can file appropriate proceedings. In this petition also, the petitioners have confined their attack on the ground that some portion of the property belongs to Meena Sharma (para 5.5, 6.1 and 6.2 of the petition). During the course of argument also, no other point is pressed by the learned counsel for the petitioner.

8. On the basis of aforesaid factual backdrop, the only question is whether the Court below has rightly considered and decided the application of the petitioner raising objection regarding ownership of one Meena Sharma.

9. The Language of section 47 is clear, which shows the intention of the Legislature that the dispute between the parties may be raised and decided in this application. So far the plaintiff and respondents are concerned, their inter-se dispute has been decided till Supreme Court. Section 47 of C.P.C., in the opinion of this Court, does not permit the petitioners to raise objection regarding alleged ownership of suit property by Meena Sharma. In 1997 (1) JLJ 364 ( *Balaji Industries (M/s) and another Vs. State Bank of India and others* ) this Court opined that Section 47 envisages the consideration of "all questions" arising between "parties of the suit". Indisputably, Corporation was not the party to the suit and as such, no question can arise for consideration vis-a-vis a party foreign to the suit". It is further opined that no application under Section 47 r/w Section 151 could properly lie, on this point in execution case. Although Shri Mahehwari relied on 2013 (I) MPWN 123 (*Mohammad Khan Vs. Ramgopal*), in the considered opinion of this Court the said judgment has no application in the present case. Para 5 of said judgment shows that there was an inter se dispute between the decree holder and the judgment debtor and, therefore, this Court opined that section 47 is attracted. In the present case, ground regarding possession of Mrs. Meena Sharma cannot be treated to be a dispute between the decree holder and judgment debtor. Thus, this contention is rejected.

10. In the considered opinion of this court, whole attempt of the petitioners is to buy time and delay the proceedings on frivolous grounds. Petitioners have no locus after having lost the battle till the highest Court of the country, to create hindrance and to deprive the petitioner from the fruits of the litigation. Whole attempt of the petitioners in filing application under Section 47 is infact an attempt to create unnecessary and unwarranted hindrance which amounts

to abuse of process of law. Court below has rightly rejected said application in view of clear finding by this Court in SA No. 247/2012 dated 21.03.2013. At the cost of repetition, petitioners cannot be permitted to raise the grievance of somebody else, who was not party to the litigation.

11. The scope of interference under Article 227 of the Constitution is limited. If order is shown to be without jurisdiction, suffers from manifest procedural impropriety or perversity, interference can be made. Another view is possible is not a ground for interference. Interference is made to ensure that Courts below act within the bounds of their authority. Interference cannot be made in a routine manner on drop of hat. This was held by the Supreme Court in (*Shalini Shyam Shetty and another vs. Rajendra Shankar Patil*), reported in (2010) 8 SCC 329.

12. In the considered opinion of this Court, order impugned is in accordance with law and cannot be said to be an illegal order or order passed without authority of law. Petition deserves to be dismissed with cost because of oblique attempt of petitioners to deprive the plaintiff from the fruits of the litigation. For this abuse of process of law, I deem it proper to dismiss this petition with costs. Petition is dismissed with Rs. 10,000/- (Rs. Ten Thousand Only) as cost. Petitioners shall deposit this amount before the Court below on the next date of hearing. Plaintiff shall be entitled to get said amount of cost.

13. Petition is dismissed with costs.

*Petition dismissed.*

**I.L.R. [2014] M.P., 384**
**WRIT PETITION**
***Before Mr. Justice Sujoy Paul***
W.P. No. 7403/2013 (Gwalior) decided on 11 February, 2014

PRATAP & ors. ...Petitioners
Vs.
GANESHRAM & ors. ...Respondents

*A. Constitution - Article 227 - Power of Superintendence* - **Held - Interference can be made if the impugned order is without authority of law and it suffers from any manifest procedural impropriety or illegality. (Para 12)**

*क. संविधान – अनुच्छेद 227 – अधीक्षण की शक्ति* – अभिनिर्धारित – हस्तक्षेप किया जा सकता है यदि आक्षेपित आदेश, विधि के प्राधिकार के बिना है

तथा वह प्रकट रुप से किसी प्रक्रियात्मक अनुचितता या अवैधता से ग्रसित है।

***B. Civil Procedure Code (5 of 1908), Order 6 Rule 17 - Amendment of Pleadings* - Held - After the commencement of trial and in absence of showing due diligence, amendment cannot be allowed. (Paras 10/12)**

*ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17 – अभिवचनों का संशोधन* – अभिनिर्धारित – विचारण आरंभ होने के पश्चात तथा सम्यक तत्परता दर्शाये जाने के अभाव में, संशोधन मंजूर नहीं किया जा सकता।

**Cases referred :**

(2006) 5 SCC 943, (2012) 11 SCC 341, 2012(1) MPLJ 710, (2009) 2 SCC 409, (2005) 4 SCC 480, (2011) 12 SCC 268.

*R.K. Upadhyay,* for the petitioners.
*Sanjay Sharma*, for the respondents.

**ORDER**

SUJOY PAUL, J.: This petition filed under Article 227 of the Constitution challenges the order dated 13.9.2013 (Annexure P-1) arising out of Civil Suit No. 136-A/2012 passed by Fourth Civil Judge, Class- I, Guna, whereby the Court below has rejected the application of the petitioners/defendants under Order 6 Rule 17 C.P.C.

2. In a suit for declaration and restoration of possession, the defendants filed their written statements. Thereafter, the Court below framed the issues and fixed the matter for plaintiffs' evidence. Admittedly, the affidavit of examination-in-chief under Order 18 Rule 4 C.P.C. were filed by plaintiffs. At this stage, application Annexure P-4 dated 5.4.2013 was filed by the petitioners/defendants. This application was rejected on the ground that the issues were framed on 28.9.2012 and the affidavits of four persons were filed on 20.12. 2012. The Court below opined that since the trial has already commenced and the petitioner has not shown any reason for belatedly filing the amendment application, it cannot be allowed. In other words, the Court below opined that petitioner has not established 'due diligence' in filing the application after commencement of the trial.

3. Criticizing this order, Shri R.K.Upadhyay submits that the finding of the Court below that trial has begun is bad in law and runs contrary to the

judgment of Supreme Court reported in (2006) 5 SCC 943 (*Baldev Singh & Others Vs. Manohar Singh & Anr.*). He submits that in para 17 of this judgment, the Apex Court opined that commencement of the trial as per Order 6 Rule 17 C.P.C. cannot be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. It is contended that the trial has not begun. Reliance is also placed on the judgment of Supreme Court reported in (2012) 11 SCC 341 (*Abdul Rehman & Anr. Vs. Ruldu & Others*). Lastly, reliance is placed on the judgment of this Court reported in 2012 (1) MPLJ 710 (*Pushpa Arora Versus Anita Arora*). Written statements are also filed to bolster these contentions.

4. Per contra, Shri Sanjay Sharma, learned counsel for the respondents supported the order and submitted that there is no procedural error in the order passed by the Court below.

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

6. The main ground of attack on the impugned order is that in view of judgment of *Baldev Singh* (supra), the trial has not begun. In the considered opinion of this Court, the amendment prayed for before commencement of the trial and after commencement of the trial needs to be decided on different principles. This is because of insertion of proviso to Order 6 Rule 17 C.P.C. w.e.f. 2002. No doubt, in *Baldev Singh* (supra), the Apex Court opined about commencement of the trial, the said judgment was considered in a subsequent judgment reported in (2009) 2 SCC 409 (*Vidyabai and others Vs. Padmalatha and another*). In Vidyabai, the Apex Court considered its earlier judgment in *Kailash Vs. Nanhku* (2005) 4 SCC 480. In *Kailash* (supra), the Apex Court gave a finding that, "in a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial".

7. After considering this judgment, the Apex Court opined that filing of an affidavit in lieu of examination-in-chief of the witness, in our opinion, would amount to "commencement of proceeding" (para 11). In para 16 of this judgment, the Apex Court considered the view of Apex Court in *Baldev Singh (s)* and opined that it is not authority for the proposition that the trial would not be deemed to have commenced on the next date of first hearing. It is

further opined that in the said case, documents were yet to be filed and in those circumstances, the Apex Court opined in that manner.

8. In (2011) 12 SCC 268 (*State of Madhya Pradesh Vs. Union of India and another*), the Apex Court opined in para 7 that the proviso curtails absolute discretion to allow amendment at any stage. If application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.

9. In *Abdul Rehman* (supra), the Apex Court opined as under:-

> "The Courts have to be liberal in accepting the same, if the same is made prior to the commencement of the trial. If such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial." (emphasis supplied)

10. In the light of aforesaid judgments, it is clear that the judgment of *Baldev Singh* (supra) has no assistance to the petitioner. Admittedly, the affidavits under order 18 Rule 4 CPC are already filed and trial has commenced. Thus, Court below has not erred in holding that trial has commenced and, therefore, in absence of showing 'due diligence' amendment cannot be allowed. The judgment of this Court cited by the petitioner is of no assistance to him in the facts and circumstances of the case.

11. In *Vidyabai* (supra), the Apex Court held that unless jurisdictional point of 'due diligence' is established, the trial Court has no jurisdiction to allow the amendment.

12. Interference under Article 227 of the Constitution can be made if the impugned order is without authority of law, it suffers from any manifest procedural impropriety or illegality. Another view is possible, is not a ground for interference. The Court below has taken a correct view in consonance with the judgments of the Supreme Court aforesaid. There is no ingredient on which interference can be made.

13.d Petition is meritless and is hereby dismissed. No cost.

*Petition dismissed.*

**I.L.R. [2014] M.P., 388**
**WRIT PETITION**
***Before Mr. Justice Rohit Arya***
W.P. No. 5784/2013 (Gwalior) decided on 28 February, 2014

ASHOK SINGH BHADORIYA ...Petitioner
Vs.
STATE OF M.P. & ors. ...Respondents

***Police Regulations, M.P. - Duties of Police*** **- Misbehaviour, harassment, man-handling - The police force is no more a British police with military attitude - The police force is to be friendly and to protect the people at large in our country, democratic polity where rule of law prevails - The police force considered to be acclaimed disciplined force need to understand the patience and self restraint is part of their duty - They should not harbour notion that there is no one to police the policeman. (Paras 13/ 14)**

*पुलिस विनियमन, म.प्र. – पुलिस के कर्तव्य* – दुर्व्यवहार, उत्पीड़न, हाथापाई – पुलिस बल अब फौजी रवैया वाली ब्रिटिश पुलिस नहीं रही – पुलिस बल को मैत्रीपूर्ण होना चाहिए और हमारे देश के सर्वसामान्य जन की सुरक्षा एवं लोकतांत्रिक राज्य व्यवस्था की सुरक्षा करने के लिये है जहां विधि का नियम सर्वोपरी है – पुलिस बल को स्वीकृत रुप से एक अनुशासनीय बल माना जाता है, उन्हें समझना चाहिए कि धैर्य और आत्मसंयम उनके कर्तव्य का भाग है – उन्हें यह धारणा नहीं पालनी चाहिए कि पुलिसवाले पर निगरानी रखने वाला कोई नहीं।

*Awadesh Singh Bhadoriya*, for the petitioner.
*Nidhi Patankar,* G.A. for the respondents No. 1, 2 & 4.

**ORDER**

**ROHIT ARYA, J.:** In this petition under Article 226 of the Constitution of India, the petitioner has sought indulgence of this Court with a prayer that respondents No.1 to 3 be directed to expedite pending enquiry against the respondents No.5 and 6 and initiate criminal proceedings against them.

2. Petitioner has alleged that the respondents No.5 and 6 while they were posted as Assistant Sub Inspector and Constable of SAF respectively had misbehaved, harassed, humiliated and manhandled him on 15/05/2013 at Deendayal Check post and therefore, he had made a complaint to the authorities. Gist of the complaint is to the following effect:

"The complainant, Brijendra Singh Bhadoriya on 15/05/2013 at about 11.30 pm when he was travelling in his Maruti Esteem bearing registration No.MP07EA0732 passing through Malanpur towards Gwalior and reached near Deendayal check post, A.S.I., Naresh Singh Chouhan and Constable of SAF, Jandel Singh have stopped the vehicle for checking, then he(complainant) by sitting on the driver seat opened the Dicky (Boot) even then they told him (complainant) to get down from the vehicle for checking. The complainant asked them to do so. On this, they abused with filthy language, committed marpeet with him and humiliated. Thereafter, on the instructions of the Additional Superintendent of Police, issued challan of the vehicle."

3. Petitioner submits that considering the gravity of the alleged incident, the respondents must be directed not only to complete the enquiry pending against the respondents No.5 and 6 expeditiously but also initiate the proceedings as contained in Regulation 337 of the Madhya Pradesh Police Regulations.

4. In response to the order dated 04/09/2013 passed by this Court, the respondents have brought on record the progress report wherein it is stated that on complaint being filed by the petitioner, an enquiry was ordered by the Superintendent of Police, Gwalior. As per enquiry report dated 23/05/2013 conducted by the City Superintendent of Police, Maharajpur, Gwalior (Annexure A/1), the statements of petitioner, petitioner's witness, Brijendra Singh Bhadoriya, respondents No.5 and 6 as well as independent witnesses, namely; Bikam Sngh Bhadoriya and Jitendra Singh Rajawat have been recorded. It has been found in the enquiry that during night hours on 15/05/2013, on the orders of the senior officers, two wheeler and four wheeler vehicles were checked at the check post of Deendayal Nagar, Maharajpur in order to check the undesirable activities by suspected people. During such checking, the petitioner alongwith his brother, Brijendra Singh Bhadoriya had reached the check post in Maruti Esteem bearing registration No.MP07EA0732 in a high speed and Assistant Sub Inspector, Naresh Singh Chouhan by torch light signals some how stopped the car. Due to jerk of sudden brake applied police personnel standing around that area had a narrow escape. On checking, it was found that petitioner did not possess the registration book and other documents in respect of the car and, therefore, challan was prepared and since the petitioner refused to pay the fine, the vehicle was sent to the police station. Thereafter, in the Court of Judicial

Magistrate, First Class, Gwalior, the petitioner accepting the guilt in case No.4340/13, paid the fine amount of Rs.600/vide receipt No.38292/10 and under the orders of the Court, the vehicle was released. On the insistence of petitioner, MLC was also got done and none of the witnesses except the petitioner and his brother alleged physical assault by the police personnel. It was concluded that as the petitioner's vehicle on checking, it was found that petitioner does not have registration book and other documents of the car in which he was riding and on refusal to pay the fine, the vehicle was sent to the police station. Besides, on accepting the guilt before the Court of Judicial Magistrate, First Class, Gwalior since fine was imposed upon him and it was paid, as a sequel thereto, the complaint was made by the petitioner.

5. It appears that thereafter, the petitioner filed a private complaint before the Court of Judicial Magistrate First Class, Gwalior. Under the orders of the Court, the Superintendent of Police, Gwalior, on the same allegations ordered for enquiry by the Additional Superintendent of Police, Gwalior. The said authority again conducted a detailed enquiry wherein the petitioner and his witness, Brijendra Singh Bhadoriya, respondents No.5 and 6, Head Constable No.1894, Akhilesh Sharma, Inspector Ravi Singh Chauhan, Additional Superintendent of Police, Virendra Jain and independent witnesses, namely; Vikram Singh Bhadoirya and Jitendra Singh Kushwah. Upon critical evaluation of the statements recorded, the Additional Superintendent of Police vide his report dated 16/09/2013 submitted to the Superintendent of Police, Gwalior. The same is also on record as Annexure A/2, the gist reads as under:

> "On 15/05/2013 at about 11.30 pm., Ashok Singh Bhadoriya (complainant) was riding Esteem car bearing registration No.MP07 EA0732 and under the jurisdiction of Maharajpur Police Station at Deendayal Thiraha, Bhind road, the vehicle of petitioner was asked to stop for checking but the complainant failed to extend cooperation for stopping and checking the vehicle and used provocative language against the police personnel checking the vehicle. On this, the complainant was taken to Virendra Jain, Additional Superintendent of Police, City (East) who was present at the spot. The said officer asked the complainant to show the documents of the vehicle, the complainant told that he does not possess the papers. Therefore, the Station House Officer had issued a challan to pay fine under the Motor Vehicles Act and after passing the orders, the complainant deposited the fine amount

of Rs.600/. At the checking spot, Deendayal Thiraha, Bhind-Gwalior road, there were other vehicles checked alongwith the vehicle of the complainant. The police personnel checking the vehicle of complainant were not known to each other prior to incident and there was no enmity between them at the time of checking his vehicle. The general public, whose vehicles have been checked, amongst them the independent witnesses Vikram Singh Bhadoriya and Jitendra Singh Kushwah have not stated anything that the checking police personnel misbehaved or committed marpeet with the complainant.

During enquiry, no other material came on record, to deviate from the enquiry conducted earlier by City Superintendent of Police, Maharajpur."

6. The respondents' counsel, therefore, submits that on the complaint filed by the petitioner twice, two enquiries have been conducted; one on the directions of the Superintendent of Police, Gwalior and another one on the orders of the Court of Judicial Magistrate, First Class, Gwalior through different enquiry officers. In the enquiries so held, the statements of petitioner and his witness, the respondents No.5 & 6 and their respective witnesses including the independent witnesses were recorded. The enquiry reports are selfcontained and explanatory.

7. Considered the rival contentions and the material on record is perused.

8. In both the enquiry reports, it has been found that since petitioner did not possess the registration book and other documents of the car which he was driving at the time of checking, therefore, the car was sent to police station as he refused to pay the fine. On the next date, as per the orders of the Court of Judicial Magistrate, First Class, Gwalior, the fine amount of Rs.600/- has been paid and, thereafter, the car was released. Further, the petitioner and the respondents No.5 and 6 are not known to each other and there is no personal animosity between them. Under such circumstances, the entire matter appears to have flared up on reactionary mode due to checking of the car in question at the check post.

9. In view of the above, this Court *prima facie* is of the view that no illintention can be attributed to the checking police personnel, the respondents No.5 and 6. More over, there were other vehicle owners at the check post undergoing checking of their vehicles and no such action was complained by any one of them and even

the independent witnesses have also not deposed to that effect.

10. This Court is of the view that the facts and circumstances of the case in hand do not either fulfill factual ingredients or to justify hard penal action against the police personnel as provided under Regulation 337 of the Madhya Pradesh Police Regulations.

11. In view of the above, the petition sans merit and has to be dismissed.

12. The observations made by this Court are only for the purpose of deciding the petition and not otherwise.

13. Before parting, it is considered apposite to observe that the police force is no more a British police with military attitude. The police force is to be friendly and to protect the people at large in our country; democratic polity where rule of law prevails. In the Welfare State, deployment of police force is not to crush but to help and protect the people/society and for sustenance of law and order which in a way help facilitate maintenance of social order in the society. As such, police force has onerous duty and responsibility to protect and regulate the social order by maintaining peace, tranquility and public order in the society. At the same time, the public at large/society also need to contribute towards the same goal and need to realize their fundamental moral duties.

14. However, the police force considered to be acclaimed disciplined force need to understand that patience and self-restraint is part of their duty. They should not harbour notion that there is no one to police the police man.

15. Accordingly, the petition stands dismissed with the aforesaid observation.

*Petition dismissed.*

**I.L.R. [2014] M.P., 392**
**WRIT PETITION**
***Before Mr. Justice Rohit Arya***
W.P. No. 1435/2012 (Gwalior) decided on 28 February, 2014

KANCHAN SINGH & anr. ...Petitioners
Vs.
DAULAT SINGH (SINCE DECEASED)
BALWANT SINGH & ors. ...Respondents

***Civil Procedure Code (5 of 1908), Order 39 Rules 1&2 - Temporary Injunction*** **- Held - Suit for partition filed wherein all the coparceners /plaintiffs sought share in the Joint Hindu Family Property**

**and sought possession - Temporary injunction may be granted against the respondent/defendant not to alienate the property i.e. the subject matter of the partition during pendency of the suit. (Paras 3/ 4)**

*सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थाई व्यादेश* – अभिनिर्धारित – विभाजन के लिये वाद प्रस्तुत किया जिसमें सभी सहदायिक/वादीगण ने हिन्दू संयुक्त कुटुम्ब की सम्पत्ति में हिस्सा चाहा है और कब्जा चाहा है – प्रत्यर्थी/प्रतिवादी के विरुद्ध, सम्पत्ति अर्थात वाद लंबित रहने के दौरान विभाजन की विषयवस्तु का अन्य संक्रामण नहीं किये जाने के लिये अस्थायी व्यादेश प्रदान किया जा सकता है।

**Case referred :**

AIR 1988 SC 576.

*Prashant Sharma*, for the petitioners.
*Nidhi Patankar*, G.A. for the respondent No. 22/State.
*Rishikesh Bohare*, for the respondents No. 15,17,18 & 19.

**ORDER**

**ROHIT ARYA, J.:** This writ petition under Article 227 of the Constitution of India, at the instance of plaintiffs is against the concurring order of the first appellate Court dated 18.1.2012 (Annexure P/1) while deciding the appeal against the order dated 30.8.2011 (Annexure P/2) in Civil Suit No.41A/11, by which dismissed the application under Order 39 Rule 1 and 2 of CPC.

2. The subject - matter of the suit relates to partition and possession of Joint Hindu family property as described in the plaint. During pendency of this suit, plaintiffs moved an application under Order 39 Rule 1 and 2 of CPC seeking temporary injunction against the defendants for not alienating the suit property on the ground that if the suit property is alienated, it will cause prejudice to the interest and right of the plaintiffs in the suit property, as it will lead to multiplicity of proceedings. However, the trial Court rejected the application and same was upheld by the appellate Court by placing reliance upon judgment rendered by the Apex Court in the case of *Sunil Kumar and another Vs. Ram Parkash and others* (AIR 1988 SC 576).

3. Upon bare perusal of the judgment, it appears that in the aforesaid

judgment the issue involved was in relation to alienation of property by coparceners, in that context the Apex Court had ruled that permanent injunction cannot be granted against ***Karta*** of the family being manager of the property who has a right to dispose of joint Hindu Family Property to meet out legal necessity to discharge his antecedent debt which is not tainted with immorality. As such, the aforesaid case is distinguishable. In the instant case, suit for partition has been filed wherein all the coparceners / plaintiffs have sought share in the joint Hindu Family Property and sought possession. Therefore, in this context, application for injunction was filed, restraining the defendants from alienating the coparcenery property. Therefore, this Court is of the opinion that the Courts below were not justified in dismissing the application.

4. In view of the above, the orders passed by the learned Courts below are not sustainable in the eye of law. Accordingly, the same are set aside. The respondents – defendants shall not alienate the coparcenery property i.e subject-matter of partition as claimed in the plaint during the pendency of suit. The trial Court is directed to proceed with the suit and decide the same as early as possible, preferably within a period of six months, as the suit is pending for the last three years.

5. At this stage, counsel for respondents No. 15,17, 18 and 19 makes a statement at the Bar that they are not concerned with the partition amongst coparcnersers in respect of coparcenery joint Hindu Family Property owned by them, they are legal representatives of Khoob Sngh against whom relief has not been sought. Therefore, they may not be injuncted from alienating property which is not part of the coparcenory property.

6. In view of this submission, this Court without commenting upon on the submissions so made, liberty is granted to the respondents No. 15,17, 18 and 19 to move an appropriate application before the trial Court which shall advert to it on its own merits and decide the same accordingly in accordance with law.

7. With the aforesaid, petition stands allowed and disposed of.

*Petition allowed.*

**I.L.R. [2014] M.P., 395**

**REVIEW PETITION**

***Before Mr. Justice N.K. Mody***

R.P. No. 166/2013 (Indore) decided on 5 April, 2013

NARAYAN TRADING CO. ...Petitioner

Vs.

ABCOM TRADING PVT. LTD. ...Respondent

***Civil Procedure Code (5 of 1908), Section 115 - Review Petition - Delay & láches*** **- Prayer for modification of order passed on 28.09.2012 and for grant of liberty to the petitioner to raise objection afresh u/s 48 of Arbitration & Conciliation Act, 1996 - Held - Application filed by the petitioner is not bonafide - Award is of the year 2005 - Appellate order is of the year 2007 - Inspite of lapse of more than 7 years respondent is not getting the fruits - Petition dismissed.(Para 5)**

*सिविल प्रक्रिया संहिता (1908 का 5), धारा 115 – पुनर्विलोकन याचिका – विलम्ब और गफलत* – दि. 28.09.2012 को पारित किये गये आदेश में परिवर्तन के लिये याचना तथा याची को माध्यस्थम और सुलह अधिनियम, 1996 की धारा 48 के अंतर्गत पुनः आक्षेप उठाने की स्वतंत्रता प्रदान किये जाने का निवेदन किया गया – अभिनिर्धारित – याची द्वारा प्रस्तुत आवेदन सद्भावपूर्ण नहीं – अवार्ड वर्ष 2005 का है – अपीली आदेश वर्ष 2007 का है – 7 वर्षों से अधिक अवधि व्यपगत हो जाने के बावजूद, प्रत्यर्थी को फल प्राप्त नहीं हो रहा है – याचिका खारिज।

**Cases referred :**

AIR 2005 SC 592, AIR 2006 SC 1260, (2011) 2 SCC 705.

*S.R. Saraf*, for the petitioner.

*Vijay Asudani*, for the respondent.

**ORDER**

**N.K.Mody, J.:** This is a review petition filed under Section 151 of CPC, where in the prayer is that the review petition be allowed and order passed in WP No. 8186/2011 on 28/09/2012 be modified and the petitioner be granted liberty to raise the objections afresh under Section 48 of Arbitration and Conciliaiton Act, 1996 (hereinafter referred as A and C Act).

2. Learned counsel for the petitioner submits that in the execution petition filed by the respondent, the objections were filed by the petitioner which were

in two folds, firstly that the award is not duly stamped and secondly since the petitioner is not party to the agreement, therefore, the award is not binding on the petitioner. Learned counsel submits that the objections were dismissed by the learned Executing Court, against which writ petition was filed by the petitioner before this Court which was numbered as WP No. 8186/2011 and was dismissed on 28/09/2012. It is submitted that prior to the disposal of WP No. 8186/2011, petitioner filed fresh objections before learned Court below under Section 48 of A and C Act,but mistakenly the permission was not sought to raise objections from this Court, therefore, learned Executing Court dismissed the same. It is submitted that the mistake is bonafide on the part of counsel for the petitioner. Learned counsel placed reliance on a decision in the matter of *Board of Control for Cricket, India and another Vs. Netaji Cricket Club and others,* reported in AIR 2005 SC 592, wherein the Hon'ble Apex Court has held that review application is maintainable even on account of misconception of law or fact by Court or an Advocate. It was further held that mistake by Court in nature of undertaking given can also be a ground for review. Further reliance is placed on a decision in the matter of *Jet Ply Wood Pvt. Ltd. v. Madhukar Nowlakha,* reported in AIR 2006 SC 1260, wherein application for withdrawal of suit filed without leave to file fresh suit and the permission was granted to withdraw the suit, it was held that there is no specific provision in C.P.C. providing for recalling of the order permitting withdrawal of suit, provision of section 151 can be resorted to in the interest of justice. Reliance is also placed on a decision in the matter of *Rajendra Prasad Gupta v. Prakash Chandra Mishra,* reported in (2011) 2 SCC 705, wherein the Hon'ble Apex Court. had a occasion to to consider the provision under Order XXIII Rule 1 and Section 151 of CPC and held that every procedure is permitted to Court for doing justice unless expressly prohibited. It is submitted that in the interest of justice order dated 28/09/2012 passed in WP No.8186/2011 be modified and petitioner be permitted to raise objection filed under Section 48 of A and C Act.

3. Learned counsel for the respondent opposes the prayer and submits that the application is without any substance. It is submitted that the application was filed under Section 48 of A and C Act, while earlier application filed by the petitioner was under Order XXI Rule 58 CPC which was treated by the Executing Court as application under Section 48 of A and C Act and was dismissed against which writ petition was filed before this Court in which validity of that part of the order whereby application under Order XXI Rule 58 of

CPC, was dismissed, was under challenge. It is submitted that before this Court no ground was raised by the petitioner about that part of the order. It is submitted that after dismissal of the WP No.8186/2011 vide order dated 28/09/2012, which was filed by the petitioner under Section 48 of A and C Act. was also dismissed vide order dated 07/01/2013, against which Civil Revision was filed by the petitioner which was numbered as 20/2013, which was also dismissed by this Court vide order dated 14/03/2013. It is submitted that the order passed by this Court and also passed by learned Executing Court whereby objections filed by the petitioner under Section 48 of A and C Act, was dismissed, attend finality. It is submitted that the petition filed by the petitioner is full of mala-fides, therefore, the same be dismissed.

4. From perusal of the record, it appears that the award was passed in favour of the respondent on 16/05/2005 by Grain And Feed Trades Association (in short Gafta), against which an appeal was filed by the petitioner- at London which was dismissed on 08/05/2007. Thereafter execution petition was filed by the respondent on 06/05/2010 in which number of adjournments were sought by the petitioner which were granted by the learned Executing Court. Thereafter objections were filed by the petitioner by way of application under Order XXI Rule 58 CPC which was treated as application under Section 48 of A and C Act. Thereafter again objections were filed by the petitioner alleging that the award is not duly stamped which was also dismissed. Against order dated 08/07/2011 and 29/08/2011 passed by Executing Court, writ petition was filed on 11/10/2011 which was numbered as WP No.8186/2011 and the same was dismissed on 28/09/2012. During pendency of writ petition on 02/12/2011 without seeking leave of this Court, again an application was filed by the petitioner under Section 48 of A and C Act, which was replied by the respondent on 09/12/2011 wherein an objection was raised by the respondent that the application filed by the petitioner is not maintainable. The case was adjourned from time to time on the request of the petitioner and ultimately on 28/09/2012, writ petition filed by the petitioner was dismissed. Till dismissal of the writ petition by this Court at no point of time it was never requested by the petitioner to permit the petitioner to grant leave to raise fresh objections under Section 48 of A and C Act before the learned Executing Court. Vide order dated 07/01/2013 Executing Court dismissed the objection, against which Civil Revision was filed before this Court which was numbered as 20/2013 and the same was decided on 14/03/2013 holding that the objections filed by the petitioner cannot be entertained. Immediately after dismissal of

revision petition, present petition has been filed.

5. Keeping in view the factual scenario, it can safely be said that the application filed by the petitioner is not bona-fide. The award of which the execution is filed is of the year 2005. The orders passed by the appellate authority is of the year 2007. Inspite of lapse of more than seven years, the respondent who is having award in his favour is not getting the fruits.

6. In view of this, the petition filed by the petitioner stands dismissed. No order as to costs.

*Petition dismissed.*

**I.L.R. [2014] M.P., 398**
**APPELLATE CIVIL**
***Before Mr. Justice J.K. Maheshwari***
M.A. No. 3744/2010 (Indore) decided on 26 February, 2013

VINIT SHARDA ...Appellant
Vs.
SURESHNATH & ors. ...Respondents

*A. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Valid Licence* - **Endorsement on driving licence to drive the transport vehicle carrying goods of dangerous and hazardous nature - Absence thereof - Should not be treated to be in violation of terms and conditions of the policy - Held - Driver was possessing the valid driving licence. (Para 14)**

*क. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का दायित्व – वैध लायसेंस* – हानिकारक और खतरनाक स्वरुप के माल को ले जा रहे परिवहन यान को चलाने का वाहन लायसेंस पर पृष्ठांकन – की अनुपस्थिति – को पॉलिसी के निबंधन एवं शर्तों का उल्लंघन नहीं माना जाना चाहिए – अभिनिर्धारित – वाहन चालक के पास वैध चालक लायसेंस था।

*B. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company* - **Though the record was summoned from R.T.O. - No person has been called from the R.T.O. Office - Insurance Company has not proved their defence - Held - Merely taking a defence in the written statement would not be sufficient without proving it by evidence. (Para 15)**

*ख. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का दायित्व* – यद्यपि आर.टी.ओ. से अभिलेख बुलाया गया – आर.टी.ओ. कार्यालय से किसी व्यक्ति को नहीं बुलाया गया – बीमा कम्पनी ने अपना बचाव साबित नहीं किया – अभिनिर्धारित – मात्र लिखित कथन में बचाव लेना, साक्ष्य द्वारा साबित किये बिना पर्याप्त नहीं होगा।

***C. Motor Vehicles Act (59 of 1988), Section 173 - Enhancement*** **- Amount awarded looking to the percentage of permanent disability appears to be just and proper - However, only Rs. 2,000/- has been awarded in conventional heads enhanced by Rs. 25,000/-.(Para 16)**

*ग. मोटर यान अधिनियम (1988 का 59), धारा 173 – बढ़ाया जाना* – स्थायी निशक्तता के प्रतिशत को देखते हुए अवार्ड की गयी रकम, न्यायसंगत और उचित प्रतीत होती है – तथापि, परंपरागत मद में केवल रु. 2,000/– अवार्ड किये गये, रु. 25,000/– से बढ़ाया गया।

***D. Motor Vehicles Act (59 of 1988), Section 173 - Enhancement - Assessment of income*** **- No document regarding the work of contractor-ship has been produced - Income Tax return of the year 2005-06 and 2008-09 has been produced - Earning is accepted as Rs. 80,000/- per annum and dependency as Rs. 60,000/- and by applying multiplier of 14 amount is enhanced by Rs. 1,00,000/-. (Paras 17-18)**

*घ. मोटर यान अधिनियम (1988 का 59), धारा 173 – बढ़ाया जाना – आय का निर्धारण* – ठेकेदारी के कार्य से संबंधित कोई दस्तावेज प्रस्तुत नहीं – वर्ष 2005–06 व 2008–09 के आय कर रिटर्न प्रस्तुत किये गये – रु. 80,000/– प्रति माह का उपार्जन और आश्रितता रु. 60,000/– के रुप में स्वीकार की गयी तथा 14 का गुणक लागू करते हुए, रकम रु. 1,00,000/– बढ़ायी गयी।

**Cases referred :**

2006(2) MPLJ 211, 2010 ACJ 1912.

*Satish Jain,* for the appellant.

*H.C. Jindal* with *Monish Jindal*, for the respondent/Insurance Company.

**ORDER**

**J.K. MAHESHWARI, J.:** This order shall also govern the disposal of M.A. Nos. 298/2011, 3744/2010 and 2020/2010. M.A. No.3744/2010 which is arising out of award dated 21/10/2010 in claim case No.9/2009 by

4th Motor Accident Claims Tribunal, Ujjain whereby the compensation to the tune of Rs. 8,21,235/- has been awarded, in a case of death of Nimish Adhyapak, filed by the owner assailing the finding of exoneration of the insurance company. Against the said award, M.A. No.298/11 has been filed by claimants seeking enhancement. M.A. No.2020/2010 has been filed by the claimant/injured against the award dated 10/3/2010 passed by MACT, Mandsaur whereby a sum of Rs.52,000/- has been awarded recording the finding of joint and several liability. All these 3 appeals are arising out of the same accident for the death and injury though date of passing of award is different by different claims tribunal, therefore all three appeals are being decided by this common order.

2. As per claim averments, it is apparent that on the date of accident i.e. 31/5/2008 the deceased along with family members and Mukesh were coming back to Ujjain after Darshan of Lord Sawariyaji. When he reached near to Inani Farm House, the truck bearing registration No. RJ-06-GA-0786 driven rashly and negligently by the driver dashed the Maruti car wherein Nimesh Adhyapak sustained injuries and ultimately succumbed to death on 4/6/2008 and Mukesh received injuries. The L.Rs. of Nimesh filed the claim petition seeking compensation to the tune of Rs.51 Lacs, interalia contending that he was a contractor and agriculturist, earing Rs.2 Lac per annum, therefore compensation may be awarded adding medical expenses incurred prior to the death. Simultaneously in claim case No.2020/10, the injured received injuries of right acetabulam, radius and ulna of left hand and disability to the extent of 8% of left hand and 12% of right hip i.e. total 20%, however it was prayed that compensation to the tune of Rs. 6,04,400/- may be awarded.

3. In M.A. No. 2020/10 which is a injury case, the claims tribunal awarded a sum Rs. 52,000/- disbelieving the medical bill Ex.P/11 in para-16. The tribunal has also recorded the finding of joint and several liability disbelieving the defence of the insurance company of not having the endorsement on driving license to drive the transport vehicle carrying goods of dangerous and hazardous nature.

4. Mr. Manish Jain, learned counsel appearing on behalf of the claimant/ injured has strenuously urged that the compensation awarded by the learned tribunal is inadequate and findings regarding discarding the medical bills worth Rs.45,000/- (Ex.P/11) is also improper and in addition to the aforesaid, it is submitted by him that amount awarded towards future loss of earning without

applying the multiplier method is unsustainable looking to the facts of the case. It is further submitted that in other head i.e. expenses incurred on attendant, transportation and loss of wages no amount has been awarded, therefore in the aforesaid heads reasonable amount of compensation may be directed.

5. In M.A. Nos. 298/11 and 3744/10, it is seen from the record that the tribunal recording the finding in case of death of Nimesh Adhyapak accepting the earning from the contractorship worth Rs.1,20,000/- per annum after deducting 1/3rd for labour expenses and further deducting 1/3rd towards personal expenses applied the multiplier of 14 and awarded a sum of Rs.7,46,662/- towards loss of dependency and further awarded Rs. 7,000/- towards funeral expenses and transportation, Rs.10,000/- for loss of consortium, Rs.5,000/- towards loss of estate and Rs.52,573/- under the head of medical expenses.

6. In M.A.No.298/2011, Mr. Hemant Sharma, learned counsel appearing on behalf of claimant/appellant contends that income tax return Ex.P/118 has been filed indicating the earning of the deceased as Rs.1,20,000/- from the work of contractorship for the financial year 2005-06 prior to the date of death. Out from the said earning, tribunal has wrongly deducted 1/3rd towards labour expenses from the total earnings and after making such deduction accepted his net earning as Rs.80,000/-, and further deducting 1/3rd, applied the multiplier of 14 and calculated the amount of loss of dependency, in fact looking to the facts of the present case it is clear that number of dependents are 5, therefore deduction 1/4th ought to be made. Therefore, accepting the earning Rs.1,20,000/- per annum and after deducting 1/4th and applying the multiplier as per age the compensation ought to have been awarded. In addition to the aforesaid, it is stated that bills Ex.P/54 to P/60 have wrongly been disbelieved by the tribunal, therefore these bills may be accepted while enhancing the amount of compensation.

7. Mr. Satish Jain, Adv. representing the owner, has assailed the finding of liability recorded against her, exonerating the insurance company for payment of compensation. It is submitted that as per judgment of Division Bench of this court in the matter of *Baghelkhand Filling Station and another Vs. Brijbhan Prasad and others*, 2006(2) MPLJ 211, it is clear that if the endorsement on a licence to drive the goods of dangerous or hazardous nature on driving licence is not there, then it should not be treated to be in violation of terms and conditions of the policy, however the finding of exoneration of

insurance company recorded by the claims tribunal is unsustainable. It is also submitted by him that in claim case No.192/08 decided by the claims tribunal, Mandsaur, the insurance company has not been exonerated and the finding of joint and several liability has been recorded. In such circumstances, when both the claim petitions are arising out of same accident, maintaining the finding as recorded by the claims tribunal, Mandsaur which has been decided prior to the decision of claims tribunal Ujjain maintaining the parity modifying the findings of Claims Tribunal adequate amount of compensation may be awarded.

8. Mr. H.C.Jindal, learned counsel representing the insurance company has filed the cross objections in M.A.No.2020/10, interalia contending that finding of exoneration of insurance company recorded by the tribunal is unsustainable. He has also filed the application under order XLI Rule 27 CPC taking the driving licence and policy on record. It is submitted by him that the claims tribunal, Ujjain while passing the award on 21/10/2010 has rightly exonerated the insurance company. It is his contention that undisputedly the vehicle which dashed the injured was a transport vehicle for carrying goods of dangerous and hazardous nature, however the said vehicle would fall within the purview of section 2(2)(j) of the Motor Vehicles Act i.e. Motor Vehicle of specified description to which as per section 14(2) proviso thereto, a driving licence to drive such vehicle for a period of one year and its renewal subject to undergoing a training or a refresher course has been prescribed. Further referring to rule 9(1) and 9(2) of the Central Motor Vehicle Rules, 1989, it is contended that driver is required to have a certification from the recognized institute, otherwise the driver cannot drive a vehicle of the said category. As in the present case the driver was possessing the licence to drive transport vehicle only without having endorsement, therefore prayed that considering the basic provisions of the Motor Vehicle Act, the rules which have not been duly considered in the judgment of *Baghelkhand Filling Station*(supra), distinguishing the same and exonerating the insurance company fastening the liability on the owner and driver, appropriate orders may be passed. In furtherance to the aforesaid contention, reliance has been placed on the judgment of Madras High Court in *Nagamani and another Vs. Singaravelu and another,* 2010 ACJ 1912.

9. On the point of enhancement it is submitted by him that in the case of claimant/injured Mukesh, the medical bills of Rs.45,000/- have rightly been disbelieved because the papers of prescription of doctor and other medical bills to purchase the medicines for the period to which he was hospitalised i.e. one month, has not been produced. Moreso, as per statement of Dr. Alok Mehta, it is clear that operation was not performed, therefore the bill which

includes the operation theater charge and surgery charges has rightly been disbelieved by the claims tribunal. It is also submitted by him that looking to the injuries sustained by the injured, the compensation of Rs.52,000/- has rightly been awarded. While in M.A.No.298/2011, it is submitted that except the income tax return, no other document is available on record proving the earning of the deceased from the contractorship. The certificate of registration as contractor is also not available on record. The claimant has not produced any document regarding qualification and to perform the work of civil nature. Even by oral evidence, nothing has been brought on record to prove the fact that deceased was a contractor and constructed the house of various persons. It is also submitted that no evidence of any persons whose house was constructed by the deceased has been brought to prove the said fact. In such circumstances, the tribunal has rightly accepted the earning of Rs.80,000/- per annum and after deducting 1/3rd and applying the multiplier as per age, the compensation has rightly been awarded. So far as the point with regard to disbelieving the medical bill Ex.P/54, it is the advance deposit of Gokuldas hospital, however it would have adjusted in final bill. So far as other bills Ex.P/55 to P/60 are concerned, those bills would have been added in the final bills, therefore, the tribunal has rightly disbelieved those bills while calculating the compensation. In view of foregoing, it is submitted that compensation awarded by Claims Tribunal is just and proper which do not warrant any interference by this Court.

10. After hearing learned counsel for parties and on perusal of judgment of Division Bench of this court in the matter of *Baghelkhand Filling Station* (supra), the court has referred rule 9 of the central Motor Vehicles Rules and observed while deciding the issue regarding endorsement on driving licence and held as under :-

> "13. A perusal of the aforesaid relevant Rules would show that endorsement in the driving licence of the applicant is necessary to the effect that he is authorised to drive a goods carriage carrying goods of dangerous or hazardous nature to human life. This endorsement was of course not seen on the driving license of respondent No.3; by the appellants. But, it is equally true that driver was holding a license to drive a tanker. It is not the case of the respondents that accident had taken place on account of the fact that there was no endorsement to

drive such a vehicle. The endorsement neither increases the efficiency of the driver nor in its absence, the efficiency of the driver is likely to be reduced in any manner whatsoever. It only certifies additionally that he is authorised to drive a goods carriage carrying goods of dangerous or hazardous nature. For driving such a vehicle, no further expertise or driving is required. This could be said to be a lapse on the part of the driver as well as on the part of the appellants herein, but this lapse was not responsible for the cause of the accident.

14. Even without the endorsement as contemplated under sub rule(3), the driving skill of respondent No.3 had not reduced. Infact appellants having seen a certificate from Hindustan Petroleum that respondent No.3 was driving their tanker earlier appeared to be satisfied that the driver was holding a valid and proper license and did not care to inquire with regard to endorsement. By taking the endorsement from the licensing authority, the nature of vehicle or the kind of vehicle which the driver would be driving would not have changed, it would have remained the same. Thus, taking of the endorsement from the licensing authority was for some other purpose and not for giving him further certificate for driving the tanker, as he was already holding a valid licence for driving it."

11. On going through the aforesaid and the facts of the said case, it appears that driving licence was not produced but the owner has come in the witness box and stated that before hiring the service of respondent No.3, he had seen his driving licence. The owner has further seen the certificate issued by the Hindustan Petroleum Corporation Ltd. and after satisfying himself that driver was possessing valid driving licence to drive a tanker, the vehicle was allowed to play. The court observed that the endorsement as required under Rule 9 was not on the driving licence though driver was possessing licence to drive the tanker, thus held that respondent had not come out with a case that accident has taken place because the endorsement of a driver to drive such vehicle was not there. It has also not been established that endorsement increases the efficiency of a driver or in absence thereto, the efficiency of the driver would be reduced. It is stated that the said certificate additionally certifies and authorises the driver to drive the goods carrying of dangerous and hazardous

nature. Considering the aforesaid, it was held that exoneration of the insurance company is unsustainable and insurance company is liable to pay the amount of compensation indemnifying the owner in a case of third party risk.

12. In the context of the aforesaid principle laid down by this court, to deal with the argument of Shri Jindal, the provisions of section 10 and 14 of the Motor Vehicles Act as well as rule 9 of the Central Motor Vehicles Rules are required to be taken note of. As per section 10, the form for issuance of the driving licence indicating the contents of licence to drive the vehicle has been specified. Section 10 is reproduced hereunder :-

> **"10. Form and contents of licences to drive** – (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.
>
> (2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely -
>
> (a) motor cycle without gear
>
> (b) motor cycle with gear
>
> (c) invalid carriage
>
> (d) light motor vehicle
>
> (e) transport vehicle
>
> (i) road-roller
>
> (j) motor vehicle of a specified description

13. As per section 14, the currency to drive a motor vehicle has been specified. The relevant portion of Section 14 is reproduced hereunder :-

> **Currency of licences to drive motor vehicles** – (1) A learner's licence issued under this Act shall, subject to the other provisions of this Act, be effective for a period of six months from the date of issue of the licence.
>
> (2) A driving licence issued or renewed under this Act shall-

(a) in the case of a licence to drive a transport vehicle, be effective for a period of three years.

(provided that in the case of licence to drive a transport vehicle carrying goods of dangerous or hazardous nature be effective for a period of one year and renewal thereof shall be subject to the condition that the driver undergoes one day refresher course of the prescribed syllabus; and

14. On perusal of foregoing provisions, it is apparent that as per subsection 10(2) the application to apply for driving licence shall specify the entitlement to the holder to drive a motor vehicle of one or more of the classes specified in section 2(a) to (j). The transport vehicle has been specified in 2(e) while the motor vehicle of a specified description has been prescribed in section 2(j). As per section 14, the currency period of different type of licence has been specified. Subsection 2 further indicates regarding renewal of the driving licence under the Act and proviso to section 2(a) makes it clear that licence of driver of transport vehicle carrying goods of dangerous and hazardous nature be effective for a period of one year and its renewal shall be subject to undergo one day refresher course by the driver of the prescribed syllabus. Thus, it is clear that for the purpose of renewal, one day training is required to a driver driving the motor vehicle carrying goods of dangerous and hazardous nature. Rule 9 of the Central Motor Vehicle Rules specifies the educational qualification for drivers of such category whereby it is specified that such drivers are necessarily required to show the ability to express his communication in any of the Indian language specified in schedule VIII of the Constitution at India and also required to show to pass out the course of a syllabus as specified therein. The certificate in this regard is required to be issued by the recognized institute. As per section 2 the qualification so prescribed in rule 1 ought to be referred while issuing the driving licence form No.7. After careful reading of section 10,14 and Rule 9 which relates to application of driving licence and currency of the licence and also regarding the qualification of driver possessing the licence as specified in the categories of section 12(2)(k) that for renewal of licence of transport vehicle carrying goods or dangerous and hazardous nature, the refresher course is required, but in case of issuance of certificate as per rule 9, the qualification as prescribed is required to be observed. Simultaneous as per rules 132 of the said rules, the responsibility of the transporter or owner of goods carriage has been specified wherein it is the

duty of them to see that the driver must possess the qualification to drive the vehicle of specified description with a certificate of the recognized institute. But because the provision of section 10 and 14 has not been considered by the Division bench of this court in a case of *Baghelkhand Filling Station*(supra) it would not be a ground to take a different view by the Single Bench on account of non-consideration of any of the statutory provision. In the said context, the judgment of Madras High Court relied upon by Shri Jindal in the matter of *Nagamani*(supra) would be of no help to him. It is to be observed here that this court is bound by the aforesaid Division Bench judgment of this Court, however, this Court is not inclined to accept the argument of Shri Jindal, as advanced in the context of the provision of section 10 and 14 of the Motor Vehicles Act and Rule 9 and 132 of Central Motor Vehicles Rules. In such circumstances, relying upon the judgment of *Baghelkhand Filling Station*(supra), the appeal filed by the owner i.e. M.A.No.3744/2010 is hereby allowed, holding that the driver was possessing the valid driving licence to drive transport vehicle.

15. It is further seen that insurance company has not discharged the burden to prove its defence of not possessing valid driving license by driver, calling a person from the RTO Office issued the said driving license. In the present case no person has been called from the RTO office, though the record was summoned by issuing a process. It is further seen that despite giving various opportunities, officers of the insurance company have not come forward to prove their defence, thus, merely taking a defence in the written statement would not be sufficient without proving it by evidence in a claim case. In view of foregoing, the cross objection filed by the insurance company stands rejected.

16. Now coming to the point of enhancement, in M.A.No.2020/10 it is seen from the record that the injured has received the fracture of acetabulam of right leg, radius and ulna of left hand. Initially the MLC was performed at Chittorgarh hospital and the x-ray report Ex.P/5 reveals that fractures were there. Lateron, injured was hospitalised in Patidar hospital from 2/6/08 to 2/7/2008 and discharge ticket Ex.P/8 has been filed. The bill Ex.P/11 has been produced for an amount of Rs.45,000/-. On careful examining the said bill also and the disability certificate Ex. P/13 issued by Dr. Alok Mehta that he has seen the patient's x-ray report, MLC and discharge ticket of Ahmedabad Hospital while treatment of fracture is in Patidar hospital have been seen. As per statement of Dr. Alok Mehta who issued the disability

certificate Ex.P/13 it is apparent that operation has not been performed. The statement of Dr. Patidar who treated the injured has not been recorded. It is surprising that if a person who remained hospitalised for a month, then he must possess the bills of various medicines during such period. There should be record of recurring medicines prescribed to him as per advise of the doctor and purchased by the injured, which is missing in the present case. Learned counsel for claimants has shown the x-ray plates of Patidar hospital from his file but on those x-ray's, date has not been mentioned and its report also is not available, however, returned it back to him. Thus, prima facie it appears from the document Ex.P/10 that there were 2 fractures, but neither in the document Ex.P/10 nor in discharge ticket it has been mentioned that any operation was performed by the doctor. It further reveals that the documents Ex.P/9, P/10 and P/11 appears to have been prepared by the same pen, thus in the light of pre-history given by the patient to Dr. Alok Mehta, it appears that x-ray report and discharge ticket of Ahmedabad have been seen by him which has not been produced in this case and medical expenses has been claimed on the basis of papers of Patidar hospital. In view of foregoing discussion, it is crystal clear that looking to the document Ex.P/4, P/5 and P/8 the fracture of acetabulam, fracture of radius and ulna is there as per report of Chittorgarh Government hospital but thereafter the claimant/injured had taken the treatment at Patidar hospital or at Ahmedabad has not been made clear, in such circumstances, the medical bills have rightly been disbelieved by the claims tribunal of worth Rs.45,000/-. In addition to the aforesaid, the tribunal has recorded a finding of permanent disability relying upon the certificate Ex.P/13 and awarded Rs.50,000/-. In the facts and circumstances of the present case, looking to the percentage of permanent disability, the amount awarded appears to be just and proper. However, in conventional heads such as pain and suffering, transport expenses and special diet, nothing has been awarded except Rs.2,000/-, therefore in view of this court Rs.25,000/- further deserves to be awarded in the said head and the amount is enhanced as Rs. 25,000/- making the total compensation as Rs.77,000/-.

17. In M.A. No. 298/2011 which is filed by L.Rs. of deceased Nimesh Adhyapak, from the evidence brought on record by the wife of the deceased, it appears that he was a contractor. No document regarding the work of contractorship has been produced. In the statement of Smt. Raksha Adhyapak it is stated that deceased had constructed the house of 4-5 persons but statement of none of those persons have been recorded before the claims

tribunal. The date of accident in the present case is 31/5/2008. The income-tax return of year 2005-06 has been produced and thereafter income tax return of year 2008-09 has been filed. It may be noted here that income tax return for the year 2006-07 and 2007-08 have not been filed. In addition to the aforesaid, no evidence of performing the contractorship work has been produced, merely relying upon income tax return of one year, the tribunal has accepted the earning as Rs.1,20,000/- and after deducting 1/3rd towards labour expenses, accepted the net earning of deceased as Rs.80,000/- per annum. In the considered opinion of this court, even if the deduction of one-third has been held illegal, even then, the earning of deceased cannot be accepted more than Rs.80,000/- per annum without proving the said fact from the material on record regarding the construction work done by the deceased. In that view of the matter, if the earning is accepted as Rs.80,000/- per year as accepted by the tribunal and after deducting 1/4th towards personal expenses looking to the number of dependents, then loss of dependency comes to Rs.60,000/-.

18. At this stage, Mr. Jindal contends that mother of the deceased has already died and the father may be dependent on other brothers, therefore his dependency cannot be counted, but I do not find substance in his arguments. When the claimants are wife, father and mother along with kids, in such circumstances the mother may be treated as dependant and on the date of filing of the petition, she was alive. It is further noted here that the father was aged 80 years, therefore he cannot be treated as earning member, therefore arguments so advanced by Shri Jindal is repelled. Accordingly, accepting the dependency as Rs.60,000/- and applying the multiplier of 14 as per judgment of Sarla Verma looking to the age of deceased, the loss of dependency comes to Rs.8,40,000/-. The tribunal has awarded Rs.52,573/- in medical expenses incurred by the family of deceased prior to the death is to be maintained. In addition to the aforesaid, the bills Ex.P/54 which is receipt of advance may not be accepted but other bills Ex.P/55 to P/60 deserves to be accepted. The total of the said bills comes to Rs. 2,873/-. On adding further sum of Rs.25,000/- in conventional heads, the total amount comes to Rs.9,20,446/-. If the amount so awarded by the tribunal I.e. Rs.8,21,230/- is deducted from the enhanced amount, then net enhancement comes to Rs.99,146/- which is rounded upto Rs.1 Lac. Accordingly, the appeal filed by the owner i.e. M.A.No.3744/2010 and the appeal filed by the claimant, M.A.No.298/2011 are hereby allowed to the extent indicated above. The appellants are entitled to receive the enhanced amount of Rs.1 Lac in addition to the compensation

awarded by the tribunal along with interest @ 7.5% per annum. It is to be further held that findings with respect to exoneration of the insurance company recorded by the claims tribunal, Ujjain stands set aside holding that owner, driver and insurance company shall be jointly and severally liable to pay the amount of compensation as awarded by the tribunal and also the enhanced amount.

19. M.A.No.2020/2010 filed by the injured/appellant is allowed in part by enhancing the compensation by a further sum of Rs.25,000/- which shall carry interest @ 7.5% per annum from the date of application. The cross objections filed by the insurance company in the said appeal stands rejected.

20. It is directed that claimants in M.A.No.298/11 and 2020/11 would be entitled to receive the enhanced amount after payment of court fee before the claims tribunal. It is further directed that amount of court fee paid by the claimants shall be payable by the insurance company by way of cost to the claimants to which the certificate shall be issued by the claims tribunal. In the facts and circumstances of the case, parties shall bear their own costs.

*Appeal allowed.*

**I.L.R. [2014] M.P., 410**
**APPELLATE CIVIL**
***Before Mr. Justice N.K. Mody***
M.A. No. 2746/2011 (Jabalpur) decided on 27 February, 2013

SHREEKANT AGRAWAL & anr. ...Appellants
Vs.
UNION OF INDIA ...Respondent

***Railways Claims Tribunal Act (54 of 1987), Sections 23, 123(c)(2), 124-A*** **- Claim petition was dismissed on the ground that death was not due to an untoward incident and the deceased who although was a bonafide passenger was trying to get down from the running train - Held - Merely because the deceased was de-boarding from the moving train, the claim petition cannot be dismissed, as it was not a self inflicted injury - It does not fall under exceptions (a) to (e) of proviso to Section 124-A - Deceased died in an untoward incident - Appellants entitled for a compensation of Rs. 4,00,000/-.** **(Para 11)**

*रेल्वे दावा अधिकरण अधिनियम (1987 का 54), धाराऐं 23, 123(सी)(2),*

*124ए* – दावा याचिका को इस आधार पर खारिज किया गया कि अप्रत्याशित घटना मृत्यु का कारण नहीं था और मृतक जो भले ही सद्भावी यात्री था, वह चलती रेलगाडी से उतरने का प्रयत्न कर रहा था – अभिनिर्धारित – मात्र इसलिए कि मृतक चलती रेलगाड़ी से उतर रहा था, दावा याचिका खारिज नहीं की जा सकती, क्योंकि यह स्वकारित चोट नहीं थी – यह धारा 124–ए के परंतुक के अपवाद (ए) से (ई) के अंतर्गत नहीं आता – मृतक की मृत्यु अप्रत्याशित घटना में हुई है – अपीलार्थीगण रु. 4,00,000/– के प्रतिकर के लिए हकदार।

**Cases referred :**

2008 ACJ 1921, (2010) 12 SCC 443, 2012 ACJ 2507, 2013(1) T.A.C. 166(Mad.).

*Anoop Shrivastava,* for the appellants.
*B.P. Adholiya,* for the respondent.

**ORDER**

**N.K. Mody, J.:** Being aggrieved by the award dated 19.05.2011 passed by Railway Claims Tribunal, Bhopal in Case No.OA/IIu/293/07 whereby claim petition filed by the appellants for compensation on account death of their son Sanjay Agrawal was dismissed, present appeal has been filed.

2. Short facts of the case are that the appellants filed a claim petition before the learned Railway Claims Tribunal, Bhopal Bench alleging that Sanjay Agrawal was their son who fell down from train No.1465 Rajkot Express on 03.10.2006 at Vidisha while he was traveling from Ujjain to Vidisha and sustained serious injuries and died. It was prayed that claim petition be allowed and amount be awarded. The claim petition was contested by the respondent on various grounds including on the ground that since the incident was not an untoward incident as defined under Section 123(c)(2) read with section 124-A of the Railways Act, therefore, the respondent is not liable for payment of compensation..It was alleged that according to the report of Divisional Railway Manager alleged incident occurred when the deceased was trying to get down from the running train, therefore, the alleged incident is covered under Exception (a) and (b) of Section 124-A of the Railways Act i.e. self inflicted injury on his own criminal act. It was prayed that the claim petition be dismissed.

3. After framing of issues and recording of evidence the learned Tribunal dismissed the claim petition against which present appeal has been filed.

4. Learned counsel for the appellant submitted that the impugned award

passed by the learned Railway Claims Tribunal is illegal and incorrect and deserves to be set aside. It was submitted that the learned Tribunal found that the death of the deceased was due to an untoward incident as defined under Section 123(c)(2) of the Railways Act. It is also submitted that the learned Tribunal has also found that there is no evidence regarding speed of the train at the time when the deceased was trying to get down from the train. It is submitted that dismissing the claim petition only on the ground since it is not untoward incident, therefore, it was a wrong decision on the part of deceased is perverse. It is submitted that on this ground claim petition could not have been dismissed. It is submitted that appeal filed by appellants be allowed and the impugned judgment passed by the learned court below be set aside.

5. Learned counsel for the respondent submits that the findings recorded by the learned Tribunal are based on due appreciation of evidence which requires no interference. It is submitted that appeal be dismissed.

6. From perusal of record, it appears that at the relevant time deceased Sanjay Agrawal was traveling from Ujjain to Vidisha in the said train along with his mother Smt. Shashi Agrawal and sister Vinita Agrawal. It has also come in evidence that all of them were traveling in general compartment. It has also come on record that the compartment in which the deceased was traveling was over crowded. It has also come in evidence that at the relevant time Vinita got down.

7. Chapter XIII of the Railways Act deals with the liability of Railway Administration for death and injuries to passengers due to accident. Section 123 of the Act deals with the definitions. Sub-section (c) of Section 123 lays down the definition of untoward incidents, which reads as under: -

> **"123. Definitions.**- In this Chapter.....
>
> (iv) the paternal grandparent wholly dependent on the deceased passenger.
>
> (c) "untoward incident' means
>
> (l)(i) the commission of a terrorist act within the meaning of sub-section (1) of section 3 of the terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or
>
> (ii) the making of a violent attack or the commission of

robbery or dacoity; or

(iii) the indulging in rioting, shoot-out or arson, by any person in or on any train carrying passengers, or in a waiting hall, cloak room or reservation or booking office or on any platform or in any other place within the precincts of a railway station; or

(2) the accidental falling of any passenger from a train carrying passengers."

8. Section 124A deals with compensation on account of untoward incident, according to which when in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitle a passenger, who has been injured or the dependent of a passenger who has been killed to maintain an action and recover damages in respect thereof. This section further lays down that the Railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed as a result of such unwarranted incident. Proviso of this section lays down the circumstances in which no compensation shall be payable if the passenger dies or suffers injury, which are as under:

(a) suicide or attempted suicide by him;

(b) self-inflicted injury;

(c) his own criminal act;

(d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

9. In the matter of *Thomas Vs. Union of India,* 2008 ACJ 1921 wherein the passenger was attempting to get off the train as he had boarded a wrong train when he fell down and his legs were crushed under the wheels and the defence was that the accident occurred due to his own negligence, and the question for consideration before Hon'ble Kerala High Court was whether

negligence of injured can dis-entitle him from claiming compensation under Section 124-A of Railways Act, Divisional Bench of Kerala High Court held that negligence of either the railway administration or that of the injured is not relevant. It was further held that since the passenger has not suffered injuries due to any of the reasons stated in exceptions (a)to (e) of proviso to Section 124-A, therefore, he is entitled for compensation. In the matter of *Jameela vs. Union of India*, (2010) 12 SCC 443 wherein deceased was standing at open door of compartment of running train and falling to his death, Hon'ble Apex Court held that since the death of said passenger was neither a case of suicide nor as a result of self-inflicted injury and also due to his own criminal act nor was he in a state of intoxication or insanity, nor any natural cause or disease, therefore, the claimants are entitled for compensation. In the matter of *Mohan Lal Vs. Union of India,* 2012 ACJ 2507 wherein passenger boarded a wrong train and as soon as she realized that it is a wrong train she tried to de-board the said train and in that process she fell and died on spot, Punjab and Haryana High Court held that the deceased was a bonafide passenger and she died in an untoward incident, hence entitled for compensation.

10. In the matter of *Union of India vs. P. Krishnan and Another* 2013(1) T.A.C. 166 (Mad.) wherein deceased while traveling in Electric Train was hit by an electric post and as a result of which he fell down from the train and died and the claim petition filed was opposed on the ground that deceased was not a bonafide passenger and he fell down from train and died on account of his own negligence and carelessness, the Tribunal concluded that the deceased was a bonafide passenger on the relevant date and no definite material was found that deceased was careless and negligence and thereby hit by principle of self inflicted injury, Madras High Court held that cause of self-inflicted injury when a person accidentally falls from train because of some jerk in such circumstances it would not amount to self inflicted injury but an untoward incident and of the claimants are entitled for compensation.

11. In the present case, learned Tribunal has found that the deceased was a bonafide passenger. The relevant ticket was also found. The fact that the deceased was bonafide passenger is further corroborated from the evidence of his mother and sister who were the co-passengers. In the facts and circumstances of the case, only because the learned Tribunal found that it was a wrong decision on the part of the deceased when he was de-boarding from the moving train, the claim petition cannot be dismissed, as it was not a self inflicted injury and was an untoward incident.

12. In view of this, appeal filed by the appellants is allowed. The impugned award passed by the learned Tribunal is set aside holding that the appellants are entitled for compensation of **Rs.4,00,000/-.** The respondent is directed to pay a sum of Rs.4,00,000/- along with interest from the date of accident at the rate of 9% per annum to the appellants. The learned tribunal is directed to invest 80% of the said amount on long term fixed deposit in the name of appellant No.2 in the nearest Nationalized Bank, in the area where the appellant No.2 is residing, with the condition that the bank will not permit any loan or advance. Interest on the said amount shall be credited on monthly basis in S.B. Account of appellant No.2, which shall be opened by the appellant No.2 from where appellant No.2 can withdraw the amount as per her needs. However, on an application by the appellant No.2 this condition could be modified by the learned tribunal in exceptional circumstances, if made out by the appellant No.2.

No order as to costs.

*Appeal allowed.*

**I.L.R. [2014] M.P., 415**
**APPELLATE CIVIL**
***Before Mr. Justice M.C. Garg***
M.A. No. 646/2003 (Jabalpur) decided on 14 March, 2013

RAJENDRA PRASAD MISHRA ... Appellant
Vs.
MAMTA & ors. ... Respondents

***Workmen's Compensation Act (8 of 1923), Section 4A - Penalty*** **- If there is a dispute about the relationship of employee and employer then the liability to pay compensation arises only after the claim is ascertained if compensation is not paid within 30 days thereafter without any justification, employer is liable to pay penalty - Since the claim after being ascertained has been paid within 30 days, no penalty should have been imposed. (Para 12)**

*कर्मकार प्रतिकर अधिनियम, (1923 का 8), धारा 4ए – शास्ति* – यदि कर्मचारी और नियोक्ता के संबंध के बारे में विवाद है तब प्रतिकर अदा करने का दायित्व केवल दावा सुनिश्चित किये जाने के पश्चात् और तत्पश्चात् यदि बिना किसी न्यायोचित्य के प्रतिकर 30 दिनों के भीतर अदा नहीं किया जाता है, नियोक्ता शास्ति का भुगतान करने के लिये दायी है – चूंकि दावा सुनिश्चित किये जाने के

पश्चात् 30 दिनों के भीतर भुगतान किया गया, कोई शास्ति अधिरोपित नहीं की जानी चाहिए थी।

**Case referred :**

1997 (8) SCC 1.

*Jasneet Hora*, for the appellant.
None for the respondents though served.

**ORDER**

**M.C. GARG, J.:** A short point involves in this appeal as to whether the appellant made himself liable to pay penalty in accordance with Section 4A of the Workmen's Compensation Act, 1923 which reads as under.:

> **"4A. Compensation to be paid when due and penalty for default.**— (1) Compensation under section 4 shall be paid as soon as it falls due.
>
> (2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.
>
> (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall—
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty per cent of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed.

Explanation.—For the purposes of this sub-section, "scheduled bank" means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

(3A) The interest and the penalty payable under sub-section (3) shall be paid to the workman or his dependant, as the case may be.

2. To appreciate the submission of learned counsel for the appellant, who submits that there was no occasion for the appellant to pay any compensation to the legal representations of the deceased-Devraj Patel who died in the accident and whose relatives have claimed that he was an employee of the appellant/company. It is submitted that the appellant would have been liable to deposit compensation, had the appellant admitted the factum of employment of deceased-Devraj Patel with the appellant. In fact the appellant never accepted him to be their employees and, therefore, the question of payment of any compensation on account of his death to his legal heirs did not arise. Thus, if there was no liability on the appellant to pay compensation, the question of payment of any penalty does not arise.

3. It is submitted that the appellant has contested the claim of the legal heirs of the deceased-Devraj Patel who filed compensation petition under the Workmen's Compensation Act because of death of deceased-Devraj Patel in the accident.

4. The case of the claimants was based upon their submissions that deceased-Devraj Patel was the employee of the appellant being posted as Cleaner in the bus in question at the relevant point of time.

5. In their reply to the claim petition, appellant denied that Devraj Patel was employed as cleaner in the bus in question. This fact is born out from the pleadings in the written statement filed by the appellant inasmuch as in para-1 of the written, the appellant has stated as under :

"1. आवेदन पत्र की कंण्डिका क्रमांक–1 अंशतः स्वीकार है लेकिन यह स्वीकार नहीं है कि मृतक अनावेदक क्रमांक 1 के बस क्रमांक एम0पी0 17 –3745 में

क्लीनर के पद पर कार्यरत था बल्कि उक्त वाहन का वैध अनुज्ञप्तिधारी ड्राइवर रमाशंकर सोनी तनय रामकिशोर सोनी उम्र 33 वर्ष था तथा उक्त बस का क्लीनर रामकिशोर मिश्रा तनय रामगोपालमिश्र साकिन पुरोनी तहसील मउगंज थाना नईगढी दुर्घटना दिनांक को थे और वर्तमान में हैं । इस प्रकार मृतक अनावेदक क्रमांक 1 का कभी भी नियोजित कर्मकार नहीं था"

6. It is submitted that in view of aforesaid denial of the claim of the respondent for compensation on account of death of deceased-Devraj Patel, issue No.1 was framed.

7. It is submitted that even in the evidence which came on record, the appellant denied that deceased-Devraj Patel was not an employee of him. In this regard they have examined Rajendra Mishra (DW1) who appeared as sole witness of the appellant and has categorically stated that deceased was not an employee of the appellant and was not posted as Cleaner at the relevant point of time.

8. It is submitted that Workmen's Commissioner has reached to a conclusion that deceased was an employee merely because appellant has not produced the record, such as, employment register, wages register. It is also submitted that this decision of the Tribunal does not hold that the appellant was guilty of not depositing the compensation amount or that on account of non-depositing the compensation amount, the appellant become liable to pay penalty under Section 4A of the Act.

9. The appellant has relied upon the judgment of Hon'ble Apex Court in the case of *Ved Prakash Garg Vs. Premi Devi and others,* report in (1997) 8 SCC 1 wherein while discussing the liability to pay penalty under Section 4A, the Apex Court has been pleased to make the following observations :

> "9. Before we deal with the rival contentions and have a look at the divergent viewpoints expressed by the different High Courts on this question, it will be necessary to keep in view the relevant statutory schemes in the light of which this controversy has to be resolved. The Compensation Act deals with the provisions for payment by certain classes of employers to their workmen of compensation for employment injuries caused by accident. There is no dispute between the parties that the deceased drivers and cleaner in these cases were workmen employed by the appellant-employers. Section 3 of

the compensation Act deals with 'Employer's liability for compensation'. subsection (1) thereof lays down that 'if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II'. It is also not in dispute that fatal personal injuries were caused to the workmen by accidents which arose out of and in the course of their employment because of which they were working on the motor vehicles of the appellant-employers when they met their ends on account of motor accidents. Section 4 of the Compensation Act deals with 'Amount of compensation'. It lays down the statutory scheme for computing the compensation payable in cases of the types of accidental injuries suffered by the workmen concerned. The employer, on a conjoint reading of Sections 3(1) and 4(1) of the insured workmen under circumstances contemplated by these provisions. Then follows Section 4A of the Compensation Act with which we are directly concerned."

10. A mere look at the aforesaid provision quoted above shows that Section 4A deals with the time for payment of compensation as required to be computed under Section 4. Sub-section (1) thereof mandates that compensation shall be paid as soon as it falls due. Sub-section (2) thereof contemplates a situation wherein the employer though accepting his liability to pay compensation to his injured workman disputes the extent of the claim of compensation and in such a case subsection (2) enjoins him to make provisional payment based on the extent of accepted liability by depositing it with the Commissioner or to pay it directly to the workman. It is obvious that such an obligation of the employer would not arise under Section 4A sub-section (2) if he totally disputes his liability to pay on grounds like the injured person being not his employee or that the accident was caused to him at a time when he was not in the course of employment or that the accident caused to him did not arise out of his employment. IF such disputes are raised by the employer then his obligation to make provisional payment under sub-section (2) of Section 4A would not arise and his liability would depend upon the final adjudication by the Workmen's Commissioner at the end of the trial. in that light when sub-section (3) of Section 4A is seen it becomes obvious that once

the compensation due under the Act becomes ascertained either provisionally under sub-section 92) or finally on adjudication by the Commissioner and if the employer does not pay the same within one months from the date it thus falls due, the Commissioner can direct under sub-clause (a) of Section 4a(3) interest at the rate provided therein and also penalty as contemplated by sub-clause (b) thereof as per the amended Section 4A(3) of the Compensation Act but even under the unamended Section 4A(3) which applied at the relevant time a clear distinction is made by the Legislature between the imposition of penalty by way of a further sum not exceeding fifty per cent of compensation found payable when it is not paid within the requisite time as and when it fell due.

11. Thus even in the scheme of unamended Section 4A(3) or as per the amended Section 4A(3) read with clauses (a) and (b) thereof, it becomes clear that additional amount of compensation can be levied against the defaulting employer by way penalty if it is shown that there is no justification for the delay on his part in making good the compensation amount to the claimant. Interest payable on the principal amount, if not paid when it fell due, is not considered by the Legislature to be a penalty. This is further highlighted by the proviso to Section 4A(3) as substituted by Act 30 of 1995 which clearly indicates that a penalty amount under clause (b) cannot be imposed against the employer without giving him reasonable opportunity to show cause. No such show cause notice is contemplated while imposing interest on default of payment of the principal amount on the part of the employer as per Section 4A(3) (a). Absence of this provision is obviously based on the legislative intent that interest on principal amount is not by way of penalty. Therefore, the employer need not be heard in this connection. A simplicity default in payment of compensation within the time of one month from the date it fell due would automatically attract the provision of simple interest under Section 4A(3) as per the rate prescribed therein and for such imposition of interest no question of justification for the delay is countenanced by the Legislature. But while imposing penalty justification for delay would be a good defence for the employer for meeting such claim for penalty. The same aspect is further highlighted by Section 4A(3)(a) of the Compensation Act as existing on the Statute book at present which shows that the interest payable under sub-section (3A) is to be paid to the workman or his dependant while the penalty imposed is to be credited to the State Government. It is in the light of the aforesaid statutory Government. It is in the light of the aforesaid statutory scheme of Section 4A that the question posed for our consideration has to be resolved."

12. A bare perusal of the aforesaid para of the judgment, shows that if there is a dispute about the relationship or stand has been taken by the employer that the deceased was not his employee, then the liability to pay compensation arises only after the claim is ascertained by the Workmen's Commissioner and compensation is not paid within 30 days thereafter. In the present case, admittedly the claim after being ascertained has been paid by the Insurance Company within 30 days, as such it is not a case where penalty should have been imposed upon the appellant.

13. With the aforesaid, this appeal is allowed.

*Appeal allowed.*

**I.L.R. [2014] M.P., 421**
**APPELLATE CIVIL**
***Before Mr. Justice N.K. Mody***
M.A. No. 2569/2011 (Indore) decided on 14 March, 2013

RAJENDRA SINGH ...Appellant
Vs.
KALOO SINGH ...Respondent

***Civil Procedure Code (5 of 1908), Order 11 Rule 2 & Order 41 Rule 23 - Principles of Res-Judicata* - Earlier suit for permanent injunction dismissed - Subsequent suit was filed for declaration and possession - Held - Subsequent suit is not barred by principles of Res-Judicata - No error has been committed by appellate court in allowing the appeal and setting aside the order passed by trial court, in remanding the case. (Para 6)**

*सिविल प्रक्रिया संहिता (1908 का 5), आदेश 11 नियम 2 व आदेश 41 नियम 23 – पूर्व न्याय के सिद्धांत* – स्थायी व्यादेश हेतु पूर्ववर्ती वाद खारिज – पश्चातवर्ती वाद, घोषणा एवं कब्जे हेतु प्रस्तुत किया गया – अभिनिर्धारित – पश्चातवर्ती वाद, पूर्व न्याय के सिद्धांतो द्वारा वर्जित नहीं – अपीली न्यायालय द्वारा अपील मंजूर करते हुए, विचारण न्यायालय द्वारा पारित किये गये आदेश को अपास्त कर, मामला प्रतिप्रेषित करने में कोई भूल कारित नहीं की गयी।

**Cases referred :**

(2008) 8 SCC 485, AIR 1970 SC 1659, AIR 1993 SC 1756.

*Sunil Jain,* for the appellant.

*S.K. Pawnekar,* for the respondent.

**ORDER**

**N.K. Mody, J.:-** Being aggrieved by the judgment and decree dated 9/9/2011 passed by III ADJ, Mandsaur in Civil Regular appeal No.18-A/11 arising out of judgment and decree dated 30/9/2010 passed by I Civil Judge class-II, Mandsaur in civil suit No.61-A/09 whereby the suit filed by the respondent was dismissed, was set aside and the case was remanded, the present appeal has been filed.

2. Short facts of the case are that respondent filed a suit for declaration and possession on 13/5/2009. The suit was contested by the appellant on various grounds including on the ground that suit filed by the respondent is barred under Order II Rule 2 CPC as respondent earlier filed a suit for permanent injunction on 11/9/2002 which was dismissed on 23/6/2008 and no appeal was filed by the respondent. It was alleged that judgment passed earlier against the appellant had attained finality and respondent had admitted that respondent was never in possession of the suit property. It was prayed that suit be dismissed. After framing of issues and recording of evidence learned trial court dismissed the suit on the ground that suit filed by the respondent is hit by Order II Rule 2 CPC and also decided other issues, against which an appeal was filed by the respondent which was allowed and the decree passed by the learned trial court was set aside and the case was remanded, hence this appeal.

3. Learned counsel for appellant submits that impugned judgment passed by learned appellate court is illegal and deserves to be set aside. Learned counsel placed reliance on Order II Rule 2 CPC which reads as under:-

> 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 his 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.'

4. It is submitted that since the relief of possession was not claimed in the earlier suit therefore it is presumed that respondent relinquished that part of the claim. Learned counsel further submits that even if it is assumed that respondent was not entitled to file the suit subsequently for possession, then too, there was no justification on the part of learned appellate court to remand the case. For this contention reliance is placed on a decision in the matter of *Municipal Corporation, Hyderabad Vs. Sunder Singh,* (2008) 8 SCC 485 wherein it was observed that 'before invoking the provision regarding remand of a case by the appellate court under Order 41 Rule 23 CPC the conditions precedent laid down therein must be satisfied. Order 41 Rule 23 would be applicable when a decree has been passed on a preliminary issue. The appellate court must disagree with the findings of the trial court on the said issue. Only when a decree is to be reversed in appeal, the appellate court may if it considers necessary, remand the case in the interest of justice." It is submitted that appeal be allowed and impugned judgment passed by the learned appellate court be set aside.

5. Learned counsel for respondent submits that since the subsequent suit filed by respondent is on a different cause of action for which the cause of action accrued to the respondent on 23/6/2008 when the former suit filed by the respondent was dismissed, therefore the suit filed by the respondent does not hit by Order II Rule 2 CPC. Learned counsel placed reliance on a decision in the matter of *Sidramapaa Vs. Rajashetty,* AIR 1970 SC 1659, wherein Hon. Apex Court observed that 'cause of action in subsequent suit is different and relief asked for in subsequent suit not one which could have been asked for in earlier suit, it was held that subsequent suit is not barred.' Learned counsel further submits that since the suit was dismissed mainly on the ground that because of Order II Rule 2 CPC the suit filed by the respondent is not maintainable, therefore learned court below committed no error in remanding the case in wholesole. It is submitted that appeal has no merits and same be dismissed.

6. In the aforesaid matter the Hon'ble Apex Court has further observed that where the cause of action on the basis of which the previous suit was brought does not form the foundation of the subsequent suit and in the earlier suit the plaintiff could not have claimed the relief which he sought in the subsequent suit, the plaintiff's subsequent suit is not barred by Order II Rule 2 CPC. In the matter of *Shri Inacio martins Vs. Narayan Hari Naik,* AIR 1993 SC 1756 wherein earlier suit for injunction was dismissed and subsequent

suit was for declaration of title with recovery of possession, the Hon'ble Apex Court has held that the subsequent suit is not barred by principles of res-judicata. Keeping in view the aforesaid position of law, this court finds that the learned Appellate court has not committed any error in allowing this appeal and setting aside the order passed by the learned trial court in remanding the case.

7. In view of this appeal has no merits and the same stands dismissed. No order as to costs.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 424**
**APPELLATE CIVIL**
***Before Mr. Justice M.K. Mudgal***
F.A. No. 286/2003 (Gwalior) decided on 26 July, 2013

PRADUMN SINGH & ors. ...Appellants
Vs.
SHIV RAJ SINGH & ors. ...Respondents

*A. Evidence Act (1 of 1872), Section 68 - Mode of proof of document required to be attested* - **Document shall not be used as evidence until one attesting witness has been called for proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. (Para 11)**

*क. साक्ष्य अधिनियम (1872 का 1), धारा 68 – अनुप्रमाणन अपेक्षित दस्तावेज के सबूत की विधि* – दस्तावेज को साक्ष्य के रुप में उपयोग नहीं किया जावेगा जब तक कि एक अनुप्रमाणक साक्षी को उसका निष्पादन साबित करने के लिए नहीं बुलाया जाता, यदि कोई अनुप्रमाणक साक्षी जीवित हो तथा न्यायालय की प्रक्रिया के अधीन साक्ष्य देने में सक्षम हो।

*B. Succession Act (39 of 1925)*, **Sections 74 & 119 - Succession - Will - Original Will not produced - Name of typist not mentioned - Also not clear that who drafted the Will - Name of one witness was typed but name of another witness was not typed and was written in handwriting - Person who typed the Will not examined - As the name of second Attesting Witness was not typed reveals the probability that he was not present when the Will was typed - Evidence of first attesting witness not recorded - Second attesting witness deposed that he was not aware of assets or property which was included**

**in Will - He also expressed his ignorance regarding person who typed the Will and the place where it was actually typed - Execution of Will not proved. (Paras 13-18)**

*ख. उत्तराधिकार अधिनियम (1925 का 39), धाराऐं 74 व 119 – उत्तराधिकार – वसीयत* – मूल वसीयत प्रस्तुत नहीं – टाईपिस्ट का नाम उल्लिखित नहीं – वसीयत किसने ड्राफ्ट की, यह भी स्पष्ट नहीं – एक साक्षी का नाम टाईप परंतु दूसरे साक्षी का नाम टाईप नही किया गया और हाथ से लिखा गया था – उस व्यक्ति का परीक्षण नहीं किया गया जिसने वसीयत टाईप की – चूंकि दूसरे अनुप्रमाणक साक्षी का नाम टाईप नहीं, यह संभाव्यता प्रकट होती है कि वह वसीयत टाईप किये जाते समय उपस्थित नहीं था – प्रथम अनुप्रमाणक साक्षी का साक्ष्य अभिलिखित नहीं किया गया – द्वितीय अनुप्रमाणक साक्षी ने कथन किया कि उसे वसीयत में शामिल अस्तियां या सम्पत्ति की जानकारी नहीं – उसने वसीयत किसने टाईप की और वास्तविक रुप से किस स्थान पर टाईप की गयी, इस संबंध में भी अनभिज्ञता व्यक्त की – वसीयत का निष्पादन साबित नहीं किया गया।

*C. Civil Procedure Code (5 of 1908), Order 18 Rule 4 - Affidavit* - **Affidavit prepared by counsel and the witness merely signing it - It can be inferred that statement produced on behalf of witness is not his actual statement. (Para 17)**

*ग. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 18 नियम 4 – शपथपत्र* – अभिभाषक द्वारा शपथपत्र तैयार किया गया और साक्षी ने केवल हस्ताक्षर किये – यह निष्कर्ष निकाला जा सकता है कि साक्षी की ओर से प्रस्तुत किया गया कथन, उसका वास्तविक कथन नहीं है।

**Cases referred :**

2008 (2) MPLJ 321, 2007(2) MPLJ 1, 2008(1) MPHT 340, 2006(1) MPWN S.N. 85, 1957 MPLJ 755, AIR.1959 SC 433, AIR 1990 SC 396, 2003 AIR SCW 177.

*S.S. Bansal*, for the appellants.
*Sanjeev Jain*, for the respondents.

**JUDGMENT**

**M.K. Mudgal, J. :-** This first appeal under Section 96 of the Code of Civil Procedure has been preferred by the appellants/defendants assailing the judgment and decree dated 29.8.2003 passed by learned XII Additional District Judge Gwalior (Fast Track Court) (Shri H.N.Awasthi) in Civil Suit No.11-A of 2003 whereby, the suit filed by the plaintiffs for declaration of title and permanent

injunction was decreed holding that the disputed house is of the ownership of the plaintiffs and they are in possession of the same. In this appeal, the appellants are referred as 'defendants' and respondents as 'plaintiffs'.

(2). The admitted facts are as follows :

> "The suit house bearing No.40/940 is situated at Amkho Lashker Gwalior which was owned by the deceased Madho Singh who had one brother Chatur Singh. Chatur Singh had two sons Gopal Singh and Shivendra Singh. The plaintiffs no.1 to 3 are sons of Shivendra Singh and plaintiff no.4 is the son of Gopal Singh. The plaintiff no.5 Shivendra Singh has expired during pendency of the suit. The map of the disputed house attached with the plaint is a part of the suit and in this case, the disputed house is referred to as `disputed property'.

(3). Facts, in brief, of the plaint are that Late Madho Singh retired Commandment I.P.S who died on 8.7.1997 was owner and title holder of the disputed property which was his self-acquired property. The plaintiffs got ownership of the disputed house on the basis of will dated 30.6.1997 Ex.P/1 which was duly executed by deceased Madho Singh in their favour during his life time. The plaintiffs have further pleaded in para 9 of the plaint that they are legal heirs of the deceased Madho Singh also. Hence, after the death of deceased Madho Singh, the plaintiffs have become owner and title holder of the disputed property. The plaintiffs No.1 to 3 being real brothers and plaintiff no.4 being their cousin, were having equal share in the disputed property. The plaintiff no.5 has already expired. After the death of deceased Madho Singh, names of plaintiffs have been mutated in his place to the disputed property. The defendants are in relation of deceased Madho Singh's wife and trying to grab the house. They have no title or interest in the said property. When they tried to dispossess the plaintiffs on 24.9.1999, the plaintiffs had to file the suit as stated above.

(4). The defendants submitted their joint written statement and denying the plaint allegations, alleged that the plaintiffs have illegally got the said house mutated in their names against which, an appeal has also been filed by them in the Municipal Corporation, Gwalior. It was further alleged that during his life time, deceased Madho Singh did not execute the will Ex.P/1 in favour of the plaintiffs. On the other hand, deceased Madho Singh had executed a will in favour of the defendants on 7.2.1992 Ex.D/2 which is valid. The will produced

by the plaintiffs alleged to have been executed by deceased in their favour is a forged document, on the strength of which, plaintiffs cannot claim the ownership and title to the disputed property. The defendants have further pleaded that they are owner of the disputed house on the basis of will Ex.D/2. Hence, prayed for dismissal of the suit.

(5). That, learned trial Court after framing four issues and after recording evidence of both the parties and having discussed the recorded evidence in detail, has decreed the suit vide impugned judgment dated 29.8.2003. The trial Court has not found proved both the wills Ex.P/1 and Ex.D/2, yet the plaintiffs' suit has been decreed holding that the plaintiffs are to be successors of the deceased Madho Singh.

(6). The following questions arise for consideration in this appeal:

(I). Whether or not the will dated 7.2.1992 Ex.D/2 was executed by the deceased Madho Singh in favour of the defendants?

(ii). Whether or not the will dated 30.6.1997 Ex.P/1 was executed by the deceased Madho Singh in favour of the plaintiffs?

(iii). Whether, the plaintiffs have acquired the title to and ownership of the disputed property being successors/heirs of the deceased Madho Singh?

(iv). Whether, the findings of the learned trial Court are based on proper reasonings?

(7). Assailing the findings recorded by the learned trial Court, learned counsel for the appellants submits that the learned trial Court has committed grave error in disbelieving the will Ex.D/2 dated 7.2.1992 executed by the deceased Madho Singh in favour of the defendants and further submits that execution and attestation of the said will was proved by the statement of Arjun Rao Phalke (DW3) which was corroborated by C.G. Jagtap (DW2)'s statement. Both the witnesses have deposed in their statements that the will Ex.D/2 was executed and signed by the deceased Madho Singh in their presence. However, the evidence of said witnesses has not been considered properly. The counsel further argues that the suit filed by Shivraj Singh and others was not maintainable on the filing date I.e. 25.9.1997 on the basis of their being the successors as all the four plaintiffs cannot be successors of the deceased Madho Singh. The plaintiff no.5 Shivendra Singh who is son of deceased's brother Chatur Singh had not filed the suit earlier. He joined the

suit subsequently and died during pendency of the suit. Therefore, the suit ought not to have been decreed in favour of the plaintiffs on the basis of their being successors of the deceased Madho Singh. Learned counsel for the appellants placing reliance on the following judgments have requested for setting aside the impugned judgment and decree and for dismissal of the suit, the judgments are as follows :

(I). *Sundariya Bai Choudhary Vs. Union of India and Others* 2008 (2) MPLJ 321;

(ii). *Gurudev Kaur and others Vs. Kaki and Others* 2007 (2) MPLJ 1;

(iii). *Govardhandas Agrawal Through L.Rs Vs. Smt. Topabai Agrrawal and another* 2008 (1) MPHT 340; and

(iv). *Hazara Bradi Vs. Lokesh Dutta Multani* 2006 (I) Weekly Notes S. N. 85).

(8). Refuting the arguments advanced by the appellants' counsel, learned counsel for the respondents pleads that the findings recorded by the learned trial Court are based on proper reasonings as the will Ex.D/2 is a forged and fake document which was prepared after the death of the deceased Madho Singh. The said will is prepared on a simple paper. It is neither registered nor attested by any Notary. Moreover, the name of the scribe or typist is not mentioned on the said will. The original will has not been produced. Ex.D/2 is a photocopy which is not admissible in evidence. Besides the alleged attesting witness Arjun Rao Phalke (DW3) has not proved the attestation and execution of the said will as per Section 68 of the Evidence Act. So far as C.G.Jagtap Rao's statement is concerned, he is neither an attesting witness nor he has put his signature in any manner on the will. Learned counsel further submits that the witness C.G. Jagtap Rao has been shown as executor in this will but no probate has been obtained by him so far. C.G. Jagtap wanted the said house to be given to his friend Shivkaran Singh Bhadoria retired DSP, who was residing adjacent to the disputed house. Owing to which, the will has been prepared with the connivance of the said witness C.G. Jagtap and he has played an active role in fabrication of the said document. Learned counsel placing reliance on the following judgments has submitted that the appeal be dismissed and the impugned judgment and decree be affirmed :

(I). *Narayan Krishnaji Joshi and another Vs. Krishnaji Mahadeo Joshi* 1957 MPLJ 755;

(ii). *H.Venkatachala Iyengar Vs. B.N.Thimmajamma* AIR 1959 SC 433;

(9). Arguments of both the parties were heard and the record of the lower Court was perused.

(10). On perusal of the said will Ex.D/2, it becomes clear that the will was executed in favour of the three defendants. Out of them, defendant no.5 Ku.Kalpana has produced her statement under Order 18 Rule 4 of the Code of Civil Procedure running in five pages and she has tried to say that the will Ex.D/2 was executed and signed by the deceased Madho Singh in favour of her sister Smt. Ranjana defendant no.2, Smt. Vandana defendant no.4, and herself. The age of Kalpana in her statement is shown to be 25 years on 4.4.2003. The alleged will was executed on 7.2.1992 on the basis of which, witness Kalpana's age was 14 years at the time of execution of the will Ex.D/2. In view of the facts, her statement cannot be believed for holding the execution and attestation of the said will by the deceased Madho Singh. For proving of a will, all the suspicious circumstances should be removed by the propounder. In *Kalyan Singh Vs. Chhoti* AIR 1990 SC 396, the Hon'ble Apex court has held that failure of propounder to remove suspicious circumstances by placing satisfactory material on record-will could be said to be not genuine. The relevant para 20 of the judgment is 20 is as under :

> "20. It has been said almost too frequently to require repetition that a will is one of the most solemn documents known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed. It is, therefore, essential that trustworthy and unimpeachable evidence should be produced before the court to establish genuineness and authenticity of the will. It must be stated that the factum of execution and validity of the will cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the court to look into surrounding circumstances as well as inherent improbabilities

of the case to reach a proper conclusion on the nature of the evidence adduced by the party".

(11). What should be the mode of proof of execution of a will, has been laid down by the Hon'ble Apex Court in *Janki Narayan Bhoi Vs. Narayan Namdeo Kadam* 2003 AIR SCW 177. While dealing with the question elaborately, the Apex Court has held in para 10 as under :

"10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness even

though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63 viz. attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by the other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act".

(emphasis supplied).

12. The will dated 7.2.1992 Ex.D/2 is a photocopy of the will. The original will was not produced on record and in this regard, no explanation on behalf of the defendants has been given in their evidence. It is true that the registration of will is not required under any provision of law. But if a document is registered, it shall be presumed that the document is executed on a particular date and time when the document is registered before the officer of the Registration Office so no suspicion arises about execution of the antedated document. If a document is prepared on the plain paper, it can be easily fabricated and antedated. The will Ex.D/2 is prepared on plain paper and does not bear the photo of tester of the deceased Madho Singh.

(13). It is evident from the will Ex.D/2 that the name of the typist has not been mentioned on it and who has drafted the will, is also not clear. On the last page, there is no signature of the tester below the typed word `signature'. In other words, the place of signature is blank. The alleged will has been attested by two witnesses Jai Singh Tomar and Arjun Rao Phalke (DW3). The name of Jai Singh Tomar is typed but name of Arjun Rao Phalke (Dw3) is not typed. Besides, his name has been written in handwriting. No explanation has been given on behalf of the defendants claiming the title on the basis of the will Ex.D/2. The typist by whom, Ex.D/2 was typed could have explained about the discrepancy as to why the name of Arjun Rao Phalke (Dw3) was not typed as that of other witness Jai Singh Tomar was, but the statement of typist was not got recorded by the defendants. This circumstance reveals the probability of Arjun Rao Phalke (DW3)'s absence when the will Ex.D/2 was typed and owing to which, Arjun Rao Phalke's name was not typed at that time and then further question arises leading to suspicion about Arjun Rao Phalke (DW3)'s signature was obtained subsequently only to show him as an attesting witness of the said will.

(14). As per allegations of the written statement, the will Ex.D/2 was executed by the deceased Madho Singh in favour of the three sisters as mentioned earlier. It has neither been explained in Ex.D/2 nor has been explained by defendants as to what was the reason for the deceased Madho Singh to have executed the will Ex.D/2 in favour of three persons jointly. If the will had been executed in favour of any one person, it would have been natural for the deceased Madho Singh to have love and affection for him/her.

(15). The statement of Ku. Kalpana (DW1) does not have credence to prove the execution and attestation of the will Ex.D/2 as Kalpana has deposed in para 17 of her statement that she had seen the will Ex.D/2 at first after one month from the death of Fufaji I.e. the deceased Madho Singh. It is clear from this statement that the will was not executed in the presence of this witness. Besides, the witness Kalpana has not claimed in her statement running to five pages that when the will was executed, she was present there. Hence, it is concluded that the statement of Kalpana (DW1) does not help to reach the conclusion that the will Ex.D/2 was executed by the deceased Madho Singh.

(16). The two witnesses namely Arjun Rao Phalke (DW3) and Jai Singh Tomar have been shown as attesting witnesses of Ex.D/2. The statement of Jai Singh Tomar was not got recorded by the defendants. It has been shown

by them that Jai Singh Tomar was no more yet his death certificate was not produced on record. But death of Jai Singh Tomar has not been challenged by the plaintiffs so it can be inferred that Jai Singh Tomar has died. Signature of Jai Singh Tomar has not been proved by members of his family or by any other person who was familiar with his signature.

(17). The defendants have produced the statement running to two pages of Arjun Rao Phalke (DW3) under Order 18 Rule 4 of the Code of Civil Procedure as one of the attesting witnesses of the will Ex.D/2 who has deposed in the chief examination that the said will was executed and signed by Madho Singh in his presence and he also signed the will as attesting witness. The witness Arjun Rao Phalke (DW3) could not stand the cross-examination. In para 8 of the statement, the witness has deposed that he got his statement recorded in the affidavit that he was acquainted with Madho Singh and he continued his relation with him till his end. Apart from this he did not get anything else recorded in his affidavit. The affidavit was got prepared by Ranjana's Advocate and he has only put his signature on it. It is obvious from the statement that the contents of the affidavit regarding the execution of the will signed by Madho Singh before him and signed by this witness himself as attesting witness were not dictated by this witness. Thus, it is clear that all the contents of the affidavit were got written by Ranjana's Advocate himself. On this ground, it can be inferred that the statement produced on behalf of Arjun Rao Phalke (DW3) is not his actual statement and so it cannot be taken as sufficient evidence for proving the attestation and execution of the will Ex.D/2.

(18). Arjun Rao Phalke (DW3) has deposed in para 13 of his statement that he was not aware of the assets or the property which was included in the will. Moreover, he has expressed his ignorance regarding the person who has typed the will and the place where it was actually got typed. The witness has further stated that the will which was read out before him was already typed and he only signed it. On the basis of the aforesaid facts, it becomes clear that neither the will Ex.D/2 was executed by Madho Singh in his presence nor he signed it in person in Madho Singh's presence. Hence, Arjun Rao Phalke's statement does not prove and testify the execution of the said will Ex.D/2.

(19). Over and above, as per pleadings of the defendants and the statements of witnesses, the alleged will Ex.D/2 was executed at the residence of Dr.Nivsarkar (as per para 11 of C.G.Jagtap Rao (DW2)'s statement). Arjun Rao Phalke does not reside adjacent to Dr.Nivsarkar's residence. In para 4

of Arjun Rao's statement, it has come on record that he lives three Kms away from Madho Singh's residence. This witness is also not Madho Singh's relative and further it has not been explained as to why he was called for witness of the execution of the will Ex.D/2. In para 10 of his statement, he has stated that he does not recognize Madho Singh's handwriting. In the light of the facts and circumstances, it appears that the statement of Arjun Rao Phalke is not only incredible but also fabricatedly prepared for proving this will. By and large, the learned lower Court has not erred in disbelieving the statement of Arjun Rao Phalke (DW3).

(20). The defendants have produced the statements running to three pages under Order 18 Rule 4 of the Code of Civil Procedure of another witness C.G.Jagtap Rao (DW2) Retd. SDO for proving the execution of the will. As per contents of the said will, Mr.C.G.Jagtap Rao (DW2) is one of the five executors of the will, but so far no one has got the probate on the basis of the said will. Mr. C.G.Jagtap Rao (DW2) has not signed the will in any capacity.

(21). The witness C.G.Jagtap being a retired S.D.O. (Revenue) deposing his statement cleverly has tried to prove execution and attestation of the will Ex.D/2 and has deposed in his statement that the said will was executed by the deceased Madho Singh at Dr.Nivsarkar's residence where the attesting witnesses Arjun Rao Phalke (DW3) and Jai Singh Tomar had signed the will. Presence of this witness is not indicated from the will Ex.D/2 though his name is mentioned as one of the executors along with other four but it has not been mentioned in it that C.G.Jagtap Rao and other four executors were present when the said will was executed. The witness has deposed in para 10 that the said will was typed on 5.2.1992 at Dr.Nivsarkar's residence and subsequently again was typed on 7.2.1992. At that time, Arjun Rao Phalke (DW3), Jai Singh Tomar, Madho Singh, Dr. Nivsarkar and he himself were present. But contrary to this, Arjun Rao Phalke has stated in para 13 that he has no knowledge of by whom the will was typed and where it was typed. The witness has further deposed that when he signed the will, it was already got typed. From the statement of Arjun Rao Phalke (DW.3), it is explicitly clear that the will was not typed in his presence. These contradictory statements run counter to each other as the said will actually was not got typed at Dr.Nivsarkar's residence. Moreover, in para 16 of C.G.Jagtap Rao's statement, it has come on record that Dr.Nivsarkar is still alive, yet his statement was not got recorded by the defendants showing that the said will was actually typed at his residence. As to why he was not produced, no explanation has been given by the

defendants. In para 22, this witness (DW.2) has admitted that the deceased Madho Singh's photo has been affixed on the will dated 30.6.1997 Ex.P/1 which has been allegedly executed in favour of the plaintiffs. The presence of this witness is also suspicious as he has admitted in para 9 that he resides 5 Kms away from Madho Singh's residence. Why this witness has actively participated in execution of the will, no plausible reason has been found in his statement whereas, he is not relative to the deceased Madho Singh.

(22). The story put forth by the defendants for execution of the will at Dr.Nivsarkar's residence is also quite unnatural. The deceased Madho Singh was retired IPS Officer. The will could very well have been executed at his residence itself (which is disputed house), but no satisfactory explanation has been brought out in this regard by the defendants. Besides, the will could have been registered easily also as it was alleged to have been executed at Gwalior where, the registration facility is also available. It is pertinent to mention here that the deceased Madho Singh put his signature in English as shown in Ex.D/2. For proving it as authenticated, the signature of Madho Singh could have been sent for from his office or other department where, he had been working for long time as government servant. But it was not done. If the authenticated signatures had been sent for, both the signatures (disputed and authenticated) could have been got examined through handwriting expert but the defendants have not produced any reliable and cogent evidence for proving the will Ex.D/2.

(23). On perusal of C.G.Jagtap's statement, it gets clear that he has hidden interest in this property as in para 21 of Kalpana Bundela's (DW.1) statement, it has come on record that when she went to lodge the report in the Police Station, Shri C.G. Jagtap and Shivkaran Singh Bhadoria went with her. Why it was necessary for Shri C.G.Jagtap for accompanying Ku. Kalpana for getting the report lodged in the police station. On behalf of the plaintiffs, the story has been put forth that said C.G.Jagtap Rao wanted the disputed house to be given to his friend Shivkaran Singh Bhadoria, a retired DSP. Though this fact has not been proved by the cogent evidence yet participation of Shivkaran Singh Bhadoria and C.G.Jagtap Rao for lodging the report through Kalpana seems to be plausible. Besides, the statement of C.G.Jagtap Rao has no substance in proving the will Ex.D/2. Thus, his statement is not found trustworthy and credible. The trial Court has rightly discarded his evidence.

(24). Learned counsel for the appellants has placed reliance on the judgment

of *Sundeariya Bai Chaudhary Vs. Union of India* 2008 (2) MPLJ 321 but this judgment does not help in any way to the appellants' case as in this case, it has been held by the High Court that the will either registered or unregistered can be proved only by attesting witness if the attesting witnesses are alive. In the instant case, statement of attesting witness Arjun Rao Phalke (DW3) has not been found trustworthy as discussed earlier. In the same manner, other judgments referred above by the appellants' counsel do not support the defendants in the facts and circumstances of the case.

(25). As per plaint allegations, deceased Madho Singh executed the will dated 30.6.1997 Ex.P/1 in favour of the plaintiffs. On perusal of the will Ex.P/1, it is clear that this will was typed by someone, whose name has not been mentioned on it and it is also not evident from the will, as to by whom it was drafted. Daryab Singh and Pratipal Singh have been shown as attesting witnesses of Ex.P/1. The statement of Pratipal Singh was not got recorded on behalf of the plaintiffs though Daryab Singh has been examined.

(26). Having discussed the evidence of plaintiffs' witnesses in para 13 to 17, the learned trial Court has concluded that the plaintiffs have failed to prove that the said will Ex.P/1 was executed by the deceased Madho Singh and statements of attesting witness Daryab Singh Bundela was also discarded by the trial Court. The reasons recorded by the trial Court are proper.

(27). During course of arguments, learned counsel for the respondents/ plaintiffs have stated before the Court that he does not want to press the plaintiffs' claim on the basis of Ex.P/1. Therefore, it is held that the plaintiffs do no get any right on the basis of the will Ex.P/1.

(28). Now, it is to be considered whether, the plaintiffs have acquired title to the disputed house on the basis of being successors of the deceased Madho Singh?.

(29). Indisputably in para 1 of the statement of plaintiff Shivraj Singh (PW1), para 8 of the statement of Daryab Bundela (PW2) and para 14 and 15 of the statement of Kalpana Bundela (DW1) it has come on record that Madho Singh had one brother Chatur Singh who had two sons Gopal Singh and Shivendra Singh. Plaintiff No.4 is the son of Gopal Singh. When Madho Singh died his brother Chatur Singh's son Shivendra Singh was alive. Madho Singh had died issue less. His wife had already died before his death. Except Shivendra Singh no other legal heirs as per schedule I of Section 8 of the Hindu Succession Act of

Madho Singh was alive to succeed his property. On the basis of said fact, it gets clear that as per Section 8 of the Hindu Succession Act after the death of Madho Singh his property devolved to his brother's son Shivendra Singh.

(30). It is true that earlier the suit was not filed by Shivendra Singh as the legal heir and successor of the deceased Madho Singh claiming to be the owner of the disputed house. On the other hand, initially, the suit was filed by Shivendra Singh sons plaintiff No. 1 to 3 and his brother Gopal Singh's son plaintiff No.4 on the basis of Will Ex.P/1 as well as successor also who were not successor of the deceased at the time of Madho Singh's death but during pendency of the suit Shivendra Singh was joined as plaintiff No.5 in the suit. He also died during pendency of the suit. The plaintiffs No. 1 to 3 are heirs of Shivendra Singh. Considering the said fact, it is concluded that the learned trial Court has not committed any error in decreeing the suit in favour of the plaintiffs on the basis of successor of the deceased Madho Singh's disputed property since the defendants are not legal heirs and their title have not been found proved on the basis of will.

(31). Having taken into account the recorded evidence and legal aspect, this Court comes to the conclusion that findings given by the learned trial Court for decreeing the suit in favour of the plaintiffs do not require any interference by this Court. Therefore dismissing the appeal, the impugned judgment of the learned trial Court is hereby affirmed.

(32). The cost of this appeal of the respondents shall be borne by the appellants.

The decree be drawn up accordingly.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 437**
**APPELLATE CIVIL**
***Before Mr. Justice S.K. Seth***
M.A. No. 2125/2011 (Indore) decided on 1 August,.2013

MANJU (SMT.) & ors. ... Appellants
Vs.
MOHD. JAMIL & ors. ... Respondents

*A. **Motor Vehicles Act (59 of 1988), Section 173 and Court Fees Act (7 of 1870), Section 7 - Reduction of Valuation of Appeal -*** **Appellant prayed for and is permitted to reduce the valuation of claim**

**in appeal - From Rs. 4,00,000/- to Rs. 3,00,000/-. (Para 10)**

*क. मोटर यान अधिनियम (1988 का 59), धारा 173 एवं न्यायालय फीस अधिनियम (1870 का 7), धारा 7 – अपील के मूल्याकंन को घटाया जाना* – अपीलार्थी ने निवेदन किया और उसे अपील में दावे का मूल्याकंन घटाने की अनुमति दी गई – रूपये 4,00,000/– से रूपये 3,00,000/–.

***B. Court Fees Act (7 of 1870), Section 7 - Ad valorem Court Fees* - When appeal is preferred between 02.04.2008 to 09.01.2013 ad-valorem court fee of 10% - On the enhanced amount is payable and when the appeal is preferred on or after 09.01.2013 court fee of 2.5% subject to a maximum of Rs. 1,00,000/- would have been charged. (Paras 7 & 10)**

*ख. न्यायालय फीस अधिनियम (1870 का 7), धारा 7 – मूल्यानुसार न्यायालय फीस* – जब अपील, 02.04.2008 से 09.01.2013 के बीच प्रस्तुत की जाती है, मूल्यानुसार न्यायालय फीस 10% की – बढ़ायी गई राशि पर देय है और जब अपील 09.01.2013 को या उसके पश्चात् प्रस्तुत की जाती है, अधिकतम रूपये 1,00,000/– तक होने के अधीन, 2.5% की न्यायालय फीस लगायी जाती है।

**Cases referred :**

2013 (2) MPLJ 220, W.P. No. 14740/2008 decided on 18.11.2011

**ORDER**

**S.K. Seth, J.:** This order shall dispose of I.A. No. 4231 of 2013 filed on behalf of appellants to reduce the valuation of appeal.

2. This is claimants' appeal under Section 173 of the Motor Vehicles Act, 1988 for enhancement of compensation, for the death of one Ratansingh in a motor accident. Claims Tribunal has awarded Rs.3,55,000 as compensation payable jointly and severally by the respondents.

3. Appeal is valued at Rs. 4,00,000 but filed on a fixed court fee of Rs. 30/- along with an undertaking of one of the claimants, Smt. Manju, (widow of Ratansingh) that the appellants shall pay the requisite court fee in view of the M.P. Amendment 2008 made in the Court Fees in the event of dismissal of the writ petitions filed in this Court challenging the vires of the Amendment Act No. 6 of 2008. These writ petitions have been dismissed on 18.11.2011 and interim order permitting filing of appeal on fixed court fees with an undertaking have also come to an end. Even though the writ petitions have

been decided, parties are still filing appeals on fixed court fee unchecked.

4. When questioned about the payment of requisite Court fee on memo of appeal, learned counsel submitted that after the reduction of valuation, he would pay the requisite court fee @ 2.5 % in the light of Single Bench order passed in *Ramgopal and another vs. Haneef Khan and others reported* in 2013 (2) MPLJ 220.

5. Now the question is what would be the Court fee payable on the memo of appeal in hand which was filed on 16.8.2011? In this context, it is relevant to note various amendments made in the Court fees Act 1870 by the State legislature from time to time. The first Amendment was brought about by the M.P. Act No. 6 of 2008 w.e.f. 2.4.2008. By the said amendment existing Article 11 was substituted as under :

"**Article 11**

| | | |
|---|---|---|
| Memorandum of appeal when appeal is not from decree or an order having force of decree. | (a) When presented to High Court- | |
| | (i) By the claimant for enhancement of the amount of award passed by the Motor Accident Claims Tribunal | Ten percent of the enhanced amount claimed in appeal. |
| | (ii) In matters Other than subclause (i)above: | Thirty Rupees |
| | (b)When presented to the Civil Court other than High Court. | Twenty Rupees" |

6. The constitutional validity of the said amendment was upheld by the Division Bench of the Court vide common Order dated 18.11.2011 in W.P. No. 14740/2008 and other connected matters. It is also relevant to point out that as interim measure; this Court permitted filing of appeal against MACT Award on a fixed Court fee of Rs. 30/- with an undertaking to pay the requisite court fee as when required.

7. Now comes, the next amendment Act No. 3 of 2013 w.e.f. 9-1-2013

further reducing the ad-valorem court fees from 10% to 2.5% on the amount of enhancement claimed in appeal subject to a maximum of one lac rupees. Therefore, when appeal is preferred against the MACT Award for enhancement of compensation arising out of claim petition instituted between the period from 2.4.2008 to 9.1.2013, parties are required to pay the ad-valorem court fee of 10% on the enhanced amount claimed in appeal. There is no escape from this conclusion. Further it must be mentioned that the Second Amendment of the 2013 instead of shackling or burdening the right of appeal, eases the burden of Court fees from 10% ad-valorem to 2.5% on the differential amount. Claimed in appeal. So a fortiori, the 2.5% court fee would be applicable only claims instituted on or after the commencement of Second Amendment of 2013.

8. It is trite to say that Court fees Act is a fiscal statute and there is no scope of any intendment. The words of the statute must be given effect to. In the case in hand the accident occurred on 23.6.2010 and the claim petition was filed on 19.7.2010. That would be the cut-off date for valuation of the Court fee as per para 12 of the above Division Bench decision which reads under :

> " Before parting with the case we may restate the well settled legal principle that the right to file an appeal vests in the suitor on the day when the action is instituted. The said right is a substantive right and cannot be taken away or even curtailed by an enactment which is not retrospective unless it says so expressly or by necessary intendment [See *E. V. Balakrishan v. Mahalakshmi Anmal and another*, AIR 1960 SC 980 and *Ramesh Singh and another v. Cinta Devi and others* AIR 1996 SC 1560]. Thus in view of aforesaid enunciation of law, the appeal which are filed in respect of claim cases instituted before the Motor Accident Claims Tribunal before 2.4.2008, fixed court fee would be payable whereas in respect of the appeal against the awards in respect of claims filed on or after 2.4.2008 ad-valorem court fee as provided under the Act No. 6 of 2008 would be payable."

9. In view of clear and unambiguous pronouncement of law by the Division Bench, the decision is binding. In our considered and respectful opinion, the view expressed in *Ram Gopal and another v. Haneef Khan* by my learned and esteemed brother Garg J. is *obiter-dicta* when he holds "that on account

of substitution of the court fee payable from 10% to 2.5% only by way of amendment brought in force on 9.1.2013, the Court fee in appeal arising from claim filed after 2.4.2008 shall be payable only @ 2..5% on the enhanced amount." The decision of the learned brother has the effacing effect of the Amending Act No. 6 of 2008 made by the competent State Legislature. As long as provisions stand in the statute Book, it must be given full effect to without entering into the realm of intendment and speculation. As stated above Court fees Act is not to restrict the right of appeal but to raise public revenue and when the question of public revenue is involved it is well to remember that laws are meant for the maximum good of maximum the numbers (Summum Bomun See J. Bentham).

10. In conclusion we hold that on the date of filing of the appeal, the Court fee payable was 10% ad-valorem of the differential amount claimed in appeal in view of the M.P. Act No. 6 of 2008 ibid. The 10% ad-valorem would have been charged on the valuation set out in the memo of appeal but we allow the I.A. No.4231/2013 and permit the appellants to reduce the valuation of claim in appeal from Rs.4,00,000/- to Rs. 3,00,000/- as enhancement. The appellants are granted four weeks' time to pay the requisite court fee failing which the appeal shall stand dismissed without reference to the Court. Office is directed to examine each appeal in the light of above decision on the question of payment of Court fee thereon.

11. Ordered accordingly.

*Ordered accordingly.*

**I.L.R. [2014] M.P., 441**
**APPELLATE CIVIL**
***Before Mr. Justice Sanjay Yadav***
S.A. No. 1160/2008 (Jabalpur) decided on 13 August, 2013

BHAGWATI (SMT.) ...Appellant
Vs.
M.P. HOUSING BOARD & anr. ...Respondents

*A. Civil Procedure Code (5 of 1908), Order 41 Rule 27* - **Plaintiff having failed to establish that despite the exercise of due diligence such evidence was not within his knowledge or he could not after the due diligence, produce the same at the time of decree appealed**

**was passed - Application has rightly been rejected. (Para 9)**

*क. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 27* – वादी यह स्थापित करने में विफल रहा कि सम्यक तत्परता बरतने के बावजूद उक्त साक्ष्य उसकी जानकारी में नहीं था या वह सम्यक तत्परता के बाद भी उक्त को उस समय प्रस्तुत नहीं कर सका जब अपील की गयी डिक्री को पारित किया गया था – आवेदन को उचित रुप से खारिज किया गया।

***B. Civil Procedure Code (5 of 1908), Order 6 Rule 17* - Incorporation of verdict of Supreme Court being sought through amendment has rightly been negatived as no such pleading is warranted. — (Para 9)**

*ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 6 नियम 17* – संशोधन द्वारा चाहा गया सर्वोच्च न्यायालय के अभिमत का समावेश उचित रुप से नकारा गया क्योंकि किसी उक्त अभिवचन का कोई औचित्य नहीं।

***C. Civil Procedure Code (5 of 1908), Section 100 - Second Appeal* - Plaintiff having failed to establish that a vested right accrued in her favour - The concurrent finding of courts below based on cogent evidence on record cannot be interfered with. (Para 15)**

*ग. सिविल प्रक्रिया संहिता (1908 का 5), धारा 100 – द्वितीय अपील* – वादी यह स्थापित करने में विफल रहा कि निहित अधिकार उसके पक्ष में प्रोद्भूत हुआ – निचले न्यायालयों का समवर्ती निष्कर्ष, अभिलेख के प्रबल साक्ष्य पर आधारित, इसमें हस्तक्षेप नहीं किया जा सकता।

***D. Specific Relief Act (47 of 1963), Section 34 - Consequential relief* - Finding arrived at by courts below in respect of plaintiff in not seeking consequential relief and the plaint being hit by proviso to Section 34 of the Act cannot be faulted with. (Para 21)**

*घ. विनिर्दिष्ट अनुतोष अधिनियम (1963 का 47), धारा 34 – परिणामिक अनुतोष* – वादी द्वारा परिणामिक अनुतोष नहीं चाहने के संबंध में निचले न्यायालयों द्वारा निकाला गया निष्कर्ष तथा अधिनियम की धारा 34 के परंतुक द्वारा वादपत्र प्रभावित होने के कारण, त्रुटि नहीं निकाली जा सकती।

**Cases referred :**

AIR 1989 SC 1076, 1994 Supp.(3) 494, 1995 (3) SCC 1, (2011) 11 SCC 13, (2008) 8 SCC 652, AIR 1972 SC 2685, AIR 1979 MP 61.

*Ravish Agrawal* with *K.S. Jha*, for the appellant.

*V.S. Shroti* with *Vikram Johri,* for the respondents.
*Ashok Banke*, for the intervener.

## JUDGMENT

**SANJAY YADAV, J. :-** This second appeal at the instance of plaintiff was admitted for final hearing on the following substantial questions of law:

(i) Whether the courts below committed an error of law in not addressing itself to the controversy with regard to unreasonable and arbitrary hike/revision of rates of the disputed space and misdirected it in deciding the issue as to whether the defendants had authority in law to revise the rates of the disputed space?

(ii) Whether the finding recorded by the lower appellate court that the defendants have explained as to under what circumstances the cost of booked space has been enhanced, is perverse?

(iii) Whether the suit preferred by the appellant/plaintiff is barred by proviso to section 34 of the Specific Relief Act, 1963?

(iv) Whether the lower appellate Court committed an error of law in rejecting the applications under order 41 rule 27 and under order 6 rule 17 C.P.C preferred by the appellant/plaintiff?

2. Parties shall be referred to as they stood before the trial court.

3. Facts giving rise to the Appeal, are that in response to the advertisement published and brochure issued by the defendants, plaintiff booked a space; show-room and departmental store under self financing payment schedule, to be constructed near T.T. Nagar Stadium New Market. Case of the plaintiff before trial court was that the price of proposed construction was fixed at Rs.32 lacs of which Rs.3.20 lacs were deposited on 10.2.2000 and the remaining amount was to be deposited in three equal installments of Rs.7.20 lacs within twelve months. The plaintiff was allotted registration number under the scheme. On 2.9.2000 the plaintiff was informed that the installment schedule has been postponed and the revised scheduled shall be communicated separately. That, on 27.9.2001 the plaintiff was informed that her registration

is temporary and the rate of the booked property has been revised @ 2000/- per sq. foot. On 9.10.2001 the plaintiff was informed that the area is 2292 sq. ft. of floor and 605 sq. ft. of mezzanine floor total area being 2897 sq. ft. That by communication dated 27.11.2001 the plaintiff was informed that the rates of booked property have been revised to Rs.57,94,000/- @ Rs.2000/- per sq. ft. Being aggrieved plaintiff filed the suit for declaration to the effect that the letter/communication dt. 27.11.2001 is illegal and is not binding on the plaintiff and that, the plaintiff is entitled to allotment of the space booked by her at the original cost and is also entitled for adjustment of interest on the amount deposited by her. The plaintiff also sought relief of injunction to the effect that the defendant be restrained from cancelling the registration of the plaintiff under the scheme.

4. The defendants disputed the claim of the plaintiff contending that in the advertisement estimated and not the final cost of space booked was stated. That, the plaintiff was informed about the revised rates on the basis of the estimated cost and actual cost incurred by the defendants. It was further contended that the plaintiff was given the option that in case she is not willing to accept the revised rates she can withdraw the amount deposited by her with interest @ 8% per annum. It was also contended that initially the cost of construction was estimated at Rs.350/- per sq. ft. Subsequently taking into account the cost of development work, cost of construction, lease rent payable to the government and other expenses the rates were revised to Rs.2000/- per sq. ft. and communication to said effect was entered into. It was further contended that the plaintiff since did not accept the revised rates, therefore, her registration got automatically cancelled on 10.10.2001.

5. The trial court vide judgment and decree dated 31.8.2006, dismissed the suit. It held that the rates advertised by the defendants were only the estimated rates and the plaintiff did not book the space in question at a fixed rate of Rs.32.00 lacs. It further held the registration in respect of the space in question has been automatically cancelled as the plaintiff did not take any appropriate steps in pursuant to the communication dt. 27.11.2001. The trial court held that there was no concluded contract and no right had accrued in favour of the plaintiff merely on registration. That, as no consequential relief of execution of sale deed and possession being sought the suit was held to be barred by proviso to Section 34 of the Specific Relief Act, 1963. The trial court held that suit for specific performance ought to have been filed.

6. An appeal preferred against the judgment and decree was also dismissed by judgment and decree dated 26.7.2008. The appellate Court also rejected the applications under Order 41 Rule 27 and Order 6 Rule 17 Code of Civil Procedure, 1908; whereby, the plaintiff respectively sought to produce documents with regard to statement of price of disputed space, letter written by one Anil Khewani to the Estate Officer, sale deed executed in favour of Anil Khewani, photographs of shop of Anil Khewani, and sought amendment to incorporate, averments with regard to decision rendered by the Supreme Court in Civil Appeal No. 1731 of 2006 (arising out of SLP (Civil) No. 22560/2004): *M.P. Housing Board v. Anil Kumar Khiwani* decided on 14.3.2005. First Appellate Court rejected the application under Order 41 Rule 27 CPC, for the reasons that, the documents were available with the plaintiff at the trial stage and no cogent reasons were assigned by the plaintiff preventing her from producing these documents. The first appellate court observed that as per clause (aa) of Rule 27 of Order 41 CPC it being obligatory for the party seeking to produce additional evidence to establish that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed and the defendant having failed to establish the same. Whereas application under Order 6 Rule 17 CPC was rejected by the First Appellate Court for the reasons that the verdict by Supreme Court is not required to be pleaded.

7. It is the contention of learned Senior Counsel appearing for the plaintiff that the Courts below committed an error of law in not addressing itself to the controversy with regard to unreasonable and arbitrary hike/revision of rates of the disputed space and misdirected it in deciding the issue as to whether the defendants had authority in law to revise the rates of the space in question. It is next urged that, the finding recorded by the lower appellate Court that the defendants have explained as to under what circumstances the cost of booked space has been enhanced is perverse. It is further contended that the Courts below erred in holding that the contract between the parties is not concluded. The finding that the suit is barred by proviso to Section 34 of the Specific Relief Act, 1963 is being questioned on the ground that there is no foundation for such finding. The decision of lower appellate Court of rejecting the application under Order 41 Rule 27 and Order 6 Rule 17 CPC is also being questioned that the same is erroneous.

8. The defendant on its turn defend the judgment and decree by the trial

court and first appellate court.

9. Taking up first, the contention regarding rejection of application under Order 41 Rule 27 of Code of Civil Procedure, 1908, it being not in dispute that the documents in question being in existence during trial and it being incumbent upon the party to establish that notwithstanding the exercise of due diligence such evidence was not within his knowledge or could not after the exercise of due diligence, be produced by him at the time of decree appealed against was passed. The plaintiff having failed to establish the same, as no evidence is there on record, the first appellate Court did not commit any error in rejecting the application. Similarly, the incorporation of the verdict of Supreme Court being sought though amendment in the suit plaint has rightly been negatived as no such pleading is warranted.

10. As regard the contention that the Courts below committed an error in not addressing itself to the controversy with regard to unreasonable and arbitrary hike/revision of rates of the disputed space and misdirected it in deciding the issue as to whether the defendants had authority in law to revise the rates of the disputed space and whether the finding recorded by the lower appellate court that the defendants have explained as to under what circumstances the cost of booked space has been enhanced is perverse.

11. It is required to be noted first the pronouncement of law in respect of scope of enhancement/revising the rates of space.

12. In *Bareilly Development Authority and another v. Ajay Pal Singh and others* (AIR 1989 SC 1076) it is held:

> "16. ..... ..... ..... .... From the above, it is clear that all the respondents who have sent their applications for registration with initial payment only after having fully understood the terms and conditions of the brochure inclusive of the Clauses 12 and 13 and Notes 1 and 2 of the General Information Table as per which the BDA has reserved its right to change, enhance or amend any of the terms and/or conditions as and when felt necessary, and also the right to relax any of the conditions at its discretion, and that the cost shown in the column 4 of the brochure was only estimated cost subject to increase or decrease according to the rise or fail in the price at the time of completion of the property. This is not only the case of the applicants of MIG scheme but also of the other applicants falling under the other categories

i.e. HIG, LIG and EWS. So it cannot be said that there was a mis-statement or incorrect statement or a fraudulent concealment in the information supplied in the brochure published by the BDA on the strength of which all the applicants falling under the various categories applied and got their names registered. In such a circumstance the respondents cannot be heard to say that the BDA has arbitrarily and unreasonably changed the terms and conditions of the brochure to the prejudice of the respondents."

"18. The respondents were under no obligation to seek allotment of houses/flats even after they had registered themselves. Notwithstanding, they voluntarily registered themselves as applicants, only after fully understanding the terms and conditions of the brochure inclusive of Clauses 12 and 13 and Notes 1 and 2 of the General Information Table which we have reproduced above, they are now trying to obtain the houses/flats at the price indicated in the brochure at the initial stage conveniently ignoring the other express conditions by and under which the BDA has reserved its right to change the terms and conditions as and when felt necessary, evidently depending upon the escalation of the prices. One should not loose sight of the fact that the BDA did not compel anyone of the applicants to purchase the flat at the rates subsequently fixed by it and pay the increased monthly instalments. On the contrary, the option was left over only to the allottees....
..... ....."

In *Delhi Development Authority v. Pushpendra Kumar Jain* - 1994 Supp (3) SCC 494 it has been held:

"8. Mere identification or selection of the allottee does not clothe the person selected with a legal right to allotment at the price prevailing on the date of drawl of lots. The scheme evolved by the appellant does not say so either expressly or by necessary implication. On the contrary, clause (14) thereof says that "the estimated prices mentioned in the brochure are illustrative and are subject to revision/modification depending upon the exigencies of layout, cost of construction etc." It may be noted that registration of applicants under the said scheme

opened on September 1, 1979 and closed on September 30, 1979. About, 1,70,000 persons applied. Flats were being constructed in a continuous process and lots were being drawn from time to time for a given number of flats ready for allotment. Clause (14) of the Scheme has to be understood in this context- the steady rise in the cost of construction and of land. No provision of law also could be brought 10 our notice in support of the proposition that mere draw of lots vests an indefeasible right in the allottee for allotment at the price obtaining on the date of draw of lots. In our opinion, since the right to flat arises only on the communication of the letter of allotment, the price or rates prevailing on the date of such communication is applicable unless otherwise provided in the Scheme. If in case the respondent is not willing to take or accept the allotment at such rate, it is always open to him to decline the allotment. We see no unfairness in the above procedure. .... ....."

In *Indore Development Authority v. Sadhana Agarwal (Smt.) and others* - (1995) 3 SCC 1, it is held

"10. So far the facts of the present case are concerned, it is an admitted position that in the proforma attached to the application for registration, the appellant said that the price mentioned by them was a probable and estimated cost, the definite price shall be intimated at the time of the allotment. Thereafter, the appellant had been informing the respondents and others who had got themselves registered, from time to time regarding the escalation in the cost of the flat. One of the reasons for the rise of the price for the LIG flat from Rs. 60,000/- to Rs. 1,16,000/- appears to be the increase in the area of the flat itself from 500 sq.ft. to 714.94 sq.ft. From 1982 to 1984, possession of the flats could not be delivered because of the dispute pending in the Court which-also contributed to the increase in the cost of the flat. Admittedly, the respondents came in possession of the flats in the year 1984. In the facts and circumstances of the case, we are satisfied that no interference was called for by the High Court."

In *Tamil Nadu Housing Board v. Service Society and another* :

(2011) 11 SCC 13, it is held:

> "25. If a development authority or board acquires a large tract of land and develops it for residential purposes and forms plots in a portion thereof for construction of houses, utilises another portion for construction of multistoreyed apartment buildings and uses the balance for development works like roads, drains, parks, open spaces apart from earmarking some areas for site office/electrical sub-station/police station, etc., then what is chargeable to the allottee of a plot or a house, is not only the cost of the plot area, but also the cost of the proportionate share in the common areas, used for development and amenities and the cost of the development.
>
> 30. Whenever allotments are made even before the completion of the development of land and construction, necessarily the cost that is shown by the authority or the board will be tentative. In regard to the land cost, there may be claims for enhancement of compensation before the reference court with appeals to high court and this court. Sometimes the entire process may take 10 to 15 years and till that process is concluded the final cost of the land cannot be determined. An allottee cannot therefore say that the authority cannot increase the cost after 12 years.
>
> 31. Similarly cost of developing of land into residential area requires coordination with different contractors engaged for laying roads, laying drains, developing parks and playgrounds, drawing electricity lines, water lines, sewerage lines etc. Many times, disputes with the contractors lead to delays and litigation. Sometimes though the work may be completed within three years, the settlement of bills and ascertainment of cost may take several years. There may also be encroachments, which will have to be removed which apart from being time consuming and involving litigation, delay the development and finalization of cost of development. As a consequence, the development cost may also shoot up beyond the estimate on account of delays, additional claims of contractors, litigations and other factors. The same applies to the cost of construction of the houses also."

In the case at hand as perceived from written statement filed by defendants

and the evidence of D.W -1 it is amply clear that besides stipulating in the brochure that the price are tentative, the escalation of price to Rs.2000/- per sq. ft is in consonance with the cost incurred by the defendant which has been duly explained by the defendant as would warrant any interference with the findings recorded by the Trial Court as well as first appellate Court in absence of any cogent material on record to draw an inference contrary to the findings.

13. In respect of the submission regarding accrual of vested right on being registered for allotment of space in question; the plaintiff, as apparent from the findings recorded by both the Courts has failed to establish an accrual right over the property in question which could have been only if and when the plaintiff had abide by the stipulations in the brochure and subsequent correspondence, requiring her to deposit the amount at enhanced rates. Having not done so the plaintiff cannot claim to have an accrual of right merely on the basis of registration or the initial allotment letter.

14. In *Delhi Development Authority v. Pushpendra Kumar Jain* (supra) it has been held:

> "8. Now coming to the other ground, we are unable to find any legal basis for holding that the respondent obtained a vested right to allotment on the draw of lots. Since D.DA is a public authority and because the number of applicants are always more than the number of flats available, the system of drawing of lots is being resorted to with a view to identity the allottee. It is only a mode, a method, a process to identity the allottee, i.e., it is a process of selection. It is not allotment by itself. ..... ..... ..... ..... ....."

In *Manjul Srivastava v. Government of Uttar Pradesh and others* :(2008) 8 SCC 652, it is held :-

> 17. In our view, the Commission was justified in rejecting the claim of the appellant. The plot in question was a category of plot (Category D) which was only reserved for the appellant but from the Clauses, as mentioned above, it would be clear that the final allotment was to be made as regards specific plots only after the lottery related to such allotment was made. It is beyond dispute that in the draw of lottery, the appellant was unsuccessful as her name did not figure in the same. It could not be disputed that 'plot reserved' and a 'plot allotted'

are different aspects altogether. A reading of the Clauses, as indicated above, would clearly show that a plot was reserved for her subject to the final allotment after the lottery related to such allotment was made.

20. Therefore, reading the aforesaid Clauses in the brochure, it is evident that since the appellant was not allotted any plot and only a plot was reserved subject to holding of a lottery for the specific plots for allotment, the appellant would not acquire any legal right to such plot, only she would be entitled to get refund of her amount deposited with the GDA.

21. In view of our discussions made hereinabove and a clear reading of the clauses of the Brochure, it would be evident that two separate parts of the clauses have been indicated in the brochure. The first part was with regard to the reservation amount and second part was with regard to allotment of plot if an applicant was successful in the draw of lots. In this connection, the letter issued by the GDA dated 10th of February, 1989 may be looked into. The subject indicated in the said letter to the appellant was regarding reservation of Plot-D in Govindpuram: then from the letter itself it would also be evident that a plot was reserved for the appellant. It would also be evident from the said letter that certain clauses were inserted by the GDA if an applicant was defaulter in payment of the balance amount. In this connection, Clause 5 of the letter dated 10-2-1989 needs reproduction :-

"Final cost of the plot shall be determined after taking into account its specific location in terms of park-facing, corner, major road facing etc. for which extra rates are prescribed to be charged which will be intimated after allotment of specific plot."

It was made clear in the said letter that the allotment was subject to conditions "Draw for specific Plot number shall be held separately". Therefore, it must be inferred that no plot was allotted to the appellant since allotment of specific plot could not be made because of failure on the part of the appellant to succeed in the draw of lots."

15. In the case at hand plaintiff having failed to establish that a vested right

accrued in her favour, a finding arrived at by trial court as well as first appellate Court on the basis of cogent evidence on record cannot be interfered with.

16. The next contention raised by Senior Counsel regarding the finding that the suit was barred by proviso to Section 34 of Specific Relief Act, 1963 is evident from the suit plaint. The relief sought for by the plaintiff is:

> i) It be declared that the letter No. 7270 dated 27th November, 2001 (Annexure XII), issued by the defendants, revising the rates, is illegal and not binding on the plaintiff and further that the plaintiff is entitled to allotment of the space booked by her (as per Annexure II), at the original cost and is also entitled for adjustment of interest on the amount deposited by her.
>
> ii) By the grant of an injunction, the defendants, jointly and severally, their employees and agents, be restrained from cancelling the registration of the plaintiff and/or allotting the said space to any other party.
>
> iii) Cost be awarded in favour of the plaintiff.
>
> iv) Any other relief be granted."

17. Apparent it is from evidence on record that before filing of civil suit since the plaintiff had not deposited the enhanced amount, the allotment was cancelled. Therefore, incumbent it was upon the plaintiff to have sought a consequential relief.

18. Proviso to Section 34 stipulates:

> "Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

19. In *Ram Saran and another v. Smt. Ganga Devi* (AIR 1972 SC 2685) it is held:

> "4. We are in agreement with the High Court that the suit is hit by Section 42 of the Specific Relief Act. As found by the fact-finding Courts, Ganga Devi is in possession of some of the suit properties. The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties. Hence the suit is not

maintainable. In these circumstances, it is not necessary to go into the other contention that the suit is barred by limitation."

20. In *Ramnarayan and others v. Firm Mangeram Radheshyam Hardoi (U.P.) and another* (AIR 1979 MP 61) it is held:

8. It will thus be seen that Section 34 of the Specific Relief Act, 1963 (old Section 42) merely gives a statutory recognition to certain well-recognised types of declaratory reliefs and further enacts a limitation on the grant of such relief in the shape of the proviso. Analysing the scope of this section, Dixit, J. (as he then was) in *Madanlal v. State of Madhya Bharat,* AIR 1955 Madh B 111 pointed out that in order to be able to seek a relief of declaration in terms of Section 42 (of old Act), the plaintiff must show that he has some legal character or some right to property and that his opponent is denying or interested to deny such legal character or right. Legal character is the same thing as Legal status, i.e., a position recognised by law. Like view has been expressed by the Allahabad High Court in *Mahabir Jute Mills v. Firm Kedar Nath,* AIR 1960 All 254.

10. Question then is whether the Court's jurisdiction to grant declaratory decrees is unfettered. The law has been stated succinctly in para 511, pp. 212-215 of Halsbury's Laws of England (Hail-sham Edition), Vol. 19, in these terms:

"Judgments and orders are usually determinations of rights in the actual circumstances of which the Court has cognisance, and give some particular relief capable of being enforced. It is, however, sometimes convenient to obtain a judicial decision upon a state of facts which has not yet arisen, or a declaration of the rights of a party without any reference to their enforcement. Such merely declaratory judgments may now be given, and the Court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not. There is a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject-matter of the declaration, and although a claim to consequential relief has not been made, or has been abandoned or refused, but it is essential that some

relief should be sought or that a right to some substantive relief should be established".

It can at once be seen that a declaration falling outside Section 34 of the Specific Relief Act will be governed by the general provisions of the Civil P. C. like Section 9 or Order 7, Rule 7, in the decision in *Supreme General Film Exchange Ltd. v. Brijnath Singhji,* AIR 1975 SC 1810, it is ruled that the circumstances in which a declaratory decree under Section 42 should be awarded is a matter of discretion depending upon the facts of each case. Thus where the act complained of deprives the plaintiff of certain present rights to property and the declaratory decree has the effect of giving present relief as well, the Courts shall have power to make such a declaration. In *Sheo Singh Rai v. Mst. Dakho,* (1877-78) 5 Ind App 87 (PC), the law is very precisely stated in the following terms:

".....a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court or unless in certain cases a declaration of right is required as a step to relief in some other Court."

11. The conclusion we have thus reached may be summarised thus: Thus Court's power to grant declaratory decrees is not limited to the terms of Section 34 (present) or Section 42 (old) of the Specific Relief Act. Declaratory decrees can well be made by the Courts under the general provisions of the Civil P. C. as Section 9 or Order 7 Rule 7, of the Code. The exercise of jurisdiction to grant such declaratory reliefs beyond the terms of that section shall depend upon the facts of each case. Such a declaration may be granted when it is essential as a step to a relief in some other case or when a declaration in itself is a substantial relief and has immediate coercive effect.

21. When examined on the touchstone of above mentioned well established settled legal principle and the nature of relief sought by the plaintiff, the finding arrived at by the Trial Court as well as first appellate Court in respect of plaintiff in not seeking consequential relief and the plaint being hit by proviso to Section 34 of the Act cannot be faulted with. Having thus considered, substantial questions of law are answered against the plaintiff.

22. In view of above analysis, the judgment and decree passed by Trial Court affirmed by the First Appellate Court does not warrant any interference. Consequently the appeal fails and is dismissed.

Costs as incurred.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 455**
**APPELLATE CIVIL**
***Before Mr. Justice G.D. Saxena***
M.A. No. 527/2013 (Gwalior) decided on 25 October, 2013

ARVIND JAIN & ors. ... Appellants
Vs.
STATE OF M.P. & ors. ... Respondents

*A. Public Trusts Act, M.P. (30 of 1951), Section 36 - Exemption* - **If an institution is already registered under Society Registration Act, M.P., 1973, the provisions of Public Trust Act, M.P., ceased to apply. (Para 12)**

*क. लोक न्यास अधिनियम, म.प्र. (1951 का 30), धारा 36 – छूट* – यदि कोई संस्थान, सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र. 1973 के अंतर्गत पहले से पंजीकृत है, लोक न्यास अधिनियम, म.प्र. के उपबंधों की प्रयोज्यता समाप्त होती है।

*B. Civil Procedure Code (5 of 1908), Order 39 Rule 1 & 2 - Temporary injunction* - **Trust was already registered under Society Registrikaran Adhiniyam, M.P., 1973 - Some persons passed resolution for registration of trust under Public Trust Act and got the same registered under Public Trust Act - In the order of registration, trust did not disclose any movable or immovable properties - As provision of Public Trust Act do not apply to an already registered body under Adhiniyam 1973 and as properties were under the control and management of old trust no temporary injunction can be granted - Appeal dismissed. (Para 3)**

*ख. सिविल प्रक्रिया संहिता (1908 का 5), आदेश 39 नियम 1 व 2 – अस्थायी व्यादेश* – न्यास, पहले से सोसायटी रजिस्ट्रीकरण अधिनियम, म.प्र., 1973 के अंतर्गत पंजीकृत थी – कुछ व्यक्तियों ने लोक न्यास अधिनियम के अंतर्गत पंजीयन हेतु संकल्प पारित किया और उक्त को लोक न्यास अधिनियम के अंतर्गत पंजीकृत कराया – पंजीयन आदेश में, न्यास ने किसी चल एवं अचल सम्पत्ति को

प्रकट नहीं किया – चूंकि लोक न्यास अधिनियम का उपबंध, पहले से अधिनियम 1973 के अंतर्गत पंजीकृत निकाय को लागू नहीं होता और जैसा कि सम्पत्तियों का नियंत्रण एवं प्रबंधन पुराने न्यास के अधीन था, कोई अस्थायी व्यादेश प्रदान नहीं किया जा सकता – अपील खारिज।

**Case referred :**

1983 JLJ 469.

*Arvind Dudawat*, for the appellants.
*R.K. Awasthy*, Dy. G.A. for the respondents No: 1 and 2/State.
*N.K. Gupta,* for the respondents No. 3 to 5.

**ORDER**

**G.D. SAXENA, J.:** This appeal under Section 104 read with Order 47 Rule 1(r) of the Code of Civil Code 1908 has been preferred by the defendants/ appellants having been aggrieved by an order dated 7th May 2013 in Civil Suit No.2A/2013 passed by the First Additional District Judge Bhind (M.P.) granting temporary injunction against the defendants restraining them from interfering into peaceful possession of the plaintiffs and causing damage to the properties under suit.

(2) The necessary facts of the case are that the temple of Jains known as 'Shree 108 Acharya Surya Sagar Nasiyaji is situated from before at Water Works Road Bhind with its wide movable and immovable properties. The worship and the properties of the said temple by that time were being managed by a Trust. As per pleadings of the respondents/plaintiffs, the trust was registered under Madhya Pradesh Society Registration Act 1973 since 1978 vide Registration No. 6851 dated 16th September 1978. It is stated that on 30th June 2012, some persons including appellants/defendants passed the resolution for creation of new trust and also resolved that the trust newly formed be registered under M.P. Public Trust Act 1951. In pursuance of the resolution, an application was filed before the Registrar, Public Trust Bhind for registration of the Public Trust for management of the Temple and it's properties situated in Bhind. After following the procedure prescribed in law and deciding the objections raised by the persons from public, the Registrar M.P. Public Trust registered the trust proposed for "Shree 108 Achaya Surya Sagar Udaseen Ashram Nasiyaji Bhind" without any movable or immovable properties for conducting religious, social and educational functions on behalf of such trust

having further intent to create harmonious atmosphere. The trust was consisting of 31 members who were bound to follow the provisions of law by maintaining the accounts regularly.

(3) It is alleged that in the garb of the registration before the Registrar M.P. Public Trust Bhind, the defendants tried to disturb possession and management of the movable and immovable properties attached with the temple and under management of trust, resultantly, the plaintiffs who are the Chairman and Secretary of the Managing Trust registered under M.P. Society Registration Act 1973 filed the suit against the defendants for declaration by questioning the validity of the proceedings launched before the Registrar M.P. Public Trust and registration of the trust on application filed by Shri Arvind Jain and others before the Registrar M.P. Public Trust Bhind with perpetual injunction for safety of the possession of the plaintiffs over the movable and immovable properties attached with the temple. On application under Order 39 Rule 1 & 2 C.P.C. filed along with suit, the learned trial court, after considering the parties' contentions and evidence on record by an order under appeal, issued the temporary injunction for safety of possession over the property of the temple managed by the trust headed by the plaintiffs. Being aggrieved by the aforesaid order, the defendants have come to this court.

(4) It is the submission of the learned counsel appearing on behalf of the appellants that, on the date of suit, the plaintiffs could not prove prima facie case in their favour, nor the plaintiffs were in possession over the movable or immovable properties under management of the trust headed by the defendants/appellants. It is argued that prior to the event the working trustees, i.e., the plaintiffs and others had lost the confidence and the properties were mismanaged, hence, the trustees passed the resolution against the working trustees and as per resolution the application for registration under M.P. Public Trust Act was filed before the Registrar M.P. Public Trust Bhind. By adopting the prescribed procedure and deciding the objections received, the Registrar validly by passing the order registered the trust under the Act. It is, therefore, prayed that by allowing the appeal, the order under appeal and the application for issuance of temporary injunction in favour of the plaintiffs may be set aside.

(5) Per contra, the respondents by supporting the order under appeal, contended that prior to get the registration as Public Trust under M.P. Public Trust Act 1951, in favour of Shree 108 Acharya Surya Sagar Nasiyaji headed

by the plaintiffs, the said institution was validly registered under M.P. Society Registration Act 1973 and the properties were well being managed, hence, there appears no imminent danger about vesting or alienating the suit property by the plaintiffs. It is submitted that the defendants being the trustees of the newly registered trust as above were trying to take the possession of the movable and immovable properties attached with temple which were under control and management of the trust registered already in the year 1978 under M.P. Registration of Societies Act 1973, so the learned trial Judge after well considering the evidence on record and the law applicable passed the valid order of injunction against the appellants/defendants who have absolutely no authority nor have the confidence of the persons interested and the properties attached to the temple as the properties were not safe in the hands of defendants. On this basis, it is prayed that by dismissing the appeal, the order assailed herein may be made absolute.

(6) Heard the learned counsel for the parties. Also perused the record of the case and the law applicable to the issue raised.

(7) The question that calls for consideration in this appeal is whether the learned court-below has committed an illegality in issuing restraint order against the appellants ?

(8) It is admitted that prior to filing of the suit in year 1978, temple Digambar Jain Nasiyaji 108 Acharya Surya Sagar Ashram Bhind through existing trust was already registered under M.P. Society Registration Act 1973. On disputes between the trustees and devotees, certain persons including defendants and others applied for registration of formed public trust known as 'Shree 108 Acharya Surya Sagar Nasiyaji Trust'. After inquiry, the Registrar M.P. Public Trust Bhind registered the said Trust. Immediately thereafter dispute regarding control over movable/immovable properties arose which gave rise to filing the present suit.

(9) Now, the question that will arise is whether a trust which is already registered under law known as "M.P. Society Registration Act 1973" dehors the question of applicability of the M.P. Public Trust Act 1951 for the purposes of bringing a suit and the trust which is already registered under M.P. Society Registration Act 1973 is not governed by M.P. Public Trust Act 1951 ?

(10) For consideration and answer the question on validity of the subsequent trust registered under M.P. Public Trust Act, the relevant provisions are required

to be considered.

(11) Section 36 of M.P. Public Trust Act 1951 is as follows:-

> **"36.Exemption.-** (1) Nothing contained in this Act shall apply to-
>
> (a) a public trust administered by any agency acting under the control of the state or by any local authority.
>
> (b) a public trust administered under any enactment for the time being in force; and (c) a public trust to which the Muslim Wakf Act 1954(29 of 1974) applies.
>
> (2) The State Government may exempt by notification specifying the reasons for such exemption in the said notification, any public trust or class of public trusts from all or any of the provisions of this Act subject to such conditions, if any, as the State Government may deem fit to impose:

(12) If there is any enactment which provides for the management and control over affairs of public trust, the public trust would come within the exemption irrespective of the fact that the same enactment covers management and control of other public trust of the same nature. When an institution has been registered as a society under M.P. Societies Registration Act 1959, by virtue of the provision contained in Section 36(b) of the M.P. Public Trusts Act 1951, the provision of the Public Trust Act ceased to apply and the institution is exempted from the operation of Public Trust Act including those contained in Section 32 thereof. In *Shri Nabhi Nandan Digambar Jain Hitopdeshani Sabha Vs. Ramchandand* 1983 J.L.J. 469 this court while considering the matter observed as follows :-

> "The plaintiff is a society registered under the Societies Registration Act 1860 which automatically became a society registered under the M.P. Societies Registration Act 1959, and thereafter under the M.P. Registration act 1973; under these Acts, the Secretary has been empowered to file on behalf of the society unless there is a provision to the contrary in the constitution of a particular society. Section 36 of the Act provides that nothing contained in this Act apply to a public trust administered under any enactment for the time being in

force. As the plaintiff society was already administered under the Societies Registration Act 1860, it is not governed by the provisions of M.P. Public Trust Act. It is true that the definition of the public trust in Section 2(4) includes a society formed for a religious or charitable purpose. Therefore, such a society has to function under dual control of the regulating machinery-under the Societies Registration Act and also under the Public Trust Act. This may give rise some difficulties as in present case. But in the present case, there is nothing to show that the plaintiff-society is a trust, as such, even though it was registered under the Public Trust Act. A Division Bench of this court in *State of M.P. Vs. Mother Superior Convent School Sagar* 1958 MPLJ 611 has held-

"The existence of a public trust is the sin qua non of action in respect of temples, math, mosques, churches, and wakfs or societies formed for religious or charitable purposes. If the basic condition viz. the existence of public trust is missing the definition of public trust as given in Section 2 (4) of the M.P. Public Trusts Act cannot being into the mischief of the Act religious and charitable institutions which do not administer any trust property. In view of the provisions of Section 2(1) of the Act the word 'trust' has to be given the same meaning as given in the Indian Trust Act, which requires the existence of trustees trust properties and beneficiaries."

(13) After giving my thoughtful considerations to the legal as well as factual aspects of the present case, it is found proved after analysing the documentary evidence and affidavits of witnesses as filed before the trial court that in the year 1978, a trust for religious purpose and management of worship of the idols installed in temple and the movable and immovable properties attached with temple above was registered before the Registrar of the the Madhya Pradesh Society Registration Act 1973 and plaintiffs Mahaveer Jain as Chairperson and Ashok Kumar Jain as Secretary of the present working trustees were nominated. Prior to institution of the suit, in a meeting a resolution was passed against the present trustees. Pursuant thereto, an application for registration of the new trust was moved by some of the trustees including the defendants/appellants Arvind Jain as Chairperson, Dinesh Jain as Secretary and Ravi Jain as General Secretary before the Registrar of Public Trust Bhind.

By holding all formalities as prescribed in the Act, the Registrar registered the Trust under M.P. Public Trust Act 1951. However, in the order of registration dated 26th February 2013, the trust did not disclose the property either movable or immovable which in turn indicated that the newly formed trust was not at all concerned with the movable and immovable properties registered under M.P. Societies Registration Act. It also appears that before proceeding for registration under M.P. Public Trust Act, the appellants/defendants and other decedents trustees did not choose to proceed in accordance with the provisions as contained in M.P. Societies Registration Act 1973. Since the trust as above was registered already under M.P. Societies Registration Act 1973, eventually provisions contained under Section 36 of the M.P. Public Trust Act are not applicable to the present scenario. So far as the management of the properties of the temple is concerned, it is quite vivid that on the date of bringing the suit, the properties were under control and management of the old trust registered under M.P. Societies Registration Act 1973 headed by the plaintiffs Mahaveer Jain and Ashok Jain, prima facie therefore, the trial court was right in passing the impugned order in favour of the plaintiffs/ respondents.

(14) Consequently, finding no irregularity or illegality in the order passed by the trial Court, the present appeal by confirming the aforesaid order dated 7th May 2013, is liable to be and is hereby dismissed.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 461**
**APPELLATE CIVIL**
***Before Mr. Justice G.D. Saxena***
M.A. No. 363/2005 (Gwalior) decided on 25 October, 2013

SIYARAM @ JAISIYARAM ... Appellant
Vs.
SMT. DEVKUWAR & ors. ... Respondents

*A. Motor Vehicles Act (59 of 1988), Section 147 - Requirement of policies and limits of liability* - **Held - If the injured/ deceased being third party was travelling in the vehicle involved in the accident and no premium for passengers as gratuitous or otherwise travelling in insured vehicle is paid in that case - The Insurance Company, under the cover of "Act Policy" cannot be held responsible**

**to indemnify the award passed against the owner of the vehicle involved the insured.** **(Para 3)**

*क. मोटर यान अधिनियम (1988 का 59), धारा 147 – नीतियों की अपेक्षा एवं दायित्व की सीमाऐं* – अभिनिर्धारित – यदि आहत/मृतक तृतीय पक्षकार होने के नाते, दुर्घटना में शामिल वाहन में यात्रा कर रहा था और उस स्थिति में बीमित वाहन में निःशुल्क या अन्यथा के रुप में यात्रा कर रहे यात्रियों के लिये कोई प्रीमियम अदा नहीं किया गया – बीमा कम्पनी को "एक्ट पॉलिसी" की आड़ में वाहन के स्वामी के विरुद्ध पारित किये गये अवार्ड की क्षतिपूर्ति करने के लिए उत्तरदायी नहीं ठहराया जा सकता।

***B. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company - Additional Premium*** **- In case the Insurance Company has recovered any additional premium for passengers travelling in vehicle or pillion rider on two wheelers, under comprehensive/full insurance cover from the insured or / and the vehicle is fully or compressive insured by the Insurance Company, certainly it is bound to indemnify the liability of the owner of the vehicle insured and responsible for payment of award amount to injured or deceased travelling in vehicle and / or as pillion rider travelling on two wheeler vehicle to their claimants.** **(Para 17)**

*ख. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का दायित्व – अतिरिक्त प्रीमियम* – यदि बीमा कम्पनी ने बीमित से व्यापक/पूर्ण बीमा क्षतिपूर्ति के अंतर्गत वाहन में यात्रा कर रहे यात्रियों के लिये या दुपहिया वाहन पर पिछली सीट पर सवार के लिये कोई अतिरिक्त प्रीमियम वसूल किया है अथवा/एवं वाहन पूर्ण रुप से या व्यापक रुप से बीमा कम्पनी द्वारा बीमित है, निश्चित रुप से वह वाहन के स्वामी के दायित्व की क्षतिपूर्ति करने के लिए बाध्य है तथा वाहन में यात्रा कर रहे आहत एवं मृतक और/अथवा दुपहिया वाहन पर यात्रा कर रहे पिछली सीट पर सवार के दावाकर्ताओं को अवार्ड की रकम का भुगतान करने के लिये उत्तरदायी है।

***C. Motor Vehicles Act (59 of 1988), Section 147 - Liability of Insurance Company*** **- In case the four wheeler vehicle or two wheeler vehicle in / on which the injured/deceased was travelling received head and collision with another vehicle, on negligent act of the driver of other offending vehicle or composite/contributory negligence of the other vehicle involved then the insurance company of the opposite/ offending vehicle is to indemnify the responsibility of the insured of other vehicle to compensate the injury/death of third party u/s 147 of the Act.**

*ग. मोटर यान अधिनियम (1988 का 59), धारा 147 – बीमा कम्पनी का दायित्व* – यदि चौपहिया वाहन या दुपहिया वाहन जिसमें आहत/मृतक यात्रा कर रहा था, अन्य आक्रामक वाहन के चालक के उपेक्षापूर्ण कृत्य से या घटना में शामिल अन्य वाहन के संयुक्त एवं योगदायी उपेक्षा से सीधे टकराता है तब अधिनियम की धारा 147 के अंतर्गत तृतीय पक्षकार के आहत/मृतक की प्रतिपूर्ति के लिये अन्य वाहन के बीमित के उत्तरदायित्व की क्षतिपूर्ति विरुद्ध/आक्रामक वाहन की बीमा कम्पनी करेगी। **(Para 18)**

**Cases referred :**

(2001) 1 SCC 237, 2005 (2) ACJ 721, (2006) 4 SCC 404 : AIR 2006 SC 1576 : 2006 AIR SCW 1822, (2007) 9 SCC 263 : AIR 2007 SC 1054 : 2007 AIR SCW 859, (2004) 8 SCC 553 : AIR 2004 SC 4767 : 2004 AIR SCW 5438, (2007) 3 SCC 700 : AIR 2007 SC 1563 : 2007 AIR SCW 2279, (2007) 5 SCC 428 : 2007 AIR SCW 2362, 2008 ACJ 1043, (2008) 7 SCC 428 : AIR 2008 SC 2729 : 2008 AIR SCW 4549, (2009) 7 SCC 148 : 2009 AIR SCW 5325, AIR 2013 SC 473, (2013) 2 SCC 41, AIR 2013 SC 483.

*R.P. Gupta*, for the appellant.
*Naresh Singh Tomar*, for the respondent No. 8/Insurance Company.

**ORDER**

**G.D. Saxena, J.:** This appeal under Section 173 of the Motor Vehicles Act 1988 has been preferred by the owner/appellant of the jeep involved in accident against an Award dated 24th December 2004 in Claim Case No. 25/2004 passed by the Fifth Additional Member of the Motor Accident Claims Tribunal, Gwalior, thereby exonerating the Insurance Company on the ground that the jeep was insured under 'Act Policy' and therefore the Insurance company was not held liable to indemnify the liability on behalf of the insured for death of the travelling passenger under third part risk.

(2) Undisputed facts of the case are that on 22nd May 2004, in night at about 1 a.m., deceased Radhavallabh, aged 45 years, who was earning monthly salary of Rs. 8,000/- as Lineman posted in MPSEB Dabra, was going accompanying his friend Parwat Singh in a jeep bearing registration No. MP06-B/6579 from Gwalior to his house situated at Dabra. On the way of Arru Crossing towards Dabra, due to rash and negligent driving the jeep owned by the appellant collided with a tree as a result, Radhavallabh received

serious injuries and died on the spot. The F.I.R. was lodged in the Police Station Dabra and after investigation, the charge-sheet was filed before the criminal court, having jurisdiction. The claim petition, filed by the claimants of the deceased was decided with an Award of Rs. 9,45,500/- passed by the tribunal in favour of the claimants and against the driver and owner of the offending jeep on the principles of joint and several liability. However, while issuing such directions, the Insurance Company was exonerated from indemnifying the liability on behalf of the owner of the vehicle involved in accident, hence, this appeal.

(3) The submission put forth on behalf of the ownerappellant is that since the jeep involved in accident was insured by the appellant for third party under 'Act Policy' with the insurance company and the passengers travelling in the jeep involved in accident including deceased Radhavallabh who died in an accident being third party to the insurance policy, the insurance company was liable to indemnify the negligent acts of the driver and consequently under vicarious liability of the owner of vehicle to satisfy the award amount on his behalf as well as driver of the vehicle involved in accident to the claimants of the deceased passenger. Therefore, it is prayed that by allowing the appeal, the direction to the extent of exoneration of the Insurance Company from the liability of satisfying the award on behalf of the insured may be set aside and instead the Insurance Company may be directed to satisfy the award amount to the claimants of the deceased.

(4) The respondents/claimants did not challenge the contents of the Award nor did they seek any enhancement of compensation. The appellant/owner of the offending vehicle remained ex parte before the tribunal, in such circumstance, he could not prove his case by producing cogent evidence that the jeep involved in accident was sold prior to the date of accident and therefore the appellant-owner can never be made liable to pay the award amount to the claimants of the deceased.

(5) Heard the learned counsel for the parties at sufficient length. Also perused the materials and the law covering the issues.

(6) In view of the submissions made by the learned counsel on either side, the question that now arises for consideration is :-

> Whether, the Insurance Company under the terms of policy or under statutory liability is obliged to indemnify the liability to

satisfy the award on behalf of the insured in case of pillion rider of a two wheeler or gratuitous passengers travelling in four wheelers by would be a third party within the meaning of Section 147 of the Act ?

(7) At this juncture, this court may usefully quote relevant provisions of the Act for ready reference. They are as under:-

**"145. Definitions.**-In this Chapter -

(a) xx xx xx xx

(b) xx xx xx xx

(c) xx xx xx xx

(d) xx xx xx xx

(e) xx xx xx xx

(f) xx xx xx xx

(g) "Third party" includes the Government."

**146. Necessity for insurance against third party risk.**- (1) No person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter.

**147. Requirements of policies and limits of liability.** (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer; and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person [including 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 in a public place;

(ii) Against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

**Explanation.**- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely:-

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a

limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

(8) In the light of the aforesaid reproduced definitions of sections, learned counsel appearing on behalf of the owner/appellant contends that on bare reading of the chapter XI "Insurance of Motor Vehicles against Third Party Risks" it appears that in Section 145 "Definition "(g)" third party" includes the Government. He submits that the word third party does not carry the exhaustive meaning except that the Government. So it denotes that in reference to third party means first party will be insurer, the insurance company, the second will be the insured in whose favour the insurance policy is issued as

per provision of law and the third party shall be all/any person for whom the policy of insurance is issued. Inviting attention of this court on the provisions as contained in sub-section 1(b) (I) and (ii) to Section 147 of the Motor Vehicle Act 1988, learned counsel submits that above provisions are of wide aptitude and so the wordings contained therein must also be attributed having regard to the context in which they are used, i.e., "third party" and will include 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 in a public place. According to him, these words cannot be interpreted in narrow sense. He states that the insurance against third party risk for using the motor vehicle in a public place by The persons or that any person, as the case may be, is necessary and under Section 147 of Act, the insurance company is bound under the cover of insurance policy to indemnify the liability towards third party. The expression 'third party' in a policy of insurance cannot be construed to mean when the policy does not say so. Eventually, the insurer or the Insurance company, being one party to the contract, under the statutory liability under Section 147 of the Motor Vehicle Act 1988 is bound to indemnify the liability of the insured to satisfy the claims of the third party claims arise out of the rash and negligent act of the insured or the person authorised by him. Learned counsel has supported his contentions by placing reliance on the decision in the case of *New India Assurance Company Vs. Satpal Singh* (2000)1 SCC 237 wherein the Hon. Apex Court observed 'with reference to the provisions in Motor Vehicle Act 1939 and the provisions in the Act 1988, particularly Section 147 in the following wordings :-

> "Under the 1988 Act an insurance policy covering third party risk was not required to exclude gratuitous passengers in a vehicle no matter that the vehicle is of any type or class. It was also held that the earlier decisions of this court render under the 1939 Act vis-a-vis gratuitous passengers were of no avail while considering the liability of the insurance company in respect of any accident which occurred or would occur after the 1988 Act came in force."

(9) On the basis of the aforesaid arguments, it is contended by the learned counsel for the appellant that the deceased who was going in a jeep, owned by the appellant and insured with the respondent No.8-the Oriental Insurance Company was third party to the insurance. This being so, the insurance

company under Sections 147 and 149 of the Motor Vehicles Act 1988 is bound under the cover of insurance policy to indemnify the liability towards third party risk. It is therefore prayed that by allowing the appeal, the Insurance Company may be directed to indemnify the award amount payable to the claimants of the deceasedpassenger travelling in the jeep.

(10) Having heard the learned counsel for the parties, the only point that arises for decision is whether the policy held by the insured covers the risk in respect of third party.

(11) Section 145(g) defines the 'third party' thus: 'third party' will include the Government. It is trite, the above definition simply states that 'third party' includes the Government. The term 'third party' must necessarily refer to a party other than those who are parties to the contract of insurance. If a party to the contract of insurance is regarded as a third party within the meaning of that term, it would offend the natural and ordinary meaning of the term 'third party'. It is trite, the insurer is one party while the insured is the other party for a contract of insurance. Therefore, it is unreasonable to construe that any person other than the said two parties would also be a third party. In reaching this conclusion, this court may derive support from the fact how the term 'third party' is understood in legal parlance. In Stroud's Judicial Dictionary, which explains third party risks in the following words:

> Third Party Risks Road Traffic Act 1930 (C 13), Section 35, Road Traffic Act, 1972 (C 20), Section 143] connotes that the insurer is one party to the contract, that the policy-holder is another party, and that the claims made by others in respect of the negligent use of the car may be naturally described as claims by third parties *Digby v. General Accident Fire and Life Insurance Corporation* (1943) A.C. 121.

(12) In Black's Law Dictionary seventh edition the terms, 'third party' and 'third party beneficiary' are defined thus:

> "Third party-One who is not a party to a law suit, agreement, or other transaction but who is somehow involved in the transaction; someone other than the principal parties. - Also termed outside party.
>
> Third party beneficiary-A person who, though not a party to a contract, stands to benefit from the contract's performance.

For example, if Ann and Bob agree to a contract under which Bob will render some performance to Chris, then Chris is a third party beneficiary.

(13) So, the expression "third party" needs to be determined in each case with reference to the terms of the insurance policy. If the risk of a person is covered under the contract of insurance, then he/she would be the third party regarding whom the insurance cover can be used and the insurer will be liable to indemnify such a person or his legal representatives/dependents. However, the person, who is not covered under terms of the insurance policy cannot be treated as "third party" within the meaning of the provisions of Section 147 and Section 149 of the Motor Vehicles Act, 1988.

(14) Alternatively, it needs to be noticed that Section 147 enjoins that the policy issued by the authorised insurer should insure the person specified in the policy against any liability which may be incurred by him in respect of death of or bodily injury to any person specified in Sub-section (1)(b)(i) and (ii). The critical expression "against any liability which may be incurred by him" occurring in section 147(1)(b)(i) undoubtedly shows that the policy of the insurance which the owner obtained from the authorised insurer is meant to insure the owner or the holder of the policy against any liability that he may incur qua third parties whether such liability be on account of death or bodily injury to any such person or damage to any property owned by him due to the accident involving motor vehicle/vehicles. Subsection (1)(b)(ii) of Section 147 further requires that the policy must also insure the owner against the death of or bodily injury caused by or arising but of the use of the vehicle if it is public service vehicle used in a public place. Therefore, it is clear that if no liability arises against the holder of the policy, the same cannot arise against the Insurance Company.

(15) It is amply clear that Sub-clause (2) carves out an exception in respect of the liability of the insurer, which is enumerated in Sub-clause (1) of Section 149. The immunity available to the insurer is under special circumstances. It is also manifest that the insurer has a duty to satisfy the award against persons insured in respect of third party risk. Obviously, a question is as to whether gratuitous passengers or passengers allowed to travel in a goods vehicle for hire or reward can be regarded as "third parties" vis-a-vis, the insurer. They are not the persons, who are totally unconnected with the insurance contract. They travel in the insured vehicle with connivance or consent of the owner or

representative of the owner, viz., the authorised driver. So, their rights stem from their oral or written agreement, as the case may be, with the owner. In other words, they are vicariously concerned with the insurance agreement through the owner. They are not third parties as such. The gratuitous passenger cannot be regarded as third party only because he is not signatory to the insurance contract. For this reason, the insurer would be placed outside the purview of Section 149(2) of the Motor Vehicles Act. Hence, the insurer cannot be held liable even for the purpose of satisfying the award in respect of the gratuitous passengers, who are not third parties qua the owner (insured). The necessary corollary would be that in such a case, the learned M.A.C.T. cannot give direction to indemnify the gratuitous passenger or the dependents of such a passenger, who was travelling in the goods vehicle.

(16) Chapter X of the Act makes insurance of motor vehicles compulsory but to some extent only, in view of the danger they pose in public places to human beings, so that the insured may not go without compensation altogether. Generally speaking there are two kinds of policies pertaining to the risk of injury to the person or death, on account of the use of a motor vehicle. The first is an accident insurance policy, where the proposer is the insured and the other person being the subject-matter of the insurance and for the policy to be legal, the insurer must have an insurable interest in the other person and if a claim arises, the sum insured is not received by the other person, but by the insured. The contract here is not one of indemnity in the strict sense, as the sum insured is a predetermined sum. The second kind of policy is a motor insurance policy, where the motor vehicle is the subject-matter of the insurance and if a claim in respect of death or personal injury to third party arises, the insured is indemnified and the third party receives the compensation from the insurer. In such a case, the amount of compensation is not pre-determined, but, is assessed by the courts under Section 147 of the Act, the insurance policy is required to insure risks to a person or classes of persons to the extent specified in the insurance policy. In this case, the insured has a policy in respect of third party risk only, but under the said policy no premium was paid for passengers and, therefore, the police does not cover risk of the passengers and the Insurance Company is not liable to pay compensation for the injuries suffered by such passengers or on the death of such passengers, as the case may be.

(17) Now, it would be relevant to refer some other decisions highlighting on the point as under:-

(i) In *National Insurance Co. Ltdv. Vs. Bommithi Subhayamma and others* 2005 (2) ACJ 721, the Hon. Apex Court had occasion to consider the award rendered by the Motor Accident Claims Tribunal, in which the deceased was travelling in a lorry as a gratuitous passenger. The Apex Court held that the insurer was not liable to pay the compensation to gratuitous passenger travelling in the goods vehicle. The Apex Court categorically directed that the claimants would be entitled to recover the amount of compensation granted in their favour by the Motor Accident Claims Tribunal from the owner of the vehicle. This case may be usefully referred to say that the view of the Apex Court is that in each case the insurer need not be directed to satisfy the award and then proceed to recover the amount from the insured (owner).

(ii) In *United India Insurance Co. Ltd., Shimla Vs. Tilak Singh and others* (2006) 4 SCC 404 : (AIR 2006 SC 1576 : 2006 AIR SCW 1822) the Hon. Apex Court referred to the concurring opinion rendered in a three-Judges Bench decision in *New India Assurance Co. Ltd. v. Asha Rani* and ruled thus:-

> "In our view, although the observations made in Asha Rani case were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger."
>
> It is worthy to note that in the said case the controversy related to gratuitous passenger carried in private vehicle.

(iii) In *Oriental Insurance Co. Ltd. Vs. Jhuma Saha (Smt) and others* (2007) 9 SCC 263 : (AIR 2007 SC 1054 : 2007 AIR SCW 859) the controversy related to fastening of liability on the insurer for the death of the owner of a registered vehicle, Maruti van. The Court observed that the accident did not involve any other motor vehicle than the one which he was driving and as the liability of the insurer Company is to the extent of indemnification of the insured against the respondent or an injured person, a third person or in respect of damages of property, the insured cannot be fastened with any liability under

the provisions of the Motor Vehicles Act, and, therefore, the question of the insurer being liable to indemnify the insured does not arise. Thereafter, the Bench referred to the decision in *Dhanraj Vs. New India Assurance Co. Ltd.* (2004) 8 SCC 553 : (AIR 2004 SC 4767 : 2004 AIR SCW 5438) and ruled thus:-

> "The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

(iv) In *National Insurance Co. Ltd. Vs. Laxmi Narain Dhut* (2007) 3 SCC 700 : (AIR 2007 SC 1563 : 2007 AIR SCW 2279), after elaborately referring to the analysis made in *Asha Rani* (supra), the Hon. Apex Court stated thus:-

> "Section 149 is part of Chapter XI which is titled "Insurance of Motor Vehicles against Third-Party Risks". A significant factor which needs to be noticed is that there is no contractual relation between the insurance company and the third party. The liabilities and the obligations relatable to third parties are created only by fiction of Sections 147 and 149 of the Act."

In the said case it has been opined that although the statute is a beneficial one qua the third party, yet that benefit cannot be extended to the owner of the offending vehicle.

(v) In *Oriental Insurance Co. Ltd Vs. Meena Variyal and others* (2007) 5 SCC 428 : 2007 AIR SCW 2362, the Hon. Apex Court held that the insurance company was not liable to indemnify owner of the car vehicle involved in the accident because, the deceased, who was Regional Manager of the Company and owner of the vehicle, was himself driving the vehicle of the company and the accident occurred due to his own negligence. The Apex Court observed:

> "7. We must say that one would have expected the high Court to apply its mind to the question arising, in a better manner and to specifically answer the question that arose for decision in the case. For instance, we may observe that it has not

reversed the finding of the Tribunal that the deceased was himself driving the vehicle. Then, what was the position? The position was that a Regional Manager of the Company, which was owner of the vehicle, was himself driving the vehicle of the Company and during the course of it, he died in an accident, whether the accident occurred due to his negligence or otherwise. It appears to us that mere going by some decision or other, without appreciating the facts in a given case, in the light of the law, if any, declared by this Court, does not lead a court or Tribunal to a correct conclusion in the normal course.

17. It is difficult to apply the ratio of this decision to a case not involving a third party. The whole protection provided by Chapter XII of the Act is against third party risk. Therefore, in a case where a person is not a third party within the meaning of the Act, the insurance company cannot be made automatically liable merely by resorting to the *Swaran Singh* (supra) ratio.

29. .....In these circumstances, we hold that the appellant Insurance Company is not liable to indemnify the insured and is also not obliged to satisfy the award of the Tribunal/Court and then have recourse to the insured, the owner of the vehicle. The High Court committed was in error in modifying the award of the Tribunal in the context."

(vi) In *Bhav Singh Vs. Savirani & another* 2008 ACJ 1043, the Full bench of this court observes as follows :-

"10. Sub Section (5) of Section 147 of the Act, however provides that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under Section 147of the Act shall be liable to indemnify a person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or classes of persons. Thus if the policy of insurance covers any liability in addition to the liability under Section 147 (1) of the Act, the insurer will be liability to indemnify the insured in case of any liability not because of the

provisions of sub section (1) of section 147 but because of the terms and conditions of contract of insurance between the insurer and the insured. Therefore, if the contract of insurance provides for a liability to a passenger or to an employee other than the liabilities provided under sub section (1) of the Section 147 of the Act, the insurer would be liable to indemnify the insured against such liability."

(vii) In *Oriental Insurance Company Ltd. Vs. Sudhakaran K. V. and others* (2008) 7 SCC 428 : (AIR 2008 SC 2729 : 2008 AIR SCW 4549) the Hon.Apex Court while dealing with the issue whether a pillion rider on a scooter would be a third party within the meaning of Section 147 of the Act, after referring to number of authorities, stated thus :-

"The contract of insurance did not cover the owner of the vehicle, certainly not the pillion rider. The deceased was travelling as a passenger, stricto sensu may not be as a gratuitous passenger as in a given case she may not (sic) be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby.

The law which emerges from the said decisions, is: (i) the liability of the insurance company in a case of this nature is not extended to a pillion-rider of the motor vehicle unless the requisite amount of premium is paid for covering his/her risk; (ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion-rider; (iii) the pillion rider in a two-wheeler was not to be treated as a third party when the accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle."

(viii) In *Bhagyalakshmi and others Vs. United Insurance Company Limited and another* ( 2009) 7 SCC 148 : (2009 AIR SCW 5325) the Hon. Apex court held:-

"13. The policy in question is a package policy. The contract of insurance if given its face value covers the risk not only of a

third party but also of persons travelling in the car including the owner thereof. The question is as to whether the policy in question is a comprehensive policy or only an Act policy."

(ix) However, the aforesaid question dealt with in the case of *Bhagyalakshmi and others* (supra) was further aptly considered by Hon. Apex Court while commenting in respect of covering third party risk in *National Insurance Company Ltd. Vs. Balakrishnan* (AIR 2013 SC 473) as under :-

"16. Thus, it is quite vivid that the Bench had made a distinction between the "Act policy" and "comprehensive policy/package policy". The crux of the matter is what would be the liability of the insurer if the policy is a comprehensive/package policy". We are absolutely conscious that the matter has been referred to a larger Bench, but, as is evident, the Bench has also observed that it would depend upon the view of the Tariff Advisory Committee pertaining to enforcement of its decision to cover the liability of an occupant in a vehicle in a comprehensive /package policy" regard being had to the contract of insurance.

21. In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed in the case of *Bhagyalakshmi* (2009 AIR SCW 5325) (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present

matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same.

22. In view of the aforesaid legal position, the question that emerges for consideration is whether in the case at hand, the policy is an "Act Policy" or "Comprehensive/Package Policy". There has been no discussion either by the tribunal or the High Court in this regard. True it is, before us, Annexure P-1 has been filed which is a policy issued by the insurer. It only mentions the policy to be a "comprehensive policy" but we are inclined to think that there has to be a scanning of the terms of the entire policy to arrive at the conclusion whether it is really a "package policy" to cover the liability of an occupant in a car.

23. In view of the aforesaid analysis, we think it apposite to set aside the finding of the High Court and the tribunal as regards the liability of the insurer and remit the matter to the tribunal to scrutinize the policy in a proper perspective and, if necessary, by taking additional evidence and if the conclusion is arrived at that the policy in question is a "Comprehensive/Package Policy", the liability would be fastened on the insurer. As far as other findings recorded by the tribunal and affirmed by the High Court are concerned, they remain undisturbed.

(x) In *National Insurance Co. Ltd. Vs. Saju P. Paul,* (2013) 2 SCC 41, the Hon. Apex court has reproduced the observations made in *Asha Rani's* case at para 12 of the decision.

"26. In view of the changes in the relevant provisions in the 1988 Act vis-à-vis the 1939 Act, we are of the opinion that the meaning of the words 'any person' must also be attributed having regard to the context in which they have been used i.e. 'a third party'. Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

27. Furthermore, sub-clause (i) of clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

28. An owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio of this Court's decision in *New India Assurance Co. v. Satpal Singh* is taken to its logical conclusion, although for such passengers, the owner of a goods carriage need not take out an insurance policy, they would be deemed to have been covered under the policy where for even no premium is required to be paid."

(xi) In *Oriental Insurance Company Ltd. Vs. Surendra Nath Loomba* (AIR 2013 SC 483), Hon. Apex Court has further taken note of the observations made in the case of *Tilak Singh* in following manner :-

"9. In *Tilak Singh* (supra) this court referred to the concurring opinion rendered in a three-Judge Bench decision in *New India Assurance Co. Ltd. v. Asha Rani* and ruled thus:-

In our view, although the observations made in *Asha Rani case* were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger.

It is worthy to note in the said case the controversy related to

gratuitous passenger carried in a private vehicle. "

(xii) In further respective paragraphs 10, 11 and 12 of *Oriental Insurance Company Ltd. Vs. Surendra Nath Loomba's case* (supra), the observation made in *Jhuma Saha (Smt)* (AIR 2007 SC 1054: 2007 AIR SCW 859) and in *National Insurance Co. Ltd. v. Laxmi Narain Dhut* (2007)3 SCC 700:(AIR 2007 SC 1563) are quoted as under:-

> "10. The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."
>
> 11. Section 149 is part of Chapter XI which is titled "Insurance of Motor Vehicles against Third- Party Risks". A significant factor which needs to be noticed is that there is no contractual relation between the insurance company and the third party. The liabilities and the obligations relatable to third parties are created only by fiction of Sections 147 and 149 of the Act". In the said case it has been opined that although the statute is a beneficial one qua the third party but that benefit cannot be extended to the owner of the offending vehicle.
>
> 12. Before this Court, however, the nature of policies which came up for consideration were Act policies. This Court did not deal with a package policy. If the Tariff Advisory Committee seeks to enforce its decision in regard to coverage of third party risk which would include all persons including occupants of the vehicle and the insurer having entered into a contract of insurance in relation thereto, we are of the opinion that the matter may require a deeper scrutiny."

(18) Thus, a careful reading of these decisions clearly shows that the liability of the insurer is limited, as indicated in Section 95 of the Act, but it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. The above judgments of Hon. the Apex Court are authorities to state that unless higher premium is paid, the higher liability of the insurer than the liability of the insured cannot be assumed. There is no further need to dilate this aspect any more because of the discussions

made supra. Hence, after considering all the relevant aspects of the matter and having regard to the case laws referred to herein-above, this court comes to analysis the legal issues as follows:-

(i) If the injured/deceased being third party was travelling in vehicle involved in accident and no premium for passengers as gratuitous or otherwise travelling in insured vehicle is paid in that case, the insurance company, under cover of 'Act policy', cannot be held responsible to indemnify the award passed against the owner of the vehicle involved the insured.

(ii) In case the insurance company has recovered any additional premium for passengers travelling in vehicle or pillion rider on two wheelers, under comprehensive/full insurance cover from the insured or/and the vehicle is fully or compressive insured by the insurance company, certainly it is bound to indemnify the liability of the owner of the vehicle insured and responsible for payment of award amount to injured or deceased travelling in vehicle and/or as pillion rider travelling on two wheeler vehicle to their claimants.

(iii) In case the four wheeler vehicle or two wheeler vehicle in/on which the injured or deceased was travelling, received head and collision with another vehicle, on negligent act of the driver of other offending vehicle or composite/contributory negligence of the other vehicle involved then the insurance company of the opposite/offending vehicle is to indemnify the responsibility of the insured of other vehicle to compensate the injury/death of third party under Section 147 Motor Vehicle Act.

(19) Now, coming to the factual aspects of this present case, it appears from the evidence on record that at the time of accident, the deceased was travelling from Gwalior to Dabra in a Jeep involved in accident. The driver of the jeep was driving the vehicle rashly which resulted in dashing against the tree. In such accident, the deceased travelling in jeep received and succumbed to injuries on the spot. On perusal of the cover-note of the policy (Ex./D1), it is found that the same is proved by witness V.C. Dholkar (DW-1) who stated that the jeep was owned by the appellant and was insured during the period from 7th May 2004 to 6th May 2005. The policy further indicated charging of the amount of Rs. 700/- against act liability, Rs. 100/- against personal accident

for owner and driver, Rs. 25/- against legal liability of driver and Rs. 70/- against any extra loading, total amounting to Rs. 895/- with specification and limitation that no own damage will be entertained and that the policy covers use of the vehicle for any purpose of use other than : (b) carriage of goods (n) other than captors or personal luggage (c) organized racing (d) pockmarking (e) speed testing etc. It is further noted that though the vehicle was insured for third party risk or under Act policy but no premium was recovered for risk of the passengers whether gratuitous or otherwise. As has been set out hereinabove, the law on this subject is very much clear. The 8th respondent-Oriental Insurance company will, therefore, not be liable to reimburse the appellant-owner.

(20) Eventually, on considering the legal as well as factual aspects of the present case, the appeal filed by the owner of the vehicle insured fails. The learned tribunal rightly concluded that being the Act Policy of the vehicle and since no premium for passengers travelling was recovered, the insurance company was not liable to indemnify the award on behalf of the insured to the claimants. As a result, this appeal filed by the owner is dismissed with cost. Counsel fee Rs. 1000/-, if certified, be added in the costs.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 481**
**APPELLATE CIVIL**
***Before Mr. Justice G.D. Saxena***
F.A. No. 349/2011 (Gwalior) decided on 27 January, 2014

BHUPENDRA KANT BHARDWAJ & ors. ... Appellants
Vs.
RAMESHCHANDRA GOYAL ... Respondent

***Civil Procedure Code (5 of 1908), Order 41 Rule 5 - Stay by Appellate Court*** **- Held - Appellate Court is not bound to grant an order of stay merely because an appeal has been preferred - Petitioner who comes to the court for seeking stay must do equity for seeking equity - Appellate Court has jurisdiction to impose such terms which may compensate decree holder. (Paras 6 & 12)**

*सिविल प्रक्रिया संहिता (1908 का 5), आदेश 41 नियम 5 – अपीली न्यायालय द्वारा रोक* – अभिनिर्धारित – मात्र इसलिए कि अपील पेश की गई है, अपीली न्यायालय रोक का आदेश प्रदान करने के लिये बाध्य नहीं – याची जो रोक

चाहते हुए न्यायालय आता है उसे साम्या चाहने के लिये साम्या करना चाहिए – अपीली न्यायालय को ऐसी शर्तें अधिरोपित करने की अधिकारिता है जो डिक्री धारक की क्षतिपूर्ति कर सकती है।

**Cases referred :**

(2005) 1 SCC 705, 2009 AIR SCW 7265, 2011 (1) MPLJ 366, (2009) 9 SCC 772, (2011) 7 SCC 755.

*N.K. Jain* with *Prashant Sharma*, for the appellants.
*M.B. Mangal*, for the respondent.

**ORDER**

**G.D. SAXENA, J.:-** Arguments were heard on I.A No. 5149/2011 which is filed under Order 41 Rule 5 of the Code of Civil Procedure 1908 by the appellants/tenants seeking stay of the operation of the impugned judgment and decree dated 3rd November 2011 in a civil suit instituted by the plaintiff/ respondent against appellants for eviction and arrears of rent with mesne profit.

(2) Learned counsel for the appellants contended that under the garb of the impugned decree, the plaintiff/respondent is bent upon to dispossess the appellants from the suit premises wherein they are running business and also residing in first floor of the building. It is submitted that if the operation of the impugned judgment and decree is not stayed, the appellants shall suffer irreparable loss which cannot be compensated in any manner and the purpose of filing the appeal would be frustrated. Hence, by the aforesaid application, the operation of the impugned judgment and decree is sought to be stayed till pendency of the appeal.

(3) In response to the application, the respondent/plaintiff contented that the appellants are enjoying the constructed area about 3000 square feet for their business in busy commercial market in the town of Gwalior City. They are further utilising 3000 square feet area for their residence on the first floor of the building and 3000 square feet area of the roof of the building but in turn they are paying meagre amount of Rs. 350/- as monthly rent to the landlord/respondent. On the other hand, the landlord/respondent is paying Rs. 7999/- as property tax to the Municipal Corporation. It is submitted that as per market price of the area in question, at present rent of Rs. 25,000/- can not be denied. Giving an example of one Shri Shyam Agrawal and Smt. Rekha Agrawal who are landlords of the adjoining building it is stated that they are getting Rs. 39,600/- as monthly rent

from tenant Dena Bank. Therefore, it is prayed that the application under consideration in such circumstances is liable to be dismissed or in alternative the appellants may be directed to deposit Rs. 25,000/- as monthly mesne profits of the building till their possession over the rented premises. In support of his arguments, learned counsel placed reliance on the following judgments of Hon. Apex Court as well as this court. They are:-

(i) *Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.* (2005) 1 SCC 705

(ii) *State of Maharastra Vs. M/s Super Max International Pvt. Ltd. & ors* 2009 (AIR SCW 7265).

*(iii) Shabbir Hussain & ors Vs. Ram Dayal & others decided* 2011(1) MPLJ 366.

(4) Before going further into a discussion of the questions that arise, the relevant provisions of law may be summarised which are as follows :-

Order 41 Rule 5 Stay by Appellate Court

**5. Stay by Appellate Court.**--- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

[Explanation.- An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance]

**(2) Stay by Court which passed the decree.**- Where an application is made for stay of execution of an appealable

decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied-

(a) that substantial loss may result to the party applying or stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) [Subject to the provisions of sub-rule (3)], the Court may make an ex parte order for stay of execution pending the hearing of the application.

[(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of Rule 1, the Court shall not make an order staying the execution of the decree.]

(5) Since the appellants/tenants have preferred an appeal against the judgment and decree of eviction from the rented premises, in that case the provisions of Section 13 of M.P Accommodation Control Act 1961 which are as follows shall also apply to the case in strict sense:

**"Sec. 13-** When tenant can get benefit of protection against eviction:- (1) On a suit or any other proceeding being instituted by a landlord on any of the grounds referred to in section 12 or in any appeal or other proceeding by a tenant against any decree or order for his eviction, the tenant shall within one month of the service or writ of summons or notice of appeal or of any other proceeding or within one month of institution of appeal or any other proceeding by the Court may on application made to it allow in this behalf, deposit in the court or pay to landlord, an amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have been

made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made; and shall thereafter continue to deposit or pay, month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate till the decision of the suit, appeal or proceeding, as the case may be.

(2) xx xx xx xx

(3) xx xx xx xx

(4) xx xx xx xx

(5) xx xx xx xx

(6) If a tenant fails to deposit or pay any amount as required by this section, the court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit, appeal or proceeding ,as the case may be.

(6) Thus, from provisions of aforesaid Order 41 Rule 5 of the C.P.C., it is amply clear that the appellate court is not bound to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. The petitioner who comes to the court for seeking a stay order must do equity for seeking equity. While granting an order of stay under Order 41 Rule 5 of the C.P.C. the appellate court does have the jurisdiction to put the parties seeking the stay order on such terms, as would in its opinion reasonably compensate the decree holder, for the loss occasioned by the delay in the execution of the decree by the grant of stay order.

(7) As regards claim made by the plaintiff for receiving higher rent on the basis of present market rate, same has been answered in the case of *Shabbar Hussain* (supra), as under:-

"10. The Scope of Order 41 Rule 5 Civil Procedure Code has been taken into consideration in the decision of Supreme Court *Atmaram Properties (P) Ltd* (Supra) in which an earlier decision of Supreme Court *Marshall Sons & Co. (I) Ltd.* (Supra) has been relied upon in which the Apex Court has directed to deposit mesne profits at quite higher rate looking to the facts and circumstances that tenant was inducted long

back and if during those days quite lessor rate of rent was prevailing, it can not be equated with present rate of rent. These decisions are fully applicable in present case also."

(8) Further on the point of stay whether it is to be granted or not while exercising discretion by the appellate court and what would be guiding factors, in *Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd.*, (2005) 1 SCC 705, at page 712: the Hon.Apex Court held as follows :-

"8. It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate court and the appellate court has discretion to grant an order of stay or to refuse the same. The only guiding factor, indicated in Rule 5 aforesaid, is the existence of sufficient cause in favour of the appellant on the availability of which the appellate court would be inclined to pass an order of stay. Experience shows that the principal consideration which prevails with the appellate court is that in spite of the appeal having been entertained for hearing by the appellate court, the appellant may not be deprived of the fruits of his success in the event of the appeal being allowed. This consideration is pitted and weighed against the other paramount consideration: why should a party having succeeded from the court below be deprived of the fruits of the decree or order in his hands merely because the defeated party has chosen to invoke the jurisdiction of a superior forum. Still the question which the court dealing with a prayer for the grant of stay asks itself is why the status quo prevailing on the date of the decree and/or the date of making of the application for stay be not allowed to continue by granting stay, and not the question why the stay should be granted.

9. Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be "substantial loss," to the party applying for stay of execution within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security

for the due performance of the decree or order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. However, this is not the only condition which the appellate court can impose. The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on the appellant. So also, an appellate court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case, an appellate court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.....

11. .....In the case of *Chander Kali Bai* the tenancy premises were situated in the State of Madhya Pradesh and the provisions of the M.P. Accommodation Control Act, 1961 applied. The suit for eviction was filed on 8-3-1973 after serving a notice on the tenant terminating the contractual tenancy w.e.f. 31-12-1972. The suit came to be dismissed by the trial court but decreed in first appeal decided on 11-8-1975. One of the submissions made in this Court on behalf of the appellant tenant was that no damages from the date of termination of the contractual tenancy could be awarded; the damages could be awarded only from the date when an eviction decree was passed. This Court took into consideration the definition of tenant as contained in Section 2 (i) of the M.P. Act which included "any person continuing in possession after the termination of his tenancy" but did not include "any person against whom any order or decree for eviction has been made". The Court, persuaded by the said definition, held that a person continuing in possession of the accommodation even after the termination of his contractual tenancy is a tenant within the meaning of the M.P. Act and on

such termination his possession does not become wrongful until and unless a decree for eviction is passed. However, the Court specifically ruled that the tenant continuing in possession even after the passing of the decree became a wrongful occupant of the accommodation. In conclusion the Court held that the tenant was not liable to pay any damages or mesne profits for the period commencing from l-1-1973 and ending on 10-8-1975 but he remained liable to pay damages or mesne profits from 11-8-1 975 until the delivery of the vacant possession of the accommodation. During the course of its decision this Court referred to a decision of the Madhya Pradesh High Court in *Kikabhai Abdul Hussain v. Kamlakar* wherein the High Court had held that if a person continues to be in occupation after the termination of the contractual tenancy then on the passing of the decree for eviction he becomes a wrongful occupant of the accommodation since the date of termination. This Court opined that what was held by the Madhya Pradesh High Court seemed to be a theory akin to the theory of "relation back" on the reasoning that on the passing of a decree for eviction, the tenant's possession would become unlawful not from the date of the decree but from the date of the termination of the contractual tenancy itself. It is noteworthy that this Court has not disapproved the decision of the Madhya Pradesh High Court in *Kikabhai Abdul Hussain* case but distinguished it by observing that the law laid down in *Kikabhai Abdul Hussain* case was not applicable to the case before it in view of the definition of "tenant" as contained in the M.P. Act and the provisions which came up for consideration of the High Court in *Kikabhai Abdul Hussain* case were different.

13. In *Shyam Charan v. Sheoji Bhai* this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorised and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord. With advantage and approval, we may refer to a decision of the Nagpur High Court. In *Bhagwandas Lakhamsi*

*Vs. Kokabai* the learned Chief Justice of the Nagpur High Court held that the Rent Control Order, governing the relationship of landlord and tenant, has no relevance for determining the question of what should be the measure of damages which a successful landlord should get from the tenant for being kept out of the possession and enjoyment of the property. After determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order. If the real value of the property is higher than the rent earned then the amount of compensation for continued use and occupation of the property by the tanant can be assessed at the higher value. We find ourselves in agreement with the view taken by the Nagpur High Court.

16. We are, therefore, of the opinion that the tenant having suffered a decree or order for eviction may continue his fight before the superior forum but, on the termination of the proceedings and the decree or order of eviction first passed having been maintained, the tenancy would stand terminated with effect from the date of the decree passed by the lower forum. In the case of premises governed by rent control legislation, the decree of eviction on being affirmed, would be determinative of the date of termination of tenancy and the decree of affirmation passed by the superior forum at any subsequent stage or date, would not, by reference to the doctrine of merger have the effect of postponing the date of termination of tenancy.

19. To sum up, our conclusions are:

(1) While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.

(2) In case of premises governed by the provisions of the Delhi Rent Control Act, 1958; in view of the definition of tenant contained in clause (1) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

(3) The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date."

(9) In *State of Maharashtra Vs. Super Max International (P) Ltd.*, (2009) 9 SCC 772, at page 796 : The Hon. Apex court observed as follows:-

"77. In the light of the discussions made above we hold that in an appeal or revision preferred by a tenant against an order or decree of an eviction passed under the Rent Act it is open to the appellate or the Revisional Court to stay the execution of the order or the decree on terms, including a direction to pay monthly rent at a rate higher than the contractual rent. Needless to say that in fixing the amount subject to payment of which the execution of the order/decree is stayed, the Court would exercise restraint and would not fix any excessive, fanciful or punitive amount.

(10) Now, on examining the case in the light of the aforesaid decisions, it comes to the notice that the learned trial court for want of sufficient proof disallowed the prayer of the landlord for the prospective rent @ Rs. 25,000/- monthly claimed on the basis of present market rate of rent of the building let out to the appellants. However, it was not disputed by the appellants that landlord/respondent is receiving Rs. 350/- towards monthly rent and he is paying Rs. 7999/- as property tax against the rented building to the Municipal Corporation Gwalior. Therefore, it was put forth by the landlord that the

aforesaid sum is separately recoverable in addition to the amount of contractual rent from the tenant. Hence, according to his learned counsel, the plaintiff/ landlord is entitled to receive amount of contractual rent vis-a-vis property tax both from the defendants.

(11) In the case of *Mohd. Ahmad Vs. Atma Ram Chauhan* (2011) 7 SCC 755, facing the same situation, the Hon. Apex Court observed, relevant para is as under:-

> "21. xxxx xxxxx xxxxx xxxxx
>
> (ii) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so that the landlord gets the actual rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only."

(12) Considering the above, at present, direction for payment of mesne profits/damages against the appellants under order 41 Rule 5 of C.P.C. on the basis of present market rate of rent of the building cannot be issued when the appeal is pending. However, the appellants/tenants can be put on such reasonable terms for due performance of such decree or order as may ultimately be binding upon them as prescribed under Order 41 Rule 5(3) of C.P.C. as well as Section 13(1) of the M.P. Accommodation Control Act, 1961. Consequently, stay with respect to possession of rented property is granted to the appellants/defendants subject to compliance of the following conditions for due performance of such decree or order as may ultimately be passed by this court:-

> (i) that, money part of the decree (Cost of the suit) payable to the plaintiff/respondent be deposited by the appellants within a period of two months from the order' of this court before the trial/Executing court.
>
> (ii) that, the appellants shall furnish an undertaking with a solvent security worth **Rs. 5,00,000/- (Rs. Five Lac only),** to the satisfaction of the Trial/Executing court for handing over the possession of the rented property and mesne profits/

damages for wrongful possession as determined by the appellate court within the time period as fixed by the appellate court. Aforesaid undertaking of the appellants with the above solvent security shall be furnished within a period of two months from today before the Trial/ Executing court.

(iii) That, the appellants/defendants to deposit from the date of filing of appeal, i.e., 12/12/11, the amount of rent as determined by the trial court per month. Thereafter every month the appellants/defendants shall without fail deposit the rent on or before every 15th day of Gregorian calendar month till the finality of the appeal.

(iv) That, the appellants/tenants shall also deposit the property tax amount which was paid by the owner of the suit house to the Municipal Corporation on furnishing necessary bill of the property tax and the deposit of the receipt thereof by the plaintiff/owner before the Executing court and deposit of such payment of bills shall be made by the appellants/tenants within two months from the date of furnishing the above bills and receipts. The property tax as directed shall be levyable from the date of filing of the suit for eviction before the trial court.

(v) That, the amount of rent and the amount paid towards property tax by the landlord on being deposited by the appellants/tenants shall be disbursed to the respondent/ landlord.

(vi) In case there is failure to make compliance of the aforesaid directions within the stipulated period mentioned above, the interim arrangement that the respondent/plaintiff would not obtain warrants of possession shall stand automatically vacated without reference to the bench.

(13) In view of aforesaid, the application (I.A No. 5149/2011) stands disposed of.

(14) List the appeal on priority basis under category of senior citizen.

*Order accordingly.*

**I.L.R. [2014] M.P., 493**
**APPELLATE CRIMINAL**
***Before Mr. Justice J.K. Maheshwari***
Cr. A. No. 1299/1997 (Indore) decided on 22 January, 2013

DILIP ...Appellant
Vs.
STATE OF M.P. ...Respondent

*A. Penal Code (45 of 1860), Section 304-B & Evidence Act (1 of 1872), Section 113-B* - **The evidence with respect to cruelty, harassment soon before death regarding demand of dowry ought to be established for bringing the charge u/s 304-B of I.P.C. at home.** **(Para 10)**

*क. दण्ड संहिता (1860 का 45), धारा 304–बी व साक्ष्य अधिनियम (1872 का 1), धारा 113–बी* – भा.द.सं. की धारा 304–बी का आरोप साबित किये जाने के लिये, दहेज की मांग से संबंधित मृत्यु के तुरंत पहले क्रूरता, उत्पीड़न के संबंध में साक्ष्य को स्थापित किया जाना चाहिए।

*B. Penal Code (45 of 1860), Section 304-B & Evidence Act (1 of 1872), Section 113-B* - **Presumption u/s 113-B of Evidence Act is not attracted in absence of proving the ingredients of the said charge.** **(Para 12)**

*ख. दण्ड संहिता (1860 का 45), धारा 304–बी व साक्ष्य अधिनियम (1872 का 1), धारा 113–बी* – उक्त आरोप के घटक साबित करने के अभाव में, साक्ष्य अधिनियम की धारा 113–बी के अंतर्गत उपधारणा आकर्षित नहीं होती।

**Cases referred :**

1997 SCC (Crl.) 759, 2004 SCC (Crl.) 692, 2005 SCC (Crl.) 218, AIR 2007 SC 3146, (2003) 8 SCC 80.

*Vivek Singh,* for the appellant.
*Manish Joshi,* P.L. for the respondent/State.

**JUDGMENT**

**J.K. MAHESHWARI, J. :-** This appeal under Section 374 of the Code of Criminal Procedure is directed against the judgment dated 05.12.1997, passed in Sessions Trial No.120/1997, by IInd Additional Sessions Judge, Ujjain convicting the appellant under Section 304-B of IPC with Rigorous

Imprisonment for 10 year.

2. The prosecution story as alleged is that on 31.12.1996 deceased Manju was died by burns. The dying declaration (Ex. P-11) was recorded by Anil Patwa, Naib Tahsildar (PW-8) mentioning that the burn was caused by her husband because the father has not given dowry in marriage thereupon the offence under Section 307/498-A of IPC was registered. After death due to said injuries the offence under Section 307 read with Section 302, 304-B as well as 306 of IPC was registered and the challan has been filed. On committal it was sent to competent Court for trial where the charges under Section 306, 302 and 304-B of IPC were framed. The accused had abjured his guilt stating innocence and taken a defence of false implication after the death by his wife. The prosecution has examined 15 witnesses to prove its case and in defence no witness has been examined by the accused.

3. The Trial Court found that the dying declaration (Ex. P-11) cannot be relied upon to prove the charge under Section 302 of IPC. It is further held that the charges under Section 302 and 306 of IPC has not been established by the prosecution bringing the cogent evidence on record, however, acquitted the accused but relying upon the statement of Rampal-father of deceased (PW-12) and Rambabu-brother of deceased (PW-13) and also partly relying upon the dying declaration convicted the appellant for the charge under Section 304-B of IPC and directed him to undergo Rigorous Imprisonment for 10 years.

4. Shri Vivek Singh, learned counsel appearing on behalf of the appellant after reading the statement of Rampal-father (PW- 12) and Rambabu-brother (PW-13) and also reading the dying declaration (Ex. P-11) and also the statement of Anil Patwa, Naib Tahsildar (PW-8) recorded dying declaration and further relying upon the statement of Prakashchandra Dubey (PW-9), Forensic Expert and Yashpal Sharma (PW-1) contended that the deceased was died in a bathroom pouring the kerosene over her. This neighbour reached on the sport first and found that the door of the bathroom was bolted from inside, which was broken by Yashpal Sharma (PW-1) with the help of Om Prakash and Sanjay Jadhav and as per the evidence brought it is clear that at that time the accused was not present on the spot. In addition to it, it is submitted that in the statement of father and brother of deceased it has not been established that there is any demand of dowry, cruelty and harassment soon before her death, essential to bring the charge under Section 304-B of

IPC at home and to draw the presumption under Section 113-B of Evidence Act. It is further said that by plain reading of dying declaration allegation of cruelty and harassment as well as demand of dowry is not there, therefore, the prosecution has not established the essential ingredients of Section 304-B of IPC. However, the presumption under Section 113-B of Evidence Act is not attracted. In such circumstances conviction directed by the trial Court is liable to be set aside. Shri Vivek Singh, counsel has placed reliance on the judgments of Hon'ble the Apex Court in the case of *Sham Lal Vs. State of Haryana* [1997 SCC (Cri) 759], *Baljeet Singh and another Vs. State of Haryana* [2004 SCC (Cri) 692], *State of Rajasthan Vs. Teg Bahadur and others* [2005 SCC (Cri) 218] and *M. Srinivasulu Vs. State of A.P.* [AIR 2007 SC 3146] to buttress the said contention and prayed to acquittal of accused alloying this appeal.

5. Per contra Shri Manish Joshi, learned Panel Lawyer for the respondent-State contends that in the statement of Rampal-father (PW-12) and Rambabu-brother (PW-13) it is clear that she was subjected to cruelty and harassment on account of not giving sufficient dowry in the marriage, and such complaint was made as and when she came back to the house. The aforesaid statements has been relied upon proving the ingredients of the dowry death soon before the death. In addition to it looking to the averments of the dying declaration, relied by the Sessions Court the conviction for the charge under Section 304-B of IPC has rightly been recorded, however, interference is not warranted, therefore, the appeal may be dismissed.

6. After hearing learned counsel appearing on behalf of the parties and on perusal of the record it is not in dispute that the charge under Section 302 and 306 of IPC was framed in addition to the charge under Section 304-B of IPC. The appellant was acquitted by the charge of Section 302 as well of 306 IPC. The conviction has only been directed under Section 304-B of IPC. Prior to appreciating the evidence brought on record the ingredients of Section 304-B is required to be taken note of, however, it is reproduce as under: -

> [304B. Dowry death.-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry,

such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

Explanation- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

Bare reading of the aforesaid in a case of dowry death three ingredients as required to be established-(i) the death of a woman caused by burns or bodily injury or occurs otherwise than normal circumstances within seven years of marriage (ii) that married woman had died within seven years from the date of marriage; and (iii) it ought to be established that soon before her death the deceased woman was subjected to cruelty and harassment in connection with the demand of dowry by her husband or any relative of her husband.

7. As per Section 2 of the Dowry Prohibition Act, it is clear that any property or valuable security given or agreed to be given either directly or indirectly by one party to a marriage to the other party to the marriage would fall within the purview of the dowry. In this regard it can safely be observed that demand must have a inextricable nexus with the marriage, in case it has no connection with the consideration for the marriage it will not amounting to demand for dowry.

8. On proving the aforesaid the death of woman shall be deemed to be a dowry death and the accused shall be punished with the imprisonment for a term which shall not be less than 7 years or may be extended up to life. In the said context presumption regarding dowry death has been specified in Section 113-B of Evidence Act which is relevant, however reproduced as under:

"113B. Presumption as to dowry death.- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death."

Bare reading of the aforesaid, for determination that the accused has

committed a dowry death of a woman it is required to be seen that soon before her death she was subjected to cruelty and harassment in connection with any demand of dowry by accused. On bringing such evidence the presumption causing death by the accused would be in favour of the prosecution. Thus, to prove the charge under Section 304-B of IPC and to draw presumption of dowry death as enumerated under Section 113B of Evidence Act the evidence brought in a particular case on record is required to be seen.

9. In the present case the intimation regarding death was given to the Police Station regarding the incident by Yashpal Sharma (PW-1), who is a neighbour residing in front of the house of the deceased as well as the accused. He had first reached on the spot and found that since the bathroom bolted from inside, burn smell is coming, however, with the help of two other persons the door was broken by pushing and after pouring the water over the body and the flames deceased was shifted to the hospital. In his statement it has also come on record that by pouring kerosene over the body deceased received burns, and on account of burn injuries deceased Manju succumb to death. The dying declaration (Ex. P-11) was recorded by Anil Patwa, Naib Tahsildar (PW-8), as per his statement but the Sessions Court has not found it worthy to rely upon for the purpose of proving the charge under Section 302 and 306 of IPC. On the point of proving the charge under Section 304-B the prosecution has brought the statement of Rampal (PW-12), who in his statement stated that the marriage of his daughter was solemnized about two and half year back. It is also stated by him that the deceased had conveyed him regarding cruelty due to non- fulfilling the demand of a buffalo and motorcycle. Rambabu (PW-13) in his statement has stated that the deceased was facing physical and mental agony on account of demand of dowry of a motorcycle and a buffalo and the said fact was conveyed by her as and when came at his place. In addition to it in the dying declaration (Ex. P-11) the question relating to demand of dowry has been relied upon by the Sessions Court wherein it was stated by the deceased that her husband has refused to live with her because her father and brother have not given anything in marriage and at the time of incident he was present and put her into fire in the bathroom. However, in the context of the aforesaid evidence brought on record it is to be seen whether the said evidence is sufficient to prove the charge against the accused under Section 304-B of IPC drawing the presumption. However various judgments of the Hon'ble Apex Court are required to be analyzed on

10. The explanation to the said section says that the word "dowry death" shall have the same meaning as in Section 304-B IPC which means such death should be otherwise than in normal circumstances and within seven years of marriage. On a conjoint reading of these sections, it is clear that for drawing a presumption under Section 113-B of the Evidence Act firstly, there should be death of a woman otherwise than in normal circumstances, within seven years of marriage and the prosecution having shown that soon before her death she was subjected to cruelty or harassment in connection with any demand for dowry by persons accused of having committed the offence. Unless and until these priliminary facts are established by the prosecution, it is not open to the courts to draw a presumption agaisnt the accused invoking Section 113-B of the Evidence Act. We are supported in this view of ours by a judgment of a three-Judge Bench of this court in the case of *Ramesh Kumar V. State of Chhattisgarh* wherein this Court held thus: (SCC pp. 626-27, para 12)

"Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption- Is not mandatory; It is only permissive as the exployment of expression 'may presume' suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to 'all the other circumstances of the case'. A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from

drawing the presumption. The expression- 'the other circumstances of the case' used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase 'may presume' used in Section 113-A is defined in Section 4 of the Evidence Act, which says-'Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.'" (emphasis in original)

11. The above case, of course, deals with Section 113-A of the Evidence Act. However, the principle laid down therein squarely applies to cases involving Section 113-B of the said Act also insofar as they relate to the proof of facts enumerated in the section before a presumption is drawn.

12. From the above, it is clear that certain conditions precedent by way of proved facts should be brought on record before the Courts can draw a presumption under Section 113-A or 113-B of the Evidence Act.

17. Having noticed the requirement of law both under Section 304-B IPC as also under Section 113-B of the Evidence Act, we are of the considered opinion that both the courts below erred in drawing an adverse presumption against the accused by shifting the onus on them to prove the date of marriage, which, in our opinion, is not the requirement of law. On the contrary, the law requires the prosecution to establish first by cogent evidence that the death in the case occurred within seven years of the marriage. Therefore, we will have to consider whether the prosecution has established the factum of Darshana having died within five years of her marriage as contended by PW 4. A perusal of his evidence shows that according to him marriage of Darshana was solemnized in the year 1982 but he was not aware which samvat it was. He says

it was the month of Jaistha but was not sure whether it was Samvat 2035. He specifically states that a bahi entry was made by his nephew Satbir in regard to the date of marriage and expenses incurred in connection therewith, but this document was not produced in the court. Existence of such a document is established not only from the evidence of PW 4 but also from the evidence of the investigating officer, PW 10 who says that he was made known of the existence of such a document but he did not either seize the said document or verify the date of marriage from the said document. He also states that he made an enquiry about the year of marriage of Darshana and nobody was able to tell the date but the year of marriage was told to him. He goes further to state that he did not record the statement of those persons who told him about the year of marriage. Therefore, it is clear that the prosecution has failed to produce the available evidence regarding the date of Darshana's marriage and thereby failed to discharge its initial onus of proof. The defence in this case has unequivocally challenged the correctness of the date of marriage, as stated by the prosecution. It even examined defence witneses in this regard. Be that as it may, the question whether the defence has been able to establish its version of the date of marriage is immaterial because in the first instance it was for the prosecution to establish this fact which for the reasons stated above, it has failed to do. Both the courts below, thus, have clearly erred in shifting the onus of proving the date of marriage on the defence and drawing a presumption against it. This is evident from the finding of the trial court which is as follows:

"Accused Baljeet in this case has not been able to rebut the mandatory presumption under Section 113-B of the Indian Evidence Act thus prosecution has been able to prove his guilt."

This finding which is concurred to by the High Court, in our opinion, is wholly erroneous and unsustainable in law."

In the case of *State of Rajasthan Vs. Teg Bahadur and others* [2005 SCC (Cri) 218] the Court relying upon the judgment of *Hira Lal v. State (Govt. of NCT, Delhi,* (2003) 8 SCC 80 has observed that: -

"18. Our attention was drawn to Section 113-B of the Evidence Act and Section 304-B of the Indian Penal Code by the learned counsel appearing for the accused. A conjoint reading of Section 113-B of the Indian Evidence Act and Section 304-B of the Indian Penal Code shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". For the above proposition, learned counsel appearing for the accused, cited the judgment of this Court in the case of *Hira Lal v.State (Govt. of NCT, Delhi.* In that case this Court observed thus: (SCC pp. 86-87, para 9)

"The expression 'soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution. 'Soon before' is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to the expression 'soon before' used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods 'soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession'. The determination of the period which can come within the term 'soon before' is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice,

however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."

20. On a careful scrutiny of the statements of the aforesaid witnesses, it is seen that witnesses have given different statements regarding demand of dowry. According to him, with respect to dowry, dispute was raised at the time of marriage. According to Om Prakash, when Suman returned to her parents' house, she complained about demand of dowry by the in-laws. There is no corroboration about the statement of Om Prakash by the statement of his wife Smt. Hira Bai. Under these circumstances, we are of the opinion, that there is lack of evidence to prove the demand of dowry and that the evidence led by the prosecution bristles with discrepancies and contradictions. On the basis of the evidence, it could not be treated to have been proved that actually the accused had made a demand of dowry and that was made soon before the death and due to this, the deceased was harassed."

Thereafter, in the case of *M. Srinivasulu Vs. State of A.P.* [AIR 2007 SC 3146] has observed that: -

"9. The necessity for insertion of the two provisions has been amply analysed by the Law Commission of India in its 21st Report dated 10th August, 1988 on 'Dowry Deaths and Law Reform'. Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related deaths, legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background presumptive Section 113B in the Evidence Act has been inserted. As per the definition of 'dowry death' in Section 304B IPC and the wording in the presumptive Section 113B of the Evidence Act, one of the essential ingredients,

amongst others, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment "for or in connection with the demand of dowry". Presumption under Section 113B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

(1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304B IPC).

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

10. A conjoint reading of Section 113B of the Evidence Act and Section 304B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113B of the Evidence Act and Section 304B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for

raising a presumption under Section 113B of the Evidence Act. The expression 'soon before her death' used in the substantive Section 304B IPC and Section 113B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon after' used in Section 114 (illustration (a)) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

14. The prosecution version primarily rests on three documents i.e. exhibits 2, 3 and 4 dated 3.1.1990, 20.6.1991 and 25.10.1990 respectively. A careful reading of these documents which were letters by the deceased show that there was in fact no allegations of any demand of dowry made by the accused. Exhibit 3 i.e. the letter dated 20.6.1991 is very significant. Grievance in the said letter was not to any demand of dowry. In fact the deceased had clearly written that she was forced to marry with the accused against her wish and that created a lot of problems for her. The underlying essence of the letter is that the deceased was not willing to get married and wanted to continue her studies and she was married against her wish. There is one significant statement in the letter, which is to the effect that the deceased did not want to go to her parental home for Gangamma festival as her husband was taking due

care of her. In exhibit 4 i.e. letter dated letter dated 25.10.1990 she has clearly stated that she was all right and was happy in her in laws place and her in laws were taking good care of her and she on the other hand stated that somehow or other she does not want to live in the marital home. In Exhibit 2 i.e. letter dated 3.1.1990 also she had stated that she was happy. In fact she wrote to her father that he should take good care of her mother."

As per the aforesaid judgments of Hon'ble the Apex Court, it is clear that in the case where a woman has died other than the normal circumstances within seven years, the evidence with respect to cruelty, harassment soon before her death regarding demand of dowry ought to be established for the purpose of bringing the charge under Section 304-B of IPC at home. After proof of the aforesaid ingredients, the presumption of dowry death as specified under Section 113-B of Evidence Act may be drawn by the Court. In absence of proving the ingredients, the presumption cannot be drawn.

11. In the context of the aforesaid precedents of law by Hon'ble Apex Court the evidence brought by the prosecution is required to be examined. On reading of the dying declaration it reveals that the husband of the deceased has denied to live with him because the father and brother of the deceased has not given him dowry. It is not reflected from the said dying declaration that the accused has made any demand which was refused though it is a requirement contemplated and enumerated under Section 304-B of IPC. In addition to it if we go through the statement of the father Rampal (PW-12) the allegation of demand of buffalo and motorcycle has been made but when such demand was made it has not been made clear in his statement. Similar is the statement of Rambabu (PW-13) brother of deceased. Thus, looking to the statement of both these brother and father it cannot be accepted that the evidence of cruelty, harassment coupled with demand of dowry soon before her death is available. It can safely be observed here that in a case of dowry death to interpret the phrase 'soon before her death' the demand must be in consonance to the incidents occurred. It can further be a persistent demand soon before commission of an incident, in absence thereto the presumption for dowry death as specified under Section 113B of Evidence Act would not come into the picture. It is made clear here that presumption for dowry death as specified under Section 113B of Evidence Act was operated only when the prosecution has brought some evidence to prove the charge of Section 304-B of IPC of cruelty, harassment and demand of dowry resulted soon before the death.

In the present case as per the evidence of the father Rampal (PW-12) and the brother Rambabu (PW-13) the aforesaid ingredients has not been established discharging the onus to draw presumption under Section 113B of Evidence Act.

12. In addition to the aforesaid, if we see the statement of the Yashpal Sharma (PW-1) who is the person reached on the spot first, it is clear that the deceased was inside the bathroom and bolted the door, which was broken with the help of two other persons. The aforesaid fact has been reiterated by the Forensic Expert Prakashchandra Dubey (PW-9). It is categorically stated by him that after perusal of the spot it was found that the dead body was inside the bathroom and the flames were there and the door of the bathroom was closed from inside, which was broken by the neighbours while bringing the body of the injured outside from the said bathroom. In addition to it looking to the statement of Dr. S.K. Agrawal (PW-11), it is clear that the body of the deceased was burnt by 99%. However, in such circumstances the dying declaration recorded, creates doubt looking to the other prosecution evidence itself, which has been partly relied upon by the trial Court and partly disbelieved. In the facts and circumstances of the present case primary evidence of burn of the deceased is available inside the bathroom, which is only 3 x 3 feet and its door was broken by the neighbours and the said fact has been conquered by the Forensic Expert. Thus, in the considered opinion of this Court relying upon the said dying declaration only wherein even the allegation of demand of dowry soon before death is not available, the conviction of accused is not in fair administration of justice. Therefore, the finding recorded by the trial Court partly relying upon the said dying declaration only to prove the charge u/S 304-B of IPC is unsustainable in law. In the said sequel of facts in the light of judgment of Hon'ble the Apex Court in the case of *Sham Lal* (supra), *Teg Bahadur* (supra), *M.Srinivasulu*.(supra), *Hira Lal* (Supra) and *Baljeet Singh* (supra), the presumption under Section 113-B of Evidence Act is not attracted in absence of proving the ingredients of the said charge.

13. Accordingly, the appeal filed by the accused/appellant succeeds and is hereby allowed. The conviction and the sentence directed by the Trial Court is hereby set aside. The appellant is acquitted from the charge under Section 304-B of IPC and in consequence to it the bail bonds furnished by the appellant stand discharged.

*Appeal allowed.*

**I.L.R. [2014] M.P., 509**
**APPELLATE CRIMINAL**
***Before Mr. Justice U.C. Maheshwari & Mr. Justice B.D. Rathi***
Cr. A. No. 440/1999 (Gwalior) decided on 8 May, 2013

SHANKAR DHOBI & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

***Criminal Procedure Code, 1973 (2 of 1974), Section 222*** - **Offence proved included in offence charged - Held - At the time of appreciation of evidence the trial court or appellate court comes to the conclusion that the accused have committed the offence of same cognate in which lesser punishment is provided and the charge of major section is framed then without modifying the existing charge, the accused could be convicted for the lesser punishment - Further held, if the charge is framed by ignoring the material circumstances of the FIR and charge sheet u/s 173 then at any subsequent stage of the case or even in appeal if it is found that charges are not correctly framed then the impugned judgment liable to be set aside and the matter be remanded back for framing correct charges and trial afresh.**

**(Paras 10/11)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 222 – साबित अपराध को आरोपित अपराध में समाविष्ट किया गया* – अभिनिर्धारित – साक्ष्य के मूल्यांकन के समय, विचारण न्यायालय या अपीली न्यायालय यदि इस निष्कर्ष पर पहुंचता है कि अभियुक्त ने समान सजातीय अपराध कारित किया है, जिसमें लघुतर दण्ड उपबंधित है किन्तु गुरुत्तर अपराध की धारा का आरोप विरचित किया गया है तब विद्यमान आरोप को परिवर्तित किये बिना, अभियुक्त को लघुतर दण्ड के लिये दोषसिद्ध किया जा सकता है – आगे अभिनिर्धारित किया गया कि यदि धारा 173 के अंतर्गत प्रथम सूचना रिपोर्ट एवं आरोप पत्र की तात्विक परिस्थितियों को नजरंदाज करके आरोप विरचित किया गया है तब प्रकरण के किसी भी पश्चातवर्ती प्रक्रम पर या अपील में भी यदि यह पाया जाता है कि आरोपों को सही रुप से विरचित नहीं किया गया है तब आक्षेपित निर्णय अपास्त किये जाने योग्य है और मामले को सही आरोप विरचित करने तथा नये सिरे से विचारण हेतु प्रतिप्रेषित किया जावे।

*N.P. Dwivedi & S.K. Tiwari,* for the appellants.
*B.K. Sharma,* G.A. for the respondent.

**ORDER**

The Order of the Court was delivered by,

**U.C.MAHESHWARI, J.:-** The appellants - accused have filed this appeal under Section 374 (2) Cr.P.C., being aggrieved by the judgment dated 2.9.1999 by Special Judge, (constituted under the provision of S.C. & S.T. (Prevention of Atrocities) Act, in short "The Act", and Sessions Judge, Shivpuri in Special Case No. 80/95, whereby the appellant no. 1, Shankar has been convicted and sentenced under Section 376 (1) of the IPC, r/w Section 3 (2) (v) of the Act with a direction to undergo for life imprisonment with fine of Rs.5000/-. In default of depositing the same, for further six months RI has been award, while appellant nos. 2 and 3 Dabbe © Damodar and Raghveer Singh have been convicted and sentenced under Section 376/114 of IPC, r/w Section 3 (2) (v) of the Act with a direction to suffer the same punishment, as awarded against the appellant no.1.

2. The facts giving rise to this appeal in this appeal in short are that on dated 1.10.1995 at about 7 o'clock in the morning, the prosecutrix Ràmvati, (PW-7) lodged the FIR at P.S. Pohari contending that in the midnight of 30.9.1995 and 1.10.1995, she was all alone at her residence while her husband had gone to the Hanuman Temple of the village to participate in some prayer. In the evening of 30.9.1995 after taking her meals, she went to sleep. At about 12 o'clock in the night the appellants Shankar Dhobi, Dabbe @ Damodar and Raghuveer Singh entered in her house. Out of them, the appellant no. 1, Shankar started doing Masaj of her breasts while the accompanied appellant no. 2 Dabbe @ Damodar and appellant no. 3, Raghuveer were standing there near the cot. The prosecutrix tried to run away from such place but she was caught hold by the appellant no. 2, Raghuveer. After catching her legs, he pressed her on the cot. Thereafter appellant no. 1, Shankar committed sexual intercourse on her contrary to her wish. The prosecutrix cried. At the same time, her husband, Gendalal (PW-8) and brother in law Jankee Lal came there from Hanuman Temple. Then the appellants tried to run away from such place. Out of them, her husband caught hold the appellant no.1, Shankar but later on he also flade away. On such report, the offence of Section 376/34 of IPC was registered against all the three appellants. The prosecutrix was sent to the hospital where after carrying out her medical examination, the MLC report was prepared. The investigation was carried out. On completion of the same, on establishing charges of Section 376/34 of IPC and 3 (1) (xii) of the

Act, the appellants were charge sheeted for the same.

3. After committing the case to the Sessions Court, on evaluation of the charge sheet, charge of Section 376 of IPC and Section 3 (2) (v) of the Act were framed against the appellant no. 1, Shankar while charge of Section 376/114 of IPC and Section 3 (2) (v) of the Act were framed against appellant nos. 2 and 3. They abjured their guilt, on which trial was held. After recording the evidence, on appreciation of the same, the appellants were held guilty and punished as mentioned above. Being dissatisfied with such conviction and sentence, the appellants have come to this court with this appeal.

4. We have heard Shri N.P. Dwivedi and Shri S.K. Tiwari, appearing counsel for the appellants as well as Shri B.K. Sharma, learned Govt. Adv for the respondent-State at length. Keeping in view their arguments, on perusing the record in the following circumstances, we deem fit to remand the matter after setting aside the impugned judgment of the trial court to decide the case afresh.

5. It is apparent from the averments of the FIR that all the appellants entered in the house of the prosecutrix, Ramvati Bai when she was all alone in her residence and after entering her house, the appellants nos. 2 and 3 remained inside her house while the appellant no. 1, Shankar started Masaj of the breasts of the prosecutrix and in continuation of the same, he committed sexual intercourse on her without her consent. While performing such sexual intercourse as per available evidence, she was caught hold by the appellant nos. 2 and 3 from the upper side and lower side and in such premises, the appellant nos. 2 and 3 assisted and facilitated the appellant no. 1 in committing the aforesaid alleged sexual intercourse on the prosecutrix without her consent and wish. After holding the investigation, prima facie such circumstance was found to be established on which the Police Report, under Section 173 of Cr.P.C., charge sheet was filed under Section 173 of the Cr.P.C. for prosecution of the appellants under the above mentioned Sections.

6. It is apparent from the record that subsequent to the committal of the case to the Sessions Court, on evaluation and preparing the papers of the charge sheet and Police Report filed under Sections 173 of Cr.P.C., the charge of Section 376 of IPC, r/w Section 3, 2 (v) of the Act were framed against the appellant no. 1, Shankar, while charge of Section 376/114 of IPC, r/w Section 3, (2) (v) of the Act were framed against the remaining appellants. It appears that while framing such charge, the provision of Section 376 of IPC

was not perused by the trial court in its entirety, if the same was seen or perused by the trial court, then in the available circumstances, the trial court ought to have been framed the charge against the appellants for the offence of Section 376 (2) (g) of IPC alongwith above mentioned Sections of the Act.

7. Before proceeding further, We deem fit to reproduce the concerning part of Sub Section 2 of Section 376 alongwith its explanation no. 1 of IPC. The same is read as under:

376. **Punishment of rape:-**

(1) .....

(2) **Whoever :-**

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) Commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable for fine.

Provided .....

**Explanation 1:-** Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the 'meaning of this sub section.

8. In view of aforesaid language of the provision, if the case at hand is examined only on the basis of charge sheet, then it is apparent that all three appellants had entered in the house of the prosecutrix with intention to commit rape on her and after entering in her house, out of them, appellant no. 1, Shankar after doing masaj of the breasts of prosecutrix had committed rape

on her while the remaining appellants were present inside her house and remained active to assist and facilitate the appellant no. 1, Shankar with their act to commit such sexual intercourse on the prosecutrix. So in such premises, the trial court, instead to frame the charge of Section 376 (1) or Section 376 (1)/114 of IPC, was bound to frame the charge of Section 376 (2) (g) of IPC against each of the appellants because such provision was in force on the date of the incident and lodging the FIR. So in such premises, it is apparent that the trial of the impugned case was not held by the trial court by framing the appropriate and proper charge on the basis of Police Report and the charge sheet. Subsequent stage of trial, at any point of time such mistake was not pointed out before the trial court either by the prosecution or on behalf of the defence. In such premises, the trial was held only with respect of the offence made punishable under Section 376 (1) and 376/114 relating to the abatement of the offence and for the offence under Section 3 (2) (v) of IPC.

9. It is apparent from the provision that under Section 376 (1), the accused of the rape, (if it is not gang rape or other types of rape), described under Sub Section 2 of Section 376 of IPC may be punished by the court with the minimum punishment of seven years which may be extended upto the life imprisonment but under Section 376 (2) (g) of IPC. Minimum punishment upto ten years which may extend upto life imprisonment has been prescribed. So in such premises, this case was the case of framing the charge of Section 376 (2) (g) of the IPC, in which, in comparison of Section 376 (1) of IPC, some higher punishment has been prescribed, but the trial court has- proceeded in the matter after framing the charge of minor punishment of Section 376 (1) and Section 376 (1)/114 of IPC. In the aforesaid premises, this court has to answer the question that on the basis of aforesaid framed charge by the trial court, in the light of the available evidence, whether this court can consider the matter, keeping in view the provision of Section 376 (2) (g) of IPC, when such charge of Section 376 (2) (g) have not been framed against the appellants unless such question is answered, this court can not consider the question for extending the acquittal or to affirm the impugned conviction of the appellants. In such a situation, court has to consider whether Section 386 of Cr.P.C., the case should be remanded back to the trial court with a direction to frame the charge of Section 376 (2) (g) of IPC at the place of Section 376 (1) and Section 376/114 of IPC against the appellants and decide the case afresh after extending additional opportunity to the parties to adduce their evidence on the aforesaid amended charge.

10. It is settled proposition of law based on the spirit of Section 222 of Cr.P.C. that on appreciation of the evidence either the trial court or the appellate court comes to the conclusion that the accused like appellants have committed the offence of the same cognate, in which some lesser punishment is provided and the charge of major Section of such cognate was framed then without modifying the existing charge of framing the charge of the Section of lesser punishment, accused could be convicted under the Section of lesser punishment because the ingredients of such Section of lesser punishment is included in the Section of major punishment. For example, if the charge of Section 376 (2) (g) is framed and after trial, on appreciation, the offence is found to be committed of Section 376 (1) of IPC, then without framing the charge of such Section 376 (1) of IPC on the basis of same charge of Section 376 (2) (g) of IPC, the accused could be convicted under Section 376 (1) of IPC. As such no modification in the existing charge is required and pursuant to it, fresh trial is also not required. But if the charge is framed by ignoring the material circumstance of the FIR as well as other papers of the charge sheet filed with the Police Report under Section 173 of Cr.P.C. for the offence of the Section, in which the lesser punishment is provided, then at any subsequent stage of the case even in the appeal, if it is found that the correct charge was not framed in the matter and if the court also comes to conclusion that after framing the correct charge, the case decided afresh, then there is no option with the court except to set aside the impugned judgment and remanded the matter to the trial court with the direction to replace the framed charge by framing correct charge against the accused like the appellants and decide the same afresh.

11. True it is that the impugned judgment was passed long before, i.e. in the year 1999 and the alleged incident had occurred in the year 1995 but mere on the basis of such delay by ignoring the aforesaid illegality of the trial court the case of the accused like appellants could neither be taken into consideration for extending the acquittal or to affirm their conviction.

12. In view of aforesaid discussion, without expressing any opinion on the available evidence of record or giving any findings on merits on the facts of the case, by allowing this appeal in part, the impugned judgment is set aside and the case is remitted back to the trial court with a direction to frame the charge of Section 376 (2) (g) of IPC against the appellants at the place of Section 376 (1) and 376 (1)/114 of IPC respectively, keeping the charge of Section 3 (2) (v) of the Act for the trial against them and after extending the

opportunity to the parties to adduce their additional evidence on such modified charge and decide the matter afresh. The trial court is further directed to decide the matter afresh on its own merits without influencing from any observation or the findings given by such court in the impugned judgment or by this court in the present order. It is specifically observed that the trial court shall also be at liberty to decide the question relating to the charge of Section 3 (2) (v) of the Act afresh without influencing from any observation or the findings given by such court in the impugned judgment or by this court in this order. It being the old case, the trial court is directed to decide the matter in compliance of the aforesaid direction within six months from the date of receiving the record of the case alongwith copy of this order. Office is directed to send back the record alongwith copy of this order immediately to the trial court.

13. At the request of the counsel present, the parties are directed to appear before the trial court, i.e. before the Special Court (constituted under the Act), Shivpuri. If such court is not functioning their, then before Sessions Court of Shivpuri on 20.6.2013, so also on other dates as are fixed by such court in this regard till disposal of the trial. The bail bonds of the appellants are continued till 20.6.2013 and pursuant to it, each of the appellants is directed to furnish his personal bond of Rs. 20,000/- alongwith one surety of the like amount to the satisfaction of the aforesaid trial court in accordance with the terms and the provision of Section 437 and 439 of Cr.P.C.

14. The appeal is allowed in part as indicated above.

*Appeal partly allowed.*

**I.L.R. [2014] M.P., 515**
**APPELLATE CRIMINAL**
***Before Mr. Justice U.C. Maheshwari & Mr. Justice B.D. Rathi***
Cr. A. No. 643/1998 (Gwalior) decided on 15 May, 2013

RAFIQ ...Appellant
Vs.
STATE OF M.P. ...Respondent

*A.* ***Evidence Act (1 of 1872), Section 32 - Dying Declaration*** **- Recorded by the police and supported by other evidence is admissible in evidence - Merely on hyper technical grounds it cannot be disbelieved - Held - Could be a basis for conviction. (Para 17)**

*क. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन* – पुलिस द्वारा अभिलिखित किया गया और अन्य साक्ष्य द्वारा पुष्टि की गई, साक्ष्य में ग्राह्य है – मात्र अति तकनीकी आधारों पर अविश्वास नहीं किया जा सकता – अभिनिर्धारित – दोषसिद्धि का आधार हो सकता है।

***B. Evidence Act (1 of 1872), Section 32 - Dying Declaration*** **- Mere satisfaction of Magistrate regarding physical fitness of the person to record dying declaration is sufficient - Statement has been proved - Then, there is no need to obtain fitness certificate or medical examination by the Doctor. (Paras 17/21/23)**

*ख. साक्ष्य अधिनियम (1872 का 1), धारा 32 – मृत्युकालिक कथन* – मृत्युकालिक कथन अभिलिखित किये जाने के लिये व्यक्ति की मात्र शारीरिक योग्यता के संबंध में मजिस्ट्रेट की संतुष्टि पर्याप्त है – कथन साबित किया गया है – तब, चिकित्सक का योग्यता प्रमाण पत्र अभिप्राप्त करने या उसके द्वारा चिकित्सीय परीक्षण की आवश्यकता नहीं।

**Cases referred :**

(1996) 1 SCC (Cr.) 31, AIR 2002 SC 2078, 2011(2) MPHT 43, AIR 2002 SC 2973, AIR 2003 SC 1074, AIR 1962 SC 1252, AIR 1998 SC 1850, AIR 1992 SC 1817.

*V.K. Bhardwaj* with *Anvesh Jain,* for the appellant.
*B.K. Sharma,* G.A. for the respondent.

**JUDGMENT**

The Judgment of the Court was delivered by, **U.C. MAHESHWARI, J. :-** This judgment shall decide aforesaid both the Criminal appeals bearing No.643/1998 (Rafiq S/o Subrati Vs. The State of Madhya Pradesh) and No.03/1999 (Smt. Kallo Bai Wd/o Subrati Vs. The State of Madhya Pradesh), arising out of the impugned judgment.

2. Appellants have filed this appeal under Section 374 of Cr. P. C. being aggrieved by the judgment dated 8.12.1998 passed by 1st Additional Sessions Judge, Gwalior in S.T. No.207/1988 whereby the appellant of Cr. A. No.643/98 has been convicted and sentenced under Section 498-A of IPC for RI two years with fine of Rs.200/- while the appellant of Cr. A. No.03/99 has been convicted and sentenced under Section 302 and 498-A of IPC for life imprisonment with fine of Rs.200/- in earlier section and RI two years with fine of Rs.200/- in later.

3. The facts giving rise to these appeals in short are that, the deceased Manno Bai was married with appellant Rafiq on 22.2.1987. Subsequent to marriage she was residing in her matrimonial home along with the appellant Rafiq and his mother Kallo Bai. The father of the deceased Anwar (PW2) had given all necessary things in the dowry but a Television set was not given. So subsequent to marriage the deceased was asked by the appellants that her parents have given lessor dowry and Television was not given. Due to that the deceased was subjected to harassment in the matrimonial home. On receiving such information by her father Anwar (PW2), he visited her residence and tried his level best to satisfy the appellant Rafiq, at that time he was asked by appellant Kallo Bai to take away his daughter from her residence and they will got second marry of Rafiq. Subsequent to that appellant Rafiq had left Mannobai to her parental home where she resided for two three months but near about before two months from the date of the incident i.e. 29.2.1988, the appellant after giving the assurance that they will not harass her in future took her with him to matrimonial home. Subsequent to that and before fifteen days of alleged incident nephew of aforesaid Anwar Chhote Khan (PW9) apprised him Manno Bai has sent the intimation that she is under fear of her life in the matrimonial home, so she should be brought her back on some early date. Subsequent to that on 29.2.1988 said Anwar on receiving the information from Ravindra Goswami that Manno Bai has been taken to hospital in burn condition then after apprising such incident to his brother Noor Mohd went to Kamla Raja hospital Gwalior where Manno Bai was admitted. In hospital he was apprised by Manno Bai that since last three days appellant Rafiq was carried out her beating and today Kallo Bai after pouring kerosene with intention to kill set ablaze on her, resultantly she sustained burn injuries. The incident was immediately reported by Anwar at 11.30 am on the same day at Police Station Padaw, on which FIR (Ex.P.3) was registered against the appellants for the offence of Section 307 and 498-A of IPC. On the date of incident Ajay Singh (P.W.17), Station House Officer of aforesaid Police Station went to the place of the incident and prepared the spot map(Ex. P.6), so also seized the Can of kerosene, along with the plan and blood stained earth and the match box by preparing the seizure memo (Ex.P.7). The case diary statement of Manno Bai was also recorded in the hospital, in which she categorically stated that Kallo Bai after pouring kerosene on her set ablaze. On the request of the police to the Executive Magistrate as well as the doctor to record the dying declaration of Manno Bai, on the same day i.e. 29.2.1988 her dying declaration in presence of witnesses and Dr. M. K. Gupta was recorded by

P. L. Sharma (P.W2), Naib Tahsildar/ Executive Magistrate Gwalior, in which the deceased stated that Kallo Bai after pouring kerosene set ablaze on her. During the course of treatment Manno Bai succumbed to alleged burn injuries, on which inquest intimation No.7/88 was registered, in which autopsy of her corpus was carried out and its report (Ex. P.4) was prepared. After holding further investigation on completion of the same the appellants were charge sheeted for the offence of Section 302 and 498-A r/w Section 34 of IPC.

4. After committing the case to the Sessions Court on evaluation of the charge sheet initially on 4.8.1988 the charges of Section 302 in alternate of Section 302/34 and 498-A of IPC were framed against the appellants, on which they abjured the guilt, on which the trial was directed. Subsequent to it, during pendency of the trial vide dated 30.7.1996 additional charge of Section 304-B IPC was also framed against both the appellants, they again abjured the guilt, on which the trial was proceeded further. After recording the evidence on appreciation of the same by the impugned judgment the appellant Rafiq was held guilty for the offence Section 498-A of IPC while appellant Smt. Kallo was held guilty for the offence of Section 498-A and 302 of IPC and they were punished for their respective offence with the punishment as stated above. Being dissatisfied with such conviction and the sentence the appellants have come to this court with their above mentioned separate appeals.

5. Shri V. K. Saxena, Senior Advocate assisted by Shri Aditya Singh, learned counsel for the appellant Kallo Bai, after taking us through the record of the trial Court including the evidence of the prosecution as well as the defence so also exhibited papers argued that the prosecution has utterly failed to prove the alleged offence against the appellant Kallo, on proper appreciation of the evidence the trial Court ought to have acquitted this appellant. Initially, he said that taking into consideration the evidence adduced by the prosecution as accepted in its entirety even then the ingredients of alleged offence are not made out against this appellant. In continuation he said that there is no evidence on record to show that subsequent to marriage at any point of time the deceased was subjected to cruelty or harassment on account of dowry in the matrimonial home by this appellant. He further said that witnesses examined from the parental family of the deceased have deposed contrary to the case diary statement recorded under Section 161 of Cr. P. C. while some of the witnesses have not supported the case of the prosecution. Thus, in the lack of any admissible and cogent evidence with respect of alleged cruelty towards the

deceased by this appellant, her conviction under Section 498-A of IPC is also not sustainable. He further said that the conviction of this appellant under Section 302 of IPC is not sustainable on various counts. In this regard firstly he argued that there is no any eye witness who saw the incident, in which after pouring the kerosene on the deceased this appellant set ablaze on her. As such entire case is based on three sets of dying declaration, first set is of oral dying declaration, as alleged which was given by the deceased to her father Anwar (PW2) and her aunt Rashidan (PW11). According to them when they reached the hospital to meet Manno Bai then they were apprised by the deceased that after pouring the kerosene on her appellant Kallo set ablaze. In this regard he said that looking to the nature of burn injuries sustained by the person of the deceased it could be assumed that she was not in a position to speak, therefore the story put forth by the deceased to this witness could not have been relied upon by the trial Court but contrary to it, the same was relied on as supporting evidence of other dying declaration. He further said that as per deposition of Deepak Bhargav (DW6) the case diary statement of the deceased Manno Bai was recorded before registration of the offence, which does not appear to be natural. He further said before recording such case diary statement fitness certificate of the deceased has not been obtained from the doctor on the contrary it was specifically noted that both hands of the deceased Manno Bai are in burned condition and due to such reason her thumb impression or signature could not be taken on such case diary statement. Even on such statement it is not stated that the same was read over to Manno Bai and was admitted by her as correct. So in such premises, such case diary statement being not in accordance with law could not have been a foundation to draw any inference against this appellant. There is another dying declaration (Ex. P.12) is on record as alleged the same was recorded by Shri L. P. Sharma, Naib Tahsildar (P.W.12). Mere perusal of the deposition of such witness, it is apparent that it was not recorded by the aforesaid witness after taking the fitness certificate from the doctor regarding mental status of the deceased Manno Bai whether she is in a position to give the statement and even at bottom of the same no specific fitness certificate to show that during such statement she remained fit, was obtained from doctor. Mere on the basis of the signature of the doctor and Naib Tahsildar, this dying declaration could not be a foundation to hold guilty to the appellant. He further argued that the same was not written in the question-answer manner. In such premises and in the lack of fitness certificate and the the deposition of aforesaid Dr. M. K.

Gupta, who signed the dying declaration at the bottom mere on deposition of Naib Tahsildar L. P. Sharma, the same could neither be relied nor safe to hold conviction against the appellant. He further argued that aforesaid Anwar and Rashidan on recording their case diary statement to the police said that they have a doubt that Manno Bai sustained the burn injuries by the act of the appellant and on recording their deposition they have stated contrary to such case diary statements and implicated this appellant for setting ablaze on her. So in such premises also the story put forth by these witnesses in their Court deposition being contrary to the case diary statement could not be relied upon. So far, other witnesses are concerned, he said that various relative of the parental family have not supported the prosecution case and whatsoever evidence has come on record is not sufficient to hold the impugned conviction against this appellant. With these submission he prayed to extend the acquittal to this appellant by allowing this appeal. In support of his contention he placed his reliance on the reported decisions in the matter of *Kanchy Komuramma Vs. State of A. P. reported* in (1996) 1 SCC (Cr.) 31, in the matter of *Girdhar Shankar Tawade Vs. State of Maharashtra* reported in AIR 2002 SC 2078, so also in the matter of *Kanhaiya Lal Patel Vs. State of M. P.* reported in 2011 (2) MPHT 43.

6. Shri B. K. Bhardwaj, Senior Advocate assisted by Shri Anvesh Jain, learned counsel for the appellant Rafiq, after taking us through the record of the trial Court including the evidence of the prosecution as well as the defence so also exhibited papers by adopting the arguments advanced by above mentioned Senior counsel Shri V. K. Saxena argued that in view of inconsistency between the case diary statement and the deposition of Anwar PW2), Nanhi Bai (PW4), the mother of the deceased, Rashidan aunt of the deceased, they could not be relied on. He further said that even on taking into consideration the evidence adduced by the prosecution is accepted in its entirety even then, offence of Section 498-A of IPC is not made out against this appellant. He also referred the deposition of aforesaid witnesses and prayed to extend the acquittal to this appellant. He also placed his reliance on some reported decision.

7. On the other hand responding the aforesaid arguments by justifying the impugned conviction and sentence of the appellant Shri B. K. Sharma, learned Govt. Advocate said that the same being based on proper appreciation of the evidence is in conformity with law does not require any interference

either for extending the acquittal to the appellant or modifying the impugned conviction in some other section and prayed for dismissal of this appeal.

8. Having heard the counsel keeping in view their arguments, we have carefully gone through the record of the trial Court including the evidence and exhibited documents.

9. True it is that entire case of the prosecution is based on circumstantial evidence, so also on aforesaid three dying declaration of the deceased, out of them as alleged first oral dying declaration of the deceased Manno Bai was made in the hospital to her father Anwar (PW2) and her aunt Rashidan (PW11), as stated by these witnesses in their case diary statement. On receiving the information of brining Manno Bai after sustaining the burn injuries, the Police went to the hospital and recorded her interrogatory statement (Ex. D.3) the same could also be treated to be the dying declaration and third dying declaration (Ex.P.12) was recorded by L. P. Sharma, Naib Tahsildar (PW12).

10. So far oral dying declaration made by Manno in the hospital to her father Anwar (PW2) and aunt is concerned, on recording the deposition of Anwar he categorically stated in paragraph one that her daughter got married with the appellant Rafiq on 20.2.1987. In her marriage all the articles were given by him, he is not in a position to remember the same but said that list of the articles was given. Subsequent to marriage Manno Bai visited her residence, on such visit she apprised him that on account of demand of dowry she is subjected to beating by the appellant Rafiq while she is subjected to harassment by her mother-in-law. Manno Bai was also resided with him near about three months and thereafter on giving assurance by Rafiq she was sent to matrimonial home but again she was subjected to harassment in the matrimonial home for which she sent the information to him through his nephew Chhotelal intimating to take her because her life is in danger. Subsequent to such information only after three four days, Manno Bai was killed by Rafiq by setting ablaze on her. On receiving information he reached to hospital where she was admitted, on which she apprised him that she has been burnt by her mother-in-law appellant Kallo while she was subjected to slap and thereafter he went to the Police Station Padaw and lodged FIR (Ex.P.3) while Rashidan (PW11) aunt of the deceased on recording her deposition she stated that in the life time of Manno apprised her that her husband and mother-in-law are not keeping her properly and she has been subjected to harassment, on which she resided for two months in the parental home where for some days the appellant Rafiq was

also resided but after giving assurance that she will be kept properly in the matrimonial home the appellant took her away while Manno was not inclined to go with him saying that if she will come back, inspite that she was sent to the matrimonial home by her parents. Thereafter, she was killed by setting fire. On receiving such information she accompanied with her sister-in-law (Devrani) and Nanhi Bai went to the hospital. In her cross-examination she categorically stated that she was apprised by Manno that she has been killed by setting ablaze by appellant Kallo while she was subjected to slap by appellant Rafiq. So accordingly, both the witnesses have stated about oral dying declaration given by the deceased Manno to them in the hospital. They have also stated about cruelty and harassment given by the appellants to the deceased in the matrimonial home.

11. Coming to consider the interrogatory statement of the deceased Manno (Ex. P.3), recorded by Deepak Bhargav (DW6), Sub Inpector of police. True it is, that the same was recorded without obtaining any certificate regarding health condition of Manno and it is also stated that the hands of the deceased is in burn condition, thereby her thumb impression could not be taken on it but the fact remains that trial Court has only treated to be supporting dying declaration to the dying declaration recorded by the Naib Tahsildar Shri L. P. Sharma and therefore in other available circumstances of the matter (Ex. D. 3) also appears to be recorded by the police official. Accordingly, Deepak Bhargav (DW6) he himself on on receiving the information he went to the hospital and according to his deposition of para four such case diary statement was recorded by him. We have not found any evidence to show that Deepak Bhargava Sub Inspector have any enmity with any of the appellants. Therefore, it could not be said that such statement was falsely prepared by the witness just to implicate the appellants. In such interrogatory statement (Ex.D.3) Manno Bai categorically stated that appellant Rafiq is her husband and subsequent to marriage her mother-in-law harassed her, today when I was in the kitchen my mother-in-law came from the back side and after pouring the kerosene set ablaze with match box, on which she cried, her clothes were also burnt then she became unconscious.

12. Coming to consider the dying declaration of the deceased (Ex.P.12), recorded by Shri L. P.Sharma, Naib Tahsildar/ Executive Magistrate. On perusing the same it is apparent that the same has not been stated/ recorded in the question answer manner but in such statement Manno Bai stated her name,

husband's name, age and her address. In further averments she stated that whatsoever I will state it will be true, she further stated that on 29.2.1988 at about 8.00 O'clock in the morning she was subjected to slap by her husband while her mother-in-law after pouring the kerosene ablaze her. She herself stated that she is fully conscious and hearing the talk of the Magistrate and understand the same. The same is also having thumb impression of Manno at bottom and one side of such thumb impression Naib Tahsildar and another side Dr. M. K. Gupta have put their signature. Out of them aforesaid Naib Tahsildar has been examined to prove such dying declaration. It is undisputed fact on record that Dr. M. K. Gupta has not been examined to prove the same.

13. The appellant's counsel by referring the above mentioned cited cases argued that in view of the principle laid down in these cases and on account of non-production of the doctor as witness who signed the dying declaration (Ex. P.12) gives sufficient circumstances to draw the inference that such dying declaration is neither genuine nor could be taken into consideration against the appellant.

14. We have carefully gone through all the aforesaid cited cases but in view of the decision of the Five Judges Bench of the Apex Court in the matter of *Laxman Vs. State of Maharashtra* reported in AIR 2002 SC 2973, in the available circumstances of the present case any of the aforesaid cited case is not helping to the appellants. In above mentioned decision, the Apex Court has held as under:

> ".....But where the eye-witnesses state that the deceased was in a fit and conscious state to make the declaration,the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely necessary, although to assure

> authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

15. In view of the aforesaid law on examining the case at hand in view of the aforesaid discussion the same is applicable to the present case and also sufficient to act upon on the dying declaration (Ex. P.12) recorded by the Naib Tahsildar/ executive Magistrate.

16. Apart the aforesaid in the matter of *State of Karnataka Vs. Shariff* reported in AIR 2003 SC 1074, in which it was held as under :

> "21. It is true that PW 11 and PW 14 were Police personnel and a Magistrate could have been called to the hospital to record the dying declaration of Muneera Begum, however, there is no requirement of law that a dying declaration must necessarily be made to a Magistrate. In *Bhagirath v. State of Haryana* AIR 1997 SC 234 on receiving message from the hospital that a person with gun shot injuries had been admitted a head constable rushed to the place after making entry in the police register and after obtaining certificate from the doctor about the condition of the injured took his statement for the purposes of registering the case. It was held that the statement recorded by the head constable was admissible as dying declaration. Similar view was taken in *Munnu Raja & Anr. v.*

*State of Madhya Pradesh* 1976 (2) SCR 764, wherein the statement made by the deceased to the investigating officer at the police station by way of First Information Report, which was recorded in writing, was held to be admissible in evidence.

23. In *Padmaben Shamalbhai Patel v. State of Gujarat* 1991 (1) SCC 744 it was held that the failure on the part of the medical men to record the statement of the deceased in question and answer form cannot in any manner affect the probative value to be attached to their evidence. This view was reiterated in *State of Rajasthan v. Bhup Ram* 1997 (1) Crimes 62 and *Jai Prakash & Ors. v. State of Haryana* 1998 (7) SCC 284.

17. In the light of this decision the conviction could be based even on the basis of dying declaration of the deceased recorded by the police, as such there is no requirement to record the same by the Executive Magistrate. It is also held in this case that recording the dying declaration in question and answer form is not required and on that count also the dying declaration could not be discarded. It is also held that dying declaration of the deceased could not be discarded to draw any inference on the basis of the injury report or post mortem report of the deceased.

18. Long before in the matter of *Muniappan Vs. State of Madras* reported in AIR 1962 SC 1252 the Apex Court has held as under :

"6. The dying declaration in the present case was as follows :

"Sir,

This day 24th January, 1960, in the noon at 12.30 Muniappan, son of Kola Goundan of Kannankurichi stabbed me in my body with knife.

Soon after he said these words, his speech stopped. His life was gone.

(Left thumb impression of) Elumalai witnesses :

1. (Signed in Tamil) Muthuswami Udayar.

2. (Signed) K. R. Perumal.

3. (Signed in Tamil) C. Kannan.

4. (Left thumb impression of) Kundaswami.

24th January, 1960. (Signed) S. A. Amir Sub-Inspector."

Here, the accusation against the appellant was complete, and there is nothing to show that Elumalai wished to say anything more or that he had anything more to add. In so far as the dying declaration, goes, it is a complete statement, and makes a very clear accusation against the appellant. If this dying declaration is taken into account, then it hardly needs corroboration in view of the decision of this Court in *Khushal Rao v. State of Bombay* ([1958] S.C.R. 552). The Privy Council case, therefore, is clearly distinguishable on facts and does not apply to the dying declaration with which we have to deal. The Privy Council case was considered by this Court in *Abdul Sattar v. Mysore State* (A.I.R. (1956) S.C. 168), where also the dying declaration was incomplete but was quite categoric in character and definitely indicated that it was the accused in that case who had shot the deceased. The dying declaration was, therefore, acted upon. The learned counsel for the appellant attempted to distinguish *Abdul Sattar's* case (A. I. R. (1956) S. C. 168) on the ground that in that case there was corroboration of the dying declaration and contended that an incomplete dying declaration, if categoric in character, may be acted upon if corroborated but not if not so corroborated. In our opinion, corroboration would not always be necessary if the dying declaration is complete in its accusation and there is nothing to show that the maker of the statement had anything further to add....."

19. The question relating to the dying declaration on arising the occasion was also considered by the Apex Court in the matter of *Ram Bihari Yadav Vs. State of Bihar and others* reported in AIR 1998 SC 1850, in which it was held as under :

"11.From a plain reading of Exh.2 as well as the statement of PW 7, it is clear that the learned magistrate has satisfied himself about the identity of Smt. Shivratri Devi; he put

questions to her and satisfied himself about her condition that she was fit enough to make the statement. The statement itself consists of two sentence. Having regard to all the facts and circumstances both the courts below have relied upon the dying declaration and we find no cogent reason to take a different view of the matter. Having found that the dying declaration is true and acceptable there is no escape from the conclusion that the appellant was responsible for intentionally causing burn injuries to his wife Smt. Shivratri Devi, which resulted in her death."

20. Besides the aforesaid in the matter of *Smt.Paniben vs. State of Gujarat* reported in AIR 1992 SC 1817, the Apex Court has held as under:

"It would be a travesty of justice if sympathy is shown when cruel act like bride burning is committed. It is rather strange that the mother-in-law who herself is a woman should resort to killing another woman. It is hard to fathom as to why even the "mother" in her did not make her feel. It is tragic deep rancour should envelope in her reason and drawn her finer feelings. The language deterrence must speak in that it may be a conscious reminder to the society. Undue sympathy would be harmful to the cause of justice. It may even undermine the confidence in the efficacy of law. Mere fact that the accused, mother-in-law, has spent more than a decade in jail, cannotbe a ground to show any leniency."

21. In view of aforesaid dictum mere satisfaction of the Magistrate regarding physical fitness of the person to record the dying declaration is sufficient and if such statement has been proved by the Magistrate then in every case there is no necessity to obtain fitness certificate from the doctor or to prove fitness of the person by examining the doctor. In the aforesaid last cited case it was also held that mere on account of advance age of the accused like appellant Kallo no lenient view could be adopted by the Court either for holding conviction or imposing the punishment.

22. In the aforesaid premises dying declaration Es.P.12 recorded by Shri L. P. Sharma, Naib Tahsildar/Executive Magistrate could not be held to be

inadmissible. Mere such dying declaration is sufficient to hold the conviction agaisnt the appellant Kalloo.

23. In the case at hand as stated above besides the dying declaration Ex.P.12 recorded by the Executive Magistrate the story narrated by the deceased in the aforesaid dying declaration Ex.P.12, is also found to be supported with the dying declaration of deceased Manno recorded in the shape of case diary statement by Deepak Bhargav (DW6), in which in some different words same thing has been sated, as stated in the Ex. P.12. Thus mere on hyper technical ground any of the aforesaid dying declarations could not be disbelieved specially when the version stated in such dying declaration is further supported by Anwar (PW2), father of the deceased and Rashidan (PW-11), aunt of the deceased, as stated above. So in such premises, we are of the considered view that the trial Court has not committed any error in holding the impugned conviction under Section 302 against the appellant Kallo by relying on all three dying declarations. Therefore, findings of the trial Court in this regard being not required any interference at this stage, are hereby affirmed.

24. So far the question of sustainability of conviction and sentence of both the appellants under Section 498-A of IPC is concerned, It is apparent from written dying declarations (Ex.P.12) and (Ex.D.3) that on the date of the incident at the same place and the same time initially a slap was given by the appellant Rafiq to the person of the deceased and thereafter the appellant Kallo came from the back side and after pouring the kerosene set her ablaze. So, firstly this act at the same time and same place by the appellants gives sufficient circumstance to draw the inference against them that the deceased in her matrimonial home was subjected to cruelty, beating and harassment. Besides this, the Anwar (PW2) and Nanhi Bai (P.W.4), father and mother of the deceased respectively categorically stated in their depositions that in the life time deceased Manno Bai apprised them regarding cruelty, beating and harassment carried by the respective appellants on her. So in these premises, the approach of the trial Court holding guilty to both the appellants for the offence under Section 498-A of IPC does not appear to contrary to the record and the same do not require any interference at this stage.

25. In view of aforesaid discussions and being distinguishable on facts the case law cited by the appellants' counsel in the matter of *Girdhar Shankar*

*Tawade Vs. State of Maharashtra* (supra) and AIR 2002 SC 2078 and in the matter of *Kanhaiya Lal Patel Vs. State of M. P.*(supra) are also not helping to the appellants.

26. In view of the aforesaid, we have not found any perversity, illegality or irregularity or anything against propriety of law in the impugned judgment of the trial Court requiring any interference at this stage. Consequently, by affirming the judgment as well as conviction and sentence of aforesaid both the appellants as awarded are hereby affirmed and both the appeals being devoid of any merits are hereby dismissed. The bail bonds of the appellants are hereby cancelled. Pursuant to it, the appellants are directed to surrender themselves before the trial Court on or before 1.7.2013 for facing their respective remaining awarded jail sentence, failing which the trial Court shall be at liberty to take appropriate steps to serve the awarded jail sentence to them.

27. Separate copy of judgment is being placed in both the appeals.

28. Let the record of the trial Court along with a copy of this judgment be sent to the trial Court immediately for compliance.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 529**
**APPELLATE CRIMINAL**
***Before Mr. Justice U.C. Maheshwari & Mr. Justice B.D. Rathi***
Cr. A. No. 594/2000 (Gwalior) decided on 16 May, 2013

KISHAN SINGH & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

*A. Evidence Act (1 of 1872), Section 3 - Interested Witness - Testimony* - **Held - Neither reliable nor sufficient to draw any inference to hold conviction, unless supported by independent witness or evidence. (Para 26)**

*क. साक्ष्य अधिनियम (1872 का 1), धारा 3 – हितबद्ध साक्षी – परिसाक्ष्य* – अभिनिर्धारित – दोषसिद्धि के लिये कोई निष्कर्ष निकालने हेतु न तो विश्वसनीय है और न ही पर्याप्त है जब तक कि वह स्वतंत्र साक्षी अथवा साक्ष्य द्वारा संपुष्ट नहीं किया जाता।

*B. Evidence Act (1 of 1872), Section 3 - Inconsistent*

***Statements*** **- At one or two stages of the same trial - Testimony becomes unreliable - Held - Conviction based on such statements/testimony deserves to be set aside. (Paras 19/25/29)**

*ख. साक्ष्य अधिनियम (1872 का 1), धारा 3 – असंगत कथन* – समान विचारण के एक या दो प्रक्रमों पर – परिसाक्ष्य अविश्वसनीय हो जाता है – अभिनिर्धारित – उक्त कथनों/परिसाक्ष्य पर आधारित की गई दोषसिद्धि, अपास्त किये जाने योग्य।

**Cases referred :**

AIR 1979 SC 1408, (1976) 1 SCC 442, AIR 1978 SC 59, 1985 (supp) SCC 596, AIR 1994 SC 1250, (1974) 3 SCC 397.

*N.P. Dwivedi* with *Atul Gupta,* for the appellants.
*B.K. Sharma,* G.A. for the respondent.

**JUDGMENT**

The Judgment of the Court was delivered by,

**U.C. MAHESHWARI, J. :-** The appellants accused have filed this appeal under Section 374 (2) Cr.P.C., being aggrieved by the judgment dated 21.8.2000 passed by the IVth Additional Sessions Judge, Gwalior in S.T. No. 41/85, whereby the appellant nos. 2 and 4 namely Sobran Singh and Surendra Singh were convicted under Section 148 and 302 of IPC while appellant nos. 1 and 3 Kishan Singh and Sugreev Singh have been convicted under Section 148 and 149, r/w Section 302 of IPC. Pursuant to it, each of them have been sentenced for one year RI with fine of Rs.1000/-, in default of depositing the fine amount for further three months imprisonment in the first count while for life imprisonment, with fine of Rs.5000/-. In default of depositing the fine amount for further one year RI in the last count.

2. The facts giving rise to this appeal in short are that on 14.7.1984, at about 6.10 in the evening, the complainant Mahendra Sharma, (PW-1) lodged an FIR, (Ex. P-1) at P.S. Dabra contending that he accompanied with Balkishan Brahmin (P.W.4) was sitting on his Flour Mill situated in his village on the way of Tekanpur. At the same time towards from the village, the appellant no. 3, Sugreev Singh lashed with Pachfera (fire arm), and appellant no. 1, Kishan Singh lashed with farsa, (sharp edged weapon) came there and stood by the side of the road. In further averments, it is stated that at that time, his brother Ajay Sharma went to J.P. General Store. There was earlier enmity between his and the appellants families, therefore, on account of some doubt,

he saw towards the appellants No.3 and 1, then he found that some indication was given by them by raising their hands, resultantly, the appellant no. 4, Surendra Singh lashed with twelve bore single barrel rifle and the appellant no. 2, Sobran singh lashed with twelve bore double barrel rifle and one Mira lashed with Katta came there towards from the village. At the same time above mentioned appellant no. 3, Sugrive Singh and appellant no. 1, Kishan Singh told to kill the enemy present there. Ajay entered into the shop and tried to pull down the shutter. Meanwhile the appellant no. 1, Kishan Singh and appellant no. 3, Sugreev Singh went there and pulled the shutter up and appellant no. 2, Sobran Singh and appellant no. 4, Surendra Singh, with intention to cause death of Ajay opened fire from their respective rifles on Ajay resultantly on sustaining the bullet injuries, he fell down. Then the accused Meera threatened that everybody who will come here, will be killed. Thereafter the appellants flade away towards the agricultural field. Subsequent to it, he reached near to Ajay, who was laying dead on the floor of such shop. He sustained the bullet injuries on his left hand and in the right armpit. Veer Singh had also reached. The appellants. Kishan Singh, Sobran Singh and Sugreev Singh and Surendra Singh all are real brothers and sons of Lal Singh Jat and Meera is their friend. On account of Panchyat Election there was enmity between the father of the appellants and his family. On account of such enmity in the case of murder of Prayag Singh the brothers of the appellants, they implicated his brother Ajay. In which after holding the trial the Ajay was acquitted by the court and due to that the appellants have murdered Ajay.

3. On the aforesaid information, a crime No. 211/84 was registered against the appellants at P.S. Dabra, (Ex. P-1) for the offence of Section 302/ 148/149 of IPC. According to such FIR, offence was committed on the aforesaid date at about 5.30 in the evening.

4. Immediately after lodging the report the Police (Investigating Officers) came to the place of the occurrence where after preparing the spot map (Ex. P-2) the articles found were seized by Panchanama, (Ex. P-3). Inquest Panchanama of corpus of Ajay, (Ex. P-4) was prepared and thereafter dead body was sent to the hospital with an application, (Ex. P-5), where it's autopsy was carried out by Dr. K.G. Maheshwari, (PW-3), the postmortem report, (Ex. P-6) was prepared. In that the cause of death was found to be the excessive hemorrhage,respiratory failure and circulating failure and shock due to bullet injuries. In further investigation, through photographer, some photographs of such place were taken out, (Ex. P-9 to P-14). The interrogatory

statements of the witnesses were recorded. The clothes of the deceased and pallets/ bullets found in the corpus of Ajay were handed over by the Doctor to the Police, which were sent to the forensic lab for its chemical examination, where the same was carried out and its report was produced in the record of the trial court.

5. The Patwari map, (Ex. P-18) was also got prepared. The appellant no. 1, Kishan Singh was arrested on 15.7.1984 by Panchanama, (Ex. P-8) and on disclosing the information by him, his memorandum under Section 27 of the Evidence Act (Ex. P-19-A) was recorded. Pursuant to it at his instance, the farsa was recovered. Subsequent to it, the appellant no. 4, Surendra Singh was arrested on 11.7.1986, while the appellant no. 2, Sobran Singh and appellant no. 3, Sugreev Singh were arrested on 28.9.1984 by the P.S. Padav in Crime No. 11/84. At the time of their arrest from their possession their respective licensed rifles of twelve bore, double barrels and twelve bore single barrel were seized from them. Subsequently they were sent to the aforesaid P.S. in connection of the impugned crime. The further investigation was held. On completion of the same. The appellants were charge sheeted. One of the accused namely Meera being absconded could not be arrested and charge sheeted.

6. After committing the case to the Sessions Court, on evaluation of the charge sheet, the charge of Section 149/302 and Section 148 of IPC were framed against the appellant no. 1, Kishan Singh and appellant no.3, Surendra Singh while the charge of section 302, in alternate of Section 149/302 and 148 of IPC were framed against the appellant no. 2, Sobran Singh and appellant no. 4 Surendra Singh. They abjured their guilt, on which the trial was held and statements of sixteen prosecution witnesses were recorded, while two witnesses were examined by the defence. On appreciation of the evidence, the appellants were held guilty and punished, as stated above. Being aggrieved from such conviction and punishment, the appellants have come to this court with this appeal.

7. Shri N.P. Dwivedi and Shri Atul Gupta, learned arguing counsel for the appellants after taking us through the record of the trial court argued that on proper appreciation of evidence available on record, the appellants ought to have been acquitted by the trial court but they have been convicted under the wrong premises. In continuation by referring the depositions of the prosecution witnesses examined as eye witnesses of the incident complainant

Mahendra Kumar Sharma, (PW-1), brother of the deceased, Veer Singh, (PW-2) and Bal Krishan, (PW-4), submitted that the testimony of Mahendra Kumar Sharma, (PW-1), on the material questions are apparently inconsistent with the FIR and his case diary statement, as while lodging the report, he did not specifically stated that Veer Singh, (PW-2) was present at the time of happening the incident or sustaining the injuries by the deceased. He further said that Bal Krishan in his deposition has not supported the prosecution case. On the contrary, he turned hostile and has not proved the presence of Mahendra Kumar Sharma, (PW-1) near the place of the incident, as stated by him. In continuation, he said that Veer Singh, in his chief examination has stated some incriminating thing against the appellants but in cross examination he did not support the prosecution case and stated contrary to chief examination and the facts remains that he is not stated as eye witness in the FIR (Ex.P-1) as well as in case diary statement of Mahendra Sharma, counsel said that according to it initially the presence of the witness Veer Singh near the place of incident and at the time of happening the incident was not shown. Only during the course of deposition, for the first time in the court and contrary to aforesaid earlier version the Mahendra Sharma has shown the presence of his witness at the scenario of the incident. Thus, the same being material exaggeration could not be a foundation to hold the presence of Veer Singh on the spot. In such premises, the presence of the alleged eye-witness Veer Singh at the scenario of the incident is doubtful thus his testimony could not be relied on. He further said that Veer Singh in his in-chief stated, till some extent, in favor of prosecution while in cross-examination by dis-mentaling the entire inchief, has stated different story, on which he was also declared hostile. Thus on this count also his testimony is not safe to hold the conviction of the appellants. In continuation he said that the presence of Mahendra Kumar Sharma (P.W.1) near the place of occurrence, is also doubtful due to lack of independent supporting evidence. Thus, mere on suspected sole testimony of Mahendra Kumar Sharma, in the light of deep enmity factor between the parties, the impugned conviction of the appellants is not sustainable. By referring para 19 of the deposition Mahendra Sharma in which fact regarding enmity has been accepted by him, he said that the probability of false implication of the appellants in this matter by this witness, could not be ruled-out. He further said that unless the presence of Mahendra Kumar Sharma (P.W.1) is proved near the place of incident at the time of happening the incident by cogent, admissible and reliable evidence, his testimony could not be the foundation to

hold the conviction of the appellant. Now there is no option in the matter except to rely the testimony of Man Singh, (DW-1), who categorically stated that he was doing his job as Barber near by the place of the incident and the alleged gun-shot was fired on Ajay by some unknown person, on which, he went to the residence of Mahendra Kumar Sharma, (PW-1) and apprised him about the incident then Mahendra Kumar Sharma, came on the spot, till then such unknown assailant had gone. It was not only stated by aforesaid defence witness, Man Singh but the other defence witness, Rajendra, (DW-2) has also stated the same. Such story putforth by the defence witnesses till some extent has also been supported by the prosecution witness Veer Singh and Balkishan. In such premises, the appellants could not be held to be the culprits of the alleged incident.

8. In continuation, he said that in view of the existing factor of enmities between the families of the appellants and said Mahendra Kumar Sharma, (PW-1, the real brother of the deceased), on account of political rivalry and murder case of Prayag Singh (the brother of the appellants) in which Ramnath, the father of Mahendra Kumar was prosecuted and convicted, the Court has to consider the testimony of Mahendra Sharma with cautious and care. It is settled proposition of law that unless the presence of material/ solitary witness by independent source of evidence at the scenario of the incident is proved, his testimony is neither sufficient nor trustworty to hold the conviction against the appellants.

9. In further arguments he said that from the spot map, (Ex.P-2) prepared by Police on the date of the incident and spot map prepared by the Patwari, (Ex. P-18), after some days of the incident, it is apparent that shop of J.P. Store in which the alleged incident occurred is covered with walls from three sides and its shutter is open towards the western side and as per testimony of Mahendra Kumar Sharma, (PW-1), he was sitting nearby his flour mill situated towards the northern, eastern side of J.P.Store so also the other side across the side road. By referring thesaid maps and the depositions of Patwari as well as of Investigating Officer he said that according to them, the front part of the J.P.Store facing towards some other road, is not visible from the flour mill where Mahendra Sharma was seating. So in such premises, also the testimony of Mahendra Kumar Sharma, (PW-1) is not reliable. He further submitted that as per deposition of Veer Singh, (PW-2), Balkishan (PW 4), Ramnarayan Dubey (P.W.5), Jaiprakash Bhadoriya (P.W.7) Patwari, Kailash Narayan Shrivastava, (PW-9) and also according to defence witnesses, there were

some ipomoeà carnea bushes (shrubs of Beshram) being standing by the side of the aforesaid road and in view of such ipomoea carnea bushes (shrubs of Beshram), the place of incident was not visible from the flour mill. So in such premises, prosecution evidence is not reliable.

10. He also said that undisputedly the alleged incident was happened in the evening in the locality where various shops are situated and various persons were also present but none of them who were examined have supported the case of prosecution. So in these circumstances, merely on the testimony of Mahendra Kumar Sharma, (PW-1) no inference could be drawn against the appellants.

11. In further arguments, by referring the Ballistic Expert Report, (Ex. P-24), he said that according to opinion of expert, it is not possible to estimate with scientific accuracy the time elapsed since the gun was fired last and it is apparent fact that Sobran Singh and Surendra Singh were arrested after two months and licenced rifle of Sobran Singh was seized. So in view of such opinion of the Expert that rifle of appellant no. 2, Sobran Singh could not be connected with the alleged incident. Specifically, when there is the opinion that the alleged empty twelve bore cartilages could be fired with rifle like the seized one. So in the lack of seizure of gun of Surendra Singh and in view of aforesaid opinion of Ballistic Expert, no inference could be drawn against the appellants.

12. He further said that the presence of appellants or any of them at the place of incident has not been proved by any independent source of evidence. He also said that on carrying out the autopsy of Ajay according to the deposition of the Doctor, he has found three bullet in such corpus and judicial notice could be taken by this court that from twelve bore rifle the bullet shot could not be made. While cartilages having pallets could be fired from the twelve bore gun. He said that there is no case of the prosecution that any bullet shot was caused by the alleged appellant. He said that empty cartilages recovered from the spot were not properly sealed and in which manner the same were handled and dealt with till sending to the forensic lab for balletic analysis by the police in this respect no evidence has been put fourth by prosecution. The malkhana register of the Police Station was neither produced nor proved. Such thing is also not connecting the appellant nos. 2 and 4 with the alleged offence. Lastly he said that in order to prove the bonafide of the Investigating Agency, all the concerning Rojnamcha entries had neither

produced nor proved on the record. With these submissions, the appellants' counsel has prayed to extend acquittal to the appellants from the alleged charge by allowing this appeal.

13. The appellants' counsel has also placed reliance on some reported decision of the Apex Court as well as of this a court.

14. On the contrary by justifying the impugned conviction of the appellants Shri B.K. Sharma, respondent's counsel said that the approach of the trial court being based on proper appreciation of the evidence is in confirmity with law. It does not require any interference at this stage to extend acquittal to the appellants. He said that besides the depositions of alleged eye witness and the complainant Mahendra Kumar Sharma, (PW-1), the prosecution has successfully proved the case through circumstantial evidence through Dr. K.G. Maheshwari, (PW-3) and the postmortem report of the deceased, so also through Kedar Singh, (PW-16), the I.O. and prayed for dismissal of the appeal.

15. Having heard the counsel at length, keeping in view their arguments, advanced, we have carefully gone through the record of the trial court including the evidence adduced by the parties and the exhibited papers of the charge sheet so also the impugned judgment.

16. Firstly, we proceed to examine the sustainability of the findings of the trial court holding Ajay died with the homicidal death due to excessive hemorrhage, failure of respiratory system and shock on account of sustaining the bullet shot injuries, as stated in the post-mortem report (Ex.P-6) proved by Dr. K.G. Maheshwari, (PW-3), we have carefully examined the postmortem report, so also perused the deposition of said Doctor. In the deposition, the Doctor has stated that he found three bullets and fourteen pallets from different places of the corpus of Ajay, although his deposition, till some extent, regarding description of bullets and pallets, is inconsistent with the postmortem report, but in the lack of any contrary evidence, there is no circumstance in the case to modify the aforesaid findings of the trial court holding the Ajay died due to homicidal death. Therefore, such finding of the trial court is hereby affirmed.

17. Now the court has to answer the question whether the alleged injuries of gun shots were caused to the person of Ajay by the appellant nos. 2 and 4, Sobran Singh and Surendra Singh, with their respective rifles in furtherance of the common object of the appellants or such death was caused by some other or unknown persons. It is apparent from the impugned judgment that the trial

court has mainly relied on the testimony of Mahndra Kumar (P.W.1) the complainant and brother of the deceased alongwith the postmortem report (Ex.P/6) and the deposition of Doctor K.G. Maheshwari, so also till some extent on the version of in chief of the hostile witness Veer Singh, (PW-2). It is settled preposition of law that in a criminal case the testimony of the eye witness mere on account of his relationship with the deceased or the victim by holding him the interested witnesses only on such count could not discarded if his presence at the place of incident is proved by the available evidence and circumstances and his testimony appears to be trustworthy. So, his testimony should be considered with all cautious and care because on account of the factum of existing serious enmity between the parties, the possibility of false implication of the accused like appellants could not be ruled out.

18. True it is the complainant, Mahendra Kumar Sharma, (PW-1) lodged the FIR with the Police immediately after forty minutes from the time of the alleged incident and has implicated the appellants by stating their alleged acts. As per FIR, at the time of the incident he along with Balkishan (P.W.- 4) was sitting nearby his flour mill facing towards southern side situated other side of the road and towards the northern, eastern sides from the shop of J.P.Store in which the alleged incident was happened. The shop of J.P.Store is facing towards its western side while towards northern sourthern and eastern side of this shop there is a wall as evident from the spot map, (Ex. P-18) prepared by Patwari. Bare perusal of such map and deposition of Patwari Kailash Narayan Shrivastava, (PW-18), it is apparent that the inner part of the shop of J.P. Store, the place of the occurrence is not visible from the aforesaid flour mill. Besides this, there is some long distance from northern wall of J.P. Store and the aforesaid flour mill because there is some road existed as S.No.238 between these two shops and other side of the road in front of the flour mill, some open land of survey no. 237 and 236 is also situated as evident from aforesaid map (Ex.P/18) thus, keeping in view such circumstance, we have gone through in chief as well as cross examination of Mahendra Kumar Sharma, (PW-1). It is true that in his entire chief, he tried to support the version stated in the FIR and his case diary statements but the same is exaggerated by him to show the presence of Veer Singh at the time of happening the alleged incident while such presence of Veer Singh was neither stated by him in the FIR, (Ex. P-1) nor in his case diary statement, (Ex. D-2). In both the papers, he stated that after sustaining the bullet injuries by deceased Ajay when he reached near him, at that time Veer Singh also came there. Accordingly,

such version of the witness being contrary to his FIR and the case diary statement could not be the foundation to draw the inference that at the time of happening the alleged incident causing the gun shot injuries to the deceased Ajay, Veer Singh was present. In this circumstance, the in-chief of the deposition of Veer Singh (P.W.2) in which contrary to the version of FIR so also in exaggeration of initial prosecution case he tried to show his presence at the time of accident, is not reliable. Even otherwise, in view of his cross-examination in which he disowned his entire chief. Although cross examination of this witness was carried out on the other date from the date of recording in chief. But, in any case, the inconsistent testimony of Veer Singh (P.W.2) as in the chief he supported the prosecution case and later, on cross-examination, he himself demolished his entire version of in-chief could neither be safe nor could be foundation to hold that Mahendra Kumar Sharma (P.W.1) was present nearby the place of the incident on the aforesaid flour mill and saw the appellants/accused as culprits of the incident.

19. Our aforesaid approach with respect of the deposition of Veer Singh that inconsistent statements of the witnesses in the same trial and same depositions at different places of the same deposition could not be relied upon is fully fortified by the decision of the Apex Court in the matter of *Suraj Mal Vs. The State (Delhi Administration)*- AIR 1979 SC 1408 in which it was held as under:-

> "Where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses. .....**Placitum**

20. In view of the aforesaid discussion if the presence of Veer Singh (P.W.2) at the time of happening the incident nearby the place of incident is excluded then there is no any other evidence on record to show that the Mahendra Kumar Sharma (P.W.1) was present at the time of happening the incident on the aforesaid flour mill or nearby the place of the incident. As per FIR complainant Mahendra Kumar Sharma, (PW-1) was sitting with Bal Kishan (P.W.4) on his aforesaid flour mill and thereby the Bal Kishan was shown to be the eye-witness of the incident but on recording the deposition, Balkishan (P.W.4) has not supported the testimony of Mahendra Kumar Sharma, (PW-1). Even he has neither proved nor admitted the presence of Mahendra Kumar

Sharma, (PW-1) alongwith him on the spot at the time of incident. As such any of the alleged eye witnesses of the prosecution including Veer Singh and Bal Kishan have neither proved nor accepted the presence of Mahendra Kumar Sharma, (PW-1) at the time of incident near by the place of incident or on the aforesaid flour mill. The burden to prove such fact was on the shoulder of the prosecution and same could have been proved by examining the shop keepers of such locality or other persons who were present in the market on that day, but out of them, none has proved the presence of Mahendra Kumar Sharma, (PW-1). So in such premises, when presence of Mahendra Kumar Sharma, (PW-1) at the place of the incident itself is doubtful at the time of incident, then in that circumstance, mere on his testimony, in the light of long history of inimical relationship between the parties, it could not be said that the culprit, the assailants who made gun shots on the deceased Ajay in J.P. Store was seen or identified as the appellants or any of them.

21. Apart the aforesaid, the Mahendra Kumar Sharma, (PW-1), in his deposition, categorically stated that distance of J.P. Store the place of incident, from his flour mill was near about 20-25 steps, i.e. near about 50 feet. While as per Patwari map, (Ex. P-18) prepared by Patwari, Kailash Narayan Shrivastava, (PW-18) of the measurement, the distance of J.P. Store from the alleged flour mill was shown about 119 feet while after turning hostile the prosecution witnesses , Veer Singh, (PW-2), Bal Kishan, (PW-4), Jaiprakash Bhadorya (P.W.7) have stated such distance 400-500 feet. For the sake of arguments if it is deemed that Veer Singh and Bal Kishan being hostile witnesses their version regarding aforesaid distance could not be relied on then in any case a relative the maternal uncle of the deceased Mahendra Kumar Sharma, (PW-1) and the witness of spot map (Ex.P/2), prepared by Police namely Ram Narayan Dubey, (PW-5), who did not turn or declared hostile, on recording his deposition in para-2 of his cross examination categorically stated the distance of the J.P. Store from the flour mill of Mahendra (P.W.1) was near about 400-500 feet. So in such premises, on taking into consideration the aforesaid all three inconsistent version of the witnesses, one thing is certain that in the light of deposition of Patwari and his map and the deposition of said relative of Mahendra Kumar Sharma i.e Ram Narayan Dubey, the version of Mahendra Kumar Sharma, (PW-1) stating the distance of 40-50 feet is not reliable. In the available circumstances, such distance could not be deemed to be less than 119 feet as stated by Patwari so also in view of the deposition of Ram Narayan Dubey, the same was either 119 feet or more than this. For

the sake of arguments, if it is deemed that Mahendra Kumar Sharma, (PW-1), was sitting on his aforesaid flour mill at the distance of more than 119 feet from the J.P. Store in which the gun-shot was made on the person of Ajay then in view of the opinion and deposition of Dr. K.G.Maheshwari, who prepared the postmortem report, the alleged gunshot was made on the person of the deceased from the distance of less then three feet, then on account of aforesaid long distance and the situation of the northern wall of J.P.Store it could not be deemed that the place of occurrence was visible to the Mahendra Sharma (P.W.1) from his aforesaid flour mill. So, in such premises also it shall be deemed that the alleged incident and the culprit who made the alleged gun-shot was not seen by Mahendra Kumar Sharma (P.W.1). As such, he was not in a position from his flour mill to see the incident and its real culprit.

22. Aforesaid question regarding visibility of the place of incident from the flour mill of Mahendra Kumar Sharma, (PW-1) may also be considered in the light of other circumstances, according to which as per deposition of Patwari, Kailash Narayan Shrivastava, (PW-18) and in the light of cross examination of Ramnarayan Dubey and the hostile witnesses, namely, Veer Singh, Balkishan, Jaiprakash Bhadoriya, so also the depositions of defence witnesses Man Singh and Rajendra that between J.P. Store and the flour mill, there is a road and at the side of the road some ipomoea carnea bushes (shrubs of Beshram) having the height of 6 to 7 feet were there and due to that person could not see the place of the incident, i.e. J.P. Store from flour mill. So in such premises, also it could not be said that Mahendra Kumar Sharma, (PW-1) saw the alleged incident while happening the same or identified the culprits of the same.

23. Now we proceed to examine the case in the light of the fact of inimical relationship between the parties and others since long and on account of that whether there is a possibility of false implication of the appellants as argued by the appellants' counsel.

24. On perusing the paras 11, 14, 15,16 and 19 to 25 of the depositions of Mahendra Kumar Sharma, (PW-1), it is apparent that the deceased and his family including this witness had enmity since long with so many persons including the family of the appellants and due to that the family members of the Mahendra have been implicated by other persons in different criminal matters, according to this witness Mahendra against his father Ramnath and deceased Ajay, the case of murder of Prayag Singh, the brother of the appellants was tried in which deceased Ajay was acquitted while his father, Ram Nath was

convicted and sentenced. As per further averments of deposition, besides from the family of the appellants, the deceased was also having deep enmity with the other persons namely, Ramesh, Brij Mohan and Purshotam, son of Ram Bai, and on account of that civil litigation was also contested between them. According to such case the family of this witness and the deceased was quarreling with the above mentioned persons on account of possession of some agricultural land. As per para 16 of the deposition, the criminal case at the instance of Brij Mohan was also registered against deceased Ajay and his father Ramnath. In para 19, the witness has categorically accepted that since last fifteen years, on account of deep enmity and inimical relations with the above mentioned Ramesh, Brij Mohan and Purshotam, they always remained interested to cause the injuries to the family of the witness, so also try to implicate them in false litigations. In same para-19 the witness has accepted that he and every member of his family are puzzled and under harassment of the appellants because they are always remained interested and try to cause the injury to his family. So his family wants that the appellants should go away by leaving the village. He further stated because of the activities of the appellants they have become deeply puzzled and at any cost they want to get rid off from the appellants. In view of the aforesaid deposition of Mahendra Kumar Sharma, his entire family including the deceased Ajay Sharma had serious inimical relations and enmity with the appellants and some other persons whose names are stated above, from the deposition of this witness Mahendra Sharma.

25. Apart the aforesaid, Mahendra Kumar Sharma, (PW-1) in para 26 of his deposition has also stated that in 1980, his father Ramnath contested the election of Sarpanch of village against the appellant no. 3, Sugriv Singh in which his father was defeated by Sugriv Singh. In view of such deposition, it is apparent that on account of village politics and election of Sarpanch the long enmity was existing between the parties.

26. In view of the aforesaid enmity factor if the case is examined, then in view of aforesaid discussion it is apparent that from the uncorroborated testimony of Mahendra Kumar Sharma (P.W.1) could not prove the presence of this witness at the scenario of the incident by cogent, admissible and reliable evidence. Thus, In view of aforesaid serious inimical relationship of the parties unless the testimony of Mahendra Sharma (P.W.1) is found to be supported by any independent witness or the source of independent evidence, his sole testimony, being interested witness, having serious animus with the appellants,

is neither reliable nor sufficient to draw any inference to hold the conviction against the appellants. Thus there is no option with the court except to discard the testimony of this interested witness, Mahendra Kumar Sharma, (PW-1). Our aforesaid view is fully fortified by the decisions of the Apex Court in the matter of (i) *Badri Vs. State of Rajasthan* (1976) 1 SCC 442, in which it was held as under :-

> "19. Further.....If a witness, who is the only witness against the accused to prove a serious charge of murder, can modulate his evidence to suit a particular prosecution theory for the deliberate purpose of securing a conviction. Such a witness cannot be considered as a reliable person and no conviction can be based on his sole testimony.

(ii) *Bir Singh and others Vs The State of Uttar Pradesh*- AIR 1978, SC page 59, in which it was held as under:-

> "9. P.W.2..... It is true that it was not incumbent on the prosecution to examine each and every witness so as to multiply witnesses and burden the record. This rule however does not apply where the evidence of the eye-witness suffers from various infirmities and could be relied upon only if properly corroborated. In the instant case all the eye-witnesses had serious animus against the accused and they were interested in implicating the accused. The substitution of Ram Dularey Singh in the general diary was a suspicious circumstance. The fact that the police was not able to recover any weapon or to explain how the appellants got hold of the guns was yet another circumstance that required a reasonable explanation from the prosecution. According to the finding of the learned Sessions Judge even the FIR was ante-timed and although the High Court has not accepted this finding we feel, that the High Court on this aspect has entered into the domain of speculation. In view of these special circumstances it was incumbent on the prosecution to examine the two witnesses at least to corroborate the evidence and if they were not examined the Sessions Judge was justified in drawing an adverse inference against the prosecution. At any rate, it cannot be said that if under these circumstances the Sessions Judge was not prepared

to accept the evidence of these witnesses his judgment was wrong or unreasonable. It may be that the High Court could have taken a different view but that by itself as held by this Court is not a sufficient ground for reversing an order of acquittal."

(iii) In the matter of *State of U.P. Vs. Satish Chandra and others*- 1985 (supp) SCC 596, in which it was held as under :-

"6. It is not necessary.....Unless there is satisfactory evidence to implicate the accused persons in the crime, it would be difficult to hold that the accused persons had really caused death of the deceased. While all other particulars relating to the prosecution case may not be disputed, as held by the High Court, the authorship of the crime had been in dispute and the prosecution has to fail as it has not established that fact. If the link between the incident and the respondents is not established, the High Court was justified in acquitting them."

(iv) In the matter of *Patel Chela Viram Vs. State of Gujarat*- AIR 1994 SC 1250, in which it was held as under :-

"5. As mentioned above, the High Court mainly relied on the evidence of P.W. 2. We find from the judgment of the Sessions Court that P.W. 2 admitted that there are two rival factions and he filed an application against the accused in the year J 976 for binding over them and consequently proceedings were launched against the accused and that there were certain other instances which would show that P.W. 2 was inimical towards the accused. Therefore, it cannot be said that he is an independent witness. Further, there is some force in the submission of the learned Counsel for the appellant that P.W. 2 appears to be a chance witness. He deposed that he went to this particular field which is away from his house to answer the call of nature. On his being a chance witness it is necessary to have a closer scrutiny of his evidence. Coming to the medical evidence we find only four contusions yet the evidence of P.W. 2 is to the effect that all the other four accused dealt blows with sticks. This part of the evidence is not corroborated by the medical evidence. It is pointed out in number of cases by this Court when the case rests on the sole testimony of the

single witness, the same should be wholly reliable. We find in the instant case that P.W. 2 is not only an interested witness but the version given by him is highly doubtful apart from the fact he being a chance witness. The view taken by the Sessions Court is quite reasonable."

27. Coming to consider the question connecting the licensed rifle seized from the possession of appellant no. 2, Sobran Singh with the alleged incident is concerned, as per record available such appellant was arrested along with his licensed rifle near about after two and half months from the date of the incident in some other crime number of P.S. Padav. The rifle was also seized by such P.S. the subsequently it was sent to the aforesaid P.S. Dabra, where the impugned offence was registered but the prosecution has failed to prove that after seizing the aforesaid rifle from Sobran Singh, in which manner it was handled and dealt with and in which manner it was kept till sending the same to FSL for ballistic examination. In this regard the concerning relevant register of Malkhana of the P.S. so also the sample of the concerning seal affixed on the sealed articles, the concerning Rojnamcha entries by which the same were sent to FSL were neither produced nor proved on record. The same position is also on record regarding the seized blank cartilages from the spot. These cartilages till sending to the FSL in which manner, the same were dealt with or kept in the safe custody for which the concerning document or the record has neither been produced nor proved. So, in the lack of such material evidence the available ballistic expert report, (Ex. P-24) could not be connected as piece of evidence against any of the appellants in the present case. Even apart, for the sake of arguments, if such report Ex.P/24 is taken into consideration, then according to it, the expert was not in a position to say that when the last fire was made by the seized alleged rifle of the Sobran Singh and in such report, only it was stated that the cartilages under examination could be fired from the rifle like the seized rifle. So in such premises, it could not be deemed that there is direct evidence that the alleged fire was made by the appellant no. 2, Sobran Singh on the date of the incident to cause gun shot injuries to the deceased, Ajay. So, in such premises also the impugned conviction is not sustainable.

28. Apart the aforesaid it is apparent from the evidence adduced by the prosecution on record, as discussed above that Mahendra Sharma (P.W.1) has deposed the distance of the place where he was sitting at the time of incident was from the place of incident was near about 40 to 50 feet and he saw the incident while the Kailash Narayan Shrivastava (P.W.9) Patwari in his

map (Ex.P-18) and deposition said such distance 119 with the averments that there is a wall also at northern side of J.P.Store and at side of road between the flour mill and such Store there is shrubs of "Beshram" of the tall hight and on recording the depositions of the Ramnarayan Dubey (P.W.5) by admitting the existence of said shrubs of "Beshram" has stated such distance 400-500 feet and this witness was not declared hostile. The same thing was stated in the cross-examination by the hostile witnesses, namely, Veer Singh (P.W.2), Balkishan (P.W.4) and Jaiprakash Bhadoriya (P.W.7) that such distance was 400 to 500 feet and tall shrubs of Beshram was there. So from such distance it could not be assumed that person may see the incident and identify the culprits. In such premises, it is apparent that there are two sets of evidence regarding the situation between place of incident and the place where Mahendra Sharma was, as alleged, sitting with Balkishan (P.W.4) who has not supported the case. So, in view of settled proposition that where on appreciation two sets of evidence are revealed then out of them court is bound to adopt such set of evidence which is favorable to the accused. So, in such premises also the testimony of eye witness Mahendra (P.W.1) on account of long distance from the place of incident and due to northern wall of J.P. Store and the shrubs of "Beshram" is full of suspicious and doubtful and the same could not be the foundation of holding the conviction against appellants. Our aforesaid view is fully fortified by the decision of the Apex Court in the matter of *Harchand Singh Vs. State of Haryana*- (1974) 3 SCC 397, in which it was held as under :-

> "11.The function of the court in a criminal trial is to find whether tile person arraigned before it as the accused is guilty of the offence with which he is charged. For this purpose the court scans the material on record to find whether there is any reliable and trustworthy evidence upon the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which Ile is charged. If in a case the prosecution leads two sets of evidence, each one of which contradict and strikes at the other and shows it to be unreliable, the result would necessarily be that the court would be, left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.
>
> 12. Mr. Marwah has cited before us the case of *Vadivalu*

*Thevar V. The State of Madras* wherein it was laid down that the court can base the conviction of the accused on a charge of murder upon the testimony of a single witness if the same was found to be convincing and reliable. There can, in our opinion, be no dispute with the above proposition, but that proposition can be of no avail in the, present case. As already mentioned earlier, the prosecution evidence itself creates doubt about the veracity of the testimony of Ram Asra,upon which testimony reliance is now sought to be placed by Mr. Marwah. Had the testimony of Ram Asra been of a convincing character and the prosecution evidence had not itself created doubt regarding the correctness of his testimony, this Court might have sustained the conviction of appellants upon the testimony of Ram Asra. As the things are, prosecution itself has led evidence to show that the testimony of Ram Asra is not reliable."

29. In view of the aforesaid discussion, we are of the considered view, that the prosecution has failed to prove the case against the appellants beyond reasonable doubt and in such premises, the approach of the trial court holding guilty to the appellants for the aforesaid offences being perverse and deserves to be and is hereby set aside. Consequently, by allowing, this appeal, the impugned judgment holding conviction and the sentence against the appellants under the above mentioned offence are hereby set aside. Pursuant to it, the appellant nos. 2 and 4 namely Sobran Singh and Surendra Singh are acquitted from the charge of Section 148 and 302 of IPC leveled against them while appellant nos. 1 and 3 Kishan Singh and Sugreev Singh are acquitted from the charge of section under Section 148 and 149, r/w Section 302 of IPC leveled against them.

30. We are apprised by the counsel present that the appellant nos. 1 and 3 namely Kishan Singh and Sugriv Singh are on bail in the present matter while the appellant No.2 and 4, namely, Sobaran Singh and Surendra Singh are facing the awarded jail sentence. Thus, in view of this judgment the bail bonds of appellant No.1 and 3 are hereby discharged while appellant nos. 2 and 4 are directed to set at liberty, if their presence are not required in any other matter. The amount of fine, if deposited by the appellants or any of them then after verification, the same be refunded to them.

31. The appeal is allowed, as indicated above.

*Appeal allowed.*

**I.L.R. [2014] M.P., 547**
**APPELLATE CRIMINAL**
***Before Mr. Justice Ajit Singh & Mr. Justice B.D. Rathi***
Cr. A. No. 1424/2004 (Jabalpur) decided on 18 July, 2013

GULAB RAO NAGLE ...Appellant
Vs.
STATE OF M.P. ...Respondent

*A. Penal Code (45 of 1860), Section 302, Evidence Act (1 of 1872), Section 3* - **Oral Evidence is not supported by medical evidence - Sword injury allegedly caused from behind not found during autopsy - In Dehati Nalshi name of witness also missing - Oral evidence not reliable. (Para 10)**

*क. दण्ड संहिता (1860 का 45), धारा 302, साक्ष्य अधिनियम (1872 का 1), धारा 3* – मौखिक साक्ष्य को चिकित्सीय साक्ष्य द्वारा समर्थन नहीं – कथित रुप से पीछे से कारित की गयी तलवार की चोट, शव परीक्षण के दौरान नहीं पायी गयी – देहाती नॉलिशी में भी साक्षी का नाम अनुपस्थित – मौखिक साक्ष्य विश्वसनीय नहीं।

*B. Criminal Practise* - **Appellant could not have been convicted on the same set of evidence that formed the basis of acquittal of other co-accused. (Para 12)**

*ख. दाण्डिक नियम* – अपीलार्थी को उसी साक्ष्य के समूह के आधार पर दोषसिद्ध नहीं किया जा सकता जो कि अन्य सह अभियुक्त की दोषमुक्ति के आधार निर्मित करते हैं।

*Sanjay Verma*, for the appellant.
*B. D. Singh*, G.A. for the respondent/State.

**J U D G M E N T**

The Judgment of the Court was delivered by,
**B.D. Rathi, J. :-** The sole appellant Gulab Rao has been convicted for an offence under section 302 of the Indian Penal Code (for short "the IPC") for committing the murder of Roshan on 19/3/2003 at 8 p.m. at Bhim Nagar, Bhopal and sentenced to undergo imprisonment for life with fine stipulation, while co-accused Lallu alias Vijay Singh, Guddu alias Ajay Singh and Bachhu alias Rajkumar, were acquitted of the offences charged with. The impugned judgment was passed by I Additional Sessions Judge, Bhopal in Sessions

Trial No.174/03 on 10/8/2004.

2. According to the prosecution case, in the wake of a quarrel of Roshan with appellant and Guddu Singh of Bhim Nagar in a marriage ceremony 5-6 days prior to the incident, on 19/3/03 at about 8 p.m., Lallu S/o Chain Singh and appellant came to Roshan's house and asked his mother Shakunbai (PW1) about him, on which Roshan answered that he was outside the house. Thereafter, on the pretext of entering into a compromise they took away Roshan with them. After some time, feeling anxious, Shakun Bai also came out followed by her son Kailash and daughter Sushila. In the street of Chokhelal Soni, she saw that some altercation was going on between Roshan, Phool Singh, appellant, Lallu and Bachhu and when they all reached near the house of Chokhelal, Lallu assaulted Roshan by Sword from behind due to which he fell down. Bachhu and two others caught hold of him while appellant repeatedly stabbed Roshan in his stomach by *Chhuri* (small dagger). Shakun Bai cried for help on which her son and daughter viz. Kailash and Sushila came there, but the assailants, with an intention to cause his death, kept on assaulting Roshan fearlessly and thereafter fled from the spot. Despite the alarm being raised by Shakun Bai, no one from the locality came forward for her help. According to Shakun Bai, at that time electricity was shut off but it was a moonlit night and with Lallu, appellant and Bachhu, there were two more boys of Bhimnagar aged between 20 to 25 years, whom she could identify by face. At that juncture, wife of Chhokhelal, Shivcharan and others came there and in an Autorickshaw of one Irshad, she brought Roshan to 1250 Hospital where he was declared dead. Dehati Nalishi (Ex.P/1) was lodged at the Hospital at 9.45 p.m. by Shakun Bai.

3. Autopsy was conducted by Dr. Ashok Sharma (PW4), who noticed, as many as, 5 incised wounds and 10 stab wounds mainly on the chest and abdomen of Roshan. Cause of death was shock and hemorrhage as a result of multiple stab injuries on the chest and abdomen. Weapons of offence viz. a dagger and a sword were seized from the appellant and Vijay Singh alias Lallu vide seizure memos (Ex.P/5) and (Ex.P/12) respectively. The Director of Medico Legal Institute vide his report (Ex.P/19), on examination of the said weapons of offence, opined that the injuries described in the post mortem report, could be caused by those.

4. During the trial, the appellant and three other co-accused pleaded not guilty to the charges and contended that they had been falsely implicated.

5. The trial court, on the basis of testimony of eye-witnesses Shakun Bai and Ramakant (PW2), has held the appellant guilty of committing the murder of Roshan and acquitted the other three above named co-accused persons.

6. Learned counsel on behalf of the appellant argued that the statements of eye-witnesses are not reliable because the prosecution has failed to prove that Shakun Bai and Ramakant were present on the spot. It was also submitted that on the same set of evidence three other co-accused were acquitted by the trial Court, whereas appellant was convicted without taking into consideration that important witnesses Kailash, Sushila, Phool Singh, Shivcharan and Prem Narayan Sharma were not examined by the prosecution.

7. On the contrary, learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the conviction is well merited. He also argued that it is for the prosecution choice how to prove its case, therefore non examination of certain witnesses would not be fatal to the case of the prosecution.

8. Having regard to the arguments advanced by the parties, we have perused the evidence and material on record.

9. The learned trial Court, after disbelieving the testimony of Shakun Bai and Ramakant, has acquitted co-accused persons on the ground that the corresponding injuries were not found in autopsy report, but at the same time, on the testimony of these two witnesses, has convicted the appellant.

10. It transpires from the record that the whole case of prosecution was doubtful from its inception i.e. lodging of Dehati Nalsihi (Ex.P/1), which was lodged by Shakun Bai. In this Dehati Nalishi, as well as, in para 27 of her deposition, it is mentioned that Lallu assaulted Roshan by Sword from behind due to which he fell down, but, such corresponding injury was not found during autopsy. Shakun Bai stated in para 2 that her son Roshan was caught hold by Guddu, but in Dehati Nalishi (Ex.P/1) name of Guddu has not been mentioned and instead of that it was mentioned that Roshan was caught hold by accused Bachhu and two other unknown persons. In paras 18, 19 and 20, she categorically denied her deposition regarding most of the important facts mentioned in Dehati Nalishi (Ex.P/1) and Police Statement (Ex.D/2). Similarly, she also said that before deposing, she had understood very well what to depose in the Court. In para 24 of her evidence, she has deposed that when she reached the Hospital, she had told the names of appellant and Lallu as the

assailants to the Doctor, but this fact was neither mentioned in the MLC report nor corroborated by Dr.Ashok Sharma (PW4). Contrary to what has been mentioned in the MLC Report (Ex.P/18), she also deposed that Shivcharan had not taken Roshan to Hospital. From para 8 of her evidence, it is clear that Roshan used to quarrel with many persons and had a criminal history.

Further, Shakunbai in paragraph 3 of her evidence has deposed that Ramakant had also taken Roshan to the Hospital in the Autorickshaw. It means that Ramakant was also present on the spot, but name of Ramakant has not been mentioned in the Dehati Nalishi. Learned trial Court has disbelieved the testimony of Ramakant only in respect of acquitted coaccused, although his deposition, as eye-witness, should have been totally disbelieved by the trial Court on this ground. In the light of the aforesaid contradictions and omissions, evidence of Shakun Bai does not inspire confidence.

11. Prosecution has not taken any pain to search other two unknown boys who had also committed the crime as per the facts mentioned in Dehati Nalishi (Ex.P/1). Eye-witnesses, as mentioned in the Dehati Nalishi, Kailash, Sushila and Phool Singh were also not produced by the prosecution. As per MLC (Ex.P/18), Roshan was brought to the Hospital by Shivcharan from the spot, but Shivcharan has not been examined. Wife of Chokhelal who had come on spot was also not examined. Although, it was not necessary, yet looking to he facts and circumstances of the case, where witnesses produced in the Court deposed in an exaggerated manner with omissions and material contradictions, it was essential to examine the aforesaid witnesses to bring home the charge against appellant beyond reasonable doubt.

12. We are of the considered view that in the aforesaid premises, the whole case of the prosecution appears to be doubtful. Appellant could not have been convicted on the same set of evidence that formed the basis of acquittal of other co-accused. It is well settled that suspicion, by itself however strong it may be, is not sufficient to take place of proof and warrant a finding of guilt of accused.

13. Accordingly, the appeal stands allowed. Appellant is acquitted of the offence. He is in jail since 26.3.2003 i.e. for more than ten years. He be released forthwith if not required in any other case. Fine amount, if deposited, be refunded.

*Appeal allowed.*

**I.L.R. [2014] M.P., 551**
**APPELLATE CRIMINAL**
***Before Mr. Justice Ajit Singh & Mr. Justice B.D. Rathi***
Cr. A. No. 2316/2006 (Jabalpur) decided on 23 July, 2013

BARRO BAI @ LEELA BAI & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Sections 302, 304 Part-II - Murder - Conviction and sentence - Appeal*** - **F.I.R. does not contain the name of appellant No. 1 - Independent eye witnesses turned hostile - P.W. 1 deposed that deceased was beaten twice - P.W. 2 deposed that the deceased was assaulted only at hand pump - Held - No blood stains were found on the alleged weapon of offence - No sharp weapon was used - No intention to kill - Appellant No. 1 did not commit any offence - Her conviction set-aside - Act committed by other appellants would fall u/s 304 Part-II and not u/s 302 of IPC. (Paras 9 to14)**

*दण्ड संहिता (1860 का 45), धाराऐं 302, 304 भाग–II – हत्या – दोषसिद्धि और दण्डादेश – अपील* – प्रथम सूचना रिपोर्ट में अपीलार्थी क्र. 1 के नाम का समावेश नहीं – स्वतंत्र प्रत्यक्षदर्शी साक्षीगण पक्षद्रोही हुए – अ.सा. 1 ने कथन किया कि मृतक को दो बार पीटा गया – अ.सा. 2 ने कथन किया कि मृतक पर केवल हेण्डपम्प पर हमला किया गया – अभिनिर्धारित – अपराध के कथित हथियार पर रक्त के धब्बे नहीं पाये गये – धारदार हथियार का उपयोग नहीं किया गया – जान से मारने का आशय नहीं – अपीलार्थी क्र. 1 ने कोई अपराध कारित नहीं किया – उसकी दोषसिद्धि अपास्त – अन्य अपीलार्थीयों द्वारा कारित कृत्य भा.द.सं. की धारा 304 भाग–II के अंतर्गत आयेगा और न कि धारा 302 के अंतर्गत।

*A. Usmani*, for the appellants No 1 & 2.
*R.P. Prajapati*, for the appellant No.3.
*Yogesh Dhande*, G.A. for the respondent/State.

**J U D G M E N T**

The Judgment of the Court was delivered by, **B.D. Rathi, J. :-** This common judgment shall govern the disposal of both the appeals as they have arisen out of the same impugned judgment.

2. The above named appellants have been convicted for an offence under section 302 read with Section 34 of the Indian Penal Code (for short "the

IPC") for committing the murder of Chokhelal on 13/7/2004 at 1 p.m. at Village Mangudiya, and sentenced to undergo imprisonment for life with fine stipulation. The impugned judgment dated 17/11/2006 was passed by VII Additional Sessions Judge, Jabalpur in Session Trial No.640/2004.

3. According to the prosecution case, Chamanlal lodged a report that on 13/7/04, at about 1.30 p.m.., while he was there in his home, daughter of Bhagirath came and informed that Chokhelal had been assaulted jointly by Bhura, Bijju and Gayadeen with Lathis and was lying near Rethra Handpump. Chamanlal immediately rushed towards the spot and found that Chokhelal was lying on the ground and blood was oozing from his head. On his query as to assailants, Chokhelal informed that when he was going to lodge report of Bhura with regard to the altercation in the backdrop of Chokhelal prohibiting Bhura from letting Bhura's cattle graze in his paddy field, Bhura, Chippu and Gayadeen assaulted him with Lathis on his head and hand near the Rethra Handpump and the incident was witnessed by some inhabitants of the locality. Saying this, Chokhelal fell unconscious.

4. Thereafter, Chokhelal was shifted to Hospital. Injury report (Ex.P/13) was prepared by Dr.H.P.Singh (PW6). He found lacerated wounds, one on the right parietal region, second on the left parietal region and third on the right middle finger. At that time also, Chokhelal was unconscious. Chokhelal died on 15/7/2004 during the course of treatment. Autopsy was conducted by Dr. Ashok Jain (PW13) and after recording of evidence of material witnesses and on completion of the investigation, charge-sheet was filed.

5. During the trial, the appellants pleaded not guilty to the charges and contended that they had been falsely implicated.

6. Learned counsel on behalf of the appellants argued that the trial Court has wrongly held that appellant Barro Bai was also involved in committing the murder of Chokhelal. According to him, the evidence of material witnesses is not in conformity with the recitals of the First Information Report (for brevity "FIR"). It was also submitted that Deena (PW5) was the only independent eye-witness and he was declared hostile. Therefore on the basis of evidence of interested witnesses full with contradictions and omissions, her conviction cannot be sustained. So far as the case of other appellants is concerned, it was argued that they had entered into a sudden and unprecedented quarrel with Chokhelal and he was assaulted by Lathis without any intention to kill him, therefore, in the interests of justice, it would be just and proper that their

conviction is altered to one under Section 304 Part II of the IPC and sentenced accordingly.

7. On the contrary learned Government Advocate, while making reference to the incriminating pieces of evidence on record, submitted that the convictions are well merited and, no interference with the impugned judgment is called for.

8. Having regard to the arguments advanced by the parties, we have perused the evidence and material on record.

9. Author of the FIR, Chaman Lal (PW2) deposed that FIR (Ex.P/3) was lodged by him. The FIR does not contain the name of Barrobai. It was lodged on the basis of oral dying declaration. All the facts which were narrated by declarant to Chaman Lal were mentioned in FIR. The presence of independent eye-witness Deena was proved by Yashoda bai (PW1) in paragraph no.3 of her evidence. Deena has not deposed anything against the appellants and he was declared hostile.

10. As per the statement of Yashodabai, when Chokhelal restrained Barrobai from grazing her cattle in his field, Barrobai started pelting stones and Chokhelal returned to his house. Barrobai also reached to the house of Chokhelal and assaulted him by the wooden plank but this fact was not mentioned in the FIR. Besides this, Yashoda Bai also deposed that deceased was beaten twice, first at her house and second time near the Peepal tree situated near the hand-pump, but Chaman Lal stated that deceased was assaulted only at hand-pump. On the information given by Kamini Devi (PW12), child witness, Chaman Lal reached on the spot (near the hand-pump) whereby entire story was narrated by Chokhelal. If deceased was beaten twice, then certainly this fact ought to have been told to Chaman Lal and thereafter mentioned in the FIR, but it appears that deceased was not beaten at the house by appellant Barro Bai, therefore, the child witness Kamini Devi, is also not trustworthy.

11. Yashoda Bai deposed in her evidence that deceased was beaten by wooden plank and that plank was snatched by her. Afterwards, the same was seized by Police vide seizure memo Ex.P/2. But as per the Forensic Science Lab report (Ex.P/21), no blood stains were found on the said wooden plank.

12. On the aforesaid premises, we are of the considered view that Barro Bal did not commit any offence, therefore, her conviction cannot be sustained.

13. As per the prosecution story mentioned in FIR(Ex.P/3), Chokhelal was assaulted when he was going to lodge report, meaning thereby, that there was an unprecedented quarrel with the deceased. He was not assaulted by any sharp edged weapon and after wielding two Lath! blows, appellants Bhure, Chhipu and Gayadeen fled. It reveals that they had no intention to kill Chokhelal, otherwise, he would have been dealt with more Lathi blows.

14. Having regard to the facts and circumstances of the case, in our considered opinion, the act committed by the appellants Bhure, Chhipu and Gayadeen would fall under Section 304 Part II of the IPC and not under Section 302 of the IPC.

15. Resultantly, both the appeals are allowed in part. We set aside the conviction and consequent sentences of appellant Barrobai and acquit her of the offence. Her bail bonds stand discharged. Fine amount, if deposited by her, be refunded. Convictions and consequent sentences of the appellants Bhure, Chippu and Gayadeen, under Section 302 read with 34 of the IPC are also set aside, instead, they are convicted under Section 304 Part II of the IPC and sentenced to undergo rigorous imprisonment for 6½ years and to pay a fine of Rs.2000/- each, in default to suffer R.I. for six months. Fine amount, if already deposited, be refunded after adjustment.

Appeals partly allowed.

*Appeal partly allowed.*

**I.L.R. [2014] M.P., 554**
**APPELLATE CRIMINAL**
***Before Mr. Justice B.D. Rathi***
Cr. A. No. 525/1998 (Jabalpur) decided on 26 July, 2013

GAMA @ NIRMAL KUMAR & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Sections 341, 294, 307, 326 r/w Section 34* - Complainant specifically deposed in para 2 that he had blocked the sword blow given by appellant No. 3 and no other appellant had assaulted him - Allegation of exhortation against appellants No. 1, 2 & 4 is not reliable does not find place in F.I.R. - Held - Conviction and sentence of appellants No. 1, 2 & 4 cannot be upheld - They are**

**acquitted of all the offences - However, conviction of appellant No. 3 is maintained u/s 326 by reducing sentence to simple imprisonment for 1 year and fine of Rs. 4,000/- - Sentence u/s 341 is altered to fine sentence. (Paras 7, 8 & 9)**

*दण्ड संहिता (1860 का 45), धाराऐं 341, 294, 307, 326 सहपठित धारा 34* – कंडिका 2 में शिकायतकर्ता ने विनिर्दिष्ट रुप से कथन किया है कि उसने अपीलार्थी क्र. 3 द्वारा तलवार से किये गये वार को रोका था और किसी अन्य अपीलार्थी ने उस पर हमला नहीं किया – अपीलार्थी क्र. 1, 2 व 4 के विरुद्ध प्रोत्साहन देने का आरोप विश्वसनीय नहीं और प्रथम सूचना रिपोर्ट में स्थान नहीं पाता – अभिनिर्धारित – अपीलार्थीगण क्र. 1, 2 व 4 की दोषसिद्धि एवं दण्डादेश अभिपुष्ट नहीं किया जा सकता – उन्हें सभी अपराधों से दोषमुक्त किया गया – किन्तु, धारा 326 के अंतर्गत अपीलार्थी क्र. 3 की दोषसिद्धि कायम रखते हुए दण्डादेश 1 वर्ष के साधारण कारावास एवं रु. 4,000/– के अर्थदण्ड द्वारा घटाया गया – धारा 341 के अंतर्गत दण्डादेश को अर्थदण्ड में परिवर्तित किया गया।

*Manish Datt* with *Siddharth Datt*, for the appellants.
*Amit Pandey*, P.L. for the respondent.

**JUDGMENT**

**B.D. RATHI, J. :-** Being aggrieved with the judgment dated 26.2.1998 passed by the IIIrd Additional Session Judge, Hoshangabad in S.T. No.170/1994 whereby all the appellants, have been convicted and sentenced for the offences punishable under Section 341 read with S.34 of the I.P.C. Moreover, appellant no.3 stands convicted under Section 326 of the IPC while the remaining appellants have been convicted under Section 326 read with Section 34 of the IPC and sentenced accordingly.

2. According to the prosecution case, on 29.12.1993 at 2.30 p.m., while Niranjan Sharma (PW2) along with Anil Sharma, Ajay Singh Rajput and Bhupendra was returning after taking bath in Narmada, near Balak School, Kothi Bazar, Dharmendra Kahar, maternal-uncle of Dharmendra, Prakash and Gama, respectively armed Sword, Ballam and Lathis wrongfully restrained him and Dharemendra gave a Sword blow on Niranjan's left wrist, whereby the bone was broken, and the remaining appellants grappled with them and assaulted by kicks and fists. When companions of Nirajan intervened, appellants after threatening and abusing fled. Thereafter at Police Station Hoshangabad, FIR(Ex.P/2) was lodged and after completion of investigation, charge-sheet was filed.

3. Charges under Sections 341, 294, 307, 326 read with Section 34 of the I.P.C. were framed. Appellants pleaded false implication and not guilty.

4. At the outset, learned Senior counsel submitted that he does not want to challenge the convictions of appellant no.3 Dharmendra. However, he prayed for lesser corresponding sentences for him. On behalf of the remaining appellants, he argued that the evidence adduced by the prosecution was not trustworthy and they be, accordingly, acquitted.

5. In response, learned Panel Lawyer while making reference to the incriminating pieces of evidence on record, submitted that the conviction was well merited and the impugned judgment does not warrant interference.

6. Having regard to the arguments advanced by the parties, perused the record of the trial Court.

7. Complainant Niranjan Sharma (PW2) in paragraph 2 of his evidence, specifically deposed that he had blocked the sword blow given by Dharemendra on his neck, resulting into injury on his left hand and no other appellant had assaulted him, although they were exhorting. In such premises, when complainant himself has not said anything against the remaining appellants, in view of evidence of witnesses Ajay (PW3) and Anil (PW4), it cannot be held that other appellants had also participated in the assault, especially when none except Niranjan received any injury.

8. So far as the allegation of exhortation against appellant nos. 1,2 and 4 levelled by Niranjan in his court statement is concerned, the same is also not reliable because in FIR, which was lodged by Niranjan himself, fact of exhortation is missing.

9. In view of the aforesaid, convictions and consequent sentences of appellant nos.1, 2 and 4 cannot be upheld. They are accordingly acquitted of all the offences. However, conviction of appellant no.3 Dharmendra for the offence under Sections 326 is maintained, but his conviction under Section 341/34 is altered to one under Section 341 of the IPC. Considering the fact that the incident took place in the year 1993, the physical, mental and financial hardship suffered by appellant Dharemendra in the prosecuting the legal battle for the past 19 years, interests of justice would be met if sentence under Section 326 is reduced to S.I. for 1 year and fine of Rs.5000/- and sentence under Section 341 of the IPC is altered to fine sentence.

10. In the result, the appeal stands allowed in part. Impugned convictions and consequent sentences of appellant nos. 1,2 and 4 namely Gama, Prakash S/o Mohanlal and Prakash alias Guddu, are hereby set aside. They are acquitted of all the offences. Their bail bonds stand discharged. Fine amount, if deposited be refunded to them.

However, conviction of appellant no.3 Dharmendra under Section 341/34 of the IPC is altered to one under Section 341 of the IPC. His conviction under Section 326 of the IPC is also maintained. For the offence under Section 341 of the IPC, he is sentenced to pay a fine of Rs.500/- (Rupees five hundred only), in default to suffer S.I. for one month and for the conviction under Section 326 of the IPC, he is sentenced to undergo S.I. for 1 year and to pay a fine of Rs.4000/- (Rupees four thousand), in default to suffer S.I. for six months. Out of the fine amount so deposited, Rs.3000/- (Rupees three thousand) shall be paid to complainant Niranjan as compensation. Needless to say that any fine amount, if deposited by Dharemendra, shall be adjusted accordingly.

11. Copy of the judgment be sent to the trial Court for compliance.

*Appeal partly allowed.*

**I.L.R. [2014] M.P., 557**
**APPELLATE CRIMINAL**
***Before Mr. Justice G.S. Solanki***
Cr. A. No. 807/1997 (Jabalpur) decided on 8 August, 2013

JAMNA BAI ...Appellant
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 306 - Abetment to commit suicide* - Prosecution witnesses did not support prosecution case - Deceased in her dying declaration had stated that appellant used to scold her for not doing work properly and therefore, she poured kerosene oil on herself and she does not want to live - It cannot be said that appellant in any manner abetted the deceased to commit suicide - Appeal allowed. (Paras 6-10)**

*दण्ड संहिता (1860 का 45), धारा 306 – आत्महत्या का दुष्प्रेरण* – अभियोजन साक्षीगण, अभियोजन के प्रकरण का समर्थन नहीं करते – मृतिका ने अपने मृत्युकालिक कथन में कहा कि अपीलार्थी उसे ठीक से कार्य नहीं करने के

लिए डांटा करता था और इसलिए, उसने स्वयं पर मिट्टी का तेल उडेल लिया और वह जीना नहीं चाहती – यह नहीं कहा जा सकता कि अपीलार्थी ने किसी प्रकार से मृतिका को आत्महत्या कारित करने के लिए दुष्प्रेरित किया – अपील मंजूर।

**Case referred :**

AIR 2010 SC 327.

*Sankalp Kochar* with *S.K. Dixit,* for the appellant.
*R.P. Tiwari,* P.L. for the respondent/State.

**JUDGMENT**

**G.S. Solanki, J. :-** This appeal has been preferred by the appellant under section 374(2) of the Cr.P.C. being aggrieved by conviction and sentence recorded by Fourth Additional Sessions Judge, Sagar vide order dated 11.4.1997 passed in S.T. No. 62/96 whereby the appellant has been convicted under Section 306 of the IPC and sentenced to R.I. for 4 years with fine of Rs. 500/- and in default of payment of fine, R.I. for further 3 months.

2) The facts, in short, giving rise to this appeal are that marriage of Sushila Bai (since deceased) was performed with Radhe Shyam (son of the appellant) 3-4 years before the incident. It was alleged that, after marriage the appellant used to harass Sushila Bai and due to the harassment made by the appellant, Sushila Bai committed suicide on 17.11.1995 by pouring Kerosene oil on herself. She was rushed to the hospital, where her dying declaration was recorded. During treatment, she died on 18.11.1995 due to the burn injuries sustained by her.

3) After enquiry, FIR was registered under section 306 of the IPC against the appellant. Deceased was sent for post mortem. The appellant was charge sheeted before JMFC, Sagar, who in turn, committed the case to the Sessions Court. Learned Additional Sessions Judge framed the charges under section 306 of the IPC against the appellant,

4) Appellant abjured the guilt and pleaded false implication.

5) Learned Fourth Additional Sessions Judge, Sagar on appraisal of evidence on record, convicted and sentenced the appellant as mentioned hereinabove, hence this appeal.

6) Learned counsel for the appellant has submitted that the learned trial Court has committed illegality in appreciating the evidence on record in its

proper perspective. None of the witnesses has supported the prosecution case. The trial Court has convicted the appellant only on the basis of dying declaration recorded by Dr. J.P. Nayak (PW-15). The learned trial Court has also failed to appreciate the facts of dying declaration wherein the deceased herself stated that she does not want to live, which shows that the deceased committed suicide due to mental depression. The harassment made by the appellant to the deceased may be a cause of death, but same cannot be termed as abetment to commit suicide by the deceased, thus no case under section 306 of the IPC is made out against the appellant. No ingredients of Section 107 of the IPC have been found against the appellant. Thus, the conviction and sentence recorded by the trial Court be set aside and the appellant be acquitted to the charge under Section 306 of the IPC.

7) Learned Panel Lawyer for the State has supported the conviction and sentence recorded by the trial Court.

8) I have heard the learned counsel for the parties at length and gone through the statements recorded before the trial Court. Witnesses like Bharat Singh (PW-9) brother of deceased, Shankar Lal (PW-1) uncle of deceased, Bhuri Bai (PW-11) mother of deceased have not supported the prosecution case. I have also gone through dying declaration of deceased. On being asked specifically to the deceased that why she poured Kerosene oil on herself, she answered that she does not want to live further. She further stated that appellant used to scold her for not doing the work properly, therefore, she poured Kerosene oil on herself.

9) It is clear from the dying declaration of the deceased that the appellant used to scold her for not doing the work properly, due to which the deceased committed suicide. In my opinion, it is not a case where deceased had no other option but to commit suicide or the appellant has dragged her to commit suicide.

10) The Apex Court in *Gangula Mohan Reddy Vs. State of Andhra Pradesh* - AIR 2010 SC 327 observed that the deceased was undoubtedly hypersensitive to ordinary petulance, discord and differences which happen in our day-to-day life. Human sensitivity of each individual differs from the other. Different people behave differently in the same situation. Apex Court further observed that abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.

11) In the light of the aforesaid decision of the Apex Court and overall facts and circumstances of the case, I find that no case under section 306 of the IPC is made out against the appellant. Ingredients of Section 107 of the IPC are also not found against the appellant. The learned Additional Sessions Judge has committed illegality in convicting the appellant under section 306 of the IPC, same is liable to be set aside.

12) Consequently, the appeal is allowed. The conviction and sentence of the appellant recorded by the learned Fourth Additional Sessions Judge vide order dated 11.4.1997 passed in S.T. No. 62/96 under Section 306 of the IPC is hereby set aside. The appellant is acquitted to the charge under section 306 of the IPC.

13) The appellant is on bail, her bail bonds and surety bonds stand discharged.

14) Record of the trial Court be sent back immediately for information and necessary action.

*Appeal allowed.*

**I.L.R. [2014] M.P., 560**
**APPELLATE CRIMINAL**
***Before Mr. Justice G.S. Solanki***
Cr. A. No. 1191/1997 (Jabalpur) decided on 26 September, 2013

LALTA PRASAD & ors. ...Appellants
Vs.
STATE OF M.P. ...Respondent

***Penal Code (45 of 1860), Section 376(2)(g) - Gang Rape -*** **Accused persons were known to the prosecutrix as they reside in the same village although their names were supplied by her father-in-law - Prosecutrix identified the accused persons in Court - Scratches and tenderness in her private part and abrasions were found on her back and forearm - Rape is not only a criminal assault on the person of prosecutrix but same destroys her whole personality and incident remains in her mind forever - Statement of prosecutrix duly corroborated by Medical Evidence and other witnesses - Trial Court rightly convicted the accused - Appeal dismissed. (Paras 9 to 18)**

*दण्ड संहिता (1860 का 45), धारा 376(2)(जी) – सामूहिक बलात्कार –*

अभियोक्त्री अभियुक्तगण को जानती थी जैसा कि वे उसी गांव के निवासी थे यद्यपि उनके नाम उसके ससुर द्वारा उपलब्ध कराये गये थे – अभियोक्त्री ने अभियुक्तगण को न्यायालय में पहचाना है – उसके गुप्तांग पर खरोंच एवं कोमलता तथा उसकी पीठ एवं अग्रबांह पर खरोंचे पायी गयीं – बलात्कार न केवल अभियोक्त्री के शरीर पर आपराधिक हमला है बल्कि यह उसके संपूर्ण व्यक्तित्व को नष्ट करता है और उसके मन में घटना सदैव बनी रहती है – अभियोक्त्री का कथन चिकित्सीय साक्ष्य तथा अन्य साक्षियों द्वारा सम्यक रुप से अभिपुष्ट – विचारण न्यायालय ने उचित रुप से अभियुक्त को दोषसिद्ध किया – अपील खारिज।

**Cases referred :**

AIR 1998 SC 1376, AIR 1971 SC 363, AIR 1998 SC 275, AIR 1973 SC 337,

*Surendra Singh* with *Shivam Singh*, for the appellants.
*Chandrakant Mishra,* G.A. for the respondent/State.

**JUDGMENT**

**G.S. SOLANKI, J. :-** This appeal has been preferred by the appellants under Section 374(2) of Cr.P.C. being aggrieved by conviction and sentence recorded by First Additional Sessions Judge, Sidhi in S.T. No. 58/96 vide judgment dated 11.6.1997 whereby the appellants have been convicted under Section 376(2)(g) of the IPC and sentenced to R.I. for 10 years with fine of Rs. 1000/- each, with default stipulations.

2. The case of the prosecution, in short, is that on 10.4.1996 at about 10.00 AM when prosecurtix was going from village Amilia to the house of her uncle-in-law Shankar Kol (PW-5) at village Chamroha Gadai, at that time, three boys, who were sitting near Bahra beneath a Neem tree, followed the prosecutrix for some distance and then appellant Ramlal Gupta caught hold her, thereafter, other appellants also came there and committed rape on the prosecutrix one by one, threatened the prosecutrix not to lodge the report and fled away from the spot. The prosecutrix came to the house of her uncle-in-law and narrated the incident to her aunt-in-law and Kotwar Jagyasen (PW-4), thereafter, her father-in-law Chhote Kol (PW-7) came there, prosecutrix narrated the story to him and lodged the report on 11.4.1996 at P.S. Amilia and crime was registered. The prosecutrix was sent for medical examination. Dr. Kalpana Ravi (PW-11) examined her and found multiple abrasions and scratches on her forearm and back. MLC report (Ex.P-15) and semen slide were prepared and undergarment of the prosecutrix was seized and sent to

the Police Station. The appellants were arrested, their undergarments were seized by the Police on 12.4.1996 thereafter they were sent for medical examination where their semen slides were prepared. The aforesaid seized articles were sent to the FSL. The Asst. Chemical Examiner submitted his report (Ex.P-23) wherein spermatozoa have been found on the semen slides and petticoat of the prosecutrix as well as on the undergarments of the appellants.

3. After due investigation, the appellants were charge sheeted before committal Court, from where the case was committed to the Court of Session, from where the case was sent for trial. The learned First Additional Sessions Judge, Sidhi framed the charge under Sections 376/34 of the IPC.

4. The appellants abjured the guilt and pleaded false implication. They further submitted that they have been falsely implicated by one Hinchhraj due to Panchayat election rivalry. The appellant did not examine any witness in their defence.

5. On appraisal of evidence on record, the learned First Additional Sessions Judge convicted and sentenced the appellant as mentioned hereinabove, hence this appeal.

6. Learned Sr. Counsel for the appellants has submitted that the trial Court has committed illegality in not appreciating the evidence on record in its proper perspective. Though the names of the appellants/accused have been disclosed by the prosecutrix in the First Information Report, however, the appellants were not previously known to the prosecutrix. Learned Sr. Counsel further submitted that the Police Station was just 2 furlong away from the house of Shankar Kol (PW-5) uncle-in-law of prosecutrix but she did not lodge the report immediately and after due deliberation, a concocted report was lodged after about 29 hours of the incident. Further, the names of the accused persons were supplied to the prosecutrix by her father-in-law namely Chhote Kol (PW-7). During investigation, no test identification parade was conducted by the prosecution. It is further submitted that Shankar Kol (PW-5) uncle-in-law and Chhote Kol (PW-7) father-in-law of the prosecutrix stated to have made search of the accused persons along with the prosecutrix but this fact has not been stated by the prosecutrix in the FIR as well as in her statement. Thus, it is not a case where the appellants were previously known to the prosecutrix or she initially identified them before any person, therefore, the prosecutrix cannot be said to be a reliable witness regarding identification

of the appellants and the learned trial Court has committed illegality in placing the reliance on the statement of the prosecutrix as well as other evidence on record. Thus, the conviction and sentence recorded by the trial Court be set aside and appellants be acquitted to the aforesaid charge.

7. Learned Government Advocate appearing on behalf of the State has supported the conviction and sentence recorded by the trial Court.

8. On careful scrutiny of statement of prosecutrix (PW-1), it reveals that the prosecutrix stated the names of accused persons and stated that appellant Ramlal caught hold her and other appellants came there and committed rape on her one by one. She further stated that Ramlal was having *farsi* and threatened her not to lodge the report. She further stated that Ramlal snatched her chain, however, this fact has not found place in the FIR. She has admitted that her father-in-law and husband used to do work of Halwahi for Thakur Hinchhraj. At the time of lodging the report, Hinchhraj and her in-laws were present along with her. She further admitted in her cross-examination that the Police Station was only 2 furlong away from the house of her uncle-in-law, however, the villagers tried to pacify the matter, therefore, the report was not lodged immediately after the incident. She admitted in her cross-examination that the names of appellants were not known to her but thereafter, she stated that though the appellants were living in the same village, therefore, she knew them.

9. The prosecutrix further stated that she narrated the whole story to her aunt-in-law Kaushalya (PW-8) and thereafter to her uncle-in-law Shankar Kol (PW-5) and Chhote Kol (PW-7) and thereafter, next day, the report was lodged at the Police Station from where the prosecutrix was sent for medical examination. She further stated that she sustained abrasions on her back. Dr. Kalpana Ravi (PW-11), Asst. Surgeon, District Hospital Sidhi stated that she examined the prosecutrix on 12.4.1996 and found linear abrasion on middle part of the forearm and multiple abrasions over back. She further found tenderness on both thighs, arms and back. She further found that hymen was old torn but there was a tenderness and pain during PV examination. On the basis of aforesaid examination, she opined that the prosecutrix was habitual to sexual intercourse, however, there is a possibility that sexual intercourse had done with her. Nothing has been brought out in the cross-examination of Dr. Kalpana Ravi (PW-11) to disbelieve her. On the contrary she specifically stated that her opinion of probability of intercourse is based on the fact that

prosecutrix sustained scratches and tenderness in her private part. She further explained that during the performance of PV, she observed pain on the face of the prosecutrix. In these circumstances, the version of the prosecutrix that she was subjected to gang rape is duly corroborated by the medical evidence on record.

10. Coming to the contentions raised by learned Sr. Counsel for the appellants; it is true that during investigation no test identification parade has been conducted but at the same time, it is well established principle of law that the fact of test identification parade is a corroborative piece of evidence and identification during trial is a substantive piece of evidence and, therefore, is admissible in the eye of law, particularly when the accused persons were previously known to the prosecutrix as observed by the Apex Court in *Goerge and others Vs. State of Kerala and another* - AIR 1998 SC 1376, *Jadunath Singh Vs. State of U.P.* - AIR 1971 SC 363 and *Raju @ Rajendra Vs. State of Maharashtra* - AIR 1998 SC 275. When I carefully examined the statement of prosecutrix in the light of aforesaid principle of law, I find that she specifically stated in her cross-examination Para-28 that she knew the accused persons because they were belonging to her village. She further admitted that she did not know their names and the names of accused persons were supplied by her uncle-in-law and father-in-law, which shows that prosecutrix previously knew the appellants by their faces only. Thus, the principles laid down by the apex Court in *Yeshwant and others* (In Cr.A. No. 173 of 1969) and *Brahmanand Gogulprasad Tiwari* (In Cr.A. No. 90 of 1970) *Vs. The State of Maharashtra* - AIR 1973 SC 337 are not applicable to the instant case.

11. Further, as per prosecutrix, she immediately narrated the story to her aunt-in-law Kaushalya (PW-8) and thereafter to her uncle-in-law Shankar Kol (PW-5) and father-in-law Chhotel Kol (PW-7) and lastly to her husband Vanshmani (PW-3) and thereafter, the report was lodged at Police Station on the next day. Shankar Kol (PW-5) stated that prosecutrix came to his house and told him that three miscreants met her in the way, committed rape on her and snatched her chain. Kaushalya (PW-8) stated that prosecutrix told her that three persons committed rape on her and further told that she does not know them by name. She further stated that Jagyasen (PW-4) Kotwar and her daughters also same there and stated that prosecutrix told him that three persons committed rape on her and assaulted her. This fact is corroborated by Chhotelal (PW-7).

12. As per the statement of Chhotelal (PW-7), Jagyasen told him that his daughter-in-law, prosecutrix and Kaushalya, wife of Shankar Kol had gone towards Nala, thereafter Chhotelal and Shankar Kol came there and prosecutrix narrated story to them, thereafter, they further proceeded to search all the miscreants. Initially one of them met them and prosecutrix identified him as Ramlal, thereafter, Shankar Kol, Chhote Kol and prosecutrix had gone to the house of Ramdhani where appellant Ramlal was present and he handed over the chain to the prosecutrix, thereafter appellant Ram Kishan was also called and interrogated by Ramdhani.

13. Unfortunately, prosecution has not examined Ramdhani but at the same time, there is no previous enmity of prosecutrix Shankar Kol and Chhote Kol with the appellants, therefore, why they have falsely implicated the appellants. The facts that Chhote Kol (PW-7), father-in-law and Vanshmani (PW-3) husband of prosecutrix used to work with one Hinchhraj and further, the accused persons were involved in canvassing for opposite candidate of Hinchhraj, came in the cross-examination but in my opinion, for dispute of third person, no one would stake the reputation of his family by using his daughter-in-law.

14. Learned Sr. Counsel further submits that Shankar Kol (PW-5) and Chhote Kol (PW-7) stated that prosecutrix accompanied them at the time of search of accused persons and the prosecutrix identified them but this fact has not found place in the statement of prosecutrix, therefore, reliance cannot be placed on such type of identification.

15. It is true that the prosecutrix has not stated this fact that she accompanied Shankar Kol and Chhotel Kol at the time of search of accused persons and she identified them. However, this fact has very well found place in her statement recorded under Section 161 of the Cr.P.C. Although the statement under Section 161 of the Cr.P.C. is not admissible in the evidence but I am referring the aforesaid statement at this juncture in order to show that the the prosecutrix is a rustic villager and it was the duty of the prosecutor and the Court to bring each and every conduct of the prosecutrix on record, which has not been done in the instant case, which is a serious lapse on the part of prosecution.

16. Further, the defence also has not tried to bring this fact on record as omission. In these circumstances, the aforesaid fact is neither an omission nor

a contradiction to the other evidence on record and merely on the basis of aforesaid fact, the whole case of the prosecution cannot be thrown out.

17. Further, it was not the incident of night or the incident of robbery or dacoity committed in the night where the victim has very short time to observe the faces of miscreants. In the instant case, gang rape was committed with the prosecutrix by three persons on broad day light and proseuctrix had sufficient time to see the faces of the persons, who ravished her one by one and it was not possible for her to forget their faces within a short period of 4 months only, as she identified the appellants before the Court on 20.8.1996 after four months of the incident.

18. It has been observed by the Apex Court in number of cases that the rape is not only a criminal assault on the person of the prosecutrix but same destroys her whole personality and the incident remains in her mind forever. In the instant case, it is not a case of mistaken identification but it is a case wherein the prosecutrix previously knew the appellants by their faces only but she did not know their names and their names were supplied by her father-in-law. If this fact she admitted in her cross-examination before the Court, same further strengthens the case of the prosecution. The statement of prosecutrix is duly corroborated by the statement of Dr. Kalpana Ravi (PW-11) and her conduct after the incident is duly corroborated by statements of Shankar Kol (PW-5), Chhote Kol (PW-7) and Kaushalya (PW-8). Thus, in my opinion, the trial Court has not committed any illegality in recording the conviction of the appellants under Section 376(2)(g) of the IPC.

19. Consequently, in view of the aforesaid discussion, the appeal being devoid of merits, is hereby dismissed. The conviction recorded by the trial Court under Section 376(2)(g) of the IPC is hereby affirmed. The appellants are on bail, their bail bonds and surety bonds stand discharged. The appellants are directed to surrender before Chief Judicial Magistrate, Sidhi for suffering the remaining the part jail sentence on or before 28.10.2013.

20. Let record of the trial Court be sent back immediately along with the copy of this judgment for information and necessary action.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 567**
**CRIMINAL REVISION**
***Before Mr. Justice U.C. Maheshwari***
Cr. Rev. No. 1915/2011 (Jabalpur) decided on 29 January, 2013

KASHI PRASAD PANDEY ...Applicant
Vs.
STATE OF M.P. & ors. ...Non-applicants

*A. Criminal Procedure Code, 1973 (2 of 1974), Section 319* - **First application u/s 319 of Cr.P.C. was rejected at the time of filing of charge sheet and before recording of evidence - As 1st application u/s 319 of Cr.P.C. was not maintainable therefore, 2nd application after the recording of evidence was maintainable. (Para 10)**

*क. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319* – आरोप पत्र प्रस्तुत करते समय तथा साक्ष्य अभिलिखित किये जाने से पूर्व द.प्र.सं. की धारा 319 के अंतर्गत प्रथम आवेदन अस्वीकार किया गया – चूंकि द.प्र.सं. की धारा 319 के अंतर्गत प्रथम आवेदन पोषणीय नहीं था इसलिए, साक्ष्य अभिलिखित किये जाने के पश्चात द्वितीय आवेदन पोषणीय था।

*B. Criminal Procedure Code, 1973 (2 of 1974), Section 319 - Summoning of Additional Accused* - **No charge sheet was filed against respondents No. 2 to 4 although there was sufficient material against them - On the basis of depositions of the eye-witnesses as well as the injured witnesses, prima facie ingredients of the offence are made out - Respondents No. 2 to 4 are directed to be impleaded as co-accused with existing accused. (Paras 11 to 13)**

*ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 319 – अतिरिक्त अभियुक्त को समन* – प्रत्यर्थीगण क्र. 2 से 4 तक के विरुद्ध कोई आरोप पत्र प्रस्तुत नहीं किया गया था यद्यपि उनके विरुद्ध पर्याप्त सामग्री थी – प्रत्यक्षदर्शी साक्षीगण तथा आहत साक्षीगण के कथनों के आधार पर भी अपराध के प्रथम दृष्ट्या अवयव गठित होते हैं – प्रत्यर्थीगण क्र. 2 से 4 को उपस्थित अभियुक्त के साथ सह अभियुक्त के रुप में अभियोजित किये जाने के लिए निदेशित किया जाता है।

**Cases referred :**

AIR 2000 SC 1127, AIR 2009 SC 1248, 2005(3) MPLJ 501.

*Sankalp Kochar,* for the applicant.
*Puneet Shroti,* P.L. for the non-applicant No. 1.
*Nitin Karan,* for the non-applicants No. 2 to 4.

**ORDER**

**U.C. MAHESHWARI, J.:** The applicant/complainant has directed this revision under section 397 read with 401 of the Cr.P.C being aggrieved by the order dated 11.10.2011 passed by the IV ASJ, Chhatarpur in ST No.73/11 whereby the application filed on behalf of respondent No.1 under section 319 of the Cr.P.C to implead the respondent No.2 to 4 as co-accused in the impugned trial, has been dismissed.

2. The facts giving rise to this revision in short are that on dated 1.8.2010 at about 4.20 in the noon, the applicant/complainant Kashi Prasad lodged the Dehati Nalshi to the Police Officer posted at Police Station Bansiya district Chhatarpur contending that at about 1-2 O' Clock in the noon near the bridge of Garhaghati, he accompanied with Asharam Tiwari, Ramvilas Pandey and Santosh Patel were carrying out the work of cutting the rods. At the same time, on four motorcycles 12 persons, three persons on each motorcycles, came there. The first motorcycle was rode by Kallu Dubey on which Ramvishal lashed with gun and Bakua lashed with lathi, were seated as pillion rider. The second motorcycle was rode by Rani Dubey on which Chhana lashed with Farsa and Ghanshyam lashed with Ballam, were seated as pillion rider. The third motorcycle was rode by Rajua Bajpai on which Bablu Mishra and Ramnaresh both lashed with guns, were seated while the forth motorcycle was rode by Jairam Pandey on which Rinku Bajpai and Bitua Dubey lashed with sticks, were seated as pillion rider. After coming to the place of incident, out of the above named persons, Kallu Dubey stationed his motorcycle and abused Santosh with filthy languages,simultaneously Ramvishal and Bakua also abused him with filthy languages and, in continuation of such act, forcibly took Santosh on their motorcycle. On resisting by the persons present, accused Ramvishal Dubey threatened them saying that if anybody will come in front of them then he will shoot him. Thereafter Santosh was taken away by them towards the village. They were followed by the persons present and also apprised the incident to Rammillan Tiwari. The other villagers including Kallu Tiwari, Ramanuj Pandey, Kallu Pandey, Ramakant Tiwari and Ramswaroop Tiwari also went towards the house of Ramvishal Dubey to get Santosh Patel released from the aforesaid custody, on the way, in front of house of Shivshankar Pathak, said Ramvishal Dubey along with his companions, lashed with implements came from the side of his house and asked the complainant and other persons if any one will dare to come his residence then he will shoot him and if want to save their lives then they may go away. On asking Ramvishal

and accompanied persons to release Santosh then again all the persons of complainant party were subjected to abuses by the culprits. They also started beating of the complainant and accompanied persons and threatened to open the gun shot on them. At the same time, Ramvishal, with intention to cause death of Kallu Tiwari made fire at him by 12 bore gun, resultantly, Kallu Tiwari sustained gun shot injuries on his right forearm, chest and head, and fell down. Thereafter, the accused fled away from such place. The complainant accompanied other persons also left such place and came to Police and lodged the Dehati Nalshi, from where the injured were sent to hospital where on medical examination their MLC reports were prepared. On advice by the doctor, xray of some of the injured persons were carried out. As per MLC report of Kallu alias Ramsewak, the gun shot injury was found on his person. On the basis of Dehati Nalshi, the original report under section 154 of the Cr.P.C was registered against the accused persons, namely, Ramvishal Dubey, Kallu Dubey, Bakua, Ghanshyam Dubey, Rani Dubey, Rajua Bajpai, Bablu Mishra, Ramnaresh, Jairam Pandey, Rinku Bajpai and Bitua Dubey. After holding the investigation, on completion of the same, except respondents No. 2 to 4, all other aforesaid accused persons were charge sheeted for the offence of section 147,148,149,364,294,323,506-B and 307 of the IPC.

3. It appears from the record that at the initial stage of filing the charge sheet, respondents No.2 to 4, inspite being named in the FIR so also in the interrogatory statement of the complainant and injured witnesses, mere on some report of Deputy Superintendent of Police, were not impleaded as an accused in such charge sheeted filed under section 173 of the Cr.P.C. It also appears from the available record that after filing the charge-sheet, inspite availability of the prima facie evidence against respondents No.2 to 4 for the alleged offence, they were not impleaded as accused in the matter,on which, then victim Santosh and some other filed an application under section 319 of the Cr.P.C to implead these respondents, along with other accused persons as co-accused in the matter. Such application was dismissed by the trial court on earlier occasion, against which some criminal revision was filed on behalf of said Santosh before the IV ASJ Chhatarpur. Such criminal revision was also dismissed on the basis of report of Deputy Superintendent of Police and the circumstances stated by the prosecution at the time of filing the charge sheet. Such order of revisional court was never challenged before this court either by Santosh or on behalf of the State.

4. It is apparent fact on record that impugned application of section 319

of the Cr.P.C was filed on behalf of respondent No.1 State of Madhya Pradesh after recording the deposition of five prosecution witnesses, namely, Santosh (PW 1) the injured person who sustained the gun shot injuries in the alleged incident, Ramakant (PW 2), Asharam Tiwari (PW 3), Ramvilas Pandey (PW 4) and Kashi Prasad Pandey (PW 5) as alleged the injured or the eye-witnesses of the incident and it is apparent from their depositions that on recording their in-chief, they have categorically stated the involvement of respondent No.2 to 4 in the incident along with other coaccused who are the existing accused of the sessions trial. The manner and the act of respondents No.2 to 4, according to which they have committed the offence against the applicant herein and the other victims, have also been stated by these witnesses. On going through the depositions of these witnesses, prima facie, it appears that the respondents No.2 to 4 participated in the alleged incident along with the existing accused of the impugned case. As such, they were prima facie involved in the common object and meeting of minds of the existing co-accused pursuant to which the alleged incident was happened. In such premises, I have found sufficient prima facie ingredients against respondents No.2 to 4 for taking the cognizance of the same offences against them which was taken against the existing co-accused.

5. Applicant's counsel, during the course of his arguments has placed his reliance on a decision of the Apex Court in the matter of *Michael Machado and another Vs. Central Bureau of Investigation and another*-AIR 2000 SC 1127 in which it was held as under :-

> 11. The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.
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> 12. But even then, what is conferred on the court is only a

discretion as could be discerned from the words the court may proceed against such person. The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons. The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined.

14. The whole proceedings must be recommenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite a large in number the court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the court should refrain from adopting such a course of action."

He also placed his reliance on a decision of the Apex Court in the matter of *Brindaban Das and others Vs. State of West Bengal*-AIR 2009 SC 1248 in which it was held as under :-

"19. The fulcrum on which the invocation of Section 319 Cr.P.C. rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned.

20. In the instant case, on the quality of the evidence adduced by the prosecution as far as the appellants are concerned, it is difficult to hold with any amount of certainty that the same would in all probability secure a conviction against the appellants. The evidence which seeks to connect the appellants with the commission of the offence are hearsay in nature. Section 319 Cr.P.C. contemplates a situation where the evidence adduced by the prosecution not only implicates a person other than the named accused but is sufficient for the purpose of convicting the person to whom summons is issued. The law in this regard was explained in *Ram Kishan Rastogi's case* (supra) and as pointed out by Mr. Ghosh, consistently followed thereafter, except for the note of discord struck in Rajender Singh's case (supra). It is only logical that there must be substantive evidence against a person in order to summon him for trial, although, he is not named in the charge-sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction."

Besides the aforesaid, he has also placed his reliance on the decision of this Court in the matter of *Sarbjit Singh Mokha Vs. State of M.P.*-2005(3) MPLJ 501 in which it was held as under :-

25. In view of the aforesaid precedents reflect that two conditions should be fulfilled to implead any other person as an accused in the case for invoking under section 319 of the Code; firstly, that other person has committed an offence; and, secondly is that, for such offence that other person could as well as be tried along with the already arraigned as accused and in view of the aforesaid appreciation it is apparent that the direct evidence in the testimony of witnesses is available on record against the applicant and, therefore, his participation regarding the alleged incident under sections 395 and 397, Indian Penal Code are prima facie made out and further looking to the FIR and the other circumstances of the case and the intial charge which was framed by the trial court against the existing accused in which the name of the present applicant was also mentioned in participation of the incident gives sufficient circumstances to proceed against the applicant along with the

existing accused. But, fortunately or unfortunately inspite of the cognizable offence and availability of the sufficient evidence in the charge-sheet the investigating agency has not sent to applicant for trial with the report of section 173 of the Code but during recording of the evidence if it was found by the trial court and arraigned him as an accused suo motu then according to my considered view the trial court has not committed any error of jurisdiction."

In the light of aforesaid principle and the depositions of the examined prosecution witnesses applicant's counsel prayed to allow his application filed under section 319 of the Cr.P.C by setting aside the impugned order with a direction to the trial court to implead the respondents No.2 to 4 as accused in the impugned case and proceed with the trial against them also.

6. On the other hand, Shri Puneet Shroti learned Panel Lawyer for the respondent No.1/State supported the arguments advanced by the applicant's counsel saying that such application was filed under section 319 of the Cr.P.C at the instance of the State of M.P. and the same but the same has been dismissed by the trial court contrary to record under wrong premises.

7. Responding the aforesaid arguments, Shri Nitin Karan counsel of respondents No.2 to 4 after taking me through some papers from the record of the trial court available in this court, argued that the respondents No.2 to 4 were rightly excluded from their prosecution by the concerning Deputy Superintendent of Police as there was no prima facie evidence against any of such respondents for taking the cognizance in the matter or to file the charge sheet. According to him, the State as well as the applicant were not in a position to show that any of such respondents have taken the active participation in the alleged incident and, in the lack of such prima facie evidence these respondents could not have been impleaded as accused in the matter. In addition, he said that once the application of the victims filed to implead respondents No.2 to 4 as an accused in the matter has been dismissed by the trial court on earlier occasion and such order was affirmed by the Sessions Court then subsequent to recording the depositions of the above referred prosecution witnesses, there was no occasion before the trial court to appreciate such evidence for impleading the respondents No.2 to 4 as an accused in the matter and, in such premises, in view of the earlier order of the trial court as well as the Sessions Court, dismissing the application of the

victims filed under section 319 of the Cr.P.C the subsequent application has been rightly dismissed by the trial court. In continuation he said that in view of the aforesaid earlier order of the sessions court , this revision being second revision is not entertainable under the law. He also argued that when the application of the State has been dismissed then the victim/ complainant has no right or authority to file the revision against such order and prayed for dismissal of this revision on the aforesaid technical grounds also.

8. It is settled proposition of the law that while dealing with the criminal revision if any irregularity, perversity, illegality or anything against the propriety of the law is found by the superior court in the order impugned or otherwise then under the revisional jurisdiction vested under section 397 red with section 401 of the Cr.P.C, this court has jurisdiction to rectify such irregularity or illegality committed by the trial court or the subordinate court. So, in such premises, the objection of the counsel of respondent No.2 to 4 that this revision is not entertainable, has not appealed me. For the sake of the argument if revision is not filed against the impugned order at the instance of the State then mere on that count the right of the victim/complainant could not be discarded from hearing of this revision filed for appropriate direction to take cognizance of the offence against the accused who were not impleaded earlier in the imugned criminal case. So, such arguments of the counsel of respondents No.2 to 4 are hereby failed.

9. So far the argument advanced by the counsel of respondents No.2 to 4, that after dismissal of the earlier applications of the present applicant as well as victim Santosh and Kallu Tiwari filed to implead respondents No.2 to 4 as an accused at the initial stage soonafter filing the charge sheet, the subsequent application, filed by the State of M.P only after recording the depositions of the above mentioned prosecution witness Santosh and others by virtue of section 362 of the Cr.P.C , could not be entertained by the trial court, has also not appealed me.

10. In view of the above mentioned cited decisions of the Apex Court as well as of this court, I am of the considered view that at the initial stage, after filing the charge sheet, before recording the prosecution evidence, if any application is filed under section 319 of the Cr.P.C by the State or by the victim to implead some other persons as co-accused in the matter, the same could not be entertained at that stage as laid down by the Apex Court in various decisions. But such application could be entertained and considered

on merits only after recording some depositions of the prosecution witnesses and on establishing the prima facie circumstances and ingredients of the alleged offence against the other accused who were not impleaded initially in the police report and charge sheet filed under section 173 of the Cr.P.C and, therefore, in the light of such recorded evidence of the prosecution, the depositions of the examined witnesses if prima facie ingredients of the offence are made out against the other accused like respondents No.2 to 4 to implead them as co-accused then there was no option with the trial court except to allow the application and imlead such respondents No.2 to 4 as co-accused in the impugned case and proceed with the trial against them also in accordance with the procedure.

11. In view of the aforesaid discussion, the arguments advanced by the respondents counsel that in view of the earlier order regarding dismissal of the earlier application filed under section 319 of the Cr.P.C to implead respondents No.2 to 4 as co-accused the subsequent application of such section is not entertainable, is hereby failed.

12. In view of the aforesaid discussion, without expressing any opinion on merits of the matter it is held that on the basis of the depositions of the eye witnesses as well as the injured witnesses named above prima facie ingredients of the alleged offence were to be made out against the respondents No.2 to 4 also so, in such premises, the trial court by allowing the impugned application of the State of M.P ought to have impleaded respondents No.2 to 4, as co-accused in the matter with a direction to proceed with the joint trial against them with the existing accused. In such premises, the order of the trial court being perverse and contrary to the record and above mentioned legal position is not sustainable. Consequently the same deserves to be set aside.

13. In view of the aforesaid by allowing this revision, the impugned order of the trial court is hereby set aside and by allowing the application of the State of M.P filed under section 319 of the Cr.P.C, respondents No.2 to 4 are directed to be impleaded as co-accused along with the existing accused of the sessions trial. The trial court is further directed that after taking the cognizance against the respondent No.2 to 4 intimate them to appear before such court and thereafter proceed with the trial against them also in accordance with the procedure prescribed under the law.

14. The revision is allowed as indicated above.

*Revision allowed.*

**I.L.R. [2014] M.P., 576**
**CRIMINAL REVISION**
***Before Mr. Justice G.S. Solanki***
Cr. Rev. No. 709/2013 (Jabalpur) decided on 25 September, 2013

CHETAN RAGHUVANSHI ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Sections 227, 228 - Framing of Charge*** **- Applicant and co-accused took out victim out of the car and assaulted by using iron rod and wooden stick - Injured suffered 12 injuries including fracture - The nature of the injury is immaterial for framing charge u/s 307 of I.P.C. - Held - Intention must be gathered not only from the injuries but also from other materials on record like statement of the witnesses and the weapon of offence. (Para 8)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 227, 228 – आरोप विरचित किया जाना* – आवेदक एवं सह अभियुक्त ने पीड़ित को कार से बाहर निकाला और लोहे की रॉड तथा लकड़ी के डंडे का उपयोग करते हुए हमला किया – आहत ने अस्थिभंग के साथ 12 चोटें सहन की – भा.द.सं. की धारा 307 के अंतर्गत आरोप विरचित करने के लिये चोट का स्वरूप तत्वहीन है – अभिनिर्धारित – आशय का निष्कर्ष, न केवल क्षतियों से बल्कि अभिलेख की अन्य सामग्री जैसे कि साक्षियों के कथन तथा अपराध में प्रयुक्त शस्त्र से भी निकाला जाना चाहिए।

**Cases referred :**

2006 (1) MPLJ 388, 2004 (4) MPLJ 262.

*Subodh Kathar,* for the applicant.
*C.K. Mishra,* G.A. for the non-applicant/State.

**ORDER**

**G.S. Solanki, J.:** This revision petition has been preferred under Section 397 read with Section 401 of the Code of Criminal Procedure being aggrieved by the order dated 06.11.2012, passed by Additional Sessions Judge, Amarwara, District Chhindwara in S.T. No.281/2012, whereby charge under Sections 147, 294, 341, 307/34 and 333 of the I.P.C. has been framed against this applicant and also against co-accused.

2. Facts in short, are that on 17.07.2012, when complainant Radheshyam

Raghuwanshi was going alongwith his colleague Lalit Malani in the vehicle Maruti Van No.28-BD-1090. It is alleged that applicant and other co-accused persons restrained them on the way and took out Lalit Malani from the aforesaid vehicle. It is further alleged that applicant Chetan Raghuwanshi and co-accused Ajju Raghuwanshi were having iron rod in their hand and other co-accused persons were having wooden stick. Initially they abused Lalit Malani and thereafter they assaulted him with the intention to kill him by using the iron rod and sticks. Complainant Radheshyam tried to intervene them but accused persons threatened him for dire consequences and left injured Lalit assuming that he died and run away from the spot.

3. Police Station Chourai, District Chhindwara registered offence under Sections 341, 147, 148, 149, 294, 506 and 307 of the I.P.C. against the applicant and other co-accused persons. Injured Lalit was sent to the hospital and he has been treated. As per MLC report, the doctor has found as many as 12 injuries in different parts of his body like chest, back side, hands and legs and complaint of pain and swelling in other parts of the body. As per X-ray report, he sustained fracture in 4th and 5th proximal Phalanx. He was also treated in private hospital at Aditya Critical Care Emergency Centre, Nagpur, wherein he was treated and was found a fracture of 9th rib as well as 4th and 5th Proximal Carpel Right Hand.

4. Applicant and co-accused have been arrested. After usual investigation, they have been prosecuted before the committal court. The committal court in turn committed the case to the court of sessions and the same has been made over for trial to the trial Court. The trial Court has framed the charge as mentioned hereinabove, hence this revision.

5. Learned counsel for the applicant submitted that the trial Court committed an illegality in framing a charge under Section 307 of the I.P.C. against the applicant. Since none of these injuries have been found on the vital part of the body, therefore, intention of the applicant and co-accused was not to cause death to injured Lalit. He has also placed reliance on decision of this Court in *Vardichand Vs. Rameshwar and others* [2006(1) M.P.L.J. 388].

6. Learned counsel appearing on behalf of the State supported the impugned order. He further submitted that there was no fracture on the body of injured person in the case of *Vardichand* (supra), therefore, principle laid down in the aforesaid case is not applicable in this case.

7. I have perused the impugned order alongwith the record of the trial Court, wherein Lalit has sustained as many as 12 injuries. As per X-Ray report and discharge summary report given by the doctor of Aditya Critical Care Emergency Centre, Nagpur, wherein as many as three fractures have been found in the body of injured Lalit. It is true that none of the injuries were found on the head of injured Lalit, but at the same time, it is well established principle of law that number of injuries are not only the decisive factor in regard to offence under Section 307 of the I.P.C. as observed by the Supreme Court in *Bappu @ Bapu Vs. State of Maharashtra and another* [2004(4) M.P.L.J.] 262, wherein it has held that :-

> "The Court is to see whether the act in question, irrespective of its results, was done with the intention or knowledge and under circumstances mentioned in Section 307, it is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable to causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even in some cases, be ascertained without any reference at all to actual wounds".

8. Considering the over all facts and circumstances of the case, facts of this case is different from the facts of *Vardichand* (supra), wherein the injured person has not sustained any fracture in any part of his body. But in this case, the injured sustained as many as 12 injuries and 3 fractures in his body. Further, the intention must be gathered not only from the injuries but also from other materials on record, like statement of the witnesses and the weapon of offence used at the time of incident. In the present case, injured Lalit as well as other witnesses have stated in their statement under Section 161 of the Code of Criminal Procedure that applicant and coaccused have assaulted injured Lalit with intention to kill him. It is on record that applicant and co-accused Ajju were having deadly weapon like iron rod and wooden sticks they mercilessly beaten injured Lalit by using deadly weapon and blunt weapon. In these circumstances, the nature of injury is immaterial for framing charge under Section 307 of I.P.C.

9. In view of the aforesaid facts and circumstances of the case, I am of

the view that the trial Court has not committed any illegality in framing the charge under Section 307/34 of I.P.C. alongwith other charges mentioned hereinabove.

This revision being devoid of merits is accordingly dismissed.

*Revision dismissed.*

**I.L.R. [2014] M.P., 579**
**CRIMINAL REVISION**
***Before Mr. Justice P.K. Jaiswal & Mr. Justice J.K. Maheshwari***
Cr. Rev. No. 1130/2013 (Indore) decided on 30 November, 2013

BALU SINGH SISODIA ...Applicant
Vs.
STATE OF M.P. ...Non-applicant

***Criminal Procedure Code, 1973 (2 of 1974), Sections 397, 91 & 227 - Documents in defence*** **- Whether any document which the accused may rely in support of his defence could be looked into at the stage of framing of charge or not - Held - No right is conferred on the accused to produce document to prove his defence at the stage of framing of charge - Under Section 227 of Cr.P.C. only the record produced in terms of Section 173 of the code is relevant - Accused cannot invoke Section 91 to show his innocence - At this stage Court exercises a limited jurisdiction and only have to see that whether prima facie case has been made out or not.** **(Para 20)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धाराऐं 397, 91 व 227 – बचाव में दस्तावेज* – क्या आरोप विरचित किये जाने के प्रक्रम पर, कोई दस्तावेज जिस पर अभियुक्त अपने बचाव के समर्थन में निर्भर रह सकता है, विचार में लिया जा सकता है अथवा नहीं – अभिनिर्धारित – आरोप विरचित किये जाने के प्रक्रम पर अभियुक्त को अपना बचाव साबित करने के लिए दस्तावेज प्रस्तुत करने का कोई अधिकार प्रदत्त नहीं है – द.प्र.सं. की धारा 227 के अंतर्गत केवल संहिता की धारा 173 के अधीन प्रस्तुत किया गया अभिलेख ही सुसंगत है – अभियुक्त अपनी निर्दोषिता दर्शाने के लिये धारा 91 का अवलंब नहीं ले सकता – इस प्रक्रम पर न्यायालय सीमित अधिकारिता का प्रयोग करते हुए केवल यह देखेगा कि क्या प्रथम दृष्ट्या प्रकरण बनता है अथवा नहीं।

**Cases referred :**

2000 CRLJ 3504, AIR 2005 SC 359, AIR 2000 SC 2583, (1996) 9 SCC 766, AIR 1977 SC 2018, AIR 1980 SC 52, (2000) 8 SCC 239, (1997) 4 SCC 393, (2000) 2 SCC 57, (1994) 4 SCC 142, (1996) 9 SCC 1, 1992 (Supp.1) 335, (2008) 5 SCC 113, AIR 2004 SC 778, (2003) SC 111, MANU/SC/0049/1986.

*A.K. Sethi* with *Harish Joshi*, for the applicant.
*Arvind Gokhale*, for the non-applicant.

**ORDER**

The Order of the Court was delivered by,

**P.K. JAISWAL, J.:** The petitioner has impugned the order dated 27.09.13, passed by Special Judge under the provisions of Prevention of Corruption Act, 1988 (for short 'the PC Act') in Special Trial No.4/13, whereby learned Special Judge rejected the application under Section 91 of Cr.P.C, on the ground that those documents can be filed under the provisions of Section 233 of Cr.P.C and those documents cannot be considered at th time of framing of charge because the same were not the part of the final report filed by the Investigating Officer.

2. Brief facts of the case are that the petitioner was initially appointed as junior engineer on 29.10.78 and thereafter, he was promoted as Assistant Engineer and at the time of raid/trap, he was working on the post of Assistant Engineer. The allegation against the petitioner that he had acquired assets in excess of his income. During investigation several important documents were collected, were with held and those documents were not included in the chargesheet. If those documents were considered even prima facie there was no scope to frame charges against him. At the time of framing of charges, the petitioner made an application under Section 91 of Cr.P.C, seeking consideration of the aforesaid documents at the time of framing of charges. The said application was rejected on the ground that at the time of framing of charges the Court is required to evaluate the material and documents on record. The trial Court held that at the stage of framing of charge, it is not obligatory for the trial Court to consider any detail and documents which are not part of the chargesheet.

3. The trial Court rejected the application and framed charge against the petitioner under Section 13 (1) (e) read with Section 13 (2) of the PC Act.

4. Learned Senior Advocate for the petitioner contended that the trial

Court committed an error in not considering the documents collected during the course of investigation by the investigating agency itself. He submitted that details of those documents are given in the charge-sheet at Serial No.154 to 162. He place the reliance on the decision of the Apex Court in the case of *State of Madhya Pradesh V/s. Mohan Lal Soni,* 2000 Cri.L.J. 3504.

5. On the other hand, learned counsel for the respondent has submitted that no provision in the Code of Criminal Procedure grants to the petitioner any right to file any material or document at the stage of framing of charge. That right is granted only after the stage of framing of charge. He further submitted that law is well settled by the three judges Bench of the Apex Court in the case of *State of Orissa V/s. Debendra Nath Padhi*, reported as AIR 2005 SC 359, wherein it has been held that at the time of framing of charge, the trial Court can consider only the material produce before it by the investigating agency, there being no requirement in law for the court to grant at that stage either an opportunity to the accused to produce evidence in defence or consider such evidence the defence may produce at that stage. With the aforesaid, learned counsel for the respondent prayed for dismissal of the criminal revision.

6. We have heard the arguments of the leanred counsel for the parties at length and perused the record.

7. In *State of Madhya Pradesh v. Mohan Lal Soni,* AI R 2000 SC 2583 referred to by the counsel for the petitioner, a complaint u/s 13(1)(e) r/w section 13(2) of the PC Act was filed against the respondent, a Road Transport Inspector. While submitting the charge sheet several important documents which were collected during the course of the investigation were withheld. At the time of framing of charge the respondent made an application seeking production of these documents in Court before proceeding to frame charge. The said application was rejected holding that for the purpose of framing of charge only the documents forwarded to the court u/s 173(5) Cr.P.C need to be considered. The revision petition against the said order was disposed of by the High Court by its order dated 8.9.1997, holding that the documents made available by the accused during investigation be produced and be taken into consideration by the trial Court while framing of charges. Thereafter, the trial court framed charges under section 13(1) (e) r/w section 13(2) of the Act. Aggrieved by the order framing charges the respondent filed a criminal revision petition in the High Court. The High Court set aside the

order framing charges and discharged the respondent. The High Court while making the order in the Criminal revision petition had relied upon the decision in *Satish Mehra v. Delhi Administration*, reported as (1996) 9 SCC 766 which was specifically overruled by the Supreme Court in *State of Orissa v. Debendra Nath Pandhi*. The State filed a petition challenging the said order in which the Apex Court had held and observed:

> *"Our attention was specifically drawn to the earlier order of he High court dated 8.9.1997 passed in Criminal Revision No. 337/97 in which the trial court was directed that the documents made available by the accused during investigation be produced and they be taken into consideration by the court while framing charges. The said order became final, it having not been challenged further. In this situation the parties and the trial court were bound and governed by the said direction. Since the trial court did not follow the said direction, the High Court having considered all the material including the documents produced by the prosecution itself, which were collected during the course of investigation, and on being prima facie satisfied taking the documents on their face value held that no offence was made out and as such no charge could be framed against the respondent. In this view, the High Court set aside the order of the trial court and passed the order discharging the respondent. The High Court in the order under appeal has elaborately considered the documents collected during the course of investigation and produced by the prosecution itself which were available at the time of framing charges....."*
>
> *The Court further held:5*
>
> *" From the decisions referred to in the same paragraph and the decisions already referred to above there was no bar to consider the material on record in the case on hand, which was collected during the course of investigation and produced before the court and particularly in view of the directions given earlier by the High Court."*

8. The decision in the case of *State of Madhya Pradesh V/s. Mohan*

*Lal Soni* (supra) was considered by the larger bench of the Apex Court in the case of *State of Orissa V/s. Debendra Nath Padhi* and observed the following which reads as under :

> *"The decision in the case of State of Madhya Pradesh v. MohanLal Soni [(2000) 6SCC 338] sought to be relied upon on behalf of the accused is also of no assistance because in that case an earlier order of the High Court wherein trial court was directed to take into consideration the documents made available by the accused during investigation while framing charge had attained finality since that order was not challenged and in that view this Court came to the conclusion that the trial court was bound and governed by the said direction of the High Court which had not been followed."*

9. The larger bench after considering the decisions of the Apex Court in the case of *State of Bihar V/s. Ramesh Singh,* AIR 1977 SC 2018, *Supdt. & Remembrancer of Legal Affairs, West Bengal v/s. Anil Kumar Bhunja,* AIR 980 SC 52, *State of Delhi v. Gyan Devi and Others [*(2000) 8 SCC 239] , *State of Maharashtra v. Priya Sharan Maharaj and Others* [(1997) 4 SCC 393] , *State of Madhya Pradesh v. S.B.Johari and Others* [(2000) 2 SCC 57] , *Minakshi Bala v. Sudhir Kumar and Others* [(1994) 4 SCC 142] , *P.S.Rajya v. State of Bihar* [(1996) 9 SCC 1] and *State of Haryana v. Bhajan Lal* [1992 (Suppl.1) 335] held that at the time of framing of charge or taking cognizance the accused has no right to produce any material.

10. Insofar as Section 91 of Cr.P.C is concerned the Hon'ble Apex Court held that the jurisdiction under Section 91 of the Code when invoked by accused the necessity and desirability would have to be seen by the Court in the context of the purpose investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry. Regarding the argument of accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code is unlimited . Wherever in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice within the parameters laid down in *Bhajan Lal's* case.

11. The Hon'ble Apex Court also considered the meaning of expression, "record of the case" used in Section 227 of the Code relevant para of the Hon'ble Supreme Court decision where provisions of the Cr.P.C has been considered which reads as under :

> "What is to the meaning of the expression 'the record of the case' as used in Section 227 of the Code. Though the word 'case' is not defined in the Code but Section 209 throws light on the interpretation to be placed on the said word. Section 209 which deals with the commitment of case to Court of Session when offence is triable exclusively by it, inter alia, provides that when it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall commit 'the case' to the Court of Session and send to that court 'the record of the case' and the document and articles, if any, which are to be produced in evidence and notify the Public Prosecutor of the commitment of the case to the Court of Session. It is evident that the record of the case and documents submitted therewith as postulated in Section 227 relate to the case and the documents referred in Section 209. That is the plain meaning of Section 227 read with Section 209 of the Code. No provision in the Code grants to the accused any right to file any material or document at the stage of framing of charge. That right is granted only at the stage of the trial. Further, the scheme of the Code when examined in the light of the provisions of the old code of 1898, makes the position more clear. In the old code, there was no provision similar to Section 227. Section 227 was incorporated in the Code with a view to save the accused from prolonged harassment which is a necessary concomitant of a protracted criminal trial. It is calculated to eliminate harassment to accused persons when the evidential materials gathered after investigation fall short of minimum legal requirements. If the evidence even if fully accepted cannot show that the accused committed the offence, the accused deserves to be discharged. In the old Code, the procedure as contained in Sections 207 and 207 (A) was fairly lengthy. Section 207, inter alia, provided that the Magistrate, where the case is exclusively triable by a Court of Session in any proceedings

instituted on a police report, shall follow the procedure specified in Section 207 (A). Under Section 207 (A) in any proceeding instituted on a police report the Magistrate was required to hold inquiry in terms provided under subsection (1), to take evidence as provided in subsection (4), the accused could cross-examine and the prosecution could re-examine the witnesses as provided in subsection (5), discharge the accused if in the opinion of the Magistrate the evidence and documents disclosed no grounds for committing him for trial, as provided in sub-section (6) and to commit the accused for trial after framing of charge as provided in subsection (7), summon the witnesses of the accused to appear before the court to which he has been committed as provided in subsection (11) and send the record of the inquiry and any weapon or other thing which is to be produced in evidence, to the Court of Session as provided in subsection (14). The aforesaid Sections 207 and 207(A) have been omitted from the Code and a new Section 209 enacted on the recommendation of the Law Commission contained in its 41st Report. It was realised that the commitment inquiry under the old Code was resulting in inordinate delay and served no useful purpose. That inquiry has, therefore, been dispensed with in the Code with the object of expeditious disposal of cases. Instead of committal Magistrate framing the charge, it is now to be framed by Court of Session under Section 228 in case the accused is not discharged under Section 227. This change brought out in the code is also required to be kept in view while determining the question. Under the Code, the evidence can be taken only after framing of charge."

12. In another judgment relied on by the respondent, *Hem Chand v. State of Jharkhand*, (2008) 5 SCC 113, a raid was conducted by the CBI officials at the residence of the appellant, an IPS officer, pursuant to which an FIR was lodged and a charge sheet was filed. The appellant filed an application for discharge on the ground that no case for framing of charge has been made out. He also filed some documents in his own defense. The said application for discharge was rejected by the Special Judge, CBI, opining that the documents relied on by the appellant cannot be looked into for the purpose

of passing an order on his application for discharge. A revision application filed by the appellant in the High Court was also disposed off. The issue before the Apex Court was whether any documents whereupon the appellant may rely in support of his defense, can be looked into at the stage of framing of charge. The Court had held:

> "It is beyond any doubt or dispute that at the stage of framing of charge, the Court will not weigh the evidence. The stage for appreciating the evidence for the purpose of arriving at a conclusion as to whether the prosecution was able to bring home the charge against the accused or not would arise only after all the evidences are brought on record at the trial."
>
> " It is one thing to say that on the basis of the admitted documents, the appellant was in a position to show that the charges could not have been framed against him, but it is another thing to say that for the said purpose he could rely upon some documents whereupon the prosecution would not rely upon."
>
> " The Court at the stage of framing charge exercises a limited jurisdiction. It would only have to see as to whether a prima facie case has been made out. Whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation should be the concern of the Court. It, at that stage, would not delve deep into the matter for the purpose of appreciation of evidence. It would ordinarily not consider as to whether the accused would be able to establish his defence, if any.

13. Both the parties have referred to a number of decisions which have been referred to hereinabove. Some of the precedents have been relied on by both the parties referring to different observations in the same precedent. However, it has to be remembered that a decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The Supreme

Court in *Bharat Petroleum Corporation Ltd and Anr. v. N.R. Vairamani and Anr.*, AIR 2004 SC 778 had observed:

> " Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

14. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper. The following words of Lord Denning in the matter of applying precedents have become locus classicus:

" Each case depends on its own facts and a close similarity between one case and Anr. is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of Anr.. To decide therefore, on which side of the line a case falls, the broad resemblance to Anr. case is not at all decisive."

15. In *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59), the Supreme had observed: " It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

16. Similarly In *Ambica Quarry Works v. State of Gujarat and Ors.* MANU/SC/0049/1986 the Supreme Court had also observed:"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

17. This cannot be disputed that to substantiate a charge, the prosecution must prove the following ingredients namely:1) the prosecution must establish

that the accused is a public servant; 2) the nature and extent of the pecuniary resources or property which were found in his possession; 3) it must be proved as to what were his known sources of income, i.e. known to the prosecution, and 4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. In *Hem Chand* (Supra) the issue before the Apex Court was whether any documents which the accused may rely in support of his defense could be looked into at the stage of framing of charge or not. It was held that at the stage of framing of charge, the Court will not weigh the evidence as the stage for appreciating the evidence for the purpose of arriving at a conclusion is where the prosecution was able to bring home the charge against the accused or not, would arise only if all the evidence is brought on record at the trial. Though on the basis of admitted documents the accused may be in a position to show that the charge could not have been framed against him but the accused could not rely upon some documents upon which the prosecution does not rely. The Court at the stage of framing charge exercises a limited jurisdiction and what is to be seen is whether prima facie case has been made out or not. What is also to be considered is whether a case of probable conviction for commission of an offence has been made out on the basis of the materials found during investigation and at that stage the Court should not delve deep into the matter for the purpose of appreciation of evidence as it would ordinarily not consider as to whether the accused would be able to establish his defense, if any. In *Debendra Nath Padhi* (Supra) the Apex Court had held that if any document is necessary or desirable for the defense of the accused, the question of invoking Section 91 at the initial stage of framing of charge would not arise since the defense of the accused is not relevant at that stage. As far as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defense. It was further held that under Section 227 Cr. P.C, what is necessary and relevant is only the record produced in terms of Section 173 of the Code and the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence.

18. Learned counsel for the petitioner had laid a great emphasis on the decision of the Apex Court in the case of *Madhya Pradesh V/s. Mohan Lal Soni* (supra). The plea of the petitioner is that the trial judge failed to consider the documents given all the details about the acquire assets. However, the said documents is not admitted by the prosecution at the state of framing of charge, the Court is not to embark on a mini trial. The acceptance of the

contention of the learned Senior counsel would rather mean permitting him to adduce his defence at the stage of framing of charge and that is against criminal jurisprudence.

19. It is well settled that the trial judge at the stage of framing charge exercises a limited jurisdiction and what is to be seen is whether prima facie case has been made out or not. At this stage, this Court would not delve in to the matter for the purpose of appreciation of evidence nor it would consider as to whether the petitioner would able to establish his defence if any.

20. In the totality of the facts and circumstances and for the foregoing reasons the material sought to be produced by the petitioner cannot be considered at the stage of framing of charge and consequently the decision of the trial court in rejecting the application under Section 91 of Cr.P.C and not considering the documents filed along with the aforesaid application in framing charge against the petitioner cannot be faulted. It is beyond any doubt or dispute that at the stage of framing of charge, the Court will not weigh the evidence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. The stage for appreciating the evidence for the purpose of arriving at a conclusion as to whether the prosecution was able to bring home the charge against the accused or not would arise only after all the evidences are brought on record at the trial. The Court at the stage of framing charge exercises a limited jurisdiction. No right is conferred on the accused to produce document in his possession to prove his defense at the stage of framing of charge. Under Section 227 of Cr. P.C, what is necessary and relevant is only the record produced in terms of Section 173 of the Code and the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. The Court only have to see as to whether a prima facie case has been made out. If that be so then the Criminal Court has not committed any legal error which is to be corrected by this Court in exercise of its revisional jurisdiction under Section 397 of Code of Criminal Procedure, 1973.

21. Consequently, for the foregoing reasons, we are of the view that the learned trial Court has not committed any legal error in passing the impugned order. The revision petition under Section 397 of Code of Criminal Procedure is without merit and the same is hereby dismissed.

*Revision dismissed.*

**I.L.R. [2014] M.P., 590**
**INCOME TAX APPEAL**
***Before Mr. Justice Krishn Kumar Lahoti & Mr. Justice B.D. Rathi***
I.T.A. No. 190/2009 (Jabalpur) decided on 4 April, 2013

COMMISSIONER OF INCOME TAX ... Appellant
Vs.
M/S. KRISHI UPAJ MANDI SAMITI, TIMARNI ... Respondent

*A.* ***Income Tax Act (43 of 1961), Section 32(1) Explanation (5) and Krishi Upaj Mandi (State Marketing Development Fund) Rules, M.P., 2000*** **- Held - Contribution towards the payment of pension fund - Being statutory liability in nature - Deduction of the same has rightly been allowed by the tribunal. (Para 5)**

*क. आयकर अधिनियम (1961 का 43), धारा 32(1) स्पष्टीकरण (5) एवं कृषि उपज मण्डी (राज्य विपणन विकास निधि) नियम, म.प्र., 2000* – अभिनिर्धारित – पेंशन निधि के भुगतान की ओर अंशदान – कानूनी दायित्व के स्वरूप का होने के नाते – अधिकरण द्वारा उचित रूप से उक्त की कटौती को मंजूर किया गया है।

*B.* ***Income Tax Act (43 of 1961), Section 32(1) Explanation (5) and Krishi Upaj Mandi (State Marketing Development Fund) Rules, M.P., 2000*** **- Held - In view of the specific provision, as contained in Explanation 5 to sub-section (1) of Section 32 of the Income Tax Act - Tribunal has rightly allowed the depreciation in respect of the assets. (Paras 9 & 10)**

*ख. आयकर अधिनियम (1961 का 43), धारा 32(1) स्पष्टीकरण (5) एवं कृषि उपज मण्डी (राज्य विपणन विकास निधि) नियम, म.प्र., 2000* – अभिनिर्धारित – आयकर अधिनियम की धारा 32 की उपधारा (1) के स्पष्टीकरण 5 में अंतर्विष्ट उपबंध को दृष्टिगत रखते हुए – अधिकरण ने सम्पदा के संबंध में अवक्षयण उचित रूप से मंजूर किया गया।

**Case referred :**

12 ITJ 12.

*Sanjay Lal,* for the appellant-revenue.
*G.N. Purohit* with *Uma Parashar,* for the respondent-assessee.

**ORDER**

The Order of the Court was delivered by,
**K. K. LAHOTI, J.:-** This appeal was admitted on 16.12.2009 on the following two substantial questions of law:-

> (I) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law in not upholding the addition of Rs.17,94,021/- being the disallowance of depreciation on fixed assets even when entire expenditure incurred towards purchase of fixed assets has already been claimed in entirety either in the current year or in earlier year and if depreciation is allowed on such assets it would amount to double deduction?
>
> (II) Whether on the facts and circumstances of the case the ITAT was justified in law in not upholding the disallowances of Rs.8,70,614/- on account of payment towards pension fund when no liability of revenue nature was determined?

2. This appeal is directed against an order dated 24th April, 2009 by the Income Tax Appellate Tribunal, Indore Bench, Indore in I.T.A. No. 42/Ind/2009.

3. Learned counsel appearing for the revenue submitted that the Tribunal has erred in disallowing the addition of Rs.17,94,021/- in respect of depreciation on fixed assets of which expenditure was already exempted, so it was a dual benefit of deduction to the assessee. It is also submitted by him that the contribution towards the pension fund by the assessee has been wrongly allowed by the income Tax Appellate Tribunal, while it ought to have been disallowed as it does not fall within the ambit of the expenses.

4. Shri Purohit, learned Senior Counsel appearing for the assessee supported the order. It was submitted by him that so far as depreciation is concerned, it has been rightly allowed by the Tribunal in view of specific provision as contained in Explanation 5 to sub-section (1) of Section 32 of the Income Tax Act which specifically provides that the depreciation shall be allowed to the assessee in spite of the fact that the assessee had claimed deduction in respect of the depreciation in computing his total income, or not. It is submitted that the aforesaid amendment as Explanation 5 to sub-section (1) of Section 32 has been inserted by the Parliament by the Finance Act, 2001 w.e.f. 01.04.2002 and is applicable in the present case.

5. So far as the contribution by the respondent towards the payment of pension fund is concerned, it is submitted that the aforesaid liability is statutory in nature and the aforesaid payment towards the pension fund has been rightly allowed by the Income Tax Appellate Tribunal. So far as the interest accrued thereon is concerned, it is submitted by the learned counsel for the respondent that it was taxable and has rightly been held so by the Tribunal.

6. It is submitted that in the light of the judgment passed by the Tribunal in *Krishi Upaj Mandi Samiti, Burhanpur*, reported in 12 ITJ 12, the Tribunal has rightly decided the matter. The aforesaid judgment of the Tribunal is binding on the Tribunal and has been rightly relied on by the Tribunal.

7. To appreciate the aforesaid contentions, we have gone through the order passed by the Tribunal. The Tribunal in paragraphs 11 and 12 of the order have considered the ground in respect of contribution to the pension fund and relying on the judgment of *Krishi Upaj Mandi Samiti, Burhanpur* (supra), the aforesaid contribution has been rightly allowed. Apart from this, under Rule 10 of the Madhya Pradesh Krishi Upaj Mandi (State Marketing Development Fund) Rules, 2000, the Krishi Upaj Mandi has to create a Reserve Fund, which is a statutory liability and the aforesaid fund is to be created for the payment of pension to the members of the Board. For ready reference, we quote Rule 10 of the aforesaid Rules, which reads thus:

> **"10. Reserved Fund.-(1)** Leaving aside Farmer's Road Fund and Agricultural Research and infrastructural development Fund, at the rate of five per cent of remaining aggregate receipts Chief Accounts Officer will deposit in separate Bank account every three months in the form of Reserve Fund. Use of Reserve Fund shall be made for the payment of pension to the members of State Board Service, family pension, ex-gratia, gratuity grant, loan and advance as per procedure prescribed by Board.
>
> (2) Each member of service of the Board shall be entitled to receive pension on retirement, gratuity and other benefits as per rules applicable to the Government servants.

(3) In the event of death during service of any member, his legal successor shall be entitled to receive gratuity family pension.

(4) Separate account of Reserve Fund shall be kept in Bank for the members of service of the Board, posted in Market Committee. One-third amount of Reserve Fund maintained by Market Committees and amount shall be sent in this fund on the 10th of every month to Chief Accounts Officer by "Account Payee" cheque. The provisions of sub-rule (2) and (3) shall be applicable to the members of such service.

(5) Loan and advance shall be given to members of the service posted in Market Committee from this fund with the sanction of Chief Accounts Officer."

8. In view of the statutory liability of the Krishi Upaj Mandi, if the Income Tax Appellate Tribunal has allowed the deduction of aforesaid contribution, no fault is found.

9. So far as the depreciation part is concerned, Explanation 5 to sub-section (1) of Section 32 of the Income Tax Act provides thus:

**"Explanation 5.-** For the removal of doubts, it is hereby declared that the provisions of this sub-section shall apply whether or not the assessee has claimed the deduction in respect of depreciation in computing his total income."

10. The aforesaid provision specifically provides that the assessee shall be entitled for depreciation in spite of the fact that the assessee had claimed the deduction in respect of depreciation in computing his total income or not. In view of the specific provision, as contained in Explanation 5 to sub-section (1) of Section 32, the Tribunal has rightly allowed the depreciation in respect of the assets of the respondent.

11. In view of the aforesaid, we find that both the questions as framed on 16.12.2009 deserve to be answered in favour of the assessee and against the revenue. Accordingly, this appeal is found without merit and is dismissed.

*Appeal dismissed.*

**I.L.R. [2014] M.P., 594**
**MISCELLANEOUS CRIMINAL CASE**
***Before Smt. Justice Vimla Jain***
M.Cr.C. No. 9971/2012 (Jabalpur) decided on 25 April, 2013

GOPIKA PRASAD TIWARI ...Applicant
Vs.
RAJMAN MISHRA & ors. ...Non-applicants

***Criminal Procedure Code, 1973 (2 of 1974), Section 482* - Whether the criminal proceedings may continue or not, if the civil proceedings are pending - Held - The criminal prosecution can not be thwarted at the initial stage merely because the civil proceeding is pending - The act which has civil profile, can not be allowed to denude of its criminal out fit. (Paras 14 &16)**

*दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 482* – क्या दाण्डिक कार्यवाहियां जारी रखी जा सकती है अथवा नहीं, यदि सिविल कार्यवाहियां लंबित है – अभिनिर्धारित – दाण्डिक अभियोजन को प्रारंभिक प्रक्रम पर रोका नही जा सकता मात्र इसलिये कि सिविल कार्यवाही लंबित है – कृत्य, जिसकी रूपरेखा सिविल है, उसे उसके आपराधिक पहनावे को निरावृत्त करने की अनुमति नहीं दी जा सकती।

*A.D. Mishra*, for the applicants.
*J. Prasad*, for the non-applicants no. 1 to 6.
*R.S. Yadav*, for the non-applicant no. 8
*Akshay Namdeo*, PL for the non-applicant no.10/State.

**ORDER**

SMT. VIMLA JAIN, J.:- Heard.

1. The applicant has preferred this petition under Section 482 of Code of Criminal Procedure, being aggrieved by the order dated 23/07/2012 passed by 1st Additional Sessions Judge, Satna in Criminal Revision No.182/2011, whereby learned Additional District Judge dismissed the revision of the applicant and confirmed the order dated 24/05/2011 passed by the Judicial Magistrate First Class Satna in criminal complaint case no. unregistered/2011 (*Gopika Prasad Mishra vs. Rajman Mishra and others*).

2. Short facts of the case are that the applicant has filed a complaint under Sections 420, 466, 467, 468, 471, 166 & 167 of Indian Penal

Code, against the respondents before Judicial Magistrate First Class Satna, on the ground that the applicant and respondents no. 1 to 6 are resident of same village and respondents no. 7 & 8, being Patwari and Revenue Inspector at relevant time, were posted in village Nimaha Tehsil Rampurbaghelan District Satna whereas respondent no.9 was the Sarpanch of gram panchayat.

3. The applicant Gopika Prasad who is son of Ramkishore Mishra (since dead), in the aforesaid complaint averred that the land bearing khasra nos. 545, 546/2, 658, 661, 666, 667, 668a, 546/9 total area 26.36 acres belonged to Ramkishore, Manmodak, and Ramsuhavan. Respondents no. 1 to 6 with intention to grab the share of applicant in the aforesaid land, prepared and registered a forged partition deed no.1207 dated 29/06/1987 (Annexure A-9) by showing co-owners Manmodak and Ramsuhavan as dead. The respondents submitted aforesaid partition dead before Revenue Inspector. The Revenue Inspector (respondent no.8) recorded the names of respondents on the aforesaid land on the report of Patwari (respondent no.7). The shares of co-owners Manmodak and Ramsuhavan were also recorded in the names of respondents while at relevant time both were alive. The respondents no. 7 & 8, at the instance of respondents no.1 to 6 vide order dated 12/08/1988 (Annexure A/10) mutated the whole land in the names of respondents. Thus, the respondents grabbed the share of applicant.

4. The applicant, after getting knowledge of the aforesaid criminal act of respondents, has filed civil suit in 2008 before Civil Judge Class I, Satna. When respondents came to know about institution of aforesaid civil suit by the applicant, to suppress their criminal activities, they committed murder of co-owner Manmodak and prepared the WILL dated 07/10/2008 of Manmodak in their favour and death certificate dated 27/09/2009.

5. The respondents, 21 years earlier to this suit, by showing the death of Manmodak and Ramsuhavan in the year 1987, got mutated the aforesaid land including shares of Manmodak and Ramsuhavan in their names. While it is clear that in the year 1987, Manmodak and Ramsuhavan were alive and respondents no.1 to 6 had illegally shown their death in partition deed dated 29.6.87 as mentioned above and filed the forged documents before Tehsil officials and got mutated all the lands in their names.

6. Being dissatisfied with the action of respondents, the applicant filed complaint case before the JMFC, Satna, for registering the offence under Sections 420, 466, 467, 468, 471, 166 & 167 of Indian Penal Code against the respondents, which was dismissed on 24/05/2011. Thereafter, the applicant filed Criminal Revision No.182/2011, which was also dismissed vide order 23/07/2012 by Additional Sessions Judge, Satna. Being aggrieved by the aforesaid orders, the applicant has filed present petition under Section 482 of Code of Criminal Procedure.

7. Learned counsel for the applicant submits that *prima facie* sufficient material is available on record to show that non-applicants have committed forgery and fraud against the applicant. He prays to direct the Court below for registering the offences under Sections 420, 466, 467, 468, 471, 166 & 167 of Indian Penal Code, against the non-applicants.

8. Learned counsel for non-applicants submits that the applicant has also filed a civil suit for injunction which has been rejected. Against such suit, a miscellaneous appeal has been filed before District Judge Satna which has also been dismissed. He further submits that the dispute is of a civil nature and no criminal liability can be attributed to the non-applicants.

9. I have perused the record with the statements of the applicant and his witnesses who stated before the Court below under Sections 200 and 202 of Code of Criminal Procedure, and the documents filed with this case.

10. **The order of mutation dated 12/08/1988 (Annexure A/10) says that :-**

> ***"ISTHAR published ..... Gopika Prasad ..... stated in the statement made before concerned official on 12/08/1988 and consented the mutation."***

This order directed the Patwari to correct the record accordingly. The said order disclosed that Gopika Prasad participated in the proceedings and his statement was recorded. Therefore it appears that the relevant documents of the said order, which are alleged to be forged and fabricated must also exist unless proved otherwise after proper enquiry.

11. The ISTHAR, Patwari report and panchnama etc., are the foundational documents of the order dated 12/08/1988 and the Court should not have ignored such documents so lightly, when it has been alleged that these documents were forged.

12. Therefore, the learned Courts below wrongly concluded that the applicant did participate in the mutation proceedings, thus non-supply of the relevant documents to him did not constitute any allegation against the accused.

13. The partition deed No.1207 dated 30/06/1987 does not speak about the land co-owned by Manmodak, but order of mutation dated 12/08/1988 and its proceedings show that he was dead. But the death certificate issued by Panchayat shows that he died on 27/09/2009. It is also alleged by applicant/ complainant that the WILL of Manmodak dated 07/10/2008, prepared by respondents, was submitted before the Civil Court. These facts and documents indicate that the said mutation order was passed and its proceedings were conducted fraudulently and with forgery with the connivance of Patwari and non-applicants.

14. The next question is whether the criminal proceedings may continue or not, if the civil proceedings are pending between the parties.

15. This is a case based on the allegations of forgery and fraud relating to the documents and mutation of land and illegal rights of ownership acquired on the basis of such documents.

16. In view of the aforesaid facts of this case, it cannot be concluded at such primary stage, that this is a frivolous complaint. The criminal prosecution cannot be thwarted at the initial stage merely because the civil proceeding is pending. The act which has civil profile, cannot be allowed to denude of its criminal out fit.

17. In the result, the petition is allowed by setting aside the impugned orders passed by the Courts below with the direction to proceed with the trial of the case in accordance with the provisions of law and decide the same on merits. It is made clear that any observation made will not bind the Courts below.

*Petition allowed.*

**I.L.R. [2014] M.P., 598**
**MISCELLANEOUS CRIMINAL CASE**
***Before Mr. Justice B.D. Rathi***
M.Cr.C. No. 632/2014 (Gwalior) decided on 6 February, 2014

DHARMENDRA SINGH BHADOURIYA & ors. ...Applicants
Vs.
ROHIT GOYAL ...Non-applicant

*A. Negotiable Instruments Act (26 of 1881), Section 138 - Dishonour of Cheque* - **Cheques were issued by the petitioner and the same were dishonoured - Prima facie this fact is sufficient to frame the charge under this Act. (Para 5)**

*क. परक्राम्य लिखत अधिनियम (1881 का 26), धारा 138 – चैक का अनादरण* – चैक याची द्वारा जारी किये गये थे और वे अनादृत किये गये – प्रथम दृष्ट्या यह तथ्य इस अधिनियम के अंतर्गत आरोप विरचित करने के लिये पर्याप्त है।

*B. Criminal Procedure Code, 1973 (2 of 1974), Section 251 - Summons Trial* - **Held - There is no provision to consider the defence at the time when particulars of the offence are stated to the accused u/s 251 of the code. (Paras 5/6)**

*ख. दण्ड प्रक्रिया संहिता, 1973 (1974 का 2), धारा 251 – समन विचारण* – अभिनिर्धारित – संहिता की धारा 251 के अंतर्गत अभियुक्त को अपराध की विशिष्टयों का कथन करते समय बचाव को विचार में लिये जाने का कोई उपबंध नहीं है।

*Sunil Kumar Sharma,* for the applicants.
None for the non-applicant.

**ORDER**

**B.D. Rathi, J.:** This petition has been preferred for invoking the inherent powers of this Court vested under Section 482 of Cr.P.C., seeking relief that the order dated 10.09.2013 (Annexure P/4) passed by J.M.F.C. Gwalior, in Criminal Case No.2812/2013 and revisional order dated 12.12.2013 passed the learned Sessions Judge, Gwalior, in Criminal Revision No.424/2013 be quashed. The application preferred by the

petitioners before the trial Court under Section 245 of Cr.P.C. (herein after referred to as 'the Code') be allowed and discharge the petitioners of the offence punishable under Section 138 of Negotiable Instruments Act.

2. The entire case and the impugned orders have been perused.

3. One private compliant has been preferred by respondent Rohit Goyal against the petitioners. Same was registered for the offence punishable under Section 138 of the Negotiable Instrument Act by the J.M.F.C. Gwalior, on 10th September, 2013. Charge under Section 138 of the Negotiable Instrument Act was framed against the petitioners by dismissing the application of the petitioners filed under Section 245 of Cr.P.C. The application was dismissed on the ground that it is a case of summon trial and provision of Section 245 of the Cr.P.C. are not applicable, the revision, preferred against this order was also dismissed.

4. It is submitted by the petitioners' lawyer that by Cheque No.0226532 dated 11.10.2012, amount of Rs.1,00,000/- and cheque No.0226512, an amount of Rs.50,000/- on 10.09.2012 was already paid to the complainant/respondent but fraudulently he has not returned the deposited cheques, kept with complainant for security purpose. In support of his contention, he has filed the statement of H.D.F.C. Bank. This fact was not considered by the Courts below and when the deposited amount has already been paid then the charge under Section 138 of Negotiable Instrument Act could not be framed.

5. In considered view of this Court, the petition is devoid of merits and liable for dismissal because the issue raised by the petitioners could not be considered by the trial Court at the stage of stating particulars of offence to the accused under Section 251 of the Code. It is an admitted fact that the cheques involved in this case were issued by the petitioners and the same were dishonoured. Prima facie this fact is sufficient to frame the charge against the petitioners under Section 138 of Negotiable Instrument Act. Apart that Provision of 245 of the Code is not applicable in this case. Trial under Section 138 of Negotiable Instrument Act is a summons Trial and procedure for trial of summons cases has been

provided under Chapter XX as Section 251 to Section 255 of the Code. Provision of Section 245 of Code, under which application for discharging was made by petitioners before Trial Court, has been made for the trial of warrant cases. Section 245 of Code is not applicable in the Trial of summons cases.

6. In summons Trial, there is no provision to consider the defence at the time when particulars of the offence are stated to the accused under Section 251 of the Code.

7. The different between Section 245 and Section 251 of the Code is that under Section 245, there is an opportunity for complainant as well as accused to produce evidence in respect of their cases before framing the charge and after taking into consideration the aforesaid evidence, it is decided by the Trial Court that whether any case is made out or not for framing the charge but under Section 251 of the Code such type of opportunity to lead evidence is not available.

8. As per the provision of Section 251 of the Code, in a summons case when accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him meaning thereby there is no provision to record the evidence of both the parties in respect of their case before stating the particulars of offence, as in warrant Trial case.

9. For taking into consideration the defence of petitioner it was necessary to take evidence on the point of payment and cheques were kept for security purpose. But as discussed above under Section 251 of the Code such procedure has not been prescribed.

10. In the aforesaid, premises, the order passed by the Trial Court and also the order passed by the learned Revisional Court are well merited. No interference is called for.

10. Petition is devoid of merits and is hereby dismissed.

*Petition dismissed.*

**I.L.R. [2014] M.P., 601**
**MISCELLANEOUS CRIMINAL CASE**
***Before Mr. Justice N.K. Gupta***
M.Cr.C. No. 4351/2011 (Jabalpur) decided on 14 February, 2014

AMIT KUMAR MEENA & anr. ...Applicants
Vs.
STATE OF M.P. ...Non-applicant

*A. Caste Certificate and investigation - Criminal Prosecution* - **There is nothing in judgment passed by Hon'ble Supreme Court in the case of Madhuri Patil that without following the guidelines, no prosecution shall be done - If the guidelines are not followed, then still the prosecution may be initiated. (Para 6)**

*क. जाति प्रमाण पत्र और अन्वेषण – आपराधिक अभियोजन* – माधुरी पाटिल के प्रकरण में माननीय उच्चतम न्यायालय द्वारा पारित निर्णय में यह उल्लेख नहीं कि दिशानिर्देशों का पालन किये बिना कोई अभियोजन नहीं किया जायेगा – यदि दिशानिर्देशों का पालन नहीं किया जाता, तब भी अभियोजन आरंभ किया जा सकता है।

*B. Caste Certificate and investigation* - **Applicants obtained caste certificates by making declaration - Police can investigate the matter as in the case of Ku. Madhuri Patil, it is nowhere prohibited by Hon'ble Supreme Court that no prosecution will be done if the guidelines are not followed - Petition dismissed. (Paras 7 & 8)**

*ख. जाति प्रमाण पत्र और अन्वेषण* – आवेदकों ने घोषणा करके, जाति प्रमाणपत्र अभिप्राप्त किया – पुलिस मामले की जांच कर सकती है जैसा कि कु. माधरी पाटिल के प्रकरण में किया गया था, माननीय उच्चतम न्यायालय द्वारा कहीं प्रतिषिद्ध नहीं किया गया है कि यदि दिशानिर्देशों का पालन नहीं किया गया तो अभियोजन नहीं किया जायेगा – याचिका खारिज।

**Cases referred :**

AIR 1995 SC 94, 2002(3) MPLJ 417.

*Aditya Adhikari,* for the applicants.
*G.S. Thakur*, P.L. for the non-applicant/State.

**ORDER**

**N.K. GUPTA, J.:** The applicants have preferred the present petition under Section 482 of Cr.P.C. against the order dated 23.2.2011 passed by the First Additional Sessions Judge, Bhopal in Criminal Revision No.277/2009 whereby the order dated 16.4.2009 passed by the learned Judicial Magistrate First Class, Bhopal in Criminal Case No.21598/2008 was confirmed in which the learned JMFC dismissed the application filed by the applicants on the ground that the directions given by Hon'ble the Apex Court in the case of *"Kumari Madhuri Patil Vs. Additional Commissioner, Tribal Development & others"*, (AIR 1995 SC 94) were not complied with, and therefore trial may be dropped.

2. The brief facts of the case are that one Ram Prakash Pahariya resident of Rewai District Shivpuri had sent a criminal complaint to the Director General of Police, Bhopal that so many persons have obtained the job and admission in various colleges on the basis of fake caste certificate. He gave a list of such persons in his complaint. He also referred the decision of WP No.898/1990. The name of applicant No.1 Amit Kumar Meena was shown in the complaint at Sl.No.23. On enquiry it was found that the applicant No.1 had received a certificate declaring him a member of Scheduled Tribe as "Bheel Meena from Tahsildar Ratlam". On enquiry done by the Collector, Ratlam it was found that the caste certificate was fake and the applicant No.1 was a member of Tribe "Meena", which is shown in the list of Scheduled Tribes given in the Constitution for Sironj Tahsil of Madhya Pradesh only, whereas the applicant No.1 was found as a resident of District Raisen and not of District Ratlam. It was also found that the certificate was issued on the basis of affidavit given by the applicant No.2 and thereafter on the basis of report given by the Collector Ratlam a prosecution was initiated against the applicants and also the authorities of Maulana Azad College of Technology, Bhopal vide order dated 13.7.1998 expelled the applicant No.1 from their college due to bogus caste certificate.

3. I have heard the learned counsel for the parties.

4. The learned counsel for the applicants has submitted that the charge sheet was initiated against the applicants though no report was given by the competent authority as directed by Hon'ble the Apex Court in the

case of *Kumari Madhuri Patil* (supra). The learned counsel for the applicants has also invited attention of this Court to the order passed by the Single Bench of this Court in the case of "*Vikas Jagdish Shipuriya Vs. State of Madhya Pradesh*", [2002(3) MPLJ 417] in which it was decided that if the guidelines given by Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra) are not followed, then no prosecution can be initiated against such defaulter.

5. After considering the submissions made by the learned counsel for the parties and looking to the facts and circumstances of the case, the only question that arose before this Court is whether the charge sheet could be filed without following the directions given by Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra) or not. If the judgment of Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra) is considered, then it would be apparent that in para 12 of the judgment the Hon'ble the Apex Court gave guidelines having 15 paras. Out of them, three paras are relevant for the present case. For the ready reference, the paras 11, 12 and 14 of the guidelines may be read as under:

> "*****
>
> 11. The order passed by the Committee shall be final and conclusive only subject to the proceedings under Article 226 of the Constitution.
>
> 12. No suit or other proceedings before any other authority should lie.
>
> 13. ******
>
> 14. In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/ the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or officers under the State or the Union or elections to any local body, legislature or the Parliament."

If the aforesaid guidelines are considered, then it would be apparent that

it was directed to the concerned officers to get the verification of the caste certificate in relation to some appointment or admission in the institution as to how such certificate could be dealt with for its verification. In the present case, the certificate filed by the applicant No.1 was already accepted and he was admitted in M.A.C.T. Bhopal. Under such circumstances, it was the duty of the officers of that College to follow the guidelines given by Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra). However, vide order dated 13.7.1998 the officers of M.A.C.T. expelled the applicant No.1 from the college. The applicants did not show their bonafide act against the order of expulsion and what steps they have taken and whether that order was cancelled from the High Court or not.

6. If the guidelines given by Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra) are considered, then by perusal of para 11, 12 and 14 of the guidelines, Hon'ble the Apex Court has directed that certificate be examined by higher authorities of the State so that there should not be any doubt about the verification of the certificate and thereafter it was mentioned that if any certificate is found forged, then a criminal prosecution may be initiated against that person, who submitted a forged certificate and obtained the benefits on the basis of such certificate. Also under those guidelines it is nowhere mentioned that without following the guidelines, no prosecution shall be done. Under such circumstances, if such guidelines are not followed, then still the prosecution may be initiated.

7. When an FIR is lodged by any complainant with any of the police officer including the SHO or higher police officer, then it is for the police to investigate the matter and either to file a report under Section 173 of Cr.P.C. (charge sheet) or to file a report under Section 169 of Cr.P.C. In the present case, the complaint was sent to the Collector Ratlam and thereafter in the enquiry it was found that the applicants were residents of District Raisen and they could not get any caste certificate from Tahsil Ratlam. They were "Meena" by caste, which falls at Sl.No.32 in the list of Scheduled Tribes for Madhya Pradesh in the Constitution (ST Order 1950). They claimed themselves to be "Bheel Meena" which was shown at Sl.No.8 in that list. At this stage, I do not want to discuss much about merits of the case otherwise it may cause prejudice to the trial Court.

However, it was prima facie apparent that the applicants were not in the tribe of either "Bheel" or "Bheel Meena" nor they were resident of District Ratlam. On the contrary, they were resident of District Raisen, whereas the tribe "Meena" was accepted as Scheduled Tribe for Sironj Sub Division only, and the Collector Ratlam prima facie found the caste certificate to be fake and therefore after getting such a report investigation was initiated and the charge sheet was filed.

8. The learned counsel for the applicants invited attention of this Court to the order of Single Bench of this Court in the case of *Vikas Jagdish Shipuriya* (supra) in which the judgment of Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra) was relied upon and it was directed that no prosecution may be done without following the guidelines of that case. Actually in the case of *Vikash Jagdish Shipuriya* (supra) the Single Bench of this Court did not establish a new analogy to appreciate a new law but in that case the guidelines given by Hon'ble the Apex Court were appreciated. Under such circumstances, there was no law laid down by the Single Bench of this Court in the case of *Vikash Jagdish Shipuriya* (supra), and therefore that order cannot be considered as a precedent in the present case. However, if the guidelines of Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra) are considered, then it is nowhere prohibited by Hon'ble the Apex Court that no prosecution will be done if the guidelines are not followed. The provisions of investigation and filing of charge sheet in Cr.P.C. are absolute and without arrangement of such provisions, the police is competent to investigate the matter and to file a charge sheet. It is the duty of the trial Court to consider the case on the basis of evidence collected and to decide it accordingly. In such circumstances, during the investigation if the guidelines given by Hon'ble the Apex Court in the case of *Kumari Madhuri Patil* (supra) were not followed, verbatim then it cannot be said that the present trial cannot be prosecuted by the police.

9. The applicants have preferred the present petition under Section 482 of Cr.P.C. to quash the proceedings of the trial Court, but in the grounds taken in the petition, it was not mentioned that the applicants sought quashment of the proceeding on the basis of merits of the case. However, the trial was initiated in the year 2008 and the applicants remained silent for three years. If they would have challenged the

prosecution on the basis of the merits of the case, then certainly such type of application would have been filed three years back, but it is filed in the year 2011, and therefore it was delayed to consider the merits of the case. At this belated stage, if merits of the case are considered, then prejudice may be caused to the applicants unnecessarily. However, in short if the evidence collected by the prosecution is considered for limited purpose of evaluation of the evidence to quash the proceeding, then it would be apparent that the applicants were residents of District Raisen. They were not the members of Tribe "Bheel Meena". They obtained the caste certificate from Tahsil Ratlam, and therefore prima facie the prosecution directed against them cannot be quashed even on merits.

10. On the basis of the aforesaid discussion, it is apparent that both the courts below have rightly dismissed the application and revision of the applicants. There is no illegality or perversity in the impugned orders passed by both the Courts below and there is no reason for any interference can be done in the orders of both the courts below by invoking inherent jurisdiction of this Court under Section 482 of Cr.P.C. Consequently, the present petition filed by the applicants under Section 482 of Cr.P.C. is hereby dismissed.

11. A copy of this order be sent to both the Courts below for information.

*Petition dismissed.*